

**Matter of Jian Song Yang v City of N.Y. Env'tl.
Control Bd.**

2016 NY Slip Op 32069(U)

June 2, 2016

Supreme Court, Queens County

Docket Number: 564/16

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART __2__

In the Matter of the Application of

Index No.: 564/16

JIAN SONG YANG,

Motion Date: 3/29/16

Petitioner,

Motion Seq. No.: 1

For a Judgment under Article of the
Civil Practice Laws and Rules Dismissing
and Vacating the Determination Thereof
and Staying the Enforcement Proceedings
Thereof

-against-

THE CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD,

Respondent.

The following papers read on this Article 78 proceeding by petitioner Jian Song Yang for a judgment annulling the determination of respondent New York City Environmental Control Board (ECB) dated November 26, 2013 which sustained notice of violation (NOV) 35005587Z (87Z) and 35005586R(86R); vacating the default judgment for NOV 35059712M(12M) and NOV 35051744K(44K); dismissing NOVs 87Z, 86R, 12M, 44K, 35055109J (09J) and 35057715Z (15Z); and staying the enforcement of the determinations pending the determination of this proceeding. Respondent ECB cross moves for an order dismissing the verified petition pursuant to CPLR 3211(a)(2), (5) and (7).

	Papers <u>Numbered</u>
Notice of Petition-Verified Petition-Exhibits-.....	1-3
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Memorandum of Law.....	

Upon the foregoing papers the petition and cross motion are determined as follows:

Petitioner Jian Song Yang, the owner of a two-family house located at 123-18 25th Avenue, College Point, New York, commenced the within Article 78 proceeding on December 21, 2015, and seeks a judgment annulling the determination of respondent (ECB) dated November 26, 2013 which sustained NOVs 87Z and 86R; vacating the default judgment for NOVs 12M and 44K; dismissing NOVs 87Z, 86R, 12M, 44K, 09J and 15Z; and staying the enforcement of the determinations pending the determination of this proceeding.

Petitioner alleges that NOV 87Z was issued on July 15, 2013; that a hearing was scheduled for November 26, 2013; that the ALJ issued a decision and order sustaining the violation on November 27, 2013; and that a Certificate of Correction has been accepted for this violation. Petitioner's documentary evidence demonstrates that a Certificate of Correction with respect to NOV 87Z was submitted to the Department of Buildings(DOB) on February 9, 2015.

The petition alleges that NOV 86R was issued on July 15, 2013; that the hearing was scheduled for November 26, 2013; that the ALJ issued a decision and order sustaining the violation on November 27, 2013; that a Certificate of Correction has been accepted for this violation, and that an attempt was made to vacate the petitioner's default on July 15, 2014 and that the ECB denied the request for a new hearing on July 16, 2014. Petitioner's documentary evidence demonstrates that a Certificate of Correction with respect to NOV 86R was submitted to the DOB on June 4, 2015.

The petition alleges that NOV 12M was issued on September 13, 2013; that a Certificate of Correction has been accepted for this violation; that this violation was duplicative of NOV87Z; that hearing date was October 28, 2013, and a default judgment was thereafter entered against petitioner; and that Mr. Yang never received the ticket for said violation and was not properly informed of the hearing date.

Petitioner alleges that NOV 44K was issued on November 29, 2013; that a Certificate of Correction has been accepted for this violation; that this violation was duplicative of NOV87Z and NOV 12M; that the hearing date was January 14, 2014 and a default judgment

was entered thereafter; that Mr. Yang never received the ticket for said violation and was not properly informed of the hearing date; and that an attempt was made to vacate the petitioner's default on July 15, 2014 and that the ECB denied the request for a new hearing on July 16, 2014. Petitioner's documentary evidence demonstrates that a Certificate of Correction with respect to NOV 44K was submitted to the DOB on June 4, 2015.

It is alleged that NOV 09J was issued on August 27, 2014; that a Certificate of Correction has been accepted for this violation; that this violation was duplicative of NOV87Z, NOV 12M and NOV 44K. Petitioner's documentary evidence demonstrates that a Certificate of Correction with respect to NOV09J was submitted to the DOB on June 4, 2015.

It is also alleged that NOV 15Z was issued on October 10, 2014; that a Certificate of Correction has been accepted for this violation; and that this violation was duplicative of NOVs 87Z, 12M, 44K and 09J. Petitioner's documentary evidence demonstrates that a Certificate of Correction with respect to NOV 15Z was submitted to the DOB on June 4, 2015.

Petitioner alleges that his July 22, 2014 application to appeal NOVs 87Z, 12M, 44K and 09J were denied by the respondent on August 1, 2014, because of the excess of the time limit for filing.

Petitioner seeks to have this court vacate all of the NOVs and stay enforcement proceedings, as the Certificates of Correction have been accepted. Petitioner asserts that he faces the prospect of paying a substantial fine for a matter that was repeatedly imposed as violation, and that he was not given an opportunity to present evidence with respect to the ECB's determinations of July 16, 2014 and August 1, 2014. Petitioner therefore alleges that the respondent's determination was arbitrary and capricious, unreasonable, unsupported by substantial evidence and contrary to law.

Respondent ECB cross moves for an order dismissing the verified petition on the grounds of failure to exhaust administrative remedies, statute of limitations and failure to state a cause of action, pursuant to CPLR 3211(a)(2) (5) and (7). Petitioner does not oppose the cross motion.

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" (CPLR 217 [1]). Agency action is "final and binding upon the petitioner" when the petitioner receives notice that the agency has "reached a definitive position on the issue that inflicts actual, concrete injury and . . . the injury inflicted may not be prevented or significantly

ameliorated by further administrative action or by steps available to the [petitioner]” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; see *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165 [1991]; *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72[1989]; *Matter of Olivares v Rhea*, 119 AD3d 866, 867 [2d Dept 2014]).

It is well settled that a litigant cannot obtain judicial review of an administrative determination without first exhausting all available administrative remedies (CPLR 7801; *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 [1978]). Title 48 of the Rules of the City of New York (RCNY) establishes ECB hearing procedures. It provides that hearing officers preside over enforcement proceedings and prepare recommended decisions and orders (48 RCNY § 3-57). A party aggrieved by a recommended decision and order may appeal within 30 days of the mailing of the recommended decision and order (48 RCNY § 3-74). A party may not appeal a recommended decision and order unless he or she: (1) pays the civil penalty imposed; (2) posts a bond; or (3) obtains a waiver from ECB (48 RCNY § 3-73). A party aggrieved by the appeal decision and order may appeal within 10 days of the mailing of the final decision and order (48 RCNY § 3-75).

A final determination was made by the ECB on June 25, 2014, with respect to NOVs 12M and 44K, and these orders were mailed to Mr. Yang at the address of the subject premises on June 26, 2014. Although Mr. Yang, in his online June 14, 2014 application to vacate said orders asserted that with respect to NOV 12M stated that he did not live at the subject premises, in his July 28, 2014 application to vacate NOVs 12M, 44K, 87Z and 86R, he stated that he lived at the subject premises, and submitted a copy of his federal individual 2013 income tax return which listed the subject address as his home address. Mr. Yang, in his petition, does not assert that the June 25, 2014 orders were mailed to an incorrect address. Therefore, as regards the June 25, 2014 orders, the applicable four month statute of limitations commenced on June 26, 2014 and expired on October 27, 2014 (CPLR 217; General Construction Law §§20 and 25-a). Inasmuch as petitioner did not commence the within proceeding until December 21, 2015, his claims with respect to the ECB’s orders of June 25, 2014, which denied his request to vacate his default with respect to NOVs 12M and 44K, are now time-barred.

With respect to NOVs 87Z and 86R, petitioner’s representative appeared at a hearing and the ALJ issued a decision and order dated November 26, 2013. The affidavit of service submitted herein establishes that said decision was mailed to Mr. Yang’s representative on December 2, 2013. Petitioner was required to file an administrative appeal of said decision and order within 30 days of the mailing of said decision and order. Mr. Yang, however, failed to file an Appeal Application challenging the November 26, 2013 order until July 28, 2014. Although he checked off a box on the appeal form stating that the appeal would be

received within 30 days of the mailing date of the decision, he did not claim that he had not been properly served with the November 26, 2013 decision and order. In the within petition Mr. Yang does not claim that he was not properly served with the November 26, 2013 decision and order, nor does he claim that he timely appealed said determination.

This court finds that the ECB in its letter dated August 1, 2014, properly denied the appeal as untimely, and that said denial became final on August 11, 2014, as petitioner failed to submit any documentation to the ECB which established its rejection of the appeal was erroneous. Petitioner thus failed to exhaust his administrative remedies, as he failed to timely file an administrative appeal, and failed to timely demonstrate that the ECB's rejection of the appeal was erroneous. In addition, to the extent that petitioner is seeking judicial review of the ECB's determination of August 1, 2014, which became final on August 14, 2014, the within proceeding is untimely, as it was commenced more than four months after August 14, 2014.

A hearing was held on NOV 09J and NOV 15Z on December 16, 2014, at which time Merrin Du, "Authorized Representative" appeared for Mr. Yang. The ALJ, in decision and order dated December 31, 2014, sustained the violations and imposed an Aggravated I penalty in the sum of \$6000.00 for NOV 09J and imposed an Aggravated I penalty of \$6,000.00 for NOV 15Z. Petitioner was required to file an administrative appeal of said decision and order within 30 days of the mailing of said decision and order. The court notes that the affidavit of service submitted by respondent in connection with said order only lists the "EFC" and violation numbers and does not set forth the names and addresses of the persons served with the orders. Therefore, the court is unable to determine whether Mr. Yang's time in which to appeal the December 31, 2014 order expired prior to the commencement of this proceeding. However, as Mr. Yang did not file an administrative appeal of the ALJ's order of December 31, 2014, the within proceeding is premature as petitioner has failed to exhaust his administrative remedies.

In view of the foregoing, respondent's cross motion to dismiss the petition in its entirety on the grounds of statute of limitations and failure to exhaust administered remedies, is granted.

Dated: June 2, 2016

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J.S.C.