At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 12th day of June, 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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In the Matter of the Application of MELVIN C. SANTANA, For a Judgment Under Article 78 of the Civil Practice Law and Rules,

Petitioner(s)

-against-

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,

Respondent(s)

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Index No: 503115/2023
Motion Seq. #1-2

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Petition/Affidavits Annexed Exhibits Annexed/Reply.....	1-8
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In this matter, Melvin C. Santana ("Petitioner") moves (Motion Seq. 1) for an order pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") for judicial review of decisions issued by New York City Office of Administrative Trials and Hearings ("OATH"), denying Petitioner's motions to vacate default judgments of alleged violations issued by the Environmental Control Board ("ECB") and the Department of Buildings ("DOB") on Petitioner's property located at 149 Norwood Avenue Brooklyn, New York 11208 ("Subject Premises"). OATH, ECB, DOB, and the City of New York ("City") (Collectively "Respondents") have opposed the motion. Additionally, Respondents cross-move (Motion Seq. 2) to dismiss the Petition in its entirety on the ground that Petitioner's motion is now time barred by the applicable statute of limitations. Petitioner has opposed this motion.

This action arises out of a DOB's issuance of Summons #35511674Z ("Summons 74Z") against Petitioner on November 14, 2019, for failure to comply with the Commissioner's Order contained in Summons/Violation # 39007376N ("Summons 76N") issued on August 8, 2019, and/or to file a Certificate of Correction pursuant to 28-201.1 and 1 RCNY 102-01 regarding work performed at the Subject Premises without a proper permit. The Summons contained an Affirmation of Service, noting that the summons was posted on the front entrance door. A copy addressed to Petitioner was mailed to the Subject Premises, as well as a second notice of the hearing date to Petitioner's mailing address at 149 33

128th St. South Ozone Park Queens, New York 11420. Subsequently, Summons #35514752Z ("Summons 52Z") was issued on December 23, 2019, for performing work without a permit at the Subject Premises. The Summons was also posted on the front entrance door, and a copy was mailed to the Subject Premises, as well as a notice of the hearing date to Petitioner's mailing address. On March 9, 2020, Summons #35518157M ("Summons 57M") was issued for failure to comply with the Commissioner's Order contained in Summons #76N and/or to file a Certificate of Correction. The Summons was also posted on the front entrance door, and a copy was mailed to the Subject Premises, as well as a notice of the hearing date to Petitioner's mailing address. Subsequently, Summons #35520820M ("Summons 20M") for failure to comply and/or file a Certificate of Correction was issued on September 21, 2020, and was also posted on the front entrance door, and mailed to the Subject Premises and Petitioner's mailing address. Lastly, on Match 2, 2021, Summons #35527683R ("Summons 83R") was issued to Petitioner for failure to comply with Commissioner's Order contained in Summons #76N and/or to file a Certificate of Correction, which was posted to the front door and mailed to the Subject Premises and Petitioner's mailing address.

Summons 74Z was scheduled for an OATH hearing on March 18, 2020, and administratively adjourned to September 11, 2020. OATH mailed notices of the new appearance date to Petitioner's Ozone Park St mailing address on March 27, 2020, and July 1, 2020. Petitioner failed to appear at the September 11, 2020, hearing and a default decision was issued on September 18, 2020, and mailed to the Subject Premises and Petitioner's mailing address. On November 6, 2020, Petitioner submitted a Motion to Vacate the September 18, 2020, default decision and on December 30, 2020, OATH mailed Petitioner a letter granting a new hearing scheduled for April 9, 2021, wherein Petitioner failed to appear. On April 26, 2021, a Second Default Decision was issued and mailed to both of Petitioner's addresses.

Summons 52Z was initially scheduled for an OATH hearing on April 29, 2020, and was administratively adjourned to December 3, 2020. OATH mailed notices of the appearance dates to Petitioner's addresses on January 17, 2020, and May 8, 2020. Petitioner failed to appear at the December 3, 2020, hearing and a default decision was issued on December 10, 2020, and mailed to Petitioner.

Summons 57M was scheduled for an OATH hearing on July 15, 2020. OATH mailed a notice of the appearance date to Petitioner's addresses on March 23, 2020. On July 22, 2020, a default decision was issued and mailed to Petitioner after he failed to appear at the hearing. Additionally, Summonses #20M and #83R were scheduled for hearings on February 3, 2021, and July 14, 2021, respectively. Notices of the appearances were mailed to Petitioner's addresses on December 18, 2020, and March 17, 2021. Petitioner failed to appear at both hearings, and default decisions were issued and mailed to him on February 10, 2021, and July 21, 2021, respectively.

On August 2, 2022, Petitioner moved to vacate all 5 summonses issued against him. On August 4, 2022, OATH responded via letter stating that Petitioner's Motion to Vacate Summon 74Z was denied

because "a prior request for a new hearing was granted and you did not appear. Your second request did not establish that exception circumstances prevented you from appearing." That same day, OATH sent Petitioner denials letters for Summonses #52Z, 57M, 20M and 83R, stating that Petitioner's Motions to Vacate are denied on the ground that the request was submitted more than one year after the date of the default decision and that Petitioner did not establish that exceptional circumstances prevented him from appearing at the hearings.

Subsequently, on December 22, 2022, Abe Sicker ("Sicker"), a registered representative on behalf of Petitioner requested new hearings on all 5 summonses. On December 23, 2022, OATH notified Sicker that this Second Motion to Vacate the default decisions was being denied due to already being notified that the requests were untimely, pursuant to the August 4, 2022, letter.

In his Petition, Petitioner claims that he had requested that the summonses be reopened because he never received notice of them "due to fatal defects regarding service of process," and that Respondents' generic and auto-generated denial letters did not address the specific defects alleged by Petitioner." In support of his Motion to Vacate to OATH, Petitioner attached a W-2 Tax statement from 2019, and a CitiBank bank statement, addressed to 370 N. Village Avenue Rockville Centre, New York 11570. Petitioner states that OATH has granted numerous motions to vacate defaults based on similar circumstances and that the failure to adhere to its prior precedent is arbitrary and capricious. Additionally, Petitioner states that "what constitutes as exceptional" cannot be ascertained by OATH's denial letters and that it is "unreasonable and punitive for OATH to levy such large judgments against Petitioner and not provide any kind of detailed explanation in its letters denying Petitioner's request for new hearing dates."

In support of their cross-motion, Respondents argue that this instant proceeding should be dismissed because it is time barred by the applicable statute of limitations. Respondents state that Article 78 proceedings must be brought within four months after the determination to be reviewed becomes final and binding upon a Petitioner. Respondents' states that its final determination was issued on August 4, 2022, thus the statute of limitations expired on December 9, 2022, and that Petitioner filed this action on January 31, 2023, nearly two months after expiration.

In opposition to their cross-motion, Petitioner argues that Respondents' August 4, 2022, letter was not a final determination. Petitioner claims that the first denial letter issued by OATH did not include any info regarding OATH Rule 6-21(j) stating that it was a final determination, nor any information regarding Petitioner's right to judicial review. Petitioner states that the language regarding any right to judicial review was only included in the follow up December 22, 2022, denial letter, and thus Petitioner had no way of knowing that that the August 4, 2022, determinations were in fact final. Petitioner argues that since a final determination letter was also sent on December 22, 2022, that his action was timely

commenced on January 31, 2023. Furthermore, Petitioner argues that Respondents' initial denial letters violated due process because they did not inform Petitioner of his rights to commence an Article 78 proceeding. Petitioner states that the misleading nature of the conflicting letters is a violation of the due process requirement of reasonably calculated notice.

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. New York City Charter § 1049-a(d)(2)(a)(ii) provides that "service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the commissioner of buildings and over which the environmental control board has jurisdiction may be made by affixing such notice in a conspicuous place to the premises where the violation occurred" (NYC Charter § 1049-a(d)(2)(a)(ii)). 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]). After a default decision is issued, "[t]he Tribunal will notify the Respondent of the issuance of a default decision by mailing a copy of the decision or by providing a copy to the Respondent or the Respondent's representative who appears personally at the Tribunal and requests a copy' (48 RCNY §6-20[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]). 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 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])" (*id*).

A proceeding under CPLR Article 78 "'must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner'" (CPLR 217 [1]; *Matter of Kaneev v City of NY Envtl. Control Bd.*, 149 AD3d 742, 744 [2d Dept 2017] *quoting Hilburg v New York State Dept. of Transp.*, 138 AD3d 1062, 1063, 31 NYS3d 126 [2016]). Mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty (*Klostermann v Cuomo,* 61 NY2D 525 [1984]).

In reviewing an agency's decision pursuant to Article 78 of the CPLR, the Court's scope of review is narrow and limited to questions of law and the extent of the sanction imposed (*Pell v Board of Education,* 34 NY2d 222 230-31 [1974]). The Court also cannot interfere unless there is no rational basis for the exercise of discretion, or the action complained of is arbitrary and capricious (*id.* at 231; *Matter of Colton v Berman,* 21 NY 2d 322 [1967]). The arbitrary and capricious test relates to whether a particular

action should have been taken or justified, and whether the administrative action is without foundation in fact (*Pell* at 231). It is not the function of judicial review in an Article 78 proceeding for the court to weigh the facts and merits de novo and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any rational basis (*id. at* 378).

Further, in a CPLR 7803 (3) proceeding, responsive affidavits, made by an affiant with firsthand knowledge of the decision-making process undertaken by the agency which were not part of the administrative record, may be considered by the Supreme Court when there is no administrative hearing and the issue is not one of substantial evidence but, rather, whether the agency's determination has a rational basis (*Matter of Menon v NY State Dept. of Health*, 140 AD3d 1428 [3d Dept 2016]; *Matter of Kirmayer v NY State Dept. of Civ. Serv.*, 24 AD3d 850 [3d Dept 2005]; *see also* CPLR 7804 [d]; CPLR 7804 [e]). "Where there was no administrative hearing, the agency may submit an employee's or official's affidavit to explain the information that was before the agency and the rationale for its decision, and courts may consider such an affidavit even though it was not submitted during the administrative process" (*Matter of Hammonds v NY State Educ. Dept.*, 206 AD3d 1334 [3d Dept 2022] [internal citations omitted]).

Here, the court finds that Petitioner's action is time-barred. Although petitioner claims that it never received the summonses, or notices of hearing, respondents have provided the summonses and affidavits of service that demonstrate that respondents complied with the affix and mail provision of the New York City Charter. It is well established that, "[a] properly executed affidavit of service raise[s] a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption" (*Kihl v Pfeffer*, 722 N.E.2d 55, 58 [1999]). OATH's decision to deny the request for vacatur was rational, supported by evidence, and consistent with applicable law, since Petitioner failed to proffer an exceptional circumstance to explain why he failed to appear at the hearings or why he waited more than one year after the decisions were issued to request a new hearing given that his August 2022 motion to vacate demonstrates that he was aware of the prior decisions. Under 48 RCNY §6-21[f], the court in its discretion, in exceptional circumstances and to avoid injustice, may consider a first request for a new hearing after default made more than one year from the date of the default decision. A bare denial of improper service does not constitute an exceptional circumstance. The Respondents issued the default judgments against Petitioner, sent to him pursuant to 48 RCNY §6-20[d], informing him of his right to appeal, and Petitioner failed to timely appeal. Absent additional evidence, Petitioner's denial of notice is insufficient to constitute an exceptional circumstance and overcome the presumption of proper service presented by the affidavits. Petitioner's argument that he does not live at the Subject Premises or the 149 33 128th St. address is also without merit since the December 22, 2022, Motion to Vacate submitted by Petitioner's representative, lists the 149 33 128th St. address as Petitioner's. The August 4, 2022, denial

letter was also mailed to Petitioner at the 370 370 N. Village Avenue address. Furthermore, the default decisions issued to Petitioner inform him of the procedure to request a new hearing after failing to appear, which Petitioner does not state he attempted to do other than with Summons #74Z. The hearing notices also state that if petitioner failed to appear at the hearing, a default judgment would be issued against him and indicate that the hearings would be held pursuant to NYC Charter Section 1049-a and related rules, and that Petitioner would have an opportunity at the hearing to provide a defense to the charges.

Accordingly, it is hereby,

ORDERED, that Petitioner's motion (Motion seq 1) for judicial review of decisions issued by New York City Office of Administrative Trials and Hearings, denying Petitioner's motions to vacate default judgments of alleged violations issued by the Environmental Control Board and the Department of Buildings is denied, and it is further,

ORDERED, that Respondents' motion (Motion Seq. 2) to dismiss the Petition in its entirety is granted.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice