

<b>Matter of Porto Resources LLC v New York City Fire Dept.</b>
2013 NY Slip Op 33267(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 102126/12
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  
PORTO RESOURCES LLC, JOSEPH F. PORTO,  
FIDLEITY TRUST REALTY INC. d/b/a  
EDEN HOUSE,

INDEX NO. 102126/12

MOTION SEQ. NO. 001

Petitioners,

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

-against-

NEW YORK CITY FIRE DEPARTMENT;  
SALVATORE CASSANO as COMMISSIONER  
OF THE NEW YORK CITY FIRE DEPARTMENT,  
NEW YORK CITY DEPARTMENT OF BUILDINGS;  
MARTIN REBOHZ as DEPUTY BOROUGH  
COMMISSIONER NEW YORK CITY DEPARTMENT  
OF BUILDINGS, and the NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD,

Respondents.

**FILED**  
DEC 20 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers were read on this motion by petitioners for a judgment pursuant to Article 78.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Before the Court in this Article 78 proceeding is a mandamus challenging the June 30, 2011 and July 1, 2011 administrative enforcement action by the Department of Buildings (DOB) in response to the illegal use of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> floors of the property known as 560 West 173<sup>rd</sup> Street, New York, NY (subject premises) as a transient hostel/hotel alleging that respondents have violated and are violating and are about to further violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment and the Constitution of the State of New York in that respondents have deprived petitioners of the beneficial use of the premises

in which petitioner Porto Resources, LLC is the lawful owner, and otherwise preventing petitioners from conducting its lawful business at the subject premises. Petitioners challenge the actions of the respondents restricting and/or otherwise prohibiting use of the subject premise pursuant to CPLR 7803(2) and (3) and have commenced the herein proceeding pursuant to CPLR 7804.

Also before the Court is a cross-motion by respondents to dismiss petitioners' Article 78 proceeding on the following basis: (1) pursuant to CPLR 3211(a)(7) as the Vacate Order issued by the DOB on July 1, 2011 was rescinded on or about October 22, 2012 and thus petitioners' request for an order lifting the Vacate Order is moot; (2) pursuant to CPLR 3211(a)(5) as petitioners are time-barred from challenging the propriety of the Vacate Order based on the four-month statute of limitations applicable to final administrative determinations; and (3) pursuant to CPLR 3211(a)(7) as petitioners failed to exhaust their administrative remedies by timely and properly appealing to the ECB Tribunal the October 14, 2011 non-final decision and order of ECB's hearing officer, or by timely responding to the ECB's letter of November 17, 2011, which requested documentation supporting that ECB rejected petitioner's appeal in error.

#### BACKGROUND

Petitioner Joseph F. Porto (Porto), is the sole member of Porto Resources LLC and sole officer of Fidelity Trust Realty, Inc. d/b/a Eden House Porto Resources (Eden). Porto Resources, LLC is the fee owner of the subject premises, which is a four story building. Eden leases the subject premises and operates a "Christian spiritual and natural healing, hostel or bed and breakfast (see Verified Petition, at 4) at the subject premises known as Eden House. Prior to Eden House operating a bed and breakfast out of the subject premises, another tenant ran a hostel/bed and breakfast known as Pied-a-Terre.

On June 30, 2011, eight Notice of Violations (NOV) were issued from the DOB which all related to the construction of a hotel. Petitioners proffer that none of the violations are relevant

to a four story multiple dwelling. DOB's enforcement action included the issuance of Vacate Order #88/2011, by Martin Rebohz, DOB's Borough Commissioner for Manhattan, on July 1, 2011, based on a finding of imminent danger to the transient guests occupying said 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> floors of the subject premises. Petitioners proffer that the issuance of the Vacate Order is both arbitrary and capricious as it neither relates to a four family multiple dwelling and is contrary to its prior determinations with respect to the use of the subject premises.<sup>1</sup> Petitioners subsequently appeared at the Environment Control Board (ECB) on August 18, 2011 to contest the violations and the Vacate Order, but the first appearance was adjourned to October 13, 2011. A hearing was held on October 13, 2011 by ALJ Selden, who issued a decision and order dated October 14, 2011 sustaining all eight NOV's on the basis that the subject premises' certificate of occupancy did not authorize the use of a transient hotel. On or about October 19, 2011, petitioners submitted to ECB, a pre-printed ECB form entitled "Request for Appeal Extensions and Hearing Recordings" (the request) wherein petitioners requested the second option which states "AUDIO RECORDING OF THE HEARING. WHEN THE RECORDING IS MAILED, YOU WILL BE GIVEN AN EXTRA TWENTY DAYS TO SERVE AND FILE YOUR APPEAL" (see Notice of Cross-Motion, p. 17; exhibit Q; Verified Petition, exhibit M). The instructions on the form state that the ECB and the agency responsible for the violation must receive copies of this request no more than thirty days after the mailing date of the decision (*id.* at exhibit Q). The form on its face however, states that a copy of the request for the audio recording was sent only to Porto Resources, LLC (*id.*). In response to the form, the ECB

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<sup>1</sup> Petitioners state that on October 26, 2010, the DOB, upon inspection of the subject premises and the business conducted by Pied-a-Terre issued a violation, number 34878578, the result of which was the issuance of a vacate order for the basement area only. There was no DOB violation for the subject premises for floors 2 through 4, the area where the hostel/bed and breakfast was located in the building, as petitioners proffer they were advised that the rest of the hostel was conforming to the last known certificate of occupancy which stated a "CLASS B Residence" (Verified Petition at 6; see exhibit A).

responded by letter dated November 17, 2011 which denied the request for the audio recording because respondents' records reflected "no payment, posting of a bond or request for financial hardship waiver" as well as on the basis that the petitioners did not "enclose proof that [petitioners] sent a copy of [their] request to the agency that charged [petitioners] with the violation" (Notice of Cross-Motion at 18; exhibit D).

#### DISCUSSION

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 Scherbryn 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. Assocs. 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., Inc. 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]).

Petitioners seek to appeal in this proceeding the October 14, 2011 decision, however it is a non-binding determination, as that decision is appealable to the ECB's Tribunal.

Additionally, petitioners seek review of a letter from ECB dated November 17, 2011, however that letter is also not ripe for judicial review as it offered petitioners the opportunity to respond to ECB by providing documentation establishing that petitioners's appeal of October 19, 2011 had been rejected in error. There is nothing before the Court demonstrating that petitioners responded to the letter November 17, 2011. Additionally, petitioners failed to properly follow the instructions on the face of the request for the audio recording (see Verified Petition, exhibit M). Specifically, petitioners failed to enclose proof that they had sent a copy of the request to both the ECB and the DOB, as well as petitioners failed to pay the fine, post a bond or request a financial hardship waiver. As such, the Court holds that the cross-motion of the respondents must be granted on the basis that the petitioners failed to exhaust their administrative remedies. As such, the merits of the petition need not be discussed.

CONCLUSION **FILED**

For these reasons and upon the foregoing papers, it is DEC 20 2013

ORDERED that respondents' cross-motion to dismiss NEW YORK is granted to the extent that the petition is dismissed, pursuant to CPLR 3211(a)(7) failure to exhaust administrative remedies; and it is further,

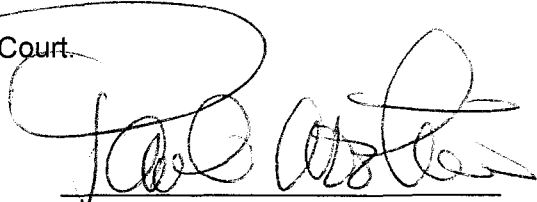
**COUNTY CLERK'S OFFICE**

ORDERED that petitioner's Article 78 petition is denied as moot and the proceeding is dismissed, without costs or disbursements to respondent; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that the respondent shall serve a copy of this Order, with Notice of Entry, upon petitioner.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 12/20/13

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
 Check if appropriate:     DO NOT POST     REFERENCE