Matter of Schulder v New York City Envtl. Control Bd.
2010 NY Slip Op 33554(U)
December 10, 2010
Sup Ct, Queens County
Docket Number: 7530/2010
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

X

IN THE MATTER OF THE APPLICATION OF ROBIN SCHULDER,

Petitioner,

- against -

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and DEPARTMENT OF BUILDINGS,

Respondent.

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 ANNULLING A DETERMINATION FINDING THAT PETITIONER VIOLATED SECTION 22-00 OF THE NEW YORK CITY ZONING ORDINANCE.

X

INDEX NO. 7530/10

MOTION SEQ. NO. 1

BY: WEISS, J.

DATED: December 10, 2010

In this hybrid Article 78 proceeding and action for declaratory judgment, petitioner pro se Robin Schulder, seeks (1) a judgment annulling the determination of respondent New York City Environmental Control Board (ECB) dated January 21, 2010, which affirmed a determination that petitioner had violated Zoning Resolution § 22-00 by storing a motor vehicle that was unregistered and lacked license plates on her property, and imposed a fine of $800.00; (2) declaring the "dead storage" provision of the Zoning

Resolution to be unconstitutionally vague; and (3) awarding legal fees, costs and disbursements pursuant to 42 USC § 1983.

Petitioner Robin Schulder resides in a one-family home located at 80-42 Bell Boulevard, Queens Village, New York. On November 21, 2008, a New York City Department of Buildings (DOB) inspector observed a black Cadillac, without license plates or a registration sticker parked in the driveway of Ms. Schulder's premises. The inspector issued a Notice of Violation (NOV) to Ms. Schulder, which states as follows: "ILLEGAL USE IN A RESIDENTIAL DISTRICT. STORAGE OF UNREGISTERED VEHICLE ON PREMISES. BLACK CADILLAC PARKED IN FRONT DRIVEWAY NO PLATES OR REGISTRATION."

The NOV lists the "Violating Conditions Observed," as "Class 2," with an "Infraction Code B54" and "B205," and that the "Provision of Law" is "ZR 22-00." The NOV states that the remedy is to "discontinue illegal use" and provides for a cure date of December 31, 2008 and a hearing date of January 13, 2009.

The issuing officer also completed an "Affidavit/Affirmation of Service" with a jurat in the "State of New York, County of QNS" which states that it is on "November 21, at 2:30 P.M. at 80-42 Bell Blvd" the officer served the Notice of Violation and Hearing on the respondent named therein. Although the form calls for the full address of the person served, the affidavit of service does not provide the full postal address, or county where the service was made. The inspector checked off Section "C. Alternate Method/Charter Service"

which provides: "Alternate method of service pursuant to New York City Charter § 1404 (d)(2)(ii) [Affix and Mail Service]. A true copy of the notice of violation was posted in a conspicuous place upon the premises where the violation occurred after a reasonable attempt to effectuate service upon the respondent or upon other person whom service may be made was unsuccessful."

"Additional Information (Explain specific details on where violation was posted on the premise or other information):" The word "Posted" is hand written in the space provided.

The issuing officer, "C. Martelli," filled out the NOV form and signed it. The NOV form, reads above the signature line as follows: "I personally observed the violation(s) and/or verified their existence through review of departmental records." Below the signature line the NOV reads as follows: "This statement is affirmed under the penalty of perjury." The NOV was also signed by the issuing officer's supervisor.

Perry S. Reich, on behalf of his wife Robin Schulder, in a letter dated November 24, 2008 and addressed to the Environmental Control Board (ECB), requested that the NOV be dismissed, or in the event that the request was denied that the matter be set down for a hearing and the period in which to cure the violation be extended. Mr. Reich contested service of the NOV, and stated that the NOV was "simply placed on our door on the day that the violation was purportedly observed." Under section 1404(2)(d) substituted service is permitted only where a "reasonable attempt has been made to deliver such notice to a person

in such premises." No such "reasonable attempt" was made here, and moreover, substituted service requires a subsequent mailing."

Mr. Reich further argued that the parking of a vehicle in one's own driveway could not constitute a violation of the zoning ordinance, as this is expressly permitted by Section 25-412 of the Zoning Resolution, and that contrary to the DOB's claim, Use Group 16 which prohibits "dead storage" in residential district, this only applies to commercial uses such as an auto repair shop. Mr. Reich asserted that Section 25-412, permits such "long term storage" without qualification, and argued that as the term "dead storage" is not defined in the zoning resolution, the section is constitutionally void for vagueness. Mr. Reich sent a substantially similar e-mail to the ECB on November 24, 2008. Mr. Reich did not receive a response to these requests, and he sent a letter to the ECB, dated December 29, 2008, inquiring as to the status of the NOV. The ECB did not respond to any of these requests to dismiss and adjourned the hearing from January 13, 2009 to June 30, 2009.

At the June 30, 2009 OATH hearing, Mr. Reich stated that he was authorized by his wife to appear on her behalf. Mr. Reich conceded that on the date the NOV was issued, the subject motor vehicle did not have license plates or a registration. He asserted that the violation was cured, in that the vehicle had been removed prior to Christmas 2008, but that he did not have any documentation as to the date the vehicle was removed, including a certificate of correction. He asserted that he called the agency and was informed that even

if he submitted an affidavit, an inspector would come to the property to see if the vehicle had been removed. He also asserted that an affidavit of correction was mailed to the DOB.

Mr. Reich asserted that the service of the NOV was in violation of Section 1404(d)(2) of the New York City Charter (now renumbered as Section 1049-a[d][2]), in that the affirmation of service did not state where the notice was placed and only stated that it was "posted." He further argued that the City Charter requires that due diligence be exercised before substituted service is made, and that the posting of the notice on the same day the violation was observed does not constitute due diligence. Mr. Reich stated that he and his wife never received the NOV in the mail.

Mr. Reich also asserted that the DOB's evidence only showed that the vehicle was parked on the property on a single day, rather than stored, and this was a permissible use; that the vehicle was removed prior to the cure date; and that the term "dead storage" was not defined in the zoning regulation and therefore, the ordinance was unconstitutionally vague.

Counsel for DOB asserted that although the NOV does not state that there was "storage," it is illegal under the zoning resolution to store an unregistered and non-plated vehicle in a residential district. She further asserted that the issue of service should have been raised first, and that service under the City Charter means that the NOV is posted on the front door, followed by a mailing to the place of occurrence and to any other address in the Department of Finance or HPD records. At the hearing, counsel for the DOB offered to "pull the mailings," and she apparently "pulled up" documents which she stated indicate that the

NOV was "posted" to 8042 Bell Boulevard in Queens and that it was mailed on December 11, 2008, to the address on file with the Department of Finance. She stated that the mailing was made pursuant to a "charter service."

Mr. Reich asserted that the inspector's affidavit was insufficient as it only said "posted" and did not state where it was mailed. Counsel for DOB stated that there was a separate affidavit of mailing. It is unclear, however, as to whether counsel submitted an affidavit of mailing at the administrative hearing. Mr. Reich reiterated that he only received the NOV posted on the door.

The Administrative Law Judge (ALJ) in a decision dated July 8, 2009 and mailed on August 10, 2009, stated that a NOV "was duly served, charging that on 11/21/2008, at 02:30 PM, the Respondent violated the below infraction(s). The Respondent appeared and entered the plea(s) indicated below, and hearing was held before me on the above-cited date [June 30, 2009]. On the Record before me, I find: VIOLATION: At the time and place specified in the Notice of Violation, and upon any further findings stated below, the Respondent caused or permitted the violation, as charged." The decision further states that: "Respondent is charged with violation of Zoning Regulation 22-00 for illegal use in a residential district-storage of a vehicle without plates or registration. The NOV indicates infraction codes B54 and B205. Only B205 was entered into the system and utilized with regard to the adjudication."

"Respondent appeared by her husband Perry Reich. Mr. Reich did not refute the allegations contained in the NOV; admitted that he stored an unlicensed and unregistered Cadillac on his property; and made a motion to dismiss the NOV on the following grounds: 1. improper service and 2. that the section of law is constitutionally void for vagueness."

"Mr. Reich testified that he removed the vehicle but could not remember exactly when. He did not present a certificate of correction. L. Latimer, Esq. appeared on behalf of Petitioner and produced an affidavit of service that the NOV was posted and a MOSAIC printout indicating that the date that the NOV was mailed. I find that service was not defective and take official notice that the affidavit of service, coupled with the computer generated mailing, is sufficient evidence of proper service; that constitutional issues are not within the jurisdiction of this Court; and that storage of unlicensed and unregistered vehicles is deemed illegal use in a residential district." The ALJ denied Mr. Reich's motion to dismiss, sustained the NOV and imposed a civil penalty of $800.00.

Mr. Reich obtained a waiver of payment of the penalty pending the administrative appeal, which was timely filed with the Environmental Control Board (ECB). The ECB in a decision and order dated January 21, 2010 denied the appeal and affirmed the determination of the ALJ, including the $800.00 penalty. The ECB stated in pertinent part as follows:

> "The main issues on appeal are whether: (1) Petitioner's evidence was sufficient to establish proper service under Section 1404(d)(2) of the Charter; Respondent was permitted to store an unregistered and unplated vehicle in her driveway

pursuant to ZR Section 25-411; and (3) Respondent's evidence was sufficient to prove correction of the violation before the cure date or first scheduled hearing date indicated in the NOV.

"Section 22-00 of the ZR specifies that Use Groups 1 through 4 are permitted in residential districts. Sections 22-11 through 22-14 of the ZR provide descriptions and clarifications of those Use Groups. Section 25-411 of the ZR provides that parking spaces in residential districts 'shall be designated and operated exclusively for the long-term storage of the private passenger motor vehicles used by the occupants of such residences.'

"On appeal, Respondent reiterates that service was improper because no reasonable attempt was made to deliver the NOV before posting it at the premises and because no affidavit of mailing was produced. Respondent also reiterates that she was permitted to store the cited vehicle on her property pursuant to ZR Section 25-411. Respondent claims, as she did at the hearing that her unrefuted testimony proved that the vehicle was removed prior to the cure date or the first scheduled hearing date. Respondent complains that its letter seeking an extension of the cure period was ignored by the ALJ. For the first time on appeal, Respondent submits copies of a certificate of correction filed with the DOB on June 26, 2009, a letter from DOB disapproving such certificate of approval on August 25, 2009, and a letter from DOB approving a certificate of approval, not submitted by Respondent, on September 9, 2009. Respondent states that it is Petitioner's position that"dead storage" is permitted only in Use Group 16, and argues that Use Group 16 restrictions are applicable only in commercial cases. Respondent also argues, as she did at the hearing, that since "dead storage" is not defined in the ZR, the statute is unconstitutionally vague. However ECB lacks authority to review constitutional claims. For the first time on appeal, Respondent contends further that the "ordinance describes 'vehicles' i.e. the plural, and speaks of storage" and that Petitioner did not establish that there were at least two vehicles on the property for at least two or three days. As this contention was not made at the hearing, and in any event does not clearly state any legal argument, the Board declines to consider it.

“In its answer to the appeal, Petitioner asserts that the affidavit of posting and computer printout offered at the hearing as proof of mailing were sufficient to show proper service under the Charter. Petitioner contends that an unplated and unregistered vehicle cannot be used by an occupant of a residence and therefore does not fall within the purview of ZR Section 25-412. Petitioner contends further that “dead storage” is a term of art used in the ZR, and that “dead storage” falls within Use Group 16 and is permitted only in certain commercial and manufacturing districts. Petitioner asserts that granting of the opportunity to cure the violation is entirely within the discretion of DOB. For the first time on appeal, Petitioner submits copies of letters, dated August 25, 2009 and August 27, 2009, disapproving Respondent’s certificate of correction.

“Respondent submitted a reply to Petitioner’s answer, which the Board declines to consider.

“On this record, the Board finds that service of the NOV was proper under Section 1404 of the Charter. Petitioner attempted service of the NOV pursuant to the “affix and mail” method of service authorized in Charter Section 1404(d)(2)(a)(ii), which provides that after a reasonable attempt has been made to locate a person on the premises upon whom service may be made under article 3 of either the Civil Practice Law and Rules or Business Corporation Law, service may be made by first affixing an NOV copy to the cited premises where the violation occurred and then making specified mailings of NOV copies. In the affidavit of affixation, the IO affirmed that on the date of offense he posted an NOV in a conspicuous place upon the premises after making a reason attempt to effectuate service on Respondent or other person upon whom service may be made. At the hearing, the Petitioner submitted a computer printout indicating that a copy of the NOV was mailed to Respondent at the place of occurrence on December 11, 2008 and that no alternative address for Respondent was found in the records Petitioner was required to search. Respondent’s claim that no reasonable attempt was made to deliver the NOV before posting it is insufficient to rebut the statements in the affidavit of

> affixation; nor is Respondent's claim that she did not receive a copy of the NOV in the mail sufficient to rebut Petitioner's proof of mailing. *See NYC v Franz Dextra* (ECB Appeal No. 42698, April 21, 2005).
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> "The Board finds further that Respondent's reliance on ZR Section 25-411 as permitting the storage of the cited vehicle is misplaced. That section authorizes only the accessory parking in certain residential districts of private passenger motor vehicles used by residents. Here the cited vehicle was unplated and unregistered, and therefore legally inoperable. The Board adopts Petitioner's reasonable position that the presence of a legally inoperable vehicle constitutes "dead storage," as use within Use Group 16 that is permitted only in certain commercial and manufacturing districts. Consequently, the storage of the cited vehicle was not a use permitted in a residential district under ZR Section 22-00.
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> "Additionally, the Board finds that Respondent's evidence was insufficient to show that the violation was corrected before the cure date or first scheduled hearing date indicated on the NOV. At the hearing, Respondent asserted that the cited vehicle was towed, but was unable to give an exact date and did not submit an invoice for the towing service. While the Board need not consider evidence submitted for the first time on appeal, the Board notes that the documents submitted by Respondent relating to the correction of the violation do not include a definitive date on which the vehicle was removed or any supporting evidence. The Board also notes that the ECB has no authority to grant an extension of time to cure the violation."

Mr. Reich in a letter addressed to the ECB dated February 3, 2010 asserted that the Board's determination contained an error, as regards the service of the NOV. He asserted that as the ECB determined that service had to be in conformity with CPLR Article 3, and as service of the NOV was made by "affix and mail," said service was defective as due diligence required more than one attempt at service on a single day.

Petitioner timely commenced this hybrid Article 78 proceeding and action for declaratory judgment and asserts that service of the NOV did not comply with the provisions of Section 1049-a(d)(2)(a) of the City Charter. Petitioner asserts that as jurisdiction and service of the NOV was challenged, the DOB had the burden of proving that the statutory and due process prerequisites were met, and that actual notice is irrelevant. It is asserted that in order to avail itself of "affix and mail" service the DOB was requires to establish that it made a reasonable attempt to effectuate service, and that no such evidence was presented at the hearing. Petitioner asserts that regardless of whether the standard is due diligence as required under CPLR 308(4), or the lesser standard of a "reasonable attempt" service is invalid here, as there is no "reasonable expectation of success" in the middle of the working day. Petitioner further asserts that no admissible proof of the mailing of the NOV was presented at the hearing.

Petitioner further asserts that as a matter of law there can be no violation of the zoning ordinance for parking a car in one's driveway. It is asserted that the courts have recognized a distinction between "storage" and "parking," and that in order to find that there was "dead storage" there would have to be a finding that the vehicle was "stored" for more than a day. There was no such proof in the record, and the NOV simply indicates that an observation on a specified date at a specified time. Petitioner also argues that the ordinance describes "vehicles," in the plural and speaks of storage, and that proof that a vehicle without

plates was parked on a residential driveway on a single day cannot, as a matter of plain meaning, come within the ambit of the use restriction.

Petitioner asserts that respondent has failed to follow its own precedents in this regard, and cites to several OATH cases and *Matter of 72A Realty Assoc. v New York City Envtl. Control Board* (275 AD2d 284, [2000]). She asserts that review of all of these decisions indicate that Use Group 16 is applied only to commercial properties, such as an automobile repair shop. She further asserts that the respondent's determination conflicts with the language of Section 25-412 of the Zoning Resolution which permits "long term storage" of a vehicle owned by the occupant without qualification. Petitioner asserts that as the term dead storage is not defined in the Zoning Resolution, calling it a "term of art" is unconstitutional under the controlling precedents of *People v Sposito* (126 Misc 2d 185 [1984]), and *People v Stuart* (100 NY2d 412[2003]).

Finally, petitioner asserts that her representative testified that the vehicle was removed before the hearing date, and as no evidence to the contrary was produced by the respondent at the hearing, no basis existed for rejecting her representative's sworn testimony at the hearing. Petitioner asserts that the Board permitted the respondent agency to submit letters of rejection of cure, after the hearing took place, and refused to consider her response, in violation of due process.

Petitioner, therefore, seeks a judgment annulling the Board's determination, declaring the "dead storage" provision of the Zoning Regulation to be unconstitutional, and awarding her attorney's fees, costs and disbursements.

Respondents, in opposition, assert that the ECB's determination has a rational basis in the record and the law, and is neither arbitrary, capricious or an abuse of discretion. Respondents state in their answer that service of the NOV upon petitioner was proper, as Section 1049-a of the City Charter permits "nail and mail" alternative service after a reasonable attempt to serve the NOV personally has been made. It is asserted that such service does not require repeated attempts at personal service under the "due diligence" standards of the CPLR, and that the affirmation of posting of the issuing officer dated November 21, 2008, and affidavit of mailing, dated December 12, 2008 were sufficient to prove proper service under the Charter. Respondents state that "[a] reasonable attempt at personal service requires that the issuing officer either locate the respondent named in the NOV at the premises, or ask whether the respondent or a person, 'upon whom service may be made' as defined in article three of the CPLR is available. If the respondent cannot be located, and/or if there is no other suitable person upon whom service may be made, alternative 'nail and mail' service, pursuant to the Charter, is appropriate." Respondents further assert that petitioner did not present proof at the hearing that the violation had been cured prior to the cure date of December 31, 2008; that the charges against petitioner do not

require a showing that multiple vehicles were involved or that the violation persisted for any particular period of time; and that Zoning Regulation 22-00 is not unconstitutionally vague.

Petitioner in her reply, asserts that with respect to service, compliance with the statutory requirements is not obviated by actual receipt of service. Petitioner that the subject zoning regulation does not state that the parking of a vehicle on one's own property is prohibited if the vehicle could not be driven off. Rather, it is asserted that Section 25-411 of the Zoning Resolution specifically permits "long term storage of ... private passenger motor vehicles" without qualification. She asserts that the "dead storage" of a motor vehicle, a Use Group 16 activity under Zoning Resolution § 32-25 (c), which is prohibited in a residential district, is only applicable to commercial vehicle storage and that the ECB previously recognized this in its own determinations.

It is well settled that a court's function in an Article 78 proceeding is "to scrutinize the record and determine whether the decision of the administrative agency [in question] is supported by substantial evidence and not arbitrary and capricious" (*Matter of Marsh v Hanley*, 50 AD2d 687 [1975]); *see also Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d 520, 522 [2009], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, 34 NY2d 222, 231 [1974]). Here, as petitioner does not challenge the ECB's determination on the ground that it was unsupported by substantial evidence, and only alleges constitutional violations and other legal error, judicial review is limited to whether the ECB's determination was arbitrary and capricious because it exceeded the ECB's statutory authority

or was made in violation of the Constitution or the laws of this State (*see Matter of Small v City of New York*, 74 AD3d 828 [2010]).

Petitioner, at the hearing contested the service of the NOV on the grounds that there was no evidence that the issuing officer made a reasonable attempt to personally serve her prior to resorting to "affix and mail" service, and also asserted that she had never received the NOV in the mail. As stated by the Court of Appeals, "[t]he incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites" (*Stewart v Volkswagen of Am.*, 81 NY2d 203 207 [1981], citing *Lamarr v Klein*, 35 AD2d 248 [1970], *affd* 30 NY2d 757 [1972]). The burden of establishing the propriety of service rests upon the party asserting jurisdiction (*see 72A Realty Assocs. v New York City Envtl. Control Bd.*, 275 AD2d 284, 285-287 [2000]). In addition, "compliance with statutory service requirements is not obviated by a defendant's actual receipt of service" (*New Hampshire Ins. Co. v Wellesley Capital Partners*, 200 AD2d 143, 150 [1994], citing *McDonald v Ames Supply Co.*, 22 NY2d 111 [1968]).

New York City Charter § 1049-a(2)(a)(ii) provides that "service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the ... the commissioner of buildings ... and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises where the violation occurred." Section 1049-a(2)(b)

further provides, in pertinent part, that "[s]uch notice may only be affixed or delivered pursuant to items (i) and (ii) of subparagraph (a) of this paragraph where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law. When a copy of such notice has been affixed or delivered, pursuant to items (i) and (ii) of subparagraph (a) of this paragraph, a copy shall be mailed to the respondent at the address of such premises...."

The City Charter's requirement that the issuing officer make a "reasonable attempt" to serve the NOV on a person who is amenable to service under Article 3 of the CPLR, provides for a lesser standard than that of "due diligence" as required under CPLR 308(4), before resort can be made to conspicuous service ("affix and mail"). The City Charter thus permits in hand delivery, as well as delivery to a person of suitable age and discretion. Although the term "reasonable attempt" is not defined, RPAPL § 735 similarly requires that a process server make a "reasonable application" to effectuate service. It is well settled in the Second Department that at least two attempts at personal service, one during normal working hours and one attempt when a person working normal business hours could reasonably be expected to be home, are required to satisfy the "reasonable application" standard (RPAPL § 735[1]; *Martine Associates LLC v Minck*, 5 Misc 3d 61 [2004]; citing to, *Eight Assocs. v Hynes*, 102 AD2d 746, 1 [1984] *affd* 65 NY2d 739 [1985]; *Hynes v*

Buchbinder, 147 AD2d 371 [1989]; *see also Brooklyn Heights Realty Com v Gliwa*, 92 AD2d 602 [1983]; *Dolan v Linnen*, 195 Misc 2d 298 [2003]).

Here, the ECB's determination that the issuing officer had made a reasonable attempt to serve the petitioner with the NOV, which was issued on November 23, 2008, at 2:30 P.M., the same date that the claimed violation occurred, was based solely upon the affirmation of service. The affirmation of service, however, merely includes a pre-printed statement that a reasonable attempt at service was made. To the extent that the affirmation of service included the handwritten word "posted" the word post has multiple meanings and it is unclear as to whether the issuing officer was affirming that he or she had affixed the NOV or perhaps had mailed it. More importantly, the affirmation of service is devoid of any information with respect to issuing officer's "reasonable attempt" to effectuate personal service, since the issuing officer's attempt at service could not have been discerned simply by reading the affirmation of service, the ECB's determination that the DOB had established that a "reasonable attempt" to serve the NOV had been made before resort to "affix and mail" service, is irrational, an abuse of discretion, and contrary to law. In view of the fact that the DOB had not obtained jurisdiction over Ms. Schulder and as the subject vehicle is no longer on the property, the NOV is not subject to enforcement.

Accordingly, that branch of the petition which seeks to annul the respondent ECB's determination of January 21, 2010, is granted. That branch of petitioner's motion which seeks a declaratory judgment to the effect that the term "dead storage" is unconstitutionally vague, is denied, as no justiciable controversy remains following the

vacatur of the ECB's determination. That branch of petitioner's motion which seeks to recover attorney's fees, costs and disbursements pursuant to 42 USC § 1983, is denied, as petitioner has not established her entitlement to such relief. Furthermore, as petitioner is appearing pro se, and does not allege that she is, or has been, represented by counsel, she may not recover attorney's fees.

Settle one judgment and order.

J.S.C.