Matter of Burrell v New York City Dept. of Health & Mental Hygiene
2012 NY Slip Op 32381(U)
September 6, 2012
Supreme Court, Queeens County
Docket Number: 6999/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** **IA PART 6**

In the Matter of MICHAEL B. BURRELL, Petitioner,	Index Number 6999/12
-against-	Motion Date July 12, 2012
NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, et al.,	Motion Cal. Number 6
Respondents.	Motion Seq. No. 1

The following papers numbered 1 to 17 read on this Article 78 proceeding by petitioner Michael Burrell for a judgment directing respondent New York City Department of Health and Mental Hygiene (DOHMH) to remove the charges and interest from Tax Lien Certificate No.4A and in the alternative ordering the DOHMH to pay the improper assessments with interest; and further seeks an order setting aside the judgment of foreclosure and sale of the said Tax Lien; and in the alternative order the DOHMH to give petitioner due process to determine the proper amount allegedly owed based on the various records. Respondents DOHMH and the New York City Department of Finance (DOF) cross move for an order dismissing the petition on the grounds of res judicata and collateral estoppel, and statute of limitations. Respondents NYCTL-2008-A Trust, The Bank of New York as Collateral Agent for the NYCTL-2008-A Trust, NYCTL 1998-2 Trust and The Bank of New York as Collateral Agent for the NYCTL 1998-2 cross-move for an order dismissing the petition on the grounds of res judicata and collateral estoppel, and statute of limitations.

	Papers Numbered
Notice of Petition-Verified Petition-Exhibits......................	1-3
Amended Notice of Cross Motion-Affirmation-Exhibits	4-7
Notice of Cross Motion -Affirmation-Exhibits.......................	8-11
Opposing Affirmation-Exhibit...	12-13
Reply Affirmation...	14-15
Reply Affirmation...	16-17
Memorandum of Law..	

Upon the foregoing papers the motion and cross motions are determined as follows:

Petitioner Michael Burrell and his wife Cherie Burrell are the owners of residential real property located at 115-34 223 Street, Cambria Heights, New York, Block 11411, Lot 51. The Burrells purchased their home in 1992, with a mortgage of $97,750.00, which they paid in full, and satisfied in August 2004.

Mr. Burrell alleges that in 2006 he learned that the DOHMH had charged the Burrells for pest control and cleanup on their property from 1995 through 1998, in the total sum of $25,068.00, together with interest and charges. The DOHMH placed a lien on the subject property, pursuant to Section 27-2144 of the Administrative Code of the City of New York. The DOHMH statement of account dated March 1, 2005, set forth 18 separate charges for seven health inspections, eight exterminations and three clean ups of the subject property, between October 2, 1995 and November 9, 1998. Petitioner asserts that he and his wife have no knowledge of any such inspections, exterminations or clean ups of the subject real property at any time, and that the DOHMH did not visit their home 18 times, in the three years, at intervals of every other month. He alleges that upon learning of these charges, he wrote to the Director of Pest Control, requesting a copy of the tickets and/or clean up bills, and that he met with the Director of Pest Control, Margaret Jung. It is alleged that Ms. Jung informed him that the agency no longer had the records, and that he should write a letter disputing the charges, and that it was likely they would be reduced or eliminated. Mr. Burrell, in a letter dated February 17, 2006 and sent by certified mail to the DOHMH and the DOF on February 17, 2006, disputed the charges and requested, among other things, copies of the tickets or clean up bills. Mr. Burrell met with Ms. Jung some four to six months later, and alleged that he also communicated with the DOHMH's office, by telephone, mail, and in person.

Petitioner alleges that after he notified the DOHMH in writing of his objections to said charges, he was entitled to an administrative hearing, pursuant to Section 27-2129 of the Administrative Code of the City of New York, and 24 RCNY §7-01, and that he was not afforded due process.

Petitioner alleges during this time, he and his wife fell behind on their real property taxes, and that they were unaware that the City of New York issued a tax lien on the real property on June 1, 2008, which included the disputed charges assessed by the DOHMH. The DOF sold Tax Lien Certificate No. 4A to NYCTL 2008-A Trust, with the Bank of New York as collateral agent and custodian for said Trust. On May 20, 2009, NYCTL 2008-A Trust commenced an action in this court entitled *NYCTL 2008-A Trust, et al v Cherie Burrell, Michael Burrell, et al.* (Index No. 13915/2009) to foreclose on the tax lien. The Burrells appeared in that action, and disputed the DOHMH charges. They asserted that no work was ever performed at their property by the DOHMH; that they were unaware of the agencies' records until after the foreclosure action was commenced; and that the DOF records did not comport with the DOHMH charges.

In the foreclosure action, the Trust, in March 2010, moved for an order granting summary

judgment in its favor against Cherie K. Burrell and Michael B. Burrell, and to appoint a referee to compute the amounts due. The Hon. Timothy Flaherty, in a memorandum decision, addressed the parties' contentions, determined that Michael Burrell had failed to raise any triable issues of fact that would warrant the denial of summary judgment, and granted the motion for summary judgment and for the appointment of a referee. With respect to Mr. Burrell's claims regarding the DOHMH charges, the court noted, as follows:

"Even assuming defendant Michael Burrell first received notice of the DHMH charges in early 2006, he admits he did not bring an Article 78 proceeding within four months thereafter challenging the charges as baseless or exaggerated, and as a consequence, cannot assert such claims herein (*see Community Counseling & Mediation Services v New York City Dept. of Health & Mental Hygiene*, 45 AD3d 315 [2007]; Administrative Code of the City New York §17-152). Contrary to defendant Michael Burrell's contention, his 2006 letter to DOHMH whereby he contested the validity of the DOHMH charges and requested DOHMH document them, did not estop the City from subsequently selling a lien based, in whole or part, in the disputed charges, nor did it estop plaintiffs from foreclosing in such lien (*see* New York City Administrative Code §§11-319[b][8], 17-142,17-147, 17-151; *see also NYCTL 1999-1 Trust v Stark*, 21 AD3d 402, 403 [2005])."

"In addition, the DOHMH charges relate to actions taken between October 1995 and November 1998. According to plaintiffs, the records of the charges relating to billings and exterminations were disposed of in, or about December 2005, and DOHMH received approval in its application in January 2008 to dispose of inspection reports dated between 1991 and 1999. Defendant Michael Burrell had failed to demonstrate that DOHMH violated any rule or statute when disposing of the records related to the inspection, extermination and cleanup bills, or inspection reports, issued in connection with his property".

The Hon. Darrell Gavrin issued an order granting summary judgment in favor of the Trust, and appointed a referee to compute the amount due. Mr. Burrell asserts that although he requested that the referee hold a formal hearing with respect to the amount of the tax lien, no hearing was held. On December 9, 2011, a judgment of foreclosure and sale of the tax lien, dated November 21, 2011, in the sum of $83,681.73, was entered in the action commenced under Index No. 13915/2009.

Mr. Burrell, in a letter dated August 10, 2011, and addressed to the Commissioner of the DOHMH, stated that he had written many letters, made numerous visits and telephone calls to the DOHMH regarding the tax lien, and that he received no response from the agency; that the charges assessed against his property were erroneous and false; and that the DOHMH informed him that the original bills related to this matter had been destroyed despite the fact that he had made requests for said bills since 2006. He requested that the Commissioner look into the matter and withdraw the tax lien.

The DOHMH, in a letter dated January 26, 2012, responding to Mr. Burrell's letter of

August 10, 2011, stated, in pertinent part, as follows:

"A thorough investigation was conducted however the paper records for the services that were performed do not exist as they have been destroyed. These documents are only retained for seven (7) years. Your letter indicated that you contacted the Department of Health and Mental Hygiene (DOHMH) on numerous occasions. We were unable to find any record of communication via telephone or mail that was sent to this office".

"In regards to the tax lien sale, the health charges would only have been included in the lien sale if there were over $1,000.00 in real estate taxes due to the City of New York. A search of the Department of Finance's (DOF) Fairtax records for the property revealed that there are outstanding charges and interest for DOHMH totaling $34,980.50 and Real Estates (sic) taxes for DOF totaling $19,094.46. These outstanding charges and taxes were sold in a lien sale by DOF. There may be other charges or fees due the City of New York however we do not have access to those records".

"Your only recourse is to file an Article 78 with the New York State Supreme Court. The court will review your claim and make a decision".

Mr. Burrell, in a letter dated February 29, 2012, requested that the Commissioner of the DOHMH intervene in the tax lien action, stating that the sale of the property had been stayed by the court, pursuant to an order to show cause, dated February 10, 2012. The DOHMH in a letter dated March 21, 2012 stated that it had nothing to add to its letter of January 26, 2012.

Plaintiff commenced this Article 78 proceeding on April 3, 2012, and asserts that the DOHMH charges should be removed from the lien, as no records exist which establish that the subject property was inspected and that any work was performed at the property; that the DOHMH and the DOF's records are contradictory; and it cannot be stated with certainty what work was performed and what amounts are allegedly owed. Petitioner concedes that he and his wife owe the real property taxes and state that they are willing to pay the amount owed for said taxes. Petitioner, thus, seeks a judgment directing respondent New York City Department of Health and Mental Hygiene (DOHMH) to remove the charges and interest from Tax Lien Certificate No.4A and in the alternative ordering the DOHMH to pay the improper assessments with interest; and further seeks an order setting aside the judgment of foreclosure and sale of the said Tax Lien; and in the alternative order the DOHMH to give petitioner due process to determine the proper amount allegedly owed based on the various records.

Respondents DOHMH and DOF cross-move to dismiss the amended petition on the grounds of res judicata and collateral estoppel and statute of limitations. Respondents NYCTL2008-A Trust, The Bank of New York as Collateral Agent for the NYCTL-2008-A Trust, NYCTL 1998-2 Trust and The Bank of New York as Collateral Agent for the NYCTL 1998-2 cross-move to dismiss the petition on the identical grounds. Respondents assert that the DOHMH charges for inspections, exterminations and clean ups were previously litigated in the

foreclosure action, and therefore this proceeding is barred by the doctrines of res judicata and collateral estoppel. Respondents further assert that the within proceeding is time barred, as petitioner admittedly received notice of the disputed charges in 2006, and did not commence a proceeding for judicial review of said charges within four months of receipt of said notice. It is asserted that the DOHMH's January 26, 2012 and March 21, 2012 responses to petitioner's inquiries regarding a determination or a request for reconsideration cannot serve to extend the statute of limitations.

Res judicata, or claim preclusion, bars relitigation of claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269[2005]). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Xiao Yang Chen v Fischer*, 6 NY3d 94 [2005], *quoting O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Res judicata precludes re-litigation of all claims which were raised, or could have been raised, in the prior action (*see Xiao Yang Chen v Fischer*, 6 NY3d at 100; *Cypress Hills Cemetery v City of New York*, 67 AD3d 853, 854 [2009], *lv denied* 14 NY3d 712[2010]).

The primary purposes of res judicata are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy (*see Matter of Hodes v Axelrod*, 70 NY2d 364, 372 [1987]; *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). However, unfairness may result if the doctrine is applied too harshly; thus "[I]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive [the litigant] of one" (*Matter of Reilly v Reid*, 45 NY2d at 28). It is not always clear whether particular claims are part of the same transaction for res judicata purposes. A "pragmatic" test has been applied to make this determination--analyzing "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" (Restatement [Second] of Judgments § 24 [2]; *see Xiao Yang Chen v Fischer*, 6 NY3d at 100-101; *Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981]; *Matter of Reilly v Reid*, 45 NY2d at 29).

Applying these principles, it is apparent that actions to foreclose on a tax lien and an Article 78 proceeding against a governmental agency do not constitute a convenient trial unit. The purposes behind the two are quite different. They seek different types of relief and require different types of proof. Furthermore, in the tax lien foreclosure action, Mr. Burrell has not interposed any claims against the owner of the tax lien or the DOF, and the DOHMH is not a party to that action. Rather, Mr. Burrell raised certain defenses in opposition to the motion for summary judgment to foreclose on the tax lien, and Justice Flaherty determined that he had failed to raise any triable issues of fact. The doctrine of res judicata, therefore, does not bar the within Article 78 proceeding.

Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; *see also Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *Kedik v Kedik,* 86 AD3d 766, 767[2011]; *Matter of Frontier Ins. Co.*, 73 AD3d 36, 41 [2010]). Moreover, as a general rule, future litigation between parties arising from the same transaction is precluded following a valid final judgment in previous actions, even if a new action is based upon different theories or seeks a different remedy (*see Matter of Josey v Goord,* 9 NY3d 386, 389-390 [2007]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Collateral estoppel requires that the party to be precluded from relitigating the issue "had a full and fair opportunity to contest the prior issue" (*Ryan, supra*, 62 NY2d at 501).

The doctrine of law of the case " is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). The doctrine "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (*Baldasano v Bank of N.Y.*, 199 AD2d 184, 185[1993]; *see Erickson v Cross Ready Mix, Inc.,* ___ AD3d ___, 2012 NY Slip Op 06062 [2012]; *Gay v Farella*, 5 AD3d 540, 541[2004]; *Gilligan v Reers*, 255 AD2d 486, 487 [1998]), "and to the same questions presented in the same case" (*RPG Consulting, Inc. v Zormati*, 82 AD3d 739, 740[2011], citing *People v Evans*, 94 NY2d 499, 502 [2000]). The doctrine of law of the case is inapplicable here, as no prior determinations have been made in this Article 78 proceeding, and the tax lien foreclosure action is a separate action.

In the tax foreclosure action, Mr. Burrell, clearly raised the issue of the propriety and amount of the DOHMH charges for inspections, exterminations and cleanups at the subject real property. The court therein found that the tax lien, in its entirety, was presumed to be regular and valid and effectual to transfer to the purchaser named therein and adjudged said tax lien be valid and enforceable, for the amount of the lien and the interest to which the holder was entitled (*see* Administrative Code of the City of New York, §11-337). The court therein further determined that Mr. Burrell could not raise as a defense to the motion for summary judgment that the lien charges were baseless or exaggerated, as he had not timely sought judicial review of said charges in an Article 78 proceeding. Thus, the issue of statute of limitations was previously raised by Mr. Burrell and decided against him. The doctrine of collateral estoppel, thus, is applicable here and bars petitioner from seeking judicial review of the DOHMH charges. The court therein, however, made no determination as to whether Mr. Burrell could seek further relief from the DOHMH.

Petitioner asserts that once he notified the DOHMH in writing of his objections to the charges, the agency should have reviewed the objections, notified him of its decision, or provided an administrative hearing, pursuant to the provisions of the Administrative Code of the City of New York, §27-2129 and 24 RCNY §7-01. Petitioner's reliance on Section 27-2129 of the Administrative Code is misplaced, as the "department" referred to in this section is the Department of Buildings of the City of New York (Administrative Code of the City of New York

§ 27-232). In addition, 24 RCNY §7-01 provides that "(a) Pursuant to the New York City Charter, §§1041, 1046, 1047 and 1048, the Department of Health has determined that all adjudicatory hearings commenced by notice or finding of violation pursuant to Article 7 of the New York City Health Code, where the Department seeks a fine or monetary penalty, pertaining to enforcement of State and local health laws and regulations shall be conducted by the Department." This section also provides who can serve as a hearing examiner and the scope of his or her powers. This section thus gives the Department of Health the power to conduct such hearings and appoint its own hearing examiners. There is nothing in 24 RCNY §7-01, however, which grants any hearing rights to individual property owners.

Judicial review of administrative decisions concerning liens must be commenced by an Article 78 proceeding (*see e.g.*, *Atkinson v City of New York*, 96 NY2d 809 [2001] (workers' compensation lien); *Matter of Art-Tex Petroleum v New York State Dept. of Audit and Control*, 93 NY2d 830 [1999] (environmental lien); *Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v Town of Fallsburg,* 78 NY2d 194, 201, [1991] (tax lien); *O'Neil v City of New York,* 10 Misc3d 30 [2005] (sanitation clean up lien). An Article 78 proceeding must be commenced within four months after final determination of the challenged administrative act. The acts challenged here are the DOHMH charges for inspections, exterminations and cleanups at the subject property, which thereafter formed a portion of the lien on the property. These charges were incurred in 1995, 1996, 1997 and 1998. Final determination occurred when the DOF billed the owner at which time the four-month statute of limitations started running. Mr. Burrell concedes that he received notice of the charges in 2006, and that he wrote a letter to the DOHMH dated February 17, 2006, protesting the charges (*see Matter of Mitchell v City of New York Dept. of Health & Mental Hygiene*, 23 AD3d 475, 475-476 [2005]; *Community Counseling & Mediation Servs. v New York City Dept. of Health & Mental Hygiene, 45 AD3d 315 [2007]; Triway Realty Corp. v City of New York*, 218 AD2d 592 [1995]; *Matter of M & D Contrs. v New York City Dept. of Health*, 233 AD2d 230 [1996]). Petitioner failed to commence an Article 78 proceeding for either mandamus directing the DOHMH to respond to his letter of February 17, 2006, or for judicial review, within four months after receipt of the notice of charges in 2006. As the statute of limitations expired in 2006, the within proceeding for judicial review of the DOHMH charges that were billed by the DOF, is untimely.

To the extent that petitioner seeks judicial review of the DOHMH's letter of January 26, 2012, the agency made no determination regarding the disputed charges. Rather, the DOHMH merely stated that the records sought by petitioner are no longer in existence, and that it relied upon the DOF's records with respect to the amount of the tax lien, including the total amount of the DOHMH charges. Petitioner argues that for many years, he telephoned, visited and sent letters to the DOHMH, in an effort to resolve the disputed charges. Petitioner's argument is unavailing, as correspondence and a request for reconsideration following a final determination of an agency does not, in and of its self, extend the four-month statutory period in which review of the final determination must be sought (*see De Milio v Borghard*, 55 NY2d 216, 222 [1982]; *see also Raykowski v New York City Dept. of Transp*., 259 AD2d 367 [1999]; *Matter of Fiore v Board of Educ. Retirement System*, 48 AD2d 850 [1975], *affd* 39 NY2d 1016 [1976]). Petitioner

has not shown any legally cognizable excuse for the six-year delay in challenging the DOHMH charges.

To the extent that petitioner's due process claims pertain to the alleged actions of the referee in the foreclosure action, they cannot be addressed in this proceeding. To the extent that petitioner claims that he was denied due process by the Commissioner of the DOHMH, the four-month statute of limitations under CPLR 217(1) would still be applicable to a constitutional claim. A party may not assert constitutional claims in an attempt to subvert the statute of limitations provided by CPLR 217 when the essence of the party's challenge is to the specific actions of an administrative agency (*see generally Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 201 [1991]; *see also Matter of Roebling Liquors, Inc. v Michael Urbach, as Commissioner of the New York State Department of Taxation and Finance*, 245 AD2d 829, 830 [1997]).

To the extent that petitioner seeks, in the alternative, an order directing the DOHMH to pay the alleged improper assessments with interest, such relief is not incidental to the primary relief sought by petitioner and, therefore, is not available here (CPLR 7806).

Finally, to the extent that petitioner seeks an order setting aside the judgment of foreclosure and sale of the tax lien, such relief is not available here, and can only be sought in the lien foreclosure action (CPLR 7803).

In view of the foregoing, respondents' cross motions to dismiss the petition are granted.

Dated: September 6, 2012

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Howard G. Lane, J.S.C.