

CPLR 7801: Assessment of Civil Penalty

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in light of the discretion given the courts in determining the issue of substantial right. There is no indication that a change in the law was intended here, and, on the contrary, authorities agree that no change was to be wrought from this omission.²²⁵

ARTICLE 78—PROCEEDINGS AGAINST BODY OR OFFICER

CPLR 7801: Assessment of civil penalty.

In *City of Rochester v. Diksu Corp.*,²²⁶ plaintiff city sought to enjoin defendant corporation from renting certain premises until defendant obtained a certificate of occupancy. Plaintiff moved for: (1) a preliminary injunction; (2) summary judgment; and (3) assessment of a civil penalty. Prior to this action the plaintiff's officer inspected the dwelling, and, finding it uninhabitable, served defendant with notice of the defects and ordered it to repair or vacate the premises. At the time of this action defendant was advised of its right to a hearing on the inspector's findings.

The defendant persistently contended that the premises were in good repair, but refused to request the hearing. The defendant further maintained that it would be futile to require it to apply for a certificate of occupancy since the building official had previously stated (with regard to other property) that his department would never issue a certificate of occupancy to the defendant.

The court, in its discretion, denied plaintiff's request for summary judgment and injunctive relief because of the apparent friction between plaintiff and defendant and the questions of fact arising therefrom. The court, however, did allow the assessment of a civil penalty against the defendant until such time as it should obtain a certificate of occupancy. In so doing, the court pointed out that the defendant should have exhausted its administrative remedies and then proceeded under Article 78 for review of the acts of plaintiff's officials. Instead, defendant chose to ignore the code provisions and, by inaction, gain time and rents.

The decision in the instant case, in effect, forces the defendant to pursue its administrative remedies and then proceed under Article 78 if it desires relief against the plaintiff city.

The practitioner should glean from the foregoing an awareness that the avoidance of Article 78 and its prerequisites, in such situations, will obtain nothing save a delay, for which the courts will assess a penalty.²²⁷

²²⁵ 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5701.19 (1965); see also 7B MCKINNEY'S CPLR 5701, commentary 553 (1963).

²²⁶ 47 Misc. 2d 407, 262 N.Y.S.2d 690 (Sup. Ct. Monroe County 1965).

²²⁷ See generally 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7801.01 (1965).