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The Metamorphosis of the Environmental Control Board

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When coauthor of this article (Bailey) learned how to conduct real estate trials as a young lawyer in Supreme and Civil Courts, the Environmental Control Board (ECB) was where he spread his wings as a trial attorney. While other practitioners joked that the place was a kangaroo court where non-lawyers out-numbered lawyers 50 to 1, Bailey took each trial very seriously and relished the ability to go to trial at almost every hearing appearance. He saw three desks—one for the judge and another each for him and the prosecutor and remembered that it had the core of any court room albeit in a very small room (ranging from 10'x10' to 12'x12') that could barely fit the three attorneys, much less the witnesses.

Many years later, the prosecution of Department of Building violations, inter alia, has turned ECB into a serious place of business. Many elements caused this metamorphosis:

• The construction boom increased the activity and value of New York City real estate throughout the city.

• The adoption of various new regulations increased fines and penalties and repeat offenders saw fines double or triple.

• The new rules included the equivalent of a crime scene investigation task force to go after serial offenders.

• The invention of 311 made the ability to report building violations a phone call away.

• For restaurants, a new grading system made health violation grades posted on all restaurant front windows.

• Violations hit the Internet in real time to allow the public to discover more about where they lived and worked and to make decisions based on these facts.


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• The fervent building and rebuilding of city buildings required the removal of violations before a certificate of occupancy could be obtained.

The ECB became the central hearings administrative tribunal for 13 administrative agencies.1 While it has the jurisdiction to issue orders for compliance with the law, lax service of process and stiff default penalties assure it well serves its unspoken task of raising hundreds of millions of dollars in penalties to funnel to the city. This article will review the mission of the ECB, an analysis of the relevant governing laws, and the recent Appellate Division and lower court cases calling for the ECB to follow the same methods of service of process as in ordinary judicial proceedings.

The ECB Funding Engine

The NYC 2014 budget has a line of $805,041,000 for "fines and forfeitures." By contrast, the total operating expense of ECB's parent, the Office of Administrative Trials and Hearings, is $35,486,132, showing an operating profit for the ECB of roughly $770 million.2 This is what the city anticipates collecting, likely a small fraction of what it anticipates imposing.3

Defaults

New York City Charter §1049-a (§1049-a) charters ECB. Under §1049-a(d)(1)(d), "failure to plead or appear shall be deemed, for all purposes, to be an admission of liability and shall be grounds for rendering a default decision and order imposing a penalty in the maximum amount prescribed under law for the violation charged." While "shall be grounds" implies that the ECB might order a lesser default penalty, the ECB only orders the maximum penalty for every default. Compared to the penalties on contested or admitted violations, default penalties range from serious to draconian. For example, building code notices of violations (NOV) carry quintupled penalties upon ordinary defaults.4 However, for some violations, the standard penalty of $1,000 leaps to $25,000 for an "aggravated II default."5

48 RCNY §3-82 (§3-82) governs vacating a default before the ECB. Unless made in bad faith, vacatur of the default is automatic within 45 days after the original hearing date, but no vacatur lies after one year after the finding out about the NOV. Within that one-year period, improper service of the NOV is only a ground for vacating the default if accompanied by non-receipt of the NOV.

Service of Process

Among the agencies issuing ECB adjudicated NOV's are: Department of Buildings, Department of Environmental Protection, Fire Department, Department of Health & Mental Hygiene, Landmarks Preservation Commission, Department of Parks & Recreation, Police Department, Department of Sanitation, and Department of Transportation. Some of these agencies have their own methods for service of process in their enabling laws. §1049-a dictates methods of service, varying from agency to agency. All issuing agencies may use service methods under CPLR Article 3 (normal service of process in civil proceedings) and BCL Article 3 (including the infamous service on the Secretary of State for business entities).

In order for the ECB to obtain personal jurisdiction, the issuing officer must properly serve the NOV in accordance with §1049-a. This requires first that there be a reasonable attempt at personal service as provided for by CPLR Art. 3 or BCL Art. 3.6

Some agencies' may also effect service by delivering the notice "to a person employed

by the respondent on or in connection with the premises where the violation occurred," or by "affixing [the] notice in a conspicuous place to the premises where the violation occurred," together with mailing the violation thereafter,7 provided there has been a previous reasonable attempt at personal service.8

For such "reasonable attempt" under §1049-a, the server must know whom the server is serving, an individual or entity,9 know the service requirements for the individual or entity,10 and properly indicate on the affidavit of service that a reasonable attempt at personal service was made on an individual authorized to receive process.11 A "reasonable attempt" requires "at least two attempts at personal service, one during normal working hours and one attempt when a person working normal business hours could reasonably be expected to be home."12

Those forms of service of process set forth in the CPLR, BCL, and some of §1049-a allow for ECB judgments to be entered directly on the dockets of the Civil Court and Supreme Court. Service methods under the individual enabling laws allow for penalties to be assessed, but then the city must sue on those penalties to obtain judgments in the Civil or Supreme Courts. As to these latter, the judicial process opens defaults upon a showing of a reasonable excuse and a meritorious defense.13 However, the law forbids the judicial court to serve as a forum for collateral attack on the ECB determination, if there was a full and fair opportunity to mount the defense before the ECB.14

'Wilner v. Beddoe'

In Wilner v. Beddoe,15 the First Department unmaske d the ECB's practice of simply taking the affidavits of service as sufficient proof of the ECB's jurisdiction. In Wilner, the affidavits were defective on their face. However, the lower court found service to be proper, stating that service made in accordance with Article 3 of the CPLR is merely a permissible alternative and is not mandated.

This arose as follows: Under §3-82, anyone requesting to vacate a default must fill out the ECB vacating a default form. If the request is not received within 45 days, the applicant must check on the form one of the permissible reasons to open a default.

Outside the 45 days, "even a bona fide excuse will be unavailing to vacate the default, unless the original notice of violation was improperly served or the defaulting party was not a proper party in the first instance."16

ECB refusals to vacate a default, are reviewable solely under CPLR 7803, only allowing reversal of ECB if "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Courts rarely find these standards satisfied.17

Further, there is no due process requirement that ECB hold a testimonial hearing regarding service of process. Agencies are free to resolve disputed questions on papers alone.18 ECB therefore decides questions of propriety of service, solely by reading the affidavits of service. With regard to this, the Wilner trial court noted,

[A]pparent discrepancies between the applicants form and the ECB records, even if those discrepancies are factual in nature, …are resolved solely based upon the ECB records, in favor of the ECB, without the need for further factual development. If someone denies receipt of the Notice of Violation, as long as the affidavit of service by ECB's process server shows a prima facie valid service, the request to vacate the default is denied, without any further factual inquiry.19

However, at the Appellate Division, Wilner underlined the requirements in §1049-a to conform to the methods of service in ordinary judicial proceedings and emphasized that the ECB must not rubber stamp affidavits of service presented to it, but critically examine them for sufficiency under the statutes to which they purport to conform. Thus Wilner is landmark in holding the ECB to the rigors of its own regulations, disallowing ECB's practice simply assuming that the affidavits of service are valid.

Prior case law presaged Wilner. In Gallo v. City of New York,20 the court noted:
Ordinarily, an affidavit of service is sufficient to establish service. Here, however, each affidavit of service recites that affix and mail service was made after a reasonable attempt at service was made… The DOB's affidavits of service, however, do not set forth any specifics as to what reasonable attempts at service were made prior to resorting to affix and mail service. Although some affidavits of service state "no one available to accept the violation" the DOB inspector did not state what efforts were made to locate a person of suitable age and discretion.

Although Wilner is a very recent case, its ripples are beginning to appear. Matter of 985 Amsterdam Ave. v. Beddoe,21 cited to Wilner with regard to the service of process that is at the core of Wilner, but used Wilner as the core for its citation to Gutierrez v. Rhea,22 for the proposition that "rules of an administrative agency, duly promulgated, are binding upon the agency as well as upon any other person who might be affected." Under the Gutierrez rule as seen through the lens of Wilner, Beddoe vacates defaults before the ECB because inter alia, Beddoe found that the ECB's vacating a default form is both inconsistent with the regulations governing ECB and does not allow for other valid possibilities to vacate a default outside of the 45-day no-reason-needed period. Thus Wilner's enforcement of regulations against the ECB is expanded to include all areas in which ECB's adjudication methods and enforcement procedures as applied fail to adhere to the regulations as written.

Conclusion

Undeniably, the ECB has an immense caseload that requires efficiency in processing. Undeniably, the enforcement of the various quality of life laws and a real estate safe city is an absolutely necessary governmental function. Yet, our system of ordered liberty requires that any government be itself bound by the same laws that binds its citizens. This, unfortunately, is ECB's great failing. Many times in our society, due process protections start from decisions of our courts. And once again our courts have made the first move to stand up for law and order in imposing fines affecting persons and their businesses and real estate. Now we call upon the agency to step up and follow the law of these cases when processing and prosecuting the Department of Building and Health violations. Unfortunately, thus far, we have seen no evidence of progress.

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Endnotes:

1. http://www.nyc.gov/html/ecb/html/home/home.shtml.
2. These are rough figures and do not account for the funding the city receives from other fine collecting bodies such as the criminal courts.
3. http://www.nyc.gov/html/omb/html/publications/finplan06_13.shtml.
4. http://www.nyc.gov/html/dob/downloads/pdf/ecb_penalty_update.pdf.
5. Id.
6. §1049-a(d)(2)(b).
7. §1049-a(d)(2)(a)(i)-(ii), (d)(2)(b).
8. Id.
9. If it is an entity, the server needs to determine what type.
10. Which can be found in either CPLR Article 3 or BCL Article 3.
11. Gallo v. City of New York, 36 Misc.3d 1204(A) (2012) (including providing specifics as to what sort of reasonable attempts at personal service were made).
12. Oparaji v. City of New York, 2011 N.Y. Slip Op. 33265(U) (Sup. Ct. 2011).
13. Diuccio v. Soren, 96 AD3d 994, 947 NYS2d 563.
14. Kaufman v. Eli Lilly, 65 N.Y.2d 449 (1985).

15. 102 A.D.3d 582, 958 N.Y.S.2d 388 (2013).
16. 48 R.C.N.Y. §§3-82 (c)(1)(A),(c)(2).
17. Bailey and Treiman, New York Real Property Law Journal, Vol. 37, No. 2, "Whatever Happened to Article 78?"
18. 508 Realty Assocs. v. DHCR, 61 AD3d 753, 877 NYS2d 392 (AD2 2009).
19. Wilner v. Beddoe, 928 N.Y.S.2d 884, 894 (Sup. Ct. 2011) (reiterating the statements made by Helen Balsam, Legal Director of the ECB, in her affirmation).
20. 36 Misc.3d 1204(A) (2012).
21. 102332/2012, NYLJ 1202608296119, at *1 (Sup., NY, Decided May 22, 2013).
22. 105 A.D.3d 481, 964 N.Y.S.2d 1, 2013 WL 1458598 (N.Y.A.D. 1st Dept.), 2013 N.Y. Slip Op. 02453.