

**Matter of 985 Amsterdam Ave. Hous. Dev. Fund
Corp. v Beddoe**

2013 NY Slip Op 31183(U)

May 2, 2013

Sup Ct, New York County

Docket Number: 102332/2012

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 102332/2012
989 AMSTERDAM AVENUE HDFC
VS.
BEDDOE, SUZANNE A.
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to 4, were read on this ^{petition} ~~motion~~ to ~~for~~ vacate respondents' determinations

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

PAPERS NUMBERED

1
2-3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants the petition to the extent set forth pursuant to the accompanying decision. C.P.L.R. §§ 7803(3) and (4), 7806.

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: 5/2/13

Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 46

-----X

In the Matter of the Application of
985 AMSTERDAM AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,

Index No. 102332/2012

Petitioner,

For a Judgment Pursuant to Article 78
of the CPLR

- against -

DECISION AND ORDER

SUZANNE A. BEDDOE, as Chief
Administrative Law Judge at the Office
of Administrative Trials and Hearings,
N.Y.C. ENVIRONMENTAL CONTROL BOARD,
N.Y.C. OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS, and HELAINE BALSAM, as
Legal Director of the Environmental
Control Board,

Respondents **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).

APPEARANCES:

For Petitioner

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For Respondents

Pamela A. Koplik, Assistant Corporation Counsel
Rachel K. Moston, Assistant Corporation Counsel
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LUCY BILLINGS, J.S.C.:

Petitioner seeks to vacate three default judgments issued by
respondent New York City Environmental Control Board (ECB),
imposing fines for three New York City Department of Buildings
violations issued to petitioner, N.Y.C. Charter § 1049-
a(d)(1)(d), and to reverse respondents' denial of petitioner's

request to vacate the default judgments. Petitioner claims respondents' service of their notices of violation and hearing, of the default judgments, and of their determination denying petitioner's request to vacate the default judgments was deficient and that the fines imposed were arbitrary. After oral argument, based on respondents' administrative record and regulations and on New York City Charter § 1049-a(d), the court grants the petition and remands the proceeding to respondents for a new hearing for the reasons explained below. C.P.L.R. § 7803(3) and (4).

I. THE UNDISPUTED ADMINISTRATIVE PROCEEDINGS

The Department of Buildings (DOB) issued the violations July 28, 2011, against petitioner's residential cooperative building. Violation #34923721R was for a lack of fire stopping in the boiler room wall, to be corrected by installing the fire stopping. Violation #34923722Z was for prohibited locks on bedroom doors in two apartments, to be corrected by removing the prohibited locks. Violation #34923723K was for a lack of smoke detectors in specified apartments and hallways, to be corrected by installing the smoke detectors. The notices of each of the violations informed petitioner of a hearing on the violation scheduled September 15, 2011.

Petitioner mailed certificates of correction for the three violation to DOB September 8, 2011. Since petitioner did not dispute the violations when they were issued and subsequently submitted the certificates of correction, petitioner assumed it

[* 4]
was unnecessary to appear at the hearing to resolve the violations.

DOB disapproved petitioner's certificates of correction however, because they lacked a sworn explanation of how the violations were corrected. By the time petitioner received the disapprovals, it already had failed to appear at the hearing September 15, 2011, but it resubmitted certificates of correction October 5, 2011, which DOB approved October 18 and 21, 2011.

Petitioner never received any notices that it had defaulted regarding the violations, either that it had defaulted in appearing for the hearing on the violations scheduled September 15, 2011, or that a default judgment had been issued. After petitioner received bills in November 2011 for the fines imposed for the violations, \$5,000 for #34923721R, \$2,500 for #34923722Z, and \$8,000 for #34923723K, petitioner, through its managing agent, submitted a request to respondents November 30, 2011, to vacate the default judgments and reschedule the hearing.

ECB denied this request because: "You did not include information or documents you were asked to provide or the documents you provided did not prove your claim." V. Pet. Ex. G; V. Answer Ex. E. ECB's form "Request for a New Hearing After a Failure to Appear," which petitioner submitted, states: "REASON FOR WHICH A NEW HEARING SHOULD BE GRANTED: YOU MUST CHECK ONE OF THE REASONS LISTED BELOW. . . . IF NO REASON IS CHECKED, YOUR REQUEST WILL BE DENIED." V. Pet. Ex. F at 2; V. Answer Ex. D at 2. Petitioner failed to indicate one of the reasons listed.

The only reason listed that conceivably may have applied to petitioner's circumstances, however, was: "It is more than 45 days from the missed hearing date, but it is less than 30 days from the mailing date of the default order." V. Pet. Ex. F at 2; V. Answer Ex. D at 2. Respondents' administrative record includes an affidavit that a default order related to each violation was mailed to petitioner September 20, 2011, as part of a bulk mailing of default orders to many destinations, automatically generated through respondents' database. Petitioner, however, attests that it never received any such order. Tellingly consistent with petitioner's nonreceipt, no copy of a default order or judgment that was mailed is included in respondents' administrative record or anywhere else in the record. Because petitioner did not know when any default order was mailed, this listed reason would not be understood to apply to petitioner's circumstances.

Another reason listed on ECB's form "Request for a New Hearing After a Failure to Appear" was that petitioner "did not receive the ticket (notice of violation) because the issuing agency did not serve the ticket correctly." V. Pet. Ex. F at 2; V. Answer Ex. D at 2. Although petitioner claims that DOB's service of the Notice of Violation and Hearing (NOV) for #34923723K, regarding a lack of smoke detectors, was deficient, petitioner did receive the NOV, so this listed reason would not be understood to apply to petitioner's circumstances either.

Petitioner did not, however, receive ECB's denials of

petitioner's request for a new hearing on the violations, because ECB addressed its three denials, one for each violation, to petitioner in the care of its managing agent at 799 Broadway, New York, NY 10003. Petitioner's address was 985 Amsterdam Avenue, New York, NY 10025. Its managing agent's address was 80 East 11th Street, New York, NY 10003.

Since neither petitioner nor its managing agent received any response to petitioner's request for a new hearing, the managing agent submitted another request March 5, 2012. This request fully explained why petitioner failed to appear at the originally scheduled hearing, why the agent failed to include one of the listed reasons in the first request for a new hearing, and that petitioner previously had corrected the violations. Respondents never responded to this request in writing.

II. APPLICABLE PROCEDURAL REQUIREMENTS

A. Respondents' Regulations

Respondents' regulations do not prohibit petitioner's second request for a new hearing after its first request was denied. The regulations only prohibit repeated requests after a request has been granted, the hearing has been rescheduled, and the requesting party has defaulted again in appearing at the rescheduled hearing. 48 R.C.N.Y. § 3-82(e). Respondents provide no reason for ECB's failure to grant or at least to determine petitioner's second request submitted March 5, 2012.

48 R.C.N.Y. § 3-82(b) requires ECB to grant requests for new hearings received within 45 days after the missed hearing unless

ECB finds the request in bad faith. When a request for a new hearing is made more than 45 days after the missed hearing, 48 R.C.N.Y. § 3-82(c) narrowly limits the circumstances in which ECB must grant the request. These regulatory provisions differ from the reasons listed on ECB's form Request for a New Hearing. 48 R.C.N.Y. § 3-82(c)(1)(A) requires a showing that the notices of violations, as opposed to the notices of the orders adjudicating the violations, were not served on petitioner by personal service according to C.P.L.R. § 311(a)(1) or other applicable law. This regulation does not require a showing that petitioner did not receive the NOV's.

The regulations are silent regarding respondents' deficient service of notice of the orders adjudicating the violations. Nor do the regulations provide for a new hearing when a request is within 30 days after the mailing date of the default order. The triggering event is the default itself, after which a request must be submitted within 45 days. Once this period has elapsed, even if notice of the default has not yet been mailed, even the most compelling reasons will not support a new hearing unless the defaulting party's circumstances fit 48 R.C.N.Y. § 3-82(c)'s narrow prescriptions.

Nevertheless, 48 R.C.N.Y. § 3-81(a) requires that notices of orders "rendered in consequence of a default" were to be sent to petitioner. Since respondents' administrative record nowhere reveals notices of ECB's orders rendered as a consequence of petitioner's default in appearing September 15, 2011, neither

does any evidence indicate that, before the 45 days to reopen a default under any circumstances except bad faith expired, petitioner received any notice of that deadline. Therefore petitioner received notice of neither the default orders nor the deadline for freely reopening them, regardless of the excuse for the default. Thus petitioner was denied the opportunity to which petitioner was entitled under 48 R.C.N.Y. § 3-82(b) to request a new hearing without any excuse. Gutierrez v. Rhea, ___ A.D.3d ___, 2013 WL 1458598, at *3-4 (1st Dep't Apr. 11, 2013); Marciano v. Goord, 38 A.D.3d 217, 218 (1st Dep't 2007).

B. New York City Charter § 1049-a(d)

Respondents' regulations derive from New York City Charter § 1049-a, the regulations' enabling legislation. Wilner v. Beddoe, 102 A.D.3d 582, 583 (1st Dep't 2013). Charter § 1049-a(d)(2) provides that NOV's may be "served in the same manner as is prescribed for service of process" by C.P.L.R. Article 3. See Wilner v. Beddoe, 102 A.D.3d at 583. While ECB delivered the NOV's to an officer of petitioner pursuant to C.P.L.R. § 311(a)(1), when service is effected under any of C.P.L.R. Article 3's provisions for personal delivery, such as § 311(a)(1), C.P.L.R. § 306(b) requires that the affidavit of service describe the person served. The description must include the person's "sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features." C.P.L.R. § 306(b). DOB's affidavit of service of NOV #34923723K, regarding the lack of smoke detectors, omitted any such description. V.

Answer Ex. G at 2.

Charter § 1049-a(d)(1)(h) further provides 30 days after the mailing of notice of a default order to request a new hearing, reopening the default:

before a judgment based on a default may be so entered the board must have notified the respondent [petitioner here] by first class mail . . . (i) of the default decision and the penalty imposed; (ii) that a judgment will be entered . . . ; and (iii) that entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of the board within thirty days of the mailing of such notice.

Consistent with this governing law, ECB's request form lists a reason that applies "more than 45 days from the missed hearing date," even without a showing of deficient service of the NOV's, and applies to petitioner's circumstances: petitioner submitted its request "less than 30 days from the mailing date of the default order." V. Pet. Ex. F at 2; V. Answer Ex. D at 2.

This provision encompasses petitioner because respondents have failed to show that any default orders ever were generated for mailing to petitioner. Respondents' affidavit of mailing does not include copies of the documents mailed. The absence of any notices of default or any default orders attached to the affidavit or included elsewhere in respondents' administrative record raises the inference that no such documents ever were generated and certainly does not support the contrary inference that they were generated and that they were the documents mailed September 20, 2011. Respondents also fail to provide any explanation why, if default orders or notices were generated and

mailed to petitioner, they are not part of the record. Nor do respondents point to any evidence that petitioner actually received, at least 30 days before its first request for a new hearing submitted November 30, 2011, notice of its default or any other evidence, such as conduct by petitioner, indicating it knew about its default. Based on the absence of default orders or notices mailed to petitioner, the 30 days from their mailing date never even began to run, encompassing petitioner within the time limitation of ECB's request form as well as Charter § 1049-a(d)(1)(h).

While notice of the default orders may have been unnecessary for petitioner to know that it did not appear at the hearing September 15, 2011, it demonstrates a persuasive reason why it needed that notice to know that ECB determined it to be in default. Because petitioner had certified its correction of each violation, and DOB then had approved those certifications, petitioner did not expect to be determined in default. Thus, only after petitioner received information that ECB had fined petitioner for the violations, did it contact ECB about reopening the administrative proceedings.

Petitioner's second request for a new hearing submitted March 5, 2012, provides this explanation. Presented with this explanation, respondents not only lack a reason for the failure to determine petitioner's second request, but they also fail to provide a reason why petitioner's circumstances, being unaware its nonappearance had led to default orders, did not warrant a

new hearing. Petitioner's explanation meets Charter § 1049-a(d)(1)(h) standard of "good cause shown." Any requirement imposed by respondents for any further showing would violate the governing Charter provision.

III. CONCLUSION

For the foregoing reasons, the court grants the petition to the extent of vacating any default orders and judgments issued by respondents, which imposed fines of \$5,000 for NOV #34923721R, \$2,500 for NOV #34923722Z, and \$8,000 for NOV #34923723K, against petitioner. C.P.L.R. § 7803(3) and (4). The court remands this proceeding to respondents to grant petitioner's request submitted March 5, 2012, to reopen the hearing on the NOVs after petitioner defaulted in appearing for the hearing, and to provide a new hearing on the NOVs with reasonable advance notice of the hearing date to petitioner. This decision constitutes the court's order and judgment granting the petition to the extent set forth above and otherwise dismissing this proceeding. C.P.L.R. § 7806.

DATED: May 2, 2013

UNFILED JUDGMENT

Lucy Billings

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).

LUCY BILLINGS, J.S.C.

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