Matter of Lucas v New York City Dept. of Bldgs.
2013 NY Slip Op 33224(U)
December 16, 2013
Supreme Court, New York County
Docket Number: 103708/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
LYDIA A. LUCAS,
Petitioner,

INDEX NO. 103708/12

-against-

MOTION SEQ. NO. 001

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

NEW YORK CITY DEPARTMENT OF BUILDINGS and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
Respondents.

The following papers, numbered 1 to 5 were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the Environmental Control Board (ECB).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4, 5

Cross-Motion: ☐ Yes ☒ No

In this Article 78 proceeding, Lydia A. Lucas (petitioner) seeks a judgment discharging the notice of violation (NOV) and hearing, violation number 34789116Y (violation at issue), issued by the Department of Buildings (DOB) for the alleged charge that on May 28, 2009 at 400 East 119th Street, New York, New York (subject premises), demolition work was performed without a permit offending section 28-105.1 of the New York City Construction Code. Petitioner also seeks an order vacating the determination of the New York City Environmental Control Board (ECB) as to the violation at issue. The respondents' are in opposition to the herein petition and maintain that the ECB, in a determination made on June 21, 2012, properly denied

petitioner's request to vacate a default order levied against her with regards to the violation at issue because her request to vacate the default was not received within 45 days from the hearing date of July 23, 2009 nor was it made within one year of learning of the violation's existence. ECB maintains that its determination to deny petitioner's request to vacate the default judgment must be upheld as it was reasonable, rational and consistent with the relevant laws.

BACKGROUND

On or about May 28, 2009, the New York City Department of Buildings (DOB) allegedly issued two NOVs, numbered 34789115M and 34789116Y, simultaneously against petitioner at the subject premises, which cited violations for failure to maintain the subject premises in a code compliant manner and because demolition work was performed without a permit, respectively. A hearing date for both violations was set for July 23, 2009 at 8:30 a.m.

Subsequently, on July, 23, 2009, petitioner alleges that she appeared to contest both violations, but that the hearing for NOV 34789115M was adjourned to December 3, 2009 because of the nonappearance of DOB Inspector Christopher Wolf (Inspector Wolf). Petitioner maintains that that she never received an adjourn date for the violation at issue. On December 3, 2009, petitioner appeared for a hearing which occurred before Administrative Law Judge Sarah Sprung (ALJ Sprung), and she was subsequently fined $1,000.00, which she paid. Moreover, at the hearing petitioner explained to ALJ Sprung that demolition work was not being performed at the subject premises.

In a letter dated May 30, 2012 from a collection agency, petitioner learned that the ECB defaulted her on July 23, 2009 with regards to the NOV at issue, and assessed the maximum fine of $8,000.00. Petitioner moved to vacate the default in a form letter application dated June 18, 2012. By letter dated June 21, 2012, the ECB denied the application to vacate the default and directed that petitioner pay the $8,000.00 fine immediately. The herein Article 78 petition

ensued.

STANDARD

The standard of review in this Article 78 proceeding is whether the ECB's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

"Section 1049-a of the New York City Charter, the enabling legislation which underlies 48 RCNY 3-82 (Rule 3-82), governing procedures for vacating defaults before ECB, requires that [NOV] of matters overseen by the ECB be 'served in the same matter as is proscribed for service of process by [CPLR article 3] or [Business Corporation Law article 3]' (NY City Charter § 1049-a [d][2][a]) (*Matter of Wilner v Beddoe*, 102 AD3d 582, 583 [1st Dept 2013]). There are four enumerated exceptions to this service provision, two of which relate to service of NOVs of City Charter or Administrative Code provisions enforced by various departments, including as

applicable here, the DOB (*id.*, *see also* NY City Charter § 1049-a[d][2][a][i]). "Such NOVs may be served by delivery to "a person employed by the respondent on or in connection with the premises where the violation occurred" (NY City Charter § 1049-a[d][2][a][i]), or by "affixing such notice in a conspicuous place to the premises where the violation occurred" (NY City Charter § 1049-a[d][2][a][ii]), coupled with the mailing of a copy of the NOV "to the respondent at the address of such premises" (NY City Charter § 1049-a[d][2][b]). Even with respect to these two exceptions, however, such substituted service may not be effected unless "a reasonable attempt has been made to deliver such notice . . . as provided for by [CPLR article 3] or [Business Corporation Law article 3]" (NY City Charter 1049-a[d][2][b]).

DISCUSSION

The Court is concerned that even though petitioner appeared at the ECB office in regards to NOV 34789115M, she was defaulted on the NOV at issue when both NOV's were scheduled for a hearing on the same date, time and location. Moreover, the hearing regarding NOV 34789115M was adjourned to December 3, 2009 because Inspector Wolf failed to appear, at which time petitioner alleges she explained to the ALJ that no demolition work was being performed at the subject premises and paid a fine of $1,000, which she believed to be a full resolution of all matters. The ECB offers no explanation as to why the hearing was adjourned on NOV 34789115M and not on the violation at issue, given the fact that Inspector Wolf issued both violations at the same time and presumably his appearance at a hearing would be necessary for both violations. Moreover, in its letter of June 21, 2012 in which ECB denied petitioner's request for a new hearing, the ECB stated the grounds for denial were "you did not include information or documents you were asked to provide, or the documents you provided did not prove your claim" (Notice of Petition, exhibit I), neither of which is argued by the respondents in connection with the herein application.

Furthermore, the record does not indicate what efforts Inspector Wolf made to

personally serve petitioner or someone of suitable age and discretion pursuant to CPLR 308 prior to posting the notice on the fence, and the affidavit of service only indicates that alternative service was utilized "after not locating respondent" (Verified Answer, exhibit A). "The failure to make any effort at personal service runs afoul of the New York City Charter's directive that a 'reasonable attempt' at personal service be made prior to resort to alternative means of service" (*Matter of Wilner v Beddoe*, 102 AD3d at 583, citing *Matter of Oparaji v City of New York*, 2011 NY Slip Op 33265[U] [Sup Ct, Queens County 2011]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is granted; and it is further,

ORDERED that the matter of the NOV at issue is remanded to the ECB for a new hearing; and it is further,

ORDERED that petitioner shall serve a copy of this order, with Notice of Entry, upon the respondents and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/16/13

Enter:

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**