STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

SHINE TIME, LLC, BRIAN C. HART and ERIC J. HART,

Plaintiff,

-against-

THE TOWN OF SCHODACK and THE COUNTY OF RENSSELAER,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0226-12 Index No. 238051

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs Brian C. Hart and Eric J. Hart are owners of real property having a street address of 1515 Columbia Turnpike, in the Town of Schodack (the "Town"), Rensselaer County. Plaintiff Shine Time, LLC ("Shine Time") is a tenant of the premises and, since

2003, has operated a car wash at that location. The premises is located within Town of Schodack Sewer District No. 6. Inasmuch as the Town did not have its own waste water treatment facility for Sewer District No. 6, in 1998 it contracted with the Town of East Greenbush to connect with its waste water treatment facility.[1] In 2002 Shine Time applied to the Town of Schodack for a permit to connect to the Town sewer system (Sewer District No. 6). The application was granted, but required Shine Time to pay a $5,000.00 sewer connection fee, which Shine Time paid. In 2007, purportedly pursuant to its agreement with the Town of East Greenbush, the Town of Schodack issued bills for an additional sewer connection fee denominated "East Greenbush Sewer Hookup Fees pursuant to Agreement dated the 24th day of July, 1998". The bills went out to at least eight commercial property owners[2]. The bill issued to Shine Time was in the amount of $66,360.00[3]. Notwithstanding the issuance of the bills, officials for both Towns apparently continued to conduct negotiations concerning the sewer connection fees in the ensuing two years. In 2009 they ultimately agreed that the sewer connection fee to commercial properties should be reduced. As a consequence, the sewer connection fee for Shine Time was reduced from $66,360.00 to $35,000.00.[4] As a result of the foregoing, a sewer connection fee of $35,000.00 appeared

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[1]The original contract between the two Towns was entered into on July 24, 1998. A subsequent agreement was entered into on May 27, 2004.

[2]It is indicated that there were only a "limited" number of single family residential units in the Sewer District, and that the sewer hookup fees for these property owners had already been paid.

[3]The bill was actually for $71,360.00, however Shine Time was given credit for the $5,000.00 payment it made in 2002.

[4]It is indicated by the Town Supervisor of the Town of Schodack that the amounts invoiced were the actual amounts paid (or as the Town Supervisor indicated, "passed through")

on Shine Time's 2010 Town and County Tax bill. This amount was subsequently confirmed in a letter dated January 20, 2011 from the attorney for the Town of Schodack to the attorney for Shine Time.

On October 13, 2011 the plaintiffs commenced the above-captioned action for injunctive and declaratory relief. Specifically, they seek a determination that the additional sewer connection fee (beyond the $5,000.00 paid in 2002) is unlawful under Town Law § 198 (1) (h)[5], and violates NY Constitution Art IX § 2, as well as the procedural and substantive due process clauses of the federal and state constitutions. They also allege that the sewer connection fee constitutes a "taking" under the federal and state constitutions and that the Town of Schodack should be estopped from charging and enforcing the fee. Issue has been joined, and the plaintiffs have made a motion pursuant to CPLR 3212 for summary judgment and, pursuant to CPLR 3124 and 3126, to strike the answer of the defendant Town of Schodack. The defendants oppose plaintiff's motion. Defendant Town of Schodack has cross-moved for summary judgment by reason of plaintiff's failure to comply with the

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to the Town of East Greenbush, without any additional "markup".

[5]Town Law § 198 (1) (h) recites as follows:

> "1. Sewer districts. After a sewer district shall have been established, the town board may: []
> (h) establish, from time to time, charges, fees or rates to be paid by the owners of real property within such district for the connection of house service lines or mains with such sewer system. Such connection charge may include any expense incurred for the purpose of providing service, whether such expense be incurred for construction within the property line or within the street lines. In addition, such connection charge may include a fee for the inspection of such connection, the expense of performing service in relation thereto or for any other special benefit received"[].

applicable statute of limitations.

Turning first to the cross-motion, the statute of limitations applicable to an action for a declaratory judgment is six years (see CPLR 213 [1]; Matter of Town of Olive v City of New York, 63 AD3d 1416-1418 [3rd Dept., 2009]). However, "in determining the limitations period to be applied in a declaratory judgment action, a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form" (Matter of Capital Dist. Regional Off-track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045 [3d Dept., 2012], citations omitted). "The applicable limitations period is determined by examin[ing] the substance of [the] action to identify the relationship out of which the claim arises and the relief sought" (see Kreamer v Town of Oxford, 91 AD3d 1157, 1158-1159 [3d Dept., 2012], quotations omitted).

It is well settled that an administrative determination becomes final and binding, and the applicable statute of limitations begins to run, when the administrative action has its impact upon a party and it is clear that the party is aggrieved thereby (see Matter of Edmead v McGuire, 67 NY2d 714, 716; Matter of Biondo v State Bd. of Parole, 60 NY2d 832, 834; Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 357; Matter of Dugan v Liggan, 90 AD3d 1445, 1446-1447 [3d Dept., 2011]; Matter of Adams v Carrion, 85 AD3d 1517, 1518 [3d Dept., 2011]; Matter of Ragi v Servis, 91 AD3d 1169, 1179 [3d Dept., 2012]; Matter of Matter of North Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs., 96 AD3d 1186, 1187 [3d Dept., 2012]). In other words, the statute of limitations does not commence to run until the aggrieved party is notified of an administrative determination that

is unambiguous and certain in its effect (see Matter of Edmead v McGuire, supra, at 716; Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, 1038 [3rd Dept., 2010]; Matter of New York State Radiological Society v Wing, 244 AD2d 823, [3d Dept., 1997], mot for lv to app denied, 92 NY2d 802 [1998]). Finality does not occur until the administrative agency has arrived at a definitive position on the issue which inflicts actual concrete injury (see, Matter of Ward v Bennett, 79 NY2d 394, 400; Matter of McDonald v Board of the Hudson River-Black River Regulating District, 86 AD3d 844, 846 [3d Dept., 2011]).

Requests for reconsideration do not, ordinarily, toll or revive the statute of limitations (see Lubin v. Board of Educ. of City of New York, 60 NY2d 974; Matter of Yarbough v Franco, 95 NY2d 342, 347-348 [2000]; Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, 34 AD3d 895, 896-897 [3rd Dept., 2006]). "The statute of limitations runs from the initial determination 'unless the agency conducts a fresh and complete examination of the matter based on newly presented evidence'" (Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, supra, at 897, quoting Matter of Quantum Health Resources v DeBuono, 273 AD2d 730, 732 [2000], lv dismissed 95 NY2d 927 [2000]).

As the defendants point out, a case arising out of essentially the same set of facts was recently litigated. Spinney At Pond View, LLC v Town Board of Town of Schodack (Sup. Ct., Rensselaer Co., Index No. 233644) involved a challenge to water and sewer charges imposed by the Town of Schodack, including sewer charges arising out of Town of Schodack Sewer District No. 6. In that case, the commercial property owners argued that

the charges were excessive, lacked a rational basis and constituted an unconstitutional tax upon their properties. Supreme Court, in a decision-order dated Sept., 20, 2011, rejected an affirmative defense predicated on the statute of limitations. The Court further found that the sewer connection charges lacked a rational basis, in violation of Town Law § 198 [1] [h], and granted plaintiff's motion for summary judgment (see Spinney At Pond View, LLC v Town Board of Town of Schodack [Sup. Ct., Rensselaer Co., Index No. 233644, unpublished]). The order was appealed, and on October 18, 2012 the Appellate Division reversed, finding that the action was barred under the statute of limitations, and directed that the complaint be dismissed. The Appellate Division found that the plaintiff's claims centered upon the overall assignment of benefit units and allocation of such units in computing the level of benefit to individual properties; and that "such rate-fixing or fee-setting activities are properly viewed as 'quasi-legislative act[s]' [], reviewable in the context of a CPLR article 78 proceeding" (Spinney At Pond View, LLC v Town Bd. of Town of Schodack, 99AD3d 1088 [3d Dept., 2012], at 1089). The Appellate Division further stated:

> "To the extent that plaintiffs attempt to couch their claims in constitutional terms, we note that '[t]he simple expedient of denominating the [instant] action [as] one for declaratory relief and characterizing the matter as one of constitutional . . . dimension does not cure' plaintiffs' failure to comply with the four-month statute of limitations applicable to CPLR article 78 proceedings" (id., at 1089, quoting Marsh v New York State & Local Employees' Retirement Sys., 291 AD2d at 714 [5] [internal quotation marks and citation omitted], and citing Matter of Town of Olive v City of New York, 63 AD3d at 1418, and Matter of Aubin v State of New York, 282 AD2d [919] at 921-922).

The plaintiffs acknowledge having received an invoice from the Town of Schodack for a sewer connection fee of $66,360.00 in March 2007. As noted, in January 2010 plaintiffs received a Town and County Tax bill which included a charge denominated "sewer connection fee" of $35,000[6]. Plaintiff's 2011 and 2012 property tax bills contain the same charge with added penalties.[7] The gravamen of plaintiffs' claim is that the sewer connection fee is unlawful by reason that it violates the provisions of Town Law § 198 (1) (h). Notably, the grounds for review under CPLR 7803 (3) include "whether a determination was [] affected by an error of law". In this instance, the error of law is alleged to be a failure to adhere to Town Law § 198 (1) (h). The challenge here is to the quasi-legislative act of assessment of a sewer connection fee which allegedly exceeds the Town's statutory authority. This, in the Court's view, is reviewable under CPLR Article 78 (see Spinney At Pond View, LLC v Town Bd. of Town of Schodack, 99AD3d 1088 [3d Dept., 2012]; Matter of Federation of Mental Health Centers Inc., 275 AD2d 557, 559-560 [3d Dept., 2000]).

It is undisputed that the sewer connection fee was initially imposed in 2004 (as noted, in the amount of $66,360.00). It was imposed, once again, as an assessment on plaintiffs' 2010 Town and County tax bill, however this time in the amount of $35,000.00. It was at this point, at the very latest, that the determination became final and binding upon the plaintiffs for purposes of accrual of the four month statute of limitations under CPLR 217. As such, the Court is of the view that the statute of limitations commenced to run at that

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[6]The plaintiffs acknowledge this in paragraph 37 of their Second Amended Complaint.

[7]The 2012 the sewer connection fee now totals the sum of $49,750.19 with penalty.

time.[8] Under the circumstances, because the determination to impose the sewer connection fee could properly have been challenged under CPLR Article 78, the Court finds that the instant action is untimely commenced.[9]

The Court must hasten to add that the Court is mindful of plaintiffs' contention that this case is distinguishable from Spinney At Pond View, LLC v Town Board of Town of Schodack (supra) by reason that the plaintiffs here are relying upon a theory of state law preemption: that a municipality can only exercise those powers expressly conferred upon it by the state legislature (see NY Const Art IX § 2 ¶ [c] [8]). Plaintiff cites Kamhi v Yorktown (141 AD2d 607 [2d Dept., 1988]) which held that a CPLR Article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment. In Penny Lane/East Hampton, Inc. v County of Suffolk (191 AD2d 19, 21-22 [2d Dept., 1993]), the plaintiff sought a declaration that a local law was preempted by state law. The Court can only point out that the challenge here is not to enactment of a local law, but rather to actions taken by Town officials which allegedly exceed the Town's authority under Town Law § 198 (1) (h).

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[8]Notably however, even if the statute of limitations was said to accrue as late as the receipt of the January 20, 2011 letter from the attorney for the Town of Schodack which "confirmed" the $35,000.00 sewer connection fee, the instant action, commenced in October 2011, would still be untimely.

[9]Without deciding the issue (which the Court does not reach), the Court observes that Town Law § 198 (1) (h) recites that "such connection charge may include a fee for the inspection of such connection, the expense of performing service in relation thereto *or for any other special benefit received*" (emphasis supplied). The foregoing language is exceedingly broad. The defendants' argument here is that the plaintiffs have received a significant benefit (access to the East Greenbush sewage treatment facility). Within the context of a timely CPLR Article 78 proceeding, the Court could have examined whether the Town had formulated a sewer connection fee having a rational basis predicated upon "the expense of performing service in relation thereto or for any other special benefit received", as set forth in Town Law § 198 (1) (h).

The plaintiffs, as a part of their opposition to the cross-motion, place reliance upon the "continuing wrong" doctrine, arguing that a new cause of action accrues each day the wrong continues. The Court has reviewed the cases cited by the plaintiffs (see Hampton Heights Dev. Corp. v City of Utica, 136 Misc2d 906, 912 [Supt. Ct., Oneida Co., 1987], involving application of an improperly adopted local law, the issue being whether the City of Utica Water Board was lawfully created; Amerada Hess Corp. v Acampora, 109 AD2d 719, 722 [2d Dept., 1985], involving an unduly restrictive zoning ordinance, which precluded plaintiff from any reasonable use of its land; Capruso v Village of Kings Pt., 78 AD3d 877, 878-879 [2d Dept., 2010], challenging use by the Village of dedicated park lands for a non-park purpose; MacEwen c City of New Rochelle, 149 Misc 251, 254 [Sup. Ct., Westchester Co., 1933], holding that passage of an invalid zoning ordinance is a continuous invasion of plaintiff's property rights akin to a trespass; and Dowsey v Village of Kensington, 257 NY 221, 228 [1931], a challenge to an unreasonably restrictive Village zoning ordinance). Because the plaintiffs here seek review of a "fully completed, separate, discrete act" the Court finds that the continuing wrong doctrine has no application (see Matter of Federation of Mental Health Centers Inc., 275 AD2d 557, supra, at 560).

The plaintiffs also advance an argument predicated on the doctrine of estoppel. The general rule is that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (Matter of Schorr v New York City Department of Housing Preservation, 10 NY3d 776, 779 [2008], quoting citations omitted) or to prevent it from performing a "governmental function" (see Matter of Village of Fleischmanns, 77 AD3d 1146, 1148-1149 [3rd Dept., 2010]; Matter of Pegasus Cleaning Corporation v Smith,

73 AD3d 1328, 1330 [3rd Dept., 2010]). "Moreover, '"erroneous advice by a government employee does not constitute the type of unusual circumstance[s] contemplated by the exception"' to this general rule" (Matter of Amsterdam Nursing Home Corporation (1992) v Daines, 68 AD3d 1591, 1592 [3rd Dept., 2009], quoting Notaro v Power Auth. of State of N.Y., 41 AD3d at 1320, quoting Matter of Grella v Hevesi, 38 AD3d 113 [3d Dept., 2007] at 117). Here, the Town, in including a sewer connection fee as a part of the tax assessment on plaintiffs' property was clearly exercising what amounts to a governmental function. While the Court is aware that there have been some infrequent exceptions to the rule prohibiting estoppel against governmental agencies (see e.g., La Porto v Village of Philmont, 39 NY2d 7 [1976], cited by the plaintiffs, involving the failure of the Village of Philmont to enforce its boundaries for a period of 80 years), the Court is of the view that this is not one of those exceedingly rare circumstances. For this reason, the Court finds that the doctrine of estoppel has no application to the instant matter.

In summary, the Court finds that the action was untimely commenced, and concludes that the cross-motion must be granted. As a part of the foregoing, for the reasons enunciated by the Appellate Division in Spinney At Pond View, LLC v The Town of Schodack (99 AD3d 1099, supra, 1089-1090), the Court finds that inclusion of allegations that plaintiffs' constitutional rights have been violated does not operate to change the result.

Turning to plaintiffs' motion pursuant to CPLR 3126, on January 24, 2012 the plaintiffs served the following demands upon the defendant Town of Schodack: demand for interrogatories; notice for discovery and inspection; and combined discovery demands. By letters dated March 8, 2012 and April 26, 2012 plaintiffs' counsel requested said defendant

serve responses to the demands. At a status conference held with the Court on May 17, 2012, defendant's counsel requested, and the Court approved, an extension to July 14, 2012 to comply with plaintiffs' discovery demands. The Court held another status conference on September 11, 2012, during which defendant's counsel conceded that he had not complied with plaintiffs' discovery demands. The Court directed defendant's attorney to comply by September 28, 2012. Defense counsel failed to do so, but belatedly (on October 4, 2012) served a response to the demand for interrogatories, without responding to any other of the demands. The attorney for the Town of Schodack concedes that the Town failed to comply with all outstanding discovery demands, but indicates that he has belatedly done so simultaneously with the service of the cross-motion here.

"Where a party fails to comply with a discovery order, CPLR 3126 authorizes the court to fashion an appropriate remedy, the nature and degree of which are matters entrusted to the court's sound discretion []" (see Mary Imogene Bassett Hospital v Cannon Design, Inc., 97 AD3d 1030, 1032-1033 [3d Dept., 2012], citations omitted). As set forth above, the Town of Schodack has, concededly, failed to comply with several court directives. While the Town's conduct is not excusable, plaintiffs have failed to demonstrate how or in what respect they have been prejudiced. In fact, it appears that they were able to muster sufficient documentation to make the instant motion for summary judgment in the absence of the Town's discovery responses. The Town's actions, although dilatory to the extreme, do not appear to be wilful. In the Court's view, the plaintiffs have not demonstrated that they are entitled to the ultimate sanction, dismissal of the Town's answer. Under the circumstances the Court finds that appropriate remedy is a monetary sanction against the Town in the sum

of $500.00.

In view of all of the foregoing, the Court finds that plaintiffs' motion for summary judgment must be denied, and the action dismissed as to the Town of Schodack.

Accordingly, it is

ORDERED, that the motion of the plaintiff for summary judgment is denied; and it is further

ORDERED, that the motion of the plaintiff for relief pursuant to CPLR 3124 and CPLR 3126 is granted to the limited extent that the Court directs the Town of Schodack to pay the plaintiffs the sum of $500.00 within thirty (30) days; and it is further

ORDERED, that the cross-motion of the defendant Town of Schodack is granted; and it is further

ORDERED, that the action be and hereby is dismissed as to the Town of Schodack.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the Town of Schodack. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: April 1, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated October 24, 2012, Supporting Papers and Exhibits
2. Affidavit of Patrick McGovern, sworn to October 19, 2012 and Exhibits
3. Notice of Cross-Motion dated November 29, 2012, Supporting Papers and Exhibits
4. Affirmation in Opposition of Stephen A. Pechenik, Esq., dated November 29, 2012
5. Reply Affirmation of Benjamin F. Neidl, Esq., dated December 13, 2012