Matter of Tri-Rail Constr. Inc. v Environmental Control Bd. of The City of N.Y.
2014 NY Slip Op 30549(U)
March 5, 2014
Supreme Court, New York County
Docket Number: 100747/13
Judge: Donna M. Mills
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[* 1]

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

PRESENT: DONNA M. MILLS PART 58

Justice

In the Matter of the Application of
TRI-RAIL CONSTRUCTION INC

Petitioner,

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

-against-

THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK A DIVISION OF THE OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Respondent.

Index No. 100747/13

MOTION DATE

MOTION SEQ. NO. 06

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion ____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits – Exhibits ...	1
Answering Affidavits – Exhibits	2, 3
Replying Affidavits	4

CROSS-MOTION: ____ YES ✓ NO

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).

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 3/5/14

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of

TRI-RAIL CONSTRUCTION INC.,

Petitioner,

For an Order Pursuant to Article 78 of the CPLR Ordering and Directing Respondents to Vacate Certain Default Judgments and Conduct Hearings,

– against-

Index No.: 100747/13

THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK A DIVISION OF THE OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Respondent.

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MILLS, J.:

Petitioner, Tri-Rail Construction Inc. (Tri-Rail), a company engaged in the construction business, seeks an order, pursuant to CPLR article 78 (Article 78), directing respondent, New York City Environmental Control Board of the City of New York, a Division of the Office of Administrative Trials and Hearings (ECB), to grant Tri-Rail new hearing dates concerning 10 notices of violations (NOVs) against Tri-Rail and to schedule those dates (petition at 4). The numbers of the NOVs at issue here are: 178-769-122 and 178-828-540 (together, NOVs 1 and 2) and 176-286-303, 176-492-241, 176-492-250, 176-514-178, 177-053-452, 177-053-461, 177-053-470, and 177-053-480 (together, NOVs 3-10).

Background

NOVs 1 and 2 and NOVs 3-10, as well as four others, were the subject of this court's

prior order, dated September 4, 2012 (Tri-Rail III), and familiarity with that order is presumed. Regarding NOVs 1 and 2, in Tri-Rail III, this court directed ECB to schedule new hearing dates to determine whether Tri-Rail received notices, from ECB, of Tri-Rail's defaults on the ECB hearing dates that had been previously scheduled for those NOVs (*see* Tri-Rail III at 2, 4, 6). Concerning NOVs 3-10, in Tri-Rail III, Tri-Rail claimed that the representatives who had previously appeared in ECB hearings for Tri-Rail had not been authorized to do so (*id.* at 5). Because such circumstances would have rendered the proceedings a nullity, this court determined that ECB's denial of Tri-Rail's application to reopen those hearings, based on default, was invalid, and ordered ECB to grant new hearing dates to determine whether or not the representatives were authorized. ECB granted new hearing dates for the 14 NOVs involved in Tri-Rail III, with 12 of the 14 scheduled for ECB hearings on November 15, 2012, and the remaining two scheduled on two other dates. The 12 NOVs scheduled to be heard on November 15, 2012 included NOVs 1 and 2 and NOVs 3-10, which are at issue here.

ECB provides evidence that it notified Tri-Rail of the November 15, 2012 date for the 12 NOVs. It is also undisputed that, on October 18, 2012, counsel for ECB advised counsel for Tri-Rail of that date. Tri-Rail does not contend that it was not properly notified of the November 15, 2012 hearing date prior to that date. Tri-Rail's counsel avers that Tri-Rail's law firm recorded in its calendar, for reference, only two of the twelve NOVs scheduled to be heard on November 15, 2012. On November 15, 2012, a representative for Tri-Rail appeared and sought the adjournment of only the two NOVs that the firm had recorded on its calendar, but did not request adjournments of NOVs 1 and 2 and NOVs 3-10, which were also scheduled to be heard that day

(*see* petition, exhibit C).[1] ECB granted the requested adjournment, for the two NOV numbers that are not at issue here, to December 20, 2012. ECB provides evidence demonstrating that default orders were mailed to Tri-Rail for NOVs 1 and 2 and NOVs 3-10 on November 26, 2012 (Balsam aff, ¶ 15, exhibit M). On December 20, 2012, Tri-Rail appeared at ECB for the hearing on the two adjourned NOVs and admitted to those violations (petition, exhibit D).

On February 5, 2013, Tri-Rail's counsel sent an email message to ECB's counsel inquiring about the status of the hearings for NOVs 1 and 2 and NOVs 3-10, and noting that Tri-Rail had received an adjournment of the two other NOVs to December 20, 2012. The next day, ECB's counsel responded by asking for the numbers of the two NOVs that ECB had adjourned and whether Tri-Rail's counsel had any proof that its representative had adjourned NOVs 1 and 2 and NOVs 3-10 on November 15, 2012 (Balsam aff, exhibit N). The record reveals an email message dated March 5, 2013 (the March 5, 2013 Email), from Tri-Rail's counsel to ECB's counsel, stating "[j]ust a reminder that we are still awaiting your advise [sic] as to this matter" (*id.*). Later that day, ECB's counsel wrote that Tri-Rail was in default for failing to appear at the November 15, 2012 hearings and referred Tri-Rail's counsel to Title 48 of the Rules of the City of New York (RCNY) § 3-82 (*id.*).

On May 17, 2013, Tri-Rail commenced this proceeding. On June 26, 2013, in opposition to Tri-Rail's verified petition, ECB served its memorandum of law and verified answer, in which ECB argued that Tri-Rail had failed to exhaust its administrative remedies because it had not

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[1] The ECB adjournment application that Tri-Rail's counsel filled out on November 15, 2012 is a form on which Tri-Rail left blank additional spaces/lines available to insert more NOV numbers. On the application, Tri-Rail requested an adjournment of the two NOVs that are not at issue here because its counsel's Long Island office had been closed for over a week due to hurricane Sandy and had no attorney available to appear as its case calendar was full.

requested a new hearing, and, alternatively, that the petition was time-barred. On or about July 2, 2013, Tri-Rail submitted to ECB, a "Request for a New Hearing After a Failure to Appear (Vacating a Default)" (New Hearing Request) for each of NOVs 1 and 2 and NOVs 3-10 (reply, exhibit A). On each New Hearing Request, Tri-Rail indicated that the request was being submitted more than 45 days after the missed hearing date, but less than 30 days from the default order's mailing date.[2] In Tri-Rail's submissions to ECB with the New Hearing Requests, Tri-Rail stated: (1) that on November 15, 2012, ECB did not advise Tri-Rail's appearing representative that a hearing was scheduled on the violations; (2) that with the March 5, 2013 Email, "ECB's counsel advised this NOV was in default"; and (3) that ECB had opposed Tri-Rail's Article 78 petition, in this proceeding, on the ground that New Hearing Requests should be made (reply, exhibit A). In August 2013, ECB denied the New Hearing Requests on the ground(s) that: (1) they were not received by ECB within 45 days of the missed hearing date; or (2) were not received by ECB within 30 days of the date that the default order was mailed; or (3)

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[2] In the New Hearing Requests, Tri-Rail's counsel indicated that she had not previously submitted a New Hearing Request for the involved violations and that Tri-Rail had learned about NOVs 1 and 2 on or about March 2012 (reply, exhibit A). However, NOVs 1 and 2, and others, were previously addressed by ECB and by this court in 2011 (*see Matter of Tri-Rail Constr., Inc. v Environmental Control Bd. of the City of N.Y.*, Sup Ct, NY County, November 16, 2011, Mills, J., index No. 106979/11, at 3 n 3, 4-5, 9-11, *revd* 104 AD3d 445, 445 [1st Dept 2013] [reversing as time-barred the portion of the decision that granted Tri-Rail's petition to vacate defaults of certain NOVs] [Tri-Rail I]). In Tri-Rail I, Tri-Rail's president averred that Tri-Rail had already filed New Hearing Requests for NOVs 1 and 2, which ECB had denied. This court determined that ECB's denial of Tri-Rail's request to vacate what the court labeled as the "Group IV" NOVs, which included NOVs 1 and 2, was not arbitrary and capricious, and dismissed the petition as to NOVS 1 and 2, and others, including two NOVs numbered 178-769-131 and 178-828-531 (*id*). NOVs 1 and 2 and NOVs 178-769-131 and 178-828-531 were also adjudicated in Tri-Rail III. Thereafter, NOVs 178-769-131 and 178-828-531 were heard by ECB, at the December 20, 2012 hearing, previously discussed above (petition, exhibit D; Background Section, *supra* at 3). At the hearing, Tri-Rail admitted liability to those NOVs, despite having asserted, in Tri-Rail I, that it was no longer at the job site when the NOVs were issued.

were not received within one year of when Tri-Rail learned of the default (*id.*, exhibit B). On September 12, 2013, Tri-Rail served its reply papers in this proceeding, which included copies of the New Hearing Requests and accompanying submissions, and ECB's August 2013 denial letters.

Discussion

As an Article 78 proceeding is a special proceeding, if no triable fact issues exist, like a summary judgment motion, it may be summarily determined upon the submissions, and judgment granted for the prevailing party (CPLR §§ 409 [b], 7801, 7804 [a], [h]; *Matter of York v McGuire*, 99 AD2d 1023, 1024 [1st Dept] *affd* 63 NY2d 760, 761 [1984]).

In moving, Tri-Rail's sole argument is that ECB's conduct on November 15, 2012, in not advising Tri-Rail's appearing representative that NOVs 1 and 2 and NOVs 3-10 were scheduled to be heard that day, was arbitrary and capricious because "in our experience, ECB will have all the NOVs scheduled for a particular respondent together when the representative appears" and "will advise the appearing representative of other NOVs scheduled for the Respondent" (petition, ¶¶ 12-14). Tri-Rail also states that it did not intend to default, and demonstrated its intent to appear and respond by appearing on November 15, 2012 and requesting an adjournment of the two other NOVs, and by appearing on December 20, 2012 for hearings on the adjourned NOVs. Tri-Rail's counsel further states that, with the March 5, 2013 Email, "ECB advised that the ten (10) NOVs were in default" (petition, ¶ 19).

In opposition, ECB argues that Tri-Rail's petition should be dismissed because it is time-barred and because Tri-Rail failed to exhaust all administrative remedies. CPLR 217 (1) provides for a four-month statute of limitations for commencing an Article 78 proceeding

(*Matter of Bashir v Environmental Control Bd.*, 113 AD3d 763 [2d Dept 2014]). In addition, generally the petitioner in an Article 78 proceeding against an agency is required to exhaust available administrative remedies prior to commencing the proceeding (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 548 [1st Dept 2007]). However, ECB agreed to lengthy adjournments of this proceeding while Tri-Rail made the submissions that ECB argued were required in order to exhaust administrative remedies, rendering moot ECB's arguments concerning the statute of limitations and the exhaustion of remedies.

As mentioned above, Tri-Rail argues that it is entitled to new hearings because ECB's conduct in failing to advise Tri-Rail's appearing representative that NOVs 1 and 2 and NOVs 3-10 were scheduled to be heard was arbitrary and capricious. In *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal* (46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]), the Court stated that:

> "[i]t is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason . . . the judicial function is at an end. Indeed, the determination of an agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record. Moreover, it is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable [citation and internal quotation marks omitted]."

"[P]etitioner . . . has the burden of proof to show that the agency determination was arbitrary and capricious" (*Matter of Mosher v Ward*, 218 AD2d 626, 627 [1st Dept 1995]).

In opposition, ECB points to evidence that Tri-Rail was provided notice of the November 15, 2012 hearings for NOVs 1 and 2 and NOVs 3-10. ECB also cites to 48 RCNY § 3-81 and §

3-82.[3] In addition, regarding NOVs 1 and 2, ECB argues that it already vacated the first defaults, and that 48 RCNY § 3-82 (e) provides for only a single opportunity to request a new hearing after a party's failure to appear. As to NOVs 3-10, ECB argues that Tri-Rail did not establish that notice of the hearing was issued to an improper party.

In moving, Tri-Rail did not claim that it did not have notice of the November 15, 2012 hearing date, or otherwise challenge, in any respect, the notice that was provided by ECB prior to that date. While Tri-Rail submits the affidavit of the attorney who appeared on March 15, 2012, who states that in his experience, which he does not quantify, ECB schedules all appearances for a respondent on the same date, and advises an appearing representative of other NOVs scheduled for a respondent, this is not adequate to establish such a pattern of practice at ECB. More importantly, Tri-Rail does not cite to authority to demonstrate that ECB was required to provide additional notice of the hearings on the hearing date. Tri-Rail also does not dispute ECB's assertions concerning 48 RCNY §§ 3-81 and 3-82, or argue that these rules do not apply or that they were not properly applied to Tri-Rail by ECB.

In reply, Tri-Rail's counsel asserts that neither Tri-Rail nor its counsel knew of the status of NOVs 1 and 2 and NOVs 3-10 until receipt of the March 5, 2013 Email. To the extent that

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[3] Among other things, 48 RCNY § 3-81 provides that failure to appear or proceed as required by ECB constitutes a default. When, as was the case here, a request to ECB to vacate a default is made more than 45 days after the ECB respondent has failed to appear, 48 RCNY § 3-82 provides for a new hearing only if the respondent establishes that the new hearing was requested within one year of the time the respondent learned of the violation's existence. In addition, the ECB respondent also must establish that there is a reasonable basis to believe that it did not receive the NOV due to improper service or generic service on the respondent as an "owner" or "agent," or that the respondent was an improper party when the NOV was issued. This section also grants ECB's Executive Director the discretion to grant the New Hearing Request to avoid injustice where exceptional circumstances exist.

this is intended as an assertion that Tri-Rail should be granted a new hearing because it did not receive default notices from ECB, the argument is improperly raised for the first time in reply (*Matter of Thurmond v Fischer*, 112 AD3d 1234, 1235 [3d Dept 2013]; *see also Matter of Stoves & Stone, Ltd. v Martinez*, 17 AD3d 683, 684 [2d Dept 2005]). In any event, Tri-Rail does not state that it did not receive the notices, or claim that ECB did not have its correct mailing address.[4] As Tri-Rail's counsel provides no factual basis to demonstrate the basis of her knowledge as to whether or not Tri-Rail received the default notices, her assertions as to Tri-Rail are discounted as conclusory. Furthermore, while, in its ECB submissions, Tri-Rail noted that ECB's counsel advised of the default through the March 5, 2013 Email, Tri-Rail did not state that it did not receive default notices. Issues not raised before ECB may not be considered here (*Matter of James Simpson, Inc. v City of N.Y. Envtl. Control Bd.*, 252 AD2d 557, 557 [2d Dept 1998]).

Conclusion

As petitioner has not meet its burden to demonstrate that ECB's determination was arbitrary or capricious, or without a rational basis, it has not demonstrated entitlement to the relief it seeks.

Accordingly, it is

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[4] In Tri-Rail I, Tri-Rail's president submitted an affidavit in which he stated that Tri-Rail had not received certain NOVs from ECB, but, in the affidavit he submits here, Tri-Rail's president does not aver that Tri-Rail did not receive the default notices.

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 3/5/14

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.