26 Misc.3d 1233(A), 907 N.Y.S.2d 442, 2010 WL 817497 (N.Y.Sup.), 2010 N.Y. Slip Op. 50361(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 26 Misc.3d 1233(A), 2010 WL 817497 (N.Y.Sup.))

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(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Albany County, New York.
In the Matter of the Application of, William M. WINDSOR, Petitioner and, Plaintiff, For a Judgment Pursuant to Article78 of the Civil Practice Law and Rules,
v.
STATE of New York, George Pataki, David Paterson, New York Office of Parks, Recreation and Historic Preservation, Bernadette Castro, Carol Ash, Christopher Pushkarsh, New York State Office of the State Comptroller, Carl Mc Call, Thomas D. Dinapoli, Office of New York Attorney General Eliot L. Spitzer, Andrew Cuomo, Maid of the Mist Corporation, James V. Glynn, Christopher Glynn, Edward J. Rutkowski, and Does 1 to 100, Respondents and Defendants.

No. 9808–09.
March 7, 2010.

William M. Windsor, Marietta, GA, Petitioner/Plaintiff Pro Se.

Andrew M. Cuomo, Attorney General of the State of New York, (Adrienne J. Kerwin, Esq. of Counsel), Albany, Attorney for New York State Respondents and Defendants.

Phillips Lytle, LLP, (Marc W. Brown, Esq. of Counsel), Buffalo, Attorneys for Maid of the Mist Corp., James V. Glynn and Christopher Glynn.

JOSEPH C. TERESI, J.

***1** The pro se petitioner/plaintiff commenced this action to set aside a 40 year lease agreement between the Maid of the Mist Corporation ("Maid") and the NYS Office of Parks, Recreation & Historic Preservation ("State") for the operation of boat excursions under Niagara Falls and in the Niagara River. The petitioner served a hybrid verified petition and verified complaint alleging the license agreement was obtained by fraud and in violation of the New York State Finance Law. Initially, the petitioner moved for leave of court for disclosure and a motion for a default judgment against Maid, its two principal corporate officers and the State respondents. The Maid and the State cross-move to dismiss the article 78 petition and the complaint pursuant to CPLR 3211(a)(7) and CPLR § 7804(f). Subsequently, the petitioner filed12 additional motions/admission requests seeking procedural and substantive relief.

FACTS

The Maid had been operating boat excursions at Niagara Falls since 1971. In addition to its New York operation, the Maid has a wholly-owned Canadian subsidiary corporation named Maid of the Mist Steamboat Company, Ltd. ("Steamboat"). The Maid also has a lease with the Canadian Niagara Parks Commission ("NPC") to operate a boat excursion operation on the Canadian side of Niagara Falls and the Niagara River. On September 10, 2002, the Maid executed a forty year lease with the State for services at the Niagara Reservation State Park. The lease includes services for the observation tower, elevators, docks and other facilities relating to Maid's operation of the "Maid of the Mist" boat excursions. On December 3, 2002, the lease was approved by the NYS Office of the Attorney General. On February 21, 2003, the lease was approved by the NYS Office of the State Comptroller. The lease required a substantial investment by Maid to improve the State's property in consideration of the 40 year lease. The lease required the Maid to make a capital investment of $3 million dollars within 30 days of written notice of approval from the Comptroller's Office for Phase 1 of the project and a capital investment of $2 million dollars within 10 days of written notice from the State of the award of construction contracts pursuant to Phase 2 of the project. Maid maintains it made a capital in-

vestment of $5 million dollars to the State within 30 days of written notice of approval of the lease from the Comptroller's Office. Maid contends it has continually operated the excursion business since the lease was renewed in September 2002.

The petitioner seeks to void the Maid lease and obtain the lease as the successful competitive bidder. The petitioner alleges the lease Steamboat has with the Canadian government expired and that it is the primary reason why he seeks to void the New York lease. Steamboat contends it had a Canadian lease since July 21, 1989 for a period of 21 years. Steamboat alleges that although the Canadian lease expired on November 30, 2009, the lease contains a hold over provision that allows Steamboat to continue as a monthly tenant. Steamboat contends it has been current with monthly payment pursuant to the Canadian lease since December 1, 2009. Steamboat alleges it is continuing lease negotiations with the NPC. On February 26, 2009, the petitioner commenced a lawsuit in Ottawa, Ontario seeking to have the Canadian boat excursion lease subjected to competitive bidding. On October 28, 2009 the Canadian government recommend that the Canadian lease be obtained by competitive bids.

***2** The lease was awarded to the Maid by the State as a sole source provider. The petitioner seeks to set aside the Maid's lease alleging it was obtained by fraud and misrepresentation. The petitioner alleges the respondents/defendants are in violation of NYS Finance Law § 163 and Parks, Recreation and Historic Preservation Law § 3.09 (2–a)(2–d) which requires competitive bidding in awarding contracts. The petitioner alleges Maid is not a sole source provider. The petitioner contends Maid was never the only company in the world that could provide elevator service or boat service to the State. The petitioner contends the State has improperly refused to terminate the 2002 Maid lease. The petitioner seeks to have the 2002 lease declared void.

On March 5, 2009, the petitioner submitted a protest to the NYS Comptroller challenging the award of the lease to the Maid as a sole source provider pursuant to the Comptroller's Office Protest Procedure. Petitioner claims if the lease was now offered for bid, he could run the operation better and improve profits for the State. The Maid claims the petitioner was not an interested party in 2002 and his protest was untimely. The State maintains it complied with all applicable laws, regulations and guidelines when negotiating the lease and verified with the Canadian government that Steamboat and the Maid had access to the Niagara basin to operate tour boats. On April 9, 2009, the State Comptroller issued a decision in response to petitioner's protest. The Comptroller determined 1) the lease was “principally a revenue contract” and not an “expenditure contract” subject to the competitive bidding requirements of State Finance Law § 163; 2) even if the Maid was not a sole source provider, the lease was not awarded in violation of the bidding statute, and 3) the Comptroller would not rescind its approval of the 2002 Maid lease.

In support of the motion to dismiss the State defendants allege 1) the petitioner has named former public figures who are improper parties; 2) the action is barred by the statute of limitations and the ripeness doctrine; 3) the petitioner lacks standing; 4) the petition failed to state a cause of action; 5) the claims are barred by laches and 6) personal service has not been attained on respondents Pushkarsh and Rutowski. The State also opposes petitioner's applications for default judgments and leave to conduct discovery.

The State maintains the lease was awarded to the Maid in 2002 as it was the only entity that could utilize the Canadian dock. The State alleges the Maid had continuously contracted with the Canadian government for exclusive leasehold rights for landings and the construction of boat launch facilities. As a result of the exclusive leasehold, the Maid was the only entity that could provide boat service to and from the Niagara Falls State Park dock to the Canadian dock. The license was awarded to the Maid without a request for bids and approved by

the Attorney General and the Comptroller. The State maintains no grounds exist which authorize or require the State respondents to cancel the 2002 license agreement.

***3** The Maid defendants allege the petitioner was not a bidder for the New York lease nor had he expressed any interest in the lease prior to the award of the lease by the State on September 10, 2002. The petitioner never sought a copy of the lease with a FOIL request until 2009. The petitioner admits that he was unaware that the lease was available in 2002. Maid claims the State acted properly by designating Maid a "sole source" provider that did not require a "formal competitive process" pursuant to State Finance Law § 163(10)(b)(i). Maid was also deemed a sole source provider as the Steamboat lease allowed Maid to dock its boats on the Canadian side of the Niagara River.

Maid claims the petitioner has failed to obtain jurisdiction over it as service upon its receptionist is not authorized service. Maid further claims the petitioner lacks standing and this proceeding is untimely. Maid contends it made a good faith effort to have the petitioner withdraw its claims as this action was frivolous. As a result, the Maid seeks the payment of attorney fees.

PRIOR LITIGATION

Maid also seeks the dismissal of the petition on the grounds of res judicata. The petitioner and the Maid defendants are no strangers to extensive litigation. In May 2006, Maid commenced an action against the petitioner and his son's company, Alcatraz Media, Inc., to prevent them from fraudulently selling tickets for boat rides on the Maid of the Mist. Petitioner Windsor participated in the management in Alcatraz Media, Inc. The action was commenced in the United States District Court for the Northern District of Georgia and was assigned to Chief Judge Orinda Evans. On May 12, 2006, Judge Evans issued a preliminary injunction against the petitioner and Alcatraz and prohibited them from selling Maid tickets or vouchers, from participating in fraudulent schemes and from filing false reports relating to Maid. Judge Evans found that Alcatraz's conduct "caused consumer confusion and complaints". On August 9, 2007, Judge Evans granted Maid's motion for summary judgment on its claims for tortuous interference with business operations and issued a permanent injunction against Windsor and Alcatraz. Judge Evans dismissed all of petitioner's counterclaims and awarded Maid attorney fees and expenses in excess of $400,000.00. Judge Evans further found that there was "no doubt as to Windsor's desire to inflict harm on Maid" and found "it was Alcatraz's and Windsor's stubbornly litigious actions that gave rise to this litigation." Judge Evans held that the defendants engaged in "deceptive acts" which "deceived" customers by creating a "scam" of selling vouchers they knew were worthless. Judge Evan further found that "Alcatraz and Windsor have unduly complicated and prolonged [the case] as a result of harboring hostile personal feelings against Maid." Upon appeal to the United States Court of Appeals for the Eleventh Circuit, the Court affirmed Judge Evans' summary judgment order and the imposition of the permanent injunction. The Court of Appeals concluded that Alcatraz and Windsor "acted purposely and maliciously with the intent to injure Maid and ... did in fact cause Maid financial injury." The Court of Appeals found the defendants' counterclaims were unnecessary and were asserted to cause Maid "unnecessary financial hardship." A Consent Order and Judgment was signed in Georgia on December 9, 2008 which embodied the terms of Judge Evans' Order and Judgment of August 9, 2007. Subsequently Windsor filed multiple motions and commenced a new action against Judge Evans seeking her removal from the bench and her impeachment as a judge. Petitioner Windsor also filed proceedings to have all of Maid's attorneys disbarred from the practice of law. Petitioner Windsor constantly refers to Maid, its attorneys and Judge Evans as "extremely dishonest people" and "pathological liars".

***4** On December 22, 2009, Judge Evans issued an order which addressed petitioner's 62 post-

judgment motions filed after the Consent Order and Judgment was entered. Judge Evans again dismissed petitioner's motions finding they lacked merit. Judge Evans granted Maid's motion to enjoin the petitioner from filing any future motions, pleadings or other papers regarding the case. Judge Evans held,

> Windsor's persistently litigious behavior undermines the integrity of the Consent Final Order and Judgment submitted by the parties and signed by the Court in this case, as well as the other unsubstantiated collateral attacks, procedurally improper post-judgment motions, and increasingly bitter rhetoric. Windsor's continued filing of frivolous, improper post-judgment motions also continues to subject plaintiffs [Maid] to needless trouble and expense. Finally, Windsor, is ORDERED not to file in *any* court any new lawsuit which involves claims arising from the same factual predicate or nucleus of operative facts as the instant case. These claims would be barred by the doctrine of res judicata. The filing of such claims would serve no purpose except to harass plaintiffs and would probably result in sanctions against Windsor. Windsor commenced this action against Maid and the State on November 20, 2009.

DISCUSSION

The purpose of statutes of limitation is to force a plaintiff to bring his or her claim within a reasonable time so that the defendant will have timely notice of the claim against him or her. (*Blanco v. American Tel. & Tel. Co.,* 90 N.Y.2d 757 [1997]). A statute of limitation operates as a limitation of liability which creates the liability as a condition attached to the right to commence the action. (*Yonkers Contracting Co., Inc. v. Port Authority Trans–Hudson Corp.,* 93 N.Y.2d 375 [1999]). Limitation statutes rest on the need to protect the judicial system from the burden of adjudicating stale and groundless claims. (*Duffy v. Horton Memorial Hosp.,* 66 N.Y.2d 820 [1985]). A court may not extend the time limited by law for the commencement of an action, no matter how compelling the circumstances. (*Bayridge Air Rights v. Blitman Const. Corp.,* 80 N.Y.2d 777 [1992]; *Peterson v. Long,* 136 Misc.2d 725 [Sup.Ct.1987]). The statute of limitations cannot be deemed arbitrary or unreasonable solely on the basis of a harsh effect. (*Zumpano v. Quinn,* 6 NY3d 666 [2006]).

A proceeding pursuant to CPLR Article 78 "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." (*see,* CPLR § 217(1); *Matter of Simon v. New York City Tr. Auth.,* 34 AD3d 823 [2nd Dept.2006]).For a determination to be final and binding upon the petitioner, it must be clear that the petitioner seeking review is aggrieved by the determination, and this generally occurs when the challenged action has its impact. (*Matter of Rapoli v. Village of Red Hook,* 29 AD3d 1007 [2nd Dept.2007]). The burden rests on the party seeking to assert the statute of limitations as a defense to establish that its decision provided notice more than four months before the proceeding was commenced. (*Matter of Vil. of Westbury v. Department of Transp.,* 75 N.Y.2d 62 [1989]).

***5** The petitioner clearly states in his moving papers that, "the statute of limitations is not relevant in this proceeding" and "the year 2002 is irrelevant to this proceeding". Petitioner's conclusions are misplaced. The verified petition alleging violations of Article 78 of the CPLR are untimely. The lease between Maid and the State was signed on September 10, 2002. The date the lease was signed is the starting date for the statute of limitations. (*Jones v. Amicone,* 27 AD3d 465 [2nd Dept.2006]). The petitioner had until January 10, 2003 to commence an Article 78 proceeding. Petitioner never commenced this Article 78 proceeding until November 20, 2009. Since the petition was commenced more than four months after the lease was signed by the Maid and the State, it is untimely and must be dismissed. (*Long Island Pine Barrens Soc., Inc. v. County of Suffolk,* 55 AD3d 610 [2nd Dept.2008]; *Platt v. Town of Southampton,* 46

AD3d 907 [2nd Dept.2007]).

The petitioner also seeks a declaratory judgment which in this case, is also governed by a four month statute of limitations. In a declaratory judgment action, the applicable statute of limitations is determined by the substantive nature of the claim. (*Solnick v. Whalen,* 49 N.Y.2d 224 [1980]). If a proceeding pursuant to CPLR Article 78 would have been appropriate to settle a dispute with a governmental entity, the four month period of limitations governing proceedings pursuant to CPLR Article 78 is applicable. (*Lenihan v. City of New York,* 58 N.Y.2d 679 [1982]). Petitioner challenged the State's award of the 2002 lease claiming it was obtained without competitive bidding. Any such challenges to the action of the State in awarding the lease must be brought pursuant to CPLR Article 78 and subject to a four month statue of limitations. (*Press v. County of Monroe,* 50 N.Y.2d 695 [1980]).

The complaint alleges the lease obtained by Maid with the State was a result of fraud, misrepresentation, conspiracy and a violation of due process. The statute of limitations for fraud or misrepresentations must be commend within six years from the date of the fraudulent act. (*see*, CPLR § 213.) The lease was signed on September 10, 2002 and petitioner's allegations of fraud and misrepresentation were never alleged until November, 20, 2009. The commencement of this proceeding seven years after the lease was signed is deemed untimely. (*County of Ulster v. Highland Fire Dist.,* 29 AD3d 1112 [3rd Dept.2006], *lv denied* 7 NY3d 710 [2006]

CPLR § 213(8) allows the commencement of a fraud action within two years from the time the plaintiff claims he discovered the fraud, or could with reasonable diligence have discovered it. Windsor alleges he was not aware of the existence of the "2002 N.Y. License" until April 1, 2009. (*see*, Motion to Strike dated January 6, 2010, at ¶ 23). However, the petitioner admits that he was aware of the New York Lease in 2005 when he requested a copy of the contract from the New York State Parks Office. (*see*, Fourth Affidavit of William M. Windsor, sworn to January 5, 2010 at ¶ 55). Petitioner's Fourth Affidavit further stated that "I attempted to obtain a copy of the contract in 2005, 2006 and 2007. I requested the contract from OPRHP in 2005. I issued requests for production of documents to MOTM (Maid of the Mist) in the Atlanta lawsuit in 2006. I managed to get documents produced by MOTM for an in camera inspection in 2007, but the judge refused to disclose the contents." Windsor was aware of the lease in 2005 and he submitted a Proposed Order with Findings of Fact where he stated "Windsor attempted to obtain a copy of the contract in 2005, 2006 and 2007." (*see*, Proposed Order at ¶ 16). Moreover, the Maid of the Mist operated its touring business openly in 2002 in the Niagara River and the license was publicly available on February 21, 2003 after it was approved the Attorney General and the State Comptroller. The petitioner was aware of the 2002 lease as early as 2005 and his allegations of fraud and misrepresentation are untimely. The petitioner failed to satisfy his burden of establishing that fraud could not have been discovered prior to the two-year exception to six-year statute of limitations for fraud actions to apply and thus the action was time barred. (*see*, CPLR §§ 203(g), 213(8), 3211(a)(5); *Sargiss v. Magareli,* 50 AD3d 1117 [2nd Dept.2008]).

***6** Petitioner alleges his constitutional right of due process was denied when the State awarded the lease as a sole source contract to Maid. Constitutional claims brought pursuant to 42 U.S.C. § 1983 must be commenced within three years from the alleged unconstitutional act. (*Zapata v. City of New York,* 502 F3d 192 [2nd Cir.2008]). Since the lease was awarded in 2002, petitioner's 2009 constitutional claims are untimely.

Petitioner alleges a cause of action for civil conspiracy. New York does not recognize civil conspiracy as an independent cause of action. (*Plymouth Drug Wholesalers, Inc. v. Kirschner,* 239 A.D.2d 479 [2nd Dept.1997]), and the claim for

civil conspiracy must be dismissed. (*Zachariou v. Manios,* 50 AD3d 854 [1st Dept.2008]).

Petitioner alleges he is entitled to a default judgment against the State defendants and the Maid individual officers for their failure to appear or answer the petition/complaint. The respondents maintain this proceeding was commenced by a CPLR Article 78 proceeding on November 20, 2009 returnable January 8, 2010. CPLR § 7804(c) requires that an answer to the petition/complaint or a motion to dismiss must be served five days before the return date. The Maid moved to dismiss the petition/complaint on December 29, 2009 and the State moved to dismiss the petition/complaint on December 31, 2009. The motions to dismiss the petition/complaint were timely. Petitioner's motions seeking default judgments dated December 14, 15 and 21, 2009 are denied.

The petitioner alleges the corporate entity Maid was served the verified petition and the verified complaint on November 25, 2009, with service upon a receptionist, Terry Aloian, a person alleged authorized to receive service. Maid alleges Ms. Aloian was not authorized to accept service and therefore the petitioner did not obtain jurisdiction upon the Maid. Normally, when service is contested, the matter is set for a traverse hearing to determine issues of fact. However, since the statute of limitations is dispositive to this proceeding, the Court, in the interests of judicial economy, determines a traverse hearing is unnecessary.

Finally, respondent Maid's request for attorney fees is denied. “An attorney fee is merely an incident of litigation is not recoverable absent a specific contractual provision or statutory authority.” (*Hoopers Assocs. v. AGS Computers,* 74 N.Y.2d 487 [1989]).

Accordingly, the verified petition and the verified complaint are dismissed in their entirety. The relief sought in petitioner's/plaintiff's subsequent motions and requests for admission are hereby dismissed.

This Memorandum shall constitute both the Decision and Order of the Court. The Original Decision and Order are returned to attorneys for the State of New York defendants. A copy of this Decision and Order and all other papers are delivered to the Albany County Clerk. The signing of this Decision and Order and delivery of a copy of this Decision and Order to the Albany County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

***7** So Ordered.

N.Y.Sup.,2010.
Windsor v. State
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