SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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3921 108 LLC,

Petitioner,

- v -

DEPARTMENT OF BUILDINGS, ENVIRONMENTAL CONTROL BOARD, OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

Respondent.

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INDEX NO. 152203/2021

MOTION DATE N/A[1]

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for Article 78.

The petition to vacate determinations made by respondents is denied.

Background

Petitioner owns a building in Queens and explains that between January 2017 and April 2017, respondent the Department of Buildings ("DOB") issued 6 summonses relating to work performed without a permit in the cellar. Petitioner contends that it did not initially receive the summonses and once it did, it submitted applications to respondent the Office of Administrative Trials and Hearings ("OATH") to vacate these defaults on July 7, 2020.

Petitioner complains that OATH denied each of these applications and insists that none of the denials for a new hearing contained a notice that petitioner could obtain a stay of the default for good cause shown under the NY City Charter. It also claims that two of the six summonses

[1] The Court must address the elephant in the room – that this proceeding was fully briefed and ready to be decided more than three years ago. Although it was only recently assigned to this part, the undersigned apologizes, on behalf of the court system, for the absurd delay in the resolution of this proceeding.

should be dismissed (the ones issued in February) because DOB failed to mail the summonses to petitioner's mailing address. Petitioner claims that the remaining four should be remanded to OATH for further proceedings.

In opposition, respondents contend that the decision to deny new hearings for each of these summonses were rational. They emphasize that specific requirements must be met before a default can be vacated; they point out that because petitioner's applications were submitted three years after the summonses were issued, petitioner had to set forth exceptional circumstances justifying its failure to appeal. Respondents point out that DOB served each summons by affixing a copy to the subject premises. They argue that for one of the two summonses that petitioner claims were not properly mailed, a representative for petitioner requested an adjournment of the hearing date (which was scheduled for April 4, 2017).

With respect to the two allegedly improperly mailed summonses, respondents acknowledge that the summonses themselves incorrectly state petitioner's mailing address. However, respondents argue that when they were actually mailed, the correct address was included and so any error had no impact on proper notice to petitioner.

In reply, petitioner claims that the instant proceeding is one of statutory interpretation and that the rational basis standard does not apply. It claims that respondents are not entitled to any deference concerning the interpretation of the relevant NY City Charter provision at issue.

Discussion

The instant proceeding only concerns the specific language of the notice provided to petitioner as petitioner withdrew its claims about improper service relating to two of the summonses in reply (NYSCEF Doc. No. 42, n 1).

The relevant City Charter section provides that:

> "Notwithstanding the foregoing provision, before a judgment based upon a default may be so entered the board must have notified the respondent by first class mail in such form as the board may direct: (i) of the default decision and order and the penalty imposed; (ii) that a judgment will be entered in the civil court of the city of New York or any other place provided for the entry of civil judgments within the state of New York; and (iii) that entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of the board within thirty days of the mailing of such notice" (NY City Charter § 1049-a[d][1][h]).

The default determinations at issue here (which are not the final determinations) all provide that petitioner had two options after it failed to appear for a scheduled hearing (*see* NYSCEF Doc. No. 38). Petitioner could (1) admit the violation and pay a reduced fine by a date certain or (2) petitioner could ask for new hearing (this hearing is automatically granted if it is made no more than 60 days after the mailing or hand delivery date of the default decision) (*id*.). The default notices also stated that if petitioner failed to choose either option, it must pay the full amount or the City would get a legal judgment against petitioner (*id*.).

Petitioner's sole complaint is that this notice does not specifically state that petitioner can request a stay of the future judgment. Respondents acknowledge that the specific phrase "stay" is not included but emphasize that a stay of entering a judgment is automatically granted where petitioner either pays the reduced fine or where it requests a new hearing.

The Court finds that there is no basis to grant the petition based on the failure to include this precise language "stay." A plain reading of the notice leaves little doubt about petitioner's options, including the fact that that respondents are not going to get a judgment if petitioner either pays the reduced fine or seeks a new hearing. It is unclear what adding the term "stay" would contribute to this notice and respondents readily admit that a stay of the full judgment automatically amount goes into effect if petitioner utilized either of the two options provided.

More importantly, petitioner wholly failed to articulate what harm it suffered by the failure to include that petitioner could seek a stay of the judgment. That is, petitioner does not explain what action it would have taken had it known that it could seek a stay (a stay which it would have received by either paying the reduced fines or seeking a new hearing). The record shows that petitioner ignored all of these notices and waited until 2020 (three years later) to vacate its defaults.

The Court recognizes that there is a non-binding Supreme Court case upon which petitioner relies (*205 Spencer Realty LLC v City of New York*, 2020 NY Slip Op. 33424[U], 6 [Sup Ct, NY County 2020]). Although the judge in that decision faulted respondents for not including the stay language, the remedy was simply to remand the summonses back to OATH. The decision did not direct OATH to vacate the defaults. And respondents cite to a Supreme Court case that sided with respondents on this issue (*5919 Realty LLC v City of New York*, Index Number 154665/2019 [Sup Ct, NY County 2020]).[2]

In any event, the *205 Spencer Realty* decision is not binding on this Court and the Court fails to see what purpose is served by remanding this proceeding to OATH. The fact is that petitioner sought to vacate the defaults and respondents denied those requests. The instant proceeding does not concern the merits of vacating those defaults. Rather, petitioner seems hyper-focused on specific language in the NY City Charter. But petitioner did not adequately explain how this purported technical defect (the omission of the language about a stay) is a basis to remand the proceedings back to OATH. Petitioner received all of the process it was due and respondents considered petitioner's application on the merits. To grant petitioner's request

[2] Respondents refer to this case as Exhibit 23 to their answer but no Exhibit 23 was uploaded to NYSCEF.

would require this Court to elevate form over substance for no apparent reason. The Court therefore declines to do so.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

6/17/2024
DATE

ARLENE P. BLUTH, J.S.C.

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