

Matter of Hussain v City of New York

2012 NY Slip Op 31763(U)

June 29, 2012

Supreme Court, New York County

Docket Number: 400832/11

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C.
Justice

PART 5

Sabul Hussain

INDEX NO. 400832111

MOTION DATE 4/10/12

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

City of New York

The following papers, numbered 1 to 3 were read on this motion to/for vacate administrative decision

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
APPLICABLE PROVISIONS OF THE JUDGMENT

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given until entered. To obtain entry, counsel or interested parties must appear in person at the Supreme Court's Desk (Room 1610).

Dated: 6/29/12

BARBARA JAFFE *Jaffe*
J.S.C.

JUN 29 2012 9 2012

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
In the Matter of the Application of
SABUL HUSSAIN,

Petitioner,

Index No. 400832/11

Argued: 4/10/12
Motion Seq. No.: 003

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

DECISION & JUDGMENT

-against-

CITY OF NEW YORK,

Respondent.

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).~~

-----X
BARBARA JAFFE, JSC:

For petitioner:
Matthew Shapiro, Esq.
Street Vendor Project
Urban Justice Center
123 William Street, 16th Fl.
New York, NY 10038
646-602-5649

For respondent:
Teresita V. Magsino, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street, Room 5-175
New York, NY 10007
212-788-8899

By notice of petition dated March 30, 2011, petitioner brings this Article 78 proceeding seeking an order directing respondent to dismiss notice of violation (NOV) 140-539-585 for failure to effect proper service of process, or in the alternative, directing respondent to grant him a hearing on the NOV. Respondent opposes.

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). 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 . . . 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 Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

I. APPLICATION OF 48 RCNY § 3-82

Title 48, chapter 3, section 83 of the Rules of the City of New York (48 RCNY § 3-83) governed vendors' requests for vacatur of defaults until April 4, 2010, when it was repealed and 48 RCNY § 3-82 was amended to include guidelines for such requests. (City Record, Mar. 5, 2010 at 506-07).

Here, petitioner's counsel asserts, "upon information and belief," that petitioner first requested a new hearing in the "beginning of 2009." (Ver. Pet.). Petitioner offers a copy of a request date stamped December 2, 2009 (*id.*, Exh. B), a verification page reflecting that on June 8, 2010 his counsel sent a copy of the December 2 request to ECB via facsimile transmission (*id.*, Exh. C), correspondence from ECB indicating that it received the June 8 facsimile (*id.*, Exh. D), and a copy of a new request dated November 1, 2010 (*id.*, Exh. E).

As petitioner offers no evidence that he made a request in early 2009, the recipient's name on the December 2 date stamp is illegible, and ECB denies having received these requests, absent any proof of service for the December 2 request, the earliest date on which he may be considered to have requested a new hearing is June 8, 2010. Accordingly, respondent's determination that 48 RCNY § 3-82 governs petitioner's request for vacatur of his default is neither arbitrary nor capricious.

II. REQUIREMENTS FOR VACATUR OF DEFAULT

Pursuant to 48 RCNY § 3-82, a vendor requesting a new hearing on an NOV more than

45 days after defaulting must, as pertinent here, demonstrate that “there is a reasonable basis to believe” that he never received the NOV because he was never properly served and that “a new hearing was requested within one year of the time [he] learned of the existence of the violation.” (48 RCNY § 3-82[c][1][a]).

New York City Charter §1049-a(d)(2)(a) provides, in pertinent part, that ECB must serve NOVs “in the same manner as is prescribed for service of process by article three of the [CPLR]” Pursuant to CPLR 308(1), personal service on an individual may be made by, *inter alia*, “delivering the summons within the state to the person to be served.”

Here, respondent’s affidavit of service reflects that New York City Police Officer Benny Lopez personally served petitioner with NOV 140-539-585 on February 26, 2004 at 9:04 p.m. at the intersection of 37th Street and Seventh Avenue in Manhattan. (Ver. Ans., Exh. A). However, as a second affidavit of service reflects that Lopez personally served petitioner with a different NOV on the same date at the same time at a different location, the intersection of 32nd Street and Seventh Avenue. (*Id.*, Exh. B). Therefore, as Lopez could not have been in two places at the same time, petitioner has demonstrated that there exists a reasonable basis to believe that he never received NOV 140-539-585.

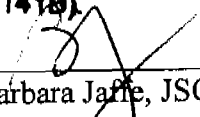
As respondent’s denial of petitioner’s request was based solely on its conclusion that its record reflects petitioner’s receipt of the NOV (*id.*, Exh. E), it is arbitrary and capricious. Absent any indication that respondent considered whether petitioner established that he requested a new hearing within one year of learning that the NOV existed, and absent any argument by respondent as to same, whether he did so is beyond my the scope of my review.

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is granted to the extent that the matter is remanded to respondent for a review of petitioner's request for a new hearing on NOV 140-539-585 consistent with this decision and judgment within 30 days of service of same with notice of entry.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. **ENTRY:** entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 29, 2012
New York, New York
JUN 29 2012