HIC LLC v City of New York
2024 NY Slip Op 34100(U)
November 20, 2024
Supreme Court, New York County
Docket Number: Index No. 150669/2021
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. W. FRANC PERRY**	**PART**	
	Justice		
HIC LLC, Plaintiff,		**INDEX NO.**	150669/2021
- v -		**MOTION DATE**	01/22/2021
THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK Defendant.		**MOTION SEQ. NO.**	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner moves this Court pursuant to Article 78 of the Civil Practice Law and Rules to vacate the decisions of the Office of Administrative Trials and Hearings ("OATH") regarding summonses issued to the petitioner by the New York City Department of Buildings ("DOB").

A summons was issued to the petitioner on January 22, 2018, for the unauthorized construction of a curb cut for a vehicle on the sidewalk abutting 2298 First Avenue, New York, New York, in violation of Code 101 and Section of Law 28-105.1 of New York City's Administrative Code. The petitioner received an additional seven summonses that were issued after the petitioner did not correct the curb cutout.

Facts

Summons 1, 6 and 7

OATH held hearings on summonses 1, 6 and 7. At each hearing a representative of the petitioner appeared and provided testimony to the hearing officers.

Summons 1[1]

The petitioner timely requested a hearing to challenge the summons it received regarding the curb cutout. The hearing was held on March 8, 2018. HIC LLC's vice president appeared at the OATH hearing and asserted that the curb cut existed prior to the petitioner purchasing the property and that the current tenant did not need the cut out. The OATH hearing officer found such testimony credible but determined that the pre-existence of the curb cut out did not constitute a valid defense to the illegal curb cut out and sustained the summons. *See* NYSCEF Doc. No. 21 at p. 2.

On July 3, 2018, OATH denied the petitioner's request to appeal as the petitioner had not paid the penalty or received a waiver of such payment before requesting the appeal of the hearing officer's decision.[2] The denial provided that the petitioner could submit documentation within thirty-five days if it believed the denial was in error otherwise the rejection would become final at such time. The petitioner did not provide the requisite proof of payment of the total $1,600 penalty imposed or seek and submit a waiver from paying. *See* 48 RCNY § 6-19(a)(1)(iii). After receiving the denial of its appeal request on July 3, 2018, the petitioner did nothing further for over two years with respect to summons 1until it paid the summons and filed a request for reconsideration of the rejection of the petitioner's request to appeal. OATH denied the request for reconsideration on July 23, 2020, and the petitioner subsequently filed this Article 78 petition on January 20, 2021.

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[1] Summons 1 is summons # 35308933K.

[2] The form decision also incorrectly state that the request to appeal was untimely. However, the decision states that if the petitioner believes the rejection is in error it must submit documentation to that effect which the petitioner never did. In addition, the decision correctly states that proof of payment or a waiver was required prior to requesting the appeal.

Summons 6 [3]

A hearing was held on summons 6 on January 31, 2019. An HIC employee testified that he could not locate a Department of Buildings approval for the curb cut out. He also testified that HIC had corrected the curb cut out. The hearing officer sustained the summons finding that HIC had not "credibly show[n] that the Certificate of Correction was accepted". *See* NYSCEF Doc. No. 21 at p. 41.

Summons 7 [4]

An administrative hearing regarding summons 7 occurred on June 20, 2019. An employee from HIC again testified that HIC had removed the cut out from the curb but that it had not yet received a Certificate of Correction from DOB. The hearing officer sustained the summons and found the petitioner failed to provide proof of its defense namely the "permit it received to restore the cut, or the disapproval letter from petitioner of its certificate of correction application." *See Id.* at 42-43.[5]

Summonses 2, 3, 4, 5 & 8[6]

Default judgments were issued on these summonses after the petitioner did not appear at the scheduled hearings.

On summonses 2 and 5, the petitioner received notice of defaults on October 25, 2018 and November 1, 2018 after it did not appear at the hearing dates for such summonses. The notices of default provided that HIC had the option of admitting the violation, paying a substantially reduced fine and "fixing the problems shown on the summons immediately" or

[3] Summons 6 is Summons # 035390304N.
[4] Summons 7 is Summons # 035394389J.
[5] It is worth noting that the hearing had already been adjourned once for HIC to submit further evidence.
[6] Summons 35336705R ("summons 2"), Summons 35338696N ("summons 3"), Summons 35341581K ("summons 4"), Summons 35388875Y ("summons 5"), and Summons 35395569L ("summons 8").

within 60 days of receipt of the notice of default submitting the OATH form to request a new hearing which would be automatically granted. *See* NYSCEF Doc. No. 22. The petitioner took no further action on summonses 2 and 5 until it filed the instant Article 78 petition on January 20, 2021.

On summons 3, HIC did file a motion to vacate the default judgment. However, the petitioner filed the motion to vacate more than sixty days[7] after receiving the notice of default and did not provide a reasonable excuse for its nonappearance. *See* 48 RCNY § 6-21(c) and NYSCEF Doc. No. 24 at p. 3.

Petitioner was granted a new hearing after it moved to vacate the default judgment on summons 8. The petitioner then missed the new hearing and again filed to vacate the new default. OATH denied the request as HIC was granted a new hearing after not appearing and did not "establish exceptional circumstances" that prevented HIC from appearing on its new hearing date. *See. Id.* at p. 12.

Petitioner moved to vacate the default on summons 4 close to two years after the notice of default was mailed. OATH denied such request finding that the petitioner provided no exceptional circumstances that prevented it from appearing at its scheduled hearing. *See Id.* at 6 and 48 RCNY § 6-21(e)(2)(f) (providing that a new hearing requested more than a year after a default may be granted in "exceptional circumstances" and "in order to avoid injustice").

Findings

This case involves an initial summons followed by seven subsequent summonses issued once the petitioner did not correct the curb cut out. The Court disagrees with the respondent that the petitioner's failure to perfect its appeal on summons 1 for two years means it did not exhaust

[7] This OATH deadline was increased to 75 days in June 2022.

its administrative remedies. The respondent's denial of its request for reconsideration of the appeal was a final decision. *See* Matter of City of New York (Grand Lafayette Props. LLC), 6 N.Y.3d 540, 547 (2006) (finding that "final and binding on petitioner" in CPLR 217(1) means when the "petitioner has suffered a concrete injury which is not amenable to further administrative review and corrective action."); *see also Matter of Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 316 (2006).

The Court also finds that this action is not time barred as the statute of limitations were extended due to the executive order which suspended the statute of limitations on all civil matters due to the COVID-19 pandemic until November 3, 2020. *See* Executive Order 202.67; *see also* Cortes v. City of New York, 226 A.D.3d 501 (2024). This Article 78 petition was filed within four months after the suspension was lifted.

The Court further finds that the petitioner has failed to provide any evidence that the agency's decision on summons 1 was arbitrary or capricious, contained an error of law or constituted an abuse of discretion. *See* CPLR § 7803(3); *see also Heintz v. Brown*, 80 N.Y.2d 998, 1001 (1992) (holding that "courts are limited to an assessment of whether a rational basis exists for the administrative determination" and "the reviewing court may not substitute its own judgment of the evidence for that of the administrative agency").

OATH considered the petitioner's defense that it did not construct the illegal curb cut out; however, the hearing officer still held the petitioner liable as the owner of the property containing the illegal curb cut out. The petitioner has provided no clear evidence to this Court to determine that the agency's decision holding the current owner liable for the unlawful construction of a prior owner was arbitrary or capricious or constituted an abuse of discretion or an error of law. The petitioner provides no legal authority for its proposition that the respondent cannot hold the petitioner liable for the illegal construction of a prior owner. There is no record of any permit being issued by the DOB for the curb cut out.[8]

The denial of requests for new hearings after default judgments are final determinations for which judicial review can be sought pursuant to Article 78 of the CPLR. *See* 48 RCNY § 6-21(j); CPLR § 7801(1). The petitioner has failed to provide a reason for why any of the defaults were arbitrary or capricious, were an error of law or constituted an abuse of discretion. Instead, the defaults were issued after the petitioner received notice and failed to appear at the scheduled hearings and did not timely request new hearings which would have been automatically granted. *See* 48 RCNY § 6-21(b). On some of the defaults, the petitioner never bothered to even request a new hearing. On summons 8, the petitioner did request a new hearing, received such and missed the new hearing as well without providing a reason for such nonappearance.

In the absence of any evidence that OATH's decisions were arbitrary or capricious, an abuse of discretion or an error of law it is:

ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to petitioner.

This constitutes the decision and order of this Court.

11/20/2024
DATE

W. FRANC PERRY, J.S.C.

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

[8] The petitioner now provides an approved drawing from 1990 for a construction job that contains the curb cut out. *See* NYSCEF Doc. No. 6 at p. 4. However, there is no evidence that the DOB ever issued a permit for the curb cut out. In addition, the petitioner actually provided sworn testimony that there is no record of such a permit. *See* NYSCEF Doc. No. 21 at 42.