

**Matter of DJW Mgt. LLC v New York City Envtl.
Control Bd.**

2013 NY Slip Op 32093(U)

September 4, 2013

Sup Ct, New York County

Docket Number: 112085/11

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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
DJW MANAGEMENT LLC,
Petitioner,

INDEX NO. 112085/11

-against-

MOTION SEQ. NO. 001

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

FILED

**NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD,**
Respondent.

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COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 4 were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the Environmental Control Board (ECB).

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2, 3, 4

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

In this Article 78 proceeding, DJW Management, LLC (DJW or petitioner) seeks an order, reversing, annulling and setting aside the June 27, 2011 default judgment and fine of the Environmental Control Board (ECB) and the August 24, 2011 decision denying petitioner's application to vacate default judgment against DJW on the notice of violation (NOV) number 034908856M (NOV at issue) and directing the ECB to hold a hearing on the NOV at issue. The ECB levied the maximum fine of \$6,000.00 against DJW on default regarding the NOV at issue. The ECB submits papers in opposition to the herein motion and cross-moves to dismiss, pursuant to CPLR 3211(a), alleging that the action was brought improperly because the petitioner was listed as H. Ted Hu, (Hu), that Hu lacked standing to file on behalf DJW, and on the basis that DJW must be represented by counsel, pursuant to CPLR 321(a). Thereafter, Hu

retained counsel and the ECB withdrew its cross-motion pursuant to a So-Ordered Stipulation dated August 8, 2012, wherein DJW was substituted in this proceeding in place of Hu.

BACKGROUND

On or about May 13, 2011, the New York City Department of Buildings (DOB) allegedly served two NOV's, numbered 034908856M and 034900857Y, simultaneously against JDW's multiple dwelling located at 2736 Pitkin Avenue, Brooklyn, New York. The DOB cited two violations of different Building Codes due to an alleged illegal basement on the premises. ECB alleges that copies of the NOV's were subsequently mailed to the petitioner on June 7, 2011, which set a hearing date of June 27, 2011 for both NOV's at 10:30 a.m., at the ECB office located at 233 Schermerhorn Street, 11th Floor, Brooklyn, New York, 11201 (Brooklyn ECB office).¹

Subsequently, on June 27, 2011, petitioner appeared to contest NOV 034900857Y. At the hearing petitioner conceded service for this NOV, alleging that it was left on the front gate of the building premises, and petitioner found it timely. The ECB allowed petitioner to adjourn, and subsequently go forward on NOV 034900857Y. Consistent with ECB Administrative Rules, Hu was permitted to represent DJW before the ECB. He alleged that on NOV 034900857Y, the DOB complaint was filed by a non-paying tenant alleging that "the basement had been legal for 90 years" (cite). ECB Administrative Law Judge (ALJ) Aubreys Lees, by decision hand stamped dated August 25, 2012, dismissed NOV 034900857Y. In her decision ALJ Lees states, "Mr. Athanios [DOB'S counsel] stated that after reviewing the HPD records, he would move to dismiss the NOV as the records indicate that respondent [DJW] was not in violation. I

¹ "The ECB holds hearings to adjudicate whether persons or entities should be held responsible for violating local laws, rules and regulations that concern pollution and other quality of life issues in New York City" (*Matter of Wilner v Beddoe*, 33 Misc3d 900 [2011 NY Slip Op 21276] [Sup Ct, New York County 2011], citing NY City Charter § 1049-a[d]). The DOB is one of the 13 New York City agencies that are permitted to issue violations, and the NY City Charter authorizes the ECB to adjudicate these issued violations (*id.*).

find that the NOV does not set forth a prime facie case. I credit petitioner's evidence and grant Petitioner's motion to dismiss the violation" (see ECB order dated August 24, 2011, but hand stamped August 25, 2011).

Sometime during his defense of NOV 034900857Y, petitioner learned that the ECB defaulted it on June 27, 2011, and assessed the maximum fine of \$6,000.00 with regards to the NOV at issue. In accordance with ECB rules, petitioner moved to vacate the default in a form letter application dated August 17, 2011. By letter dated August 24, 2011, the ECB denied the application to vacate the default in a one line statement, without any rationale. The herein Article 78 petition ensued.

Petitioner denies proper service of the NOV at issue. Specifically, petitioner asserts that the NOV at issue listed the wrong party name, JDW Management LLC, not the proper party name DJW Management, LLC (see Petition, page 2, section 2; ECB exhibit C). Petitioner claims that he did not receive notice because the NOV at issue was not properly served on him. Petitioner also proffers that the ECB improperly and wrongly denied his application to vacate the default determination. In support, petitioner asserts that the default determination should be vacated and the maximum fine lifted because he has an excusable reason for his non-appearance on June 27, 2011. Specifically, petitioner maintains that he was present at the correct time and date at the Brooklyn ECB office, and he appeared and responded to NOV 034900857Y but that he did not respond to the NOV at issue because he had not received any notice of this NOV. Petitioner also proffers that he has a meritorious defense to the NOV at issue, in that he asserts the same defenses as he asserted as to NOV 034900857Y, which the ECB accepted and subsequently dismissed. Although the hearing from the NOV at issue was set for the same day, time, and location, petitioner alleges that it had no notice of same and the ECB wrongly issued a default against it.

In opposition, ECB proffers that the petitioner was properly served with the NOV at issue

in accordance with NY City Charter §1049-a(h), and that copies of both NOV's were mailed to the petitioner on June 7, 2011, bearing the same hearing return date. ECB asserts that the default order regarding the NOV at issue was allegedly mailed to the petitioner on July 5, 2011 (see ECB affidavit of service, exhibit B) and the ECB's records did not support petitioner's claim that it was not sent notice of the default order. ECB also found that petitioner's application to vacate the default was untimely by six days, alleging that the deadline was August 11, 2011, because the request was not made within 45 days of the missed hearing date, or 30 days of the mailing of the default order (see ECB Memorandum of Law at 1). On these grounds ECB maintains that its determination to deny petitioner's request to vacate the default judgment must be upheld as it was reasonable, rational and consistent with the relevant laws.

STANDARD

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 Scherbyn 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. Assoc. 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. 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]).

“Section 1049-a of the New York City Charter, the enabling legislation which underlies 48 RCNY 3-82 (Rule 3-82), governing procedures for vacating defaults before ECB, requires that [NOV] of matters overseen by the ECB be ‘served in the same manner as is proscribed for service of process by [CPLR article 3] or [Business Corporation Law article 3]’ (NY City Charter § 1049-a [d][2][a]) (*Matter of Wilner v Beddoe*, 102 AD3d 582, 583 [1st Dept 2013]). There are four enumerated exceptions to this service provision, two of which relate to service of NOVs of City Charter or Administrative Code provisions enforced by various departments, including as applicable here, the DOB (*id.*, see also NY City Charter § 1049-a[d][2][a][i]). “Such NOVs may be served by delivery to “a person employed by the respondent on or in connection with the premises where the violation occurred” (NY City Charter § 1049-a[d][2][a][i]), or by “affixing such notice in a conspicuous place to the premises where the violation occurred” (NY City Charter § 1049-a[d][2][a][ii]), coupled with the mailing of a copy of the NOV “to the respondent at the address of such premises” (NY City Charter § 1049-a[d][2][b]). Even with respect to these two exceptions, however, such substituted service may not be effected unless “a reasonable attempt has been made to deliver such notice . . . as provided for by [CPLR article 3] or [Business Corporation Law article 3]” (NY City Charter 1049-a[d][2][b]). Business Corporation Law §§ 306 and 307 mandates, as pertinent here, that service of process be made by personal delivery to the corporation’s registered agent or to the secretary of state.

DISCUSSION

NY City Charter gives an applicant 30 days to move to open a default or any ECB hearing (see NY City Charter 1049-a[d][1][h]). ECB proffers that service was effectuated by a City of New York Issuing Officer, who states in the affidavit of service that the NOV at issue was served on petitioner using “Alternative Method/Charter Service” and that “No responsible party

or owner present. Violation posted on front door" (see Verified Answer, exhibit A, p. 2).

While the ECB found that petitioner did not fulfill the requirements of 48 RCNY § 3-82(c), there was ample evidence in the record demonstrating that petitioner had an excusable reason for his non-appearance and a meritorious defense for the maximum fine regarding the NOV at issue. As such, the Court finds that there are significant factual issues with the case at bar. Specifically, (1) whether the ECB named or served the correct party in the NOV; and (2) whether ECB properly effectuated the "nail and mail" requirements of the City Charter, first; (a) by properly effectuating personal service on a responsible party, (see NY City Charter §1049-a(d)(2)(a)(i) and (ii); see also *Matter of Wilner v Beddoe*, 102 AD3d 582 [1st Dept 2013]), and (b) by the proper attachment or "nail" procedure of the NOV.

The Court is concerned that even though petitioner appeared at the Brooklyn ECB office in regards to NOV 034900857Y, he was defaulted on the NOV at issue when both NOV's were scheduled for a hearing on the same date, time and location. Furthermore, the record does not indicate what efforts the DOB Issuing Officer made to personally serve petitioner pursuant to Business Corporation Law § 306 or 307. "The failure to make any effort at personal service runs afoul of the New York City Charter's directive that a 'reasonable attempt' at personal service be made prior to resort to alternative means of service" (*Matter of Wilner v Beddoe*, 102 AD3d 582, 583 [1st Dept 2013], citing *Matter of Oparaji v City of New York*, 2011 NY Slip Op 33265[U] [Sup Ct, Queens County 2011]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is granted; and it is further,

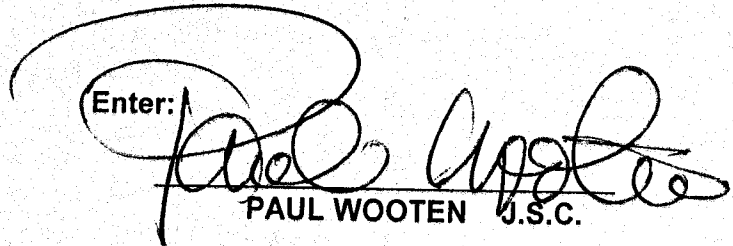
ORDERED that the matter of the NOV at issue is remanded to the ECB for a new hearing; and it is further,

ORDERED that petitioner shall serve a copy of this order, with notice of entry, upon the

ECB and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: Sept. 4, 2013

Enter: 
 PAUL WOOTEN U.S.C.

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

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