SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LOEB BOATHOUSE SERVICES, LLC, ROBERT TOWERS,

Petitioners-Plaintiffs,

Index №.: 158983/16
Motion Seq. Nos. 004 and 005

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, and its constituent municipal Agency, THE DEPARTMENT OF PARKS AND RECREATION; DEAN POLL and CENTRAL PARK BOATHOUSE LLC,

Respondents-Defendants.

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CAROL R. EDMEAD, J.S.C.:

In this consolidated Article 78 action, respondents the City of New York (the City) and the Department of Parks and Recreation (Parks Department) (collectively, the City respondents) move, pursuant to CPLR 3211 (a) and CPLR 7804 (f), to dismiss the First Amended Verified Petition and Second Amended Complaint (the hybrid Petition) (motion seq. No. 004). Respondents Dean Poll (Poll) and Central Park Boathouse LLC (the Boathouse respondent) (collectively, the Poll respondents) also move to dismiss the hybrid Petition (motion seq. No. 005). The motions are consolidated for disposition.

BACKGROUND

This case arises from the City respondents' award, following a request for proposal (RFP) and process of evaluation, of a concession and license agreement to operate a restaurant, snack bar, and rowboat rental business in Central Park to the Boathouse respondent. As the Boathouse respondent held a prior concession and license agreement for the same property, this award was

effectively an extension. The court declines a further recitation of the factual history, as it has been discussed at length on the record in the disposition of prior motions.

Petitioners Loeb Boathouse, LLC and Robert Towers filed the hybrid Petition on June 8, 2017, seeking to annul the award of the license agreement and to declare the award unconstitutional under the United States Constitution as well as the New York Constitution. Petitioners also seek to compel to the City defendants to give them the subject concession and license agreement, or to engage in a new round of RFP and evaluation. Petitioners also seek damages and attorney's fees pursuant to 42 USC § 1983.

The City respondents argue that the hybrid Petition should be dismissed, as: (1) petitioners lack standing to pursue their Article 78, constitutional, and § 1983 claims; (2) the court lacks subject matter jurisdiction, as petitioners challenge is moot and as petitioners failed to exhaust their administrative remedies; (3) petitioners fail to state a cause of action; (4) petitioners challenge to the RFP evaluation process is time-barred. The City respondents also argue that the Parks Department is not a suable entity.

The Poll respondents similarly argue that petitioners lack standing, the court lacks subject matter jurisdiction, petitioners fail to state a cause of action, and that the challenge to the RFP evaluation is time-barred. Additionally, the Poll defendants argue that, as Poll was not awarded the concession and license, there is no basis for his inclusion as a respondent.

DISCUSSION

Standing

CPLR 3211 (a) (3) provides that dismissal is available where "the party asserting the cause of action has not legal capacity to sue." While the statute refers specifically to "capacity,"

New York courts treat this provision as encompassing the larger concept of standing (*see e.g. Sta-Brite Servs., Inc. v Sutton*, 17 AD3d 570 [2d 2005]). Standing, generally, "is a threshold determination, resting in part on policy considerations, that a person should be allowed to access the courts to adjudicate the merits of a particular dispute" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). More specifically, in cases involving "governmental action in land use matters generally," a plaintiff, "for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large" (*Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301 [2015]).

Respondents argue that petitioners lack standing as they do not allege that either petitioner the Loeb Boathouse Services, LLC (the Boathouse petitioner) or Robert Towers (Towers) bid on the subject concession and license award. In opposition, petitioners do not contest this. Instead, they argue that non-party JPO Concepts, Inc. (JPO), which did bid on the subject concession and license, has standing. As JPO is not a party to this action, that is the answer to a question that need not be asked.

In the context of governmental contracts, the Court of Appeals has held that non-bidders do not have standing to challenge the bidding process through an Article 78 proceeding (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579 [1998]; *see also Friends of Dag Hammarskjold Plaza v City of N.Y. Parks & Recreation*, 13 Misc3d 1220[A] [holding that the *Matter of Transactive* "continues as controlling precedent" and that "a non-bidder cannot challenge the award of a government contract"]). Thus, petitioners, as non-bidders, do not have standing to challenge subject concession and license agreement and their Article 78 petition must be dismissed. Nor do petitioners have standing to bring state and federal

constitutional claims, federal § 1983 claims, or claims for declaratory relief stemming from the award of a governmental contract to which they did not bid. Thus, the hybrid Petition must dismissed in its entirety.

Subject Matter Jurisdiction

Respondents are also entitled to dismissal of the petition on the parallel ground that the court lacks subject matter jurisdiction, as petitioners have failed to exhaust their administrative remedies. "It is well settled that one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544 [1st Dept 2007]).

The RFP stated that "Proposers … have a right to protect a solicitation and award as specified in Chapter 1 of Title 12 of the Rules of the City of New York [RCNY]) (RFP at 18). The RCNY provides that "Any actual or prospective bidder proposer may protest any determination regarding a concession … in writing to the Agency Head within ten days after the protesting party knows or should have known the facts that prompted the protest but no later than ten 10 days after the publication of the notice of award concession" (12 RCNY § 1-08 [a] [1]).

Here, petitioners do not allege that they exhausted the administrative remedies provided for by the RFP and the RCNY. Accordingly, in addition to the reasons related to standing articulated above, this Article 78 petition must be dismissed, pursuant to CPLR 3211 (a) (2), for a lack of subject matter jurisdiction.

CONCLUSION

Accordingly, it is

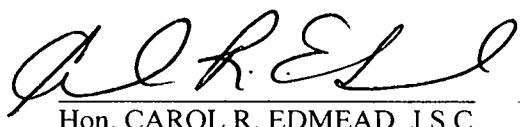
ORDERED that the motions of respondents (motion seq. Nos. 004 and 005) to dismiss petitioner's First Amended Verified Petition and Second Amended Complaint are granted; and it is further

ORDERED that this consolidated Article 78 petition is dismissed; and it is further

ORDERED that counsel for the City respondents are to serve a copy of this order, along with notice entry, on all parties within 10 days of entry.

DATE: June 15, 2018

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

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