

Runway Towing Corp, Inc. v New York State Commr. of Transp.
2024 NY Slip Op 35450(U)
April 29, 2024
Supreme Court, Queens County
Docket Number: Index No. 718123/2022
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14

Justice

-----X

RUNWAY TOWING CORP, INC.,

Petitioner,

- V -

NEW YORK STATE COMMISSIONER OF
TRANSPORTATION AS AGENT FOR THE PEOPLE OF
THE STATE OF NEW YORK,

Respondent.

-----X

INDEX NO. 718123/2022

MOTION DATE 03/09/2023,
03/09/2023

MOTION SEQ. NO. 001 + cross-
motion & 002

**DECISION + ORDER ON
MOTION**



The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 52, 53, 54, 55, 82

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is ordered that: motion sequence 1, for an order pursuant to CPLR 6311, 6313, and 7805; the cross-motion for an order pursuant to CPLR 7804 (f), and 3211 (a) (5) and (7); and motion sequence 2, for an order pursuant to CPLR 602, to remove from another court and consolidate an earlier filed action bearing Index No. LT-302261-22/QU, are decided as follows:

On August 30, 2022, Petitioner Runway Towing Corp, Inc. ("Petitioner") filed the instant petition pursuant to Article 78 of the CPLR, seeking to vacate respondent New York State Commissioner of Transportation's ("Respondent") determination to recover possession of a 90,000 +/- square foot parcel of real property located in south of the Belt Parkway and north of the Nassau Expressway, with access and frontage along 152nd Avenue, in South Ozone Park, Queens, New York (the "Premises"), owned by nonparty the State of New York, and used by Petitioner. The petition further seeks a preliminary and permanent injunction against Respondent.

Petitioner is in the business of towing, recovering, and salvaging motor vehicles within New York City. Respondent is an office of nonparty the New York State Department of Transportation ("DOT"), an executive agency of nonparty the State of New York.

On or about April 16, 2018, Fleet Recovery SVS, Inc. (“Fleet”) obtained a use and occupancy permit from DOT. Petitioner occupied the Premises as one of the subtenants of Fleet. On or about March 2021, DOT terminated the permit issued to Fleet. In its cross-motion, Respondent states that Fleet was not authorized to sublet the Premises under its permit. Petitioner alleges that Respondent was notified that the subtenants wanted to stay and have an opportunity to bid for a use and occupancy permit at a public auction. On or about August 2021, Petitioner obtained a use and occupancy permit for the Premises, from Respondent, that expired on September 30, 2021. Petitioner requested Respondent extend the permit indefinitely based upon on the fact that Petitioner had performed emergency removal of more than 600 disabled vehicles caused by Hurricane Ida and was storing those vehicles on the Premises.

Petitioner alleges that Respondent denied Petitioner’s request without providing Petitioner an opportunity to be heard or considering the essential nature of the service they provide. Petitioner further alleges that Respondent’s decision to recover possession of the Premises was arbitrary and capricious, and an abuse of discretion. In response, Respondent alleges that it granted an extension for sixty (60) days and sent a rider to Petitioner. Respondent further alleges that Petitioner did not return a copy of the signed rider prior to the expiration of the permit, so the permit was not extended.

Now, Petitioner moves for a preliminary injunction and stay, as well as to remove from another court and consolidate an earlier filed action bearing Index No. LT-302261-22/QU, with the instant proceeding¹. Respondent cross-moves to dismiss the petition for, among other things, untimeliness. The court will first address Respondent’s cross-motion.

CPLR 3211 (a) (5) provides that a party may move to dismiss “one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of [...] [the] statute of limitations [...].” On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court accepts the facts alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*see GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015]).

“‘[The] defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired’” (*Deutsche Bank Natl. Tr. Co. v Blank*, 189 AD3d 1678, 1679 [2d Dept 2020], quoting *HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2d Dept 2019]). “‘If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period’” (*id.* at 1678; *see also Geotech Enterprises, Inc. v 181 Edgewater, LLC*, 137 AD3d 1213, 1214 [2d Dept 2016]).

The record contains, among other things, a copy of a use and occupancy permit for the Premises bearing number X1423, issued by Respondent on or about August 13, 2021, to Petitioner for a term beginning on April 1, 2021, and terminating on September 30, 2021, and various correspondence between the parties. In a letter dated October 6, 2021, Respondent notified Petitioner that it did not receive an “executed rider agreement to Permit X1423 [...] for the use

¹ The Court notes that since the submission of the instant motions and cross-motion, a decision was issued in LT-302261-22/QU, permitting a warrant of eviction to remove Petitioner from the premises.

and occupancy of [the subject real] property [...] [and that said permit,] pursuant to its terms [...] terminated on September 30, 2021. As of the termination date your client is no longer authorized to use or occupy the State's property at the location described [...]. Your client must immediately vacate the property and all personal items belonging to you or others located at the site must be removed immediately" (EF 43).

"A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes final and binding" (*Hilburg v New York State Dept. of Transp.*, 138 AD3d 1062, 1063 [2d Dept 2016]; CPLR 217 [1]). "An administrative determination becomes final and binding within the meaning of CPLR 217 (1) when the petitioner seeking review has been aggrieved by it" to inflict an actual, concrete injury (*Matter of Bashir v Environmental Control Bd.*, 113 AD3d 763, 764-65 [2d Dept 2014] [quotation marks and citation omitted]; see also *Stop-The-Barge v Cahill*, 1 NY3d 218, 223 [2003]; *Matter of Boyd v Hilton*, 213 AD3d 927, 928 [2d Dept 2023]). Denial of a demand submitted to an entity, while not an outright refusal, is a determination for purposes of calculating statute of limitations (see *Matter of Waterside Assoc. v New York State Dept. of Env'tl. Conservation*, 127 AD2d 663, 665-66 [2d Dept 1987]).

The statute of limitations begins to run when a party receives notice of the determination or the effective date of the action challenged in the determination, if later (see *Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *Matter of Bruno v Greenville Fire Dist.*, 125 AD3d 961, 962 [2d Dept 2015]). Where a decision regarding a renewal is issued or a party is notified that additional action needs to be taken, the final determination is the date the party receives notification, not the end date of the agreement (see *Matter of McCarry v Purchase Coll., State Univ. of N.Y.*, 98 AD3d 671, 672-73 [2d Dept 2012]; see generally *Matter of Cole v New York City Hous. Auth.*, 122 AD3d 527, 528 [1st Dept 2014] [statute of limitations began to run when petitioner received notice of termination of benefits if action was not taken]; *Matter of Passaro v Lake George Park Commn.*, 288 AD2d 678, 678-79 [3d Dept 2001]; *Matter of Steck v Jorling*, 182 AD2d 937, 937 [3d Dept 1992]). A request for reconsideration does not serve to extend or revive the statute of limitations (see *Tornheim v Fiala*, 136 AD3d 797, 797 [2d Dept 2016]).

Here, Petitioner requested an indefinite extension of the use and occupancy permit for the Premises, from Respondent, that expired on September 30, 2021. Respondent notified Petitioner on September 13, 2021, that a 60-day extension was issued and that no further extensions would be given. It is undisputed that a rider for the extension was sent to Petitioner and not returned to Respondent prior to the expiration of the permit. In response, Respondent issued a letter dated October 6, 2021, notifying Petitioner that the occupancy and use permit terminated on September 30, 2021. The instant matter commenced on August 30, 2022, more than four months after the expiration date of the underlying Permit, Respondent's letter dated October 6, 2021, and the proposed expiration date listed in the rider.²

Contrary to Petitioner's contentions, the instant action does not arise from the petition filed in Civil Court by Respondent on February 16, 2022.³ The instant petition seeks a review of

² The Court also notes that the instant action was commenced more than four months after Respondent issued its Notice to Quit and removed the Premises from the auction scheduled for December 3, 2021.

³ The Court further notes that the instant action was filed more than four months after the petition filed in Civil Court under index number LT-302261-22/QU, and after the RPAPL Article 7 trial had already been completed.

Respondent's decision to recover possession of the Premises, a process which began with Respondent's letter dated October 6, 2021. Respondent's letter dated October 6, 2021, notified Petitioner that the occupancy and use permit terminated on September 30, 2021, and that Petitioner was to immediately vacate the property. As the aforementioned letter is considered a final determination, Respondent sufficiently demonstrates that the instant action was brought after the expiration of the applicable statute of limitations. In opposition, Petitioner fails to sufficiently raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*see Blank*, 189 AD3d at 1678).

Therefore, Respondent is entitled to dismissal of the petition. The parties' remaining contentions have been considered and found to be unavailing.

Accordingly, it is **ORDERED** that for the above-stated reasons, Petitioner's motion (Seq. No. 1) seeking a preliminary injunction and a stay is denied; and it is further

ORDERED that Respondent's cross-motion (Seq. No. 1) is granted in that the petition is denied in its entirety and the proceeding is, hereby, dismissed; and it is further

ORDERED that Petitioner's motion (Seq. No. 2) for consolidation is denied; and it is further

ORDERED that Respondent shall serve, via NYSCEF, a copy of this Order with Notice of Entry, upon Petitioner, within ten (10) days from the date of entry; and it is further

ORDERED that this action is hereby disposed.

This constitutes the Decision and Order of this Court.

Dated: April 29, 2024


PHILIP HOM, J.S.C.

