

Matter of Dyer v New York City Env'tl. Control Bd.

2014 NY Slip Op 30315(U)

January 28, 2014

Sup Ct, New York County

Docket Number: 401722/13

Judge: Jr., Alexander W. Hunter

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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

Index Number : 401722/2013

DYER, STEVEN

vs

NYC ENVIRONMENTAL CONTROL

Sequence Number : 001

ARTICLE 78

PART 33

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 18, 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). 7-18

Replying Affidavits _____ | No(s). _____

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

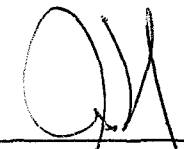
*decided in accordance with the
Decision and Judgment annexed hereto.*

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).

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

Dated: 1/28/14


_____, J.S.C.

ALEXANDER W. HUNTER JP

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

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

-----X
In the Matter of the Application of
Steven Dyer,

Index No.: 401722/13

Petitioner,

Decision and Judgment

-against-

New York City Environmental Control Board,

Respondent.
-----X

HON. ALEXANDER W. HUNTER, JR.

The application of pro se petitioner for an order pursuant to CPLR Article 78, annulling all decisions and orders rendered by respondent New York City Environmental Control Board ("ECB") against petitioner and dismissing all notices of violations issued to petitioner, is denied and the proceeding is dismissed without costs and disbursements. The cross-motion by respondent to dismiss the petition is granted.

Pro se petitioner Steven Dyer is a disabled veteran. He was issued a specialized vending license by New York City Department of Consumer Affairs. Between 2012 and 2013, ECB issued several notices of violation against petitioner for vending food in violation of General Business Law ("GBL") Section 35-a. Thereafter, ECB entered civil penalties and default judgments against petitioner for failure to appear at scheduled hearings. Currently, petitioner has civil penalties totaling \$56,593.05.

On March 20, 2013, Justice Joan B. Lobis granted the petitions of four disabled veteran specialized vending licensees and ruled that GBL § 35-a does not apply to food vendors (the "March 20, 2013 decisions"). Thereafter, ECB commenced appeals of the March 30, 2013 decisions. While the four proceedings were related to each other, they are not related to the instant proceeding. However, petitioner seeks retroactive application of the March 30, 2013 decisions to his notices of violations so as to annul the ECB decisions and orders and to vacate the ECB civil penalties.

Petitioner avers that: (1) the instant matter is timely; (2) the notices of violations are *void ab initio*; and (3) the decisions of respondent are arbitrary and capricious.

Respondent cross-moves to dismiss the petition on the grounds that the petition fails to state a cause of action. Respondent avers that petitioner cannot retroactively apply the March 20, 2013 decisions, which are on appeal, to notices of violations are in default and his claims are either time-barred or not ripe for review.

It is well settled that a litigant cannot obtain judicial review of an administrative determination without first exhausting all available administrative remedies. See CPLR 7801; Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 52, 57 (1978).

Title 48 of the Rules of the City of New York ("RCNY") establishes ECB hearing procedures. It provides that hearing officers preside over enforcement proceedings and prepare recommended decisions and orders. See 48 RCNY § 3-57. A party aggrieved by a recommended decision and order may appeal within 30 days of the mailing of the recommended decision and order. See 48 RCNY § 3-74. A party may not appeal a recommended decision and order unless he or she: (1) pays the civil penalty imposed; (2) posts a bond; or (3) obtains a waiver from ECB. See 48 RCNY § 3-73. A party aggrieved by the appeal decision and order may appeal within 10 days of the mailing of the final decision and order. See 48 RCNY § 3-75.

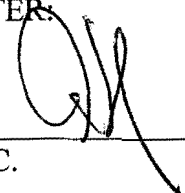
In the event that a party fails to submit a timely response or otherwise appear at ECB for a hearing, ECB may issue a default judgment. See 48 RCNY § 3-81. A party may request a new hearing to vacate a default judgment within 45 days of the hearing date upon which the party did not appear. See 48 RCNY § 3-82. A request for a new hearing that is received more than 45 days from the date upon which a party did not appear may be granted and a hearing conducted only if the party establishes that a new hearing was requested within one year of the time the respondent learned of the existence of the violation, and that there is a reasonable basis to believe that the party did not receive the notice of violation. Id.

The fact that petitioner failed to timely respond to the notices of violation and failed to appear at scheduled hearings renders the instant application premature due to failure to exhaust administrative remedies. Thus, the application of petitioner is denied.

Accordingly, it is hereby

ADJUDGED that the application of pro se petitioner for an order pursuant to CPLR Article 78, annulling all decisions and orders rendered by ECB against petitioner and dismissing all notices of violations issue to petitioner, is denied and the proceeding is dismissed without costs and disbursements. The cross-motion by respondent to dismiss the petition is granted.

Dated: January 28, 2014

ENTER: 

J.S.C.

UNFILED JUDGMENT
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