

**Matter of Perlbinder Holdings, LLC v Office of
Admin. Trials and Hearings/Envtl. Control Bd.**

2018 NY Slip Op 32987(U)

November 27, 2018

Supreme Court, New York County

Docket Number: 154639/18

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

PERLBINDER HOLDINGS, LLC and BARTON MARK
PERLBINDER

Petitioners,

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

Index Number 154639/18

-against-

OFFICE OF ADMINISTRATIVE TRIALS AND
HEARINGS/ENVIRONMENTAL CONTROL BOARD,

Respondent.

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CAROL R. EDMEAD, J.:

Petitioners brings this Article 78 proceeding to annul the April 17, 2018 determination of respondent Office of Administrative Trials and Hearings/Environmental Control Board (OATH), which denied petitioners' appeal from a decision of an OATH hearing officer. That decision sustained 78 notices of violation issued by the New York City Department of Buildings, pertaining to an advertising sign located at 663-669 Second Avenue in Manhattan, and assessed fines against petitioner in the approximate amount of \$780,000. Petitioner also seeks a judgment annulling OATH's denial of petitioners' request for a waiver of the requirement to pay the fine, as a precondition to filing its administrative appeal, and a judgment directing OATH to grant petitioners' appeal, pending a decision by the New York City Board of Standards and Appeals on

petitioner's pending application for a zoning variance.

As a preliminary matter, respondent argues that petitioners lack standing to challenge the notices of violation issued to S&M Enterprises LLC (S&M), and the fines levied against it. The amended verified petition (Petition) states, and respondent does not dispute, that S&M was the former name of petitioner Perl binder Holdings, LLC (Perl binder), which name was changed on July 16, 2003, when a certificate of amendment of articles of incorporation of S&M was filed with the New York Department of State. See Petition, n1 at 3. Inasmuch as Perl binder and S&M are the same entity, the former has standing to challenge the fines assessed against itself, under its former name.

48 RCNY § 6-19 provides that, in order to appeal a decision of a hearing officer, a party must prove that any fines imposed by such decision have been paid, unless the party has obtained a waiver of prior payment, an application for which "must be made before or at the time of the filing of the appeal and must be supported by evidence of financial hardship." 48 RCNY § 6-19 (d) (1). Respondent argues that petitioners' challenge to the fines assessed against them will be "forever premature" (respondent's memorandum of law at 12), because petitioners failed to pay the fines, or to show financial hardship, and now, the time to appeal the hearing officer's decision has expired. That argument overlooks the fact, to which respondent turns later in its brief, that an appeal of the denial of petitioners' request for a waiver of prepayment of the fines is now before this court. With regard to that claim, respondent argues that, while petitioners submitted tax returns to OATH, as evidence of financial hardship, OATH did not consider them, and, therefore, this court may not consider them, because they were untimely submitted. In arguing that this court may not consider the tax returns, respondent cites *Belok v New York City Dept. of Hous. Preserv. & Community Dev.*

(89 AD3d 579, 580 [1st Dept 2011] and *Matter of 77 Realty LLC v New York City Water Bd.*, 21 Misc 3d 1144 (A), 2004 NY Slip op 51949U (New York Co. 2004), *affd* (1st Dept 2005). In both of these cases, the courts held that a party may not present the court with a matter that was not “adduced before the agency.” *Belok*, 84 AD3d at 580. Here, of course, the relevant tax returns were submitted to respondent. The question is whether they were timely submitted. Citing 48 RCNY § 6-19, respondent argues that, having failed to submit evidence of financial stringency, at the time that they appealed the decision of the hearing officer, petitioners were barred from pursuing their appeal. The administrative record shows, however, that respondent waived the requirement set forth in 48 RCNY § 6-19, by sending to petitioners’s attorney six letters, all of which are dated April 2, 2018 and all of which state that the request for waiver of payment of the penalty is denied, and further state that “acceptable forms of evidence [of financial hardship] include the first two pages of respondent’s most recent tax return,” and that:

“[i]f you believe this rejection is in error, you must submit the documentation . . . to the OATH Hearings Division Appeals Unit within 30 days of the hearing decision . . . or 10 days of the date of this letter, whichever is later. On that date, this rejection becomes final.”

Petition, exhibit R. Petitioners timely submitted the called-for documentation, on April 11, 2018, together with an explanation of some of the entries on the tax return, with reference to some items that do not appear on the two pages submitted. By letter, dated April 17, 2018, OATH rejected petitioners’ request for reconsideration, without any explanation.

Inasmuch as respondent now states that its decision was based upon petitioners’ failure to submit financial documentation at the time that they filed their appeal, that decision was arbitrary. Having expressly notified petitioners that the denial of their appeal was not final, but would

become final on a given date, unless petitioners submitted documentation of financial exigency, prior to the date, respondent could not rationally fail to consider petitioners' appeal, which petitioners filed, prior to respondent's deadline. The proper course, however, is not for this court to consider petitioners' financial documentation, in the first instance, but for OATH to do so. Inasmuch as OATH will consider petitioners' financial documentation and, if it finds it persuasive, rule on petitioners' appeal, it would be premature for this court to do so. In view of respondent's representation, that it did not consider petitioners' financial documentation, respondent's discussion of that documentation, in its memorandum of law, is clearly inappropriate.

Accordingly, it is hereby

ADJUDGED that the petition is granted, to the extent that the April 17, 2018 determination of respondent Office of Administrative Trials and Hearings/Environmental Control Board, which denied petitioners' appeal of a hearing officer's decision, sustaining 78 notices of violation issued against petitioners by the New York City Department of Buildings, is reversed, and remanded to Office of Administrative Trials and Hearings/Environmental Control Board for further consideration; and it is further

ORDERED that petitioner shall serve a copy of this Order with notice of entry upon respondent within twenty (20) days of said entry.

Dated: November 27, 2018

ENTER:



Carol R. Edmead J.S.C.

HON. CAROL R. EDMOAD
J.S.C.