

Matter of 316 37th St. LLC v Beddoe

2014 NY Slip Op 33618(U)

December 23, 2014

Supreme Court, New York County

Docket Number: 100338/14

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
12/23/14
E

CAROL E. HUFF

Index Number : 100338/2014

316 37TH STREET, LLC.

vs

BEDDOE, SUZANNE A.

Sequence Number : 001

ARTICLE 78

PART 32

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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this _____

motion is decided in accordance
with accompanying memorandum decision

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

FILED

DEC 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 23 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: DEC 23 2014

[Signature]
CAROL E. HUFF J.S.C.

- 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 32

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In the Matter of the Application of : Index No. 100338/14
316 37TH ST. LLC,

Petitioner, :

For a Judgment Under Article 78 of the Civil Practice Law ;
and Rules,

- against - :

SUZANNE A. BEDDOE, CHIEF ADMINISTRATIVE :
LAW JUDGE, NYC ENVIRONMENTAL CONTROL :
BOARD, NYC OFFICE OF ADMINISTRATIVE :
TRIALS AND HEARINGS, HELAINE BALSAM, ESQ. :
LEGAL DIRECTOR OF THE NYC ENVIRONMENTAL :
CONTROL BOARD, THOMAS FARIELLO ACTING :
COMMISSIONER, NYC DEPARTMENT OF :
BUILDINGS,

FILED

Respondents. DEC 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks a judgment annulling determinations of respondent Environmental Control Board ("ECB") which upheld nine New York City Department of Buildings ("DOB") violations and denied petitioner's application for hardship waiver and added time to file an appeal. Respondents cross move to dismiss the petition on the ground that petitioner failed to exhaust its administrative remedies.

On March 24, 2012, petitioner received nine DOB notices of violation ("NOV") in connection with two signs hung at its premises. The NOV's for each sign charged violations including failure to register the signs, failure to use a licensed sign hanger, and illegally posting

signs within two hundred feet of an arterial highway.

Following a hearing conducted November 8, 2013, in a decision and order dated November 21, 2013 (the “D&O”), the NOVs were sustained and petitioner was fined a total of \$45,000. Printed on the back of the D&O were instructions for appealing:

To appeal you must pay the full penalty stated within twenty (20) days of the mailing date of this Decision and Order (D&O). You are also allowed to post a bond if the Board agrees. If you cannot pay because of financial hardship, you may ask not to pre-pay by sending us a letter within twenty (20) days of the mailing date of the D&O. You should include proof of hardship, such as tax returns. If we grant your request, you will not have to pay the penalty while your appeal is being decided. If you lose your appeal you must pay all penalties.

* * *

Your appeal must be received by ECB within thirty (30) days of the mailing date of the D&O. . . . If you need more time to write your appeal, send a letter to the address above explaining why you need more time. This letter also must be received within 30 days of the mailing date of the D&O.

Decision, Petition Ex. A.

By letter dated December 9, 2013, Hugo G. Salazar, petitioner’s owner, wrote ECB requesting a financial hardship waiver. By letter dated December 19, 2013, petitioner’s attorney wrote ECB requesting an extension of time to appeal. Both requests were timely. By letter dated January 3, 2014, ECB denied the requests, stating that petitioner did not enclose proof of service of the request to “the agency that charged you with the violation,” (DOB); that petitioner failed to “include evidence of financial hardship . . . or your evidence was found not to be sufficient; and “Your appeal does not identify an error that ECB may review.” By this time, it was too late for petitioner either to pre-pay the penalty or to file an appeal. By letter dated January 9, 2014, petitioner’s attorney wrote ECB requesting reconsideration of the denial. By letter dated January

17, 2014, ECB denied the request for reconsideration, stating, “Your request for a waiver of payment while you make your appeal was properly rejected. . . . Either you did not include evidence of financial hardship with your request or your evidence was found to not be sufficient.”

Respondents argue that petitioner is precluded from seeking Article 78 relief, having failed to exhaust administrative remedies by not perfecting its administrative appeal. See CPLR 7801(1); Young Men’s Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371 (1975).

However, among other things, petitioner is challenging the January 9 ECB determination that denied reconsideration of its decision not to allow petitioner more time to perfect its appeal. The ECB appeal procedures are confusing and in some ways inconsistent to the point of seeming almost calculated to make an appeal impossible. For example, a full appeal must accompany an application for more time to appeal, because if the application is denied the time to file the appeal will have expired; and if a hardship waiver is denied, there is no time left to pay the penalty and appeal. Both of these scenarios occurred here.

Since one of the issues presented in this Article 78 proceeding is whether petitioner should have had more time to perfect his administrative appeal, the cross motion to dismiss the proceeding on the ground of failure to perfect the administrative appeal is denied.

Accordingly, it is

ORDERED that the cross motion is denied, and respondents are directed to file an answer to the petition within two weeks of service of notice of entry of this order, or at a time agreed to by all parties.

Dated: DEC 23 2014


CAROL E. HUFF
J.S.C.

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DEC 24 2014
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