Astoria Homeowners, Tenants & Bus. Civil Assoc., Inc. v City of New York
2015 NY Slip Op 32413(U)
December 12, 2015
Supreme Court, Queens County
Docket Number: 702345 2015
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN KERRIGAN IAS PART 10

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Astoria Homeowners, Tenants & Business Civic Association, Inc.,

Index No: 702345 2015

Plaintiff,

-against-

Motion Dates: 8/25/15; 9/16/15

The City of New York, Gilber Taylor, as Commissioner for the Department of Homeless Services, Scott Stringer, as Comptroller of the City of New York, Women In Need, Inc., 71-11 Realty LLC and 71-11 Realty Co., a New York Partnership,

Mot. Seq. Nos. 1,2 and 3

Defendants.

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The following papers read on this motion by defendant 71-11 Realty LLC for an order dismissing the complaint on the grounds of statute of limitations, lack of standing and failure to state a cause of action; cross-motion by plaintiff for a preliminary injunction, enjoining defendants from operating a homeless shelter at the Westway Motel, located at 71-11 Astoria Boulevard and 72-05 Astoria Boulevard, East Elmhurst, New York, pursuant to CPLR 6301, preliminarily enjoining defendant Scott Stringer, Comptroller of the City of New York, from registering a City procurement contract between the City of New York and Women in Need, Inc. for the operation of the Westway Motel as a permanent homeless shelter, pursuant to CPLR 6301, and for joinder of Westway Associates LLC as a necessary party defendant, pursuant to CPLR 1001; motion by defendants City of New York, Gilbert Taylor, as Commissioner of the Department of Homeless Services, and Scott Stringer, as Comptroller of the City of New York, to dismiss the complaint upon the grounds of statute of limitations, laches, lack of standing, and failure to state a cause of action; and motion by defendant Women In Need Inc. to dismiss the complaint upon the grounds of statute of limitations and failure to state a cause of action:

Papers

	Numbered
Notice of Motion-Affirmation-Exhibits-Affidavit of Service	EF4-14
Notice of Cross Motion-Affirmation- Exhibits.....	EF27-51
Memorandum of Law.....	EF 52
Opposing Affirmation-Exhibits.....	EF59-62
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Reply Affirmation-Exhibits.....	EF64,66-68
Reply Memorandum of Law.....	EF 65
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Notice of Motion-Affirmation-Exhibits.....	EF15-18
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Notice of Motion-Memorandum of Law-Affirmation-Exhibit	EF20-23
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Reply Memorandum of Law.....	EF 77

Upon the foregoing papers the motions and cross-motion are consolidated for the purposes of a single decision and are determined as follows:

At the outset this Court notes that the motion of 71-11 Realty LLC (71-11) was submitted on August 25, 2015, and that the separate motions of defendants City of New York, Taylor and Stringer and of Women In Need, Inc. (WIN) were submitted on September 16, 2015. The parties pursuant to stipulation dated August 27, 2015 agreed to adjourn 71-11's motion to September 16, 2015. Said stipulation was not so-ordered by the court. Plaintiff submitted a single cross-motion and opposition papers in response to the three separate motions, and all of the defendants have responded to said cross motion. Plaintiff however, was not granted permission by this court to submit a single cross motion and opposition to all three motions. Proper procedure required that plaintiff cross move in each motion in order to seek relief as to all defendants, and to e-file and submit separate opposition papers corresponding to each motion. In view of the fact that all the defendants have responded to plaintiff's cross motion and opposing papers, this court in the interests of judicial economy will consider the cross motion and opposition papers as against all defendants. The parties are cautioned that this type of motion practice will not be tolerated by this court in any future actions and proceedings in this Part.

71-11 is the current fee owner of the improved real property located at 71-11Astoria Boulevard and 72-05 Astoria Boulevard. 71-11 Realty Co., a named defendant herein, transferred its interest in 71-11Astoria Boulevard and 72-05 Astoria Boulevard, East Elmhurst, New York to 71-11 Realty LLC (71-11) , pursuant to a deed dated February 7,

2002. The deed was indexed against Block 1003, Lots 1, 4 and 11 (71-11 Astoria Boulevard), but was not indexed against Block 1004, Lot 52 (72-05 Astoria Boulevard).

71-11 entered into a lease agreement with Westway Associates LLC (Westway) dated October 20, 2007, for the lease of the premises known as 71-04 and 71-10 Ditmars Boulevard and 71-11 Astoria Boulevard, East Elmhurst, New York, Block 1003 Lots 1, 4 and 11, and Block 1004, Lot 42. The lease agreement requires the landlord to obtain a permanent certificate of occupancy for the subject premises allowing it to be used as a motel containing 121 rooms. The lease also provides that upon the commencement of the lease term in November 2007, the premises would be delivered to the tenant vacant and free of all tenancies and occupancies, other than those units occupied by clients of the New York City Department of Homeless Services (DHS).

The DHS is a mayoral agency of the City that is tasked with providing transitional housing and services, short-term emergency housing and re-housing support to the City's homeless families and individuals. The subject premises known as the Westway Motor Inn, is also known as the Westway Family Residence, and is presently a homeless shelter for up to 121 homeless families with children. Said shelter began accepting families with children referred by DHS on July 10, 2014, pursuant to an emergency declaration approved by the Office of the New York City Comptroller on May 16, 2014.

On October 1, 2014, WIN entered into an emergency contract with the City, acting by and through DHS, to provide emergency shelter services for homeless families at the subject premises for a term commencing on July 10, 2014 and ending on January 9, 2015. Said emergency contract was registered by the City Comptroller on December 17, 2014, pending permanent procurement of a long term contract. It is asserted that in January 2015, WIN submitted a proposed contract to the DHS to operate a shelter at the subject premises for a proposed term expiring on June 30, 2019, with an option to renew for an additional four-year term.

The DHS conducted a Fair Share review of the facility pursuant to the New York City Charter, Section 203 and Title 62, Appendix A of the Rules of the City of New York. The Fair Share review was issued on November 17, 2014. On January 15, 2015, DHS held a public hearing on the proposed long-term contract with WIN. DHS has submitted a contract to the Comptroller's office for long term operation of the Westway Family Residence at the subject premises. While this motion was subjudice, the Comptroller's office notified DHS on August 3, 2015 that it would decline to register the contract. DHS, however, intends to resubmit the contract to the Comptroller.

Plaintiff Astoria Homeowners, Tenants & Business Civic Association, Inc.

(Astoria) commenced this action by e-filing on March 12, 2015. The summons in the action names Astoria and "John and Jane Doe #1 through John and Jane Doe #500, being fictitious names of the current residents of 71-11 Astoria Boulevard and 72-05 Astoria Boulevard, Queens, NY". After plaintiff served its summons and complaint, it e-filed and served an amended verified complaint on May 1, 2015, deleting from the caption the John and Jane Doe plaintiffs. It is noted that plaintiff in an exhibit attached to its cross motion, included a copy of an amended summons, and that the parties in their respective motions and cross-motion have deleted the John Doe and Jane Doe plaintiffs from the caption. Plaintiff, however, has not e-filed and serve an amended summons. Therefore, the John Doe and Jane Doe defendants have not been properly deleted from the caption of this action.

Plaintiff alleges that it is a not-for-profit corporation created to promote, foster and encourage interest and support "in the proper development and beneficial use and enjoyment of the neighborhood of Astoria and its environs, including the neighborhoods of East Elmhurst and Astoria Heights". It is alleged that plaintiff's members include individual homeowners, business owners and tenants in the vicinity of the subject premises, and other individuals, families and business owners who either reside or work in the vicinity of the subject premises, including homeowners and residents immediately adjacent to the subject premises.

The amended complaint alleges four causes of action against all of the defendants and seeks to: "(a) declare and enjoin the use and operation of a permanent homeless shelter at the Westway Motor Inn, located at 71-11 and 72-05 Astoria Boulevard, East Elmhurst, NY ("Westway"), as violative of the applicable provisions of the New York City Charter, the New York City Administrative Code, the applicable regulations of the New York State Office of Temporary and Disability Assistance, and the applicable City zoning laws; (b) declare and enjoin the operation and management of the Westway as a public nuisance and a wasteful expenditure of public funds in violation of the New York State General Municipal Law; and (c) enjoining the Comptroller of the City of New York from registering a permanent procurement contract with defendant Women in Need, Inc. (WIN)".

The first cause of action against all defendants alleges a violation of Section 28-201.1 of the Administrative Code of the City of New York, and asserts that the use of Westway as a homeless shelter is prohibited under the applicable zoning resolution; that the anticipated use of the premises violates the certificate of occupancy for the building located at 71-11 Astoria Boulevard, and that such use is in violation of the Building Code. Plaintiff seeks a declaration to the effect that the operation of the Westway for the purposes of a homeless shelter is a violation of Section 28-201.1, and seeks a preliminary and permanent injunction.

The second cause of action against all defendants alleges a violation of 18 NYCRR

Part 900, and asserts that the Westway facility is in violation of 18 NYCRR § 900.5 in that it does not comply with State and local laws, regulations and codes relating to the building and construction of physical plants; fire prevention and fire protection; plumbing and water supply; heating and electrical systems; kitchen and food service; sanitation and maintenance; and health and safety. It is further alleged that the Westway facility is not in compliance with environmental standards promulgated in 18 NYCRR §900.12. Plaintiff alleges that said violations are detrimental to the health and safety of the residents and to the plaintiff, and seeks injunctive relief.

The third cause of action alleges that the manner in which WIN and DHS have operated Westway on a temporary emergency basis constitutes a public nuisance to the community at large and to the plaintiffs; that the acts of nuisance include increased criminal activity, loitering, trespassing, littering and permitting convicted registered sex offenders to occupy the shelter; and that neither WIN nor DHS have taken any steps to ablate the nuisance, even though they have been notified of the offending conduct. Plaintiff seeks an order compelling defendants WIN and DHS to abate the nuisance.

The fourth cause of action alleges a violation of General Municipal Law §51, in that the DHS' expenditure of over $4,000.00 a month for a single room unit constitutes waste; that awarding the contract to WIN, given improprieties found by the Comptroller's office in WIN's past performance of other contracts, constitutes waste; that the expenditure of public monies for the use and operation of Westway in violation of the City Charter, Administrative Code, zoning laws, the certificates of occupancy and the laws and regulations of the State Office of Temporary and Disability Assistance constitutes a waste of public property. Plaintiff seeks to enjoin the expenditure of public monies for the WIN contract.

With respect to plaintiff's cross-motion for a preliminary injunction and for leave to add the tenant Westway as a necessary party defendant, in order to obtain relief pursuant to CPLR 6301, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v Capasso,* 75 NY2d 860[1990]; *Doe v Axelrod*, 73 NY2d 748[1988]; *Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]; *Matos v City of New York*, 21 AD3d 936 [2d Dept 2005]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*Ruiz v Meloney*, 26 AD3d 485, *supra*; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, [2d Dept 2006]; *Weinreb Management, LLC v KBD Management, Inc.*, 22 AD3d 571[2d Dept 2005]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v Axelrod, supra*, at 750; *Ruiz v Meloney, supra*; *Weinreb Management, LLC v KBD Management,*

supra). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *see Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824[2d Dept 2010]; *Village of Westhampton Beach v Cayea*, 38 AD3d 760, 762 [2d Dept 2007]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347 [2003]).

Here, it is clear that plaintiff is seeking the ultimate relief requested in its complaint and is not seeking to maintain the status quo and to prevent any conduct which might impair the ability of the court to render a final judgment (*see* CPLR 6301; *St. Paul Fire and Mar. Ins. Co. v York Claims Serv.*, 308 AD2d at 348-349). The circumstances presented in this case are not of such an extraordinary nature as to warrant mandatory injunctive relief pending the resolution of the litigation (*see Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d at 824; *Village of Westhampton Beach v Cayea*, 38 AD3d at 762; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d at 728; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d at 347; *Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]).

The court further finds that plaintiff is not entitled to a preliminary injunction in order to conduct discovery. Finally, plaintiff has failed to demonstrate the likelihood of success on the merits, as it cannot establish that any of its causes of action may be maintained against the defendants. Therefore, that branch of the plaintiff's cross motion which seeks a preliminary injunction, is denied.

That branch of the cross-motion that seeks to add Westway as a party defendant is denied. Plaintiff has failed to demonstrate that the tenant Westway is a necessary party to the within action. To the extent that plaintiff asserts that Westway's "use or misuse" of the subject property is in violation of its lease agreement with the landlord 71-11, plaintiff is not a party to the lease agreement, nor is it a third party beneficiary of said agreement, and cannot assert any claims against Westway based upon an alleged breach of the lease agreement.

That branch of 71-11's motion to dismiss the complaint upon the ground of statute of limitations is denied. Defendant 71-11 asserts that Astoria's claims should have been brought in an Article 78 proceeding and that the four month period of limitations set forth in CPLR 217 expired prior to the commencement of this action. Plaintiff, however, does not seek judicial review of any action taken by 71-11. To the extent that plaintiff may be seeking mandamus with respect to the municipal defendants, this does not transform its plenary claims against 71-11 into claims that should be reviewed in an Article 78 proceeding. Therefore, 71-11's assertion that the within action is barred by the four month period of limitations for commencing an Article 78 proceeding is rejected.

71-11 correctly points out that plaintiff's summons fails to specify its address as required by CPLR 305(a). A failure to comply with the technical requirements of CPLR 305 (a), however, does not warrant dismissal of the action unless there is a showing of prejudice caused by such defect. As 71-11 has failed to show any prejudice whatsoever (*see* CPLR 305 [c]; *Cruz v New York City Hous. Auth.*, 269 AD2d 108 [1st Dept 2000]), dismissal of the within complaint upon this ground is not warranted. It is noted that this Court is bound by the ruling of the First Department in this regard, in the absence of any contrary holding by the Appellate Division in this Department (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 664, 1984).

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences" (*Leon v Martinez*, 84 NY2d 83, 87[1994]; *see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Nasca v Sgro*, 130 AD3d 588 [2d Dept 2015]; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 901-902 [2d Dept 2014]). The court is limited to "an examination of the pleadings to determine whether they state a cause of action," and the "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). "The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments'" (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 723 [2d Dept 2013], *quoting Pace v Perk*, 81 AD2d 444, 449[2d Dept 1981] [internal quotation marks omitted]; *see also Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d at 901-902).

"A court is, of course, permitted to consider evidentiary material . . . in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]), and, if it does so, " 'the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one' " (*id.* at 1181-1182, *quoting Guggenheimer v Ginzburg*, 43 NY2d at 275). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d at 902 [internal quotation marks omitted]; *see Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682 [2d Dept 2012]). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d at 683 [internal quotation

marks omitted]; *see Sokol v Leader*, 74 AD3d at 1182; *see also Nasca v Sgro*, *supra*).

David Spiess, the managing member of 71-11, states in his affidavit that 71-11 is the fee owner of the subject premises and that it leased said premises to Westway pursuant to a triple net lease. He states that 71-11 does not maintain an office in the premises and has not entered into any lease or other agreement with Westway, WIN, the City of New York or DHS to operate a homeless shelter at the subject premises. He further states that 71-11 receives a fixed rent from Westway which is not dependent on or contingent upon the monies generated by the operation of the homeless shelter. 71-11 argues that since it is an out-of-possession landlord, it is not a proper party to this action and cannot be held liable for any of the alleged claims.

An examination of the amended complaint establishes that it fails to set forth any specific allegations against 71-11, and only alleges claims against the "defendants". Plaintiff's first cause of action seeks declaratory and injunctive relief and alleges a violation of Section 28-201.1 of the Administrative Code of the City of New York, based upon alleged violations of the certificate of occupancy, the Building Code, and the applicable zoning resolutions.

Section 28-201.1 of the Administrative Code provides as follows: "It shall be unlawful to erect, construct, alter, extend, repair, fail to maintain, move, remove, demolish, occupy, use or operate any building, structure, premises, or equipment, or to conduct any subject matter regulated by this code or by the zoning resolution, or to cause same to be done, in conflict with or in violation of any of the provisions of this code, the zoning resolution, or the rules of the department or, with regard to existing buildings, any applicable provision of the 1968 building code or any other law or rule enforced by the department. It shall be unlawful to fail to comply with an order of the commissioner or to violate any order of the commissioner issued pursuant to this code, the 1968 building code, the zoning resolution or any law or rule enforced by the department."

Section 28-201.3 of the Administrative Code, entitled " Methods of enforcement" provides as follows: "The commissioner may use any of the methods set forth in this code to enforce compliance with this code, the 1968 building code, the zoning resolution, other laws or rules enforced by the department and orders of the commissioner issued pursuant thereto including but not limited to:

1. Proceedings for the recovery of civil penalties for immediately hazardous, major and lesser violations before the environmental control board or other administrative tribunal.

2. Civil judicial proceedings for the recovery of civil penalties or injunctive relief or both for

immediately hazardous, major and lesser violations.

3. Criminal judicial proceedings for the imposition of criminal fines or imprisonment or both for immediately hazardous, major and lesser violations.

4. The issuance and enforcement of peremptory orders for immediately hazardous, major and lesser violations.

5. The issuance of a commissioner's request for correction of an unlawful use or condition or order to correct an unlawful use or condition.

6. Other special remedies as set forth in this code, the zoning resolution or other law or rule."

Section 28-201.3 of the Administrative Code, provides that: "Officers and employees of the department and of other city agencies designated by the commissioner shall have the power to issue summonses, appearance tickets and notices of violation for violations of this code, the 1968 building code, the zoning resolution or other laws or rules enforced by the department, orders, and requests for corrective action".

The Administrative Code thus, grants the New York City Commissioner of Buildings the sole power to enforce violations of Section 28-201.1. In the absence of an express private right of action, plaintiff can seek civil relief in a plenary action based upon a violation of a statute "only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history" (*Carrier v Salvation Army*, 88 NY2d 298, 302[1996] [internal quotation marks and citations omitted]). This determination is predicated on three factors: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]). The Court of Appeals has repeatedly recognized the third as the most important because "the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme" (*id.* at 634-635 [citation omitted]; *see Uhr v East Greenbush Central School Dist.*, 94 NY2d 32,[1999]). The Court of Appeals, has declined to recognize a private right of action in instances where "[t]he Legislature specifically considered and expressly provided for enforcement mechanisms" in the statute itself (*see Mark G. v Sabol*, 93 NY2d 710, 720[1999]; *see also Cruz v TD Bank, N.A.*, 22 NY3d 61, 70-71 [2013]).

Here, permitting a private right of action for a violation of Administrative Code § 28-201.1 would not be consistent with the legislative scheme. The enforcement of the statutory provisions has been expressly entrusted to the Commissioner of the Department of Buildings, and the remedies provided militates against any implied private right of action. In view of the fact that no private right of action exists for the enforcement of violations of Section 28-201.1, that branch of 71-11's motion which seeks to dismiss the first cause of action upon the ground of lack of standing is granted.

Plaintiff's second cause of action seeks to enjoin the operation of the homeless shelter based upon the alleged failure of the defendants to comply with the provisions of 18 NYCRR §900.5 and 900.12. Notably, 18 NYCRR § 900.14(i) provides that: " Complaints of noncompliance [with Part 900] may be submitted to the local district by or on behalf of residents. Upon receipt of such a complaint, the local district must determine whether the facility is in compliance and advise both the department and the complainant of its findings. If the facility is not in compliance, the department must issue a notice of noncompliance to the local social services district in accordance with subdivision (d) of this section."

The provisions of 18 NYCRR Part 900 clearly provides that issues of non-compliance are within the purview of the local social services districts. Permitting a private right of action for a violation of 18 NYCRR Part 900 would not be consistent with the legislative scheme. Plaintiff neither represents the shelter residents nor alleges that it made any complaint on behalf of the shelter residents. Moreover, plaintiff is not seeking to ensure that the facility is in compliance with all applicable laws, regulations and standards set by the New York State Department of Social Services. Rather, plaintiff is seeking to shut down the shelter by means of an injunction. As there is no private right of action for violations of 18 NYCRR Part 900, that branch of 71-11's motion which seeks to dismiss the second cause of action upon the ground of lack of standing is granted.

Plaintiff's third cause of action for a public nuisance alleges that defendants WIN and DHS's operation of a homeless shelter at the subject premises on a temporary emergency basis has created a nuisance for the neighboring residents. A public nuisance "is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency" (*Copart Indus. v Con Ed* Co., 41 NY2d 564, 568 [1977]). To make out a cause of action for public nuisance, Astoria must establish by clear and convincing evidence that the "conduct amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *see Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031, 1036 [2d Dept 2006], *appeal denied,7* NY3d 921 [2006]; *DeStefano v Emergency*

Housing Group, Inc. 281 AD2d 449, 451[2d Dept 2001] [internal citations omitted]; *lv to appeal denied*, 96 NY2d 715 [2001]). Further, as a private party, plaintiff has to show that it suffered some special damage, separate and apart from that suffered by the public at large (*see 532 Madison Ave. Gourmet Foods,* 96 NY2d at 292). Plaintiff alleges that the community at large was affected by the conduct of loitering, littering, an increase in crime, and permitting a registered sex offender to reside at the shelter for an unspecified period of time before being removed from the shelter. As the injury to plaintiff also affects the community at large, it is not special within the meaning of a public nuisance. As such, plaintiff lacks standing to bring this public nuisance claim (*see id.*). In addition, the third cause of action is devoid of any allegations against the property owner 71-11. Therefore that branch of 71-11's motion which seeks to dismiss the third cause of action upon the grounds of lack of standing and failure to state a cause of action is granted.

Plaintiff's fourth cause of action alleges a violation of General Municipal Law §51. Pursuant to General Municipal Law § 51, taxpayers may bring suit to prevent illegal acts by "officers agents, commissioners and other persons acting, or who have acted, for and on behalf of any...municipal corporation in this state" and "an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste..." (G ML § 51). However, a suit under GML § 51 "lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (*Godfrey v Spano*, 13 NY3d 358, 373[2009], *quoting Mestiva of Forest Hills Inst v City of New York*, 58 NY2d 1014, 1016 [1983]). There is no fraud alleged here. Therefore, for this claim to be viable, petitioner must "state a claim for an illegal dissipation of municipal funds" (*Godfrey*, 13 NY3d at 373). Plaintiff alleges that the City and DHS committed waste by awarding the contract to WIN; that the award of said contract does not further the needs of the neighborhood or provide for appropriate care for the homeless; and that the amount spent by DHS on a single room constitutes waste. The complaint, however, does not contain any allegations against the property owner 71-11 for fraud or the illegal dissipation of municipal funds. The complaint thus fails to state a cause of action under General Municipal Law § 51 against defendant 71-11. Therefore, that branch of 71-11's motion which seeks to dismiss the fourth cause of action upon the ground of failure to state a cause of action is granted.

As to the motion by the City, Taylor and Stringer to dismiss the complaint, that branch of the motion which seeks to dismiss the complaint upon the ground of statute of limitations is denied. Contrary to said defendants' assertions, the complaint does not seek relief in the nature of mandamus to compel. Rather, plaintiff is seeking to enjoin the municipal defendants from operating a homeless shelter at the subject premises. This Court, therefore, declines to convert the within action into an Article 78 proceeding, and the four month statute of limitations governing Article 78 proceedings is not applicable here.

That branch of the motion which seeks to dismiss the first cause of action for injunctive relief based upon a for a violation of Section 28-201.1 of the Administrative Code, is granted. Section 28-201.3 of the Administrative grants the New York City Commissioner of Buildings the sole power to enforce violations of Section 28-201.1 and for the reasons stated above, no private right of action exists to enforce a violation of Section 28-201.1. Plaintiff, therefore, lacks standing to maintain the first cause of action.

That branch of the motion which seeks to dismiss the second cause of action for injunctive relief based upon the alleged failure of the defendants to comply with the provisions of 18 NYCRR §900.5 and 900.12, is granted. The provisions of 18 NYCRR Part 900 clearly provides that issues of non-compliance are within the purview of the local social services districts and for the reasons stated above, no private right of action exists. Plaintiff therefore, lacks standing to maintain the second cause of action.

That branch of the motion which seeks to dismiss the third cause of action for a public nuisance is granted, as plaintiff has failed to allege that, as a result of the shelter's operation, it would suffer a type of harm that was different from the type of harm that other members of the community would suffer (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031, 1036 [2d Dept 2006], *appeal denied*, 7 NY3d 921 [2006]; *DeStefano v Emergency Housing Group, Inc.* 281 AD2d 449, 451[2d Dept 2001]; *lv to appeal denied*, 96 NY2d 715 [2001]).

That branch of the motion which seeks to dismiss the fourth cause of action for a violation of General Municipal Law § 51 is granted. The complaint fails to state a claim under General Municipal Law § 51, as plaintiff has failed to allege that some government official acted corruptly or fraudulently, or engaged in illegal activities (*see Godfrey v Spano*, 13 NY3d 358, 373[2009]; *Mestiva of Forest Hills Inst v City of New York*, 58 NY2d 1014, 1016 [1983]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d at 1036). This Court further notes that, to the extent that plaintiff in its fourth cause of action asserts that Comptroller Stringer should refuse to register the contract between the City and WIN, plaintiff has failed a state a claim for such relief.

Defendant WIN moves to dismiss the complaint upon the grounds of statute of limitations, lack of standing, failure to state a cause of action and laches.

That branch of WIN's motion to dismiss the complaint upon the ground of statute of limitations is denied. As heretofore stated, the complaint does not seek relief in the nature of mandamus to compel. Rather, plaintiff is seeking to enjoin the municipal defendants from operating a homeless shelter at the subject premises. This Court, therefore, declines to

convert the within action into an Article 78 proceeding, and the four-month statute of limitations governing Article 78 proceedings is not applicable here.

That branch of WIN's motion to dismiss the first cause of action for injunctive relief based upon a violation of Section 28-201.1 of the Administrative Code is granted. Section 28-201.3 of the Administrative grants the New York City Commissioner of Buildings the sole power to enforce violations of Section 28-201.1, and for the reasons stated above, no private right of action exists to enforce a violation of Section 28-201.1. Plaintiff, therefore, lacks standing to maintain the first cause of action.

That branch of WIN's motion to dismiss the second cause of action for injunctive relief based upon the alleged failure of defendants to comply with the provisions of 18 NYCRR §900.5 and 900.12, is granted. The provisions of 18 NYCRR Part 900 clearly provides that issues of non-compliance are within the purview of the local social services districts and for the reasons stated above, no private right of action exists. Plaintiff, therefore, lacks standing to maintain the second cause of action.

That branch of WIN's motion to dismiss the third cause of action for a public nuisance is granted, as plaintiff has failed to allege that, as a result of the shelter's operation, it would suffer a type of harm that was different from the type of harm that other members of the community would suffer (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031, 1036 [2d Dept 2006], *appeal denied*, 7 NY3d 921 [2006]; *DeStefano v Emergency Housing Group, Inc.* 281 AD2d 449, 451[2d Dept 2001]; *lv to appeal denied*, 96 NY2d 715 [2001]).

That branch of WIN's motion to dismiss the fourth cause of action for violation of General Municipal Law § 51 is granted. The complaint fails to state a claim under General Municipal Law § 51, as plaintiff has failed to allege that some government official acted corruptly or fraudulently, or engaged in illegal activities (*see Godfrey v Spano*, 13 NY3d 358, 373[2009]; *Mestiva of Forest Hills Inst v City of New York*, 58 NY2d 1014, 1016 [1983]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d at 1036).

Accordingly, 71-11's motion , the City's, Taylor's and Stringer's motion and WIN's motions to dismiss the complaint in its entirety are granted, plaintiff's cross-motion for injunctive relief and for leave to add Westway as a necessary party defendant is denied, and the action is dismissed.

Dated: November 12, 2015

KEVIN J. KERRIGAN, J.S.C.