

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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Index No. 114094/08

In the Matter of the Application of  
STACEY MORIATES and BRENDA GILL,

Petitioners,

for a Judgment pursuant to Article 78 of the Civil  
Practice Law and Rules

- against -

NYC OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

Respondents.

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Hon. Nicholas Figueroa, J.S.C.:

DECISION  
and ORDER

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The two petitioners seek a judgment, pursuant to Article 78 of the CPLR, annulling a decision issued by the New York City Board of Collective Bargaining (“the Board”) and the New York City Office of Collective Bargaining (“OCB”) (“the Decision”) (*Moriates*, 1 OCB2d 34 [BCB 2008]). The Decision dismissed petitioners' improper practice petition ("IPP") against the City of New York (“the City”) and the New York City Department of Environmental Protection (“DEP”) without a hearing. Petitioners challenge such determination as arbitrary and capricious.

Respondents have filed a motion to dismiss, maintaining that petitioners failed to join necessary parties, that the applicable statute of limitations now forecloses such parties' joinder, and that the proceeding should not be allowed to continue in their absence.

Petitioners belong to Chapter 32 of the Civil Service Technical Guild, Local 375 of District Council 37 (“the Union”). Both petitioners are employees of DEP, a line agency of the City.

In December 2007, Chapter 32 held intra-chapter elections. The two candidates running for

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President were the incumbent and a contender. In June 2008, Chapter 32 re-ran its election after the December 2007 election results were successfully challenged. The incumbent defeated the contender in both elections. Petitioners worked for the incumbent's slate.

On March 24, 2008, petitioners filed a verified IPP against both the City and DEP, claiming that DEP violated section 12-306(a)(1), (2), and (3) of the New York City Collective Bargaining Law ("NYCCBL") when it refused to allow petitioners to respond to the contender's campaign literature via DEP's e-mail system; that DEP failed to combat fraudulent campaign-related e-mails; and that the agency enforced its e-mail policy against the contender only after the election was a fait accompli. In a 15-page opinion, the Board denied petitioners' IPP summarily.

Petitioners then filed this petition, naming the Board and OCB as respondents, but not also naming the City or DEP. It is noted that the Board is an independent, quasi-judicial agency. In other words, joinder of the Board does not effect a joinder of the City or DEP.

Section 12-308 of the NYCCBL provides that an Article 78 petition challenging a Board decision must be filed within thirty (30) days of service of the decision. The Decision in this case was served on petitioners at some point after it was rendered on September 24, 2008, and the petition challenging it was filed on October 21, 2008. As noted above, however, the City and DEP have not yet been brought into the proceeding. Thus, notwithstanding the timeliness of the petition as against the Board, the issue remains as to whether the City and DEP are necessary parties whose non-joinder requires dismissal of this proceeding.

A person whose interests "might be inequitably affected by a judgment" must be made a party to the action (CPLR 1001[a]). A judgment in this case would determine the validity of the Decision, which ruled that petitioners' charges of City and DEP wrong-doing were foreclosed. The City and DEP thus have an interest in the outcome of this proceeding, an interest that would be inequitably

affected if they were denied the opportunity to support the Decision operating in their favor. Therefore, the City and DEP are necessary parties to this proceeding.

There are three ways to cure an omission of a necessary party: (1) when the court has jurisdiction over a necessary party who has not been joined, the court “shall [directly] order him summoned”; (2) when a court cannot effectively issue such an order because it does not have jurisdiction over the necessary party, such jurisdictional defect may be cured if the necessary party consents to the relief sought or voluntarily appears; or (3) if the court lacks jurisdiction over a necessary party who neither consents nor appears, the court may permit the proceeding to continue in his absence if certain statutorily enumerated factors militate toward doing so (CPLR 1001).

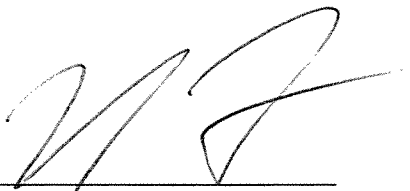
In *Red Hook/Gowanus Chamber of Commerce v N.Y. City Bd. of Std. and Appeals*, 5 N.Y.3d 452 (2005), the Court of Appeals expressly left open the question of whether “by virtue of the lapsed statute of limitations, [a necessary party was] subject to, or beyond the ‘jurisdiction’ of the court as the term is used in CPLR 1001.” Only recently, however, in *Matter of Windy Ridge Farm v Assessor of Town of Shandaken*, 11 N.Y.3d 725 (2008), the Court of Appeals concluded the question it had left unresolved in *Red Hook*, holding that “[a] statute of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any remedy from a defendant” (*id.*, at 727, quoting *Matter of Romeo v New York State Dep’t of Educ.*, 41 AD2d 1102). Accordingly, notwithstanding the expiration of the statutory period, this court has jurisdiction over the City and DEP and does not need to consider the discretionary factors under CPLR 1001(b) at this time. Upon being joined, the City and DEP may raise any defense they may have or may instead, given the implications suggested by the *Windy Ridge* decision, choose to participate in the proceeding on the merits.

It is therefore ORDERED that respondents’ motion to dismiss is denied; and it is further

ORDERED that the City of New York and the New York City Department of Environmental Protection be joined as respondents and that petitioners serve them with a notice of amended petition and amended petition within 30 days of the date of this Court's decision.

This constitutes the decision and order of the Court.

Dated: April 30, 2009



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J.S.C.