

Lampkin v Raines

2022 NY Slip Op 32797(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 150633/2021

Judge: Arlene Bluth

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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. ARLENE BLUTH PART 14

Justice

-----X

VINCENT LAMPKIN

Petitioner,

- v -

JOHN RAINES AS MANHATTAN BOROUGH
COMMISSIONER OF THE DEPARTMENT OF BUILDING
OF THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 150633/2021

MOTION DATE 08/11/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for LEAVE TO FILE.

The motion by petitioner to vacate respondent's notices of entry for motion sequences numbers 001 and 002 is denied.

Background

In this Article 78, petitioner seeks to annul a decision by respondent finding that the Department of Housing Preservation and Development ("HPD") must complete required work at a building owned by petitioner.

The judge previously assigned to this case granted respondent's cross-motion to dismiss and denied the petition on October 27, 2021 (NYSCEF Doc. Nos. 58 and 59). Both decisions referenced the reasons stated on the record (*id.*). On May 10, 2022, respondent e-filed notices of entry for both decisions.

Petitioner seeks to vacate the notices of entry. He claims that respondent failed to include the entire order of the Court with the notice of entry by not including the transcript. Petitioner argues that he was prejudiced by respondent's failure by having to contact the Court reporter himself to get a copy of the Court's decision. In the alternative, petitioner asks for leave to appeal and directs the Court to read the petition as justification for this request.

In opposition, respondent observes that petitioner had until June 9, 2022 to file a notice of appeal (30 days from when respondent filed the notices of entry) and failed to do so. It argues that petitioner was fully aware of the fact that the Court had previously dismissed the petition in October 2021 and that petitioner had ample time to request the transcript. Respondent points out that petitioner attached a transcript to the instant motion. It argues that the instant motion is simply an attempt by petitioner to get more time to file a notice of appeal.

The Court observes that counsel for petitioner requested, and was granted, two adjournments in order to file a reply and did not submit anything.

Discussion

“The requirement that a party take an appeal within 30 days from service of an order or judgment with notice of entry is nonwaivable and jurisdictional in nature” (*W. Rogowski Farm, LLC v County of Orange*, 171 AD3d 79, 83, 96 NYS3d 88 [2d Dept 2019]). Here, there is no dispute that respondent filed the notices of entry on May 10, 2022. Instead of filing a notice of

appeal, for some reason, petitioner filed the instant motion to vacate the notices of entry on June 9, 2022 (the date respondent asserts is the deadline to file a notice of appeal).

The Court rejects petitioner's claim that the notices of entry are improper. Petitioner does not cite a single case for the proposition that a notice of entry has to include a transcript where the order references a decision made on the record. CPLR 5513(a) states that the time to appeal begins to run from when the "judgment or order" to be appealed from, along with "notice of its entry" is served. The orders were included in both notices of entry.


Moreover, petitioner's claim that he was somehow prejudiced by having to ask for the transcript is ludicrous. The judge previously assigned to this proceeding issued a decision in October 2021 and respondent waited until May 2022 to file a notice of entry. Petitioner and his counsel were both fully aware of the Court's decision for many, many months. He had ample opportunity to request the transcript. And, of course, this argument makes little sense because the Court denied the petition in its entirety, meaning that petitioner had every incentive to file his own notice of entry and appeal if he actually wanted to appeal the decision.

The Court also declines to grant petitioner's request for leave to file an untimely appeal. The Court observes that petitioner did not make any substantive arguments in favor of this claim; rather he argued that the Court should grant this request "for reasons stated in petitioner's Petition . . . and petitioner's Affirmation in Support of Notice of Motion to Amend Petition . . . and petitioner's Affidavit in Opposition" (NYSCEF Doc. No. 63, ¶ 11). A vague reference to papers previously filed is not sufficient to explain why he should be entitled to file an untimely

appeal. Moreover, respondent correctly argued that the decision dismissing the petition rendered petitioner’s potential appeal as an “appeal as of right” (CPLR 5701[a]). Petitioner did not explain how CPLR 5701(c), the provision cited in his notice of motion, would apply to the instant situation. That provision appears to apply to appeals of orders which are “not appealable as of right” (CPLR 5701[c]).

Accordingly, it is hereby

ORDERED that the motion by petitioner is denied in its entirety.

<u>8/19/2022</u>							
DATE			ARLENE BLUTH, J.S.C.				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER			
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>	REFERENCE