

Matter of Baumrind v Beddoe
2013 NY Slip Op 30692(U)
April 5, 2013
Sup Ct, New York County
Docket Number: 103338/12
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: NON. PETER H. MOULTON
Justice

PART 40B

Index Number : 103338/2012
BAUMRIND, MARTIN
vs.
BEDDOE, SUZANNE
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is partially is decided
per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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: 4/5/13

[Signature] J.S.C.
NON. PETER H. MOULTON

- 1. CHECK ONE: CASE-DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40 B

-----X
In the Matter of
MARTIN BAUMRIND and 160 FIRST AVENUE, LLC,

Petitioners,

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

Index No. 103338/12

-against-

SUZANNE BEDDOE, EXECUTIVE DIRECTOR and
CHAIRPERSON OF THE ENVIRONMENTAL CONTROL
BOARD, THE NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, CARTER STRICKLAND,
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
and THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Respondents.

-----X
PETER H. MOULTON, J.S.C.:

Petitioners bring this proceeding to vacate a decision of
respondent Environmental Control Board of the City of New York
(the "ECB") dated March 15, 2012, which denied petitioners'
application for reconsideration seeking to process their appeal
as timely. Alternatively, petitioners seek to vacate the
decision which they sought to appeal, dated September 16, 2011,
which was issued after a hearing. That decision upheld the
imposition of a \$2,400 penalty for a violation of 15 RCNY § 1-01
(g) (the "violation").¹

¹15 RCNY § 1-01 (g) states that "No person shall interfere
with or obstruct any employee of [the Department of Environmental
Protection] in the performance of their official duties,
including but not limited to the performance of inspections."

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The Underlying Dispute

Petitioners object to the violation, which was assessed by an inspector in 2011, on the basis that their superintendent did not "interfere with or obstruct" the inspection of an asbestos project. They point out that the inspection ultimately took place, albeit thirty minutes after the inspector left the site after being blocked by the building superintendent. They further assert that the superintendent had reason to deny access to the inspector (who wore no uniform) until the owner confirmed that she was not an imposter.² Petitioners complain that the issue rises to a constitution level because they were punished for asserting their property rights under the Constitution, their due process rights to privacy, and their right to be free of warrantless searches of their property.³

²Petitioners point to a 2008 DEP warning regarding impersonators who, posing as DEP employees, enter the homes of homeowners who are in arrears for water service or who need meter service, and then demand cash. That warning provides that a "DEP employee must provide proper identification" and those entering homes must also have "badges and are in uniform." Petitioners dispute the inspector's claim that she showed the superintendent an identification card (with no security holographic).

³Petitioners gloss over that portion of the inspector's testimony asserting that the superintendent not only refused to allow her to enter the building, but also told her she was not permitted to photograph the building's exterior. Petitioners' arguments appear to relate only to the building's interior.

Timeliness of the Appeal

This court must first decide whether respondents erred as a matter of law in rejecting petitioners' appeal as untimely (see e.g., *Matter of Bikman v New York City Loft Bd.*, 14 NY3d 377 [2010] [agency is not entitled to deference in interpreting the multiple dwelling law and the RCNY; matters of statutory interpretation do not require specialized agency knowledge]). As noted by respondents, if the appeal is untimely, petitioners have failed to exhaust their administrative remedies and cannot seek review of the underlying decision (see e.g., *Matter of BMP Contr. Corp. v City of N.Y. Env'tl. Control Bd.*, 202 AD2d 223 [1st Dept 1994] [proceeding should have been dismissed based on petitioner's failure to exhaust its administrative remedy by appealing the decision that it sought to challenge]; 48 RCNY § 3-76(a) ["After exhaustion of the procedures set forth above, judicial review of the final decision and order of the board may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules"]).

Assuming that the underlying decision is reviewable, it would need to be transferred to the appellate division, as the matter implicates the issue of substantial evidence (see e.g., *Matter of Friends of Kelly O'Neil Levy v Environmental Control Bd. Of the City of N.Y.*, 94 AD3d 630 [1st Dept 2012] [proceeding regarding ECB's determination was transferred to the appellate

division because it involved substantial evidence)).

Under 48 RCNY § 3-71, written exceptions to the hearing officer's decision may be filed "within 30 days of the mailing of said decision and order." However, as is provided under 48 RCNY § 3-72, "the time within which exceptions to the hearing officer's recommended decision and order must be filed with the tribunal shall be extended by 20 days from the date when such transcription or audio tape is delivered or mailed to the party requesting same." Petitioners' attorney requested the audio recording by letter dated October 19, 2011, attaching the agency's form extension request. Petitioner checked the box stating "AN AUDIO RECORDING OF THE HEARING. WHEN THE RECORDING IS MAILED YOU WILL BE GIVEN AN EXTRA TWENTY DAYS TO SERVE AND FILE YOUR APPEAL."

By letter dated October 27, 2011 ECB administrative staff denied the extension request because petitioners failed to post bond and enclose proof that their request was sent to the Department of Environmental Protection ("DEP"). However, ECB permitted petitioners to demonstrate, by November 7, 2011, that the rejection was in error. After email correspondence with an ECB appeals attorney, petitioners' attorney sent a letter dated November 4, 2011 regarding proof of service on DEP, and indicating that petitioners' understood that the ECB would rescind its October 27, 2011 letter if petitioners filed the bond

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by November 7, 2011. By letter dated November 7, 2011, petitioners transmitted the requisite bond. The appeal was filed by letter dated February 21, 2012. The attached copy of that letter bears a stamp "ECB 2012 Feb 22 AM 9:32". Petitioners' affirmation of service reflects that the letter was mailed from 90 Church Street on February 21, 2012 by priority mail with "Expected delivery tomorrow."

By letter dated March 15, 2012, the appeal was rejected as untimely, with citation to a letter dated January 18, 2012, which petitioners' counsel asserts he never received. The January 18, 2012 letter indicated that the ECB rescinded its October 27, 2011 denial letter and indicated that a copy of the audio recording was enclosed. The letter stated that petitioners had "twenty days, plus five-days mailing time" from the date of the letter to appeal.

In seeking reconsideration, petitioners' attorney stressed that he never received the January 18, 2012 letter. He further maintained that because of this "I was provided with an inaccurate date for the mailing/receipt of the disk, resulting in the incorrect calendaring." He does not indicate who provided him with the incorrect date, and does not maintain that it was respondents who did so. He also concedes that he received "the disk at the end of January, 2012" but does not specify a date. Petitioners' attorney actually attaches a copy of a large

envelope from the ECB, addressed to him, which he found while "going thru my papers" which is stamped January 19, 2012, one day after the January 18, 2012 letter. Petitioners contend that absent an affidavit of service, respondents cannot demonstrate that the appeal was properly rejected as untimely.

Petitioners' argument seems to be based upon his assumption that the tape was not mailed on the date stamped on the envelope, but at some later date. Absent an affidavit of service, counsel argues that the court must look to the date that he actually received the tape. Because counsel states that this was at the end of January, he concludes that he received the tape on January 30, 2012. He points out that twenty days thereafter falls on Sunday February 19, 2012, which extended the time to appeal to Monday February 20, 2012. Because February 20, 2012 was a holiday, counsel maintains that the appeal was timely filed on the next day, February 21, 2012.

Even if the court were to ignore the envelope bearing the stamp date of January 19, 2012, and even if the tape was received on January 31, 2012 (one day after counsel contends that he received the tape), the appeal is nevertheless untimely. Contrary to petitioners' position, the appeal was not filed on February 21, 2012; it was merely placed in the overnight mail. As indicated by the tracking provided by petitioners, the appeal was received by the ECB on February 22, 2012. Thus, even under

the most favorable scenario, the appeal was filed on February 22, 2012, which was at least one day too late. Thus despite the diligent efforts and good quality of counsel's work, he missed the deadline for the appeal.⁴

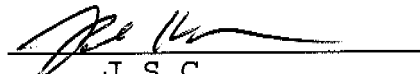
It is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed without costs and disbursements.

This Constitutes the Decision and Judgment of the Court.

Dated: April 5, 2013

ENTER:


J.S.C.

UNFILED JUDGMENT

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⁴Petitioners cite no legal argument for their contention that the issue of timeliness should have been decided "as part of the appeal, rather than by administrative processing." There is no basis to presume that the letter from Marcia Thomas-Henry, a member of the appeals support staff, does not represent the agency's final decision on the matter.