Matter of 3680 Broadway Equities Inc v City of New York

2024 NY Slip Op 30085(U)

January 8, 2024

Supreme Court, New York County

Docket Number: Index No. 153519/2023

Judge: Shahabuddeen Abid Ally

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHAHABUDDEEN ABID ALLY** **PART** **16TR**

Justice

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INDEX NO. 153519/2023

In the Matter of the Application of
3680 BROADWAY EQUITIES INC,

MOTION DATE _____

Petitioner,

MOTION SEQ. NO. 001

- v -

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

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-24 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioner brings this Article 78 proceeding challenging the denial of its motion to vacate default by respondent New York City Office of Administrative Trials and Hearings ("OATH"). Respondents cross-move to dismiss pursuant to CPLR § 3211 on the grounds that petitioner is barred from seeking such relief by the statute limitations. Upon the above cited papers and for the reasons set forth below, the petition is denied, respondents' cross-motion is granted, and this petition is dismissed.

Petitioner is a corporation and the owner of the property located at 3680 Broadway, New York, New York (the "Property"). Respondent OATH is the agency charged with presiding over administrative hearings involving New York City agencies. Respondent New York City

Department of Buildings ("DOB") is the agency charged with enforcement of the Building Code of the City of New York.

On or about March 17, 2020, DOB issued a summons to petitioner for failure to maintain the building wall or appurtenances pursuant to New York City Administrative Code § 28-302.1 (petitioner's exhibit A, NYSCEF No. 2). The summons listed the initial hearing date as May 28, 2020 (*id.*). According to the affidavit of service, the affiant utilized affix and mail service after knocking on the front entrance door of the Property and received no response (*id.*). After waiting several minutes, the affiant posted the summons at the front entrance door and mailed Notices of Hearing to the Property, to petitioner at the Property, to the address on file for petitioner with DOB, and to the Bank of New York (*id.*). The hearing was rescheduled for July 20, 2020 and OATH mailed notice of the new date to the Property and to the addresses on file with OATH, which match the addresses on file with DOB (respondents' exhibit C, NYSCEF No. 13).

After petitioner failed to appear at the rescheduled hearing, OATH issued a Decision Based on Failure to Answer Summons ("Default Determination") on July 27, 2020 (respondents' exhibit D, NYSCEF No. 14). The Default Determination assessed a fine of $25,000 but provided that petitioner had the opportunity to admit the violation and pay a reduced fine or ask for a new hearing (*id.*). The Default Determination also indicated that the first request for a new hearing would be granted if received by OATH no more than sixty days after mailing of the Default Determination (*id.*). The Default Determination was mailed to petitioner at the addresses on file with DOB and OATH (*id.*).

Petitioner submitted its first request to vacate the Default Determination ("First Request") on November 3, 2020, approximately 98 days after the Default Determination was mailed to petitioner (respondents' exhibit E, NYSCEF No. 15). In its First Request, petitioner averred that

it did not receive notice of the summons and that service was defective in that the DOB representative did not make a reasonable attempt at service (*id.* at 3). Petitioner's First Request was denied in a determination issued on January 5, 2021 ("2021 Determination") on the grounds that petitioner's request was submitted more than sixty days after the mailing of the Default Determination (respondents' exhibit F, NYSCEF No. 16). The 2021 Determination also indicated that although petitioner claimed it did not receive the notice or summons, OATH's records showed that the summons or notice was properly served (*id.*). The 2021 Determination was mailed to the addresses listed on the First Request and on file with OATH on January 6, 2021 (*id.*).

On February 16, 2023, petitioner again moved to vacate the Default Determination and requested a new hearing ("Second Request") (petitioner's exhibit B, NYSCEF No. 3). Petitioner again claimed that it did not receive the summons and that service was improper (*id.*). Petitioner's Second Request was denied in a letter issued by OATH on February 17, 2023 ("2023 Determination") (petitioner's exhibit C, NYSCEF No. 4).

Petitioner subsequently commenced the instant proceeding by notice of petition and verified petition on April 18, 2023. Petitioner contends that its Second Request provided basis to constitute "exceptional circumstances" such that vacatur of the 2023 Determination and a new hearing were warranted. Petitioner also argues that OATH's denial of its Second Request was contrary to determinations made in other matters with similar facts.

Respondents oppose the petition and cross-move to dismiss the proceeding pursuant to CPLR § 3211, arguing that the petition is barred by the four-month statute of limitations set forth in CPLR § 217. Respondents contend that notwithstanding petitioner's Second Request and the 2023 Determination, the 2021 Determination was unequivocally final and binding pursuant to

OATH regulations, and therefore petitioner's time in which to bring an Article 78 challenge expired in May 2021.

In reply, petitioner avers that this proceeding is not untimely because the 2021 Determination was not unequivocally final. Because the 2021 Determination did not contain language on its face conveying its finality, petitioner claims, it was ambiguous and thus should be construed against respondents. In the alternative, petitioner argues that the failure of the 2021 Determination to convey petitioner's right to judicia review violated petitioner's Due Process rights under the United States and New York State Constitutions.

Discussion

CPLR § 3211(a)(5) provides that a party may move to dismiss a claim where the cause of action may not be maintained due to, *inter alia*, commencement past the applicable limitations period. A defendant who seeks dismissal pursuant to this provision bears the initial burden of establishing prima facie that the time in which to sue has expired (*see Singh v New York City Health and Hospitals Corp*, 107 AD3d 780 [2d Dept 2013]). If so established, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the suit was commenced within the asserted period (*id.*).

A special proceeding commenced pursuant to Article 78 to challenge an administrative agency's final determination must be made within four months after the determination becomes final (CPLR § 217[1]); *see Solnick v Whalen*, 49 NY2d 224, 232 [1980]). A determination becomes final once "impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process" (*Essex County v Zagata*, 91 NY2d 447, 453[1998], quoting *Chicago & S. Air Lines v Waterman Corp.*, 333 US 103, 113 [1948]). An agency decision is not final if the party's grievance may be "prevented or significantly

ameliorated by further administrative action or by steps available to the complaining party" (*id.*, quoting *Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986]).

Pursuant to City Charter § 1049-a and the rules set forth in Title 48 of the Rules of the City of New York ("RCNY"), adjudication of summonses based on alleged violations of laws and regulations overseen by DOB is conducted by OATH. A party that fails to appear on the designated hearing date may be held in default by OATH and thereafter be subject to the fine prescribed for the given violation (City Charter § 1049-a[d][1][d]). A party who has received a default determination may request a new hearing (48 RCNY § 6-21[a]), and a first request submitted within seventy-five days of the default would be granted (48 RCNY § 6-21[b]).[1] Requests made after seventy-five days of the default but within one year must include a statement setting forth a reasonable excuse for the default and are granted at the Hearing Officer's discretion (48 RCNY § 6-21[c]). Requests submitted outside these periods may be granted upon a showing of "exceptional circumstances and in order to avoid injustice" (48 RCNY § 6-21[f]). A denial of such a request constitutes a final determination and is not subject to further review by or appeal to OATH (*see* 48 RCNY § 6-21[j]).

Here, the 2021 Determination was a final determination and as such, its mailing commenced the four-month period for petitioner to bring an Article 78 proceeding. Notwithstanding petitioner's argument that the face of the 2021 Determination letter did not expressly inform petitioner that its denial of the motion to vacate constituted a final determination, 48 RCNY § 6-21[j] is explicit that a denial of a motion to vacate constitutes a final determination and that no recourse other than an Article 78 proceeding is available upon denial of a motion to vacate default.

[1] The Court acknowledges that at the time of the 2021 Determination, this subsection of the RCNY provided that first requests submitted within sixty days of the default would be granted.

Petitioner's argument that the 2021 Determination was unacceptably ambiguous is unavailing. The 2021 Determination unequivocally conveyed OATH's determination that petitioner's First Request was denied both as untimely and upon the merits of petitioner's contentions. There is no ambiguity on its face that petitioner's request for vacatur and new hearing was denied based on OATH's determination that service of the requisite notices was proper.

Even if this proceeding was not time-barred, petitioner has failed to demonstrate that OATH's denial of the requests to vacate default were arbitrary and capricious or lacked rational basis. In the context of an Article 78 proceeding, the court's function is to evaluate whether, upon the facts before an administrative agency, that agency's determination had a rational basis in the record or was arbitrary and capricious (CPLR § 7803[3]; *see, e.g. Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 [1st Dept 1996]). The administrative determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of . . . the facts" (*see Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 [1983], citing *Matter of Pell*, *supra* at 231). A reviewing court may not substitute its own judgment for that of the agency making the determination (*see Partnership 92 LP v New York State Div. of Hous. & Community Renewal*, 46 AD3d 425 [1st Dept 2007]). If the administrative determination has a rational basis, there can be no judicial interference (*Matter of Pell*, *supra* at 231-232).

New York City Charter § 1049-a(d)(2) permits use of affix and mail service of DOB summonses provided that there has been "a reasonable attempt" to serve the relevant party

pursuant to Article 3 of the CPLR (*see* N. Y. City Charter § 1049-a[d][2][b]). Contrary to petitioner's argument, the Court of Appeals has held that a single unsuccessful attempt at personal service is sufficient to satisfy the "reasonable attempt" requirement before affix and mail may be used (*Matter of Mestecky v City of New York*, 30 NY3d 239, 246 [2017] ["the alternate service procedure authorized by the statute – a single attempt to personally deliver the [notice of violation], 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"]). Further, the record establishes that the addresses for petitioner on file with both DOB and OATH remained the same from the date of the summons through its Second Request for vacatur, and that these addresses were used by petitioner in both of its requests. The record further establishes that notices for the summons, the rescheduled hearing, the Default Determination, the 2021 Determination, and the 2023 Determination, was mailed to these addresses. Nothing in the record indicates that OATH's finding that petitioner failed to demonstrate reasonable excuse for its default or an exceptional circumstance was arbitrary and capricious or lacked rational basis.

The Court has considered petitioner's remaining arguments and finds them to be without merit.

Conclusion

Based on the foregoing, the Court finds that OATH's 2021 Determination constituted a "final determination" that commenced the limitation period set forth in CPLR § 217 and therefore this proceeding is untimely. In the alternative, the Court further finds that petitioner has not met its burden to establish that OATH's denial of its requests to vacate the default were arbitrary and capricious or lacked rational basis. Accordingly, it is hereby:

ORDERED and ADJUDGED that the petition is denied, respondent's cross-motion is granted, and this proceeding dismissed.

This constitutes the decision and order of the Court.

01/08/2024
DATE

SHAHABUDDEEN ABID ALLY, A.J.S.C.

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