SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the matter of the Application of

SAHARA CONSTRUCTION CORP.,

Petitioner,

For a Judgment Under Article 78 of the CPLR,

-against-

THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS and THE NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS,

Respondents.

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DECISION/ORDER

Index no. 154956/2018

Mot. Seq. No. 001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Article 78 petition, petitioner, Sahara Construction Corp. (Sahara), seeks a declaration that the Office of Administrative Trials and Hearings' (OATH) decision dated December 5, 2017 (Decision) was erroneous and was arbitrary and capricious, as well as an order reversing and annulling the Decision in its entirety. Respondents, OATH and the New York City Department of Consumer Affairs (DCA), cross-move to dismiss the petition.

Background

This matter arises from the improvement of a residential property. On or about April 10, 2009, Sahara, a home improvement business licensed by the DCA, and Lucyna Dereszowska (Dereszowska), the owner of the residential property located at 82-20 243rd Street, Bellerose, New York (property), entered into a home improvement contract (Rizzuti Aff., Ex. A, 1). The scope of the home improvement work was:

> "To extend front and back of foundation, renovate first floor, construct new basement, and construct new second floor according to the plan and its specifications. Concreting and paving to be done to driveway and front and back walking area, also finishing front and back porch with granite tiles (includes white marble buluster [sic]), to the [property], owned by [Dereszowska], which construction shall be done according to approved drawings and NYC Building Department Code.
>
> The Contractor has carefully examined the [property], upon which the work to be performed and agrees to furnish all labor, materials and equipment to perform contractual work including incidental items, necessary to complete in a quality and workmanship manner." (*id.*)

The home improvement contract stated that Sahara was to perform the home improvement work on the property in exchange for $272,500.00 (*id.*, 2). Sahara thereafter began work on the property. During the home renovation, Dereszowska noticed defects and deviation from the plans in Sahara's work on the property. According to Dereszowska, Sahara worked with her to correct some of the problems in the workmanship, but that Sahara stopped working on the home in September 2014, and that its co-owner did not respond to her subsequent phone calls and emails (Rizzuti Aff., Ex. B, 2).

Sometime in 2015, Dereszowska then filed a complaint with the DCA. DCA conducted an investigation into the allegations, and eventually issued a Summons alleging that Sahara violated Administrative Code §§ 20-393(1), (11), and 6 RCNY §§ 2-221(a)(1), (2), (4), (5), (8), (9), (10), and 6 RCNY § 2-221(b) (Rizzuti Aff., ¶19). A hearing was commenced on October 23, 2017, before an OATH Hearing Officer, and continued through October 25, October 30, October 31, November 2, and November 3, 2017 (hearing) (*id.*, 23).

At the hearing, Sahara made two motions, both of which were denied. First, Sahara moved to dismiss the Summons due to expiration of statute of limitations (Rizzuti Aff., Ex. B, 1). Sahara argued that the Summons was brought outside the two-year or one-year statute of limitations pursuant to penal code and that the Summons was barred due to laches. The Hearing

Officer determined that Sahara failed to meet its burden to demonstrate the existence of a statute of limitations prohibiting the "charges brought against [Sahara] at OATH's tribunal or in DCA's rules or regulations" (*id.*, 2). Further, the Hearing Officer found that the defense of laches was inapplicable, as there was continuous contact between Dereszowska and Sahara, leading up to September 2014 and communication between DCA and Sahara in 2015 (*id.*).

Sahara next moved for discovery, arguing that it is entitled to, among other things, documented communications between Sahara and Dereszowska. The Hearing Officer denied Sahara's motion on the basis that it had ample opportunity to make its discovery requests prior to the hearing, and that its motion was untimely (*id.*, 2). The Hearing Officer also found that Sahara's discovery requests were "broadly based, seemed irrelevant, and also more likely than not seemed like a delay tactic or a fishing expedition to find some vague possible information to support his defense . . . . " (*id.*, 2-3).

The Hearing Officer determined that Sahara violated, among others, NYC Admin. Code section § 20-393(1). Section 20-393(1), prohibits the "[d]eviation from or disregard of the plans or specifications or any terms and conditions agreed to under a home improvement contract in any material respect without the written consent of the owner." As a result, the Hearing Officer imposed a total civil penalty in the amount of $5,000,[1] and awarded Dereszowska restitution in the amount of $230,266.533 to cover the cost of repairing Sahara's work (*id.*, 15, 23). In support of the Hearing Officer's award of restitution, the Officer found that:

> "Petitioner has provided estimates to correct Respondent's departure from the contract and architectural plans to repair the Owner's home as well as providing receipts and/or bills for out of pocket expenses paid for items and repairs to the home caused by Respondent's failure to fulfill his contractual obligations. I find that Respondent deviated and disregarded the material terms of the contract and the architectural plans causing serious structural problems to her home and that

[1] The Hearing Officer also based the total civil penalty on Sahara's violation of NYC Admin Code section § 20-393 (11), and 6 RCNY §§ 2-221(a)(1), (2), (4), (5), (8), (10), and 6 RCNY § 2-221(b).

> the Owner should be compensated so that her home is in compliance with the NYC Department of Building Code, the architectural plans and the contract."

(*id.*, 18).

Sahara thereafter attempted, unsuccessfully, to appeal the Decision. On or about January 2, 2018, Sahara file with OATH a Financial Hardship Application associated with the administrative matter, which was granted on January 8 (waiver). However, the waiver applied to the $5,000 civil penalty only (Schulman Aff., ¶7). On January 9, 2018 OATH received a request from Sahara for administrative appeal of the decision. In a January 10 letter to Sahara, OATH rejected Sahara's appeal on the basis that it did not conform with the requirements set out in 48 RCNY § 6-19(c). In a letter dated January 26, 2018, OATH asserted an additional basis for rejection of its appeal: Sahara failed to pay restitution to the DCA before filing the appeal.

Sahara filed the instant petition arguing that the Hearing Officer erred by denying Sahara's motion to dismiss the Summons based on the expiration of the statute of limitations and by denying Sahara's motion for discovery. Sahara further argues that the Decision erred by awarding restitution pursuant to 48 RCNY § 20-393(1), since that statute does not provide for such relief. Moreover, Sahara argues that the decision erred by not applying New York law concerning the burden of proof in determining the claim supporting restitution. Finally, Sahara argues that it has exhausted administrative remedies. Specifically, counsel for Sahara contends that he had a conversation with Peter Shulman, assistant director of OATH's Appeals Unit, wherein Shulman indicated that Sahara's administrative remedies had been exhausted. In support of its cross-motion to dismiss the petition, the DCA argues that Sahara failed to exhaust its administrative remedies within OATH.

Discussion

In reviewing a determination made by an administrative agency such as the DCA, the court's inquiry is "limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record" (*Matter of Partnership 92 LP and Bldg. Mgt. Co., Inc.*, 46 AD3d 425, 428 [1st Dept 2007]). Furthermore, courts have held that:

> "[T]he 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"

(*id.* at 428-429 [internal citations omitted]).

It is well settled that one who objects to the act of an administrative agency must exhaust available administrative remedies prior to litigating the matter in a court of law (*see e.g. Irizarry v New York City Police Dept.*, 260 AD2d 269 [1st Dept 1999]). However, exhaustion of administrative remedies is not required where an agency's action is challenged as unconstitutional, wholly beyond its grant of power, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury (*see Lehigh Portland Cement Co. v. New York State Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 140 [1995]; *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 [1978]).

The instant petition must be dismissed, as Sahara has failed to exhaust its administrative remedies. According to Title 48 of the Rules of the City of New York ("RCNY") governing the process for appealing an OATH decision, an appeal will only be accepted where the party seeking review of a decision "provides proof of payment in full of any fines, penalties, or

restitution imposed by the decision, except as provided in subdivision (d)" (48 RCNY § 6-19 [c][1][iii]).[2]

Subdivision (d) states, among other things, that the requirement that prior payment of fines or penalties before an appeal is filed may be waived due to the applicant's financial hardship. However, 48 RCNY § 6-19 (d) (2) states in no uncertain terms that "payment of restitution is not subject to waiver due to financial hardship." Accordingly, if a Hearing Officer has ordered the payment of restitution, an applicant must have deposited the restitution with the agency responsible for collecting payment pending determination of the appeal prior to or at the time of filing the appeal. Further, 48 RCNY § 6-19(e)(2) indicates that after the appeal is filed, the "Appeals Unit will promptly issue a written decision," which is "the final decision of the Tribunal."

Here, there is no dispute that Sahara did not pay the restitution prior to filing the Petition. The Decision required that Sahara pay a total civil penalty in the amount of $5,000 and restitution in the amount of $230,266.533. While Sahara received a financial hardship waiver permitting Sahara to file an appeal without paying the civil penalty, that waiver did not apply to the ordered restitution. Sahara was required to pay the restitution before his appeal of the Decision was perfected, which it did not, and thus, OATH never issued a final determination. Accordingly, since Sahara has failed to exhaust its administrative remedies, the Court may not review its claims. While the Court recognizes that the payment of restitution prior to perfecting the appeal of the OATH determination in this matter is onerous, it is the duty of the Legislature, not the Judiciary, to modify this rule.

[2] Section 6-01 of Title 6 of RCNY delegates DCA's adjudicatory powers to conduct hearings, issue decisions, impose fines and civil penalties, and other relief to OATH.

Sahara's argument that NYC Admin Code § 20-393(1) does not provide for restitution is without merit. Pursuant to section 20-104 (e) (2), the DCA is empowered to "arrange for the redress of injuries caused by such violations [of the consumer affairs code]," including those addressed in section 20-393(1) (Admin Code § 20–104). Courts deciding cases presenting similar circumstances have found that the DCA is permitted to award restitution (*see Marin Const. Corp. v. Scatliffe*, 271 A.D.2d 206 [1st Dept 2000] [upholding DCA's award of restitution for violations of the Administrative Code]; *Aaron's Const. Corp. v. Gould*, 29 Misc. 3d 1216(A), [Sup. Ct. N.Y. Co. 2010] [finding that Admin. Code § 20–104[e][2] grants the DCA discretion to award restitution]). Further, Sahara's citation to Chapter 45-a, section 1049-d(1)(g) of the New York City Charter is inapplicable, since that section address the Environmental Control Board, which is not at issue.

Additionally, Sahara's remaining arguments that the requirement to pay restitution prior to perfecting its appeal is unconstitutional, that payment of the ordered restitution would cause irreparable harm to Sahara, and that resort to the OATH appeal process would be futile were made for the first time in its reply, and thus not considered by the Court (*see Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 (1st Dept 2012) ("[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion.").

Conclusion

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the Petition of Sahara Construction Corp. for relief, pursuant to CPLR Article 78 (motion sequence 001), is denied. And it is further

ORDERED and ADJUDGED that the cross- motion of Respondents, the Office of Administrative Trials and Hearings and New York City Department of Consumer Affairs, is granted and the petition is dismissed with prejudice. And it is further

ORDERED that counsel for respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

Dated: New York, New York

November 5, 2018

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.