

Matter of 49 Warren Realty, LLC v City of New York
2012 NY Slip Op 30044(U)
January 16, 2012
Supreme Court, New York County
Docket Number: 102166/11
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler

PART: 25

Justice

49 WARREN REALTY LLC, et al,

Petitioner

- against -

THE CITY OF NEW YORK, et al,

Respondent.

Index No.: 102166-11

Motion Date: _____

Motion Seq. No.: 001

Motion Cal. No.: _____

Article 78 Order to Show Cause by Petitioners to vacate and/or dismiss certain violations, penalties and fines issued by Respondents and/or vacating Petitioners' defaults and allowing Petitioners to submit answers to said violations.

	Papers Numbered
Article 78 Order to Show Cause with Petition, accompanying Affidavit & Exhibits	<u>1</u>
Respondents' Verified Answer with accompanying Exhibits and Memorandum of Law ...	<u>2, 3</u>
Respondents' Cross-Motion with Notice, accompanying Affirmations & Exhibits	<u>4</u>
Petitioners' Affirmation in Opposition to Cross-Motion & accompanying Exhibits	<u>5</u>
Respondents' Supplemental Affirmation in Support of Cross-Motion and in Opposition to Petition with accompanying Exhibits	<u>6</u>
Petitioners' Response to Respondents' Discovery Request	<u>7</u>
Respondents' Affirmation in Opposition to Petitioners' Response to Respondents' Discovery Request	<u>8</u>
Other: <u>Respondents' Counsel's Letter Clarifying Record regarding</u> <u>Notices of Violations Numbers 012268860 and 034518131H</u>	<u>9</u>

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is hereby ordered that this Article 78 Motion and the Cross-Motion are both decided as follows:

**THIS MATTER IS DECIDED
IN ACCORDANCE WITH THE
ATTACHED 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 1415).

Dated: 11/15/12
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check if appropriate: ☐ Do Not Post ☐ Reference
Check one: ☒ **Final Disposition** ☐ **Non-Final Disposition**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 25

-----X
In the Matter of the Application of:

49 WARREN REALTY, LLC, TRIBECA REALTY LLC,
AND DRAGON ESTATES CONDO ASSOCIATION,
Petitioners,

Index No. 102166/11

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

-against-

DECISION/ORDER

THE CITY OF NEW YORK,
THE CITY OF NEW YORK OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS,
THE CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD,
and CAROLYN KLIEN,

Respondents.

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).

HON. SHLOMO S. HAGLER, J.S.C.:

Petitioners 49 Warren Realty, LLC, Tribeca Realty LLC, and Dragon Estates Condo Association (collectively "Petitioners") move by Order to Show Cause and Verified Petition, pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), for an order directing respondents the City of New York ("NYC"), the City of New York Office of Administrative Trials and Hearings ("OATH"), the City of New York Environmental Control Board ("ECB"), and Carolyn Klien (collectively "Respondents") to (1) vacate several default judgments of violations issued by the ECB against Petitioners, (2) grant a hearing on the merits, and/or (3) dismiss the violations for failure to state a cause of action and to obtain jurisdiction over Petitioners. Respondents oppose the motion and cross-move for an order pursuant to CPLR § 3211(a)(5) dismissing Petitioners' petition as it relates to Notice of Violation number 34818572H on the grounds that it is time-barred by the applicable statute of limitations.

Factual Background

This case involves fifteen (15) Notices of Violations (“NOV”) issued by the ECB to the various owners of the premises located at 49 Warren Street, New York, New York 10007 (“Subject Premises”). During the time period that these NOV’s were issued, the Subject Premises was under the consecutive ownership of three different owners. In 2001, 49 Warren Realty, LLC (“49 Warren”) was the owner of the Subject Premises. On or about April 25, 2002, 49 Warren sold the subject premises to Tribeca Realty, LLC (“Tribeca”). (See Exhibit “2” to Verified Petition.) Tribeca’s ownership of the Subject Premises was recorded with the Office of the City Register on November 13, 2002. (*Id.*) Tribeca thereafter formed a condominium association called Dragon Estates Condo Association (“Dragon”). On or about January 14, 2005, Dragon took ownership of the Subject Premises which was recorded or filed in the Office of the City Register on January 19, 2005. (See Exhibit “3” to Verified Petition.) Due to the numerous NOV’s issued against the Subject Premises, Dragon, the current owner of the Subject Premises, cannot obtain a permanent Certificate of Occupancy for the Subject Premises.

The Notices of Violation at issue in this Article 78 Proceeding are as follows:

<u>Violation Number</u>	<u>Issued To</u>	<u>Date Issued</u>
0122688060	Tribeca	May 5, 2001
0130847595	Tribeca	December 4, 2002
0118495640	Tribeca	December 8, 2002
0130906959	Tribeca	December 31, 2002
0132705320	Tribeca	February 6, 2003
0137546961	Tribeca	September 13, 2003
010838265P	49 Warren	July 7, 2004
0144881936	Tribeca	November 13, 2004
0143315920	Tribeca	January 10, 2005
034518131H	Tribeca	April 27, 2006
034538198K	Tribeca	November 1, 2006
034752719Y	49 Warren	January 12, 2009
034752720L	49 Warren	January 12, 2009
034818062H	49 Warren	November 16, 2009
034818572H	49 Warren	November 17, 2009

None of the above NOV's were issued to Dragon, although it was the actual owner at the time NOV numbers 034818062H, 034752719Y, 034752720L, 034818572H, 034538198K, and 034518131H were issued.

At the time NOV number 0122688060 was issued on May 5, 2001 to Tribeca, 49 Warren was the owner of the premises. In addition, all the NOV's issued to 49 Warren were issued after 49 Warren had sold the Subject Premises to Tribeca. Tribeca was the owner of the Subject Premises at the time NOV numbers 010838265P, 0118495640, 0130847595, 0132705320, 0130906959, 0137546961, 0144881936, and 0143315920 were issued. Out of these eight (8) NOV's, NOV number 010838265P was issued to 49 Warren, while the remaining NOV numbers 0118495640, 0130847595, 0132705320, 0130906959, 0137546961, 0144881936, and 0143315920 were issued to Tribeca, the actual owner at the time.

NOV numbers 0130847595, 010838265P, 034752719Y, 034752720L, and 034818062H were vacated by ECB after this Article 78 Proceeding was filed and are therefore moot. (See Affirmation of Lawrence A. Omansky, Esq. in Opposition to Defendants' [sic] Cross-Motion at ¶ 4.) ECB has not made a final determination whether to vacate the default judgments pertaining to NOV numbers 0122688060 and 034518131H. (See Respondents' Verified Answer at ¶¶ 29 & 99 and Respondents' letter dated December 5, 2011.) ECB has denied Petitioners' request to vacate default judgment for NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, 0143315920, 034538198K, and 034818572H.

Discussion

Petitioners brought this Article 78 proceeding to vacate several default judgments of violations at the Subject Premises issued by Respondents against Petitioners after the ECB refused to vacate these default judgments and grant a hearing on the merits or, alternatively, to dismiss the

violations for failure to state a cause of action and to obtain jurisdiction over Petitioners. Under 48 Rules of the City of New York (“RCNY”) §3-82 (f): “[r]eview of a denial of a request for a new hearing after a failure to appear may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.” The duty of this Court is not to determine the merits of the NOV’s, rather it is to determine whether ECB acted arbitrarily and capriciously or abused its discretion when it denied Petitioners’ request to vacate said default judgments.¹ (See, Heinz v. Brown, 80 N.Y.2d 998 [1992].)

As indicated above, the only violations which the ECB has refused to vacate and are still at issue in this Article 78 proceeding are NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, 0143315920, 034538198K and 034818572H. The challenge to the ECB’s refusal to vacate the defaults on these NOV’s rests on the determination of two questions. The first question is whether a NOV issued to a previous owner is enforceable as to the actual owner of the premises. The second question entails whether the ECB provided proper notice of the NOV’s to the Petitioners.

The first question pertains specifically to NOV numbers 034818572H and 034538198K. NOV number 034818572H was issued to 49 Warren on November 17, 2009, when in fact the actual owner was Dragon. NOV number 034538198K was issued to Tribeca on November 1, 2006, when, again, the actual owner of the Subject Premises was Dragon. The NOV’s were issued against 49 Warren and Tribeca respectively, and therefore can only be enforced against the entity to whom the NOV was issued. It is not enforceable against a subsequent owner. (See 48 RCNY §3-82[c][2][B].) Since the Subject Premises was owned by Dragon and not by Tribeca at the time that

1. Significantly, once the ECB administrative judge reviewed NOV numbers 0130847595, 010838265P, 034752719Y, 034752720L, and 034818062H on the merits, the administrative judge vacated both the defaults and the violations.

NOV number 034538198K was issued, it was arbitrary and capricious and an abuse of discretion for the ECB to deny Petitioners' request to vacate the default judgment concerning NOV number 034538198K.

While the Subject Premises was no longer under the control of 49 Warren at the time that NOV number 034818572H was issued and Petitioners would thereby have a reasonable basis for an Article 78 challenge, Respondents argue that this Article 78 proceeding was brought beyond the four (4) month Statute of Limitations period. Petitioners made their first request to vacate 49 Warren's default of NOV number 034818572H on April 8, 2010 (see Omansky's Affirmation in Opposition to Defendants [sic] Cross Motion ["Omansky Aff. in Opposition to Cross-Motion"], at ¶ 6), which is acknowledged by Respondents (see Affirmation of Pamela A. Koplick in Support of Cross Motion to Dismiss the Petition ["Koplick Aff. in Support of Cross Motion"], at ¶ 9, and Affirmation of Helaine Balsam in Support of Respondents' Cross-Motion to Dismiss the Petition ["Balsam Aff. in Support of Cross-Motion"], at ¶ 11). Respondents allege that the denial of 49 Warren's request to vacate its default on NOV number 034818572H was made on April 13, 2010, and the denial was mailed to 49 Warren and to Petitioners' attorney on that same date. (See Balsam Aff. in Support of Cross-Motion, at ¶ 11.) In addition, Respondents allege that duplicates of the denials were mailed to 49 Warren and Petitioners' attorney again on June 23, 2010. (Id.) Respondents rely upon the Balsam Aff. in Support of Cross-Motion, which states that the ECB's usual course of business at that time was that when the ECB denied a request to vacate a default, it enters that denial into ECB's Automated Information Management System ("AIMS") and AIMS automatically generates a denial letter and automatically sends it out to the addresses it has on record.² (Id.)

2. Respondents also submit an AIMS Violation Inquiry History ("VIH") upon which they rely. Although this VIH shows various actions, such as the denial of requests to vacate the

Significantly, Respondents failed to provide any copies of the alleged denial letters dated April 13, 2010 which were allegedly mailed to 49 Warren and Mr. Omansky. Indeed, Respondents state that at the time of the April 13, 2010 denial, ECB did not retain copies of denials of requests to vacate defaults. (*Id.*, at n.2.) While Respondents have submitted copies of the duplicate denial letters dated June 23, 2010 allegedly mailed to 49 Warren and Mr. Omansky (see Exhibit "A" to the Supplemental Affirmation in Support of Cross-Motion to Dismiss the Petition and in Opposition to the Petition), they have not submitted any affidavits of service for either the April 13, 2010 or June 23, 2010 denial letters.

In support of their Cross-Motion to Dismiss, Respondents rely solely upon the Balsam affirmation. The submission of an affirmation by an attorney is only valid when the attorney is not acting as a party to the proceeding. (See CPLR § 2106.) Such an affirmation lacks probative value and is not acceptable as evidence. An affirmation cannot be used when the attorney is a party or acting as a party. An affidavit, as opposed to an affirmation, is required by a party to support the Cross-Motion.

In addition, Ms. Balsam's affirmation does not purport to be based on personal knowledge. Instead, Ms. Balsam states that she is "familiar with the facts and circumstances set forth herein based upon the records of ECB, the applicable rules and regulations, and conversations with other agents, officers and employees of ECB and other agencies of the City of New York." (See Balsam Aff. in Support of Cross-Motion, at ¶ 1.) An attorney's affirmation which is not based on the attorney's first-hand knowledge is without evidentiary value. (See 2084-2086 BPE Associates v State of N.Y. Div. of Housing and Community Renewal, 15 A.D.3d 288 [1st Dept 2005] citing Zuckerman v. City of New York, 49 NY2 557, 563 [1980].)

defaults as Ms. Balsam explains in her affirmation, it neither shows whether the denial letters were actually generated nor mailed.

Furthermore, an affidavit describing service pursuant to the a regular course of business is not sufficient to replace the need for an actual copy of an affidavit of service of process. (See In re Application of 72A Realty Associates v. New York City Environmental Control Board, 275 A.D.2d 284 [1st Dept 2000] [assertion that an affidavit was filed “in the regular course of business” is not a substitute for proof in the form of an actual affidavit of service].) The necessity of having an affidavit of service is vital to the protection of Petitioners’ due process rights. (Id.) Therefore, since Respondents have not proved by a valid affidavit of service on what date the ECB served Petitioner 49 Warren, it cannot be said that Petitioner failed to file its Article 78 petition more than four (4) months from its notification of denial. As a result, Respondents’ Cross-Motion to Dismiss must be denied.

The remaining NOVs numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, and 0143315920 were issued to Tribeca, the actual owner of the Subject Premises. The sole issue is whether there was proper service provided to Tribeca. Respondents provided affidavits of mailing which they claim cover NOV numbers 0137546961, 0144881936, and 0143315920. (See Respondents’ Supplemental Affirmation in Support of Cross-Motion to Dismiss the Petition and in Opposition to Petition [“Respondents’ Supplemental Affirmation”] at ¶ 7 and Exhibits “B,” “C” and “D,” thereto.) However, the submitted affidavits of mailing, each of which covers a range of consecutive summons numbers, do not encompass these NOV numbers. Exhibit “B” to Respondents’ Supplemental Affirmation, which is presented as an affidavit of mailing for NOV number 0137546961, is actually an affidavit of mailing covering NOV numbers 373875 to 374864. Exhibit “C” to Respondents’ Supplemental Affirmation, which is presented as an affidavit of mailing for NOV number 0144881936, is actually an affidavit of mailing covering NOV numbers 802731 to 804176. Exhibit “D” to Respondents’ Supplemental Affirmation, which is presented as an affidavit of mailing for NOV number 0143315920, is actually an affidavit of mailing covering

NOV numbers 853399 to 854571. Therefore, Respondents have not even provided proof of service of NOV numbers 0137546961, 0144881936, and 0143315920 upon Tribeca.

For NOV numbers 0118495640, 0130906959, and 0132705320, Respondents have not provided copies of any affidavits of mailing. The only evidence regarding proof of mailing presented by Respondents is an Affidavit from Bernard Brenner, dated February 29, 1984, regarding the Department of Sanitation's Mailing Process ("Brenner Affidavit"), that describes the procedures used at the Department of Sanitation's Summons Control Unit ("SCU") for processing Sanitation notices of violations which are issued by Department of Sanitation personnel pursuant to Section 1404(d)(2) of the Charter of the City of New York, which provides for "nail and mail" service of Sanitation violations. (See Respondents' Answer at ¶ 19 and Exhibit "C" thereto.³) As discussed above, an affidavit describing service or mailing pursuant to a regular course of business is not sufficient to replace the need for an actual copy of an affidavit of service of process. (See In re Application of 72A Realty Associates v. New York City Environmental Control Board, 275 A.D.2d 284 [1st Dept 2000] [assertion that an affidavit was filed "in the regular course of business" is not a substitute for proof in the form of an actual affidavit of service].) The necessity of having an affidavit of service is vital to the protection of Petitioners' due process rights. (Id.) Furthermore, the Brenner Affidavit also states that, in the regular course of business, an affidavit of mailing is prepared and forwarded to the ECB with a copy of the notice of violation. (Brenner Affidavit, at ¶¶ 10 and 11.) Therefore, the ECB should have provided those affidavits of mailing, but have not done so. By failing to provide proof of service of NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, and 0143315920 with proper affidavits of mailing, the ECB

3. Respondents do provide a copy of the original summons for NOV number 118495640 (as Exhibit "A" to the Verified Answer), but the portion relating to the service is fairly illegible. In addition, for the "nail and mail" service to be effective, an affidavit of mailing would still be required but was not provided by Respondents.

failed to show that it acquired jurisdiction over Tribeca. Based on the deficiency in proving proper service of NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, and 0143315920 issued to Tribeca, the denials by ECB to vacate the default judgments for those NOV's were arbitrary and capricious and an abuse of discretion.

Conclusion

Accordingly, it is ORDERED AND ADJUDGED, that the petition is granted as to Dragon, even though it was the actual owner at the time NOV numbers 034818062H, 034752719Y, 034752720L, 034818572H, 034538198K, and 034518131H were issued, since it was never served with those Notices of Violations; and it is further

ORDERED AND ADJUDGED, that the petition is granted so far as NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0144881936, and 0143315920 against Tribeca are concerned since Respondents failed to show that service of the NOV's were properly made upon those Petitioners; and it is further

ORDERED AND ADJUDGED, that the petition is granted so far as NOV number 034818572H against 49 Warren is concerned, and Respondents' Cross-Motion to dismiss this NOV as being brought beyond the four (4) month time limit for filing an Article 78 petition is denied, since Respondents did not present proof of mailing of the final administrative determination upon Petitioner 49 Warren and, therefore, failed to provide sufficient evidence to show that the Article 78 proceeding was brought after the four (4) month time limit; and it is further

ORDERED AND ADJUDGED, that the portion of the petition regarding NOV numbers 0130847595, 010838265P, 034752719Y, 034752720L, and 034818062H is rendered moot as those Notices of Violations were vacated by ECB after this Article 78 Proceeding was filed; and it is further

ORDERED AND ADJUDGED, that the petition is denied without prejudice as being premature regarding NOV numbers 0122688060 and 034518131H, since the ECB has not made a final determination whether to vacate the default judgments pertaining to those Notices of Violation; and it is further

ORDERED AND ADJUDGED, that NOV numbers 0118495640, 0130906959, 0132705320, 0137546961, 0143315920, 0144881936, 034518131H, 034538198K, and 034818572H are remanded to the ECB for a hearing on the merits.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for Petitioners and Respondents.

Dated: January 6, 2012
New York, New York


Shlomo Hagler
J.S.C.

Hon. Shlomo S. Hagler, J.S.C.

UNFILED JUDGMENT

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