SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16

PART 16

PRESENT: ALICE SCHLESINGER
Justice

Nurzahan Begum

INDEX NO. 403072/09

MOTION DATE

-v-

MOTION SEQ. NO. 001

City of New York

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for ___

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is granted in accordance with the accompanying memorandum decision. The Clerk shall enter judgment accordingly.

RECEIVED
FEB 17 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
FEB 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: FEB 11 2010

ALICE SCHLESINGER

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---X

In the Matter of the Application of

NURZAHAN BEGOM,

Petitioner,

Index No. 403072/09
Motion Seq. No. 001

For a Judgment Pursuant to CPLR Article 78,

-against-

THE CITY OF NEW YORK,

Respondent.

---X

SCHLESINGER, J.:

Petitioner Nurzahan Begom is a 50 year-old Bengali immigrant who works as a street vendor selling peanuts, typically in the area of Lafayette and Canal Streets. Ms. Begom seeks to annul the decision by the respondent City of New York which denied her application to vacate her default in appearing at hearings in connection with two violations she received. Ms. Begom requests a new hearing so as to contest the violations and have any fines lowered so she can afford to pay them and have her license renewed. The City opposes the petition, arguing that its decision was "rational and reasonable, and made in accordance with the applicable law and rules." (Aff. in Opp. at ¶16).

Background Facts

At issue are two violations issued to Ms. Begom for allegedly selling peanuts too close to the crosswalk. Violation No. E 145 712 529 was issued on August 6, 2006 for selling at a mobile cart within two feet of the crosswalk, when the rule 17-315(e) of the Administrative Code requires that the cart be ten feet from the crosswalk. The Notice of Violation (NOV) set a hearing date of October 5, 2006. The second violation No. E 146 795 029 was issued on October 7, 2006 based on the same rule for vending four feet and three

inches from the crosswalk. The NOV set a hearing date of November 8, 2006. (Copies of both NOV's are attached as Exhibit A to the petition).

Ms. Begom asserts in her verified petition (at ¶4) that she brought both of these NOV's to Ifigenia "Effie" Tsatsaronis, the owner of Manhattan Food Vendors in Queens, who agreed to serve as Ms. Begom's authorized representative before the Environmental Control Board (ECB) for a fee of approximately $10 per ticket. To corroborate this assertion, Ms. Begom has attached to her petition (Exh. B) a copy of the business card she received from Ms. Tsatsaronis. Due to her medical problems, Ms. Begom was in and out of various hospitals when the NOV's were pending, but it was her understanding that Ms. Tsatsaronis was taking care of the matter for her.

That was not the case. In June 2009, pursuant to a New York City investigation of an alleged underground market in mobile food vending permits, Ms. Tsatsaronis was charged with Criminal Possession of a Forged Instrument in the Second Degree and Falsifying Business Records in the Second Degree in connection with her work with food vendors (see Press Release from the New Department of Investigation, Exh. C to the petition). Ms. Begom's NOV's were not attended to, a default was entered, and significant default fines were assessed. It appears that Ms. Begom first learned of these fines when she attempted to renew her license and could not because she could not afford to pay the fines. She then sought the assistance of the Street Vendor Project of the Urban Justice Center, a non-profit organization specializing in this field.

Before commencing this Article 78 proceeding, Ms. Begom's counsel sought to vacate the defaults and obtain new ECB hearings for the two violations at issue and five others. Specifically, on August 14, 2009 counsel completed an ECB form entitled

"REQUEST FOR A HEARING NEW HEARING DATE" (Exh. D to the petition). The pre-printed form stated: "Please explain why the respondent is/was unable to attend the hearing date." In the space provided for the reason, counsel wrote "Respondent was ill & unable to attend." Having heard nothing, counsel and Ms. Begom went to the ECB on September 14 where they were informed orally that a new hearing had been granted as to all but the two NOV's at issue, and that the fines due and owing for the two outstanding violations totaled $2,155.33.

Counsel then submitted a second request for a new hearing limited to the two NOV's at issue. This time counsel submitted a detailed letter dated September 28, 2009 in support of the request (Exh. E to the petition). In the letter, counsel confirmed that Ms. Begom had hired Effie's Food Vendors to represent her and was unaware of the defaults until she sought to renew her license. She further confirmed that Ms. Begom wished to contest the tickets and resolve the matter expeditiously so she could return to work. Again having received no response, counsel's office telephoned ECB on November 25 and spoke to a supervisor Valerie Dallas Vega. Ms. Vega informed counsel's office that Ms. Begom "had failed to provide a valid reason for her default and her request for a new hearing date had been denied." (See petition at ¶15). This Article 78 ensued.

Curiously, it appears that the ECB never responded in writing to either of Ms. Begom's applications to vacate her default. Further, as this Court confirmed with counsel for the City, the ECB did not retain copies of the default orders allegedly sent to Ms. Begom, but it does have available the blank forms which it typically utilizes. Thus, in reviewing the actions of the ECB here, this Court must accept as true all unrefuted statements in the verified petition which were made based on personal knowledge.

Discussion

The City contends that it properly found that Ms. Begom had failed to establish an adequate excuse for her default. Counsel contends that Ms. Begom has not provided sufficient proof of her medical issues or that she retained Ms. Tsatsaronis to act as her representative. In a footnote (at p. 6) counsel further states: "In any event, ECB's records indicate that petitioner or someone representing petitioner, appeared on multiple hearing dates to respond to the NOVs in question. Thus, petitioner's argument that she was unable to attend is questionable."

The City's argument has no logical basis. Rather than undermining petitioner's claim, the fact that someone appeared at the ECB on multiple occasions on Ms. Begom's behalf confirms that petitioner did not intend to willfully default. It further corroborates Ms. Begom's sworn statement in the petition that she had retained Ms. Tsatsaronis as her representative to appear on her behalf and had reasonably relied on that arrangement. The photocopy of the business card for Ms. Tsatsaronis attached to the petition supports petitioner's statement. Further, the criminal charges filed against Ms. Tsatsaronis relate to her work with vendors and lend credence to petitioner's assertion that Ms. Tsatsaronis failed to follow through with her agreement to represent Ms. Begom and allowed a default to be entered, unbeknownst to Ms. Begom.

In response to the City's opposition, Ms. Begom obtained and provided copies of her medical records to corroborate her assertion that her own medical issues interfered with her ability to tend to the violations. Records from Wyckoff Heights Medical Center confirm admissions in early September 2007 and again later that month for various medical

issues, including uncontrolled diabetes and hypertension, dizziness and fainting. Records from Woodhull Medical & Mental Health Center confirm Ms. Begom's admission there in November 2007 and again in December for psychotic episodes and unpredictable behavior requiring medication. When Ms. Begom appeared before this Court with counsel and her cousin present, petitioner represented that these records were just a sampling of Ms. Begom's numerous visits to medical facilities over the period in question due to ongoing problems.

In light of these facts, particularly when combined with Ms. Begom's limited skills in the English language and limited education, this Court finds that petitioner has adequately demonstrated a reasonable excuse for her default at the hearing, and the City's conclusion to the contrary lacks a rational basis.

The issue of a meritorious defense is a bit more complicated, as this Court is not convinced that Ms. Begom is even required to make such a showing. The City first points to 48 RCNY §3-82 which allows a vendor to request a hearing within 30 days of ECB's mailing of a default order. If the request is timely made in connection with a first default, ECB "shall grant the request." If the request is timely made in connection with a second or subsequent default, the request "may be denied by the executive director absent a showing of a meritorious defense." Thus, while the regulation allows the ECB to consider the issue of meritorious defense in connection with a second or subsequent default, it does not require such a showing by a vendor or mandate a denial of the hearing request absent a showing. The issue of meritorious defense is discretionary, at best.

The City also cites 48 RCNY §3-83 which governs requests made after the 30-day period referenced in §3-82. Subdivision (a) of the regulation mandates that such requests

"shall be granted where, within 90 days from mailing of the default order, respondent [the vendor] alleges a credible explanation and excuse for the default together with an allegation of a meritorious defense to the violation charged." While mandating that ECB grant a new hearing where excusable default and a meritorious defense are demonstrated, the regulation by implication leaves it to the ECB's discretion to determine how to proceed absent proof of a meritorious defense. This conclusion is confirmed by the language in subdivision (b) of the regulation, which states that:

> The executive director may designate categories of alleged defenses which **in the interest of justice** shall be grounds for a late stay of default and a hearing without regard to the requirements set out in paragraph (a) above. (emphasis added)

According to counsel for the City, no such categories have been officially designated to provide guidance for consideration of the interest of justice. Nevertheless, the regulation indicates, and ECB materials confirm, that the agency does not insist upon proof of a meritorious defense as a precondition to vacating a default. For example, the pre-printed ECB hearing request forms completed by Ms. Begom's counsel (Exhibits D and E to the petition) request a reason for the default but make no mention of a meritorious defense. The printout from the ECB Web site regarding hearings (Exh. E to City's opp.) similarly instructs the public that a reason for the default must be proffered, but it makes no mention of a meritorious defense. Further, and quite significantly, in the case at bar the ECB supervisor pointed only to an inadequate excuse, and made no mention of a meritorious defense, when explaining to petitioner's counsel the basis for the denial of Ms. Begom's request for a hearing (see petition at ¶15).

Thus, every indication is that the ECB can, and often does, vacate a vendor's default and grant a new hearing "in the interest of justice" absent a showing of a meritorious defense. Similarly, our courts can and often do allow issues to be heard on the merits "in the interest of justice and substantive fairness." *Bustamante v. Green Door Realty Corp.*, 2010 WL 274430 (NYAD 1st Dep't), citing *Tishman Constr. Corp. of NY v. City of New York*, 280 AD2d 374, 376-77 (1st Dep't 2001) (renewal granted, default vacated and matter directed to proceed on the merits in the interest of justice, where plaintiff's motion to vacate a default in opposing a dismissal motion was originally denied for lack of an affidavit of merit). Indeed, the courts have broad discretion to vacate defaults consistent with "the strong public policy of this State to dispose of cases on their merits." *Rodgers v. 66 East Tremont Heights Housing Development Fund Corp.*, 2010 WL 273535 (NYAD 1st Dep't), citing *Santora & Kay v. Mazzella*, 211 AD2d 460, 463 (1995).

In any event, Ms. Begom has suggested in her papers various points which she could raise at an ECB hearing in her defense, beyond simply disputing the claim that she was too close to the crosswalk. As the Appellate Division explained in *Street Vendor Project v. City of New York*, 43 AD3d 345, 346 (1st Dep't 2007), *lv denied* 10 NY3d 709:

> If a street vendor is fined, the vendor is free to argue in a future proceeding that the fine is so disproportionate that it is an abuse of discretion pursuant to CPLR 7803 (3) (see *Matter of Griffith v Aponte*, 123 AD2d 260 [1986], *appeal dismissed* 70 NY2d 641 [1987]). Whether the imposition of a particular fine – which under the fine schedule can range from $50 to $1,000 – constitutes an abuse of discretion is a sui generis inquiry turning on myriad factors, including the seriousness of the violation, the amount of the fine, recidivism, if any, by the vendor and the economic circumstances of the vendor (*see Matter of Mitchell v. New York City Dept. of Consumer Affairs*, 160 AD2d 487 [1990]; *Griffith, supra*).

What is more, the ECB cannot properly insist on a showing of excusable default or a meritorious defense where, as here, it has wholly failed to establish proper notice to Ms. Begom of the hearing dates or the mailing to her of the default orders. The City attached to its opposition as Exhibits B and D computer printouts of the history for each violation. In addition, as Exhibit F it provided a Notice of Appearance which the Vendors Help Center in Queens filed with ECB on behalf of Ms. Begom in February of 2008 and two orders of adjournment calling for the appearance of the officer at the hearings.[1] At oral argument, the City also produced purported affidavits of mailing of the default orders. A close look at these documents reveals countless inconsistencies and irregularities which undermine the evidentiary value of the documents.

For example, the NOV regarding Violation No. E 146 712 529 sets a hearing date of October 5, 2006 (Exh A to opp.). Yet, the City's counsel asserts (at ¶ 9) that a hearing was scheduled for September 11, 2006 – a date before the date on the NOV – and Ms. Begom was held in default for her failure to appear. The computer printout has an entry dated September 18, 2006 indicating a default, also a date which precedes the October 5 hearing date in the NOV but which differs from the default date alleged by counsel. Clearly, the entry of a default on a date which precedes the hearing date in the NOV is improper. The printout then contains numerous entries continuing through December 16, 2009 indicating that a hearing was "assigned" "adjourned" or "rescheduled". The last entry referring to a default is dated July 29, 2008. The violation was ultimately "docketed" on

[1] The orders of adjournment list the Vendors Help Center as the mailing address for notice, further confirming that Ms. Begom had hired the organization to represent her at the ECB and that they defaulted, unbeknownst to petitioner.

January 31, 2009. The printout contains an entry dated September 14, 2009 indicating that current counsel for Ms. Begom had gotten involved, that date being about a month after counsel filed their first request for a new hearing.

The entries regarding the second NOV E 146 795 029 are equally problematic. For example, the cover sheet for the computer printout (Exh. D to opp.) indicates "Hearing Date/Time: 06/09/08 0900." Page 3 has an entry for a default dated June 16, 2008. Yet the Order of Adjournment (Exh. F to answer) indicates that on February 27 the hearing as to both violations was last adjourned to July 24, 2008 for the appearance of the issuing officer.[2] The entry of a default before the adjourned date was improper.

The Affidavits of Mailing submitted by the City at oral argument are similarly lacking in evidentiary value. All the "affidavits" are computer lists of violation numbers and names and addresses, with a final page containing a sworn statement attesting to the purported mailing of a particular document to the designated individual on a date certain. The first affidavit states at the top "Page: 63; Mailing Date: 09/18/06; Report Date: 09/16/06; Type of Order: Default Order." Ms. Begom's name and a mailing address in Brooklyn also appear on page 63, next to Violation number 0146712529. On the next page provided, page 110, the top reads "Mailing Date: 9/20/06; Report Date: 9/20/06; Type of Order: Stip Order." At the bottom, an individual whose name is unclear signs to attest to a mailing on September 22, 2006. Thus, the date of the report precedes the pre-printed mailing date on page 63, page 110 contains a completely different pre-printed mailing date, and the

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[2]The Order of Adjournment appears to be mistakenly dated 2007, instead of 2008. It apparently was issued when the Vendors Help Center appeared on February 27, 2008, as it accompanies the Notice of Appearance which bears a date stamp of February 27, 2008.

signed affidavit refers to yet another mailing date. In light of these discrepancies, coupled with the fact that the City cannot produce an actual copy of the default order allegedly mailed, this Court finds that the ECB has failed to establish proof of mailing of the default orders to Ms. Begom or her representative.[3]

Without valid proof of service of the default order, the City cannot properly argue that Ms. Begom delayed unreasonably in seeking to vacate her default. Nor can they establish which of the cited regulations controls or which standard of proof applies, as those issues are dependent on the mailing date of the default order. At oral argument, counsel suggested that a vendor has one year from the issuance of the NOV to request a hearing. However, no such one-year limitation appears in any of the regulations cited by the City. To the extent the Website printout (Exh E to opp.) refers to NOV's more than one year old, it merely states that those hearing requests are evaluated on a "case-by-case basis." It in no way indicates a higher burden for the vendor or any other limitation. Even if it did, any such policy could not be applied here where the City failed to prove proper mailing to Ms. Begom of the Default Order. Without notice of the issuance of a Default Order, Ms. Begom would have no reason to go to ECB to request a new hearing.

For all these reasons, this Court finds that the decision by ECB to deny Ms. Begom's request for a new hearing is arbitrary and capricious and must be annulled. Accordingly, it is hereby

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[3]Some of the entries purport to indicate that a Default Order relating to Ms. Begom's violations was mailed to the Vendor Help Center, further corroborating Ms. Begom's assertion that she retained Effie at the Center to appear on her behalf.

ORDERED AND ADJUDGED that the petition is granted in its entirety, the decision by the City denying petitioner's request for a hearing in connection with the two violations E 145 712 529 and E 146 795 029 is annulled, and the Environmental Control Board is directed to proceed forthwith with hearings on notice to petitioner and her counsel.

This constitutes the decision, order and judgment of this Court. The Clerk shall enter judgment accordingly.

Dated: February 11, 2010

FEB 11 2010

J.S.C.

ALICE SCHLESINGER

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