[* 1]

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

PRESENT: EDMEAD Justice

PART 35

JAMES RITONE

-v-

NYC DEPT CONSUMER AFFAIRS

INDEX NO. 102965/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
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

The instant Article 78 Petition is decided in accordance with the annexed Memorandum Decision. It is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioners.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

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

Dated: 1/13/11

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

----------X

In the Matter of the Application of
JAMES RHONE and CONTRACTORS
NETWORK, INC.,

Index No. 102965/2010

Petitioners,

for a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

-against-

NEW YORK CITY DEPARTMENT OF
CONSUMER AFFAIRS,

Respondent.

----------X

EDMEAD, J.:

Petitioners James Rhone (Rhone) and Contractors Network, Inc. bring this Article 78 proceeding seeking a judgment vacating an Appeal Determination which denied petitioners' motion to vacate several decisions and orders (Orders) of the respondent New York City Department of Consumer Affairs (NYCDCA). Following an inquest and a determination, petitioners were ordered to pay NYCDCA fines totaling nearly $19,000. They were also directed to pay seven complainants restitution, a sum totaling $77,849.

The underlying administrative proceedings were initiated on August 14, 2006, August 14, 2007, February 28, 2008, June 30, 2008, July 03, 2008, and October 20, 2008, whereby seven complainants: (Guy Lallemand, James McAden, Beverly Powell, Monica Ranjitsingh, Maxine Lassiter, Marilyn Shapiro, and Kuo-Chung Lin [collectively, Complainants]) reported to NYCDCA that they hired petitioners to make home improvements at their respective residences and petitioners failed to honor their obligations under the contract. The Complainants reported

that not only did petitioners leave large portions of the work undone, their substandard work caused the Complainants to incur additional expenditures as they were forced to hire new contractors to complete the home improvement projects. For example, complainant Ranjitsingh asserts that she entered into an agreement with petitioners for home improvements at her residence located at 115-108 233rd Street in Cambria Heights, New York in exchange for $85,000. Although Ranjitsingh paid petitioners $83,500, the work was deficient in that there were problems with the heating system, flooding in the basement and failure to install windows in the foundation of the new extension to the home. Ranjitsingh was forced to hire another contractor in order to repair petitioner's errors and thereby incurred an additional $30,000 in expenses.

A notice of hearing was mailed on behalf of each Complainant, setting forth the charges against petitioners for deceptive trade practices, failing to perform work, and various other contract deficiencies. Petitioners failed to appear in five of the seven hearings. On October 9, 2008, October 17, 2008, October 31, 2008, January 26, 2009, February 20, 2009, March 5, 2009, and January 20, 2010, NYCDCA issued an order on behalf of all Complainants. Upon petitioners' default in five of the cases, NYCDCA found petitioners guilty of charges under 6 RCNY § 2-221, 6 RCNY § 1-14, and Administrative Code § 20-393 (11). NYCDCA ordered petitioners to pay fines in amounts between $2,000 and $6,000 for the above-referenced violations. Petitioners were also ordered to pay restitution in amounts ranging from $3,000 to $25,000 to each of the Complainants according to their individual damages.

Petitioners subsequently filed a motion to vacate the decisions and orders entered on behalf of Complainants Lallemand, McAden, Powell, and Ranjitsingh. Concerning

Complainants Lallemand and Ranjitsingh, NYCDCA denied petitioners' motion for failing to submit the motion within the requisite 15-day time period. Concerning Complainants McAden and Powell, NYCDCA denied petitioners' motion because the motion did not contain a statement offering an excuse for nonappearance, nor did it include a sworn statement outlining a meritorious defense to the charges alleged in each violation. Petitioners subsequently filed this Article 78 petition to overturn NYCDCA's Orders.

Petitioners contend that they are entitled to vacatur of NYCDCA's determinations because respondents' acts were arbitrary and capricious, an abuse of discretion and were not supported by substantial evidence in the record. Petitioners also contend that NYCDCA's imposition of fines and restitution paid to the Complainants was in error of law because NYCDCA's determinations violated an automatic stay triggered by Rhone's filing of a Chapter 7 Bankruptcy Petition with the United States Court for the Eastern District of New York on August 8, 2008. Petitioners further contend that a bankruptcy petition prevents creditors from the collection and enforcement of debts, unless a creditor files a motion requesting that the automatic stay be lifted, and that here, NYCDCA failed to bring such a motion.

NYCDCA argues that the Orders are entitled to judicial affirmance because (1) they provide for restitution in accordance with the law; (2) under Section 363 (b) (4) of the Bankruptcy Code, NYCDCA is exempt from the automatic stay; (3) a governmental agency may institute civil actions and seek restitution among other sanctions, as a codification of the state's public policy prohibiting deceptive business practices; and (4) petitioners failed to list NYCDCA as a creditor in its bankruptcy filing, and thus the corresponding debt is not dischargeable.

The petition is denied. For the reasons discussed below, there was a rational basis for

NYCDCA's determinations and the actions complained of were neither arbitrary or capricious, nor an error of law (*see Matter of Partnership 92 LP and Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

NYCDCA is an agency responsible for licensing all contractors and salespersons engaged in the home improvement business (Administrative Code of the City of New York § 20-387 [Administrative Code]). As set forth in the City Charter,

> "the commissioner, in the performance of said functions, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of laws relating to deceptive or unconscionable trade practices"

(NYC Charter § 2203 [e]). NYCDCA has the power upon "due notice and hearing" to revoke any license and to impose fines and civil penalties for violations (Administrative Code § 20-104 [e]). NYCDCA is also charged with the maintenance of standards of integrity, honesty, and fair dealing among persons or entities engaged in licensed activities (Administrative Code § 20-101).

In reviewing a determination made by an administrative agency such as NYCDCA, the court's inquiry is "limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record" (*Matter of Partnership 92 LP and Bldg. Mgt. Co., Inc.*, 46 AD3d at 428). Furthermore, courts have held that:

> "[T]he determination of an agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute

> its judgment for that of the agency when the agency's determination is supported by the record"

(*id.* at 428-429 [internal citations omitted]).

In order for petitioners to redress any of NYCDCA's determinations, it is well settled that one who objects to the act of an administrative agency must exhaust available administrative remedies prior to litigating the matter in a court of law (*see Irizarry v New York City Police Dept.*, 260 AD2d 269 [1st Dept 1999]). Following petitioners' failure to appear at a number of inquests and their subsequent default, NYCDCA ordered petitioners to pay the agency a host of fines in addition to restitution amounts to several Complainants. Petitioners later moved to vacate the Orders but the record reveals that petitioners failed to do so in a timely manner.

A party seeking to vacate a default decision following an inquest or hearing, must file a written motion to vacate the decision within 15 days from the date such party knew or should have known of the decision (6 RCNY § 6-44). The motion must contain a statement offering an excuse for the nonappearance and a sworn statement outlining a meritorious defense to the charges alleged in the violation and the motion must include a check or money order in the amount of $25 (6 RCNY § 6-44). Finally, if restitution has been ordered, then the movant must deposit the restitution amount ordered with the NYCDCA (6 RCNY § 6-40).

On September 18, 2008, NYCDCA sent petitioners a notice of a hearing concerning the charges made by Complainant Lallemand. NYCDCA issued an Order on October 09, 2008, following petitioners' failure to appear and subsequent default. On November 12, 2008, petitioners submitted a written motion to vacate that Order, a date that was nearly four weeks after the date petitioners knew or should have known of the Order (6 RCNY § 6-44). Petitioners

neglected to include a sworn statement outlining a meritorious defense to the charges alleged in the violation and they did not include a check or money order for $25, as required.

The record further demonstrates that NYCDCA forwarded a copy of its Order on behalf of Complainant Ranjitsingh to petitioners on October 17, 2008. Petitioners submitted a motion to vacate that decision and order on November 12, 2008, nearly four weeks after petitioners' notification of its Order. That motion also failed to meet the requisite requirements under 6 RCNY § 6-44.

Petitioners argue that their counsel neglected to provide them with notice of the hearings, and, thus, they were unable to submit a written motion to vacate the aforementioned Orders within the requisite 15 days. However, the record demonstrates that petitioners received notice of NYCDCA's Orders involving Complainants Lallemand, McAden, Powell, and Ranjitsingh. A copy of each decision and order was not only mailed to petitioners' attorney, one was also mailed to petitioners' residential and corporate addresses on file (Exhibits E, K, Q, and W to Verified Answer). Moreover, each of those Orders provided instructions for petitioners, if they so desired, to submit a written motion to vacate NYCDCA's Order (*id.*)

Concerning Complainants Lassiter, Shapiro and Lin, it appears that petitioners failed to comply with the requisite procedures under 6 RCNY § 6-40. According to that statute, parties aggrieved by a NYCDCA decision and order may, within 30 days from the decision, file a written appeal. That appeal must delineate the issues upon which the appeal is based, "including the precise findings of fact, conclusion, or procedure to which exception is taken, and arguments presenting the points of law and fact relied upon with respect to each issue" (6 RCNY § 6-40 [a]). Here, the record demonstrates that petitioners failed to adhere to those terms.

Following a hearing on March 28, 2008, petitioners and Shapiro entered into a settlement whereby petitioners would pay Shapiro $7,500 for the added expenditures she incurred following petitioners' work. The parties further agreed that if petitioners defaulted upon the settlement agreement, Shapiro would be entitled to a judgment of $12,125. Petitioners subsequently defaulted on the settlement agreement and Shapiro re-instituted her complaint against petitioners before NYCDCA. Following a hearing concerning petitioners' default, an Administrative Law Judge awarded Shapiro $12,125 in damages. After failing to adhere to the terms of the settlement agreement, petitioners exposed themselves to penalties and the reinstatement of prior charges (*see Matter of Marin Constr. Corp. v Scatliffe*, 271 AD2d 206 [1st Dept 2000]). As a result of said failure, NYCDCA issued an Order on February 20, 2009. A copy of its Order was immediately mailed to petitioners (Exhibit II to Verified Answer). However, petitioners never moved to vacate the Order within the requisite time period and sought no other relief prior to instituting this Article 78 petition.

On March 5, 2009, following an inquest, NYCDCA issued an Order regarding Complainant Lassiter. NYCDCA immediately mailed copies of its Order to petitioners (Exhibit EE). Again, petitioners did not submit a written motion to vacate the Order as required. Instead, they instituted this Article 78 petition on March 2, 2010. It appears from the record that petitioners failed to exhaust their administrative remedies prior to bringing this petition.

Petitioners do not allege that they have exhausted their administrative remedies. Instead, petitioners contend that NYCDCA's determinations were the result of an error of law under Chapter 7 of the U.S. Bankruptcy Code. 11 USC § 362 (a) of the United States Bankruptcy Code provides:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USC § 301, 302, or 303], or an application filed under section 5 (a) (3) of the Securities Investor Protection Act of 1970 [15 USC § 78eee (a) (3)], operates as a stay, applicable to all entities, of –
>
> "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

It is undisputed that petitioners filed a Chapter 7 Bankruptcy petition, thereby demonstrating entitlement to a stay under the aforementioned statute. However, NYCDCA submits that the debt petitioners owe the agency falls within an exception to the automatic stay.

"A debt that is scheduled pursuant to [11 USC] § 521 (l) and Federal Rules of Bankruptcy Procedure 1007 (a) and (b) (1) is discharged unless the debt is excepted from discharge under one of the exceptions set forth in [11 USC] § 523 (a)" (*Matter of Massa v Adonna*, 187 F3d 292, 295-296 [2d Cir 1999]). 11 USC § 523 (a) of the Bankruptcy Code governs the nondischargeability of debts in a Chapter 7 proceeding. It provides:

> "(a) A discharge under section 727, 1141, 1228 (a), or 1328 (b) of this title [11 USC § 727, 1141, 1228 (a), 1228 (b), or 1328 (b)] does not discharge an individual debtor from any debt- -
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty."

In interpreting this statute, courts have held that a bankruptcy discharge does not serve to discharge a debtor from a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss," other than a tax penalty (*see State of New York v Williamson*, 8 AD3d 925, 930 [3d Dept 2004] [internal quotation marks and citation omitted]). Here, a percentage of petitioners' liability is based on the statutory penalties assessed following petitioners' violations, and a review of the record reveals that the penalty was intended to punish them and deter others from engaging in similar conduct. Therefore, the aforementioned fines and penalties levied against petitioners fall squarely within the exception to the discharge contained in 11 USC § 523 (a) (7).

As to the amounts petitioners were directed to pay the Complainants for restitution, those amounts fall within another exception to discharge under the Bankruptcy Code, for petitioners' failure to provide NYCDCA notice of the filing of its bankruptcy petition. The notice requirement is codified at 11 USC § 342 (a), which provides that "there shall be given such notice as is appropriate . . . of an order for relief in a case under this title" (*Matter of Massa v Adonna*, 187 F3d at 296). 11 USC § 523 (a) further provides that there is no discharge for any debt

> "(3) neither listed nor scheduled under section 521 (1) of this title [11 USC § 521 (1)], with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit–
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing"

(11 USC § 523 [a] [3]). Moreover, courts have held that the opportunity for a creditor to participate in bankruptcy proceedings is of obvious importance and the burden of establishing that a creditor has received adequate notice rests with the debtor (*Matter of Massa,* 187 F3d 292, *supra*; *In re Horton*, 149 BR 49, 57 [Bankr SDNY 1992). Petitioners do not deny that formal notice of its bankruptcy proceeding was never given to NYCDCA and the record reveals that petitioners failed to schedule the debt owed to NYCDCA in its original petition. Thus, it appears that under the totality of the circumstances, NYCDCA was not adequately apprised of petitioners' bankruptcy proceeding (*Matter of Massa v Adonna*, 187 F3d at 297). Consequently, NYCDCA, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and this court may not substitute its judgment for that of the agency because the agency's determinations are supported by the record (*Matter of Partnership 92 LP and Bldg. Mgt. Co., Inc.*, 46 AD3d at 428-429).

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioners.

Dated: January13, 2011

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)