Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

In the Matter of the Application of
CHOUDARY M. AKRAM,
Petitioner,

-against-

JULIO RODRIGUEZ, et al.,
Respondents.

Index
No. 25951 2011

Motion
Date February 7, 2012

Motion
Cal. No. 1

Motion
Seq. No. 1

The following papers numbered 1 to 11 read on this Petition for a judgment, pursuant to Article 78 of the Civil Practice Law and Rules, inter alia, vacating the final administrative determination of the Environmental Control Board (ECB), dated July 21, 2011, which affirmed the decision of Administrative Law Judge Joan P. Beck-Wall (ALJ Beck-Wall), dated December 10, 2010.

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Notice of Petition - Petition - Exhibits.....	1-4
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Upon the foregoing papers is it ordered that the proceeding is determined as follows:

Petitioner is the owner of the building located at 45-16 National Street, in the County of Queens, City and State of New York. On October 18, 2010, Issuing Officer Castellano of the Department of Buildings (DOB) issued two Notices of Violation (NOVs) to petitioner. The first NOV under No. 34876328L (28L) cited a violation under NYC Admin. Code § 28-105.1, for "work without a permit." The issuing officer noted that there were: (1) temporary lally supports installed in the cellar; (2) metal and glass enclosures, partitions, doors, and hardware installed on the first floor to create two additional offices; and (3) full-height

partitions installed on the third floor to create two additional rooms. The second NOV under No. 34876329N (29N) cited violations under Admin. Code §§ 28-210.1 and 28-202.1, for "residence altered for occupancy as a dwelling from 1 or 2 families to greater than 4 families." The officer noted that the first floor was illegally subdivided and that the third floor was altered to form "additional S.R.O.'s" (Single Room Occupancy). Both NOVs provided no cure date (as they were "Class 1" violations) and ordered petitioner to appear for a hearing on December 7, 2010. It appears that prior to the hearing date, petitioner submitted a certificate of correction regarding NOV No. 29N; however, it was disapproved on November 2, 2010 on the basis that he did not have approved plans or permits.[1]

Petitioner and his witness appeared at the administrative hearing on December 7, 2010, along with DOB's counsel and one of its witnesses. On December 10, 2010, ALJ Beck-Wall determined that petitioner was in violation of Admin. Code § 28-105.1 (NOV No. 28L) and imposed a $1,600.00 fine, and Admin. Code §§ 28-210.1 and 28-202.1 (NOV No. 29N) and imposed a $2,400.00 and $45,000.00 fine, respectively. ALJ Beck-Wall noted that petitioner testified that he did not perform the alterations himself, but that it was the work of his tenants, and that he did perform work to the cellar because he was replacing the joists. In determining that petitioner was in violation under both NOVs, ALJ Beck-Wall stated that:

> "For NOV #28L, [petitioner] does not deny that he (or his agents) performed the cited work. [Petitioner] failed to secure the required permits prior to the performance of the cited work (multiple cited conditions). Therefore, I find [petitioner] in violation and impose the ECB Board approved penalty. For NOV #29N, [petitioner] does not deny the cited residence was altered from a legal two family to four families. Therefore, I find [petitioner] in violation of 28-210.1. I impose the ECB Board approved penalty for maintaining the existence of the cited illegal alterations. I further find [petitioner] in violation of 28-202.1 and impose the $1,000 per day penalty for the maximum amount (45 days) permitted by law. [Petitioner] failed to submit any documentary evidence prove [sic] that all the violating conditions were removed to toll the running of the per day penalty. This NOV was served on 10/18/10. The $1,000 per day penalty started running on that date."

On December 22, 2010, petitioner, by his attorneys, filed a Request for Appeal Extensions and Hearing Recordings and Financial Hardship Application, which was granted by the ECB on January 19, 2011. The ECB noted that its appeals unit must receive petitioner's appeal by February 14, 2011. In petitioner's Notice of Appeal, petitioner

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1. It appears from testimony elicited at the administrative hearing that petitioner did not also initially submit a Certificate of Correction with respect to NOV No. 28L.

requested that AJJ Beck-Wall's decision be overturned for the following three reasons: (1) ALJ Beck-Wall improperly denied petitioner's request for an adjournment; (2) the ECB lacked personal jurisdiction over petitioner for NOV No. 29N due to improper service; and (3) the DOB failed to prove that petitioner altered the premises to occupy four or more families as required under law. By letter dated March 25, 2011, petitioner himself wrote to the ECB raising additional bases of appeal to be considered along with his counsel's submissions. The arguments raised by petitioner in this letter dealt generally with the issue of failure by ALJ Beck-Wall to consider certain evidence at the hearing.

By decision dated July 21, 2011, the ECB issued its appeal decision and order, denying petitioner's exceptions and finding petitioner in violation of Admin. Codes §§§ 28-105.1, 28-210.1, and 28-202.1, but reducing the penalty to $47,400. The ECB determined the following, in relevant part:

1. ALJ Beck-Wall did not improperly deny petitioner's request for an adjournment, as petitioner's belief that an adjournment would allow him to properly file certificates for approval and mitigate his damages was misguided. ALJ Beck-Wall properly explained that an adjournment would be "fruitless" as the violations (to which petitioner conceded) were Class 1 violations, which afford no cure dates which would relieve petitioner of penalties, and that no mitigation was available for NOV No. 29N since "as of the date of the hearing, more than 45 days had long passed."[2] In any event, whether to grant or deny an adjournment was within the sound discretion of the ALJ.
2. The argument that petitioner was not served properly was not considered, as it was raised for the first time on appeal.
3. Petitioner acknowledged at the hearing that all the work which was the subject of the NOVs issued to him was, in fact, done without proper permits issued from the DOB. Petitioner admitted that the first and third floor tenants restored the respective areas to their prior legal condition, conceding that same was initially done without permits issued from the DOB. Petitioner did not present proof that he obtained certificates of correction which were approved by the DOB. Petitioner's misinterpretation of the remedies set forth in the NOVs were irrelevant.
4. The argument that the DOB failed to prove that petitioner altered the premises was not considered, as it was raised for the first time on appeal. In any event, it was "the arrangement of the premises for additional dwelling that is the basis for the violation, and not its actual habitation."
5. Petitioner's supplement to his attorney's appeal was not considered, as it did not conform to the rules for filing an appeal.

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2. The maximum penalty for the violation is 45 days.

Petitioner then timely commenced the within proceeding under Article 78 seeking a judgment vacating both the December 10, 2010 decision and order and the July 21, 2011 appeal decision and order. Petitioner advances the following arguments in support of his petition: (1) the subject property is a "mixed use property," and the Admin. Codes cited in the NOVs do not apply to mixed use buildings; (2) the violations should not have been issued to petitioner since it was his tenants who altered the premises; (3) ALJ Beck-Wall did not pay attention to the testimony that established that the violations were removed and that the Certificates of Correction for both violations were submitted to the DOB for approval on or about November 11, 2010; (4) ALJ Beck-Wall did not grant petitioner an adjournment as requested; (5) the ECB inaccurately stated that there was no proof that petitioner filed proof of correction which was eventually approved; (6) the ECB could have discovered from public records that the DOB approved the Certificates of Correction; (7) the ECB should have considered petitioner's supplement to his appeal; (8) the ECB incorrectly determined that petitioner required permits to restore the premises to its prior legal condition; and finally (9) the ECB incorrectly held that an adjournment of the hearing would not have made a difference.

Respondents have answered the petition and have advanced three defenses: (1) most of the aforementioned arguments were not made before the ECB and, as such are not properly before this court and should be dismissed; (2) if this court were to reach those arguments not preserved on appeal, the matter should be transferred to the Appellate Division for a substantial evidence review (CPLR 7803 [4]); and (3) the ECB's final determination was based upon substantial evidence, was a proper exercise of its discretion, was reasonable and rational, and should be upheld.

"Judicial review of administrative determinations is confined to the 'facts and record adduced before the agency' " (*Matter of Yarbough v Franco*, 95 NY2d 342 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 [1982]; *see Acevedo v New York State Div. of Housing and Community Renewal*, 67 AD3d 785 [2009]). As such, to the extent that petitioner advances arguments relating to the property being a "mixed use building," the violations being issued to petitioner despite the fact that his tenants performed the alterations, the Board having to search public records to determine that the DOB approved petitioner's Certificates of Correction, or the Board incorrectly stating that petitioner was required to obtain a permit prior to restoring the premises, these contentions will not be considered herein as they are raised for the first time in this proceeding (*see Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]; *Matter of Acevedo*, 67 AD3d at 786; *Matter of 374 E. Parkway Conmar Owners Corp. v New York State Div. of Hous. & Community Renewal*, 300 AD2d 670 [2002]). Further, the arguments regarding improper service of the NOVs and respondent's failure to prove conversion of the premises, raised in

petitioner's counsel's appeal, as well as the arguments raised in petitioner's supplement to his counsel's appeal regarding ALJ Beck-Wall's failure to consider certain documents and testimony will also not be considered as they were either improperly raised for the first time or improperly submitted to the Board. The fact that petitioner submitted proof that the Board received the supplement to petitioner's appeal on April 1, 2011 – along with proof that the DOB approved petitioner's Certificates of Correction – is irrelevant, as the Appeals Unit must have received the appeal by February 14, 2011 (per the Board's January 19, 2011 approval for an extension of time to file an appeal, discussed above).

Since the only remaining issue properly before the court is the issue of whether ALJ Beck-Wall improperly denied petitioner an adjournment, and whether the Board incorrectly agreed that an adjournment would not have made a difference, a substantial evidence hearing is not required per CPLR 7803 (4) and 7804 (g). As to the issue of the adjournment, it is well-settled that judicial review of an administrative determination is limited to whether the agency's determination was arbitrary or capricious, was an abuse of discretion, or lacks a rational basis in the law or the record (*see* CPLR 7803 [3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222 [1974]; *Matter of Colton*, 21 NY2d 322 [1967]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and without regard to the facts" (*Matter of Pell,* 34 NY2d at 231). "[A]n agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based (*see Kogan v Popolizio*, 141 AD2d 339 [1988]). Here, the Board correctly determined that ALJ Beck-Wall properly exercised her discretion in denying petitioner's request for an adjournment, as the maximum penalties had already accrued by the time the hearing was held and, as such, an adjournment would not have made a difference.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed.

Dated: March 5, 2012

J.S.C.