W1-Bay Plaza v Environmental Control Bd.
2016 NY Slip Op 31972(U)
October 6, 2016
Supreme Court, New York County
Docket Number: 154592/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Edmead Justice

PART 35

W1-BAY PLAZA

-v-

ENVIRONMENTAL CONTROL BOARD

INDEX NO. 154592/16
MOTION DATE 8/24/16
MOTION SEQ. NO. 001

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

In this Article 78 action, Petitioner W-1 Bay Plaza, LLC ("Petitioner"), a New York corporation, seeks to vacate an administrative order and penalty imposed by Respondents Environmental Control Board of the City of New York (the "Environmental Board") and New York City Department of Buildings (the "Department of Buildings"; collectively "Respondents"). For the reasons set forth below, the Court finds that the Petition was timely served and, having resolved that threshold issue, transfers the balance of this Petition to the Appellate Division, First Department.

On or about July 7, 2015, the Department of Buildings issued violation number 35134738H (*Exh 1*, the "Violation"), alleging that Petitioner disconnected "switch panel box outlets" without an electrical permit. On that date, the Department of Buildings officer who issued the Violation also took several photographs (*Exh 2*). The first hearing date pursuant to the Violation, August 21, 2015, was adjourned when the issuing Department of Buildings officer failed to appear.

On September 11, 2015, the next hearing date, the officer again failed to appear. Instead of another adjournment, the hearing officer entered the Violation and photographs into evidence over Petitioner's objection (*NYSCEF 14*). Petitioner moved to dismiss the Violation on two grounds: first, that the Violation's charge, "disconnection of switch panel box outlets," did not fall within the definition of "Electrical Work" pursuant to NYC Administrative Code 27-3004; and second, that the Department of Buildings had failed to meet its burden of proof to show that a violation occurred. Because Petitioner believed that the Department's threshold burden had not been satisfied, Petitioner rested its case without providing any evidence of its own.

On September 28, 2015, the hearing officer issued a Recommended Decision and Order

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

Dated: _____ _____, 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
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sustaining the Violation and imposing a $1,600.00 fine (*Exh 3*). On October 7, 2015, the Department of Buildings also issued a second violation for failure to certify correction of the previous Violation, assessing an additional fine of $1,500.00 (*Exh 6*, the "Second Violation"). On November 19, 2015, Petitioner appealed the Department of Buildings' Order and Second Violation to the Environmental Board (*Exh 4*), which the Environmental Board denied on January 28, 2016 (*Exh 5*).[1]

This Article 78 Petition was filed on May 31, 2016, and served upon Respondent on Monday, June 20, 2016 (*NYSCEF 6*), the first business day after the Saturday, June 18, 2016 15-day service deadline.

The Petition requests: first, a declaration that the Environmental Board's order violated lawful procedure, was based on legal error, was not based on substantial evidence, was arbitrary and capricious, and was an abuse of discretion; second, vacatur of said order; third, a declaration that the Department of Buildings cannot issue a civil penalty (the Second Violation) absent a formal hearing through the Environmental Board; fourth, vacatur of the Second Violation; and fifth, costs and disbursements.

In its memorandum of law in support, Petitioner bases its requests for relief on the following: first, that the Environmental Board acted arbitrarily and without authority in finding that Petitioner's disconnection of a switch panel box constituted "electrical work" within the meaning of the NYC Administrative code; second, that Petitioner was denied due process because the provision Petitioner is alleged to have violated is unconstitutionally vague; third, that the proceedings below were defective because Petitioner could not cross-examine the individual who created the photographs used as evidence to sustain the Violation; fourth, that the Environmental Board's order was not predicated on "substantial evidence"; and fifth, that the Department of Buildings' issuance of the Second Violation did not follow proper procedures.

In opposition, Respondents argue: first, that the Petition should be dismissed because it was not timely served; second, that CPLR requires transfer to the Appellate Division because the Petition requests "substantial evidence" review; third, that the Environmental Board's final determination should be upheld because it was rational and supported by substantial evidence; and fourth, that the Second Violation should be upheld, without the necessity for a separate hearing, because it was rational and based on substantial evidence-specifically, a continued failure to remedy the first Violation, which Petitioner challenged unsuccessfully.

In reply, Petitioner responds that: first, the Petition was timely served because service was effectuated on the first business day after the statutory deadline, and in the interests of justice; second, that transfer to the Appellate Division is unwarranted because certain threshold determinations by this Court, such as due process and constitutionality, would obviate the need for "substantial evidence" analysis by (and therefore transfer to) the Appellate Division; and third, that the complete lack of admissible evidence of any violation could not possibly constitute

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[1] Petitioner's allegation that it "was never offered an opportunity [to] challenge the [Department of Building's] Civil Penalty" – referring, presumably, to the Second Violation and $1,500.00 fine – is technically correct. Though the Court makes no substantive determination with respect to the Second Violation, it is unclear from the record why, despite Petitioner's inclusion of that issue in its appellate brief (*Exh 4*), the Environmental Board did not address the Second Violation. For the reasons set forth below, however, the Court does not substantively address this issue.

"substantial evidence" sufficient to sustain Respondents' burden in proving the Violation(s).

Discussion

Because the issue of transfer may preclude determination of the Petition's remaining issues, the Court addresses the transfer argument first.

Though Article 78 proceedings are initiated in Supreme Court (CPLR 7804[b]), CPLR 7804(g) provides that, if the "substantial evidence" question is raised (CPLR 7803[4]),

> "*the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata*, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to ... the appellate division ..." (emphasis added).[2]

An "objection as could terminate the proceeding" is not limited to those enumerated categories, but is generally understood to be limited to threshold objections such as those listed in CPLR 3211(a), as well as similar grounds such as lack of standing, lack of finality, and failure to exhaust administrative remedies—in other words, objections which, if sustained, would dispose of the action and obviate the need for further review (Siegel, *New York Practice* § 568 [5th ed]; Alexander, *Practice Commentaries*, CPLR 7804:8 [2016]; *see also OTR Media Group, Inc. v Bd. of Standards and Appeals of City of New York*, 132 AD3d 607, 607–08 [1st Dept 2015] [whether an administrative action or decision was arbitrary and capricious is not an "objection that could have terminated the proceeding" within the meaning of CPLR 7804(g), and is thus properly transferred to the Appellate Division for *de novo* review], *citing Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405, 405, 597 NYS2d 65 [1st Dept 1993]).

Importantly, and contrary to Petitioner's arguments that this Court can address constitutional and due process questions without reaching the substantial evidence question (*Pet'r Reply* at 5), "the *mere presence* of the substantial evidence question" will trigger the transfer requirement in the absence of a viable threshold objection (Professor Siegel, *New York Practice* § 568 [5th ed] [emphasis added]; *G & G Shops*, 193 AD2d at 405 [entire case, including constitutional, procedural, and substantial evidence issues, should have been transferred at the outset because the constitutional and procedural issues decided by the Supreme Court were not "objections that could have terminated the proceeding" within the meaning of CPLR 7804(g)]; *accord Pieczonka v Jewett,* 273 AD2d 842, 842 [4th Dept 2000] [Supreme Court should not have decided petitioner's claim that agency failed to comply with procedural requirements for hearing]; *Hull-Hazard, Inc. v Roberts*, 129 AD2d 348, 350 [3d Dept 1987], *affd*, 72 NY2d 900

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[2] The reasoning for transfer is that the nature of such review is akin to appellate review of a judicial trial record, a task traditionally performed by the Appellate Division (Alexander, *Practice Commentaries*, CPLR 7804:8 [2016]).

[1988] [where a substantial evidence question is presented, Supreme Court may address objections in point of law which are limited to "threshold objections of the kind listed in CPLR 3211(a)]").

Accordingly, the Court turns to the only portion of the Petition which necessitates a CPLR 7804(g) threshold determination: the timeliness of service of the Petition upon Respondents. The parties do not dispute the relevant facts: that Petitioner filed the Petition on May 31, 2016, several days before the June 3 deadline, then served Respondents on Monday, June 20, 2016, the first business day after the 15-day service deadline, which fell on Saturday, June 18 (*see* CPLR 306-b).

Late service is permitted if the original service deadline falls on a weekend or public holiday and service is effectuated on the first business day thereafter (General Construction Law § 25-a; *Mitchell v New York Univ.*, 129 AD3d 542, 544 [1st Dept 2015], *lv den*, 26 NY3d 908 [2015] [late service permitted on the following business day after President's Day, a public holiday]; *accord Robayo v Edison Price Light., Inc.*, 119 AD3d 763, 763 [2d Dept 2014] [late service permitted when served on the first business day after a Sunday and the Fourth of July]). Accordingly, service was proper here because it occurred on the first business day after the deadline (June 18), which fell on a weekend. To the extent that none of the cases cited by Respondents speak to the unique facts here – that is, service on the first business day after a weekend deadline – they do not impact the Court's reasoning.

Having decided the only threshold "objection as could terminate the proceeding," this Court's role also terminates.

Accordingly, it is hereby

ORDERED that this Petition is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803(4)); and it is further

ORDERED that Petitioner shall serve a copy of this Order with notice of entry upon Respondents and the Clerk of Court within 20 days of entry; and it is further

ORDERED that upon service of this order with notice of entry, the Clerk of Court is directed to transfer this file to the Appellate division, First Department.

The foregoing constitutes the decision and order of the Court.

DATED: 10-6-2016

HON. CAROL R. EDMEAD J.S.C.

J.S.C.

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

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

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