

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index
Q INTERNATIONAL COURIER INC., etc.		Number <u>700042</u> 2007
-against-		Motion
		Date <u>October 8, 2008</u>
VISTA MARO LLC, et al.		Motion
		Cal. Number <u>32</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 5 read on this motion by defendant City of New York and defendant New York City Economic Development Corporation (EDC) for an order pursuant to CPLR 3211(a) (1), (5) and (7) dismissing the complaint against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Memoranda of Law	3-5

Upon the foregoing papers it is ordered that: The branch of the motion which is for an order pursuant to CPLR 3211(a) (1) and (7) dismissing the fifth cause of action as asserted against defendant City of New York and defendant EDC is granted. The branch of the motion which is for an order pursuant to CPLR 3211(a) (7) dismissing the seventh cause of action as asserted against defendant City of New York and defendant EDC is granted. The branch of the motion which is for an order pursuant to CPLR 3211(a) (5) and (7) dismissing the eighth cause of action as to defendant City of New York and defendant EDC is denied. (See the accompanying memorandum.)

Dated: January 12, 2009

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

<hr/>	X	INDEX NO. 700042/2007
Q INTERNATIONAL COURIER INC., etc.		BY: KITZES, J.
- against -		MOTION SEQ. NO. 1
VISTA MARO LLC, et al.		MOTION CAL NO.: 32
<hr/>	X	MOTION DATE: 10/8/08
		DATED: January 12, 2009

Defendant City of New York and defendant New York City Economic Development Corp. (EDC) have moved for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint alleged against them.

Defendant City of New York owned a parcel of realty, approximately five acres in size, in the vicinity of JFK Airport on the south side of Rockaway Boulevard. Plaintiff Q International Courier, Inc. (QIC), the operator of a courier service, had a need for a new facility in the vicinity of the airport. In or about 2004, the defendant City made plans to sell the parcel to a developer who would build a facility for use by QIC.

Defendant Vista Maro, LLC, as a developer and landlord, and plaintiff QIC, as a tenant, entered into a letter of intent dated March 27, 2006 by which Vista proposed to lease up to 60,000 square feet of the building to be constructed upon the parcel at

rents and terms advantageous to QIC. The letter of intent expressly states that it is "non-binding, but is intended to outline the principal business terms of and permit the parties to undertake due diligence in connection with the transaction described herein." The letter of intent further states in relevant part: "The preparation, revision or delivery of the LOI or any lease for examination and discussion shall in no event be deemed an offer or an obligation to lease the Premises but shall be merely a part of the negotiations between Landlord and Tenant. Neither party hereto shall have any obligation or liability to the other whatsoever at law or in equity (including any claims for detrimental reliance or promissory estoppel) unless and until such time as both parties shall have executed and delivered a lease." According to the plaintiff, Vista used the letter of intent to induce the City of New York and the New York City Economic Development Corporation (EDC) to transfer the parcel to it at below market rates. Plaintiff QIC further alleges that, relying on the letter of intent, it allowed leases on its other facilities to expire and did not seek other locations for its business.

On or about June 28, 2006, the city transferred the five acre parcel of realty to defendant EDC. On or about June 28, 2006, EDC executed a deed to the parcel in favor of defendant Vista with the intent that plaintiff QIC would be a major tenant at the premises. The deed to defendant Vista states in relevant part: "(A) Grantee *** covenants (i) within six (6) months from the date

hereof to commence construction *** on the premises of a building *** containing a minimum of 70, 500 square feet of floor area *** and (ii) to complete such Construction within two (2) years and six (6) months from the date hereof. (B) Grantee *** covenants that, for a period of ten (10) years from the date hereof, not less than 60,000 square feet of Floor Area in the building (the "Quick Space") shall be used in connection with the non-residential business operations and corporate purposes of Quick International Courier, an air cargo delivery company *** primarily in connection with Quick's *** air cargo and delivery service business and for no other purposes, except with the prior written approval of Grantor. The remaining space in the building shall be used for airport-related non-residential business purposes." The deed from EDC contained a reverter clause which in substance provided that if Vista failed to construct the building on the premises or failed to lease the premises as required, then EDC had the "right" to re-enter and take possession of the premises "and the estate conveyed hereby to Grantee shall thereupon terminate and fee simple title to the premises *** shall revert in Grantor forever ***."

The plaintiff alleges that defendant Vista violated the terms of its grant by failing to begin construction of the new building in a prompt manner. Moreover, according to the plaintiff, instead of giving a lease to it for the area required by the deed, defendant Vista took steps to enter into a lease with defendant Forward Air, Inc., another courier, at a substantially higher rent

than QIC would have paid, and Vista offered to lease only a relatively small area of the new facility to QIC. Although Vista and Forward Air did not enter into a lease, nevertheless, Vista has sought to impose terms and conditions upon QIC which were more onerous than those set out in the letter of intent.

The plaintiff further alleges that the defendant City and defendant EDC "conspired with, and materially assisted Vista to enable Vista to acquire and develop the JFK parcel for a tenant other than QIC."

That branch of the motion which is for an order pursuant to CPLR 3211(a) (1) and (7) dismissing the fifth cause of action as asserted against defendant City of New York and defendant EDC is granted. The fifth cause of action seeks a judgment "directing and compelling the City of New York and the EDC to exercise its right of reverter/reacquisition against Vista so as to reacquire the JFK parcel***." In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700,702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.) Insofar as the City of New York is concerned, its deed to EDC contains no reverter clause, and, moreover, the City is not a party to the deed from EDC to Vista. Insofar as defendant EDC is concerned, as a

not-for-profit local development corporation organized pursuant to Not-For-Profit Corporation Law § 1411, it has the right to acquire real estate by purchase and to "to sell, lease, mortgage or otherwise dispose of or encumber any such plants or any of its real or personal property or any interest therein upon such terms as it may determine ***." (NFPCL § 1411[c].) Similarly to its statutory discretion to dispose of real property "upon such terms as it may determine," the reverter clause in the deed gives EDC the right to revoke the grant, but not the duty to do so. The right to revoke given by the deed is discretionary in nature. The deed expressly speaks of the "Grantor's exercise of such option to re-enter and reacquire." (Emphasis added.) Article 78 relief in the nature of mandamus to compel is unavailable in a matter which is discretionary. (See, Klostermann v Cuomo, 61 NY2d 525; Town of Riverhead v New York State Dept. of Environmental Conservation, 50 AD3d 811 ["The determination to initiate proceedings leading to the revocation of a permit is a discretionary function (see ECL 23-2711[6]) with respect to which mandamus does not lie ***].) Alternatively, if the fifth cause of action seeks the remedy of an injunction, the plaintiff failed to adequately allege irreparable injury if an injunction is withheld. (See, Meccariello v Meccariello, 46 AD3d 640; McDermott v City of Albany, 309 AD2d 1004.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the seventh cause of action as

asserted against defendant City of New York and defendant EDC is granted. The plaintiff brought the seventh cause of action pursuant to 42 USC § 1983 on the theory that those defendants conspired with the developer to deprive QIC of property rights involving its prospective tenancy at the premises. The plaintiff's conclusory and vague allegations of a conspiracy do not adequately support a cause of action for the deprivation of constitutional rights under 42 USC § 1983. (See, Diederich v Nyack Hosp., 49 AD3d 491; Kubik v New York State Dept. of Social Services, 244 AD2d 606.)

That branch of the motion which is for an order pursuant to CPLR 3211(a) (5) and (7) dismissing the eighth cause of action as to defendant City of New York and defendant EDC is denied. First, the complaint, supplemented with the plaintiff's submissions (see, Rovello v Orofino Realty Co., Inc., 40 NY2d 633; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159), adequately states a cause of action for a declaratory judgment since there is a concrete controversy among the parties. (See, Hunt Bros., Inc. v Glennon, 81 NY2d 906; County of Oneida ex rel Health Dept. v Kennedy, 300 AD2d 1091.) The plaintiff has asserted a cause of action for a judgment declaring, inter alia, that the deeds from the city to EDC and from EDC to Vista have become invalid because, by failing to construct the building and by thwarting QIC's anticipated tenancy, Vista has not put the property to its intended public use. Section 384(b) of the City Charter allows "the

mayor *** with the approval of a majority of the members of the borough board *** [to] lease or sell any real property of the city *** to a local development corporation without competitive bidding and for such purpose or purposes and at such rental or for such price as may be determined by the mayor to be in the public interest ***." The plaintiff alleges that the city and EDC transferred the property to Vista without competitive bidding and at a favorable price to advance the public purpose of job creation by QIC and that Vista has thwarted that public purpose. "A municipal contract which does not comply with statutory requirements or local law is invalid and unenforceable." (Infrastructure Management Systems, LLC v County of Nassau, 2 AD3d 784, 786.) Second, the plaintiff has standing to maintain the eighth cause of action. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request ..." (Caprer v Nussbaum, 36 AD3d 176, 182.) In the case at bar, plaintiff QIC has alleged an "actual injury" to its own financial interests. (Hunts Point Terminal Produce Co-op. Ass'n, Inc. v New York City Economic Development Corp, 36 AD3d 234, 247; see, New York State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 207.) Third, the eighth cause of action is not time-barred. There is no specific limitation period prescribed for a declaratory judgment action, but "if the rights the parties are seeking to have adjudicated in a declaratory judgment action could have been raised

in a proceeding having a statutorily prescribed limitation period, then that specific limitations period will govern ***." (Marsh v New York State and Local Employees' Retirement System, 291 AD2d 713, 714; see, New York City Health and Hospitals Corp. v McBarnette, 84 NY2d 194; Trager v Town of Clifton Park, 303 AD2d 875.) "Otherwise, the six-year 'catch-all' provision of CPLR 213(1) will apply ***." (P & N Tiffany Properties, Inc. v Village of Tuckahoe, 33 AD3d 61, 63; see, American Ind. Paper Mills Supply Co. v County of Westchester, 16 AD3d 443.) The plaintiff stipulates that it "does not seek mandamus to compel a ministerial act ***, does not contend that the City acted in excess of its jurisdiction ***, and does not seek to challenge any 'determination' by the City ***." (Memorandum of Law, p.36.) Since the eighth cause of action seeks a remedy not attainable in an Article 78 proceeding and does not seek the review of a particular agency determination or procedure, the court finds that CPLR 213(1) applies. (See, Martin Goldman, LLC v Yonkers Indus. Development, 12 AD3d 646.)

Short form order signed herewith.

J.S.C.