

Matter of Herrera v New York Off. of Admin. Trials & Hearings

2020 NY Slip Op 30007(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 155422/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

ROBERTO HERRERA,

Petitioner,

Index No.
155422/2019

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

**DECISION
and ORDER**

- against -

NEW YORK OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS (“CITY OF NEW YORK”),

Motion Seq. 1

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Roberto Herrera (“Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), seeking an Order reversing the determination issued by Respondent Office of Administrative Trials and Hearings (“Respondent”) to deny a new hearing dated November 8, 2018 (“Final Determination”). Respondent cross moves to dismiss the proceeding.

Petitioner is the owner of the building located at 33-46 86th Street, Flushing, New York (the “Property”). In 2016, the New York City Department of Buildings (“DOB”) issued two summonses for violations at the Property. Hearings were scheduled and default judgments were issued against Petitioner for failing to appear. On October 5, 2018, Petitioner appealed the default judgments and requested a new hearing. On November 8, 2018, Respondent issued a Final Determination denying a new hearing.

Petitioner brings this Verified Petition as an Article 78 proceeding on May 30, 2019. Respondent cross moves to dismiss the Verified Petition on July 15, 2019.

Parties' Contentions

Petitioner argues that he has a reasonable excuse for his default of the violations. Petitioner asserts that he was not residing in the Subject Premises and therefore did not obtain proper notice of the hearings. Petitioner argues that Respondent would not be prejudiced if the Court vacated the Final Determination and granted a new hearing. Petitioner further argues that the Final Determination lacked a rational basis.

In opposition, Respondent argues that the Article 78 Petition should be dismissed because Petitioner's claim is time-barred by the four-month statute of limitations pursuant to CPLR § 217(1). Respondent asserts that Petitioner commenced this action on May 24, 2019 more than six-months after the Final Determination. Additionally, Respondent argues that Petitioner was properly served with the Subject Summonses for the related hearings pursuant to City Charter § 1049-a(d)(2). Respondent asserts that "DOB made 'reasonable attempts' to deliver the Subject Summonses to a person at the premises before affixing the Subject Summonses to the door and then mailing the Subject Summonses to both the premises and to alternate addresses associated with Petitioner." (Respondent's Memo of Law at 12). Respondent further asserts that Petitioner rescheduled the hearing related to one of the summons for violation, 69H, and no one appeared on his behalf.

Legal Standards

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." See CPLR 7803 [3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

An Article 78 proceeding must be brought “within four months after the determination to be reviewed becomes final and binding upon the petitioner” except if “a shorter time is provided in the law authorizing the proceeding.” CPLR 217[1]. “For a determination to be final it must be clear that the petitioner seeking review has been aggrieved by it.” *Lubin v. Bd. of Educ. of City of New York*, 60 N.Y.2d 974, 976 [1983].

Turning to service, City Charter § 1049-a(d)(2)(a) states in relevant part,

The environmental control board shall not enter any final decision or order pursuant to the provisions of paragraph one of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law, except that: ...

(ii) service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of ... the commissioner of buildings ... and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises where the violation occurred; and

City Charter § 1049-a(d)(2)(b) further states,

(b) Such notice may only be affixed or delivered pursuant to items (i) and (ii) of subparagraph (a) of this paragraph where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law. When a copy of such notice has been affixed or delivered, pursuant to items (i) and (ii) of subparagraph (a) of this paragraph, a copy shall be mailed to the respondent at the address of such premises.

Discussion

Here, the application is time-barred. Respondent issued a Final Determination denying Petitioner's motion to vacate the default judgments against Petitioner on November 8, 2018. Petitioner had until March 8, 2019 to commence an Article 78 proceeding pursuant to CPLR § 217[1] and failed to do so. Instead, Petitioner commenced an Article 78 proceeding more than two-months after the statute of limitations expired. Therefore, the Petitioner is dismissed.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that Respondent's cross motion to dismiss is granted; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order, along with notice of entry on all parties within 15 days of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JANUARY 2, 2020



Eileen A. Rakower, J.S.C.