[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Justice

START ELEVATOR INC

- v -

NYC ENVIRONMENTAL CONTROL BOARD

INDEX NO. 101713/11

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Article 78

	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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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).

Dated: 7/15/11

JUL 15 2011

BARBARA JAFFE 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 5

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In the Matter of the Application of START ELEVATOR, INC.,

Petitioner,

Index No. 101213/11

Mot. Date: 5/24/11
Mot. Seq. No.: 001

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

DECISION & JUDGMENT

-against-

THE ENVIRONMENTAL CONTROL BOARD OF THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

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BARBARA JAFFE, J.S.C.:

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By order to show cause and verified petition dated February 9, 2011, petitioner brings this Article 78 proceeding seeking an order vacating petitioner's alleged default of a violation and dismissing the violation. By verified answer dated May 10, 2011, respondents oppose the petition.

I. BACKGROUND

On or about April 23, 2010, Inspector Philip Noberini of respondent New York City Department of Buildings (DOB) issued petitioner violation #38209246Y based on its alleged

failure to maintain the lock mechanism on an elevator at a building in Manhattan, and a hearing was scheduled for July 22, 2010 before the New York City Environmental Control Board (ECB) to resolve the violation. (Petition dated Feb. 9, 2011 [Pet.], Exh. 1).

Respondents' affidavits of service reflect that on June 1, 2010, petitioner was served with the notice of the violation and hearing date by service on the New York State Secretary of State. (*Id.*, Exh. 2). Respondents also mailed the notice of violation to petitioner at three different addresses, including 4350 Bullard Avenue, Bronx, New York, which petitioner concedes is its principal place of business. (Verified Answer dated May 10, 2011 [Ans.], Exh. C; Pet.).

On July 22, 201, petitioner failed to appear for the hearing, and on July 27, 2010 respondents mailed it a copy of the ECB's decision and order upholding the violation and imposing a $25,000 penalty to two different addresses, including the Bullard Avenue address. (*Id.*, Exh. D). By request dated August 3, 2010, Woodcrest Mgmt. Corp. (Woodcrest), which asserted under penalty of perjury that it had been authorized by petitioner to make the request, sought a new hearing. (*Id.*, Exh. E). Respondents granted the request and the hearing was rescheduled for October 28, 2010. (*Id.*).

On October 28, 2010, petitioner failed to appear, and on November 3, 2010, respondents mailed it a copy of ECB's decision and order again upholding the violation and penalty. (*Id.*, Exh. F). By notice mailed on December 20, 2010, ECB notified petitioner that the penalty remained unpaid. (Pet., Exh. 3).

By request dated January 31, 2011, petitioner requested a new hearing before the ECB, alleging that it did not own the building at which the violation had been found. (Pet., Exh. 7). By letter dated February 3, 2011, the ECB denied petitioner's request as petitioner's previous request

for a new hearing had been granted and it had failed to appear on the rescheduled date. (*Id.*, Exh. 8).

II. CONTENTIONS

Petitioner denies having received notice of either hearing date and asserts that the owner of the building, not it, should be held liable for the violation. (Pet.).

Respondents maintain that it properly served petitioner with the notice of violation and hearing date and that the ECB properly denied petitioner's second request for a hearing pursuant to 48 RCNY § 3-82(e), which provides that no more than one request for a new hearing may be granted. It thus contends that its determination denying petitioner's request was rational and neither arbitrary nor capricious. (Memo. of Law, dated May 10, 2011).

In reply, petitioner denies having authorized Woodcrest to request a new hearing and asserts that it was not informed that the hearing had been rescheduled or notified of the October 2010 hearing, and that absent any authority given to Woodcrest, it is bound by Woodcrest's actions. (Verified Reply, dated May 17, 2011).

III. ANALYSIS

The only questions that may be raised in a proceeding to challenge action or inaction by a state or local government agency are, in pertinent part, whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . (CPLR 7801, 7803[3]). The determination of an administrative 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." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

If the court determines that the administrative determination has a rational basis, the court's inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997], *rearg denied* 90 NY2d 1008). Moreover, where a determination has a rational basis, "an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference." (*Matter of Arif v New York City Taxi and Limousine Commn.*, 3 AD3d 345 [1st Dept 2004], *lv granted* 2 NY3d 705, *appeal withdrawn* 3 NY3d 669).

Pursuant to 48 RCNY § 3-82(e), "[n]o more than one request for a new [ECB] hearing under this section may be granted with respect to any one notice of violation . . ." As petitioner's previous request for a new hearing had been granted, respondents' denial of its request for a

second hearing was neither irrational nor arbitrary or capricious. (*See eg Matter of Small v New York Dept. of Sanitation*, 74 AD3d 828 [2d Dept 2010] [petitioner failed to establish that ECB's determination exceeded its statutory authority]; *Matter of Hernandez v Lancaster*, 52 AD3d 296 [1st Dept 2008], *lv denied* 11 NY3d 709 [ECB's denial of petitioner's request to intervene was rationally based on ECB rules and regulations and thus neither arbitrary nor capricious]; *Matter of Burrito Factory, Inc. v City of New York*, 270 AD2d 217 [1st Dept 2000], *lv denied* 95 NY2d 848 [ECB's "reasonable, rational interpretation and application of the Code sections under which it functions are entitled to judicial deference"]).

Moreover, petitioner's conclusory denial of having received notice of the violation or hearing date is insufficient to controvert respondents' proof of service of same, and it thus fails to establish a reasonable excuse for its failure to appear for the July 2010 hearing. (*See Matter of Daniello Carting Co., LLC v Envtl. Control Bd. of City of New York*, 84 AD3d 799 [2d Dept 2011] [petitioner failed to submit affidavits with specific facts contesting allegations in ECB's affidavits of service, and allegations in petition denying receipt of notices of violation insufficient to rebut presumption of proper service]). Petitioner's assertion that it did not authorize Woodcrest to request a new hearing on its behalf is also fatally conclusory and thus fails to demonstrate a reasonable excuse for its failure to appear for the October 2010 hearing.

And, as petitioner in its January 2011 request for a new hearing did not deny having received notice of the October 2010 hearing, it improperly raises this issue for the first time here. (*See Yarbough v Franco*, 95 NY2d 342 [2000] [judicial review of administrative proceedings confined to facts and record before agency]; *Matter of James Simpson, Inc. v City of New York Envtl. Control Bd.*, 252 AD2d 557 [2d Dept 1998] [in Article 78 proceeding, court may not

consider issue that was not raised before administrative tribunal]).

For all of these reasons, petitioner has failed to establish any ground warranting an order vacating respondents' denial of its request for a new hearing.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 15, 2011
New York, New York

JUL 15 2011

UNFILED JUDGMENT

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