Matter of Awan v Environmental Control Bd. of the City of N.Y.
2022 NY Slip Op 30613(U)
February 24, 2022
Supreme Court, Kings County
Docket Number: Index 509860/2021
Judge: Debra Silber

At an IAS Term, Part 9 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 24th day of February, 2022

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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In the Matter of the Application of

ABDUL AWAN,

Petitioner,

- against -

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,

Respondent,

For a Judgment pursuant to article 78, CPLR, to review and annul the determination made by respondent denying petitioner's application to vacate his default in appearing for a hearing.

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Decision/Order/Judgment

Index 509860/2021

MS #1

The following papers were read herein:	Papers Numbered in NYSCEF
Petition, Notice of Petition and Exhibits	1-11
Verified Answer and Exhibits	14-39
Reply Affidavits (Affirmations)	41

Upon the foregoing papers, petitioner moves for a judgment pursuant to CPLR Article 78 directing respondent to reconsider petitioner's application in a fair and lawful manner.

Facts and Procedural History

Petitioner timely commenced this CPLR article 78 proceeding on April 27, 2021. A notice of petition and a verified petition were filed on that date. Therein, he claims that the decision made by The Office of Administrative Trials and Hearings (OATH) dated January 4, 2021 [Doc 2], which considered and then, after eight months, denied his request for a new hearing, dated April 23, 2020, also known as a "Motion to Vacate a Default" [Doc 6] was arbitrary and capricious. Petitioner claims he did not receive the summonses/notices of violation, and thus did not know that he was directed to appear for the hearings. He avers that the notices were not served properly, and that his application should have been granted. The outstanding bill for the summonses [Doc 3] was, when the petition was filed, $793,936.26, with interest running.

Respondent has answered the petition, and claims that the summonses were served properly, and further, that petitioner had to provide "exceptional circumstances" as he applied to vacate his default more than a year after the default, and that he did not do so.

Discussion

First, the court notes that the respondent Environmental Control Board has, since 2016, had the summonses that had been adjudicated by it instead adjudicated at OATH, pursuant to 48 RCNY § 6-02. Here, the summonses were issued by the New York City Department of Buildings and the New York City Fire Department, and all state that the petitioner property owner must appear at the Brooklyn OATH office for each hearing.

The decision denying the petitioner's request to vacate his default provides only one sentence of an explanation "Your motion for a new hearing after you failed to appear on your scheduled hearing date is denied because: Your request was submitted more than one (1) year after the date of the default decision and did not establish that exceptional circumstances prevented you from appearing." The court finds that this conclusion is erroneous and thus was made arbitrarily and capriciously.

The respondent herein has provided copies of the front and back of the summonses, as well as the decisions, in E-File Docs 15-37. Document 15 is described as being solely related to violations for 695 Coney Island Avenue, Brooklyn, NY. It has 12 summonses, and half (if not more) were not in fact decided more than a year before petitioner's motion to vacate his default, as the hearing dates listed thereon are in May and June of 2019, which were less than a year before his "motion." Document 17 contains the decisions for this property's summonses, which comprises 118 pages. They appear to be in chronological order, and the second half [Pages 61-118] were mailed in May, June, July, August, and September of 2019. All of these were mailed within a year of petitioner's application to vacate his default. Further, four of the summonses with hearing dates, never mind the decision dates, which are within a year of his motion, are identical. Four violations are for work without a permit on apartments 2R and 3R. At a hearing, it is unlikely that fines would be imposed four times for the same exact violation. A quick search of ACRIS, the online NYC Register's website, which the court takes judicial notice of, indicates that petitioner sold this property in 2021. He therefore is not be able to remove the violations

for this property, regardless of the outcome of the hearing on the summonses. Further, it must be noted that the NYC Department of Housing Preservation and Development's (HPD) website, which the court also takes judicial notice of, indicates that at the time the violations were issued, for work without a permit, the work was being done under the auspices of an Article 7A Administrator appointed by HPD, and not by petitioner. In fact, one of the summonses, [Doc 15 Page 4], states that the summons could not be served personally because "spoke to contractor hired by HPD . . . stated respondent lost building and does not know his whereabouts. No authorized person present to accept legal documentation." It appears that petitioner herein has a meritorious defense to the violations issued by the City Buildings Department for work being done "without a permit" by the City's Housing Department at this building. The City does not need to obtain a permit for work it hires contractors to do as emergency repairs or otherwise. The petition avers that at least one building was placed into the City's Alternative Management Program (AEP) and should not have been issued violations as the City had boarded it up. It states that another property is also vacant. Yet another was also placed in the 7A program (659 Coney Island Avenue), the petition states at paragraph 20.

The court will not go through each and every summons and decision and try to figure out which ones were less than a year and which ones were more than a year before petitioner's motion to vacate his default. The petition lists eight properties which petitioner seeks to have hearings on, with some fifty notices of violation, now called "summonses." Not only would doing so be incredibly tedious, but the court must note that petitioner's

motion was made at the height of the COVID-19 pandemic when the courts (and presumably OATH) were shut down and the Governor had suspended filing deadlines for litigation. Specifically, Governor Andrew M. Cuomo tolled civil statutes of limitation from March 20, 2020 to November 3, 2020. (See Governor Cuomo's Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, and 202.72.) As relevant to this matter, any decision sent to petitioner after March 20, 2019 should have permitted petitioner to move to vacate until the later of a year after it was sent, or November 3, 2020, without showing any exceptional circumstances.

With regard to petitioner's claim that the violations/summons were not served correctly, the court finds the applicable law to be unclear. Respondent asserts that the NYC Department of Buildings and the NYC Fire Department are permitted to use "affix and mail" service, pursuant to NYC Charter § 1049-a(d)(2)(a), but this section states that "such notice may only be affixed . . . 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 CPLR . . . and a copy shall be mailed to the respondent at the address of such premises." Nonetheless, the first violation in Exhibit 15, for work without a permit at a six-family property, was served by affixing the summons, which has petitioner's mailing address filled in at the top of it, to the front door, and writing "knocked and rang doorbells, no answer." The others have similar statements, and all have petitioner's mailing address written in at the top. The mailings which followed, sent by the NYC Department of Buildings, [Doc 16] were sent to the property address as well as his mailing address, it

appears. But petitioner claims that the summons should have been served by certified mail. There is no support for this claim in the petition. That is not in fact required for service of these summonses/notices of violation.

The Rules of the City of New York, specifically, 48 RCNY § 6-17, cited by respondent in their memo of law, states that after a hearing, OATH will "promptly serve the decision on all parties." It does not specify how the decision should be served. There are no published legal decisions interpreting this provision. Here, for the one property the court reviewed the papers for, OATH provides copies of all of their "decision based on failure to answer summons" issued, some of which were addressed to the property address, and some of which were addressed to the petitioner's mailing address. Several [Doc 17 Pages 90, 103, 111] are addressed to a totally different address but still lists petitioner as the respondent party. No explanation is offered for these.

It must also be noted that there is no administrative appeal of a denial of a motion to vacate a default, which is acknowledged by respondent in its papers, citing 48 RCNY § 6-21(j). Thus, there is no claim that this issue is not ripe for an Article 78 special proceeding.

"In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009] [internal quotation marks omitted]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of*

Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). Moreover, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham*, 12 NY3d at 431).

Here, the court finds that OATH acted arbitrarily in cursorily determining that the fifty summonses had been adjudicated, and the decisions on default served, more than a year before petitioner's motion to vacate his default was served. That was not the case. Plus, we are in a pandemic and courts have been reluctant to default people who have not wanted to come to court. Further, petitioner appears to have a meritorious defense to many of the summonses, as it seems that some of the work was being performed by a City agency, not by petitioner, and other violations were not within his control to rectify because either there was a 7A Administrator for the building or it was in another program that denied him access. A sad case of the "left hand not knowing what the right hand is doing."

Accordingly, it is

ORDERED and ADJUDGED that the petition for relief pursuant to Article 78, of petitioner Abdul Awan, is granted to the extent of annulling the decision issued on January 4, 2021 which denied the petitioner's request to vacate his default in answering the listed summonses, and the matter is remanded to the respondent ECB (now NYC Office of Administrative Trials and Hearings), for further proceedings with respect to the listed summonses. OATH is directed to grant petitioner's motion to vacate his default with regard to those summonses with decision dates on or after March 20, 2019 as if he had made

the motion within 60 days, which requires OATH to grant his motion, and to schedule a hearing on those, and to consider the remainder of the summonses listed on the January 4, 2021 decision and determine whether the motion to vacate should be granted and hearings should be held with regard to them, and, for those properties which, on the summons date were being managed by the City of NY or a person appointed by the City of NY, such as a 7A Administrator, OATH shall consider this to be an exceptional circumstance; and

Any requested relief not expressly addressed herein is denied. And it is further

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

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

The foregoing constitutes the decision, order, and judgment of the court.

E N T E R:

Hon. Debra Silber, J.S.C.