Smoke Scene Midtown Inc. v New York City Off. of Admin. Trials & Hearings
2025 NY Slip Op 34194(U)
November 3, 2025
Supreme Court, New York County
Docket Number: Index No. 158784/2024
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** ***Justice*** **PART** **41M**

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SMOKE SCENE MIDTOWN INC.,

Petitioner,

- v -

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, ASIM REHMAN AS COMMISSIONER AND CHIEF JUDGE OF CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, DEPARTMENT OF CONSUMER AND WORKER PROTECTION, VILDA VERA MAYUGA AS COMMISSIONER OF CITY OF NEW YORK, DEPARTMENT OF CONSUMER AFFAIRS, CITY OF NEW YORK

Respondent.

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INDEX NO. 158784/2024

MOTION DATE 09/23/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 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 (BODY OR OFFICER).

Upon the foregoing documents, it is

Petitioner, Smoke Scene Midtown Inc. ("Smoke Scene"), commenced the underlying Article 78 special proceeding against the respondents, New York City Office of Administrative Trials and Hearings ("OATH"), Asim Rehman as Commissioner and Chief Judge of City of New York Office of Administrative Trials and Hearings, Department of Consumer and Worker Protection ("DCWP"), Vilda Vera Mayuga as Commissioner of City of New York, Department of Consumer Affairs, and the City of New York, seeking an order: (1) reversing the May 24, 2024, determination by OATH denying the request to vacate a default decision rendered under Summons No. 23T00966; (2) directing OATH to vacate the default decision and remanding the

matter for a new hearing on the merits; and (3) enjoining DCWP and OATH from enforcing the penalty proscribed in the default decision, in the amount of $34,400.00.

Respondents oppose the petition, asserting that the petition should be dismissed as the application is barred by the four-month statute of limitations and OATH's determination was reasonable, rational, and supported by the administrative record. For the reasons set forth below, the petitioner's application is denied in its entirety and the verified petition is dismissed.

Facts:

The relevant facts from the administrative record are as follows. On February 23, 2023, Smoke Scene was issued Summons No. 23T00966 (the "Summons") for the unlicensed sale of tobacco and charged with violating NYC Administrative Code § 20-202(a)(1) (NYSCEF Doc. No. 3). The Summons included a remote hearing date scheduled for April 7, 2023, in front of OATH (*Id.*).

However, per petitioner's request(s), this initial hearing date of April 7th was then adjourned three times: (1) prior to the April 7th hearing date, petitioner requested the hearing date be rescheduled, and OATH rescheduled the hearing for June 2, 2023; (2) on June 2, 2023, petitioner appeared and requested an adjournment to obtain counsel, the request was granted and the hearing was adjourned to August 11, 2023; and (3) on August 11, 2023, petitioner's supposed authorized representative appeared and requested an adjournment to gather evidence, the request was granted and the hearing was scheduled for September 8, 2023 (NYSCEF Doc. No. 21-26). Confirmation and notice of the adjournment orders and/or new dates were all mailed to petitioner at the address provided for Smoke Scene (NYSCEF Doc. No. 22; 24; 26). Petitioner failed to appear at the hearing on September 8, 2023, and on November 1, 2023, OATH issued a default decision finding Smoke Scene in violation and imposing a penalty in the amount of $34,400.00

(NYSCEF Doc. No. 4). The same day, the default decision was sent to Smoke Scene at its' provided address (NYSCEF Doc. No. 28).

Thereafter, on or around March 29, 2024, petitioner's authorized representative, attorney "Kenneth Frenkel P.C.", submitted a request and/or motion to vacate on petitioner's behalf to vacate the default decision and schedule a new hearing on the Summons (NYSCEF Doc. No. 5). On the form, the "[r]eason for which a new hearing should be granted" was listed as "First Request- More than 75 days", and attached the affidavit of Smoke Scene's owner stating, among other things, that the authorized representative did not appear at the hearing, the petitioner was unaware of the non-appearance, and the representative said they would file a request to reopen but when the owner called in January, the representative advised the request had not been made (NYSCEF Doc. No. 5). On or around April 25, 2024, OATH issued a determination on the motion to vacate, denying the request on the grounds that it was more than 75 days after the default decision and that petitioner had not established a reasonable excuse for the failure to appear (NYSCEF Doc. No. 31).

Then, on May 20, 2024, Smoke Scene's owner submitted a second request to vacate the default decision and schedule a new hearing on the Summons. On the form, the "[r]eason for which a new hearing should be granted" was again listed as "First Request- More than 75 days" and included a similar explanation (NYSCEF Doc. No. 32). This form did not include any mention of the petitioner's attorney. On May 24, 2024, OATH responded to the request, stating: "[w]e have reviewed OATH's records and found that a hearing officer in our Special Motion Part already denied your request for a new hearing on 04/25/2024", advising that "[a] denial of a request for a new hearing after default is the Tribunal's final determination and is not subject to review or appeal at the Tribunal. Judicial review of the denial maybe sought pursuant to Article

78 of the New York Civil Practice Law and Rules", and concluding with the "request for reconsideration of OATH's final determination is denied" (NYSCEF Doc. No. 33). This correspondence was mailed to petitioner the same day and sent to the provided Smoke Scene address (NYSCEF Doc. No. 34). Thereafter, on or around September 20, 2024, petitioner commenced this special proceeding to challenge this determination (NYSCEF Doc. No. 1).

Discussion:

Petitioner now seeks to challenge the decision rendered by OATH on May 24th, denying the petitioner's motion to vacate the default decision and request for a new hearing under the Summons. Respondents oppose the application, asserting the proceeding is time-barred by the governing limitations period. Upon a review of the record, the petitioner's application must be denied as it was not made within the four-month period after OATH issued a final determination.

As set forth under CPLR § 217(1), a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner. Under 48 RCNY § 6-21(j), "[a] denial of a request for a new hearing after default is the Tribunal's final determination and is not subject to review or appeal at the Tribunal." Therefore, when assessing the statute of limitations in a proceeding to challenge a denial of a motion to vacate a default and/or request for a new hearing, the determination becomes final when OATH issues a decision on the request.

Considering, the final determination for purposes of this action was made on April 25, 2024, when OATH first denied the petitioner's motion to vacate the default and request for a new hearing on the Summons. As this was the agency's final determination in the matter, the four-month statute of limitations period to seek judicial review of this denial began to run on this

date. Therefore, the petitioner's application, which was filed September 20, 2024, was made after the applicable four-month limitations period.

In reply, petitioner's attorney contends that this action is timely as the limitations period should be computed from the date of May 25th when petitioner's second or reconsideration request was denied and counsel first received notice of the denial. More specifically, petitioner's attorney contends that despite being the party that filed the request to vacate on March 29th, the April 25th denial letter of this request was mailed only to the Smoke Scene address. Counsel alleges that it was only after the petitioner provided a copy of the May 24th letter that counsel received notice of any denial of the application. Therefore, counsel asserts that as he was not sent or did not receive notice of the April 25th denial, the statute of limitations should be measured from May 24th when counsel was notified of the denial.

In article 78 proceedings, "[a] determination generally becomes binding when the aggrieved party is notified" (*Musey v 425 E. 86 Apartments Corp.*, 154 AD3d 401, 404 [1st Dept 2017], citing *Matter of Vil. of Westbury v Dept. of Transp.*, 75 NY2d 62, 72 [1989]). In the absence of unambiguous statutory language, "any general requirement that notice must be served upon the party . . . must be read . . . to require, at least, that notice be served upon the attorney the party has chosen to represent him" (*Matter of Odunbaku v Odunbaku*, 28 NY3d 223, 228 [2016], quoting *Bianca v Frank*, 43 NY2d 168, 173 [1977]). Where counsel has appeared, a statute of limitations or time requirement does not begin to run unless counsel is served with the determination or the order or judgment sought to be reviewed (*Id.*).

However, any contention that the April 25th decision was sent only to Smoke Scene and/or was not sent to petitioner's attorney is belied by the fact that petitioner's attorney is CC'd on the decision itself and the accompanying affidavit of mailing demonstrates that the decision

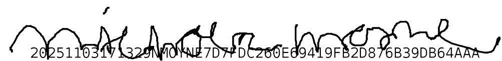
was mailed to “Kenneth Frenkel, P.C.” at the address provided on the submitted form (NYSCEF Doc. No. 29; 31 at 1, 3). Therefore, contrary to any assertion otherwise, the April 25th determination was final and binding, and the limitations period should not be measured from the date of the May 24th letter.

Further, the May 24th letter denying the petitioner’s additional request and/or for reconsideration did not restart the four-month limitations period to challenge OATH’s determination. This response did not include “a fresh look into the merits” (*Park Off Broadway, LLC v New York City Water Bd.*, 224 AD3d 576, 576 [1st Dept 2024] [internal citations omitted]), and the “letter merely referenced the original denial and rendered no new determination to be challenged in an article 78 proceeding” (*Taub v New York City Water Bd.*, 236 AD3d 479 [1st Dept 2025]) [internal quotations omitted]. Therefore, the petition is time-barred, and the court need not address whether the underlying determination was arbitrary and capricious.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petitioner’s application is DENIED in its entirety, and the verified petition is dismissed.

This constitutes the decision and order of the court.



11/3/2025		NICHOLAS W. MOYNE, J.S.C.	
DATE			

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