

888 Realty LLC v Office of Admin. Trials & Hearings, City of N.Y.
2020 NY Slip Op 33266(U)
September 30, 2020
Supreme Court, Kings County
Docket Number: 510513/2019
Judge: Ingrid Joseph
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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of September 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ~~Hon. Inq.~~

P R E S E N T: HON. INGRID JOSEPH, J.S.C

-----X
888 Realty LLC,

Index No.: 510513/2019

Petitioner,

-against-

Decision/Order

Office of administrative Trials and Hearings,
City of New York, New York City Department
of Buildings

Respondents,

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's Motion:

Papers

Numbered

Notice of petition/Petition/Affidavit/Exhibits Annexed 1 - 4

Answer/Affirmation/ Memorandum/ Exhibits Annexed..... 5 - 10

Petitioner 888 Realty LLC ("Petitioner/888 Realty") filed the instant, Article 78 proceeding for judicial review of a final determination issued by Respondent Office of Administrative Trials and Hearings ("OATH") on January 11, 2019.

This matter arose on or about April 6, 2011, when an officer with the Department of Buildings (Thomas Spina) issued a Notice of Violation and Hearing (No. 34895452M) concerning work without a permit that was allegedly done at the Petitioner's 70-unit apartment building, located at 888 Montgomery Street, Brooklyn, NY 11213. Under the section entitled, "Violating Conditions Observed," Officer Spina referenced Infraction Code B101 Provision of Law 28-105.1, and wrote the following:

"Work without a permit. At time of inspection observed the illegal creation of a class "A" dwelling unit at the cellar level, left side, rear without permits. Illegal work noted: Erection of full height partitions with associated electrical wiring, boxes, fixtures, etc.... installation of gas line to service stove/oven at kitchen & installation of plumbing water waste and supply lines to service residential sink at kitchen and toilet, sink & shower stall at bathroom. Designated class 1 due to work created an immediately

hazardous living condition with no 2nd means of egress requiring vacate of apt.”

Under the section entitled, “Remedy,” Officer Spina indicated that the Petitioner should “obtain all permits for work if feasible or restore to prior legal condition with proper permits & approvals.” Under penalty of perjury, Officer Spina further indicated in the corresponding Affidavit/Affirmation of Service, that the Notice of Violation and Hearing was posted in a conspicuous place upon the subject premises and mailed in accordance with Section 1049-a(d)(2) of the New York City Charter.

The Petitioner contends that it never received the above Notice and further, that Joe Amsel, the individual who appeared on the Petitioner’s behalf at the OATH hearing (held on August 8, 2011) was not authorized to represent 888 Realty LLC (“888 Realty”). The Petitioner also claims that it never received the Decision and Order dated August 17, 2011, because 888 Realty had no relationship with Joe Amsel, did not retain Joe Amsel as its attorney, and 888 Realty’s business address, as it appears on the underlying violation, did not include the suite number. The Petitioner claims that the Department of Buildings issued five additional violations due to 888 Realty’s failure to comply with August 2011 Decision and Order, which resulted in a Notice of Levy and Sale dated November 28, 2018.

The Petitioner contends that it requested the August 2011 decision be vacated and a new hearing date provided in a letter that was sent to OATH via the “NYC.gov” web site. The Petitioner explains that its request to vacate and for a new hearing was based on three grounds. Firstly, 888 Realty alleged that Joe Amsel was not an authorized representative of the company. Secondly, 888 Realty pointed out Joe Amsel offered no evidence or defense during the hearing, and thirdly, 888 Realty claimed it never received any of the violations or the September 2011 decision by mail and consequently, was not aware that a hearing had been held. 888 Realty explains that OATH denied its request as untimely and maintains that such denial was contrary to lawful procedure, affected by errors of law, arbitrary, capricious and an abuse of discretion.

OATH, through its Assistant General Counsel, Timothy Jones (“Jones”), contends that the Department of Buildings issued a summons against the 888 Montgomery Street property for violating New York City Administrative Code 28-105 (work without a permit). Jones, having reviewed OATH’s Automated Information Management System (“AIMS”), states that 888 Realty made requests to adjourn the initial hearing from May 23, 2011, to June 13, 2011, then to August 8, 2011. Jones states that a review of AIMS also revealed that the August 8, 2011 hearing resulted in a Decision and Order dated August 17, 2011, wherein the OATH Hearing

Officer determined that 888 Realty violated Code 28-105, as noted in the Notice of Violation and Hearing issued by Officer Spina. Jones states that AIMS further reveals that a penalty of \$1,600 was imposed, which 888 Realty paid on November 29, 2011.

Finally, Jones points out that the Petitioner submitted two separate requests to vacate the August 2011 decision and order. The Petitioner filed the first request in 2016 and a second request for the same relief in 2018, more than five years after OATH issued the underlying, August 2011 decision. The instant Article 78 proceeding involves the second request that the Petitioner submitted. Jones maintains that OATH properly denied the appeal as untimely, pursuant to Section 6-26 of Title 48 of the Rules of the City of New York.

Under New York law, an Article 78 proceeding is available to challenge the actions or inaction of agencies and officers of state and local government (*Matter of Gottlieb v City of New York*, 129 AD3d 724, 725 [2d Dept 2015]). When a petitioner challenges an administrative determination that was not made after a quasi-judicial hearing, the court must consider whether the 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 (CPLR §7803; *Matter of Jefferson v New York City Bd. of Educ.*, 146 AD3d 779, 780 [2d Dept 2017]). A determination is arbitrary and capricious when it is without sound basis or regard to the facts (*Matter of Wooley v New York State Dept. Of Correctional Servs.*, 15 NY3d 275 [2010]). In demonstrating that administrative actions were taken arbitrarily or in bad faith, the petitioner bears a heavy burden of proof, for which conclusory allegations and speculative assertions will not suffice (*Matter of Harpur v Cassano*, 129 AD3d 964 [2d Dept 2015]).

The Decision and Order for the summons at issue in this case became final on September 17, 2011. 888 Realty's second request to vacate the Decision and Order was filed with OATH on December 13, 2018. The request was based upon 888 Realty's contention that Joe Amsel was not authorized to appear on its behalf at the 2011 hearing. The correspondence from OATH, dated January 11, 2019, correctly provides that the rule set forth in 48 RCNY 6-26 applies to 888 Realty's request to vacate. Section 6-26, which became effective on August 7, 2016, provides that a request for a new hearing based upon a claim of unauthorized representation must be made within three years of a decision and order becoming final. The court finds that OATH correctly determined that 888 Realty's request was untimely, since it was submitted more than seven (7) years after the underlying Decision and Order became final. Based upon these facts, the court finds that the Petitioner has failed to demonstrate that OATH's determination that its request was

untimely violated lawful procedure, was affected by an error of law, or that the determination was arbitrary and capricious.

Additionally, this court's disposition is limited to the facts and record adduced before OATH when its determination was rendered (*Matter of Sara B. Levine v New York State Liquor Authority*, 23 NY2d 863 [1969]). Therefore, this court rejects 888 Realty's argument that OATH failed to consider its allegations of improper service of the Notice of Violation and Hearing, because 888 Realty did not include any such argument in its letter that was filed with OATH on December 13, 2018.

Accordingly, the instant Petitioner for a judgment annulling and vacating the administrative determination made by the Office of Administrative Trials and Hearings, dated January 11, 2019, is denied. The instant proceeding is dismissed.

This constitutes the Decision and Judgment of the Court.

ENTER,



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice