SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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FIVE GUYS CONSTRUCTION LLC, WINDERMERE PROPERTIES LLC,

Petitioner,

- v -

CITY OF NEW YORK, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NYC DEPARTMENT OF BUILDINGS

Respondent.

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INDEX NO. 155863/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

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

Five Guys Construction, LLC ("Five Guys" or "Petitioner")[1] brings this Article 78 proceeding to review a decision rendered by the New York City Office of Administrative Trials and Hearings ("OATH"), which denied Petitioner's requests seeking new hearings regarding three violations issued by the City of New York Environmental Control Board ("ECB").

BACKGROUND

This case involves three alleged violations by Petitioner at a construction site located at 400 West 57th Street, New York, New York, owned by former party Windermere. Respondent New York City Department of Buildings ("DOB") alleges that it posted three notices of violations

[1] Windermere Properties LLC ("Windermere") and Respondents entered into a Stipulation of Settlement dated August 15, 2019, wherein Windermere agreed to discontinue its action and OATH agreed to vacate the default judgment regarding Summons No. 95K and grant Windermere a new hearing regarding its alleged violation. (NYSCEF Doc No. 16.)

("NOVs") bearing the numbers, 22Z, 23K, and 24M[2] on a fence at the site and mailed additional copies of the NOVS to Petitioner at several addresses associated with it. (NYSCEF Doc Nos. 22-25.) The NOVs indicated that Petitioner must attend a hearing before OATH scheduled for November 15, 2018. Petitioner alleges it never received any of the NOVs. After it failed to attend the hearing, OATH entered default judgments against it regarding the NOVs in the amounts of $25,000.00, $12,500.00, and $10,000.00 and mailed those default decisions to Petitioner on November 23, 2018. (NYSCEF Doc Nos. 27-29.) The default judgments advised that Petitioner could either admit the violations and pay a reduced fee, or submit requests for new hearings within 60 days (by January 22, 2019).

Petitioner submitted requests for new hearings on January 29, 2019. (NYSCEF Doc Nos. 4-6.) OATH denied those requests on February 12, 2019, stating that the requests were submitted more than 60 days after the mailing of the default decisions and did not set forth reasonable excuses for the failure to appear. (NYSCEF Doc No. 8.)

Petitioner argues that it should have been granted new hearings as of right, pursuant to 48 Rules of the City of New York ("RCNY") § 6-21, because it filed its requests within 60 days.[3] Notably, in all three of Petitioner's requests for new trials, Petitioner indicates that it learned about the NOVs on December 7, 2018 by "receiv[ing] a letter from OATH stating we are now in default." (NYSCEF Doc Nos. 4-6.) However, in its Petition, Petitioner states that these were "incorrect statement[s] that [were] included in the motion[s] due to an inadvertent mistake" and that to date it has never "received a copy of the default decisions." (NYSCEF Doc No. 1 at 4, fn 2; ¶ 17.)

[2] Those alleged violations were for an illegal sign, a defective scaffold, and damaged pedestrian protections, respectively. (NYSCEF Doc Nos. 23-25.)
[3] Although Petitioner alleges it submitted such requests on February 12, 2019, the documentation it submits indicates that the requests were made on January 29, 2019. (NYSCEF Doc Nos. 4-6.)

Rather, Petitioner alleges that it actually first learned about the NOVs on December 7, 2018 after Windermere was "contacted by a third-party company who asked if [Windermere] would like to retain the company to deal with the summons." (*Id*. at ¶ 17.) However, in Windermere's request for a new trial, it notes that it first learned about the summons on January 25, 2019 after being contacted by a company named "JackJaffa asking if we want to hire them to take care of this violation." (NYSCEF Doc No. 7.)

Petitioner alleges that on May 23, 2019 it received decisions from OATH advising that their motions were denied because the requests were "submitted more than 60 days after the mailing or hand delivery of the default decision[s] and did not establish reasonable excuse[s] for your failure to appear." (NYSCEF Doc No. 8.) Petitioner further alleges that the denials did not contain copies of the default decisions and did not otherwise indicate the dates on which the default decisions were originally mailed or hand delivered. (NYSCEF Doc No. 1 at ¶ 21.) Despite stating that it is unaware of the mailing date of the default decisions, Petitioner alleges that OATH's denials of the requests for new trials were arbitrary and capricious because its requests were made within 60 days of the mailing date of the default decisions, and therefore should have been granted as of right.

Respondents oppose the Petition, arguing that the DOB complied with all service requirements under New York City Charter § 1049-a[d][2] and that OATH's denials of the requests for new hearings were not arbitrary or capricious because the requests were made more than 60 days after the date of mailing of the default decisions and did not contain a reasonable excuse for Petitioner's failure to appear.

DISCUSSION

"The standard of review in this Article 78 proceeding is whether the ECB's 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.'" (*Lucas v New York City Dept. of Bldgs.*, 2013 WL 6856600 [Sup Ct, NY County 2013], quoting CPLR 7803 [3].) "[T]he interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable." (*Gaines v New York State Div. of Housing and Community Renewal*, 90 NY2d 545, 548-49 [1997].)

> Section 1049–a of the New York City Charter, the enabling legislation which underlies Section 3–82 of the Rules of the City of New York (Rule 3–82), governing procedures for vacating defaults before ECB, requires that notices of violation (NOV) of matters overseen by ECB be "served in the same manner as is prescribed for service of process by [CPLR Article 3] or [Business Corporation Law Article 3]" (NY City Charter § 1049–a[d][2][a]). Among four enumerated exceptions to this provision are two relating to service of NOVs of . . . the New York City Departments of Buildings and Environmental Protection (see NY City Charter §§ 1049–a[d][2][a][i]–[ii]). Such NOVs may be served by delivery to "a person employed by the respondent or in connection with the premises where the violation occurred" (NY City Charter § 1049–a[d][2][a][i]), or "by affixing such notice in a conspicuous place to the premises where the violation occurred" (NY City Charter § 1049–a[d][2][a][ii]), coupled with mailing of a copy of the NOV ["to the respondent at such respondent's last known residence or business address" "if the respondent is neither the owner nor the managing agent nor the occupying tenant of such premises"] (NY City Charter § 1049–a[d][2][b]). Even with respect to these two exceptions, however, such substituted service may not be effected unless "a reasonable attempt has been made to deliver such notice ... as provided for by [CPLR Article 3] or [Business Corporation Law Article 3]" (NY City Charter § 1049–a[d][2][b]).

(*Wilner v Beddoe*, 102 AD3d 582, 583 [1st Dept 2013].)

Regarding service of summonses for proceedings before OATH, the City Charter states that "[a] summons may be served pursuant to the requirements of §1049-a(d)(2) of the New York City Charter . . . For the purpose of serving a summons pursuant to New York City Charter §1049-a(d)(2)(a)(i) and (ii), the term "reasonable attempt" . . . may be satisfied by a single attempt to

effectuate service upon the Respondent." (Rules of the City of New York ["RCNY"] § 6-08 [a] [2].) If a respondent fails to appear for a hearing, they are held to be in default, "and without a hearing being held, all facts alleged in the summons will be deemed admitted, the Respondent will be found in violation and the penalties authorized by applicable laws, rules and regulations will be applied." (RCNY § 6-20 [b].)

However, a defaulting party may make a request for a new hearing. If the request is made within 60 days of the mailing date of the default decision, it will be granted automatically. (RCNY § 6-21 [b].) If the request is made after 60 days of the mailing date of the default decision, the request must be "accompanied by a statement setting forth a reasonable excuse for the Respondent's failure to appear and any documents to support the request." (RCNY § 6-21 [c].)

Here, the DOB inspector affixed all three notices of violations to a construction fence located at the job site on the same day, September 27, 2018, noting on his affidavits of service that "Five guys construction not on site. Site locked and inactive." (NYSCEF Doc No. 22.) Respondents also submit an affidavit of mailing dated October 9, 2018 indicating that the DOB mailed five copies of each notice to Petitioner at three separate addresses. In its Reply, Petitioner argues that the DOB inspector's use of affix and mail service was improper because his initial attempt of service did not constitute a "reasonable attempt". (NYSCEF Doc No. 41 at ¶ 6.)

The court disagrees. "[T]he alternate service procedure authorized by the statute—a single attempt to personally deliver the NOV, coupled with affixing the NOV to the property and mailing copies to the owner at the premises and other addresses on file with related City agencies—is reasonably calculated to inform owners of violations relating to their properties." (*Mestecky v City of New York*, 30 NY3d 239, 246 [2017].) In his sworn-to affidavits of service, the inspector noted that there was no one on site to personally serve and that he could not even enter the job site

because it was locked up. The court finds that this constitutes a reasonable attempt to personally deliver the notice of violation and that the inspector's use of affix and mail service pursuant to City Charter § 1049-a[d][2][a][ii] was proper.

Next, Petitioner argues that OATH's denials of its requests for new hearings was arbitrary and capricious because the requests were made within 60 days of the mailing of the default decisions and thus should have been granted as of right.

Here, Petitioner's requests were made on January 29, 2019, while the mailing date of the default decisions was November 23, 2018. Thus, Petitioner did not make the requests within 60 days of the mailing date of the default decision and it was therefore required to set forth a reasonable excuse for why it failed to appear at the hearing. Petitioner failed to set forth such an excuse, and, in fact, in making its requests, admitted that it received letters from OATH on December 7, 2018 indicating that "we are now in default." (NYSCEF Doc Nos. 4-6.) Notably, on the request forms, Petitioner stated that its address is 419 Cedarbridge Avenue #104, Lakewood, NJ, which is one of the addresses Respondents allege it mailed the notices of default to. The court does not find persuasive Petitioner's footnote claiming that its admissions of receipt were made in error. (NYSCEF Doc No. 1 at 4, fn 2.) Equally unpersuasive is Petitioner's Reply argument that the 419 Cedarbridge Avenue address is not its place of business. (NYSCEF Doc No. 41 at 3.) That address was provided by Petitioner in its requests for new hearings and is written on the notices of denials submitted by Petitioner into evidence. (NYSCEF Doc No. 8.)

Accordingly, it is hereby

ADJUDGED that the application is denied and the Petition is dismissed, with costs and disbursements to Respondents, as taxed by the Clerk, and that Respondents have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

09/09/20
DATE

W. FRANC PERRY, 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