

Matter of Jafri v City of New York

2013 NY Slip Op 30751(U)

April 10, 2013

Supreme Court, Queens County

Docket Number: 20962/2012

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

In the Matter of the Application of x

Index
Number 20962 2012

INAM A. JAFRI,

Motion Date December 14, 2012

Petitioner,

Motion Seq. No. 1

-against-

CITY OF NEW YORK,

Respondent.

x

The following papers numbered 1 to 13 read on this Article 78 proceeding by self represented petitioner Inam A. Jafri for a judgment setting aside and dismissing default judgments, setting aside a stipulation, and setting aside fines imposed in connection with five separate Notices of Violations, and in the alternative for a hearing on the merits. Respondent City of New York cross moves for an order dismissing the petition on the grounds of statute of limitations and res judicata, pursuant to CPLR 3211(a)(5) and 7804(f).

	Papers <u>Numbered</u>
Notice of Petition-Affidavit-Exhibits.....	1-3
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Upon the foregoing papers the petition and cross motion are determined as follows:

Self represented petitioner Inam A. Jafri is the owner of the real property known as 161-27 84th Road, Jamaica, New York. Mr. Jafri does not reside in this property, and it is occupied by his tenants. In this Article 78 proceeding petitioner seeks relief from five Notices of Violation (NOV) issued by the New York City Department of Sanitation (DOS) and the Department of Buildings(DOB).

NOV 034497626J:

The DOB issued NOV 034497626J to Mr. Jafri on October 6, 2005, at the subject premises located at 161-27 84th Road, Jamaica , New York. Said NOV stated that the “occupancy was contrary to that allowed by the Certificate of Occupancy or Building Department records-Hazardous DOB records indicate the cellar should not be occupied. In cellar created 3 rooms/bedrooms and 3 piece bathroom (sink, toilet, shower) There is 2nd means of egress”. The NOV stated that this was a violation of section 27-217 of the Administrative Code of the City of New York, and directed that the owner discontinue the illegal use or amend the C of O. As the violation was classified as hazardous, no cure date was provided and Mr. Jafri was directed to appear at a hearing on November 22, 2005. The affidavit of service recites that the alternative method of service, pursuant to New York City Charter section 1049-e(d)(2) was utilized, and that on October 6, 2005 the issuing officer “Posted on front door”.

The November 22, 2005 hearing was apparently rescheduled multiple times and Mr. Jafri did not appear at the hearing on February 26, 2008 and the Environmental Control Board (ECB) docketed a judgment against him in the sum of \$2,500.00 on July 31, 2008. Mr. Jafri requested a new hearing, and the ECB in a form notice bearing a mailing date of August 27, 2010 denied the request stating that : “You did not include information or documents you were asked to provide... or the documents you provided did not prove your claim. You need to pay \$2,500.00 now”.

NOV 040672813H:

The DOS issued NOV 040672813H to Mr. Jafri at the subject real property on September 15, 2008 at 11:44 A.M. citing a “failure to store receptacles” . The NOV stated that the issuing party observed “(3) 30 gallon black plastic garbage bags placed out for collection on a non-collection day. Collection days are Tuesdays & Fridays”. The NOV set forth a mail-in penalty of \$100.00, with a maximum penalty of \$300.00, and a hearing date of October 16, 2008. Mr. Jafri did not appear at the hearing, which was apparently rescheduled to June 22, 2009, and the ECB docketed a default judgment against him on October 31, 2009, in the sum of \$300.00. A payment of \$100.00 was apparently made on December 17, 2009, leaving a balance due of \$200.00. Mr. Jafri also requested a new hearing, and the ECB in a form notice bearing a mailing date of September 30, 2011 denied his request stating that: “You did not include information or documents you were asked to provide... or the documents you provided did not prove your claim. You need to pay \$200.00 now”.

NOV 041203387Z:

The DOS issued NOV number 041203387Z to Mr. Jafri at the subject real property on December 22, 2009, upon observing an “ice condition on sidewalk in front of premises with no attempt made to sand, salt or shovel path for pedestrians. Snow storm officially ended on 12/20/09 at 09:00 am”, in violation of Administrative Code 16-123. The NOV set forth a mail-in penalty was \$100.00, with a maximum penalty was \$300.00, and a hearing date of January 22, 2010. Mr. Jafri did not appear at the hearing, and a default judgment was docketed by the ECB on April 30, 2010 in the sum of \$350.00. Mr. Jafri’s requested a new hearing, and the ECB in a form notice bearing a mailing date of September 30, 2011 denied his request stating that: “You did not include information or documents you were asked to provide ... or the documents you provided did not prove your claim. You need to pay \$350.00 now”.

NOV 034880979R:

The DOB issued NOV 034880979R to Mr. Jafri on October 1, 2010, at the subject premises, citing class 2 violation of Administrative Code §28-3021, upon observing a “Failure to maintain building wall(s) or appurtenances. Defects noted: One leader at rear from gutter open at grade level and not connected to storm sewer system allowing rain water run off towards 164 Street along alleyway and accumulated storm water behind premises of 161-33 84th RD Additionally no gutter/leader at the rear garage.” The property owner was directed to maintain the exterior building wall, and to cure the violation by November 10, 2010. The NOV set forth a hearing date of November 23, 2010.

Mr. Jafri entered into a pre-hearing stipulation with the ECB dated November 4, 2010, whereby he admitted all of the material facts, accepted that he would be found in violation of the charges set forth in the NOV, agreed to pay the stipulated penalty, and agreed to that the time to comply with the Commissioner’s order contained in the NOV was extended until the expiration of 75 days from the November 23, 2010 hearing date, and to file a certificate of correction with the DOB.

NOV 174405532:

The DOS issued NOV 174405532 to Mr. Jafri on November 27, 2010, at the subject premises upon observing a “dirty area” at the premises, consisting of “a large accumulation of paper litter and trash in front yard visible from curbside”. The NOV set forth a mail-in penalty of \$100.00, with a maximum penalty was \$300.00, and provided that a hearing date of December 27, 2010. Mr. Jafri did not appear at the hearing which was rescheduled for January 31, 2011, and on May 31, 2011 the ECB docketed a judgment against him in the sum of \$300.00. Mr. Jafri requested a new hearing and the ECB, in a form notice bearing a mailing date of September 30, 2011 denied the request for a new hearing stating that: “ You did not include information or documents you were asked to provide... or the documents you provided did not prove your claim. You need to pay \$300.00 now”.

Petitioner commenced the within Article 78 proceeding on October 10, 2012 and seeks a judgment vacating his default with respect to NOV 034497626J, 040672813H , 041203387Z and 174405532 on the grounds that he never received these NOVs, and that his tenants never forwarded them to him. He asserts that although he attempted to seek a new hearing as to each of these NOVs his requests were denied, and that he was advised that he was required to go to court with respect to NOV 174405532 and NOV 034497626J.

With respect to NOV 034880979R, petitioner states that he was unable to comply due to the nature of the construction of the premises, and the nature of the construction of all the buildings in the neighborhood, and therefore he missed the compliance date. Petitioner asserts that although he entered into a stipulation with respect to this NOV, he did not waive any of his rights.

Petitioner asserts that the denial of new hearing dates and the imposition of the fines are arbitrary and capricious. He further asserts that he lacks the funds to pay the fines imposed. With respect to the stipulation, petitioner asserts that as he cannot perform the work, said stipulation is arbitrary and capricious.

Respondent, in its cross motion to dismiss the petition, asserts that as petitioner failed to commence this proceeding within four months after the ECB's final determination with respect to NOV 034497626J, 040672813H , 041203387Z and 174405532, and that the petition is now time barred. With respect to NOV 034880979R, respondent asserts that the petition should be dismissed on the grounds of res judicata and statute of limitations.

A CPLR article 78 proceeding against a public "body or officer must be commenced within four months after the determination to be reviewed becomes final and binding" (CPLR 217[1]). An agency determination is final, triggering the statute of limitations, when the petitioner is aggrieved by the determination (*see Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *Matter of Martin v Ronan*, 44 NY2d 374, 380-381 [1978]). A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted. If an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, " 'the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court' " (*Carter v State*, 95 NY2d 267, 270 [2000], *quoting Mundy v Nassau County Civ. Serv. Commn.*, 44 NY2d 352, 358 [1978], [*quoting Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 126-127, *adhered to on reargument*, 25 NY2d 692 [1969]]).

The Court of Appeals has identified two requirements for fixing the time when agency action is final and binding upon the petitioner. “First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; see, *Matter of Essex County v Zagata*, 91 NY2d 447, 454 [1998]; *Matter of Agoglia v Benepe*, 84 AD3d 1072, 1076 [2nd Dept 2011]; *Matter of Putnam v City of Watertown*, 213 AD2d 974 [4th Dept 1995]).

With respect to NOVs 034497626J, 040672813H , 041203387Z and 174405532, the final determinations are not dated. Rather, each determination sets forth a mailing date. Each undated determination constitutes a definitive and final agency action. It is well settled that “fundamental fairness requires that the aggrieved party be notified of the administrative determination before the statutory period in which to seek review commences” (*Guirdanella v New York State Div. of Hous. & Community Renewal*, 165 AD2d 667, 668 [1990]; see, *Matter of Edmead v McGuire*, 67 NY2d 714 [1986]; *Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832 [1983]; *Matter of Richardson v New York City Hous. Auth.*, 89 AD3d 1091, 1092 [2nd Dept 2011]).

Respondent has submitted affidavits of mailing with respect to NOV 034497626J, 040672813H , 041203387Z and 174405532, in support of its claim that it properly served petitioner Jafri with each NOV. These affidavits of mailing all pre-date the final determinations which denied petitioner’s requests to vacate his default and grant a new hearing. Respondent asserts that the final determinations were each mailed on the date set forth in said notices. Respondent, however, has not submitted any proof of mailing with respect to said final determinations. Therefore, the statute of limitations had not expired with respect to said NOVs, prior to the commencement of this Article 78 proceeding.

With respect to NOV 034880979R, petitioner entered into a pre-hearing stipulation with the DOB, dated November 4, 2010. A stipulation of settlement, which discontinues a claim with prejudice, is subject to the doctrine of res judicata (*see State v Seaport Manor A.C.F.*, 19 AD3d 609, 610 [2nd Dept 2005]). Under New York's transactional approach to the doctrine of res judicata, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O'Brien v City of Syracuse*, 54 NY2d 353 [1981]; see *Parolisi v Slavin*, 98 A.D.3d 488, 489-490 [2nd Dept 2012]). Here, the subject stipulation constitutes an admission on the part of petitioner, rather than a discontinuance, with prejudice, of the NOV issued by the DOB.

Furthermore, under the circumstances presented, the doctrine of res judicata does not serve as a bar to a claim to set aside a stipulation.

Stipulations of settlement are judicially favored and should not be lightly cast aside (see *Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Charlop v A.O. Smith Water Prods.*, 64 AD3d 486 [1st Dept 2009]). A party seeking to set aside such a stipulation will be granted such relief only upon a showing of good cause sufficient to invalidate a contract, such as fraud, overreaching, duress, or mistake (see *Esposito v Podolsky*, AD3d , 2013 NY Slip Op 2045, 2013 N.Y. App. Div. LEXIS 1987 [2d Dept 2013]; *McCoy v Feinman*, 99 NY2d 295, 302, [2002]; *Hallock v State of New York*, 64 NY2d at 230).

The party seeking to vacate the stipulation should do so with reasonable promptness under the circumstances (see *Hallock*, 64 NY2d at 231 [parties bound by a stipulation where they voiced no objection for two months following the execution of a stipulation]). Furthermore, a party must commence a special proceeding under Article 78 by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. (CPLR 217 [1]; *Best Payphones, Inc. v Dep't of Info. Tech. & Telecomms.*, 5 NY3d 30 [2005]).

Here, petitioner alleges that after he entered into the subject stipulation on October 10, 2012, he determined that he could not correct the building violations, allegedly due to the construction of the building. Petitioner, however, did not seek to set aside the stipulation for nearly two years after it was executed. Therefore, the court finds that this claim is barred by the statute of limitations.

In view of the foregoing, respondent's cross motion to dismiss the petition is granted solely as to the stipulation of settlement entered into with respect to NOV 034880979R, and is denied in all other respects. Respondent is directed to serve an answer, along with all supporting papers and to submit a copy of the administrative record. Petitioner thereafter shall have 10 days to serve any reply papers, and the parties shall re-notice this proceeding no later than 40 days after the service of a copy of this order together with notice of entry.

Dated: April 10 , 2013

D#48

J.S.C.