

Windermere Props. LLC v City of New York
2023 NY Slip Op 30337(U)
February 2, 2023
Supreme Court, New York County
Docket Number: Index No. 151908/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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WINDERMERE PROPERTIES LLC,

Petitioner,

INDEX NO. 151908/2022

MOTION DATE 01/26/2023

MOTION SEQ. NO. 001

- 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

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

The petition to annul and vacate respondent New York City Office of Administrative Trials (“OATH”)’s denials of petitioner’s motions to vacate various default judgments and for an order directing that OATH grant a hearing on the merits as well as remove default penalties is denied.

Background

Petitioner owns the property located at 400, 404 and 406 West 57th Street in Manhattan. It claims it took ownership of the premises in 2009 and it started renovating the property. Petitioner complains that it received numerous summonses between 2009 and 2018 by various city agencies due to conditions on the premises. It argues that its former attorney was supposed to represent its interests but the attorney failed to appear for the OATH hearings. Petitioner

observes that as a result, default penalties were issued, which caused the total penalty to amount to \$288,181.05 whereas the summonses originally totaled \$51,500.00.

Petitioner contends that October 2018, when the marshal had levied petitioner's bank account, was its first notice about the defaults at issue. Petitioner argues that because the buildings are under construction and not generating income, the instant summonses have caused substantial financial distress to petitioner.

Petitioner observes that it filed more than forty motions in December 2020 to vacate the default judgments related to these summonses and sought new hearings before OATH. It acknowledges that because each motion was filed more than a year from the date of the default decision, it had to show 'exceptional circumstances' to receive a vacatur. Petitioner claims that its counsel had undergone medical care for an on-going serious illness and he did not disclose anything to petitioner; petitioner insists it only found out about this after the attorney retired. It questions why these types of default were vacated by respondents for other building owners but not here.

Petitioner points out that it brought this proceeding before all of these motions were decided, but it claims it cannot wait any longer. It asks the Court to annul and vacate the denials of petitioner's motions to vacate their defaults, for hearings on the merits or, at the very least, to reduce the fines to exclude the default penalties.

Respondents observe that petitioner received various summonses from 2009 to 2018 from a variety of agencies, including the Department of Buildings, the New York City Department of Sanitation, and the New York City Department of Health and Mental Hygiene. Respondents were kind enough to organize the many, many summonses into various groups (Groups A-G).¹

¹ The Court adopts this framework for purposes of this motion as petitioner adopted it in its reply papers. The petition does not identify specific summonses or organize them in any way.

Respondents contend that the summonses for Group A (this includes nine summons) are all barred by the statute of limitations because the respective motions to vacate were denied by OATH well more than four months before petitioners brought the instant petition. For the summonses labeled as Group B, respondents assert that new hearings were already held on these motions and so this part of the petition is moot. Respondents maintain that petitioner paid the Group C summonses and that the Group D summonses were written off so no fines are outstanding for both C and D.

With respect to the Group E summonses, respondents contend that any requested relief is premature although they acknowledge that after the instant proceeding was commenced, the vacatur motions were denied. They insist that the basis for those denials is different from the justifications offered for the other denials and so it is not properly before the Court.

For certain summons, referred to as Group F, respondents contend that they have no record of any motions to vacate. And, finally, for Group G, respondents argue that the denial of these motions to vacate was rational. They emphasize that petitioner only offered vague and non-specific facts, and therefore did not meet their burden to show extraordinary circumstances necessary to vacate their defaults. Respondents characterize petitioner's requested relief as one for mandamus to compel—namely that OATH be directed to do new hearings or remove the default penalties for certain summonses. They maintain that such relief is only available for ministerial actions rather than the discretionary nature of OATH's determinations.

In reply, petitioner emphasizes that respondents failed to adhere to prior administrative precedent by denying these motions to vacate. It questions how respondents could grant some of the motions filed by petitioner (as well as some other landlords who made similar motions) and

not other vacatur motions initiated by petitioner. Petitioner insists that constitutes arbitrary and capricious action.

Petitioner observes that for the Group B summonses, respondents granted these vacatur motions while denying the Group G related vacatur motions. Petitioner decries these apparently inconsistent decisions. It also emphasizes that the summonses classified as Groups B, C, D and E are not a part of the instant proceeding. Petitioner insists that it does not seek relief under a mandamus to compel; rather it simply wants a finding that respondents' denial was arbitrary and capricious.

Discussion

“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. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431, 883 NYS2d 751 [2009] [internal quotations and citations omitted]).

As an initial matter, the Court observes that the petition and the moving papers did little to organize or synthesize the summonses that petitioner seeks to challenge. While it is certainly petitioner's prerogative about how to seek the instant relief, the fact that petitioner did not bring Article 78 proceedings for each motion to vacate complicated its task in this proceeding. Certainly, bringing that many special proceedings might be overly burdensome and inefficient. But instead of making specific or individualized arguments about the individual summonses in

its moving papers, petitioner only offered generalized arguments in its petition and memorandum of law in support. As discussed in more detail below, petitioner attempted to raise more specific arguments in reply, after respondent organized and categorized the summonses. Unfortunately, petitioner was not entitled to raise detailed and individualized claims for the first time in reply.

The Court also finds that petitioner's requested relief is in the nature of a mandamus to review rather than a mandamus to compel as respondents contend. Petitioner simply seeks review of final determinations made by respondents rather than an order to compel respondents to take ministerial actions.

Prior Precedent

Petitioner's first argument is that respondents are barred from denying the vacatur motions because it conflicts with respondent's decisions in other similar matters. This Court disagrees and rejects this claim. The standard to vacate these decisions is "Except as otherwise stated in §5-03 of this Title, the Chief Administrative Law Judge or his or her designee will have the discretion, in *exceptional circumstances* and in order to avoid injustice, to consider a Respondent's first request for a new hearing after default made more than one (1) year from the date of the default decision" (48 RCNY 6-21[f] [emphasis added]). There is no dispute that these claims were made well after one year from the date of the default decisions.

That language necessitates individualized decision-making which, in the decisions submitted by petitioner in its moving papers (the decisions that petitioner seeks to challenge) conclude that:

"[Petitioner's] representative alleges that the sole reason for default is an undescribed law office failure/act of malpractice that resulted from the undefined illness of an unspecified attorney who served as [petitioner's] general counsel. [Petitioner's] representative did not present any evidence to establish what circumstances existed that prevented any other attorney or non-attorney representative from appearing at the hearings or from timely seeking to reopen the

defaults. The motion also fails to explain how the general counsel's failures could have persisted undiscovered for so long by any person at his or her law office or by the respondent itself" (NYSCEF Doc. No. 18).

The decisions also observed that:

"In sum, the vague intimations made here are not sufficient to satisfy the standard established in OATH rules for the reopening of defaults that are older than one year, therefore, the motion is denied. With respect to earlier decisions granting motions based on similarly slender assertions, two things are noted. First, Hearings Division determinations, though they might be persuasive, have no precedential value. Second, even if they served as precedent, the decisions at issue here would be reversed in this instance as the analysis underlying them is not satisfactory. Upon closer review, we find those decisions devoid of the facts necessary to establish the "extraordinary circumstances" required in OATH rules, and we decline to follow them. Finally, [Petitioner's] representative also argues that service of the summonses was defective, however, our records show that the summons or notice was properly served." (*id.*).

In other words, the Court declines to find that respondents were bound to grant new hearings to petitioner simply because respondents may have granted new hearings to other landlords who claimed law office failure. Petitioner failed to show that those other instances involved exactly the same circumstances—namely that the landlord only offered vague and unspecified facts and, nevertheless, received new hearings.

The Court declines to create a bright-line rule that, essentially, if respondents decide to vacate a default, then they must do so for every other similar application regardless of the actual details of the dispute. Put another way, the Court declines to find that a party claiming that their attorney is to blame is a catch-all reason to vacate a default regardless of the details surrounding that alleged law office error.

Those details are critical and, in this instance, provide a reasonable justification for respondents' determinations. Not only did respondents find that petitioner failed to offer a detailed rationale for why it ignored dozens of summonses, the denials also noted

the significant amount of time where this failure took place. As petitioner admits, this alleged law office failure started in 2010 and persisted until 2018.

That amount of time justifies respondents' determinations. Petitioner is certainly correct that respondents have, in other instances, excused law office failure and permitted parties to proceed on the merits. But respondents are not bound to do so where the standard, as noted above, is that an applicant show exceptional circumstances. That phrase involves a case-by-case determination.

And the decisions issued by respondents here are entirely rational. Questions abound about the exact nature of the law office failure and those unanswered questions do not compel the Court to grant the requested relief. How many years was the attorney sick? How does petitioner explain not knowing anything about these summonses and hearings for nearly a decade? Respondents rationally found that the lack of detail provided by petitioner justified denying a new hearing on so many unanswered summonses issued over the last decade.

Default Penalties

Another argument offered by petitioner is that the default penalty (an additional penalty issued to parties who do not show up) violates the Eighth Amendment to the United States Constitution as an excessive fine.

The Court rejects this argument as well. Penalties that "serve only a remedial purpose and are intended to secure compliance" do not implicate the excessive fines clause (*OTR Media Group, Inc. v City of New York*, 83 AD3d 451, 454, 920 NYS2d 337 [1st Dept 2011]). As respondents point out, the purpose of these additional fines is simply

to increase compliance and ensure that a party appears for the hearing. If petitioner had appeared for the hearings, then these default penalties would not have been imposed.

And the OATH rules permit a party automatic vacatur upon filing a motion to vacate within 75 days of the default and only requires a showing of a reasonable excuse for instances where a party seeks to vacate within a year of the default.

Moreover, respondents did not have discretion on the amount of the fine—they merely imposed the amounts set forth in the penalty schedule under the statutory framework. This is not a situation where respondents made factual findings on the merits and the Court could evaluate whether the default penalties are proportional to some sort of damages calculation.

Other Issues

To the extent that petitioner attempts to raise issues for the first time in reply, the Court denies those claims as improper. Respondents did not have an opportunity to address these issues. This applies to the argument raised concerning Group B summonses which, according to respondents' opposition, received new hearings on these summonses. These new hearings were set for February 10, 2022 pursuant to an order dated October 7, 2021 (NYSCEF Doc. No. 29), both dates that are before this proceeding was commenced. In other words, petitioner knew about these hearings before it filed the petition and it should have made arguments about any purported inconsistency in the moving papers.

Petitioner also claims in reply that the arguments raised about the summonses in Groups A and F are without merit. With respect to Group A, respondents insist that petitioner cannot seek to challenge these summonses because they are time barred. They argue that the various

motions to vacate petitioner's defaults for these summonses were all decided well more than four months prior to the commencement of this proceeding. In reply, petitioner claims for the first time that respondents changed their computer system in 2019 and that the motions to vacate the Group A summonses were lost.

The Court observes that for Group A, the petitioner failed to show in reply that the motions were somehow lost due to a computer glitch or sufficiently explain why these decisions were not time-barred. There was not sufficient support for these arguments. In fact, the reply raises more questions than answers. The Court observes that the reply purports to attach an email chain between petitioner's counsel and respondents about the summonses for Group A (NYSCEF Doc. No. 40). But the summons numbers do not match up. For instance, the email chain claims that the motion to vacate summons number 037010495K was decided on September 19, 2019 (NYSCEF Doc. No. 43). This was included in a list from petitioner's counsel in the prior email (*id.*). But petitioner's reply lists various summons numbers that do not include this particular summons (NYSCEF Doc. No. 40, ¶ 4).

And the summonses that do match up in both the email correspondence and the reply papers were part of a settlement agreement according to the email from respondents (a document uploaded by petitioner) (NYSCEF Doc. No. 43). Petitioner's claim that it is not aware of such a settlement (an assertion made only by petitioner's counsel and not by petitioner itself) only highlights the confusion in these papers. In any event, the Court cannot require respondents to give new hearings where it is entirely unclear what the status is of these vacatur motions and petitioner did not give respondents an opportunity to address these issues by highlighting them in the moving papers.

With respect to Group F, respondents claim that they have no record of any motions to vacate these summonses. Petitioner did not meet its burden to show in reply that it filed these motions. Instead, it claims that the statute of limitations has not run on their right to challenge these decisions. Clearly, there is some misunderstanding with respect to Group F. Nevertheless, the Court is unable to grant any relief with respect to these summonses where respondents claim they have no record of it and petitioners claim that their time to challenge has not run out. If petitioner is correct, then that would seem to suggest that petitioner could simply make motions to vacate for these summonses.


Summary

Unfortunately, the instant proceeding required the petitioner to be significantly more precise with its demands. The fact is that the petition makes only generalized claims about dozens of summonses and vague and conclusory allegations of law office failure. The Court addressed those generalized arguments and finds that respondents' decisions were rational and that they did not violate any constitutional provisions about excessive fines.

Only in reply did petitioner start to make individualized assertions about specific summonses. And while a party is absolutely entitled to address arguments raised by respondents in opposition, petitioner was not entitled to raise entirely new claims for the first time in reply. And the Court finds that many, many new arguments were raised in reply. These included, but were not limited to, claims about specific summonses, lost motions, and a possible settlement agreement that may (or may not) have been reached. Unfortunately, under the standards governing Article 78 proceedings, it is not this Court's role to engage in its own fact finding and issue rulings about arguments that the parties did not properly raise.

Accordingly, it is hereby

ORDERED that the petition is denied in its entirety, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly in favor of respondents and against petitioner along with costs and disbursements upon presentation of proper papers therefor.

<u>2/2/2023</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE