

**Matter of New York Youth Club v New York City
Envtl. Control Bd.**

2013 NY Slip Op 30631(U)

March 28, 2013

Sup Ct, Queens County

Docket Number: 17797/12

Judge: Bernice Daun Siegal

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
In the Matter of the Application of
NEW YORK YOUTH CLUB,

Index No.: 17797/12
Motion Date: 1/7/13
Motion Cal. No.: 96
Motion Seq. No.: 02

Petitioner,

-against-

New York City Environmental Control Board,

Respondent,

for a judgment, pursuant to CPLR Article 78, vacating
the serval default judgments issued against Petitioner,
dated May 18, 2011, and the refusal to hold a hearing
dated May 25, 2012, and ordering a hearing on the
merits of the underlying summonses.

-----X

The following papers numbered 1 to 13 read on this motion for an order vacating the default Judgment Issued by the Respondent Environmental Control Board (ECB) dated May 18, 2011; and setting the summonses down for a hearing on the merits of the said summonses or, in the alternative, dismissing the said summonses.

	PAPERS NUMBERED
Notice of Petition - Affidavits-Exhibits.....	1 - 4
Verified Answer.....	5 - 9
Memorandum of Law.....	10 - 11
Affidavit in Reply.....	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Petitioner, the New York Youth Club (“NYYC”), moves by order to show cause to vacate the default judgments issued by the Respondent, Environmental Control Board (“ECB”) dated May 18, 2011 and setting the summonses down for a hearing on the merits.

Facts

The underlying action involved unpaid summonses issued to Petitioner for illegal postings throughout the City of New York. The default orders were issued by the ECB on May 12, 2010, September 15, 2010 and May 18, 2011.¹ In total, ECB contends that there are 461 default Orders. Petitioner submits the “affidavit”² of Nathan Jackson (“Jackson”), the Director of the NYYC. Petitioner contends that on or about May 25, 2012 it first received notice of the default judgment for the unpaid summonses, that NYYC knew of one summons, but never received notice of any of the other summonses, and that its office was located at 199 Terry Road, Smithtown (“199 Terry”), until on or about October 2011, when the offices moved to 40 Oser Avenue, Suite 4, Hauppauge. In addition, Petitioner contends that the notices of the summonses were sent to different addresses that are not connected with the NYYC.

Respondent submits a verified answer with exhibits including affidavits of mailing and avers that Petitioner was issued Notice of Violations (“NOVs”) from the Department of Sanitation (“DOS”), as fully set forth below. On February 6, 2010, DOS issued 100 NOVs for violations; Respondent established that they were sent certified mail to 199 Terry. Petitioner failed to appear

¹Petitioner’s papers are unclear with respect to which default orders they are attempting to vacate.

²The court notes that the document labeled as the “Affidavit” of Nathan Jackson states that Jackson “hereby affirms the truth of the following under the penalty of perjury.” Affirmations of parties to an action are not admissible evidence. (See CPLR §2106).

for the hearings and copies of the Default Orders were then mailed on May 12, 2010 to 199 Terry. For all but one of the NOV's, NYYC requested a stay of the default and the ECB granted a new hearing date of July 30, 2010. Notices of the new hearing date were mailed to NYYC on June 28, 2010. NYYC once again failed to appear and the second default orders were mailed on August 4, 2010 to 199 Terry.

On February 8, 2010, DOS issued 18 NOV's for violations. Respondent established that they were sent certified mail to 199 Terry. Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 12, 2010 to 199 Terry. NYYC requested a stay of the default, where after ECB granted a new hearing date of July 30, 2010. Notices of the new hearing date were mailed to NYYC. NYYC once again failed to appear and the second default orders were mailed on August 4, 2010 to 199 Terry.

On February 12, 2010, DOS issued 28 NOV's for violations. Respondent established that they were sent certified mail to 199 Terry. Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 12, 2010 to 199 Terry. NYYC requested a stay of the default, where after ECB granted a new hearing date of July 30, 2010. Notices of the new hearing date were mailed to NYYC. NYYC once again failed to appear and the second default orders were mailed on August 4, 2010 to 199 Terry.

On July 20, 2010, DOS issued 26 NOV's for violations; Respondent established that they were sent certified mail to 199 Terry. Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on September 15, 2010 to 199 Terry.

On July 27, 2010, DOS issued 16 NOV's for violations. Respondent established that they were sent certified mail to 199 Terry; Petitioner failed to appear for the hearings and copies of the

Default Orders were then mailed on September 15, 2010 to 199 Terry.

On February 9, 2011, DOS issued 100 NOV's for violations. Respondent established that they were sent certified mail to 199 Terry; Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 18, 2011 to 199 Terry.

On February 10, 2011, DOS issued 89 NOV's for violations. Respondent established that the February 10, 2011 NOV's were sent certified mail to 199 Terry; Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 18, 2011 to 199 Terry.

On February 11, 2011, DOS issued 54 NOV's for violations. Respondent established that the February 11, 2011 NOV's were sent certified mail to 199 Terry; Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 18, 2011 to 199 Terry.

On February 14, 2011, DOS issued 30 NOV's for violations. Respondent established that they were sent certified mail to 199 Terry; Petitioner failed to appear for the hearings and copies of the Default Orders were then mailed on May 18, 2011 to 199 Terry.

Respondent contends that Petitioner filed a request for a New Hearing After a Failure to Appear form for 230 of these Orders. The remaining 231 Default Orders remain unchallenged and not ripe for review.

For the reasons set forth below, the Petition is dismissed.

Unchallenged Default Orders

Respondent contends that Petitioner failed to exhaust its administrative remedies for contesting the Default Orders because Petitioner did not submit a Request Form to ECB as required by 48 RCNY §3-82(a), which provides, in relevant part, that “[a] request by a respondent for a new hearing after the respondent did not appear must be made by application to the executive director[.]”

Respondent, therefore, contends that the court lacks jurisdiction to consider the 231 Unchallenged Default Orders.

The court notes that petitioner must “exhaust all available administrative remedies before mounting a challenge to a final order from which it is aggrieved.” (*Newfield Cent. School Dist. v. New York State Div. of Human Rights*, 66 A.D.3d 1314 , 1317 [3rd Dept 2009]; see also *St. Matthew Lutheran Church v. New York State Division of Human Rights*, 88 A.D.3d 1280 [4th Dept 2011]; *Aliano v. Oliva*, 72 A.D.3d 944 [2nd Dept 2011]; *People ex rel. Cotton v Rodriguez*, 123 A.D.2d 338 [2nd Dept 1986][holding that “by having failed to exhaust available administrative remedies the petitioner is barred from seeking relief under CPLR Article 78].) Here, Petitioner failed to submit a Request Form for a new hearing to ECB on the 231 Unchallenged Default Orders as required by 48 RCNY §3-82(a). In reply, Petitioner fails to address this issue. Accordingly, the within Petition, as it pertains to the 231 Unchallenged Default Orders is denied.

Challenged Default Orders

In determining the within Petition, as to the Challenged Default Orders, “the sole criterion is whether the petition sets forth allegations sufficient to make out a claim that the determination sought to be reviewed 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]; *Grecco v. Cimino*, 100 A.D.3d 892 [2nd Dept 2012].) “Upon judicial review, a court is not free to substitute its judgment for that of the agency on substantive matters.” (*Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 925 [2nd Dept 2012]; *Akpan v. Koch*, 75 N.Y.2d 561 [1990].)

ECB contends that the May 25, 2012 determination, denying petitioner’s request to vacate the default order of the 230 Challenged Default Orders was reasonable, rational, and in accordance

with applicable law.

Respondent established that it is authorized to issue a default judgment in the event that a respondent fails to submit a timely response or appear before ECB for a scheduled hearing. (48 RCNY 3-81.) 48 RCNY §3-82 provides that the respondent, NYYC, had an opportunity to request a new hearing after failing to appear. “A request for a new hearing, as described in subdivision (a) of this section, that is received within 45 days of the hearing date upon which the respondent did not appear, shall be granted unless such request is found to be made in bad faith.” (48 RCNY §3-82(b).) “A request for a new hearing that is received more than 45 days from the date upon which the respondent did not appear must contain, in addition to the information stated in subdivision (a) of this section, appropriate supporting documentation.” (48 RCNY §3-82(c).)

Petitioner made the request, on the 230 Challenged Default Orders, on May 12, 2012³ significantly more than 45 days following the hearing provided for in the statute. ECB contends that the request for a new hearing did not contain the “appropriate supporting documentation.” In reply, Petitioner fails to address this issue.

In reply, Petitioner contends, once again, that it was not properly served the NOV's and other notices of default. However, Respondent established that it served the various notices on 199 Terry. Petitioner admits that its offices were located at 199 Terry, and, since about October , 2011, at 40 Oser Avenue. Nonetheless, Petitioner maintains that the “Petitioner never received the default judgment at the Oser Avenue address.” However, the Petition is silent with respect to whether they received any default judgments at the 199 Terry address.

³NYYC submitted a prior request on May 1, 2012 which was denied by ECB because it was not notarized.

It is clear from the facts presented that NYYC was served with the default orders and either failed to request a new hearing or after being granted a new hearing failed to appear for those hearings. Petitioner's May 12, 2012 request for a new hearing failed to provide the "appropriate supporting documentation" as required by the statute nor indicate that Petitioner was not properly served the Default Orders. Accordingly, based upon the available record the court cannot conclude that the determinations sought to be reviewed were "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]; *Town of Southampton v. County of Suffolk*, 98 A.D.3d 1033 [2nd Dept 2012]; *North Fork Management & Maintenance, LLC v. New York State Dept. of Labor*, 98 A.D.3d 514 [2nd Dept 2012].)

Conclusion

For the reasons set forth above, NYYC's order to show cause is denied and the Petition is dismissed.

Dated: March 28, 2013

Bernice D. Siegal, J. S. C.