

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis

PART 6

Index Number : 650354/2008
 LANDMARK WESTI INC.
 vs.
 CITY OF NEW YORK
 SEQUENCE NUMBER : 002
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE 3/31/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-9

* see 3-7, MS#1

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
 APR 21 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 4/17/09

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
**LANDMARK WESTI INC., 103 CENTRAL PARK
WEST CORPORATION, 18 OWNERS CORP., 91
CENTRAL PARK WEST CORPORATION and
THOMAS HANSEN,**

Plaintiffs,

Index No. 650354/08

Decision and Order

-against-

**CITY OF NEW YORK BOARD OF STANDARDS
AND APPEALS, NEW YORK CITY PLANNING
COMMISSION, HON. ANDREW CUOMO, as
Attorney General of the State of New York, and
CONGREGATION SHEARITH ISRAEL, also
described as the Trustees of Congregation Shearith
Israel,**

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, defendant Congregation Shearith Israel (the "Congregation"), moves, pursuant to C.P.L.R. Rule 3211(a)(7), for an order dismissing the amended complaint for failure to state a cause of action. In Motion Sequence Number 002, defendants City of New York Board of Standards and Appeals ("BSA") and New York City Planning Commission (the "Commission"), together referred to as the "City Defendants", also move to dismiss pursuant to C.P.L.R. Rule 3211(a)(7). The sole ground on which both motions rely is the contention that this action was erroneously commenced as a plenary action, rather than as an Article 78 proceeding.

This action seeks to challenge the August 26, 2008 determination of the BSA, Resolution 74-07-BZ (the "BSA Resolution"), which approved the Congregation's application for a variance for

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the property located at 6-10 West 70th Street in Manhattan. According to the Complaint, the BSA Resolution would permit the Congregation to violate zoning regulations in its planned construction of a new building which will contain a residential tower with five luxury condominium apartments.¹

Initially, at oral argument, this court raised a concern that the Attorney General was not present and had not appeared in this action. By letter dated April 3, 2009, the City Defendants served the Attorney General with a copy of the City Defendants' motion. According to the letter, the Attorney General has been served with the Complaint and with other papers in this action. To date, the court has not received any submissions from the Attorney General.

The Congregation and the City Defendants argue that plaintiffs deliberately chose to commence this as a declaratory judgment action, rather than as an Article 78 proceeding, because had it been commenced as an Article 78, it would be untimely. Case law supports their contention that parties should not be permitted to circumvent that shorter statute of limitations set forth for Article 78 proceedings "through the simple expedient of denominating the action one for declaratory relief." New York City Health and Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 201 (1994).

The statute of limitations for an Article 78 proceeding is set forth in C.P.L.R. § 217(1), which provides that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." Pursuant to the New York City

¹ This court also has before it a related case, Kettanch v. Board of Standards and Appeals, Index No. 113227/08, which also challenges the BSA Resolution; this matter was brought as an Article 78 proceeding, within the thirty (30) day period.

Administrative Code (the "Administrative Code"), the time to challenge a final determination of the BSA is shorter than the four months provided in the C.P.L.R. Section 25-207 of the Administrative Code provides that

[a]ny person or persons, jointly or severally aggrieved by any decision of the [BSA] may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

Therefore, instead of four months, plaintiffs had thirty (30) days within which to bring this action. Defendants assert that since the BSA determination was made on August 26, 2008, and this action was commenced on September 29, 2008, this action is untimely under the Administrative Code, and that plaintiffs should not be able to circumvent the Administrative Code by filing this as a plenary action rather than an Article 78 proceeding.

The Congregation and the City Defendants are simply wrong. They used the incorrect date to begin calculating the time period within which to commence this proceeding. The Administrative Code plainly states that the time to bring a proceeding is "thirty days after the filing of the decision in the office of the board." (Emphasis added.) The last page of the BSA Resolution contains the following language, in bold italic type with dates underlined:

CERTIFICATION

***This copy of the Resolution
dated August 26, 2008
is hereby filed by
the Board of Standards and Appeals
dated August 29, 2008***

***Jeff Mulligan /s/
Jeff Mulligan
Executive Director***

Thus, the calculation of the thirty-day period begins on August 29, not August 26. Once the period is calculated from the correct date, it is clear that plaintiffs had until September 29, 2008 to bring a proceeding to challenge the BSA Resolution.²

Plaintiffs first commenced this action on September 26, by electronic filing. Even if this court were to utilize the date that the amended complaint was filed, which was September 29, this action would still be timely. Therefore, defendants' argument that this action should not be converted to an Article 78 proceeding because such a proceeding is untimely is without merit. Since the statute of limitations had not expired as of the date of commencement, this is not a reason to deny converting this action to an Article 78 proceeding.

Defendants also assert that this court should not convert this proceeding to an Article 78 proceeding because plaintiffs were given an opportunity to stipulate to a conversion before the motions to dismiss were filed. Notably absent from defendants' argument is whether they would have been willing to waive the affirmative defense, which all parties erroneously believed to be valid, of statute of limitations. Plaintiffs were not required to consent to the conversion, and neither their failure to do so, nor their failure to affirmatively cross-move for such relief, bars the conversion of this proceeding.

² August 29, 2008 was a Friday. Thirty days from that date was Sunday, September 28. Since the thirtieth day was a Sunday, pursuant to General Construction Law § 25-a, the limitations period is extended until the next business day. Therefore, plaintiffs had until Monday, September 29 to commence an action or proceeding to challenge the BSA Resolution. Rodriguez v. Saal, 43 A.D.3d 272, 276 (1st Dep't 2007).

This court has the power to convert a declaratory judgment action into an Article 78 proceeding, sua sponte. C.P.L.R. §103(c); Rosenthal v. City of New York, 283 A.D.2d 156 (1st Dep't 2001), lv. denied 97 N.Y.2d 654 (2001). Therefore, plaintiffs' failure to move for such relief, or failure to consent to such a conversion, does not preclude this court from converting this action into an Article 78 proceeding. Plaintiffs are challenging the BSA Resolution. Although plaintiffs couch some of their objections in terms of the BSA having lacked jurisdiction and having given deference to the Congregation under an unconstitutional delegation of authority, the crux of their allegations is that the determination was arbitrary and capricious and erroneous as a matter of law. Allegations that the BSA failed to follow procedures and violated state laws in reaching its determination are claims that are properly adjudicated in an Article 78 proceeding. Rosenthal, supra.

Accordingly, for the reasons set forth above, this court converts this action into a special proceeding, pursuant to Article 78 of the C.P.L.R. The motions to dismiss are denied. Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition.

This constitutes the decision and order of the court.

Dated: April 17, 2009



JOAN E. LOBIS, J.S.C.

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