

**Matter of Congregation Lev Bais Yaakov v City of  
New York**

2024 NY Slip Op 32129(U)

June 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 535632/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of June 2024

HONORABLE FRANCOIS A. RIVERA

-----X  
In the Matter of the Application of  
CONGREGATION LEV BAIS YAAKOV

**DECISION & ORDER**

Index No.: 535632/2022

Petitioner,

For a Judgment Under Article 78  
of the Civil Practice Law and Rules,

- against -

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

Respondents

-----X  
Recitation in accordance with CPLR 2219 (a) of the papers considered on petition filed on December 7, 2022, under motion sequence number one, by Congregation Lev Bais Yaakov (hereinafter petitioner) for an order pursuant to CPLR Article 78 for an order (1) reviewing, annulling and vacating the denial by the respondent New York City Office of Administrative Trials and Hearings (hereinafter OATH) of petitioner's motions to vacate default judgments of alleged violations issued by the Environmental Control Board (hereinafter ECB) and directing OATH to grant a hearing on the merits of each alleged violation. The motion is opposed.

- Notice of petition
- Petition
- Exhibits A-D

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of cross-motion to dismiss filed on June 5, 2023, under motion sequence number two, by the City of New York, OATH, The City of New York Environmental Control Board, and The New York City Department of Buildings (hereinafter respondents) for an order pursuant to CPLR 3211 (a) (5) and CPLR 217 (1) dismissing the petition on the grounds that the claims raised in the petition are time-barred by the applicable statute of limitations. The motion is opposed.

- Notice of cross-motion
- Affirmation in support
  - Exhibits A-H
- Memorandum of law in opposition
- Petitioner's opposition to the cross-motion
  - Exhibits A-B
- Affirmation in reply

## BACKGROUND

On December 7, 2022, the petitioner commenced the instant special proceeding by filing a notice of petition, verified petition, an accompanying paper with the Kings County Clerk's Office (KCCO). The verified petition alleges forty-four (44) allegations of fact in support of three denominated causes of action. The first cause of action seeks a judgment pursuant to CPLR 7801-7806. The second and third cause of action seeks an order, inter alia, vacating a default judgment entered by respondent New York City Office of Administrative Trials and Hearings (hereinafter OATH) against the petitioner.

The verified petition alleges the following salient facts, among others. Petitioner owns the premises located at 3570 Nostrand Avenue, Brooklyn, New York 11229 (hereinafter the subject premises). On or about August 19, 2019, through October 10, 2020, summonses numbered 35522839L, 35522838J, 35522837H, 35517665Y, 35517664M, 35429332X, 35429331Y, 35429330M, 35429333H, 39008365M, 39008363Z, 39008357M, and 39008349M were issued against the petitioner for alleged

violations observed on the subject premises by the New York City Department of Buildings (hereinafter DOB).

On or about November 7, 2022, petitioner requested to vacate the default judgments and requested the reopening of summons numbered 35522839L, 35522838J, 35522837H, 35517665Y, 35517664M, 35429332X, 35429331Y, 35429330M, 35429333H, 39008365M, 39008363Z, 39008357M, and 39008349M. By letter dated November 23, 2022, OATH denied petitioner's request. The denial was arbitrary and capricious. Petitioner seeks an order: (1) annulling and vacating OATH's denials of petitioner's motion to vacate the default judgement of violations issued by the ECB and DOB, and (2) directing Respondent OATH to grant a hearing on the merits of the violations.

On June 5, 2023, the respondents filed a cross-motion seeking dismissal of the petition pursuant to CPLR 3211 (a) (5) and CPLR 217 (1).

## LAW AND APPLICATION

### *The Petition*

CPLR article 4 sets forth the rules governing special proceedings. CPLR 409 (b) provides in pertinent part that “[t]he court shall make a summary determination upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised” (CPLR 409 [b]). “Pursuant to CPLR 409 (b), in a special proceeding, where there are no triable issues of fact raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it” (*see*

*Matter of Korotun v Laurel Place Homeowner's Assn.*, 6 AD3d 710, 711 [2d Dept 2004], citing *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]).

CPLR 402 governs the pleadings requirements for special proceedings (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C402:1 [Note: online version]). “The petition in a special proceeding is analogous to the complaint in an action” (*id.*). “The procedure for special proceedings contemplates that the petition will be accompanied by affidavits demonstrating the evidentiary grounds for the requested relief” (*id.*, citing CPLR 403 [a]). “The purpose of the affidavits is to enable the matter to be brought before the court for summary disposition, as in the case of motion practice” (*id.*).

Petitioner brings this proceeding pursuant to CPLR Article 78 in mandamus to review the decision of respondent OATH to deny petitioner’s motions to vacate default judgements of violations issued by the ECB and the DOB against petitioner for violations located at 3570 Nostrand Avenue, Brooklyn New York 11229. The petitioner contends that the determination by OATH to deny the petitioner’s motions to vacate the default judgments entered against it was arbitrary, capricious, and utterly irrational as a matter of law.

Here, the petitioner’s papers did not contain an affidavit or provide any sworn testimony supporting any allegation of fact made in the petition. The petitioner cannot meet their burden to show that the respondents’ determination was arbitrary, capricious, and irrational as a matter of law. Under these circumstances, the petition should be

dismissed without the need to address the respondents' cross-motion claiming the petition is untimely.

***Cross-Motion to Dismiss***

The respondents did not address the lack of admissible evidence in support of the petition. Rather, they contended that the petition was untimely. For the sake of completeness, the Court will address this contention.

The respondents in support of their cross-motion to dismiss the petition contend that the claim raised in the petition, i.e., the challenge to the determinations of OATH to deny petitioner's motions to vacate the default decisions concerning summonses numbered 35522839L, 35522838J, 35522837H, 35517665Y, 35517664M, 35429332X, 35429331Y, 35429330M, 35429333H, 39008365M, 39008363Z, 39008357M, and 39008349M is time-barred under the applicable statute of limitations.

The affirmation of respondents' counsel and the documentary evidence annexed to the cross-motion established the following facts. On August 23, 2019, DOB issued to petitioner four (4) summonses 39008349M (49M), 39008357M (57M), 39008363Z (63Z) and 39008365M (65M), for failure to maintain building in code compliant manner, work without a permit, and issued a partial stop work order having observed the entire roof including sheathing completely removed without permits at the subject premises (hereinafter the August 2019 summonses).

On October 7, 2019, DOB issued to petitioner four (4) summonses 35429330M (30M), 35429331Y (31Y), 35429332X (32X), and 35429333H (33H), for work without a

permit, failure to maintain building in code compliant manner, and removal roof without a permit (hereinafter the October 2019 summonses).

On February 28, 2020, DOB issued to petitioner two (2) summonses 35517664M (64M) and 35517665Y (65Y) for work without a permit and for failure to maintain building in code compliant manner (hereinafter the February 2020 summonses).

On October 21, 2020, DOB issued to petitioner three (3) summonses 35522837H (37H), 35522838J (38J), and 35522839L (39L) for failure to maintain building in code compliant manner and work without a permit (hereinafter the October 2020 summonses) (collectively “the 13 summonses”).

The respondents annexed as exhibit B, affidavits of service of the August 2019, October 2019, February 2020, and October 2020 summonses. The petitioner has contended, among other things, that the respondents’ failure to grant petitioners request to vacate the defaults in is egregious and shocks the conscience cases because the summonses were subject to dismissal as a matter of law for failure to state a prima facie case.

There were four scheduled hearing dates for the 13 summonses on October 7, 2019, February 12, 2020, July 1, 2020, and March 3, 2021. The petitioner did not appear at the administrative hearings on each of these summonses and OATH issued default decisions against the petitioner. Thereafter, petitioner filed a request to vacate the default and to schedule new hearing dates after default. On September 23, 2021, OATH denied the motion finding the motion was filed more than a year after the default decision for some summonses and that the petitioner failed to establish “that exceptional

circumstances prevented [the petitioner] from appearing.” In other cases, OATH found that the motion was filed more than 60 days after decision and that the petitioner failed to establish a reasonable excuse for the failure to appear.

Petitioner made a second set of motions to vacate the default on November 7, 2022. On November 23, 2022, OATH denied petitioner’s second request for a hearing or reconsideration of OATH’s final determination.

In its opposition to respondents’ cross-motion, the petitioner asserted for the first time that OATH’s final determinations did not provide “unequivocal” notice of finality and that the petitioner “had no way of knowing” that those determinations were final given that they did not state OATH Rule 6-210 or provide information for further judicial review in those determinations in violation of the petitioner’s right to due process. To determine whether an agency decision is final, the court must consider whether the administrative action is complete and whether the decision aggrieves the relevant party (*see Edmead v McGuire*, 67 NY2d 714, 716 [1986]).

The respondents contended, contrary to the petitioner’s assertion, that there was no ambiguity in the September 23, 2021 final determination. The Court agrees that the OATH’s final determinations stated an unequivocal and adverse position as to petitioner’s motions to vacate and an unambiguous enforcement of the default judgment.

CPLR 217 (1) prescribes the applicable statute of limitations period for Article 78 proceedings, which are brought for the purpose of challenging an agency’s final determination. It requires a petitioner to commence a proceeding against an administrative body or officer “within four months after the determination to be reviewed

becomes final and binding.” CPLR 217 (1); *Matter of Best Payphones Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Here, OATH’s final determination regarding petitioner’s request for a new hearing after default for each of the 13 summonses, became final and binding on September 23, 2021. In accordance with CPLR 217 (1), the four-month statutory period expired four months later, on or about January 23, 2022.

Petitioner attempted to request reconsideration by OATH on or around November 7, 2022. OATH notified petitioner by letter dated November 23, 2022, that the request for reconsideration of OATH’s September 23, 2021 final determination was denied as the initial request was previously denied and there was no basis to reconsider. Once an agency renders its final determination, a petitioner’s further inquiry or request for reconsideration of the same determination will not restart or toll the four-month statute of limitation (*see Matter of DeRaffele v Village of Scarsdale Water Dept.*, 208 AD3d 781, 783 (2d Dept 2022)).

Petitioner filed the instant Article 78 proceeding on December 7, 2022, eleven (11) months after OATH’s final determination was issued on September 23, 2021. The petition was indeed untimely.

## CONCLUSION

The petition by Congregation Lev Bais Yaakov for an order pursuant to CPLR Article 78: (1) reviewing, annulling, and vacating respondent New York City Office of Administrative Trials and Hearings’ denials of petitioner’s motions to vacate default judgments of alleged violations issued by the Environmental Control Board and directing

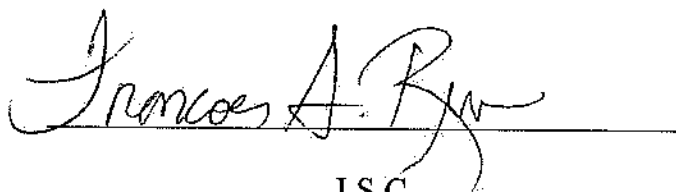
respondent New York City Office of Administrative Trials and Hearings to grant a hearing on the merits of each alleged violation is denied.

The cross-motion by the City of New York, New York City Office of Administrative Trials and Hearings, The City of New York Environmental Control Board, and The New York City Department of Buildings for an order pursuant to CPLR 3211 (a) (5) and CPLR 217 (1) dismissing the instant matter on the grounds that the claims raised in the petition are time-barred by the applicable statute of limitations is granted.

The petition is hereby dismissed.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.  
HON. FRANCOIS A. RIVERA