

**Matter of Sibersky v New York City Env'tl. Control Bd.**

2007 NY Slip Op 32355(U)

July 30, 2007

Supreme Court, New York County

Docket Number: 0104031/2007

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 35

*In the Matter of the Application of  
ALEX SIBERSKY*

INDEX NO. 104031/07  
MOTION DATE 7/13/07  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

*NYC ECB; NYC DOB; et al.*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

**FILED**

JUL 31 2007

NEW YORK  
COUNTY CLERK'S OFFICE

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of Petitioner Alex Sibersky for judgment pursuant to Article 78 of the CPLR (1) rescinding and annulling the final determination of Respondent New York City Department of Housing Preservation & Development ("HPD"), which declined to dismiss outstanding HPD violations, on the grounds that the determination was arbitrary and capricious and the near identical Department of Buildings Notice of Violation hearing no. 34340953L ("the DOB NOV") was previously dismissed in a New York City Environmental Control Board ("ECB") hearing; and (2) awarding to Petitioner the costs and disbursements of this proceeding, is **denied in its entirety**. It is further

ORDERED that the cross motion of the ECB, DOB Commissioner, Inspector Bourne MacLaren, HPD and the City of New York ("Respondents") for an order dismissing the petition is **granted, on the merits**. It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on Petitioner.

Dated: 7/30/07

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x

In the Matter of the Application of  
ALEX SIBERSKY,

Petitioner,

Index No. 104031/07

For a Judgment Pursuant to Article 78 of the C.P.L.R.  
in the Nature of Mandamus to Review

-against-

**DECISION/ORDER**

NYC ENVIRONMENTAL CONTROL BOARD, NYC  
DEPARTMENT OF BUILDING COMMISSIONER,  
BOURNE MACLAREN, INSPECTOR, BADGE #3249,  
DEPARTMENT OF HOUSING PRESERVATION &  
DEVELOPMENT OF THE CITY OF NEW YORK,  
CITY OF NEW YORK,

Respondents,

-----x

EDMEAD, J.S.C.

**FILED**  
JUL 3 1 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

Petitioner Alex Sibersky ("Petitioner") moves for judgment pursuant to Article 78 of the CPLR (1) rescinding and annulling the final determination of Respondent New York City Department of Housing Preservation & Development ("HPD"), which declined to dismiss outstanding HPD violations, on the grounds that the determination was arbitrary and capricious and the near identical Department of Buildings Notice of Violation hearing no. 34340953L ("the DOB NOV") was previously dismissed in a New York City Environmental Control Board ("ECB") hearing; and (2) awarding to Petitioner the costs and disbursements of this proceeding.

The ECB, DOB Commissioner, Inspector Bourne MacLaren, HPD and the City of New York ("Respondents") cross move for an order dismissing the petition pursuant to CPLR § 3211(a)(5) because the petition is barred by the statute of limitations.

### Petitioner's Contentions

Petitioner is the owner of 185 Lenox Avenue, NY, NY 10026 ("the premises"). Petitioner contends that the decision of the HPD not to dismiss the HPD violations pertaining to the premises was inaccurate and improper because HPD did not consider the facts before it, including the February 27, 2003 dismissal of the DOB NOV by ECB Hearing Officer Shapiro. According to Petitioner, the violations themselves were based upon out-of-date records. Further, there were no outstanding violations after the DOB NOV was dismissed.

### Respondents' Contentions

Section 1404 of the New York City Charter ("Charter") empowers the ECB to enforce provisions of the Administrative Code of the City of New York and the Rules of the City of New York relating, *inter alia*, to the construction, maintenance, use, occupancy and safety of buildings in the City of New York. The ECB can conduct adjudicatory proceedings, impose penalties, and enter and enforce judgments. Among the proceedings conducted by the ECB are those involving violations of the laws and regulations enforced by the DOB.

Pursuant to Charter § 1802, the HPD is responsible, *inter alia*, for "all functions of the city relating to the rehabilitation, maintenance, alteration and improvement of residential buildings and privately owned housing . . ." including, but not limited to, enforcement of the New York State Multiple Dwelling Law ("MDL").

The Respondents contend that on September 24, 2002, an HPD inspector ("Inspector") issued violation nos. 4353165 and 4353167 ("the HPD violations") against the premises. The

HPD violations were issued for violation of MDL §§ 300, 301 and 302<sup>1</sup> and directed Petitioner to file plans and obtain a Certificate of Occupancy, or restore the premises to the prior legal condition. HPD Notice of Violation no. 1890155 (“the HPD NOV”) was sent to Petitioner on September 27, 2002.

On November 24, 2002, the Inspector issued DOB Notice of Violation and Hearing no. 34340953L (“the DOB NOV”), which was returnable for a hearing at ECB on December 26, 2002. The DOB NOV was issued for violation of Administrative Code § 27-217<sup>2</sup> and also directed Petitioner to obtain a Certificate of Occupancy or restore the subject premises to the prior legal condition. On February 27, 2003, ECB Hearing Officer Shapiro dismissed the DOB NOV on procedural grounds with DOB’s consent. Respondents contend that dismissal of the DOB NOV did not result in the dismissal of the HPD violations.

On January 17, 2003, Petitioner submitted a request to HPD for dismissal of all HPD violations against the premises. In response, HPD re-inspected the premises on January 27, 2003. Several outstanding violations were found to have been corrected and were subsequently dismissed; however, the subject HPD violations were not cured and remain open violations. HPD entered the results of the January 27, 2003 inspection into its records on or about January 30, 2003. Respondents allege that HPD mailed the inspection report to Petitioner within forty-five days of the re-inspection.<sup>3</sup>

<sup>1</sup> “3 ‘b’ rooms now converted into class ‘a’ apt. located at apt 4, 3<sup>rd</sup> story . . . 2 ‘b’ rooms now converted into 1 class ‘a’ apt., 1<sup>st</sup> story, apartment.”

<sup>2</sup> There was an “occupancy contrary to that allowed by Department records. Records states [sic] 2 ‘B’ rooms on the 1<sup>st</sup> story and 3 ‘B’ rooms on the 3<sup>rd</sup> story. Now converted to 1 Class ‘A’ apt. on 1<sup>st</sup> and 3<sup>rd</sup> story.”

<sup>3</sup> Angela Velasquez, a clerical aid in the HPD Code Enforcement Unit since July, 2000, testified that her responsibilities at all relevant times included “mailing re-inspection reports to the dismissal request applicants.” Velasquez further testified that it was, and continues to be, the practice of the Code Enforcement Unit to mail each re-inspection report to the applicant within forty-five days of the date of re-inspection. Afterwards, the date of the dismissal, date of the mailing, applicant’s name and mailing address are recorded in a log. This information is also

CPLR Article 78 creates a special proceeding for challenging the final determination of an administrative agency in court. CPLR § 217(1) provides that “[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” Respondents contend that Petitioner commenced this Article 78 proceeding by petition dated March 9, 2007 – over four years after the HPD determination became final. Even if the Court were to consider the January 27, 2003 re-inspection report as the final determination<sup>4</sup> for a statute of limitations analysis, the petition is time-barred and must be dismissed.

In the alternative, Respondents argue that even if the court finds that the petition is not barred by the statute of limitations, the petition lacks merit and should be dismissed. Petitioner’s argument that the subject HPD violations should be dismissed based on the DOB NOV dismissal lacks merit because they are separate and distinct violations. Further, the dismissal of the DOB NOV was based upon procedural defects, and was not a decision on the merits. Therefore, there is no conflict between the ECB dismissal of the DOB NOV and the HPD determination not to dismiss the HPD violations. Finally, dismissal of the HPD violations is not warranted because Petitioner has not asserted that he has obtained a Certificate of Occupancy or that he returned the premises to the prior legal occupancy.

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recorded on the dismissal application itself, which is filed by date.

According to Velasquez, “the logs and dismissal request applications dated prior to December 9, 2004 are missing. . . . However, based upon the Code Enforcement Unit’s well-established and routine practice of mailing an applicant a copy of the re-inspection report within forty-five days of the re-inspection . . . I believe that the re-inspection report from the January, 2003 re-inspection of the subject premises, was mailed to the Petitioner within forty-five days of the re-inspection. Therefore, Petitioner would have received the re-inspection report, at the latest on or about March 12, 2003.”

<sup>4</sup> As opposed to the date the HPD NOV was mailed - September 27, 2002.

### Petitioner's Reply

In reply, Petitioner argues that the HPD decision never became final and binding upon Petitioner and that the Petition is timely. The Petition is not barred by the statute of limitations because HPD did not serve notice of its final determination. Petitioner alleges that he only became aware of the HPD decision on or about March 9, 2007 while filing an HPD Building Registration at HPD. The statute of limitations continued to toll in the interim. He notes that the Velasquez affidavit, relied upon by ECB as evidence of notice, is pure speculation and offers no proof of any record that notice was ever sent to Petitioner. Rather, Velasquez's testimony concedes that "the logs and dismissal request applications dated prior to December 9, 2004 are missing. They are most likely either misplaced . . . or . . . are not accessible."

Petitioner further contends, *inter alia*<sup>5</sup>, that the work done on the premises did not violate the MDL, that the DOB and HPD violations were identical, based upon the same facts and issued by the same Inspector, and that the HPD decision contradicts the ECB dismissal.

### Analysis

A party may move for judgment dismissing a cause of action on the ground that the cause of action may not be maintained because of the Statute of Limitations (CPLR § 3211 [a] [5]). "An article 78 proceeding must be commenced within four months 'after the determination to be reviewed becomes final and binding upon the petitioner'" (*Matter of Vil. of Westbury v Dept. of Transp. Of State of New York*, 75 N.Y.2d 62, 72 [1989], quoting CPLR § 217 [1]). An unambiguous administrative determination is final and binding so as to commence the running of

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<sup>5</sup> Plaintiff also advances arguments based upon collateral estoppel, *res judicata*, double jeopardy, due process, and the availability of mandamus.

the Statute of Limitations when the petitioner has received notice of the determination and is aggrieved by it (see *Matter of Edmead v McGuire*, 67 N.Y.2d 714, 716 [1986]; *Matter of Cauldwest Realty Corp. v City of New York*, 160 A.D.2d 489, 490 [1st Dept 1990]). However, “[w]here an ambiguity as to when a final determination has been made was created by the official body, any question as to when the statutory period begins to run will be resolved in favor of the petitioner” (*Matter of Montalvo v Crotty*, 137 A.D.2d 437, 438-39 [1st Dept 1988]).

CPLR § 7803 states that the court review of a determination of an agency consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or an abuse of discretion, or was arbitrary and capricious (CPLR § 7803(3); see *Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept 1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious when the action is taken “without sound basis in reason and . . . without regard to the facts” (*Matter of Pell v Bd. of Educ.*, 34 N.Y.2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious (*Id.*). The court’s function is completed on finding that a rational basis supports the agency’s determination (see *Howard v Wyman*, 28 N.Y.2d 434, 438 [1971]). Where the agency’s determination is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Mgt. Corp. v New York City Conciliation and Appeals Bd.*, 112 A.D.2d 72 [1st Dept], *aff’d* 66 N.Y.2d 1032 [1985]).

*Pell v Bd. of Educ.*, 34 N.Y.2d 222, 230-31 (1974), is instructive on the basic standard of Article 78 review:

“In article 78 proceedings, “the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; ‘the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is “substantial evidence.”” (Cohen and Karger, Powers of the New York Court of Appeals, § 108, p. 460; 1 N.Y. Jur., Administrative Law, §§ 177, 185; see *Matter of Halloran v. Kirwan*, 28 NY 2d 689, 690 [dissenting opn. of Breitel, J.]). “The approach is the same when the issue concerns the exercise of discretion by the administrative tribunal: The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is ‘arbitrary and capricious.’” (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460-61; see, also, 8 Weinstein-Korn-Miller, *N.Y. Civ. Prac., par. 7803.04 et seq.*; 1 N.Y. Jur., Administrative Law, §§ 177, 184; *Matter of Colton v. Berman*, 21 NY 2d 322, 329).

Where, as here, the agency’s determination involves factual evaluation within an area of the agency’s expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (see *Flacke v Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 693 [1987]). Courts are required to “resolve [any] reasonable doubts in favor of the administrative findings and decisions” of the responsible agency (*Town of Henrietta v Dept. of Envtl. Conservation*, 76 A.D.2d 215, 224, 430 N.Y.S.2d 440, 448 [4th Dept 1980]; see also *Jackson v New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 [1986]; *City of Rome v New York State Dept. of Health*, 65 A.D.2d 220, 225 [4th Dept 1978], *lv. to app. denied*, 46 N.Y.2d 713 [1979]).

Upon review of the record before this court, there are insufficient grounds upon which to conclude that HPD provided notice to Petitioner regarding its decision to not dismiss the HPD violations. Respondents have provided no evidence that notice was sent to Petitioner and, concededly, cannot produce such evidence given HPD’s inability to locate the relevant records. Velasquez’s testimony to the effect that she believed the notice was mailed pursuant to HPD

procedure is unpersuasive. Construing the ambiguity created by HPD in favor of Petitioner, the Statute of Limitations thus continued to toll until Petitioner received actual notice of the HPD decision on March 9, 2007, rendering the instant petition timely.

Nevertheless, the petition must fail on the merits. The record reveals that the HPD did not render its decision without a rational basis or without regard to the facts. The dismissal by ECB of the DOB NOV has no bearing upon the HPD violations, as they are separate and distinct violations. Moreover, the fact that these violations were based upon the same underlying facts and issued by the same Inspector does not render the HPD decision inconsistent, as the dismissal of the DOB NOV was based upon procedural defects as opposed to any inaccuracy in the DOB violations themselves. HPD relied upon the January 27, 2003 re-inspection of the premises as the basis of its decision. The HPD decision must be accorded great deference because it involved subject matter within the agency's expertise (*see Flacke*, 69 N.Y.2d at 363). Resolving any reasonable doubts in favor of the HPD findings and decision, the Petitioner has failed to establish that the HPD decision was arbitrary or capricious (*see Town of Henrietta*, 76 A.D.2d at 224).

This court finds the balance of Petitioner's arguments to be of no moment.

Conclusion

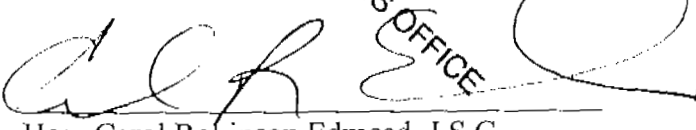
Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Alex Sibersky for judgment pursuant to Article 78 of the CPLR (1) rescinding and annulling the final determination of Respondent New York City Department of Housing Preservation & Development ("HPD"), which declined to dismiss outstanding HPD violations, on the grounds that the determination was arbitrary and capricious and the near identical Department of Buildings Notice of Violation hearing no. 34340953L ("the DOB NOV") was previously dismissed in a New York City Environmental Control Board ("ECB") hearing; and (2) awarding to Petitioner the costs and disbursements of this proceeding, is **denied in its entirety**. It is further

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Dated: July 30, 2007

  
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Hon. Carol Robinson Edmead, J.S.C.