316 Bay Ridge Parkway Realty Corp. v Department of Bldgs. of the City of N.Y.
2020 NY Slip Op 34205(U)
December 14, 2020
Supreme Court, Kings County
Docket Number: 525070/2019
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 14th day of December 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

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316 BAY RIDGE PARKWAY REALTY CORP.,

Petitioner,

- against -

DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Respondents.

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DECISION/ORDER

Index No: 525070/2019

MS #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Petition/Cross Motion/Order to Show Cause and Petition/Affidavits (Affirmations) Annexed	1, 2
Answer/Memo of Law in Opposition	3, 4

Petitioner's motion, pursuant to Article 78 of the CPLR, to reverse and annul the decision issued by the New York City Office of Administrative Trials and Hearings (OATH) on July 24, 2019, upholding five default decisions is denied. Petitioner's motion to reverse and annul the determination of OATH's Appeals Unit on November 15, 2019, which upheld the decision by Hearing Officer Eva Marie Russo Lane dated June 14, 2019 on summons numbers 035373033X, 035401852P and 035315020L, is also denied.

Petitioner was issued five summonses by the New York City Department of Buildings between November 27, 2017 and November 30, 2017 for violations of the New York City Administrative Code (Summonses 35293346R, 35293347Z, 35293348K, 35293430J, 35293431L) (See Respondents'

Exhibits A-E). All five summonses state that the issuing officer served the notices of violation in accordance with New York City Charter § 1049-a(d)(2) by posting the summonses to the front door of the premises (*Id.*). According to the affidavits of service, copies of the summonses/notices of hearing for all five violations were mailed to petitioner on January 2, 2018 to the address of the premises, and to the address on file with the New York State Division of Corporations (Respondents' Exhibit G; Petitioner's Exhibit A). The hearing was held at OATH Hearings Division on April 23, 2018, and petitioner did not appear (Respondents' Exhibit H). Therefore, on April 30, 2018, OATH Hearings Division issued decisions on default, finding petitioner in violation on all five summonses (*Id.*). On August 14, 2018, petitioner's Chief Executive Officer sent a letter to the New York City Department of Finance, OATH Violation Processing, indicating that he was disputing all five violations, because he never received the notices of the violations (Respondents' Exhibit J). On August 27, 2018, OATH sent petitioner's Chief Executive Officer a letter advising him of the procedure for requesting a new hearing after a default (Respondents' Exhibit K). Petitioner did not formally request a new hearing until July 18, 2019, and OATH denied petitioner's motion for a new hearing on July 24, 2019, because "the request was submitted more than one (1) year after the date of the default decision and did not establish that exceptional circumstances prevented [petitioner] from appearing" (Respondents' Exhibits W, X).

Petitioner was issued three summonses (035315020L, 035373033X, and 035401852P) by the New York City Department of Buildings for violations of New York City Administrative Code § 28-118.3.2 for "occupancy contrary to that allowed by the [Certificate of Occupancy] or Buildings Department records" on December 1, 2018, January 8, 2019, and March 1, 2019, respectively (Respondents' Exhibits L, N, P). All three summonses were served in accordance with New York City Charter § 1049-a(d)(2) (*Id.*). A hearing on all three summonses was held before Hearing Officer Eva Marie Russo Lane on June 10, 2019, and she issued a decision on June 14, 2019, finding petitioner in

violation for all three summonses (Respondents' Exhibit V). According to the affidavit of service, Hearing Officer Eva Marie Russo Lane's decision was mailed on June 17, 2019 to petitioner's authorized representative at the address where he requested the decision be mailed (Respondents' Exhibits S, T, V). Petitioner appealed the decision on summonses 035373033X and 035401852P on October 31, 2019, after receiving a bill from the New York City Department of Finance (Respondents' Exhibit Y). Petitioner appealed the decision on summons #035315020L on November 14, 2019, after receiving a copy of the hearing officer's decision in the mail (Respondents' Exhibit AA). On November 15, 2019, OATH denied petitioner's appeal requests, because petitioner did not appeal within 35 days of the date of the hearing officer's decision (Respondents' Exhibit BB).

In support of the Article 78 motion, petitioner alleges that it was never served the summonses (Summonses 035293346R, 035293347Z, 035293348K, 035293430J, and 03529341L), or notices of the hearing date for the five violations, for which OATH found petitioner in default (Petition ¶¶ 9, 10). Petitioner claims that OATH's July 24, 2019 decision was "arbitrary and capricious," "affected by [an] error of law," and "in violation of due process," because petitioner never received notice of the violations (*Id.* at ¶ 11). As for the three violations relating to the Certificate of Occupancy, petitioner argues that the Hearing Officer's decision is not supported by substantial evidence, and that OATH's denial of its appeal was arbitrary and capricious (*Id.* at ¶ 17). In opposition, respondents maintain that the summonses, notices of hearing, and default decisions were served on petitioner in accordance with New York City Charter § 1049-a(d)(2), and that there were no extenuating circumstances that would warrant vacating petitioner's default on the five summonses more than one year after the decisions were issued (Respondents' Memorandum of Law in Opposition at 3). Respondents contend that petitioner's appeal of Hearing Officer Eva Marie Russo Lane's decision was denied, since it was filed

more than 35 days after the date of the decision, and therefore, this court may not review OATH's decision, because petitioner did not exhaust its administrative remedies (*Id.* at 3-4, 15).

New York City Charter § 1049-a(d)(2)(a)(ii) provides that "service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of... the commissioner of buildings...and over which the environmental control board has jurisdiction may be made by affixing such notice in a conspicuous place to the premises where the violation occurred" (NYC Charter § 1049-a(d)(2)(a)(ii)). New York City Charter § 1049-a(d)(2)(b) indicates that service under this provision may only be made after "a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article 3 of the civil practice law and rules or article three of the business corporation law" (NYC Charter § 1049-a(d)(2)(b); *see also Mestecky v. City of New York*, 30 NY3d 239, 246 [2017] (holding that "a single reasonable attempt to personally deliver the NOV at the premises" is required before affix and mail service may be used in accordance with the New York City Charter)). After the notice has been posted at the premises, "a copy shall be mailed to the respondent at the address of such premises" (*Id.*). If the respondent is not an owner, managing agent, or an occupant of the premises, "then a copy of the notice shall also be mailed to the respondent at such respondent's last known residence or business address" (*Id.*).

Section 1046 of the New York City Administrative Procedure Act provides that all parties must be given "reasonable notice" of a hearing, which must include the following: (1) "a statement of the nature of the proceeding and the time and place it will be held, if applicable;" (2) "a statement of the legal authority and jurisdiction under which the hearing is to be held, and a reference to the particular sections of the law and rules involved; and" (3) "a short and plain statement of the matters to be

adjudicated, including reference to the particular sections of law and rule involved" (New York City Administrative Procedure Act § 1046(a)).

Pursuant to 48 RCNY § 6-21(f), OATH has discretion, "in exceptional circumstances and in order to avoid injustice, to consider a Respondent's first request for a new hearing after default made more than one (1) year from the date of the default decision" (48 RCNY § 6-21(f)). Under 48 RCNY § 6-19(a)(1)(i), a party must appeal a hearing officer's decision within 30 days of the date of the decision, or within 35 days if the decision was mailed (48 RCNY § 6-19(a)(1)(i)).

A party must exhaust its administrative remedies before applying for relief under Article 78 of the CPLR (*Plummer v. Klepak*, 48 NY2d 486, 489 [1979]; *People ex rel. Cotton v. Rodriquez*, 123 AD2d 338, 339 [2d. Dept. 1986]). In determining whether to reverse a decision of an administrative agency under Article 78 of the CPLR, a court must "ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (*McCollum v. City of New York*, 184 AD3d 838, 839 [2d. Dept. 2020]). A decision is arbitrary and capricious when it is "without sound basis in reason or regard to the facts" (*Id.*). If the "determination is supported by a rational basis, [the court] must sustain the determination even if [it] concludes that it would have reached a different result than the one reached by the agency" (*Id.* at 840).

OATH's decision to deny petitioner's motion to vacate the five default decisions was not arbitrary and capricious, or affected by an error of law. Although petitioner claims that it never received the summonses, or notices of hearing, respondents have provided the summonses and affidavits of service that demonstrate that respondents complied with the affix and mail provision of the New York City Charter (Respondents' Exhibit G). The three summonses that were issued on November 27, 2017 state that the notices of violation were posted to the front door of the premises after the issuing officer confirmed that no one at the premises was authorized to accept service

(Respondents' Exhibits A, B, C). The two summonses that were issued on November 30, 2017 state that the notices of violation were posted to the front door, because the issuing officer found that the door to the premises was closed when he attempted to serve (Respondents' Exhibits D, E). The affidavits of service indicate that copies of the summonses/notices of the hearing date for all five summonses were mailed on January 2, 2018 to the address of the premises where the notices of violation were posted, and to the address on file with the New York State Division of Corporations (Respondents' Exhibit G). Respondents' service complied with the New York City Charter, because only a single attempt to serve process in accordance with the CPLR or the Business Corporation Law is required, before the issuing officer may resort to affix and mail service (*Mestecky*, 30 NY3d at 244, 246). The notices of hearing provided sufficient notice under the City Administrative Procedure Act, because the notices provided the date, time, and location of the hearing, the laws that were allegedly violated, a description of the violations, the dates of the violations, and the penalties (NYC Administrative Procedure Act § 1046(a); Respondents' Exhibit G). The notices also state that if petitioner failed to appear at the hearing, a default judgment would be issued against it (*Id.*). The hearing notices indicate that the hearing would be held pursuant to "NYC Charter Section 1049-a and related rules," and that petitioner would have an opportunity at the hearing to provide a defense to the charges (*Id.*). Under these circumstances, petitioner's claim that its due process rights were violated is without merit. OATH's decision to deny petitioner's motion to vacate the defaults was rational, because petitioner did not demonstrate extenuating circumstances for waiting more than one year after the decisions were issued, given that its August 2018 letter demonstrates that petitioner was aware of the decisions.

OATH's decision to deny petitioner's request for an appeal of Hearing Officer Eva Marie Russo's Lane's decision is not reviewable by this court. Petitioner did not file the requests until

October 31, 2019 (2 summonses), and November 14, 2019 (one summons) (See Respondents' Exhibits Y, AA). Although petitioner claims that the hearing officer's decision was not mailed to petitioner until November 6, 2019, the affidavit of service indicates that the decision was mailed on June 17, 2019 to petitioner's authorized representative who appeared at the hearing (Petition ¶¶ 18, 19; Respondents' Exhibits S, T, V). Therefore, since petitioner did not appeal within 35 days of the decision, pursuant to 48 RCNY § 6-19(a)(1)(i), petitioner failed to exhaust its administrative remedies, and this court cannot grant relief on the violations relating to the certificate of occupancy (*Cotton*, 123 AD2d at 339). Petitioner's motion is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher
J.S.C.
HON. PAMELA L. FISHER