RAL Realty C Dee LLC v City of New York

2024 NY Slip Op 31391(U)

April 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 535288/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of April, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RAL REALTY C DEE LLC,

Petitioner,

-against-

CITY OF NEW YORK, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NYC DEPARTMENT OF BUILDINGS,

Respondents,

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Index No.: 535288/2022

ORDER

The following e-filed papers read herein: NYSCEF Doc. Nos.:

Notice of Petition/Affirmation in Support/Exhibits..............................	1 – 7
Answer in Special Proceeding/Memorandum of Law in Opposition.......	8 – 13

In this matter, Ral Realty C Dee LLC ("Petitioner") filed a petition for judicial review of the decision by the Respondent New York City Office of Administrative Trials and Hearings ("OATH"), denying Petitioner's motion to vacate a default judgment on violations issued by the Environmental Control Board ("ECB") and the Department of Buildings ("DOB") on Petitioner's property located at 2235 86th Street, Brooklyn, New York. Petitioner brings this challenge, pursuant to CPLR Article 78, on the grounds that DOB did not properly serve Petitioner the Notice of Violation ("NOV"), and as a result, that their denial of the motion to vacate the decision was arbitrary and capricious. In opposition, Respondents OATH, DOB, ECB, and City Of New York, ("the City") (collectively "Respondents") seek to dismiss the Petition in its entirety, arguing that Petitioner moved to vacate the default judgment more than one year after the default was issued,

failed to show exceptional circumstances to justify the delay, and is not entitled to mandamus relief.

This action arises out of DOB's issuance of a summons against Petitioner on February 27, 2018 for conducting work without a permit, after a metal canopy was erected outside of the subject property.[1] The summons, Number 35321877L ("Summons 77L"), contained an Affirmation of Service, noting that after speaking to the cashier who "had no idea about the managing agent," the issuing officer served the Summons pursuant to New York City Charter § 1049-a(d),(2), Affix and Mail Service. The affirmation states that the summons was posted on the front of the store, and a copy addressed to Petitioner was mailed to the subject property, as well as to Petitioner's mailing address at 3820 Nostrand Ave, Brooklyn, New York. A subsequent summons, Number 35380070K ("Summons 70K"), was issued on December 31, 2018, for failing to comply with the order from the Commissioner of the DOB to obtain proper permits for the metal canopy and awning. This summons was again served pursuant to Section 1049-a(d),(2), and the affirmation states that the issuing officer spoke with the store owner who declined to accept service. The notice was then "posted inside next to the counter cashier", and mailed to the subject premises and Petitioner's address on Nostrand Avenue. Petitioner's filings only address Summons 70K, but it is of note that this was the second summons for the same violation.

A hearing on Summons 70K was scheduled for April 8, 2019. Petitioner failed to appear at that hearing, and default judgment was entered against him by OATH. The Notice of Default was mailed on April 15, 2019 to the subject premises and to Petitioners address on Nostrand Avenue. Petitioner filed a request with OATH to reopen a default judgment on November 8, 2022, on the grounds that he had an excuse for the non-appearance and he was not put on notice of the violation because it was posted in an inconspicuous, tenant-occupied space. On November 15, 2022, OATH denied the request, as it was submitted more than one year after the date of the default decision and Petitioner did not establish that exceptional circumstances prevented him from appearing. Petitioner then brought this action pursuant to CPLR Article 78.

Petitioner argues that the denial of his request was arbitrary and capricious because it "fails to conform to prior administrative precedent." To support this assertion, he cites to *New York City v. Pliskin, Rubano and Baum*, Appeal # 34689, a previous OATH Appeals decision that held that

[1] Respondent's Exhibit A; DOB Summons and Commissioner's Order #35321877L.

affixing a NOV to a counter did not constitute proper service.[2] Petitioner further contends that 48 RCNY § 6-21 does not define the "exceptional circumstances" which would allow a request for a new hearing to be granted, and as such his excuse of deficient notice qualifies as an exceptional circumstance.[3] Further, Petitioner argues that the generic denial issued by OATH did not offer a specific explanation to Petitioner as to the reason for the denial.

In their answer, Respondents allege that Petitioner failed to show that the affixation to the counter was not sufficiently conspicuous. They aver that the case that Petitioner relies on is not analogous to the present case, for in *Pliskin*, OATH's determination was made after a hearing by an Administrative Law Judge, where the respondent appeared and offered testimony, supported by an affidavit from the respondent's tenant's employee, stating that the employee was not authorized to accept service on behalf of respondent. In this case, Respondent's opposition papers point to their own OATH precedent, *DOB v. BQE Park LLC*, Appeal No. 2300671, in which the OATH Appeals Board ruled that "the mere fact that copies of the summonses were affixed in a tenant's space does not, on its own, require the Board to conclude that affixing the summonses there was not reasonably calculated to give notice to the respondent."[4] Respondents further argue that Petitioner failed to show exceptional circumstances that would entitle him to a new hearing, as Petitioner offered no justification as to why Petitioner ignored the default when it was mailed to the subject premise and his mailing address. Respondents further argue Petitioner is not entitled to mandamus relief, as OATH had the discretion to grant or deny the request since it was made more than one year after the default was issued. In support, Respondents submit copies of Summons 77L, Summons 70K, the tax records of the property, and the notices of the default with affidavits of mailing.

"Pursuant to City Charter §1049-a and the rules set forth in Title 48 of the Rules of the City of New York ("RCNY"), adjudication of summonses based on alleged violations of laws and regulations overseen by DOB is conducted by OATH. A party that fails to appear on the designated hearing date may be held in default by OATH and thereafter be subject to the fine prescribed for the given violation (City Charter §1049-a[d][1][d])" (*C v. City of New York* (In re In), 2024 NYLJ

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[2] Petitioner's Exhibit; Denial Letters and Request, including DOB Summons and Commissioner's Order # 35380070K.

[3] Petitioner incorrectly cites this rule in their petition as 48 RCNY § 6-12, an evidentiary rule, but the correct rule is 48 RCNY § 6-21, Request for a New Hearing after a Failure to Appear (Motion to Vacate a Default).

[4] Respondents refer to this case in their opposition papers as "Exhibit E," but they did not attach it to their papers.

LEXIS 178 [Sup Ct, NY County 2024]). After a default decision is issued, "[t]he Tribunal will notify the Respondent of the issuance of a default decision by mailing a copy of the decision or by providing a copy to the Respondent or the Respondent's representative who appears personally at the Tribunal and requests a copy' (48 RCNY §6-20[d]). A party who has received a default determination may request a new hearing (48 RCNY §6-21[a]), and a first request submitted within seventy-five days of the default would be granted (48 RCNY §6-21[b]). Requests made after seventy-five days of the default but within one year must include a statement setting forth a reasonable excuse for the default and are granted at the Hearing Officer's discretion (48 RCNY §6-21[c]). Requests submitted outside these periods may be granted upon a showing of '*exceptional circumstances and in order to avoid injustice*' (48 RCNY §6-21[f]). A denial of such a request constitutes a final determination and is not subject to further review by or appeal to OATH (see 48 RCNY §6-21 [j])" (*id*).

A proceeding under 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]; *Matter of Kaneev v City of NY Envtl. Control Bd.*, 149 AD3d 742, 744 [2d Dept 2017] *quoting Hilburg v New York State Dept. of Transp.*, 138 AD3d 1062, 1063, 31 NYS3d 126 [2016]). Mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty (*Klostermann v Cuomo,* 61 NY2D 525 [1984]).

In reviewing an agency's decision pursuant to Article 78 of the CPLR, the Court's scope of review is narrow and limited to questions of law and the extent of the sanction imposed (*Pell v Board of Education,* 34 NY2d 222 230-31 [1974]). The Court also cannot interfere unless there is no rational basis for the exercise of discretion, or the action complained of is arbitrary and capricious (*id.* at 231; *Matter of Colton v Berman,* 21 NY 2d 322 [1967]). The arbitrary and capricious test relates to whether a particular action should have been taken or justified, and whether the administrative action is without foundation in fact (*Pell* at 231). It is not the function of judicial review in an Article 78 proceeding for the court to weigh the facts and merits de novo and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any rational basis (*id. at* 378).

Further, in a CPLR 7803 (3) proceeding, responsive affidavits, made by an affiant with firsthand knowledge of the decision-making process undertaken by the agency which were not part of the administrative record, may be considered by the Supreme Court when there is no

administrative hearing and the issue is not one of substantial evidence but, rather, whether the agency's determination has a rational basis (*Matter of Menon v NY State Dept. of Health*, 140 AD3d 1428 [3d Dept 2016]; *Matter of Kirmayer v NY State Dept. of Civ. Serv.*, 24 AD3d 850 [3d Dept 2005]; *see also* CPLR 7804 [d]; CPLR 7804 [e]). "Where there was no administrative hearing, the agency may submit an employee's or official's affidavit to explain the information that was before the agency and the rationale for its decision, and courts may consider such an affidavit even though it was not submitted during the administrative process" (*Matter of Hammonds v NY State Educ. Dept.*, 206 AD3d 1334 [3d Dept 2022] [internal citations omitted]).

The Court of Appeals has previously held that, "New York City Charter § 1049-a (d)(2)(b) permits use of affix and mail service after a single reasonable attempt by a DOB inspector to personally deliver the NOV at the premises" (*Matter of Mestecky v City of NY*, 30 NY3d 239 [2017]). Here, the Respondents offered affidavits attesting to proper service and mailing. The violations that led to the default were served pursuant to New York City Charter § 1049-a(d)(2), Affix and Mail Service. The DOB served two NOV's for the same violation, mailing both to the subject premises owned by Petitioner, as well as to Petitioner's mailing address at the Nostrand address. Respondents further mailed the notice of default judgment to Petitioner at the two addresses, pursuant to 48 RCNY 6-20(d). It is well established that, "[a] properly executed affidavit of service raise[s] a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption" (*Kihl v Pfeffer*, 722 N.E.2d 55, 58 [1999]).

OATH's decision was reasonable, rational, supported by evidence, and consistent with applicable law. Under 48 RCNY §6-21[f], OATH has discretion to consider a request for a new hearing more than one year after the default only "in *exceptional circumstances* and in order to avoid injustice." The Court need not address whether the affixation of Summons 70LK was sufficiently conspicuous because bare denial of proper service does not constitute an exceptional circumstance. Moreover, Respondents issued the default judgment against Petitioner, sent to him pursuant to 48 RCNY §6-20[d], informing him of his right to appeal, and yet he still failed to file a timely appeal. Petitioner neither contested that he was properly notified of the default nor explained why he did not request a new hearing within seventy-five days of the default.

The court finds that OATH's decision to deny the request for vacatur was not arbitrary and capricious, as Petitioner failed to proffer an exceptional circumstance to explain why he filed his request more than three years after the default was issued.

ORDERED, that Petitioner's Petition for judicial review of an administrative decision, challenging OATH's decision to deny his motion to vacate a default judgment on the grounds that Respondent's did not properly serve Petitioner, is denied in its entirety.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice