**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER** **PART 6**
***Justice***

**In the Matter of the Application of**

**AFNAN & AMMAR LLC,**

**Petitioner,**

**-against-**

**CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS and NEW YORK CITY DEPARTMENT OF BUILDINGS,**

**Respondents.**

**INDEX NO. 150885/2020**
**MOTION DATE**
**MOTION SEQ. NO. 1**
**MOTION CAL. NO.**

**The following papers, numbered 1 to _____ were read on this motion for/to**

| | **PAPERS NUMBERED** |
|---|---|
| **Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...** | |
| **Answer — Affidavits — Exhibits _____** | |
| **Replying Affidavits** | |

## Cross-Motion: Yes x No

Petitioner Afnan & Ammar LLC ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), for a judgment reversing, annulling and setting aside the determination of Respondent City of New York Office of Administrative Trials and Hearings ("OATH") dated January 8, 2020 denying Petitioner's application to vacate Petitioner's default in appearing at a hearing scheduled for January 14, 2019 with respect to a violation issued by Respondent New York City Department of Buildings ("DOB") as against Petitioner. OATH and DOB (collectively, "Respondents") oppose.

Background/Factual Allegations

Petitioner contends that "[o]n April 27, 2018 Petitioner purchased 885 Albany Avenue, Brooklyn, NY [the 'Property'] from Albany Assets, LLC in an all cash deal with the contractual representation that the premises was a 2-family dwelling and was being delivered to Petitioner at the closing free and clear of any leases and/or tenancies." Petitioner asserts that after the closing, Petitioner became aware that "there were at least two known (2) individuals occupying the Property- Hendrik

Nelso and Raynal Jaboiun - as well as several other unknown individuals - 'John Does' 1-10 and 'Jane Does' 1-10 (hereinafter all the individuals, known and unknown, are collectively referred to as the 'Occupants'). Petitioner contends that it did not reside or have access to the property as the result of the Occupants presence.

Petitioner contends that it commenced licensee holdover proceedings in Kings County Landlord & Tenant Court against the Occupants in or about July 2018. Petitioner asserts that during the proceedings it "learned that the Occupants had allegedly been given a 'Room Rental Agreement' for an individual room in the Property by one Benjamin Gaspard who never had any legal right or interest in the Property and, therefore, had no legal right to enter into a lease, as landlord, for any space in the Property." Petitioner contends that the Room Rental Agreements were issued in or about May 2017 and were for two-year terms. Petitioner further contends that the Occupants asserted "that they allegedly were SRO tenants entitled to Rent Stabilization protection and, therefore, could not be evicted from the Property." Petitioner contends that "[u]pon information and belief, each of the Occupants have been paying monthly 'rent' to Benjamin Gaspard. The licensee holdover proceedings were dismissed."

Petitioner contends thereafter, it commenced a Kings County Supreme Court Action, Index No. 515326/2019, "in order to obtain a declaratory judgment declaring the various lease void *ab initio*, and the eviction of the Occupants." Petitioner asserts that the Occupants have not appeared and there is a pending motion for default judgment against the Occupants.

Respondents assert that on September 27, 2018, DOB issued summons number 35243047L (the "Summons") to Petitioner for use of the Property. The Summons stated that the hearing date was set for January 14, 2019 at OATH and DOB served the Summons by delivery to the Secretary of State.

Respondents contend that on November 15, 2018, DOB mailed Petitioner a Notice of Hearing, informing Petitioner of the January 14, 2019 hearing. Respondents further contend that DOB mailed the notice of hearing to two separate addresses – the Property and 97-53 85th Street, Ozone Park, New York, 11416, which is the corporate address on file with the New York State Department of State and designated for service of process (the "Corporate Address").

On January 14, 2019, Petitioner did not appear at the hearing. Respondents assert that on January 23, 2019, OATH mailed Petitioner a notice of default to each of Petitioner's addresses, informing Petitioner that the case had been decided against it.

Petitioner contends that it learned about the Summons after doing an online due diligence search of the Property. Petitioner asserts that it retained Daniels Norelli Cecere & Tavel, PC as legal counsel to vacate the default and request a new hearing date. Petitioner contends that its attorney submitted an application to OATH to vacate Petitioner's Default dated December 24, 2019.

On January 8, 2020 Respondent OATH issued the Challenged Order denying Petitioner's application to vacate its default in appearing at the January 14, 2019 hearing.

Parties' Contentions

Petitioner argues that "[t]he sole issue raised by way of this appeal is whether Respondent OATH's denial of Petitioner's application to vacate its default because Petitioner allegedly failed to establish a reasonable excuse for its failure to appear is arbitrary, capricious, an abuse of discretion and/or contrary to law." Petitioner asserts that "OATH's justification of its denial of Petitioner's application can be summed up very simply as 'because Respondent says so' and such justification can only be determined to be arbitrary, capricious and an abuse of discretion." Petitioner argues that OATH did not provide an explanation or reason that it concluded that "Petitioner allegedly failed to establish an exceptional circumstance for its failure to appear." Petitioner contends that OATH states that "our records show that the summons or notice was properly served" but overlooks the fact that "Petitioner does not reside at the Property and, because of the illegal occupancy of the Occupants, has no access to the Property."

Petitioner contends that it "was in the middle of a Supreme Court litigation with the Occupants of the Property concerning the Occupants illegal leases and occupancy of the Property." Petitioner argues that it was "taking very aggressive measures to address the occupancy issue of the Property." Petitioner asserts "[i]t was not until Petitioner was conducting an on-line due diligence search, on December 5, 2019, of the Property records that Petitioner learned about the violation being issued on December 3, 2018, the January 14, 2019 hearing date and that a default had been entered against Petitioner."

In opposition, Respondents argues that "[t]he administrative records demonstrate… that Petitioner was served, not only by mailings to the subject property, but by service on the Secretary of State, and by mailings directly to 97-53 85th Street, Ozone Park, New York, 11416, which is the corporate address on file

with the New York State Department of State and designated for service of process (the "corporate address")." Respondents assert that:

> First, DOB served the subject summons on the Secretary of State. See Ex. A. In addition, DOB mailed two hearing notices to Petitioner. DOB mailed one notice to the subject property, and one notice to Petitioner's corporate address. See Ex. B; See also Feil Louis Broadwell Mgt. Corp. v NY City Envtl. Control Bd., 293 AD2d 381, 740 N.Y.S. 610 (1st Dep't 2002) (Notices of Violations contained sufficient information to constitute "copies" of originally posted violations, and provided notice reasonably calculated to apprise petitioners of the violations with which they were charged and afford them the opportunity to present objections thereto).

Respondents argue that even if Petitioner did not have access to the Property, Petitioner still received service at its Corporate Address. Therefore, Respondents argue that "OATH determined that lack of access to the subject property was not a reasonable excuse for Petitioner's default."

In reply, Petitioner argues that "Respondents do not argue that Petitioner does not have a meritorious defense. Nor do Respondents address at all the strong public policy preference to determine disputes on their merits." Petitioner asserts that:

> Respondents fail to address at all the unusual convoluted facts/history of this matter which unequivocally demonstrate that, at all times, Petitioner was taking every possible action to do exactly what the Department of Buildings directed in its Summons to remedy the violation issued, namely, to discontinue the illegal use of the subject premises in contravention of the amended certificate of occupancy, which illegal use, significantly, (i) was illegally put into place by the prior owner's ex-husband, and (ii) NYC Legal Aid argued in Housing Court was protected by the Rent Stabilization Law.

Petitioner argues that "OATH's denial of Petitioner's request to vacate petitioner's default in appearing at the scheduled hearing was arbitrary, capricious and without a rational basis in the record."

Legal Standard

"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].

CPLR § 311-a states that service of process upon a limited liability company may be made pursuant to Article Three of the Limited Liability Company Law. Article Three of the Limited Liability Company Law § 303 provides for service of process on the Secretary of State. Section 303 states in relevant part:

> (a) Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose.

"Service of process on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant. (*Micarelli v. Regal Apparel Ltd.*, 52 A.D.2d 524 [1st Dept 1976]; *Associated Imports. Inc. v. Leon Amiel Publisher. Inc.*, 168 A.D.2d 354 [1st Dept. 1990] ['Service of the summons and complaint on the Secretary of State is valid even though defendant did not receive such from the Secretary of State due to the failure to change the address on file.']). *Mercer Sq., LLC v. Soho Closet 18, LLC*, 2016 N.Y. Slip Op. 32571[U], 3 [N.Y. Sup Ct, New York County 2016]. "A corporate defendant's failure to keep a current address of an agent on file with the Secretary of State does not constitute a reasonable excuse for the default." *Id.*

Discussion

Petitioner has failed to demonstrate that OATH's determination denying Petitioner's application to vacate Petitioner's default in appearing at a hearing scheduled for January 14, 2019, was arbitrary, capricious and in bad faith. *Flacke*, 69 NY2d at 363. The record shows that DOB served the Summons on the Secretary of State, and mailed the Summons to both the Property and the Corporate Address. OATH determined that lack of access to the Property was not a reasonable excuse for Petitioner's default because even if Petitioner did not have access to the Property, Petitioner received service of the Summons at its Corporate Address. "Service of process on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant." *Mercer Sq., LLC*, 2016 N.Y. Slip Op. 32571[U], 3. Therefore, Petitioner fails to meet its burden of demonstrating that OATH's determination was arbitrary and capricious. The determination will not be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

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

**Dated: September 4, 2020**

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**