Matter of Ki Hyung Chung v New York City Envtl. Control Bd.
2012 NY Slip Op 31288(U)
May 3, 2012
Supreme Court, New York County
Docket Number: 109347/11
Judge: Peter H. Moulton

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON Justice

PART 408

Index Number : 109347/2011
CHUNG, KI HYUNG
VS.
NYC ENVIRONMENTAL CONTROL BOARD
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion~~ is Petition and Cross Motions are decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAY 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

COUNTY CLERK'S OFFICE
SUPREME COURT - CIVIL

Dated: 5/13/12

HON. PETER H. MOULTON, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40 B

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In the Matter of the Application of
KI HYUNG CHUNG,

Petitioner,

Index No. 109347/11

- against -

NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD ,

Respondent.

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PETER H. MOULTON, J.S.C:

Petitioner moves to vacate a default judgment entered against her in the amount of $24,000 based on her failure to appear at an Environmental Control Board hearing on May 4, 2010. The hearing date was contained in a Notice of Violation and Hearing (the "Notice").[1] Petitioner's counsel states that petitioner never received the Notice, and points out that the city listed in the Notice is "Flushing" when in fact it is undisputed that the correct city is "Fresh Meadows." Petitioner also maintains that service of the Notice was not effectuated pursuant to the New York City Charter § 1049-a because the Notice was "Posted to Mailbox" which does not satisfy the requirement under that provision that it be "posted in a conspicuous place upon the premises." Although the Notice also provides that it was posted "after a reasonable attempt to effectuate service" those reasonable efforts are not specified. Counsel further states that petitioner never received a response to her request to vacate her default, after she filed a form Request for a New

[1]The Notice was "affirmed under penalty of perjury" by the issuing officer. Although not specified in any of the papers, the affirmation was apparently made pursuant to ECL §71-0205.

Hearing After a Failure to Appear (Vacating a Default) (the "Request for New Hearing").[2] Further, counsel states that he did not receive a response to two letters which he sent to respondent after he was retained in February 2011, to inquire about the status of petitioner's application.

Respondent cross moves to dismiss this proceeding as time barred by the four month statute of limitations under CPLR § 217(1). Respondent claims that petitioner was notified of the agency's denial of her request to open the default, by notice dated September 10, 2010. However, the affidavit of service of the mailing is sworn to over one year later, on November 4, 2011. The affidavit, which is made by FEDCAP Rehabilitation Services, Inc., as agents for respondent, does not explain how the two affiants knew that they had in fact made such a mailing. Apparently concluding that there was some problem with the service of the agency decision, respondent "made a clerical error and resent notice of the denial on or about May 9, 2011 to petitioner and his counsel" (Affirm In Support of Cross Motion ¶22).

Respondent also cross moves to dismiss the proceeding on the basis that petitioner's claim of improper service of the Notice was not preserved for review, citing cases that hold that arguments which are not raised at the agency hearing, may not be raised later in an Article 78 proceeding. Respondent's counsel notes that the agency's denial of the application to vacate the default was made because "Your reason for not appearing is not listed in ECB's rule." Therefore, counsel maintains that the service issue raised here cannot be considered because it was not raised before the agency,

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[2]Counsel submits the affidavit of petitioner in reply. To the extent that petitioner's affidavit denies receipt of the agency decision allegedly mailed May 9, 2011, the reply was the first opportunity for petitioner to respond. Although the affidavit should have been submitted with the moving papers (the petition was only verified by counsel) to the extent that petitioner denied receipt of the Notice, there is no dispute that petitioner filled out the Request for New Hearing, and swore to the information contained therein.

on the form Request for a New Hearing.

Discussion

The four month statute of limitations to challenge an agency decision runs from notice of a final determination (*see Matter of Gonzalez*, 47 NY2d 922 [1979]). Where a party is entitled to receive written notice, the statutory period of limitations does not run until notice is received in that form (*see 90-92 Wadsworth Ave. Tenants Assoc. v HPD*, 227 AD2d 331 [1st Dept 1997] [HPD complied with the notices mandated in connection with an Article 8A rehabilitation loan and therefore, the proceeding was barred by the four month statute of limitations]). The burden rests on the agency to establish that the requisite notice was given (*see Bludson v Popolizio*, 166 AD2d 346 [1st Dept 1990]).

Respondent has failed to met its burden to demonstrate that this proceeding is barred by the statute of limitations. Respondent bases its argument upon the joint affidavit of service of two employees of respondents' agent, sworn to over a year after the agency decision was allegedly mailed. The employees swear that "on September 10, 2010 we printed out a notice denying the request for a new hearing after a failure to appear for violation number 34839614J to the respondent from ECB's Automated Information Management System ("AIMS"), and on September 13, 2010, the next business day, we mailed said notice." No basis is asserted for the employees' knowledge of mailing. Further, it would be unusual for both employees to jointly print out, and mail, a notice. If the employees had different functions, the affidavit does not explain these functions, but merely states "we printed out" and "we mailed" the notice.[3] Moreover, if there was no issue with the

[3]Where the record indicates the existence of an established and regularly followed office mailing procedure, a rebuttable presumption of mailing arises (Matter of Gonzalez, 47 NY2d at 923).

mailing, it is unclear why respondent's counsel would refer to "a clerical mistake." Although respondent's counsel claims that, based on a handwritten notation in the file, the denial was also mailed to petitioner and her counsel on May 9, 2011, no affidavit of service is attached and petitioner and her counsel deny receiving that mailing.

Respondent has also failed to establish that petitioner's claim of improper service of the Notice was not preserved for review. Respondent attaches the Request for New Hearing, filled out by petitioner (Exhibit E to the Affirm In Support of Cross Motion), which states that she first learned of ticket "by the default decision and order from Environmental Control Board (attached document)."[4] The court cannot find that petitioner's claim of improper service was not presented to the agency. Although petitioner appears to have had difficulty filling out the form, the Request for a New Hearing indicates that she did not receive notice of the hearing. There is no requirement that petitioner specify the particular defects in service raised by her counsel.

It is hereby

ORDERED that the cross motion to dismiss is denied; and it is further

ORDERED that pursuant to CPLR 7804 (f), respondent is directed to answer the petition within 20 days after this court holds a settlement conference with clients and counsel present; and it is further

ORDERED that the parties are directed to email the court at afield@courts.state.ny.us for

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[4]No document is attached to Exhibit E. In her reply, petitioner claims to have only received two notices from respondent: the Notice of Collection, indicating the date mailed as 6/24/10, and the letter from respondent, dated August 11, 2010, acknowledging receipt of petitioner's Request for New Hearing, dated August 5, 2010, but stating that the form could not be processed because the "forms were not notarized." Respondent concedes that the form was then properly notarized, processed and denied.

dates for the settlement conference.

This constitutes the Decision and Order of the Court.

Dated: May 3, 2012

ENTER:

J.S.C.