Matter of Ft Wash. Equities, Ltd. v City of New York

2023 NY Slip Op 32992(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 161033/2022

Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 161033/2022

MOTION DATE 05/05/2023

MOTION SEQ. NO. 002

In the Matter of

FT WASHINGTON EQUITIES, LTD.,

Petitioner,

- v -

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

Respondents.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

This is a proceeding pursuant to CPLR article 78 to review a September 1, 2022 determination of the New York City Office of Administrative Trials and Hearings (OATH), made after an evidentiary hearing before an administrative law judge (ALJ), finding that the petitioner had violated the New York City Building Code, as alleged in three notices of violation (NOVs), and imposing a penalty of $15,000 on each of the three violations, for a total of $45,000. The respondents move pursuant to CPLR 7804(f), 3211(a)(2), and 3211(a)(7) to dismiss the proceeding for the petitioner's failure to exhaust its administrative remedies. In this proceeding, the petitioner also challenges the constitutionality of 48 RCNY 6-19, a rule applicable to proceedings before OATH and the New York City Environmental Control Board (ECB). That rule requires a party seeking to take an administrative appeal from an initial adverse OATH determination to satisfy the condition precedent either of paying any penalties or fines in full or to request and obtain a hardship waiver of that obligation. The motion is granted, and the petition and proceeding are dismissed, as the petitioner failed to exhaust its administrative

remedies by appealing the adverse OATH determination, and failed to preserve its constitutional challenge by asserting it during the administrative process.

On July 8, 2020, the New York City Department of Buildings (DOB) issued three NOVs to the petitioner, the first alleging that it had violated Building Code § 28-105.1 for erecting a full-weight partition wall without a permit, the second alleging that it had violated Building Code §§ 28-210.1 and 202.1 by converting and maintaining a Class-A residential building to a structure containing a greater number dwelling units than permitted by the applicable certificate of occupancy, and the third alleging that it violated Building Code §§ 1020.2 and 1023.2 by failing to provide an unobstructed exit passageway for the second means of egress for one of the dwelling units. After a hearing held before on OATH ALJ on October 28, 2021, the ALJ concluded that the DOB failed properly to serve the NOVs upon the petitioner in accordance with the relevant New York City Administrative Code requirements. Consequently, in a determination dated November 9, 2021, the ALJ dismissed the NOVs. Although, in connection with the merits of the allegations, the determination recited the extent of the DOB's proof, the ALJ made no findings with respect to the merits. Shortly after the dismissals, the DOB issued a second set of NOVs alleging the same violations, and properly served them upon the petitioner, scheduling a new hearing for August 25, 2022. After the hearing on that date, an OATH ALJ, in a determination dated September 1, 2022, rejected the petitioner's contention that the NOVs already had been adjudicated on the merits, found that the petitioner did in fact commit the violations that had been alleged in the NOVs, and imposed penalties, in accordance with published penalty schedules, in the sum of $15,000 for each NOV, for a total of $45,000.

The petitioner never paid the penalties, never filed an administrative appeal of the September 1, 2022 determination, and never sought a hardship waiver in connection with the requirement that it pay the penalties in full as a condition precedent to the pursuit of the administrative appeal. Nor did it make an attempt to appeal by arguing that the penalty prepayment requirement was unconstitutional. Rather, the petitioner commenced the instant

proceeding directly to challenge the ALJ's September 1, 2022 determination. The respondents move to dismiss the petition in this proceeding on the ground that the petitioner failed to exhaust its administrative remedies.

"It is well settled that one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 548 [1st Dept 2007]). "The focus of the 'exhaustion' requirement . . . is not on the challenged action itself, but on whether administrative procedures are available to *review that action* and whether those procedures have been exhausted" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 521 [1986] [emphasis added]). Thus, where a statute, ordinance, or regulation requires or permits an administrative appeal, and a party has an opportunity to pursue it, he or she must exhaust all administrative appeals before seeking judicial review (*see Matter of Carter v State of New York*, 95 NY2d 267 [2000]; *Matter of Carter v Annucci*, 166 AD3d 1189, 1190 [3d Dept 2018]), and judicial review of the initial administrative determination is thereafter foreclosed (*see Matter of Harrell v New York City Housing Auth.*, 300 AD2d 54 [1st Dept 2002]).

A petitioner's failure to exhaust administrative remedies requires dismissal of a CPLR article 78 petition (*see Matter of Sanders v Bratton*, 258 AD2d 422, 423 [1st Dept 1999]) on the ground that the court lacks subject matter jurisdiction to entertain the petition (*see Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 66 [2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 474-475 [1st Dept 2003]; *Gelbard v Genesee Hosp.*, 211 AD2d 159, 160 [4th Dept 1995]; *Patrowich v Chemical Bank*, 98 AD2d 318, 323 [1st Dept 1984] [applying federal law]).

48 RCNY 6-19(a)(1) provides that "[a] party may appeal a decision of a Hearing Officer in whole or in part." Nonetheless, such an appeal will be considered by the OATH/ECB appellate tribunal only where the written appeal is submitted, with proof of service upon the agency issuing the NOV, within 30 days of the date of the ALJ's decision, or within 35 days if the decision was mailed. 48 RCNY 6-19(a)(1)(iii) further requires the administrative appellant to

submit proof of payment of all penalties, fines, and restitution before the tribunal will consider the appeal, or proof that it requested an obtained a financial hardship waiver from the prepayment requirement in connection with any penalties and fines. The petitioner now argues for the first time that the prepayment requirement is unconstitutional, as it violates its right to procedural due process. The respondents reject that contention, and argue, in effect, that the contention was not preserved for judicial review due to the petitioner's failure to raise it at the administrative level.

The determination of this motion is circumscribed by the decision of the Appellate Division, First Department, in *Matter of Sahara Constr. Corp. v New York City Off. of Admin. Trials & Hearings*, 185 AD3d 401 [1st Dept 2020] [*Sahara*]). In that case, Sahara Construction Company had been issued an NOV by the New York City Department Consumer Affairs, alleging that it had violated the terms of a home improvement contract, and thus had violated two provisions of the New York City Administrative Code and eight provisions of the Rules of the City of New York. As in the instant matter, an OATH ALJ conducted a hearing to determine whether to sustain the allegations. Upon determining that Sahara had indeed violated the terms of the contract, and thus violated Admin. Code of City of N.Y. §§ 20-393(1) and 20-393(11), as well as 6 RCNY 2-221(a)(10) (two counts), 2-221(a)(2), 2-221(a)(4), 2-221(a)(5), 2-221(a)(8), and 2-221(b), the ALJ not only imposed a total penalty in the sum of $5,000, but also directed Sahara pay restitution to its customer in the sum of $234,152.57. Although 48 RCNY 6-19 authorized Sahara to prosecute an administrative appeal of the OATH ALJ's determination, that rule, as explained above, required the company either to pay the penalty in full and make restitution as a condition precedent to pursuing the appeal, or to request and obtain a hardship waiver of the obligation to pay fines or penalties. Sahara obtained a financial hardship waiver excusing it from paying the $5,000 penalty in full prior to pursuing an administrative appeal, but it was not excused from making restitution, as 48 RCNY 6-19 does not allow for the waiver of restitution. The petitioner failed to pay restitution, and failed properly to serve all parties to the

administrative appeal in a timely fashion in any event. The ECB thus rejected Sahara's administrative appeal without reaching the merits.

In its CPLR article 78 proceeding, Sahara contended for the first time that the penalties imposed upon it were unconstitutionally excessive, and also asserted that it was deprived of liberty and property without due process of law by the requirements of 48 RCNY 6-19, which mandated full payment of both the $5,000 penalty (or a hardship waiver thereof) and the $234,152.57 in restitution as conditions precedent to the prosecution of an administrative appeal, inasmuch as the payment itself was necessary to its ability to exhaust its administrative remedies. The Supreme Court denied the petition and dismissed the proceeding. The Appellate Division affirmed.

In its decision, the Appellate Division explained that

> "The court correctly found that petitioner failed to exhaust its administrative remedies (*Watergate II Apts. v Buffalo Sewer Auth*., 46 NY2d 52, 57, 385 NE2d 560, 412 NYS2d 821 [1978]; *Matter of Nayci Contr. Assoc., LLC v New York City Dept. of Consumer Affairs*, 170 AD3d 435, 93 NYS3d 555 [1st Dept 2019]). The OATH rules provide explicitly that a party seeking to challenge a hearing officer's determination must first exhaust the OATH appeals process outlined in 48 RCNY 6-19. Among other requirements, the appealing party must show that it has paid in full any 'fines, penalties or restitution imposed by the decision' (48 RCNY 6-19 [c], as amended 6-19[a][1][iii]). While OATH may waive the payment of 'fines' or 'penalties' if the appealing party demonstrates a financial hardship, the rules are explicit that OATH is not permitted to waive an order of 'restitution' as a condition of the appeal (48 RCNY 6-19[d][2], as amended 6-19[b][2]). Instead, if a hearing officer has 'ordered payment of restitution,' the appealing party 'must, prior to or at the time of filing the appeal, submit proof that [it] has deposited the amount of restitution with the agency responsible for collecting payment, pending determination of the appeal' (*id.*). Petitioner has not done so, and thus has failed to exhaust its administrative remedies (*see Matter of Nayci*, 170 AD3d at 436)"

(*Sahara*, 185 AD3d at 401-402). The Court expressly declined to reach Sahara's contention that the penalties were unconstitutionally excessive, since, "[a]lthough exhaustion is not required where a party challenges the agency's actions as unconstitutional, petitioner made no excessive fine challenge below" (*id*. at 402 [citation omitted]), that is, in prosecuting or attempting to prosecute its administrative appeal. Thus, contrary to the petitioner's contention

here that OATH does not or may not consider any constitutional arguments presented to it, the Appellate Division concluded that

> "merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief" (*Matter of Schulz v State of New York*, 86 NY2d 225, 232, 654 NE2d 1226, 630 NYS2d 978 [1995], *cert denied* 516 US 944 [1995]). Thus, '[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level *should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established*' (*id.*). Petitioner has failed to do that here, and has not established that it was otherwise exempt from the exhaustion requirement (*Watergate II Apts.*, 46 NY2d at 57)"

(*id.*) (emphasis added).

Saraha, like the petitioner here, similarly failed to preserve for judicial review its contention that that the prepayment requirements of 48 RCNY 6-19, as they apply to fines and penalties, constituted an unconstitutional deprivation of due process. In this regard, the Appellate Division nonetheless explained that

> "[a]lthough neither specifically preserved nor raised on appeal, we are troubled by the constitutional ramifications of an administrative tribunal insulating its decision by making judicial review contingent on satisfaction of its order, including, as here, the payment of money (*see Burns v Ohio*, 360 US 252, 79 S Ct 1164, 3 L Ed 2d 1209, 84 Ohio Law Abs. 570 [1959] [invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction]). It seems patently unfair to force a litigant to pay restitution as a condition for filing an appeal where the litigant has received a waiver of prior payment of his fine due to financial hardship (*see* 48 RCNY 6-19[a][1][iii][B]).

(*id*). The Court noted that Sahara was

> "excused from paying a $5,000 fine as a condition to filing an appeal based on financial hardship, but, notwithstanding its financial hardship, it is forced to pay almost a quarter of a million dollars ($234,152.57) before it can file an appeal. Under this system, if you do not have the financial means to pay, you cannot come into court and seek review regardless of the merits of the challenged administrative determination (*compare* 48 RCNY 6-19[a][1][iii], with OATH's rules applicable to violations of laws or regulations enforced by the taxi and limousine commission, 48 RCNY 5-04[b] ['Pursuant to Administrative Code § 19-506.1(c), a Respondent will not be required to pay the fines, penalties, or restitution imposed in the decision in order to file a timely appeal'])"

(*id.* at 402-403). Nonetheless, "because this constitutional issue was not fully briefed" to the Court (*id.* at 403), it did not decide it.

In the instant matter, the petitioner did not present, at the administrative level, its arguments as to the unconstitutionality of the prepayment requirements of 48 RCNY 6-19. Rather, it only raised them for the first time in this proceeding. Thus, although the exhaustion of remedies requirement does not apply to those arguments, the petitioner was still required to assert them at some point during the administrative process to preserve them for judicial review, either in seeking a hardship waiver or by attempting to pursue an administrative appeal on the merits and raising the constitutional issue in the course of that attempt. Hence, the petitioner's failure to exhaust its administrative remedies by pursuing an administrative appeal of the ALJ's determination, whether by paying the $45,000 penalty in full, seeking and obtaining a financial hardship waiver, or filing an appeal without payment or a waiver that nonetheless raised the constitutional issue, requires this court to dismiss the petition on that ground.

Accordingly, it is

ORDERED that the respondents' motion to dismiss the petition for failure to exhaust administrative remedies is granted, and the petition is dismissed.

This constitutes the Decision and Order of the court.

8/28/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**