No. 25-464

IN THE

Supreme Court of the United States

PHILIP G. POTTER,

Petitioner,

v.

INCORPORATED VILLAGE OF OCEAN BEACH, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court below properly affirmed the judgment of the District Court dismissing the action, based on the applicable statute of limitations with an accrual date pursuant to the finality of the Village position that there was no Certificate of Occupancy.

LIST OF PARTIES

1. Petitioner, Philip G. Potter, was Plaintiff-Appellant below.

2. Respondents, Incorporated Village of Ocean Beach, Village Building Department, Village Board of Trustees, Mayor of the Village of Ocean Beach, Village Board of Zoning Appeals, Gerard S. Driscoll, Village Building Inspector, in his official and individual capacities, Theodore Minski, Village Building Inspector, in his official and individual capacities, Nicholas Weiss, Village Building Inspector, in his official and individual capacities, Louis Santora, Village Building Inspector, in his official and individual capacities, Robert Fuchs, Village Prosecutor, in his official and individual capacities, and Kenneth Gray, Village Hearing Officer, in his official and individual capacities, were Defendants-Appellees below.

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STATEMENT OF THE CASE

Appellant commenced the action leading to this appeal, 23-cv-06456-GRB-ARL, when he filed his complaint on August 29, 2023. (C.A. App. 10-48). In his initial complaint, Appellant alleged these nine causes of action: (1) procedural due process under 42 U.S.C. § 1983 (hereinafter "§ 1983"); (2) equal protection "class of one" under § 1983; (3) substantive due process under § 1983; (4) malicious prosecution under New York state law; (5) abuse of process under New York state law; (6) *Monell* claims under § 1983; (7) takings claim; (8) declaratory relief; and (9) conspiracy under 42 U.S.C. § 1985. (C.A. App. 10-48).

On September 28, 2023, Appellees filed a pre-motion letter seeking leave to file a motion to dismiss. (C.A. App. 190-191). Appellees argued in their letter that the Appellant's cause of actions were barred by the statute of limitations because the alleged revocation of the C/O occurred more than a decade ago. (C.A. App. 190-191). On October 2, 2023, Appellant filed a pre-motion letter in opposition of the Appellees' letter. (C.A. App. 192-193). On January 3, 2024, the District Court held a pre-motion conference, in which the District Court deemed the Appellees' motion to dismiss made and granted the motion. (C.A. App. 194).

On March 1, 2024, Appellant filed an Amended Complaint. (C.A. App. 213). In his Amended Complaint, Appellant eliminated five causes of action, leaving the remaining four causes of action in his Amended Complaint: (1) procedural due process under § 1983; (2) substantive due process under § 1983; (3) *Monell* liability under § 1983; and (4) conspiracy under § 1985. (C.A. App. 213-239).

On April 2, 2024, Appellant withdrew his conspiracy cause of action under 42 U.S.C. § 1985, as well as the claims against Defendants, Fuchs and Gray, through a correspondence to the District Court. (C.A. App. 397).

The only substantive addition to Appellant's Amended Complaint was the allegation that Appellant requested a Certificate of Occupancy search in January 2024. (C.A. App. 230). The causes of action replead in Appellant's Amended Complaint were precisely the same as those already dismissed.

On May 8, 2024, Appellees filed a notice of their motion to dismiss the Appellant's Amended Complaint, along with their memorandum of law in support of their motion to dismiss. (C.A. App. 392) (C.A. App. 394). On May 29, 2024, Appellant filed a memorandum of law in opposition of the Appellees' motion to dismiss. (C.A. App. 440). On June 12, 2024, Appellees filed a memorandum of law in further support of their motion to dismiss. (C.A. App. 495).

On July 9, 2024, District Court Judge Gary R. Brown entered his decision granting the Appellees' motion to dismiss, noting that the Appellant's causes of action were barred by the statute of limitations or are "otherwise unactionable." (C.A. App. 576-583).

Appellant filed a notice of appeal regarding Honorable Judge Brown's decision on July 29, 2024. (C.A. App. 584). The Circuit Court affirmed the dismissal by summary order dated April 10, 2025. The Court noted that "Potter did become sufficiently aware that the Village had taken a final position on the revocation of his CO to have brought this claim by at least 2020, rendering his claims based on

the Villages' revocation of his CO time barred." The Court also noted that claims regarding State Court ordered hearing had been forfeited.

REASONS FOR DENYING THE PETITION

The petition should be denied because this case does not meet the criteria of Rule 10 and therefore, there are no compelling reasons to grant the requested writ. Petitioner argues that there is a split in the circuits as to the accrual date for the procedural due process claims asserted in this action, but he fails to establish that the complaint alleged facts upon which the Court below could have found for the Petitioner. However, the purported split that petitioner relies on is contained in a footnote and is mere dicta. The Court's decision males clear that, regardless of the rationale, the claim accrued outside the Statute of limitations. The position of the Village was final as shown by the denial of rental permits. The Court's decision relied on the finality of the Village position. Petitioner's failure to take action, either in State court or federal Court, within three years of knowing that the Village position was final precludes any action at this late date.

The petition seeks review of a dismissal, based on the application of settled law to the alleged fact-intensive complaint, not a legal rule of general applicability. The facts, as alleged in the complaint, render this a poor vehicle for this Court's consideration, since Petitioner does not come to Court with clean hands. Based on the allegations of the complaint, the Petitioner was aware of the finality of the Village position that he lacked a Certificate of Occupancy as early as 2011; *see*, C.A. App. 12, as well as at various date between 2011 and 2019; *see*, C.A. App. 12-16.

The Court of Appeals applied settled principles of federal law to the particular facts alleged in this case, and any alleged error would amount, at most, to routine error correction. Moreover, this case presents significant vehicle problems that would prevent the Court from cleanly resolving the question presented. For these reasons, certiorari is unwarranted.

Additionally, this case is not an appropriate vehicle for the Court to examine the purported split it the Circuits because Petitioner's original action was deficient. Indeed, Petitioner has dropped all claims except the procedural due process claims. Although the merits of the case are not ordinarily at issue for consideration in granting certiorari, in this case it is significant that there are independent grounds that support the dismissal. The procedural history of this matter is uncommon, and quite possibly, unique. Petitioner's statement of the facts highlights that Petitioner let years go by, after knowing that the Village had finalized its position, without taking any legal action. The underlying weakness of the allegations, renders the case inappropriate for determination of any split in the circuits.

I. All Of Appellant's Causes Of Action Are Barred By The Statute Of Limitations

Appellant's three causes of action (procedural due process, substantive due process, and *Monell* liability) were all brought pursuant to 42 U.S.C. § 1983. (C.A. App. 213-239). Claims brought pursuant to 42 U.S.C. § 1983 are subject to a three-year statute of limitations under New York state law. *See*, *Lont v. Roberts*, 2013 WL 1810759, at *2 (E.D.N.Y. Apr. 26, 2013) (noting, "[t]

he statute of limitations for claims brought pursuant to § 1983 is determined by state law, and in New York State, the statute of limitations for actions brought pursuant to § 1983 is three years."); *Rene v. Jablonski*, 2009 WL 2524865, at *5 (E.D.N.Y. Aug. 17, 2009) (Judge Bianco explaining, "[w]ith regard to Section 1983 claims, federal courts generally apply the forum state's statute of limitations for personal injury claims, which is three years in the state of New York pursuant to New York Civil Practice Law § 214(5).").

While it has been noted that state law provides the statute of limitations period regarding claims brought pursuant to 42 U.S.C. § 1983, it is federal law that determines when a "federal claim accrues." *See*, *Lont v. Roberts*, 2013 WL 1810759, at *2 (E.D.N.Y. Apr. 26, 2013). "Under federal law, 'the time of accrual [is] that point in time in when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Rene v. Jablonski*, 2009 WL 2524865, at *5 (E.D.N.Y. Aug. 17, 2009); *See*, *Lont v. Roberts*, 2013 WL 1810759, at *2 (E.D.N.Y. Apr. 26, 2013) (stating, "[t]he claim accrues when the plaintiff knows or has reason to know of the harm.").

In this action before the Court, the Appellant filed his initial complaint on August 29, 2023. (C.A. App. 8). Therefore, any Section 1983 claim that accrued prior to August 29, 2020 would be barred by the three-year statute of limitations period. Based on the Appellant's allegations in his Amended Complaint, Appellant's § 1983 claims accrued prior to August 29, 2020 and are, therefore, barred by the statute of limitations. (C.A. App. 10-47).

The Appellants' Amended Complaint outlines three harms: (1) the revocation of the C/O; (2) the criminal violations; and (3) the denial of rental permits.

Based on the federal law outlined in *Rene*, the time of accrual regarding the revocation of the C/O occurs when the Appellant knows, or has reason to know of, the injury which is the basis of the claim. *Rene v. Jablonski*, 2009 WL 2524865, at *5 (E.D.N.Y. Aug. 17, 2009). Appellant alleges in his Amended Complaint that the Village issued a letter to the Appellant stating that "[a]s of this date you no longer have a valid certificate of occupancy for your residency." (C.A. App. 222). This letter gave the Appellant direct knowledge of the injury which is the basis of this action on July 15, 2011. (C.A. App. 222).

Furthermore, Appellant alleges in his Amended Complaint that he received a second letter from the Village on August 23, 2011, which stated that the Village had revoked the C/O. (C.A. App. 222-223). This correspondence with the Village gave Appellant even further knowledge of the purported injury which is the basis of this claim.

Additionally, Appellant admits to filing a FOIA request in 2012 which yielded a Certificate of Occupancy with a handwritten "X" through the C/O and the words "VOID as of July 15, 2011" written on the C/O. (C.A. App. 222). The altered C/O, which the Appellant received in 2012, also should have given the Appellant knowledge of the injury which is the basis of this action.

Further, the Appellant alleges that in 2016, 2017, and 2018, the Village denied Appellant's applications for rental permits because the Appellant did not have a valid C/O.

(C.A. App. 228) (C.A. App. 364-366). The denial of each of the Appellant's attempts to gain a rental permit, because of the Appellant's lack of a valid C/O, gave the Appellant knowledge of the injury for which this claim is based in 2016, 2017, and 2018.

As a result of this, in 2019 Appellant commenced an action against the Village in the Supreme Court of the State of New York, relating to the revocation of the C/O. (C.A. App. 228). The Appellant's decision to commence an action against the Village in 2019 relating to the revocation of the C/O further proves that as of 2019, the Appellant had direct knowledge of the injury for which this current claim is based. Indeed, it is illogical for Appellant to argue that he was not aware of any harm until 2024, when he commenced litigation against the Village on this very issue back in 2019.

Therefore, the Appellant's claims regarding the revocation of the C/O and the denial of the rental permits in 2016, 2017, and 2018 all accrued prior to August 29, 2020, and are barred by the statute of limitations.

Furthermore, Appellant's claim regarding criminal violations is also barred by the statute of limitations. Appellant alleges that on April 3, 2012, he was charged by the Village with criminal violations. (C.A. App. 224). Ultimately, these criminal violations were discharged on November 1, 2014. (C.A. App. 224). Therefore, the Appellant's claims regarding the alleged criminal violations charges accrued prior to August 29, 2020, and are ultimately barred by the statute of limitations.

Appellant argues that his causes of action are not barred by the statute of limitations, as the accrual date on his claims did not begin until January 2024, nearly six months after he commenced this lawsuit when Appellant completed a certificate of occupancy search. (C.A. App. 450-452). Appellant alleges that on January 25, 2024, he completed a certificate of occupancy search which resulted in the Village's Building Inspector stating that the C/O had been revoked on July 11, 2011. (C.A. App. 230).

However, this argument should fail as it contradicts Appellant's other arguments.

First, on one hand, Appellant argues that the certificate of occupancy search done on January 25, 2024 effectively revoked the C/O, because the Building Inspector responded noting that the C/O had been revoked. (C.A. App. 230). Yet, on the other hand, Appellant argues that the July 15, 2011 revocation was not effective because the Building Inspector lacked authority to revoke the C/O in 2011. *See*, Appellant's Brief p. 23. Appellant's argument is completely flawed as Appellant is essentially arguing that the Building Inspector did not have the authority to revoke the C/O in 2011, but did have the authority in 2024, in order to revive the Appellant's claims that would be barred by the statute of limitations.

Furthermore, the Appellant's argument that he was not aware of the harm until January 2024 is illogical. First, Appellant filed this lawsuit in 2023 alleging that the Village unilaterally revoked his C/O in violation of Due Process. (C.A. App. 34). Taken to its legal extreme, this would mean Appellant filed his complaint alleging harm prior to even being aware of the harm. Secondly,

Appellant admitted to making a Freedom of Information Act request in 2012, which returned a copy of the C/O with an "X" through it and the words "VOID as of July 15, 2011" written on the C/O. (C.A. App. 24). However, Appellant is arguing that this did not make him aware of the harm, yet the certificate of occupancy search in January 2024 did. Appellant's arguments as to why the accrual date should be January 25, 2024 is greatly flawed and cannot be accepted.

The Continuing Violations Doctrine does not apply to discrete unlawful acts "even where those discrete acts are part of a 'serial violation[],' but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015). Here, the revocation of the C/O constitutes a discrete act. The Village did not conceal this action as evidenced by the letters sent to the Appellant, the FOIA request by the Appellant which returned the word "void," and the denial of Appellant's applications for permits in 2016, 2017, and 2018 because the property did not have a valid C/O.

Furthermore, Equitable Estoppel cannot be applied to revive the Appellant's claims. Appellant does not and cannot allege facts that show he relied on any misrepresentations by the Village in a decision not to commence a lawsuit. In 2019, Appellant filed a claim against the Village in the Supreme Court of the State of New York, Index No. 616544/2019, directly related to the revocation of the C/O. (C.A. App. 229). Therefore, Appellant cannot argue that he was "lulled" into believing he did not need to commence litigation, when he has already previously admitted to commencing litigation regarding this very issue. (C.A. App. 229).

Ultimately, the decision of the District Court to grant the motion to dismiss on the grounds that the causes of action are barred by the statute of limitations should be upheld, as the facts of this case undoubtedly demonstrate that the claims accrued prior to August 29, 2020.

II. Appellant Fails To State A Claim Regarding Procedural Due Process Violations

Even should the Appellant's claims survive the statute of limitations, the District Court did not err in granting the motion to dismiss, since the Appellant failed to plead a proper procedural due process claim.

For a claim to be brought under the Fourteenth Amendment for violation of procedural due process, the "Plaintiff must show '(1) that he possessed a protected liberty or property interest; and (2) that he was deprived of that interest without due process.'" *Patterson v. Labella*, No. 6:12-CV-01572 MAD/TW, 2014 WL 4892895, at *21 (N.D.N.Y. Sept. 30, 2014), *aff'd*, 641 F. App'x 89 (2d Cir. 2016).

In the claim at hand, Appellant failed to show either element.

A. Appellant Failed To Properly Plead A Protected Property Interest

In order "[t]o demonstrate a violation of due process rights regarding one's use of property, whether on procedural or substantive due process grounds, a plaintiff must first demonstrate that he possesses a federally protected property right to the relief sought. *Sandy*

Hollow Assocs. LLC v. Inc. Vill. of Port Washington N., No. CV-09-2629-SJF-AKT, 2010 WL 6419570, at *9 (E.D.N.Y. Sept. 6, 2010). "Within the Second Circuit, 'a constitutionally protected property interest in land use regulation arises only if there is an entitlement to the relief sought by the property owner.'" *Patterson v. Labella*, No. 6:12-CV-01572 MAD/TW, 2014 WL 4892895, at *21 (N.D.N.Y. Sept. 30, 2014), *aff'd*, 641 F. App'x 89 (2d Cir. 2016); *Sandy Hollow Assocs. LLC v. Inc. Vill. of Port Washington N.*, No. CV-09-2629-SJF-AKT, 2010 WL 6419570, at *9 (E.D.N.Y. Sept. 6, 2010) (same); *O'Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007) (explaining that "[i]n order for a particular interest in a land-use benefit to qualify as a property interest for the purpose of the . . . due process clause[,] a landowner must show a 'clear entitlement' to that benefit. A mere 'abstract need or desire' for the benefit is insufficient.") (internal citations omitted).

Furthermore, "[t]he Second Circuit has instructed that the 'entitlement' test be applied with 'considerable rigor.'" *Sandy Hollow Assocs. LLC v. Inc. Vill. of Port Washington N.*, No. CV-09-2629-SJF-AKT, 2010 WL 6419570, at *9 (E.D.N.Y. Sept. 6, 2010); *DeFalco v. Dechance*, 949 F. Supp. 2d 422, 430-31 (E.D.N.Y. 2013) (noting, "[t]his 'clear entitlement' test must be applied with 'considerable rigor.'"). "The [strict entitlement] analysis focuses on the extent to which the deciding authority may exercise discretion in arriving at a decision, rather than on an estimate of the probability that the authority will make a specific decision." *Sandy Hollow Assocs. LLC v. Inc. Vill. of Port Washington N.*, No. CV-09-2629-SJF-AKT, 2010 WL 6419570, at *9 (E.D.N.Y. Sept. 6, 2010). "An entitlement to a benefit arises only when the discretion

of the issuing agency is so narrowly circumscribed as to virtually assure conferral of the benefit." *Id.*

"If the issuing authority has discretion in deciding whether to issue a permit or license, the federal courts will not sit as a 'superseding body' to the local administrative agency." *Cathedral Church of Intercessor v. Inc. Vill. of Malverne*, No. CV 02-2989(TCP)(MO), 2006 WL 572855, at *5 (E.D.N.Y. Mar. 6, 2006). Furthermore, this Court has noted that when assessing an issue regarding certificates of occupancy, the Court must be "mindful that federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many local legislative and administrative agencies." *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). "'[T]he Due Process Clause does not function as a general overseer of arbitrariness in state and local land-use decisions; in our federal system, that is the province of the state courts.'" *DeFalco v. Dechance*, 949 F. Supp. 2d 422, 430 (E.D.N.Y. 2013) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995)).

Judges in the Eastern District of New York have often held that certificates of occupancy are not a protected property interest within the meaning of the due process clause, and therefore, dismissal of the claim that centers this appeal was warranted as Appellant failed to properly plead a protected property interest. *See*, *Sandy Hollow Assocs. LLC v. Inc. Vill. of Port Washington N.*, No. CV-09-2629-SJF-AKT, 2010 WL 6419570, at * (E.D.N.Y. Sept. 6, 2010) (granting the motion to dismiss Section 1983 procedural and substantive due process claims because the plaintiffs failed to show entitlement to the issuance of a certificate of occupancy where the plaintiffs were not in full compliance with village law).

Likewise, in *Cathedral Church of Intercessor v. Inc. Vill. of Malverne*, No. CV 02-2989(TCP)(MO), 2006 WL 572855, at *5 (E.D.N.Y. Mar. 6, 2006), the Court held that the plaintiffs were unable to plead entitlement to a C/O because "Plaintiffs have not addressed the State or local laws applicable to the issuance of a certificate of occupancy, and to what extent, if any, those laws provide the issuing authority with discretion. Plaintiffs have also failed to allege that they have complied with all such state or local laws. Without these allegations, the Court is unable to conclude that Plaintiffs have adequately pleaded an entitlement to a certificate of occupancy."

Similar to *Sandy Hallow* and *Cathedral Church*, the Appellant failed to plead any fact that would support a claim that he was entitled to the C/O he sought. In Appellant's Amended Complaint, he failed to address state or local laws that apply to the issuance of a certificate of occupancy, and therefore, Appellant also failed to address the extent of discretion given to the Village by those laws. (C.A. App. 213-239).

Furthermore, Appellant admitted in his Amended Complaint that the Village informed Appellant that his residence was "'in further violation of NY State Codes and Ocean Beach Village Codes § 64-13 and § 64-14 regarding Certificates of Occupancy.'" (C.A. App. 222). In light of this admission by Appellant, Appellant failed to allege that he complies with all state and local laws. (C.A. App. 213-239).

In his Opposition to the Motion to Dismiss, Appellant argued that a C/O becomes a vested property right once it is issued. (C.A. App. 453). Appellant pointed to two main cases to support his argument, *Norton v. Town of*

Islip, 239 F.Supp.2d 264 (E.D.N.Y. 2003) and *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 642 N.Y.S.2d 21 (N.Y. 1996). (C.A. App. 454). However, in *Norton*, the Court ruled on the issuance and revocation of a non-conforming use status, not a certificate of occupancy. *See*, *Norton v. Town of Islip*, 239 F. Supp. 2d 264, 267 (E.D.N.Y.), *aff'd*, 77 F. App'x 56 (2d Cir. 2003). And, in *Town of Orangetown*, the claim made in state court[1] centered around a building permit, not a certificate of occupancy. Furthermore, in *Town of Orangetown* the Court only held that the plaintiff held a property right because plaintiff was able to show a legitimate claim of entitlement. *Id*. Here, the Appellant is unable to show a legitimate claim of entitlement, particularly in light of the ongoing code violations at the property.

Contrary to Appellant's arguments in his Opposition to the Motion to Dismiss, Courts have found that there is not a property interest in a C/O, even when the C/O was revoked after previously being issued. *See*, *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 451 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 899 (2d Cir. 1999) (concluding "that plaintiffs have failed to allege a property interest in the 1981 certificate of occupancy" and explicitly stating that the issuance of the certificate of occupancy, standing alone, will not establish a vested right); *Panetta v. Vill. of Mamaroneck*, 2012 WL 5992168, at *5 (S.D.N.Y. Feb. 28, 2012) (holding, "[b]ecause plaintiffs have so far failed to plausibly allege a constitutionally cognizable property right in the CO for the single-family dwelling, they cannot sustain a claim that defendants deprived them of that right."); *Ranieri v. Argust*, 254 A.D.2d 771, 772, 679

1. A State Court action is not binding on this Federal Court.

N.Y.S.2d 765 (4th Dept. 1998) (finding that after enactment of ordinance prohibiting locations of businesses for the storage, possession or display of firearms within 100 feet of a residential use, a previously issued certificate of occupancy ceased to be valid, and plaintiffs had no vested right to occupy the premises as a firearms sales store); *Cunney v. Bd. of Trustees of Vill. of Grand View*, 675 F. Supp. 2d 394, 402 (S.D.N.Y. 2009) (noting, "issuance of the certificate of occupancy or the landowner's substantial changes and expenditures, by themselves, will not establish a vested right.").

Thus, even if this Court finds that this action should not have been dismissed on statute of limitations grounds, the dismissal should still be upheld as Appellant did not properly plead a protected property interest in the C/O.

B. Appellant Was Not Deprived Of Due Process

Should Appellant's Procedural Due Process claim survive the lapsed statute of limitations, the claim should still be dismissed because of the existence of a post-deprivation remedy.

"The Second Circuit has repeatedly stated that an Article 78 proceeding is a 'perfectly adequate post-deprivation remedy' for an arbitrary deprivation of a property or liberty interest." *Nardiello v. Town of Oyster Bay*, 2016 WL 1464557, at *3 (E.D.N.Y. Apr. 12, 2016). "According to the Second Circuit, since an Article 78 proceeding provides an 'adequate state post-deprivation procedure to remedy a random, arbitrary deprivation of property or liberty,' its availability precludes a procedural due process violation claim." *Nardiello v. Town of Oyster*

Bay, 2016 WL 1464557, at *3 (E.D.N.Y. Apr. 12, 2016); *see also*, *Nenninger v. Village of Port Jefferson*, *509 F. App'x 36*, 39 n.2 (2d Cir. 2013) ("To the extent [plaintiff] argues that a failure to rule on his [zoning] application—complete or incomplete—denied him procedural due process, the claim fails in any event because [plaintiff] was free to bring an Article 78 mandamus proceeding in New York State court."); *Attallah v. New York Coll. of Osteopathic Med.*, 643 F. App'x 7, 9–10 (2d Cir. 2016) (holding that a plaintiff "could not plausibly claim the deprivation of a protected interest without due process of law because an adequate post-deprivation remedy in the form of an Article 78 proceeding was available under state law."); *Patterson v. Labella*, 2014 WL 4892895, at *21 (N.D.N.Y. Sept. 30, 2014), *aff'd*, 641 F. App'x 89 (2d Cir. 2016); *Nardiello v. Town of Oyster Bay*, 2016 WL 1464557, at *3-4 (E.D.N.Y. Apr. 12, 2016) (dismissing procedural due process claim arising from refusal to act on and denial of building permit due to availability of Article 78 proceeding).

In the claim that centers this appeal, not only was an Article 78 hearing available, Appellant availed himself of this Article 78 process multiple times. (C.A. App. 215); *See*, *Potter v. Incorporated Village of Ocean Beach, et al., Index No. 604776/2024 (Supreme Court of the State of New York, Suffolk County).*

Appellant argues that a post-deprivation hearing will only satisfy due process when a municipal employee "acts in a random or unauthorized manner." (C.A. App. 455). Appellant notes that a pre-deprivation hearing is required when a "municipality's decisionmakers adopt a policy or procedure." (C.A. App. 455). Therefore, Appellant's argument is that the Building Inspector who revoked his

C/O was not acting in a "random or unauthorized manner", and that a post-deprivation hearing does not suffice Appellant's due process claims. (C.A. App. 455-457).

However, Appellant's argument is in direct contradiction to his Amended Complaint. Numerous times throughout his Amended Complaint Appellant argues the Building Inspector who revoked his C/O lacked the authority to do so. (C.A. App. 213-239). Specifically, Appellant stated "in July 2011, the same Building Inspector issued correspondence to Plaintiff purporting to revoke the permanent Certificate of Occupancy. No provision of the Village Code authorized the Building Inspector to do so, neither the Village Mayor nor the Village Board of Trustees adopted a resolution authorizing or endorsing the revocation." (C.A. App. 214). Furthermore, Appellant stated "to date, no formal action has ever been taken in relation to the revocation of the Certificate of Occupancy." (C.A. App. 214). However, now Appellant argues that the Building Inspector was not acting unauthorized, and that formal action was taken by the Village that equates to adopting a policy or procedure that would require a pre-deprivation hearing. Such self-serving contradictory assertions should not be permitted to defeat a motion to dismiss.

Therefore, since a post-deprivation hearing was available to the Appellant, Appellant's procedural due process claim should be dismissed as Appellant was not deprived of due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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