

<b>Matter of 3965 Amboy Rd. Inc. v Limandri</b>
2017 NY Slip Op 31694(U)
June 6, 2017
Supreme Court, Richmond County
Docket Number: 80197/15
Judge: Charles M. Troia
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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In the Matter of the Application of

3965 AMBOY ROAD INC.,

Petitioner,

DCM 1M

Present:

HON. CHARLES M. TROIA

- against -

ROBERT LIMANDRI, as Commissioner of the City of New York DEPARTMENT OF BUILDINGS, The City of New York DEPARTMENT OF BUILDINGS, The City of New York ENVIRONMENTAL CONTROL BOARD,

Respondents.

DECISION AND ORDER

Index No. 80197/15

Motion Nos. 4439-001

518-002

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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The following papers numbered 1 to 6 were fully submitted on the 10th day March, 2017:

	Papers Numbered
Notice of Petition, with Exhibits (dated December 4, 2015).....	1
Respondents' Cross-Motion to Dismiss (dated January 29, 2016).....	2
Memorandum of Law in Support of Cross-Motion (dated January 29, 2016).....	3
Affirmation in Opposition to Respondent's Cross-Motion (dated April 26, 2016).....	4
Reply Affirmation in Support of Cross-Motion (dated May 6, 2016).....	5
Reply Affidavit in Support of Petition (dated September 28, 2016).....	6

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RICHMOND COUNTY CLERK

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Upon the foregoing papers, petitioner's application, *inter alia*, for a judgment pursuant to CPLR Article 78, reversing, annulling and setting aside respondents' August 7, 2015 decision, is denied, and respondents' cross-motion is granted.

Petitioner 3965 Amboy Road, Inc. commenced this proceeding pursuant to CPLR article 78 to challenge the determination of the Environmental Control Board of the City of New York (hereinafter "ECB") dated August 7, 2015. On May 16, 2014, an inspector from the Department of Buildings (hereinafter "DOB") issued a Notice of Violation or "NOV" 35091720M (hereinafter "20M") to John Nolan. It is undisputed that John Nolan is the title owner of the subject premises located at 3965 Amboy Road, Staten Island New York. The NOV alleges that the subject premises violated New York City Administrative Code Section 28-118.3.2, occupancy contrary to DOB records or the Certificate of Occupancy. The NOV states that the remedy to the violation is to discontinue the illegal use of the premises or to amend the Certificate of Occupancy. Petitioner was also "ordered to appear for a hearing on July 2, 2014 at 8:30 a.m."

A pre-hearing stipulation on the NOV was offered by respondent and accepted by the representative of John Nolan. In this stipulation, John Nolan admitted to the violation. On or about July 7, 2014, the ECB received a payment of six-hundred dollars (\$600), representing the reduced fine amount imposed pursuant to the stipulation. On July 10, 2015 petitioner and lessee of the property, requested a new hearing. This request was denied by petitioner on August 7, 2015.

Petitioner does not dispute that at the July 2, 2014 hearing, expediter Alejandro Lopez, as agent for John Nolan, accepted and signed the pre-hearing stipulation. However, according to petitioner, Lopez imparted advice regarding the stipulation and is "not an attorney." Thus, petitioner contends Lopez erroneously agreed that the use of the subject premises was in violation of the Certificate of Occupancy. Petitioner contends that as the stipulation was procured upon a misrepresentation it has a right to bring this Article 78 proceeding.

In addition, petitioner contends that the subject premises has been used in compliance with the Certificate of Occupancy having been zoned as a "Group 6", "C/F-3" premises. Further, petitioner contends that, as a net lessee, 3965 Amboy Road, Inc. has standing.

Respondents oppose petitioner's motion and cross move to dismiss this proceeding on the grounds that petitioner does not have standing and that the claim is time barred by the statute of limitations. Specifically, respondents contend that the ECB issued the NOV to "John Nolan" in his individual capacity and that petitioner "3965 Amboy Road, Inc." lacks standing to assert a claim on behalf of Nolan, individually.

Respondents also contend that DOB made a pre-hearing stipulation offer on the NOV to ECB respondent, John Nolan. Respondents contend that at the ECB hearing petitioner's authorized agent, Alejandro Lopez, accepted and executed the stipulation. According to respondents, by accepting the stipulation offer the facts alleged on the NOV are deemed true and waives the right to appear before a hearing officer and to an appeal. As such, respondents contend that the stipulation is a final determination and cannot be appealed.

In addition, respondents contend that petitioner is barred by the four-month statute of limitations to challenge the ECB's July 2014 determination having commenced this proceeding on December 4, 2015. Respondents also contend that the "continuing violation" doctrine does not apply herein to toll the statute of limitation. Respondents contend that the doctrine of continuing violation does not apply to "continuing effects" from earlier unlawful conduct, but to a series of "continued wrongs."

Pursuant to CPLR 7803(3), the standard of review in this CPLR article 78 proceeding is whether the determination under review was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803[3];

see *Scott v. Village of Nyack Housing Auth.*, 147 AD3d 957 [2<sup>nd</sup> Dept. 2017]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Resto v. State of N.Y., Dep't of Motor Vehicles*, 135 AD3d 772, 773 [2<sup>nd</sup> Dept. 2016]).

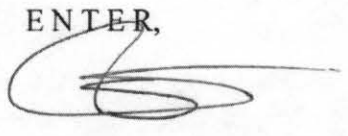
An article 78 must be commenced within four (4) months of the final determination. Here, the final determination of respondent was at the time the stipulation was entered into by respondent and the owner of the property in July 2, 2014. Irrespective of whether petitioner, as land lessee, has standing to dispute this violation, no action was taken by petitioner for well over a year after the stipulation was entered into, well beyond the four (4) year statute of limitations. The statute of limitations is not tolled by the continuing violation doctrine (see *Rowe v. NYCPD*, 85 AD3d 1001, 1002 [2<sup>nd</sup> Dept. 2011]).

Accordingly, petitioner's application to review respondents' determination is hereby dismissed and respondents' cross-motion is granted.

This constitutes the decision and order of the court.

Dated: June 6, 2017

**GRANTED**  
JUN - 8 2017  
STEPHEN J. FIALA

ENTER,  
  
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J. S. C.

Hon. Charles M. Troia  
Justice of the Supreme Court