SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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In the Matter of the Application of
LUCIA D. TEPAN CHUMBAY,

Index No. : 537/2013

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

Motion Date: March 21, 2013

Petitioner,

Seq. No.: 1

-against-

NYC DEPARTMENT OF BUILDINGS,
and NYC ENVIRONMENTAL CONTROL
BOARD,

Respondents.

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The following papers numbered 1 to 8 were read on the amended petition of the petitioner seeking an order, pursuant to Section 7801 of the CPLR, vacating the default judgment issued by the respondent NYC Environmental Control Board ("ECB"), ECB Violation No. 34902353J. Also read was the cross-motion of the respondent ECB, seeking an order dismissing the petition pursuant to CPLR 217(1), 3211(a)(5) and 7804(f), on the ground that the claims are barred by the statute of limitations.

	PAPERS NUMBERED
Notice of Amended Petition - Affirmation - Exhibits.....	1 - 3
Notice of Cross-Motion - Affirmation - Memo - Exhibits.....	4 - 7
Opposition Affirmation to Cross-Motion.....	8

Petitioner moves, pursuant to Section 7801 of the CPLR, seeking an order vacating the final determination of the ECB, and the default judgment, as to ECB Violation No. 34902353J, on the ground that the petitioner never received notice of said violations, and further, that the petitioner was never provided a hearing or notice of hearing, in regards to said alleged violation. Petitioner further claims that, despite repeated requests for a hearing, the ECB issued a notice of

ECB Denial, served and received on September 11, 2012.

Respondent cross-moves, seeking a dismissal of the petition on the ground that the claim contained therein is barred by the applicable statute of limitations. (CPLR 3211[a][(5].) Respondent alleges that the instant proceeding, commenced one year and two months after the ECB final determination, should be dismissed as time-barred. Respondent alleges that the petitioner was to appear for a hearing on April 12, 2011, and after failing to appear, the ECB issued a default with the applicable statutory penalty in the sum of $24,000.00 for the NOV on April 18, 2011. On or about June 17, 2011, the petitioner submitted a Request for a New Hearing After a Failure to Appear, and respondent denied said request on July 1, 2011, because petitioner "did not include information or documents you were asked to provide or the documents [petitioner] provided did not prove [her] claim." The ECB asserts that this denial was its final determination of the petitioner's request for a new hearing for the NOV and to vacate the underlying default. Respondent also submits that petitioner's counsel sought reconsideration of the request by letter dated September 21, 2011, and ECB subsequently denied this request as well, by letter dated September 26, 2011.

Respondent asserts that regardless of whether the court chooses to declare the July 1, 2011 determination or the September 26, 2011 letter, as the date of the final determination, the statute of limitations as set forth in CPLR 217(1), four months, had expired by the time this instant proceeding was commenced, January 9, 2013.

Petitioner asserts that the instant cross-motion should be dismissed in its entirety because the affirmation of the respondent's counsel is the only sworn testimony before the court. Petitioner cites CPLR 3211(b), which states in pertinent part: "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts. . ." (CPLR 3211[b].) Accordingly, petitioner alleges, the lack of an affidavit from someone with personal knowledge of the facts alleged within the cross-motion, requires said motion to be denied. (*Zuckerman v City of New York,* 49 NY2d 557.) Petitioner argues that as to the July 1, 2011 date, respondent cites as controlling, no affidavit or other sworn testimony was proffered by the respondent with regard to the date of service of same, and further petitioner's counsel avers in his affirmation that his office contacted the respondent requesting a determination on the petitioner's motion for reconsideration and was specifically told that no decision had been received. Petitioner's counsel then states that the ECB's letter dated September 26, 2011, was not mailed for fifty weeks, and that respondent also fails to provide any sworn statement as to such service. Petitioner's counsel avers that the letter dated September 26, 2011 was received by his office on September 11, 2012. Counsel, in a separate affirmation by John Vafai, Esq., states that after waiting nearly a year from his last correspondence with the respondents, he called to follow up regarding his September 21, 2011 letter, and received an email from ECB Queens Branch Manager Catherine A. Shor, on September 11, 2012, acknowledging the delay for the ECB's response and further, that the email attachment containing the ECB letter dated September 26, 2011, was the only copy of such notice ever received by the petitioner or counsel.

Counsel for petitioner asserts that based on the foregoing, the letter from Mr. Vafai, was not an acknowledgment of receipt of a final decision, but rather, a statement on petitioner's behalf requesting a final decision. Further, petitioner argues, the email transmission from the ECB dated September 11, 2012, acknowledges the twelve month delay, and that such acknowledgment warrants the denial of the respondent's cross-motion.

It is well settled that a court's function in an Article 78 proceeding is "to scrutinize the record and determine whether the decision of the administrative agency [in question] is supported by substantial evidence and not arbitrary and capricious" (*Matter of Marsh v Hanley*, 50 AD2d 687 [1975]); see also *Arbuiso v New York City Dept. of Bldgs*., 64 AD3d 520, 522 [2009], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, 34 NY2d 222, 231 [1974]).

At the outset the court finds that the within proceeding is not barred by the statute of limitations. Respondent has failed to submit proof, in admissible form, that either of the ECB's letters, dated July 1, 2011 and September 21, 2011 were actually mailed to petitioner or her representative on those dates. Further, as to both the NOV and the default order respectively, the computer printouts submitted by the ECB, which it asserts "indicates" that said NOV was mailed on March 9, 2011, and the default order was mailed on April 18, 2011, both are insufficient to establish that either of these notices were actually mailed on said dates. No affidavits of mailing have been submitted with respect to any of the documents purportedly sent to the petitioner, and the court declines the invitation to interpret the ECB's computer printouts.

Under section 1049-a[d][2] substituted service is permitted only where a "reasonable attempt has been made to deliver such notice to a person in such premises." No such "reasonable attempt" was made here, and moreover, substituted service requires a subsequent mailing." The Court finds that the service of the NOV was in violation of New York City Charter Section 1049-a[d][2]), in that the affirmation of service did not state where the notice was placed and only stated that it was "posted. The City Charter requires that due diligence be exercised before substituted service is made, and further, the posting of the notice on the same day the violation was observed does not constitute due diligence.

Inasmuch as jurisdiction and service of the NOV is challenged, the ECB has the burden of proving that the statutory and due process prerequisites were met. It is asserted that in order to avail itself of "affix and mail" service, the ECB was required to establish that it made a reasonable attempt to effectuate service, and that no such evidence was presented within the instant petition. Regardless of whether the standard is due diligence as required under CPLR 308(4), or the lesser standard of a "reasonable attempt," service is invalid here. As stated by the Court of Appeals, "[t]he incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites" (*Stewart v Volkswagen of Am.*, 81 NY2d 203 207 [1981], citing *Lamarr v Klein*, 35 AD2d 248 [1970], affd 30 NY2d 757 [1972]). The burden of establishing the propriety of service rests upon the party asserting jurisdiction (see *72A*

Realty Assocs. v New York City Envtl. Control Bd., 275 AD2d 284, 285-287 [2000]). In addition, "compliance with statutory service requirements is not obviated by a defendant's actual receipt of service"(*New Hampshire Ins. Co. v Wellesley Capital Partners*, 200 AD2d 143, 150 [1994], citing *McDonald v Ames Supply Co.*, 22 NY2d 111 [1968]). New York City Charter § 1049-a(2)(a)(ii) provides that "service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the ... the commissioner of buildings ... and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises where the violation occurred."

Section 1049-a(2)(b)further provides, in pertinent part, that "[s]uch notice may only be affixed or delivered pursuant to items (i) and (ii) of subparagraph (a) of this paragraph where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law. When a copy of such notice has been affixed or delivered, pursuant to items (i) and (ii) of subparagraph (a) of this paragraph, a copy shall be mailed to the respondent at the address of such premises...." The City Charter's requirement that the issuing officer make a "reasonable attempt" to serve the NOV on a person who is amenable to service under Article 3 of the CPLR, provides for a lesser standard than that of "due diligence" as required under CPLR 308(4), before resort can be made to conspicuous service ("affix and mail"). The City Charter thus permits in hand delivery, as well as delivery to a person of suitable age and discretion. Although the term "reasonable attempt" is not defined, RPAPL § 735 similarly requires that a process server make a "reasonable application" to effectuate service.

It is well settled in the Second Department that at least two attempts at personal service, one during normal working hours and one attempt when a person working normal business hours could reasonably be expected to be home, are required to satisfy the "reasonable application" standard (RPAPL § 735[1]; *Martine Associates LLC v Minck*, 5 Misc 3d 61 [2004]; citing to, *Eight Assocs. v Hynes*, 102 AD2d 746, 1 [1984] affd 65 NY2d 739 [1985]; *Hynes v Buchbinder*, 147 AD2d 371 [1989]; see also *Brooklyn Heights Realty Com v Gliwa*, 92 AD2d 602 [1983]; *Dolan v Linnen*, 195 Misc 2d 298 [2003]). Here, the ECB presents proof that the issuing officer made a reasonable attempt to serve the petitioner with the NOV, issued on the same date as that of the claimed violation in the affirmation of service. The affirmation of service, however, merely includes a pre-printed statement that a reasonable attempt at service was made. To the extent that the affirmation of service included the handwritten word "posted," the word "post" has multiple meanings and it is unclear as to whether the issuing officer was affirming that he or she had affixed the NOV or perhaps had mailed it. More importantly, the affirmation of service is devoid of any information with respect to the issuing officer's "reasonable attempt" to effectuate personal service, since the issuing officer's attempt at service could not have been discerned simply by reading the affirmation of service.

The court further finds that even assuming arguendo, petitioner did not file her request for a new hearing within 45 days from the date of default, under the ECB Vacate Rule, she is entitled to seek relief from the default, as she asserts that she was not served with the original notice of violation. The issue of lack of proper service was raised by petitioner in her requests to vacate the default, and petitioner is entitled to contest service of the NOV at a hearing before the ECB.

In view of the foregoing, respondent's cross-motion to dismiss the petition, is denied in its entirety. Petitioner's request to vacate the default judgment issued by the ECB Violation No. 34902353J, is granted, and the matter is remanded to the ECB for an evidentiary hearing on the subject NOV.

This constitutes the order and judgment of this court.

Dated: April 25, 2013

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SIDNEY F. STRAUSS, J.S.C.