

**321-3 W. 47th St. Assoc., LP v Environmental
Control Bd. of the City of N.Y.**

2013 NY Slip Op 30670(U)

April 2, 2013

Supreme Court, New York County

Docket Number: 102493/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
321-3 WEST 47TH STREET ASSOCIATES, LP,

INDEX No. 102493/12

Petitioner,
-against-

MOTION DATE _____

THE ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK,

MOTION SEQ. No. 001

Respondent.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

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

1-3

Answering Affidavits- Exhibits _____

4

Replying Affidavits _____

UNFILED JUDGMENT

CROSS-MOTION: YES NO

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).

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/2/13

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----x
321-3 WEST 47th STREET ASSOCIATES, LP,

Index No. 102493/12

Petitioner,

For a Judgment Under Article 78 of the CPLR

- against -

THE ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK,

Respondent.

UNFILED JUDGMENT

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Re: Order Denying Request for a New Hearing
After a Failure to Appear (Vacating a Default)

-----x

HON. DONNA M. MILLS, JSC.:

Petitioner, 321-3 West 47th Street Associates, LP, brings this proceeding, pursuant to CPLR article 78 proceeding, to set aside an Order Denying the Request for a New Hearing After a Failure to Appear (Vacating a Default), dated February 24, 2012, of respondent The Environmental Control Board of the City of New York ("ECB").

Respondent cross-moves to dismiss the petition.

BACKGROUND

Petitioner is a domestic limited partnership with its principal place of business in New York. Petitioner owns a building located at 323 West 47th Street, New York, New York (the "subject premises"). Statements from the New York City Department of Finance lists petitioner's address as "c/o Big Apple Management, P.O. Box 20213, Greeley Sq. Station, New York, New York, 10001" (see Not of Petition, Exh 9). In addition,

petitioner is registered with the New York City Department of Housing Preservation and Development ("HPD") using the address "c/o Big Apple Management, 347 Fifth Avenue, New York" (see Not of Petition, Exh 8).

On October 11, 2011, a New York City Department of Buildings ("DOB") Inspector issued Notice of Violation ("NOV") number 34924010P ("NOV 10P") to petitioner for occupying apartments 3B and 4B in the subject premises contrary to the existing certificate of occupancy, in violation of §28-118.3.2 of the New York City Building Code (Administrative Code of the City of NY ["Administrative Code"] §28-118.3.2). Specifically, the DOB Inspector noted that apartments 3B and 4B in the subject premises were occupied as a transient hotel.

DOB reportedly also issued eight other NOVs, specifically NOVs 34924911R ("NOV 11R"), 34924012Z ("NOV 12Z"), 34924013K ("NOV 13K"), 34924014M ("NOV 14M"), 34924015Y ("NOV 15Y"), 34924016X ("NOV 16X"), 34924017H ("NOV 17H"), and 34924018J ("NOV 18J"), to petitioner on the same day.

The Affidavits of Service for the NOV 10P state that the process server used alternate method of service, pursuant to NY City Charter §1049-a(d)(2), after a reasonable attempt to effectuate service upon the property owner or responsible party proved unsuccessful (Not of Cross Mot, Exh B). Specifically, the Affidavits of Service state that the process server (1) posted a copy of NOV 10s on the front entry door of the subject premises

on October 11, 2012, and (2) mailed copies to petitioner at the subject premises and at 163 West 23rd Street, New York, NY, purportedly petitioner's last known address (*id.*).

However, petitioner denies receiving NOV 10P, and asserts that the address to which NOV 10P was mailed is incorrect. In fact, By Decision and Order, dated December 8, 2011, after a hearing, ECB dismissed for improper service seven other violations that had been mailed to petitioner at 163 West 23rd Street, New York, NY (Dec & Order, Not of Cross Mot, Exh 3). Petitioner further states that on November 14, 2011, it retrieved the other eight violations that had been allegedly affixed to the subject premises, but that it never received any of the violations by mail.

The eight NOVs, as well as NOV 10P, directed petitioner to appear at a hearing at ECB on December 1, 2011, at 8:30 A.M., to answer and defend the allegations therein. Petitioner appeared for the scheduled hearing on eight of the violations, but failed to appear for NOV 10P. On December 6, 2011, ECB issued a default order against petitioner for NOV 10P and imposed a default penalty of \$12,000.

On February 22, 2012, petitioner requested a new hearing, essentially asserting that it did not receive the posting or mailing for NOV 10P (see Not of Cross Mot, Exh D). By final determination, dated February 24, 2012, ECB denied petitioner's request for a new hearing after a default on the ground that "[a]

request for a hearing after a failure to appear will only be granted if the failure to appear was for a reason listed in ECB's rules ... [and petitioner's] reason for not appearing is not listed in ECB's rules" (Not of Cross Mot, Exh E). The letter also directed petitioner to pay the \$12,000 penalty (*id.*).

Petitioner paid the penalty by Check No. 1297, dated March 23, 2012 (Not of Cross Mot, Exh F), and commenced this CPLR article 78 proceeding. The petition seeks an order vacating and annulling, as arbitrary and capricious, ECB's determination, dated February 24, 2012, which denied petitioner's request for a new hearing after a default on NOV 10P. Petitioner also challenged service of the other eight NOVs, but have since withdrawn those challenges as those NOVs are pending before ECB's Appeals Board and are not yet ripe for judicial review.

ECB seeks to dismiss the petition for failure to state a cause of action, on the ground that petitioner waived any right to challenge the February 24, 2012 determination by paying the \$12,000 penalty.

DISCUSSION

The only question that may be raised in a proceeding under CPLR 7808(3) is "whether a 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" The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified, and

whether the administrative action is without foundation in fact (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.*). The proper test is whether there is a rational basis for the administrative order (*id.*).

Petitioner essentially argues that the determination denying its request for a new hearing was arbitrary and capricious since petitioner was not properly served with NOV 10P. Section 1049-a of the New York City Charter permits alternative service of NOVs of matters overseen by ECB by (1) affixing NOVs in a conspicuous place to the premises where the violation occurred (see NY City Charter §1049-a[d][2][a][ii], and (2) mailing a copy of the NOV to the subject premises and to the address filed with HPD (NY City Charter §1049-a[d][2][b]).

Here, the submissions support a finding that the NY Charter provisions for alternative service of the NOV 10P on petitioner were not met since the NOV was mailed to an address other than the one filed with HPD. As such, NOV 10P should have granted petitioner's request for a new hearing.

The assertion that petitioner's payment of the default penalty bars this proceeding lacks merit. Petitioner notes that it paid the default penalty to comply with the requirements for

appeal in Title 48, §3-73, of the Rules of the City of New York.
That provision states, in part:

No appeal by a respondent shall be permitted unless within 20 days of the mailing of the hearing officer's recommended decision and order the civil penalty imposed by said order is paid or the respondent shall have posted a cash or recognized surety bond in the full amount imposed by the decision and order appealed from

(48 RCNY 3-73). Furthermore, contrary to respondent's assertion, 48 RCNY 3-82(f) expressly permits review of a denial of a request for a new hearing, pursuant to Article 78 of the New York Civil Practice Laws and Rules.

Accordingly it is

ADJUDGED that the petition is granted as follows:

The determination of respondent Environmental Control Board of the City of New York, dated February 24, 2012, is vacated and annulled and petitioner is granted a new hearing after failure to appear on Violation Number 34924010P.

Dated: 4/2/13

ENTER:



J. S. C.

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).

DONNA M. MILLS, J.S.C.