

**Apollo Bldgs. LLC v Environmental Control Bd. of
the City of N.Y.**

2014 NY Slip Op 30999(U)

April 14, 2014

Supreme Court, New York County

Docket Number: 101480/13

Judge: Jr., Alexander W. Hunter

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This opinion is uncorrected and not selected for official publication.

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

Index Number : 101480/2013

APOLLO BUILDERS, LLC.

vs

NYC ENVIRONMENTAL CONTROL

Sequence Number : 001

ARTICLE 78

PART 33

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-12

Answering Affidavits — Exhibits _____ No(s). 13-34

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the
Judgment and order annexed hereto.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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: 4/14/14

AK, J.S.C.

ALEXANDER W. HUNTER JR

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
Apollo Builders LLC,

Index No.: 101480/13

Petitioner,

Judgment and Order

-against-

The Environmental Control Board
of the City of New York, a Division of
the Office of Administrative Trials and Hearings

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141B).

Respondent.

-----X
HON. ALEXANDER W. HUNTER, JR.

The application of petitioner for an order pursuant to CPLR Article 78, annulling and setting aside the determinations of respondent the Environmental Control Board of the City of New York ("ECB") regarding notice of violation ("NOV"): 177 046 320 ("NOV 320"); 177 046 330 ("NOV 330"); 180 265 672 ("NOV 672"), or alternatively remanding the matter back to ECB for a rehearing, is denied. The cross-motion by respondent to dismiss the proceeding is granted.

The application of petitioner challenging NOV 180 265 847 is hereby deemed moot, as respondent has agreed to vacate the default judgment and grant petitioner a new hearing on the merits in accordance with the Stipulation of Partial Settlement executed on December 11, 2013.

On or about September 2, 2010, ECB issued NOV 320 to petitioner for a violation of Section 19-102(ii) of the New York City Administrative Code ("Admin. Code") for failure to comply with terms of its department of transportation ("DOT") permit. On the same day, ECB issued NOV 330 to petitioner for a violation of Section 19-109(a) of the Admin. Code for failure to provide adequate protection at its worksite. Robert Bagdadi ("Mr. Bagdadi"), managing agent of petitioner, was personally served with NOV 320 and NOV 330 on September 23, 2010.

Petitioner did not appear at the hearing scheduled for November 23, 2010 and a default judgment was entered. ECB issued a default decision and order with regard to NOV 320 and NOV 330 and mailed petitioner a copy on November 29, 2010. Mr. Bagdadi submitted a request for a new hearing, claiming that petitioner had never received the NOVs and had just learned of them on January 20, 2011. ECB provided notice of its determination denying the requests for a new hearing for NOV 320 and NOV 330 on March 8, 2011.

On or about January 20, 2012, ECB issued NOV 672 to petitioner for a violation of Section 19-102(ii) of the Admin. Code for failure to comply with terms of its DOT permit. Petitioner did not appear at the hearing scheduled for March 12, 2013, as it claims that it never received NOV 672. ECB issued a default decision and order and mailed petitioner a copy on March 18, 2013. Petitioner claims that it did not learn of NOV 672 until it received a notice of default on or about May 2, 2013 and submitted a request to vacate NOV 672 on May 16, 2013. ECB provided notice of its determination denying the request for a new hearing on May 23, 2013.

Petitioner avers that: (1) NOV 320, NOV 330, and NOV 672 were issued to the wrong entity, as petitioner was 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; (2) it was not properly served with NOV 672; and (3) NOV 672 fails to appear as a violation on ECB printouts dated April 19, 2013 and August 8, 2013.

Respondent cross-moves to dismiss the proceeding on the ground that it is barred by the applicable four-month statute of limitations.

“[A] proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding....” CPLR § 217(1). A determination becomes binding when the aggrieved party is notified. See Westbury v. Department of Transp., 75 N.Y.2d 62 (1989); Biondo v. New York State Bd. of Parole, 60 N.Y.2d 832 (1983). An application for reconsideration will not extend or toll the applicable statute of limitations. Mazzilli v. New York City Fire Dept., 224 A.D.2d 621 (2nd Dept. 1996).

Here, the final determination denying the request by petitioner for a new hearing for NOV 320 and NOV 330 was rendered on March 8, 2011. Thus, petitioner had until July 8, 2011 to challenge the determination. However, petitioner did not challenge the determination until November 8, 2013, over two years after the statute of limitations had expired to commence the instant Article 78 proceeding. There is nothing in the record to support the claim by petitioner that a second request to vacate was submitted for NOV 320 and NOV 330 on July 1, 2013 and denied by ECB on July 10, 2013. Moreover, the second request by petitioner for a new hearing did not toll the statute of limitations. Id. Hence, the challenge of NOV 320 and NOV 330 by petitioner is denied.

The final determination denying the request by petitioner for a new hearing for NOV 672 was rendered on May 23, 2013. Thus, petitioner had until September 23, 2013 to challenge the determination. However, petitioner did not challenge the determination until November 8, 2013, over one month after the statute of limitations had expired to commence the instant Article 78 proceeding. Hence, the challenge of NOV 672 by petitioner is denied. The application by petitioner is time-barred by the four-month statute of limitations and the proceeding is dismissed.

Accordingly, it is hereby


ADJUDGED, that the application of petitioner for an order pursuant to CPLR Article 78, annulling and setting aside the determinations of ECB regarding notices of violation: 177 046 320; 177 046 330; and 180 265 672, is denied.

ORDERED, that the cross-motion by respondent to dismiss the proceeding is granted.

ORDERED, that the application of petitioner challenging NOV 180 265 847 is hereby deemed moot, as respondent has agreed to vacate the default judgment and grant petitioner a new hearing on the merits in accordance with the Stipulation of Partial Settlement executed on December 11, 2013.

Dated: April 14, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR.

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