

**Matter of Tri-Rail Constr. Inc. v The Environmental
Control Bd. of the City of NY**

2012 NY Slip Op 32307(U)

September 4, 2012

Sup Ct, New York County

Docket Number: 102206/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
TRI-RAIL CONSTRUCTION INC.,

INDEX No. 102206/12

Petitioner,
-against-

MOTION DATE _____

MOTION SEQ. No. 001

THE ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK, A DIVISION OF THE OFFICE
OF ADMINISTRATIVE TRIALS AND HEARINGS,
Respondent.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES ☒ NO ☒

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).

Upon the foregoing papers, it is ordered that the ~~appeal~~ ^{appeal} be ~~dismissed~~ ^{dismissed}.

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9-4-12

Donna M. Mills

^{J.S.C.}
DONNA M. MILLS, J.S.C.

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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

TRI-RAIL CONSTRUCTION INC.,

Petitioner,

For an order pursuant to Article 78
ordering and directing respondents
to vacate certain default judgments;
to vacate alleged improper hearings
and conduct hearings,

Index No. 102206/2012

- against-

DECISION AND ORDER

THE ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK, A DIVISION OF THE
OFFICE OF ADMINISTRATIVE TRIALS AND
HEARINGS,

UNFILED JUDGMENT

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Respondent appear in person at the Judgment Clerk's Desk (Room

-----441B)----- X

DONNA M. MILLS, J.S.C.:

Petitioner Tri-Rail Construction, Inc. (Trirail), a general contractor, alleges in this Article 78 proceeding that, when it applied for work permits, respondent, The Environmental Control Board of the City of New York (the ECB), informed Trirail that it had 15 outstanding notices of violation (NOV).

The petition alleges that Trirail believed that all outstanding NOVs had either been re-opened or were the subject of prior Article 78 proceedings. Trirail moves for an order directing respondent to grant Trirail's request to schedule new hearing dates on the outstanding NOVs.

Trirail is engaged in the construction business in the City

[* 3]

of New York. The fifteen NOV's all relate to one project site on Berry Street in Brooklyn, on which Trirail was the general contractor. Trirail alleges that it ceased operations at the Brooklyn site prior to the issuance of some of the NOV's.

The challenged NOV's fall into two categories. Six of the NOV's (the first category NOV's) involve applications by Trirail to reopen hearings on the ground that Trirail never received notice of any denial of its applications to reopen those NOV's. The first category NOV's comprise 0176522720, 034799909N, 0178828540, 0178769122, 1078828531, and 1078769131.

Nine of the NOV's (the second category NOV's) involve determinations after a hearing, but Trirail alleges that the three purported representatives for it at the hearings were not authorized representatives of Trirail, and that Trirail has no knowledge of the identities of these people, Maria Pollack, Josh Nimaroff, and Pamela Lewis, who are listed on the transcripts as its representatives. The second category NOV's comprise 0177053452, 01777053461, 10770533470, 1076514178, 0176492250, 0176492241, 0177053480, and 0176286303.

The First Category NOV's

With respect to the category one NOV's, Trirail acknowledges that it received a March 5, 2012 letter from the ECB denying Trirail's application for a new hearing on all six of the category one NOV's. That letter states that this is the second

application to reopen these NOV's, and that the ECB's Special Motion Part had previously denied the motion to re-open. Trirail argues that this letter is insufficient because it is only signed by a clerk, rather than an administrative law judge, and also because it does not state a reason for the denial.

The ECB argues that this action is untimely with respect to the category one NOV's. This action was commenced on March 12, 2012. Petitioner's applications to vacate its defaults and reopen the category one NOV's were initially denied in a series of three letters, the latest bearing the date March 16, 2011. After petitioner was informed of the existence of the 15 NOV's, it again moved to vacate its default, resulting in the March 5, 2012 letter, denying reconsideration of the category one NOV's.

The ECB argues that the petition is untimely as to the first category NOV's because the petition was filed beyond the four-month statute of limitations for Article 78 proceedings. This presumes that the ECB actually mailed the determinations to the addresses furnished.

Trirail had provided the ECB with two addresses, one for itself and one for its counsel, to which all communications were to be sent. Trirail alleges that it never received any notification of the denials to vacate its defaults in the category one NOV's, but it acknowledges receiving the March 5, 2005 letter. Trirail submits the affidavit of Charles

Ventimiglia, the president of Trirail, stating that Trirail never received any communication from the ECB denying Trirail's application to reopen first category NOV's.

In opposition, the ECB submits copies of notices allegedly sent to both addresses, but does not submit any evidence that the notices were actually sent. "Respondent ECB has failed to submit proof, in admissible form, that its first determination denying petitioner's application to vacate the default was actually mailed to petitioner ..." (*Chen v City of New York Environmental Control Bd.*, 2012 WL 2619124, *2, 2012 NY Misc Lexis 3145 *3 [Sup Ct, NY County 2012]). Trirail's submission of the affidavit of its president stating that it never received the denial letters from the ECB, and the ECB has not met its burden of submitting rebuttal evidence in admissible form that the letters were actually sent (see *Gallo v City of New York*, 2012 WL 2434967, *7 [Sup Ct, NY County 2012]).

The Second Category NOVs

The ECB denied Trirail's application to vacate its defaults on the second category NOVs on the ground that Triarail was not in default on those NOVs, which had all been denied after hearings before ECB administrative judges.

In support of the verified petition, the Ventimiglia affidavit states that the representatives who appeared for Trirail at those administrative hearings were not authorized

[6]
representatives of Trirail, and that he is the only person at Trirail with authority to hire a representative to appear for Trirail in the proceedings before the ECB on the NOV's.

Ventimiglia states that he did not hire and has no knowledge of the three persons who purported to appear for Trirail at the ECB hearings on the second category NOV's.

The ECB has not submitted any evidence in admissible form challenging this assertion. The ECB merely asserts in its brief that it believes that the representatives who appeared purportedly on behalf of Trirail are employees of Jack Jaffa & Associates, a company that is often hired to represent parties issued NOV's at administrative hearings (see ECB Memorandum of Law, p 16, n 4).

If in fact the purported representatives of Trirail who appeared at the administrative hearings on behalf of Trirail were not authorized representatives, then the proceedings are a nullity, and the appearance by such unauthorized representatives cannot support the ground cited in the ECB's denial of Trirail's application to vacate its default in the second category NOV's, that Trirail was not in default.

The petition is granted to the extent of directing the ECB to grant new hearing dates on all of the NOV's listed in the verified petition, and to determine as a factual issue whether Trirail received notice of its defaults in the category one NOV's,

[* 7]
and whether the representatives who appeared on behalf of Trirail in the hearings on the second category NOVs were properly authorized representatives of Trirail.

The ECB has not established that the matter is moot because Trirail paid the fines on the NOVs.

Accordingly, it is

ADJUDGED that the petition of Tri-Rail Construction, Inc., is granted, to the extent of directing the Environmental Control board of the City of New York a Division of the Office of Administrative Trials and Hearings, to schedule new hearing dates on the following Notices of Violation: 0176522720, 034799909N, 0178828540, 0178769122, 1078828531, 1078769131, 0177053452, 01777053461, 10770533470, 1076514178, 0176492250, 0176492241, 0177053480, and 0176286303, and the matter is remanded for further proceedings consistent with the foregoing.

Dated: 9-4-12

UNFILED JUDGMENT

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E N T E R

Donna M. Mills

J. S. C.
DONNA M. MILLS, J.S.C.