Taj v New York Off. of Admin. Trials & Hearings (City of N.Y.)
2020 NY Slip Op 32846(U)
August 31, 2020
Supreme Court, New York County
Docket Number: 157080/2019
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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TAHIRA TAJ

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 157080/2019

MOTION DATE 8/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Tahira Taj (motion sequence number 001) is denied, and the instant Article 78 proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

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

In this Article 78 proceeding, petitioner Tahira Taj (Taj) seeks a judgment to overturn several orders of the respondent New York City Office of Administrative Trials and Hearings (OATH) as arbitrary and capricious (motion sequence number 001). The petition is denied.

FACTS

Taj is the owner of a residential building (the building) located at 50-35 42nd Street in the County of Queens, City and State of New York. *See* verified petition, ¶ 1. This proceeding concerns eight "notice of violation" (NOV) summonses which the non-party New York City Department of Buildings (DOB) issued on various dates in 2017 and 2018 for improper alterations to the building and work that was performed there without permits.

Specifically: 1) on November 9, 2017, the DOB issued NOVs 35291695X (95X) and 35291696H (96H); 2) on November 29, 2017, the DOB issued NOVs 35301820M (20M), 35301821Y (21Y) and 35301822X (22X); 3) on February 12, 2018, the DOB issued NOV 35230371K (71K); and 4) on May 23, 2018, the DOB issued NOVs 35338369X (69X) and 35338370N (70N). *See* verified petition, ¶¶ 4-12; exhibits A, C, E, G, I, K, M, O. OATH asserts that Taj did not attend any of the mandatory hearings before it that were scheduled on the NOVs, and that OATH therefore subsequently issued either "final determinations" or "notices of default" for all of the eight NOVs that upheld the fines and penalties that DOB had assessed as a result of Taj's non-appearance. *See* verified answer, ¶¶ 38-113. Specifically, OATH issued final determinations with respect to NOVs 95X, 96H, 20M, 21Y and 22X; and issued notices of default with respect to NOVs 71K, 69X and 70N. *Id.*; exhibits 6, 12, 18, 24, 30, 33, 36, 39. The five final determinations that disposed of NOVs 95X, 96H, 20M, 21Y and 22X were all dated March 18, 2019, and the three notices of default were dated April 10, 2018 (NOV 71K) and July 17, 2018 (NOVs 69X and 70N), respectively. *Id.*

For her part, Taj contests DOB's service of the NOVs, and claims that she "has a reasonable excuse for [her] default of the violations, as she did not receive any notice of the hearings when they were purportedly posted on the [building's] door, when they could have been handed to the individual who answered the door; and [that she] had exigent circumstances set forth in [her] request to vacate the defaults." *See* verified petition, ¶¶ 21-23.

In any event, Taj commenced this Article 78 proceeding on June 14, 2019. *See* verified petition. The parties thereafter executed a series of stipulations to extend OATH's time to answer, the last of which included a so-ordered submission schedule that specified dates in March and April 2020. Unfortunately, on March 17, 2020, the court was forced to suspend operations indefinitely due to the Covid-19 national pandemic. Between themselves, the parties then executed further stipulations which adjourned their respective submissions to dates in July and August, 2020. OATH ultimately submitted an answer on July 30, 2020. *See* verified answer. As of today, sufficient court operations have been restored to permit this matter to be fully addressed (motion sequence number 001).

DISCUSSION

As an initial matter, OATH asserts that the court cannot grant Article 78 relief in connection with NOVs 71K, 69X and 70N because Taj failed to exhaust the available administrative remedies pertaining to those NOVs before she commenced this proceeding. *See* respondent's mem of law at 10-15. OATH specifically notes that 48 RCNY § 6-20 authorizes it to issue a notice of default when a respondent fails to submit a timely response to a NOV or to appear at a mandatory OATH hearing, and that 48 RCNY § 6-21 sets forth a procedure whereby a respondent may file a motion to vacate a notice of default within 60 days after it is issued, which motion will be automatically granted. *Id.* 48 RCNY § 6-21 also provides that a

respondent may file a motion to vacate a notice of default after the 60-day time limit has passed, as long as the motion includes a "reasonable excuse" for the respondent's failure to appear at the OATH hearing on the NOV. *Id.* OATH notes that it issued notices of default regarding NOV 71K on April 10, 2018, and NOVs 69X and 70N on July 17, 2018, and observes that Taj never filed motions to vacate any of those notices of default, either within or beyond the 60-day time limit specified in 48 RCNY § 6-21. *Id.*; verified answer, exhibits 33, 36, 39. OATH then asserts that "since [Taj] did not make motions to vacate the defaults for [NOVs] 71K, 69X or 70N, she has failed to exhaust the administrative remedies for challenging these three [NOVs] and this court lacks subject matter jurisdiction to review those challenges." *Id.* Taj's petition does not explain why she failed to serve motions to vacate her defaults with respect to NOVs 71K, 69X and 70N, and does not address 48 RCNY § 6-20 or § 6-21 at all. *See* verified petition. The court finds that the documentary evidence speaks for itself, and that Taj's failure to comply with the OATH rules regarding vacatur of notices of default (48 RCNY § 6-20 and § 6-21) does indeed constitute a failure to exhaust administrative remedies. *See e.g., Matter of Sahara Constr. Corp. v New York City Off. of Admin. Trials & Hearings*, 185 AD3d 401 (1st Dept 2020) (a petitioner's failure to utilize the appeals process outlined in 48 RCNY § 6–19 also constitutes a failure to exhaust administrative remedies which requires dismissal of the petitioner's Article 78 petition). Therefore, the court finds that Taj's Article 78 petition should be denied with respect to NOVs 71K, 69X and 70N.

The balance of Taj's petition concerns her challenges to the legality of OATH's final determinations regarding NOVs 95X, 96H, 20M, 21Y and 22X. The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the agency's decision had a rational basis in the record or was arbitrary and capricious. *See Matter*

of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). An agency decision will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

As previously mentioned Taj asserts that she "did not receive any notice of the hearings when they were purportedly posted on the door, when they could have been handed to the individual who answered the door," and that she "had exigent circumstances set forth in her request to vacate the defaults." *See* verified petition, ¶¶ 21-23. With respect to Taj's assertion of lack of notice, OATH first presents copies of NOVs 95X, 96H, 20M, 21Y and 22X along with their respective affidavits of service, their original hearing date notices and their rescheduled hearing date notices. *See* verified answer, exhibits 1-3, 7-9, 13-15, 19-21, 25-27. OATH then cites the well settled Court of Appeals rule that "a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." *Kihl v Pfeffer*, 94 NY2d 118, 122 (1999). OATH concludes that the petition's unsupported allegation, that Taj "did not receive any notice of the hearings when they were purportedly posted on the door," is insufficient to overcome the presumption of service that was created by the aforementioned documentary proof. *See* respondent's mem of law at 18-20.

OATH also notes that failed to raise a "lack of notice" argument in any of the motions to vacate her defaults regarding NOVs 95X, 96H, 20M, 21Y and 22X, and that it is therefore improper for her to raise this argument now, for the first time, in this Article 78 proceeding. *Id.* As previously noted, Taj did not submit any reply papers that might have challenged OATH's "presumption of service" claim. Therefore, based on OATH's documents, the court concludes that it has adequately demonstrated the sufficiency of its service of NOVs 95X, 96H, 20M, 21Y and 22X, and the court therefore rejects Taj's "lack of notice" argument.

With respect to Taj's assertion regarding "exigent circumstances," OATH first notes that, because Taj submitted the motions to vacate her defaults regarding NOVs 95X, 96H, 20M, 21Y and 22X more than 60 days after it had issued the notices of default pertaining to those NOVs, 48 RCNY § 6-21 (c) required Taj to include a "reasonable excuse" for those defaults in her motions. *See* respondent's mem of law at 16-18. Oath then notes that "in each of her motions to vacate the defaults [regarding NOVs 95X, 96H, 20M, 21Y and 22X], petitioner provided an identical 'excuse' for failing to appear, in that she was out of the country on the hearing dates, taking care of her elderly mother in Pakistan who had been hospitalized." *Id.* OATH avers that, while "petitioner's 'excuses' [were] not unreasonable per se, [she] failed to adequately document the alleged emergency which caused [her] to be out of the country for the July 3, 2018 hearings." *Id.* OATH opines that "[a]t most, petitioner's motions to vacate the defaults . . . only establish that she was not physically present in the United States on the date of the hearings," and notes that she "did not establish any documentation to support her claim that her mother was hospitalized during the pertinent time period, such as medical records or a physician's affidavit." *Id.* OATH concludes that "[s]ince these documents were not annexed to petitioner's

submissions, OATH appropriately determined that petitioner had failed to establish reasonable excuses for [her] failure to attend the July 3, 2018 hearings." *Id*. The court agrees.

It is well settled that "an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd'* 11 NY3d 859 (2008), *citing New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 (1st Dept 2006). Here, 48 RCNY § 6-21 (d), which is entitled "Reasons for Failing to Appear," provides (in pertinent part) as follows:

> "In determining whether a Respondent has shown a reasonable excuse for failing to appear at a hearing, the Hearing Officer will consider:
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> * * *
>
> (3) Whether circumstances that could not be reasonably foreseen prevented the Respondent from attending the hearing.
>
> * * *
>
> (7) Whether the Respondent's inability to attend the hearing was due to facts that were beyond the Respondent's control. [and]
>
> * * *
>
> (10) Any other fact that the Tribunal considers to be relevant to the motion to vacate."

48 RCNY § 6-21 (d). This regulation provides that an OATH hearing officer "will consider" whether a respondent has demonstrated an adequate "reason for failing to appear." Here, Taj's motions to vacate her defaults with respect to NOVs 95X, 96H, 20M, 21Y and 22X each asserted as a "reasonable excuse" for her failure to appear that she had to return to Pakistan to care for her hospitalized mother, since she is an only child and that country does not provide adequate social services for the aged or infirm. *See* verified answer, exhibits 5, 11, 17, 23, 29. OATH does not deny that such an event could constitute either a "circumstance that could not be reasonably foreseen," or a "fact that was beyond the respondent's control." Indeed, OATH concedes that "petitioner's 'excuses' [were] not unreasonable per se." *See* respondent's mem of law at 16-18. Instead, OATH asserts that Taj "failed to establish a reasonable excuse" for her defaults because

her moving papers did not include "any documentation to support her claim that her mother was hospitalized during the pertinent time period, such a medical records or a physician's affidavit." *Id.* In this regard, the motions to vacate Taj's defaults pertaining to NOVs 95X, 96H, 20M, 21Y and 22X each included a copy of her stamped passport that showed that she had left for Pakistan on June 24, 2018 and did not return until after the July 3, 2018 hearings on the corresponding notices of default had been held. *See* respondent's mem of law at 16-18. However, Taj's motions do not include evidence to establish that the reason for her visit to Pakistan was to care for her hospitalized mother, such as medical records or a doctor's note which OATH suggested. In the court's view, an inquiry into the evidence that supports a respondent's alleged "reasonable excuse" necessarily involves an assessment of "other fact[s] that the Tribunal considers to be relevant to the motion to vacate." Here, OATH found that Taj had failed to establish those "other facts" sufficiently. The court concludes that OATH's ensuing denial of Taj's motions to vacate was consonant with its discretion pursuant to 48 RCNY § 6-21 (d) (10). As a result, the court finds that OATH's decisions to deny Taj's motions to vacate her defaults regarding NOVs 95X, 96H, 20M, 21Y and 22X was a reasonable act supported by proof (or lack thereof) in the administrative record, and not arbitrary and capricious. Accordingly, the court finds that Taj's Article 78 petition should be denied with respect to NOVs 95X, 96H, 20M, 21Y and 22X.

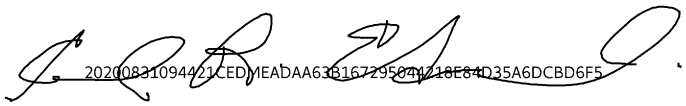
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Tahira Taj (motion sequence number 001) is denied, and the instant Article 78 proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

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



8/31/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE