

At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of January, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

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In the Matter of the Application of HIGHLAND APARTMENTS, LLC,

Index No: 508709/2019

Petitioner,

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

DECISION AND ORDER

- against -

Motion Sequence #1

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Respondents.

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

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2.
Opposing Affidavits (Affirmations).....	3.
Reply Affidavits (Affirmations).....	4, 5.

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Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action brought by Notice of Petition and Verified Petition by Petitioner Highland Apartments, LLC (hereinafter "the Petitioner"). The Petitioner is purportedly the owner of a property known as 78 Highland Place, Brooklyn, N.Y. (hereinafter "the Premises").

The Petitioner contends that the Respondents, the New York City Office of Administrative Trials and Hearings (hereinafter "OATH") should be compelled, pursuant to CPLR Article 78, to vacate three decisions/judgments in relation to violations that were granted on default as against the Petitioner. Specifically, the Petitioner argues that the underlying violations were not based upon its own conduct but that of T-Mobile Northeast, LLC (hereinafter "T-Mobile") and that similar violations were reduced to lesser class violations.

In opposition, OATH contends that its decision not to vacate the subject defaults was reasonable and that the Petitioner failed to provide a reasonable excuse for the default. OATH contends that the three violations at issue were the product of the Petitioner's failure to appear and that its decision not to vacate the defaults related to the Respondent's failure to provide a reasonable excuse pursuant to Title 48 RCNY 6-21. The Respondent further contends that the Petitioner has failed to show as part of its Petition how this underlying decision was arbitrary, capricious or an abuse of discretion. As such the Respondent argues that the Petition should therefore be denied and dismissed.

In the seminal holding of *Pell v. Board of Elections*, Judge Stephens, writing for the Court directs that a determination is an abuse of discretion, arbitrary and capricious when it is manifestly unjust.

At this time, it may be ventured that a result is shocking to one's senses of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals...There is no doubt that the reason for the enactment of the statute (CPLR 7803) was to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate.

Pell v. Board of Education, 34 N.Y.2d 222 [1974].

Notwithstanding this, "as long as the Board's determination is supported by a rational basis, and is neither arbitrary nor capricious, it will not be disturbed." *Nehorayoff v. Mills*, 95 N.Y.2d 671, 723 N.Y.S.2d 114 [2nd Dept, 2001] referring to *Pell*. Further, although Petitioner may seek same from this Court "...a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." *Matter of Hello Albert, Inc. v. East Moriches Fire Dist.*, 129 A.D.3d 966, 13 N.Y.S.3d

113 [2nd Dept, 2015], quoting *Matter of Dreier v. Lavalle*, 29 A.D.3d 790, 815 N.Y.S.2d 661 [2006] quoting *Pell*.

THE VIOLATIONS

As an initial matter, for purposes of clarity, there were apparently a total of ten violations, six of which are material to this motion.

1. **035236867L**, hearing held on June 4, 2018, reduced to a Class 2 violation, \$800.00. (the "1st Violation" Or "Initial Violation")
2. **35281185R**, hearing held on June 4, 2018, reduced to a Class 2 violation, \$800.00. (the "2nd Violation")
3. **35282157Y**, hearing held on March 12, 2018, Class 1 violation, \$12,000.00 on default. (the "3rd Violation")
4. **35317377N**, hearing held on April 30, 2018, Class 1 violation, \$12,000.00 on default. (the "4th Violation")
5. **035336792Y**, hearing held on June 25, 2018, Class 1 violation, \$25,000.00 on default. (the "5th Violation")
6. **035386954N**, issued on July 23, 2018, dismissed. (The "6th Violation")

A review of the Petition and the attached documents attached herein leads this Court to conclude that the underlying decision made by OATH was in fact arbitrary, capricious and an abuse of discretion. The Petition should therefore be granted as provided herein. The Initial Violation alleged that work was performed without a permit, in relation to work performed by non-party T-Mobile. The subsequent violations were issued alleging that the Petitioner failed to comply with the initial violation. The Court agrees with Petitioner that the decision by OATH to not address and resolve the 3rd, 4th and 5th Violations in the same manner it addressed and resolved the 1st, 2nd and 6th Violations was an abuse of discretion and arbitrary. The 3rd, 4th and 5th violations were either for the same conduct or for failure to comply with the Initial Violation.

In addition, the Petitioner has provided sufficient reason that the defaults (failure to appear) associated with the 3rd and 4th Violations were a product, in part, of a random scheduling of the hearings, March 12, 2018 and April 12, 2018, respectively. The hearing dates for the 3rd and 4th Violation were prior to the hearing date set for the 1st and 2nd Violations (June 4, 2018). As for the remaining violation 5th Violation, the Court finds that the default should also be vacated since it was issued on April 27, 2018, for failing to comply with the order in relation to the Initial Violation. Instead of being heard in conjunction with the 2nd Violation, it was scheduled and heard on a different day (June 25, 2018). The defaults resulted in a total fine of \$49,000.00. The 2nd and 5th Violations were both based on the failure to comply with the 1st Violation. The 1st and 2nd Violation were both scheduled for the same day, June 4, 2018.

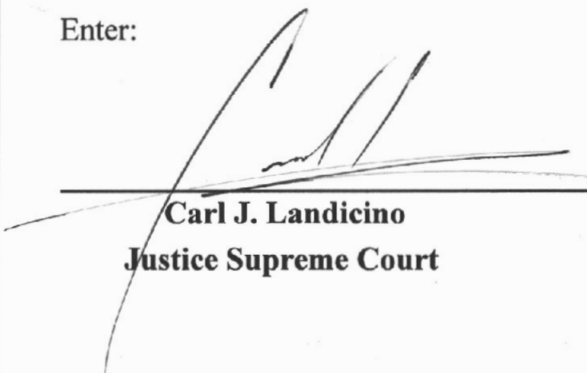
Petitioner claims that it was its belief that all the Violations were to be resolved on a single date. In light of the drastic disparity and gross inconsistency of the fines, the confusing scheduling of the hearings and the lack of reasoned determinations these matters should be heard on the merits. The Petitioner has established a reasonable excuse and a meritorious defense. Accordingly, and under these specific facts and circumstances, the Court finds that the Petition is granted, the matter is remanded to OATH and OATH is hereby directed to schedule new hearings for each of the violations to be heard on the merits. The defaults entered by OATH for 3rd, 4th and 5th Violations are hereby vacated, subject to further hearing in light of this holding. *See Yarbough v. Franco*, 95 N.Y.2d 342, 740 N.E.2d 224 [2000]; *Nowakowski v. Broadway Stages*, No. 2018-14192, 2020 WL 216731 [2nd Dept, 2020]; *Rosario v. Naranjo*, 165 A.D.3d 860, 861, 84 N.Y.S.3d 556, 557 [2nd Dept, 2018]; *Rodie v. Sahai*, 175 A.D.3d 1449, 106 N.Y.S.3d 609 [2nd Dept, 2019].

Based upon the foregoing, it is hereby so ORDERED that:

The Petition is granted to the extent that the subject defaults in relation to the 3rd, 4th and 5th Violations are accordingly vacated. The matter is remanded to OATH for new hearings on each of these Violations.

The foregoing constitutes the Decision and Order of the Court.

Enter:



Carl J. Landicino
Justice Supreme Court

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