

**Matter of 38-12 Realty LLC v New York City Env'tl.
Control Bd.**

2013 NY Slip Op 30188(U)

January 24, 2013

Sup Ct, New York County

Docket Number: 103929/12

Judge: Alexander W. Hunter Jr

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

EA
1/31/13
E

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 103929/2012
38-12 REALTY LLC
vs.
NYC ENVIRONMENTAL CONTROL
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).** 1-6
 Answering Affidavits — Exhibits _____ **No(s).** 7-22
 Replying Affidavits _____ **No(s).** 23-24

Upon the foregoing papers, it is ordered that this motion is

*Motion is decided in accordance w/
memorandum decision & judgment annexed
hereto*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/24/13

AWH, J.S.C.
ALEXANDER W. HUNTER JR

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

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of
38-12 Realty LLC,

Index No.: 103929/12

Petitioner,

Decision and Judgment

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

-against-

New York City Environmental Control Board,

Respondent.

-----X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order, pursuant to Article 78 of the CPLR, annulling and vacating respondent's denial of petitioner's request for a new hearing date with respect to violation number 500-437-14N and granting petitioner a new hearing date, is granted.

Petitioner is a New York State limited liability corporation that owns the property located at 38-12 32 Street, Queens, NY 11101 ("subject premises"). Respondent is the New York City Environmental Control Board ("ECB"), which has authority pursuant to the New York City Charter ("City Charter") to adjudicate the Notices of Violation ("NOV") issued by various city agencies. On November 16, 2011, respondent inspected the subject premises for asbestos and issued an Asbestos Inspection Report ("report"). The report listed petitioner's address as "38-12 32 Street, Queens, NY 11104."

On or about November 17, 2011, respondent issued NOV number 500-437-14N, to petitioner for four violations of the New York City Administrative Code ("Administrative Code") under the Air Pollution Control Code sections involving asbestos removal, with a scheduled hearing date of February 24, 2012. The subject NOV listed the same address for petitioner as the address indicated on the report. The only difference between the address on the report and the subject NOV and the address of the subject premises, is the last digit of the zip code. No such address exists with a 11104 zip code.

Petitioner did not appear on February 24, 2012, and a default judgment in the amount of \$52,000.00 was entered against petitioner for the subject NOV. Petitioner alleges that it first became aware of the violation and subsequent default on July 31, 2012 through the results of a title search. Petitioner submitted a form request for a new hearing to vacate the default, dated August 20, 2012, on the grounds that petitioner "did not receive the ticket (notice of violation) because the issuing agency did not serve the ticket correctly." The form lists petitioner's address

as 29-10 38th Avenue, Long Island City, NY 11101 and also gives the address of petitioner's attorney. Respondent denied the request in a letter dated August 30, 2012, because "our records show that the ticket was properly served so that [petitioner] should have received notice." Respondent attaches four versions of the denial letter that was mailed to petitioner: two addressed to the subject premises, one addressed to petitioner, and one addressed to petitioner's attorney.

Petitioner claims it was never served with the subject NOV, and alleges that service by a mailing to the address of the subject premises would have been impossible because the building located at the subject premises was demolished on or about October 31, 2011. Respondent attaches a web printout of an approved New York City Department of Buildings application for the subject premises, dated November 5, 2012, which indicates that the application was approved on August 15, 2011, and that "FULL demolition will begin on 12/05/2011." The application lists the location information and gives addresses and other contact information for the applicant of record and filing representative.

The New York City Department of Environmental Protection ("DEP") served the subject NOV on petitioner by a mailing to the subject premises on January 11, 2012, but the envelope was returned to respondent on or about January 17, 2012, with the marking "RETURN TO SENDER NO SUCH NUMBER UNABLE TO FORWARD." Respondent attaches the affidavit of service for the mailed NOV and a copy of the returned envelope. The envelope is addressed to: "38-12 32 Street Realty LLC, 38-12 32 Street, Queens, N.Y. 11104." This is not petitioner's address and refers to a nonexistent location.

The City of New York Asbestos Control Project served the subject NOV on petitioner by a mailing to the subject premises on January 18, 2012. Respondent attaches the daily affidavit of service for the 219 NOVs served on January 18, 2012, which lists petitioner's address as "3812 32nd St, Long Island Cit, NY 11101-2207." Respondent does not state whether or not this mailing was returned. Service of the subject NOV was also attempted on the New York Secretary of State. Respondent attaches the affidavit of service, which shows that the person who delivered the subject NOV had the affidavit of service notarized but not signed.

Respondent attaches, in support of its answer, the DEP Asbestos Project Notification, received November 22, 2011, which lists the address for the facility as the subject premises and the address for the building owner as the same except for giving 11104 as the zip code. The form also gives the addresses for the applicant, asbestos abatement contractor, and third party monitor. Respondent also attaches copies of a Quarterly Statement of Account for activity through November 18, 2011, a Notice of Property Value dated January 15, 2012, and a Property Tax Bill Quarterly Statement for activity through February 24, 2012, which all list the correct address of the subject premises as the mailing address.

Petitioner attaches a print out of the entity information for 38-12 Realty LLC, current through November 16, 2012, from the New York State Department of State, Division of Corporations website. The address listed for service is: "24-14 24th Avenue, Astoria, New York 11102." Petitioner also attaches its Articles of Organization, dated January 9, 2006, and the filing receipt for the Articles of Organization, dated January 11, 2006, both of which give the same address for service as the entity information.

The New York City Rules and Regulations ("City Rules") set forth the requirements for a new hearing. A request for a new hearing received more than 45 days from the scheduled hearing date may be granted if it is received within one year of the time the party learned of the existence of the violation and there is a reasonable basis to believe that the party did not receive the NOV because the party was not properly served with the violation under Article 3 of the CPLR, Article 3 of the Business Corporation Law, Section 1049-a of the City Charter, or any other provision relating to service of violations returnable to the ECB contained in the Administrative Code or the City Rules. **48 RCNY § 3 (82) (c) (1) (A)**. Each method of service listed is a permissible alternate method of service that "is not mandated to the exclusion of other permissible modes of service." **Matter of Wilner v. Beddoe, 33 Misc 3d 900, 903, 2011 NY Slip Op 21276 (Sup Ct, NY County, 2011)**.

It should be noted that Section 1049-a of the City Charter is inapplicable in the instant proceeding because it does not limit the permissible methods of service for NOV's issued by the DEP. Nonetheless, respondent must serve the NOV in accordance with Section 1049-a (d) (2) of the City Charter in order to docket the judgment for purposes of collecting the penalty imposed without applying to the court.

The Administrative Code sets forth the rules for service of papers by the Commissioner of the DEP. Petitioner falls under the definition of a person. Section 24-115 (b) of the Administrative Code provides:

Service of any written notice, order or decision required by this code shall be made on a person: (1) Either by mailing the notice, order or decision directed to the person at his or her principal place of business; or (2) By leaving the notice, order or decision with the person, or if the person is not an individual, with a member of the partnership or group concerned, or with an officer or managing agent of the corporation.

Petitioner's use of the address of the subject premises in the documents attached by respondent does not establish that this address was petitioner's principal place of business for purposes of the Administrative Code.

The Administrative Code does not define "principal place of business." The First Department has held that the courts "look to the certificate of incorporation to determine a corporation's principal place of business for purposes of CPLR 503 (c)," which concerns venue based on residence. **Discolo v. River Gas & Wash Corp., 41 AD3d 126, 2007 NY Slip Op**

04712 (1st Dept 2007); see, Job v. Subaru Leasing Corp., 30 AD3d 159, 2006 NY Slip Op 04315 (1st Dept 2006); Johanson v. J.B. Hunt Transp., Inc., 15 AD3d 268, 2005 NY Slip Op 01138 (1st Dept 2005). It is not clear whether the certificate of incorporation determines a corporation's principal place of business for purposes of service of a NOV. However, respondent was on notice that the building at the subject premises was scheduled for demolition beginning December 5, 2011 when it attempted to serve the NOV by mail in January 2012. The record is not clear on the exact date the building was demolished, but both parties agree that it was demolished in January 2012. If respondent was uncertain whether the building was actually demolished, it should have taken precautions by mailing the NOV to multiple addresses, as evidently was its practice with the denial letter.

It should be noted that the faulty affidavit of service for the Secretary of State is irrelevant in the instant case. Respondent only needs to satisfy one of the permissible methods of service, and Section 24-115 (b) of the Administrative Code does not mandate service on the Secretary of State when service is made on a person, which is defined to include entities such as limited liability corporations.

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." See, Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 (1974). "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis." Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 AD2d 72, 76 (1st Dept 1985). Therefore, this court's role is limited to whether or not respondent's decision to deny petitioner's request for a new hearing was made without a rational basis.

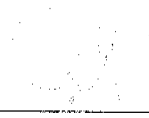
This court finds that, based on the record, respondent could not have reasonably believed that the NOV was properly served. Respondent's first attempt at service was to a nonexistent address and there is no dispute that this service is not valid. Respondent's second attempt at service was to a building that no longer existed. Despite the documents respondent submits listing the address of the subject premises at various points in time, respondent was on notice that the building at the subject premises was already demolished when it attempted in January 2012 to serve the NOV by a mailing to the demolished building. This proceeding should be remanded back to respondent to vacate the default for violation number 500-437-14N and to grant petitioner a new hearing date.

Accordingly, it is hereby,

ADJUDGED, that the petition is granted to the extent of remanding the matter back to respondent to vacate petitioner's default with respect to violation number 500-437-14N and grant petitioner's request for a new hearing, with costs and disbursements to petitioner.

Dated: January 24, 2013

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR