

Colopedo Corp. v City of New York Env'tl. Control Bd.

2013 NY Slip Op 31810(U)

June 26, 2013

Supreme Court, Queens County

Docket Number: 16639/2012

Judge: Augustus C. Agate

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

Application of COLOPEDO CORP.,

Index No. 16639/ 2012

Petitioner,

Motion Date: March 19, 2013

For a Judgment Pursuant to CPLR Article 78

Motion Seq. No. 1

- against -

THE CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD,

Respondent.

x

The following papers numbered 1 to 8 read on this Article 78 proceeding by petitioner Colopedo Corp. for a judgment annulling the determination of respondent City of New York Environmental Control Board (ECB), which denied its request to vacate defaults in appearing and default judgments.

	<u>Papers Numbered</u>
Notice of Petition-Verified Petition-Exhibits.....	1-4
Verified Answer-Exhibits-Affidavit of Service.....	5-7
Verified Reply	8
Memorandum of Law.....	

Upon the foregoing papers the petition is determined as follows:

In January 2004, Colopedo Corp. purchased real property improved by a one-two family home, located 23-34 Sound Street, Astoria, New York, 11105. Petitioner maintains an office at 19 Hill Lane, Glen Head, New York, 11545, and does not occupy the Astoria property.

The New York City Department of Sanitation (DOS) issued seven Notices of Violation (NOV) to Colopedo Corp. between July 30, 2007 and July 24, 2010 for violations of the Administrative Code at the Astoria property. All of the violations pertained to

conditions on the exterior of the property.

NOV 0158412110 (NOV 10):

A DOS supervisor issued NOV 10 on July 30, 2007 to Colopedo Corp., at 2334 Sound St., Queens, New York, 11105, for a violation of Section 16-118(2)(a) of the Administrative Code of the City of New York (Administrative Code) for a dirty sidewalk. The NOV states that alternative service was used; that the mail-in penalty was \$100.00, and the maximum penalty was \$300.00; and a hearing date of September 10, 2007 was provided.

The DOS supervisor's affidavit of service states that alternative service was made pursuant to City Charter § 1404(d)(2),¹ and the following boxes were checked: "At the time indicated on the front of this Notice of Violation...having attempted entry to the premises, I found the premises locked and no one responded to any bells, knocks or calls; ..Therefore, I affixed a copy of the herein Notice of Violation to the door of the premises at the time indicated above." The alternative service mailing date is blank, and the stamp of the notary public appears in said space. The affidavit of service is stamped "824052 Au-8 07" and an affidavit of mailing dated August 9, 2007 states, in pertinent part, that on August 9, 2007, copies of the NOV's with stamped numbers 823399 to 8245448 were mailed to each respondent at the address of the premises where the violation occurred.

Colopedo Corp. did not appear at the September 10, 2007 hearing and the ECB issued a default order and imposed a penalty of \$300.00.

NOV 0171408683 (NOV 83):

On February 2, 2010, a DOS supervisor issued NOV 83 to Colopedo Corp. for a dirty area at the Astoria property, in violation of Administrative Code §16-118(2)(a). The NOV states that notice was also sent to Colopedo Co., at 3097 Steinway St 203 , LIC, NY, 11103. The NOV states that alternative service was used; that the mail-in penalty was \$100.00, and the maximum penalty was \$300.00; and a hearing date of March 11, 2010 was provided.

The DOS supervisor's affidavit of service states that alternative service was made pursuant to NYC Charter § 1049-a(d)(2), and the following boxes were checked: "At the time indicated on the front of this Notice of Violation...having attempted entry to the premises, I found the premises locked and no one responded to any bells, knocks or calls; ..Therefore, I affixed a copy of the herein Notice of Violation to the door of the premises at the time indicated above." The affidavit of service is stamped "254224 Feb 16 10" and an

¹ Renumbered as Section 1049-a(d)(2)

affidavit of mailing dated February 17, 2010 states, in pertinent part, that on February 17, 2010 copies of the NOV's with stamped numbers 253952 to 255106 were mailed to each respondent at the address of the premises where the violation occurred, and to the additional addresses indicated on the NOV.

Colopedo Corp. did not appear at the March 11, 2010 hearing and the ECB issued a default order and imposed a penalty of \$300.00.

NOV 01711400451 (NOV 451):

On March 7, 2010, a DOS supervisor issued NOV 451 to Colopedo Corp. for loose rubbish at the Astoria property, in violation of Administrative Code § 16-120(d). The NOV states that notice was also sent to Colopedo Co, at 3097 Steinway St, STE 203, LIC, NY, 11103. The NOV states that alternative service was used; that the mail-in penalty was \$100.00, and the maximum penalty was \$300.00; and a hearing date of April 8, 2010 was provided.

The DOS supervisor's affidavit of service states that alternative service was made pursuant to NYC Charter § 1049-a(d)(2), and the following boxes were checked: "At the time indicated on the front of this Notice of Violation...having attempted entry to the premises, I found the premises locked and no one responded to any bells, knocks or calls; ..Therefore, I affixed a copy of the herein Notice of Violation to the door of the premises at the time indicated above." The affidavit of service is stamped "263897 Mar 12 10" and an affidavit of mailing dated March 15, 2010 states, in pertinent part, that on March 15, 2010 copies of the NOV's with stamped numbers 263560 to 264125 were mailed to each respondent at the address of the premises where the violation occurred, and to the additional addresses indicated on the NOV.

Colopedo Corp. did not appear at the April 8, 2010 hearing and the ECB issued a default order and imposed a penalty of \$300.00.

NOV 01721000051 (NOV 051):

On March 16, 2010, a DOS supervisor issued NOV 051 to Colopedo Corp. for having a dirty area at the Astoria property, in violation of Administrative Code §16-118(2)(a). The NOV states that notice was also sent to Colopedo Co, at 3097 Steinway St, STE 203, LIC, NY, 11103. The NOV states that alternative service was used; that the mail-in penalty was \$100.00, and the maximum penalty was \$300.00; and a hearing date of April 26, 2010 was provided.

No affidavit of service has been submitted in connection with NOV 051, although an affidavit of mailing dated March 24, 2010 has been submitted.

Colopedo Corp. did not appear at the April 26, 2010 hearing and the ECB issued a default order and imposed a penalty of \$300.00.

NOV 042672305Y (NOV 5Y):

On March 25, 2010, a DOS Police Officer issued NOV 5Y to Colopedo Corp. for having a dirty area at the Astoria premises in violation of Administrative Code §16-118(2)(a). The NOV states that the mail-in penalty was \$100.00, and the maximum penalty was \$300.00, and set forth a hearing date of April 26, 2010.

The Officer's affirmation of service states that alternative service per NYC Charter §1409-a(d)(2) was used, and the following boxes were checked: "At the time indicated on the front of this Notice of Violation with the below referenced number...having attempted entry to the premises, I found the premises locked and no one responded to any bells, knocks or calls. Therefore, I affixed a copy of the Notice of Violation with the below referenced number to the door of the premises at the time indicated above." An affidavit of mailing dated March 30, 2010 states, in pertinent part, that on March 15, 2010 copies of the NOV's "summarized by violation number on the attached sheet (Batch 100329002 to 100329015) were mailed to each respondent at the address of the premises where the violation occurred, and to the additional addresses indicated on the NOV. The attached sheet lists NOV 5Y and Colopedo's mailing address at the subject property and at the Stienway Street address.

Colopedo Corp. did not appear at the April 26, 2010 hearing and the ECB issued a default order and imposed a penalty of \$300.00.

NOV 0161160432 (NOV 32) and NOV 0177709840 (NOV 40):

A DOS inspector issued NOV 32 on July 25, 2008 and NOV 40 on July 24, 2010. Although Colopedo Corp.'s applications to vacate its default, and grant a new hearing as to these NOV's were initially denied by the ECB on April 11, 2012, the ECB has now granted a new hearing as to said NOV's.

Colopedo Corp. asserts that it was unaware of these violations until 2012. On March 7, 2012, petitioner received a letter from a debt collection agency retained by respondent with respect to NOV 32 and NOV 40. On March 29, 2012, petitioner received a letter from a different debt collection agency retained by respondent with respect to NOV 83. On April 5, 2012, petitioner conducted a website search on discovered NOV 10, NOV 451, NOV 5Y were also outstanding. on March 25, 2010. In April 2012, Colopedo Corp. seven separate requests to vacate the default as to each of these NOV's, in which it stated that it had not appeared at the hearing dates set forth in each NOV, as it did not receive notice of the NOV because the issuing agency did not serve the ticket correctly. In each instance, petitioner filled out the requisite form, and submitted copies of the NOV's, evidence of its corporate

status, and other documents pertaining to each NOV.

The ECB, in a form order bearing a mailing date of April 11, 2012, denied the request to vacate NOV 32, stating that “You did not include information or documents you were asked to provide; -OR- The documents you provided did not prove your claim”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 11, 2012, denied the request as to NOV 40, stating that “You did not include information or documents you were asked to provide; -OR- The documents you provided did not prove your claim”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 18, 2012, denied the request to vacate NOV 10, stating that “our records show that the ticket was properly served so that you should have received notice”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 18, 2012, denied the request to vacate NOV 83, stating that “our records show that the ticket was properly served so that you should have received notice”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 18, 2012, denied the request to vacate NOV 451, stating that “our records show that the ticket was properly served so that you should have received notice”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 18, 2012, denied the request to vacate NOV 051, stating that “our records show that the ticket was properly served so that you should have received notice”. Colopedo Corp. was directed to pay the sum of \$300.00.

The ECB, in a form order bearing a mailing date of April 18, 2012, denied the request to vacate NOV 05Y stating that “our records show that the ticket was properly served so that you should have received notice”. Colopedo Corp. was directed to pay the sum of \$300.00.

Pleadings:

Petitioner timely commenced the within Article 78 proceeding on August 9, 2012, and seeks to vacate the defaults and to dismiss the NOVs. Petitioner alleges that respondent failed to properly serve it with notice of these seven NOVs as required under CPLR Article 3, Business Corporation Law Article 3 and Section 1049-a of the New York City Charter, in that they were not conspicuously affixed or mailed to the premises; that the NOVs were not mailed to petitioner’s place of business or to their authorized agent for service of process by

certified mail, return receipt or otherwise; and that on six of the NOVs the citations were initially issued to “OWNER” and that this was crossed out and replaced with replaced with Colopedo Corp.

Respondent, in opposition, asserts that its denial of the requests to vacate the default orders for NOVs 10, 83, 451, 051 and 5Y were reasonable, rational and in accordance with the applicable law. It is asserted that petitioner failed to satisfy any of the requirements set forth in 48 RCNY §3-82, and that the administrative record indicates that the service of the subject NOVs was lawful and proper. Respondent states that a new hearing has been granted as to NOV 32 and NOV 40, and does not address petitioner’s claims with respect to these two NOVs.

Discussion:

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]).

The ECB Vacate Default Rule, set forth in Section 3-82 of the Rules of the City of New York, provides, in full as follows:

“§ 3-82 Request for a New Hearing after a Failure to Appear (Vacating a Default).”

“1.(a) A request by a respondent for a new hearing after the respondent did not appear must be made by application to the executive director or his or her designee. The request must be on a form prescribed by the executive director. The request must contain a current mailing address for the named respondent; it must explain how and when the respondent learned of the violation and it must be sworn or certified to under the penalties of perjury. If the request is not made by the named respondent, the request must explain the relationship between the respondent and the person making the request.”

“(b) A request for a new hearing, as described in subdivision (a) of this section, that is received within 45 days of the hearing date upon which the respondent did not appear, shall be granted unless such request is found to be made in bad faith. Such findings shall be made at the discretion of the executive director and shall include, but not be limited to, requesting only to

admit the charge(s), repeatedly filing the same request or filing the same request in more than one borough at the same time.”

“(c) A request for a new hearing that is received more than 45 days from the date upon which the respondent did not appear must contain, in addition to the information stated in subdivision (a) of this section, appropriate supporting documentation. Such request may be granted and a hearing conducted only if the respondent establishes that a new hearing was requested within one year of the time the respondent learned of the existence of the violation, and that there is a reasonable basis to believe that the respondent (1) did not receive the notice of the violation because the respondent was

(A) not properly served with the violation under article three of the civil practice law and rules, article three of the business corporation law, section 1049-a of the New York City Charter or any other provision relating to service of violations returnable to the Environmental Control Board contained in the New York City Administrative Code or the Rules of the City of New York; or

(B) cited generically, for example, as “Owner” or “Agent,” on all copies of the notice of violation sought to be served on the respondent; or

(2) was an improper party when the notice of violation was issued. An improper party is a named respondent who is

(A) an individual who was deceased or legally incompetent on the hearing date upon which the respondent did not appear; or

(B) for a premises related violation, not the owner, agent, lessee, tenant, occupant or person in charge of or in control of the place of occurrence on the date of the offense.”

“A decision to grant the request for a new hearing under this section shall not be considered a final decision on the issue of whether respondent was properly served or was a proper party on the date of offense.”

“(d) If a request for a new hearing is granted, the Environmental Control Board shall send a notice to the respondent at the respondent’s address stated on the request for a new hearing. If the respondent is deceased or legally incompetent, a notice shall be sent to respondent’s representative. Notice shall also be sent to the Petitioner.”

“(e) No more than one request for a new hearing under this section may be granted with respect to any one notice of violation unless the notice of the new hearing date was not mailed pursuant to subdivision (d) of this section. If the respondent is unable

to appear on the hearing date scheduled after a request for a new hearing is granted, respondent may request that the hearing be rescheduled one final time.”

“(f) Review of a denial of a request for a new hearing after a failure to appear may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.”

Where, as here, the petitioner did not file its request for a new hearing within 45 days from the date of default, under the ECB Vacate Rule, even a *bona fide* excuse will be unavailing to vacate the default, unless the original notice of violation was improperly served or the defaulting party was not a proper party in the first instance (*see Matter of Wilner v Beddoe*, 33 Misc3d 900 [Sup Ct New York County 2011], *affirmed* 102 AD3d 582 [1st Dept 2013]).

The touchstones of procedural due process are notice and an opportunity to be heard (*Prue v Hunt*, 78 NY2d 364 [1991]; *Toolasprashad v Kelly*, 80 AD3d 530 [1st Dept 2011]). The constitutional requirements of procedural due process apply to proceedings before administrative agencies (*Wolfe v Kelly*, 79 AD3d 406 [1st Dept 2011]). Procedural due process requirements must be met before any default is actually taken (*In re Bouchard*, 29 AD3d 79 [3d Dept 2006]; *Tupaz v Clinton County, New York*, 499 F Supp 2d 182 [Northern District, New York 2007]; *Jaouad v City of New York*, 4 F Supp 2d 311 [Southern District, New York 1998]). The ECB Vacate Rule, thus, requires that a judgment be vacated where the notice of violation was not properly served (*see Matter of Wilner v Beddoe, supra*; *Matter of Gallo v City of New York*, 36 Misc3d 1204[A] [Sup Ct, Queens County 2012]; *Matter of Oparaji v City of New York*, 2011 NY Slip Op 33265[U], 2011 NY Misc LEXIS 5982 [Sup Ct, Queens County [2011]).

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 [1st Dept 1970], *affirmed* 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 Env'tl. Control Bd.*, 275 AD2d 284, 285-287 [1st Dept 2000]).

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 commissioner of sanitation ...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:

“Such 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. In addition if the respondent is the owner or agent of the building with respect to which such notice was issued and the identity of and an address for such person is contained in any of the files specified in items (I), (ii) and (iii) of this subparagraph, a copy of the notice shall also be mailed:

(i)to the person registered with the department of housing preservation and development as the owner or agent of the premises, at the address filed with such department in compliance with article two of subchapter four of chapter two of title twenty-seven of the administrative code; or

(ii)to the person designated as owner or agent of the building or designated to receive real property tax or water bills for the building at the address for such person contained in one of the files compiled by the department of finance for the purpose of the assessment or collection of real property taxes and water charges or in the file compiled by the department of finance from real property transfer forms filed with the city register upon the sale or transfer of real property; or

(iii)to the person described as owner or agent of the premises, at the address for such person contained in the files of the agency which issued such notice of violation compiled and maintained for the purpose of the enforcement of the provisions of the charter or administrative code or other law over which such agency has jurisdiction.”

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”). 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 [Appellate Term, 2d Dept 2004]; citing to, *Eight Assocs. v Hynes*, 102 AD2d 746, 1 [2d Dept 1984] *affirmed* 65 NY2d 739 [1985]; *Hynes v Buchbinder*, 147 AD2d 371 [2d Dept 1989]; *Brooklyn Heights Realty Com v Gliwa*, 92 AD2d 602 [2d Dept 1983]; *Dolan v Linnen*, 195 Misc 2d 298 [Civ Ct, Richmond County 2003]; see also *Matter of Oparaji v City of New York*, *supra*; *Matter of Schulder v NYC Environmental Control Board*, 2010 NY Slip Op 33554[U]; 2010 NY Misc. LEXIS 6450 [Sup Ct, Queens County, 2010]).

Ordinarily, an affidavit of service is sufficient to establish service. With respect to NOV 051, no affidavit of service has been submitted. Therefore, petitioner has established that it properly raised the issue of improper service in its request to vacate the default as to this NOV and is entitled to contest service at hearing before the ECB.

With respect to NOVs 10, 83, 451, 051, and 5Y each of the affidavits of service recite that service was made by affix and mail, after an attempt at service was made on the very same date that each of the NOVs were issued. In these instances, the DOB’s reasonable attempt at service runs afoul of the service provisions set forth in City Charter § 1049-a(2)(a)(ii), and thus establishes that petitioner properly raised the issue of lack of proper service in its requests to vacate the defaults as to each of these NOVs, and is entitled to contest service at a hearing before the ECB (*see Matter of Wilner v Beddoe, supra*; *Matter of Gallo v City of New York, supra*; *Matter of Oparaji v City of New York, supra*; *Matter of Schulder v NYC Environmental Control Board, supra*).

With respect to NOV 32 and 40, as respondent has granted a new hearing, petitioner may contest the service of these NOVs at the hearing before the ECB.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the petition is granted to the extent that the ECB’s default judgment against the petitioner and its determination denying the requests for a new hearing with respect to NOV 0158412110, NOV 01714086830, NOV 01711400451, NOV 01721000051 and NOV 042672305Y is vacated, and the matter is remanded to the ECB for further proceedings; and it is further

ORDERED AND ADJUDGED that petitioner’s request for relief with respect to NOV 0161160432 and NOV 0177709840 is denied, as moot; and it is further

ORDERED AND ADJUDGED that petitioner's request to dismiss NOV 0158412110, NOV 01714086830, NOV 01711400451, NOV 01721000051, NOV 042672305Y, NOV 0161160432 and NOV 0177709840, is denied.

Dated: June 26, 2013

AUGUSTUS C. AGATE, J.S.C.