

Matter of Cangemi v Beddoe
2015 NY Slip Op 31841(U)
September 22, 2015
Supreme Court, Queens County
Docket Number: 589/15
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

In the Matter of the Application of
JOSEPH A. CANGEMI,

Index No.: 589/15

Petitioner,

Motion Date: 6/29/15

Motion Seq. No.: 2

For a Judgment pursuant to Article 78
of the CPLR

-against-

SUZANNE A. BEDDOE, as Chief Administrative
Law Judge at the Office of Administrative Trials and
Hearings

NYC ENVIRONMENTAL CONTROL BOARD,
NYC OFFICE OF ADMINISTRATIVE TRIALS AND
HEARINGS

and HELAINE BALSAM, as Legal Director of the
Environmental Control Board,

Respondents.

On January 16, 2015, petitioner Joseph A. Cangemi, then self represented, commenced the within proceeding under Index Number 589/2015, and seeks a judgment vacating the default judgments issued by respondent NYC Environmental Control Board (ECB) for Notice of Violation 35054893H (NOV 893H), NOV 35051897L (NOV 897L), and NOV 3505233K (333K) on the grounds of lack of service; reversing the ECB's default determinations on NOVs 893H, 897L, and 333K on the grounds that the determination

notices were improperly served; vacating and dismissing all penalties, fines and all prior proceedings related to NOVs 893H, 897L, and 333K on the grounds that service was improper and that the determinations were arbitrary and capricious or an abuse of discretion; (4) vacating and or reversing respondents' final determination denying the request to vacate the defaults, on the grounds of improper service; and in the alternative directing a new hearing on NOVs 93H, 97L and 33K; and staying enforcement of any and all determinations, including the payment of penalties during the pendency of the proceeding. Respondents cross move to dismiss on the grounds of statute of limitations, pursuant to CPLR 3211(a)(5) and 7804(f).

On February 20, 2015, petitioner commenced a second proceeding under Index Number 2057/2015 and seeks a judgment vacating NOV 35069501L (NOV 501L), NOV 035059500J (NOV 00J) and NOV 34055442N (NOV 442N) on the grounds that said NOVs were improperly served. Respondents cross move for an order dismissing the petition, pursuant to CPLR 3211(a)(2) and 7804(f), on the grounds of lack of subject matter jurisdiction, based upon the failure to exhaust administrative remedies.

These two proceedings were consolidated under Index Number 589/2015, pursuant to order of the Honorable Denis Butler, dated July 20, 2015 and the petition and cross motion filed under Index Number 2057/2015 were transferred to this part pursuant to an order dated August 20, 2015. Both petitions shall be determined in a single decision as follows:

Petitioner Joseph A. Cangemi is the owner of a two-family house located at 20-82 33rd Street, Astoria, New York. On August 9, 2013 the New York City Department of Buildings (DOB) received a complaint that there was an illegal conversion on the first floor of the subject premises, converting the two-family home into a three-family home.

On October 13, 2013, DOB Inspector Bhattachay issued NOV 501L to Mr. Cangemi for work without a permit, in violation of Administrative Code of the City of New York § 28-105.1, a class 1 violation. Inspector Bhattachay stated that he observed “[a]t 1st floor level erected partition full height and installed water and waste lines for 3 [piece] bathroom (sink, toilet & shower) residential sink and gas lines for stove to create class ‘A’ apt.”. Petitioner was directed to remedy the condition by obtaining permits, and to appear at a hearing on December 17, 2013.

The hearing was rescheduled twice, and on April 29, 2014, Adam Ortiz, a paralegal for Peter Mannis, Esq., Mr. Cangemi’s then counsel and authorized representative, appeared at the hearing on NOV 501L. In a decision and order dated April 30, 2014, the Administrative Law Judge stated that Mr. Ortiz had waived his rights to an attorney and translator, and admitted to the allegations set forth in said NOV; credited the information of the DOB issuing officer, imposed a civil penalty of \$1,600.00, and stated that a certificate of correction must be filed with the DOB. Petitioner did not appeal said determination.

On December 28, 2013, DOB Inspector Steinman issued NOV 897L to Mr. Cangemi for the failure to comply with the Commissioner’s order set forth in NOV

501L. Petitioner was directed to comply with the Commissioner's order, and to appear at a mandatory hearing at ECB on February 11, 2014. Petitioner did not appear at the February 11, 2014 hearing, and the ECB issued a default order, and imposed a civil penalty of \$12,000.00

On February 22, 2014, DOB Inspector Steinman issued NOV 33K to Mr. Cangemi, for the failure to comply with the Commissioner's Order in NOV 501L; directed petitioner to comply with said order; and directed that he appear at a mandatory hearing on April 8, 2014. Mr. Cangemi did not appear at the April 8, 2014 hearing, and the ECB issued a default order and imposed a civil penalty of \$24,000.00.

On April 19, 2014, DOB Inspector issued NOV 893H to Mr. Cangemi for failure to comply with NOV 501L; directed him to comply with said NOV; and directed him to appear at a mandatory hearing on June 3, 2014. Petitioner did not appear at the June 3, 2014 hearing and the ECB issued a default order and imposed a civil penalty of \$24,000.00.

On June 21, 2014, DOB Steinman issued NOV 442N to petitioner for the failure to comply with the Commissioner's order set forth in NOV 501L; directed that he comply with said order; and directed that he appear at a mandatory hearing on July 31, 2014. The hearing was rescheduled twice and held on October 28, 2014. Mr. Cangemi and his then counsel Martin J. Weinroth appeared at said hearing and argued that Cangemi's prior counsel did not communicate with him as to what had happened at the hearings; that the condition complained of existed at the time he purchased the premises; and that he had already been

issued a NOV for the failure to comply with the Commissioner's order. In a decision and order dated October 31, 2014, the administrative law judge credited Mr. Cangemi's testimony and his counsel's evidence; found that Mr. Cangemi had not presented legally valid defenses; sustained the charges and imposed a civil penalty of \$6,000.00. Mr. Cangemi did not appeal the October 31, 2014 decision and order.

On August 28, 2014, DOB Inspector Steigman issued NOV 177J for a violation of Administrative Code §28-201.1, a recurring condition. Mr. Cangemi was directed to comply with the Commissioner's Order set forth in NOV 501L and to appear at a mandatory hearing on October 14, 2014. Mr. Cangemi and his then counsel Martin J. Weinroth appeared at said hearing, and essentially raised the same defenses that were raised in connection with NOV 442N. He also testified that he had hired an architect to correct the violation who had pre-filed, but that the permits for the work had not yet been issued. In a decision and order dated October 14, 2014, the administrative law judge found that Mr. Cangemi had not offered a valid legal defense or evidence; credited the agency's testimony; determined that Mr. Cangemi had failed to comply with the Commissioner's order to certify correction; sustained the violation; and imposed the civil penalty of \$6,000.00. Mr. Cangemi did not appeal the October 14, 2014 decision and order.

On August 26, 2014, the ECB received three separate Request for a New Hearing After a Failure to Appear forms, pertaining to NOVs 93H, 97L, and 33K. In each instance, petitioner sought to vacate the default order and checked the box on the form which

reads as follows: “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. If that is the case, EXPLAIN WHY YOU MISSED THE HEARING”. Petitioner wrote that he had been hit by a vehicle and had surgery for a broken ankle and fractured heel. He also wrote that learned about the ticket in the mail while recovering from surgery, and gave it to his attorney to take care of, and that although the hearings were rescheduled, the attorney did not appear on his behalf. He stated that he had just learned of the default; that he had hired an engineer and design company who were filing the paperwork to cure the violation; and requested a new hearing.

Petitioner did not mark the box on said forms, which reads as follows: “The Respondent did not receive the ticket (notice of violation) or the issuing agency did not serve the ticket correctly”. Petitioner thus did not contest service of the NOV’s as a grounds for vacating the defaults.

The ECB, in three separate letters bearing an order date and mailing date of September 9, 2014, and addressed to Mr. Cangemi at the subject premises, denied his requests for a new hearing, stating, in pertinent part, that:

“ Your request was not received by ECB within 45 days of the missed hearing date;

- OR-

Your request was not received by ECB within 30 days of the date the default order was mailed;

- OR-

Your request was not received by ECB within one year of when you learned of the existence of the violation.”

The following appears at the bottom of each letter: “GO8D-Denial of Request for a Hearing After a Failure to Appear-Reason 7”.

A proceeding pursuant to CPLR Article 78 “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner” (CPLR 217 [1]). Agency action is “final and binding upon the petitioner” when the petitioner receives notice that the agency has “reached a definitive position on the issue that inflicts actual, concrete injury and . . . the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the [petitioner]” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; see *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165 [1991]; *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72[1989]; *Matter of Olivares v Rhea*, 119 AD3d 866, 867 [2d Dept 2014]).

It is well settled that a litigant cannot obtain judicial review of an administrative determination without first exhausting all available administrative remedies (CPLR 7801; *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 [1978]). Title 48 of the Rules of the City of New York (RCNY) establishes ECB hearing procedures. It provides that hearing officers preside over enforcement proceedings and prepare recommended decisions and orders (48 RCNY § 3-57). A party aggrieved by a recommended

decision and order may appeal within 30 days of the mailing of the recommended decision and order (48 RCNY § 3-74). A party may not appeal a recommended decision and order unless he or she: (1) pays the civil penalty imposed; (2) posts a bond; or (3) obtains a waiver from ECB (48 RCNY § 3-73). A party aggrieved by the appeal decision and order may appeal within 10 days of the mailing of the final decision and order (48 RCNY § 3-75).

A final determination was made by the ECB on September 9, 2014, with respect to NOV's 893H, 897L and 333K. Although each of the denial letters or orders state that the mailing date was also September 9, 2014, according to the affidavit of mailing all three denial letters were mailed to Mr. Cangemi, at the address of the subject property on September 10, 2014. Petitioner, in opposition to the cross motion to dismiss, asserts that the affidavit of mailing is insufficient to explain this ambiguity with respect to the mailing date, and that as the affidavit describes the items mailed as "TYPE OF DECISION AND LETTER: STAY DENIAL 7 LETTER", rather than an order, it is unclear as to what was mailed.

The affidavit of mailing is executed by two employees of FEDCAP Rehabilitation Services Inc. (FEDCAP), acting as agents for the ECB. Helaine Balsam, Deputy General Counsel of the New York City Office of Administrative Trials and Hearings, and legal advisor to the ECB, in her reply affirmation sets forth the ECB's procedures when a Hearing Officer denies a request to vacate a default, as well as the related mailing procedures. She states that the Hearing Officer will set forth the basis of the denial, using

seven different numerical reason codes, or may under certain circumstances use the code N/A. Reason 7 is “Untimely Request”. The ECB enters the denial code “D” and the numerical reason code into its computer system for the NOVs, and said system automatically sends the data file containing this information to FEDCAP. FEDCAP then merges the data into a letter format called “Denial of Request for a Hearing After a Failure to Appear”, which is indicated on the bottom of the letter. These court notes that these words appear on the bottom of the September 9, 2014 denial letters addressed to petitioner and include the words “Reason 7”.

Ms. Balsam states that ECB’s contract with FEDCAP requires that the denial notices be printed on the same date as the date as that of the mailing date which appears on the top right corner of the letter. She also states that ECB’s contract with FEDCAP, requires that the Denial Notices be mailed either on the same date that appears as the date of mailing on the printed notice, or the next business day, and that the Denial Notice is referred to as a “Stay Denial [numerical reason code] Letter” on the affidavit of mailing.

This court finds that Ms. Balsam’s affirmation provides a sufficient explanation as to the discrepancy between the date of mailing printed on the default letter and the date of mailing set forth in the affidavit of mailing, and provides a sufficient explanation of the codes used by the ECB and REDCAP. The evidence presented thus establishes that the ECB mailed the denial letters, which constitute orders, for NOVs 893H, 897L, 333K to Mr. Cangemi on September 10, 2014. Significantly, petitioner has made no denial of receipt of

the determination. His time within which to commence the Article 78 proceeding to review respondent's determinations with respect to NOV's 893H, 897L, 333K expired four months after September 10, 2014, that is, on January 10, 2015 (*see Matter of AJM Capital II, LLC v Long Is. R.R. Co.*, 131AD3d 474 [2d Dept 2015]; *Matter of Richardson v New York City Hous. Auth.*, 89 AD3d 1091, 1092 [2d Dept 2011]). Petitioner's commenced the within Article 78 proceeding with respect to NOV's 893H, 897L and 333K, on January 16, 2015. Therefore, the within proceeding is time-barred as to NOV's 893H, 897L and 333K.

The court notes that respondents, in calculating the period of limitations, have added 5 additional days for mailing the NOV's, and state that the statute of limitations expired on January 15, 2015, one day prior to petitioner's commencement of the within proceeding. Respondents do not set forth any basis for including 5 additional days for mailing, and the provisions of CPLR 2103 (b) (2), are not applicable to administrative proceedings. However, even 5 additional days for mailing were included here, the within proceeding is still time-barred (*see Mahoney v Kraut*, 111 AD2d 685 [1st Dept 1985], *affirmed* 65 NY2d 1011[1985]; *Magat v County of Rockland*, 265 AD2d 483 [2d Dept 1999]), and the court may not extend the statute of limitations (CPLR 201; *Matter of Bashir v Environmental Control Bd.*, 113 AD3d 763 [2d Dept 2014]).

The decisions and orders pertaining to NOV's 501L, 117J and 442N are not final determinations, as petitioner did not appeal the ECB's determinations. Petitioner, however, asserts that he was not properly served with notice of his right to take an administrative

appeal.

With respect to NOV 501L, respondents in a reply affirmation state that the ECB has now decided to grant petitioner an opportunity to appeal the hearing officer's decision dated April 30, 2014. With respect to NOVs 117J and 442N, respondents assert that petitioners' then counsel was served with the decisions and orders pertaining to said NOVs, and that as petitioner failed to exhaust his administrative remedies the petition should be dismissed.

As regards NOV 117J, the notice of appearance requested that the hearing decision be mailed to Mr. Cangemi at the address of the subject premises, and also provided Mr. Weinroth's email address. The Hearing Officer's decision and order, dated October 14, 2014, is addressed to Marvin J. Weinroth. However, the affidavit of service submitted by the respondent does not state what was served and who was served, and therefore is insufficient to establish that either petitioner's then counsel, or petitioner, was served with a copy of the October 14, 2014 decision.

As regards NOV 442N, the notice of appearance requested that the hearing decision be mailed to Mr. Weinroth. The hearing officer's decision, dated October 31, 2014, is addressed to Mr. Weinroth. However, the affidavit of service submitted by the respondent does not state what was served and who was served, and therefore is insufficient to establish that either petitioner's then counsel, or petitioner, was served with a copy of the October 31, 2014.

In view of the fact that there is no evidence that petitioner was properly served with the decisions and orders for NOVs 117J and 442N, his time in which to appeal said decisions and orders has not yet expired. Petitioner thus remains free to pursue his administrative remedies with respect to NOVs 501L, 117J, and 442N. However, as the ECB's determinations with respect to NOVs 501L, 117J and 442N are not final, and petitioner has not exhausted his administrative remedies, his request for judicial review is premature, and the petition must be dismissed.

In view of the foregoing, respondents' cross motion to dismiss the petition with respect to NOVs 893H, 897L, 333K is granted, as the petition is untimely. Respondents' cross motion to dismiss the petition with respect to NOVs 501L, 117J, and 442N on the grounds of failure to exhaust administrative remedies is granted, and petitioner may pursue his administrative remedies as to NOVs 501L, 117J and 442N.

Settle judgment.

Dated: September 22, 2015

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J.S.C.