[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 111377/2010

ROSEN, JONATHAN P.

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

[redacted]

Dated: 6/21/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 15

----------X

In the Matter of the Application of
JONATHAN P. ROSEN, THE SOLE SURVIVING EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ABRAHAM A. ROSEN d/b/a 1255 COMPANY,

Petitioner,

-against-

THE CITY OF NEW YORK; SUZANNE BEDDOE, as Chief Administrative Law Judge of the NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, the NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and ROBERT LIMANDRI, as COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

----------X

Index No.
111377/10

DECISION and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Jonathan P. Rosen ("Petitioner") is the executor of the estate of the late owner of the building known as and located at 882 Sixth Avenue in New York County ("the Building"). Petitioner brings this special proceeding pursuant to Article 78 of the CPLR for an order annulling the April 30, 2010 Decision and Order of the New York City Environmental Control Board ("ECB") (Decision and Order hereinafter referred to as the "Appeal Decision").

ECB was established pursuant to §1049-a of the New York City Charter ("Charter") to enforce the provisions of the Charter, the New York City Administrative Code ("Admin. Code"), and any rules or regulations made thereunder that pertain to the use and occupancy of buildings or structures within the jurisdiction of the New York City Department of Buildings ("DOB").

The New York City Council adopted Local Law 14 on February 27, 2001. Local Law 14 amended the Admin. Code by enacting §§26-259(b) & (c), to define the terms "outdoor advertising company" ("OAC") and "outdoor advertising business." Under those subsections, an OAC is defined as "a person, corporation, partnership or other business entity that as part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business. [Additional language subsequently stricken by Local Law 31 in 2005 has been omitted.]" "Outdoor advertising business" is defined as "the business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of New York available to others for advertising purposes." Petitioner states that, on or around March 1, 2006, the Building owner entered into a licensing agreement with a registered OAC known as Troystar, Inc., which provided that Troystar would be permitted to install a sign on a portion of the Building's facade.

On May 17, 2008, the New York City Department of Buildings ("DOB") issued the Building owner eight Notices of Violation ("NOVs") for violations of the City's outdoor advertising regulations. The first NOV (34645918N) (hereinafter "18N")[1] alleged that the Building owner, while acting as an OAC, failed to properly register itself as an OAC. The remaining NOVs charged that the Building owner failed to comply with various regulations applicable to advertising signs.[2]

After a hearing held on May 15, 2009, ECB Administrative Law Judge ("ALJ") Charlesa London issued a decision dated July 6, 2009, which disposed of violations 18N, 22X, 23H, and 24J ("the 18N Decision"). In the 18N Decision,

[1]All eight violations begin with the numbers "346459", immediately followed by two distinct numbers and a letter. For purposes of clarity, all further violations will be named by their distinct numbers and letter.

[2] The other charges are as follows: 22X (failure to affix decal to sign); 23H (failure to affix date to the sign); 24J (failure to submit affidavit describing the sign's composition); 17L (failure to obtain permit for the sign); 19P (improper placement of a sign in a "C6-6" zoning district); 20M (surface area of sign greater than that permitted by applicable regulation); and 21Y (height of sign greater than that permitted by applicable regulation).

ALJ London granted Petitioner's motion to dismiss as to all four charges. Most pertinent to the instant petition, ALJ London held the following with respect 18N:

> I find that [Petitioner] has adequately rebutted the [DOB's] inference, that [Petitioner] was an OAC. [DOB's] inference was mainly based upon the fact that [Petitioner] had an outdoor advertising sign on its building. I find that [Petitioner] has proven its affirmative defense by submitting a printout of a registered OAC, in this case Troystar Corp., and [Petitioner] had no interest in Troystar Corp or had a role in any aspect of Troystar's operation or management. See, 1 RCNY 49-01, definition of an Outdoor Advertising Business and [Petitioner's] Exhibit A. Accordingly, I find [Petitioner] not in violation under the cited section and this NOV is DISMISSED.

Right under the portion containing ALJ London's signature and the date, the 18N Decision lists July 15, 2009 as the date the decision was mailed.

In a decision dated July 10, 2009, ALJ London issued another decision which disposed of violations 17L, 19P, 20M, 21Y ("the 17L Decision"). ALJ London states at the beginning of the 17L Decision that, as a preliminary matter, with respect to the four other charges (18N *et seq.*), "I found that [Petitioner] was not an Outdoor Advertising Company (hereinafter "OAC"). Therefore this element of the charge will not be discussed in this decision." ALJ sustained all four charges in the 17L Decision and ordered that Petitioner pay $3,200 (representing the $800 per violation charged to non-OACs). The 17L Decision was mailed on August 7, 2009, as indicated therein.

On September 10, 2009 DOB filed an appeal of ALJ London's 17L Decision (known as an "Exception") with the ECB Appeals Unit. In its appeal, DOB challenged ALJ London's holding that the Building owner was not an OAC, and requested that ECB accordingly increase the sanction against the Building owner to $10,000 for each NOV, the statutory penalty for OACs.

In its Appeal Decision, mailed on April 30, 2010, ECB reversed ALJ London and found that Petitioner was an OAC, and accordingly increased the Building owner's penalty to $40,000.

Petitioner subsequently commenced this Article 78 Petition. Petitioner argues that ECB acted in an arbitrary and capricious manner because it considered DOB's appeal despite being filed on September 10, 2009, more than 30 days after the date of mailing (August 7, 2009) - the time in which an appeal may be taken pursuant to 48 RCNY §3-71. Moreover, Petitioner states that, even if DOB had timely filed its appeal, ECB was barred from reconsidering ALJ London's determination that the Building owner was not an OAC, as that issue was resolved in the 18N Decision, and not the 17L Decision, from which the appeal was taken. Petitioner further argues that, aside from improperly considering DOB's appeal, ECB's determination that the Building owner is an OAC is arbitrary and capricious on the merits.

ECB and DOB submit a verified answer and a memorandum of law in response to the petition. They argue (1) that the DOB appeal was timely filed; (2) that ECB was permitted to review ALJ London's finding that the Building owner was not an OAC because she made similar findings in the 17L Decision; and (3) that, on the merits, ECB's Appeal Decision had a rational basis and thus cannot be disturbed by the court.

Petitioner submits a reply affirmation.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

48 RCNY §3-71 provides, in pertinent part, as follows:

> (a) **Filing.** Any party aggrieved by the hearing officer's recommended decision and order may, *within 30 days of mailing of the same*, file written exceptions with the tribunal. A copy of the exceptions shall be served upon all parties, and proof of such service filed with the tribunal within 30 days of the mailing of said decision and order. Written exceptions must contain a concise statement of the issues presented, specific objections to the findings of fact and conclusions of law set forth in the hearing officer's recommended decision and order, and arguments presenting clearly the points of law and fact relied on in support of the position taken on each issue (emphasis added).

DOB and ECB argue that the DOB appeal was timely filed pursuant to 48 RCNY §3-15, which provides as follows:

> (a) Except as otherwise provided herein, computation of any period of time prescribed in these rules shall be as follows:
>
> (1) The start date for the time period shall not be considered in the computation. The next business day is the first day of the time period.
>
> (2) The computation is based on the number of calendar days.
>
> (3) If the last day in the period is a Saturday, Sunday or New York City legal holiday, the period is extended to the next business day.
>
> (b) When mail is used for service of any document (other than a notice of violation) on an opposing party, five additional days shall be granted the opposing party in taking any action or making any response required or permitted by these rules.

DCB and DOB note the 17L Decision was mailed on August 7, 2009, a Friday. Accordingly, the first day for computing the time for DOB to appeal was the following Monday, August 10, 2009. In addition, since the decision was mailed, DOB had an additional five days to submit its appeal. Based upon the foregoing, DOB's appeal of the 17L Decision was timely submitted.

However, the court finds that ECB acted in an arbitrary and capricious manner by revisiting the issue of whether the Building owner was an OAC, since this matter was decided by ALJ London's 18N Decision, and it is undisputed that the time for DOB to appeal that decision had lapsed. "It is settled law that the principles of *res judicata* and collateral estoppel are applicable to the determinations of quasi-judicial administrative agencies and that such determinations, when final, become conclusive and binding on the courts" (*Huber-Padilla v. Crime Victims Bd.*, 155 A.D.2d 351 [1st Dept. 1989]). When the determination of an administrative agency becomes final, it is conclusive and binding, and cannot be subjected to collateral attack (*see Joseph v. Roldan*, 289 A.D.2d 243, 244 [2nd Dept. 2001]).

In her 18N Decision, ALJ London found that the Building owner was not an OAC. This decision was mailed on July 15, 2009, and it is undisputed that no appeal of that decision was taken. While DOB and ECB argue that ALJ London also made findings as to the Building owner's status in her 17L Decision, review of that decision reveals otherwise. As noted above, at the beginning of the 17L Decision, ALJ London explicitly states that the issue of whether the Building owner was an OAC was resolved in her prior 18N decision and "will not be discussed in this decision." Moreover, although ALJ London states in her 17L decision that she finds that the Building owner is not an OAC, this is clearly predicated upon her earlier decision, and is only relevant to the 17L Decision insofar as assessing the applicable penalty amount ("I find [Petitioner] in violation under the cited statutes *and as previously stated I find that [Petitioner] was not an OAC.*") (emphasis added).

Accordingly, inasmuch as DOB failed to file a timely appeal of ALJ London's 18N Decision, ALJ London's holding therein - that the Building owner was not an OAC - became binding upon DOB, ECB, and on this court.

Wherefore, it is hereby

ADJUDGED that the Petition is granted; and it is further

ADJUDGED that ECB's Appeal Decision and Order dated April 29, 2010 and mailed on April 30, 2010 was arbitrary and capricious and contrary to law; and it is further

ORDERED that this matter is remanded to ECB for further action in accordance with the foregoing.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 21, 2011

EILEEN A. RAKOWER, J.S.C.

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).