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| <b>Rapid Demolition Container Servs., Inc. v<br/>Maldonado</b>                                                                                                                                                                   |
| 2004 NY Slip Op 30354(U)                                                                                                                                                                                                         |
| November 8, 2004                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 105305/04                                                                                                                                                                                                         |
| Judge: Faviola Soto                                                                                                                                                                                                              |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. FAVIOLA SOTO  
Justice

PART 52

Rapid Demolition

- v -

Maldonado Jose

INDEX NO.

105305/04

MOTION DATE

10/12/04

MOTION SEQ. NO.

02

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 ...  
Notice of Cross-Motion — Affidavits — Exhibits  
Answering Affidavits — Exhibits

1

2

Replying Affidavits

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
NOV 10 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: November 8, 2004

**FAVIOLA SOTO**  
J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 52

-----X  
RAPID DEMOLITION CONTAINER SERVICES, INC.,

Plaintiff,

-against-

Index No. 105305/04

JOSE MALDONADO, Chairman of the City of  
New York Business Integrity Commission  
and THE CITY OF NEW YORK BUSINESS INTEGRITY  
COMMISSION,

DECISION & ORDER

Defendants.

-----X  
**HONORABLE FAVIOLA A. SOTO, J.:**

Defendants Jose Maldonado, Chairman of the City of New York Business Integrity Commission (BIC) and BIC move, pursuant to CPLR 3212, for summary judgment in their favor. Plaintiff Rapid Demolition Container Services, Inc. (Rapid) cross-moves for summary judgment in its favor.<sup>1</sup> This motion and cross-motion were randomly reassigned to this City Part following Justice Braun's order of October 7, 2004.

#### **BACKGROUND**

Rapid, which was incorporated on March 27, 2002, is in the business of hauling construction and demolition (C&D) debris, and demolishing buildings and removing the debris (C&D business).

On April 17, 2002, Rapid filed an application for a trade

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<sup>1</sup> In its cross motion, Rapid states that "there are facts sufficient to require a trial herein." Since Rapid is itself seeking summary judgment, the court concludes that the language constitutes a typographical error. In any case, on examining the papers, the court further concludes that the issues presented by both parties in the motion and cross motion are issues of law, and that they may be resolved without a trial.

waste removal license with BIC, pursuant to section 16-505 (a) of the New York City Administrative Code (Administrative Code), to enable it to remove putrescible and other wastes.

On July 29, 2003, BIC denied Rapid's application for a trade waste removal license on the ground, among others, that Rapid had filed false, incomplete, and misleading information in its license application. BIC ruled that, although Francine Najjar was listed in the license application as the sole principal of Rapid, the evidence established that her husband, Joseph Najjar, was an undisclosed principal. BIC also found that Rapid had failed to disclose its affiliation with Rapid Demolition Co. Inc., the business run by Joseph Najjar, which had been barred from conducting business with New York City and New York State because of the company's failure to pay prevailing wages, and other violations of law.

Rapid challenged the denial of its license in an Article 78 proceeding, arguing, among other things, that the decision of BIC was without rational basis, and constituted gender discrimination, and a denial of due process. Prior to the filing of its Article 78 petition, Rapid had entered into a stipulation with BIC allowing Rapid to continue to operate its C&D business pending the conclusion of the Article 78 proceeding. On February 23, 2004, the court rejected Rapid's arguments, and denied the petition. *Rapid Demolition Services, Inc. v Maldonado*, Sup Ct,

Kings County, February 23, 2004, Schneier, J., Index No. 31748/03.

On or about March 22, 2004, the drivers of two of Rapid's trucks were arrested for allegedly engaging in trade waste collection without a license, and the trucks were seized. Rapid and BIC then entered into two additional stipulations, permitting Rapid to continue to provide containers for the hauling of C&D materials from private residential premises, and to haul that C&D debris without obtaining an exemption from licensing requirements, pending the filing of this action by Rapid, and the determination of BIC's summary judgment motion. Pursuant to the stipulations, Rapid provided BIC copies of its billing receipts for March and April 2004. Rapid's billing receipts were accompanied by a cover letter from Francine Najjar, president of Rapid, which stated that "[i]f by any chance there are any billing customers you would like us to discontinue service to please advise us and we will."

In its amended complaint, Rapid alleges that

since its inception on or about March 4, 2002, plaintiff has been engaged solely in the construction and demolition hauling business, providing and distributing containers to haul demolition debris from residential premises, other non-commercial premises, and the premises of commercial establishments; hauling demolition debris therefrom; and demolishing residential and other non-commercial and commercial premises (hereinafter the "C&D business").

Amended Complaint, ¶ 5.

Rapid seeks declaratory judgment (and concomitant injunctive relief) on the amended complaint's three causes of action, to wit: (1) a person or firm engaged in hauling C&D material "solely from residential premises and other non-commercial premises is exempt from the licensing provisions of Local Law 42 without filing an exemption therefrom" (Amended Complaint, ¶ 26); (2) because neither Rapid's principal, nor her husband, has ever been engaged in a business which requires class seven or class three licenses, or has been a principal of a business required to be licensed, Rapid is not required to file an application for exemption from licensing requirements to operate its C&D business; and (3) where a C&D business files an application for an exemption from licensing requirements, after review of the application, BIC must approve such an exemption.

On May 24, 2004, Rapid filed an application for exemption from license requirements, pursuant to section 16-505 (a).

#### **STATUTORY SCHEME**

In 1996, in response to concerns about the influence of organized crime in the garbage and carting industry, Local Law 42 was enacted, transferring the authority to regulate the private collection of waste from the Department of Consumer Affairs to the New York City Trade Waste Commission, the predecessor of BIC.

The regulation of C&D waste involves several interrelated sections of the Administrative Code. Pursuant to section 16-505,

companies engaged in the collection of "trade waste" must obtain a license from BIC. Section 16-505 states as follows:

a. It shall be unlawful for any person to operate a business for the purpose of the collection of trade waste from the premises of a commercial establishment required to provide for the removal of such waste pursuant to the provisions of section 16-116 of this code, or the removal or disposal of trade waste from such premises, or to engage in, conduct or cause the operation of such a business, without having first obtained a license therefor from the commission pursuant to the provisions of this chapter. Notwithstanding the provisions of this subdivision, a *business solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation* shall be exempt from the licensing provisions of this subdivision where, except in regard to the principals of a business solely in either or both of the class seven or the class three category of licensees as defined in rules previously promulgated by the commissioner of consumer affairs pursuant to subchapter eighteen of chapter two of title twenty of this code,<sup>2</sup> no principal of such applicant is a principal of a business or a former business required to be licensed pursuant to this chapter or such former subchapter eighteen. Grant of such exemption shall be made by the commission upon its review of an exemption application, which shall be in the form and contain the information prescribed by rule of the commission and shall be accompanied by a statement by the applicant describing the nature of the applicant's business and listing all principals of such business.

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<sup>2</sup> Pursuant to the regulations of the Department of Consumer Affairs, "[t]he Class 3 license allows the transportation of materials originated and produced solely in the business operation of the permittee" with certain exceptions not pertinent here, and "[t]he Class 7 license allows the transportation of construction and demolition debris or waste materials exclusively, that is, non-putrescible waste materials resulting from building demolition, construction, alteration and excavation," not including asbestos or asbestos containing materials. 6 RCNY § 2-172 (d) & (g).

b. It shall be unlawful for any person to remove, collect or dispose of trade waste that is generated in the course of operation of such person's business, or to operate as a trade waste broker, without first having registered with the commission.

Administrative Code § 16-505 (f) (emphasis supplied).

"Trade waste" is defined for the purposes of section 16-505 as follows:

(1) all putrescible and non-putrescible materials or substances, except as described in paragraph (2) of this subdivision, that are discarded or rejected by a commercial establishment required to provide for the removal of its waste pursuant to section 16-116 of this code as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, including but not limited to garbage, refuse, street sweepings, rubbish, tires, ashes, contained gaseous material, incinerator residue, *construction and demolition debris*, medical waste, offal and any other offensive or noxious material.

Administrative Code § 16-501 (f) (emphasis supplied).

Section 16-116 of the Administrative Code provides the following:

a. Every owner, lessee or person in control of a commercial establishment shall provide for the removal of waste by a business licensed by the New York city trade waste commission as required by subdivision a of section 16-505 of this code or register and obtain a registration number from the New York city trade waste commission as required by subdivision b of section 16-505 of this code to remove its own waste except as provided in subdivision c of this section....

b. Every owner, lessee or person in control of a commercial establishment shall post a sign which states clearly and legibly the trade or business name, address, telephone number and the day and time of the pickup of the trade waste removal business presently serving the establishment, or if the commercial establishment removes its own waste, a registration

number issued by the New York city trade waste commission shall be posted. Such sign or registration number shall be prominently displayed by affixing it to a window near the principal entrance to the commercial establishment so as to be easily visible from outside the building. If this is not possible, such sign or permit shall be prominently displayed inside the commercial establishment near the principal entrance to the premises.

Administrative Code § 16-116.

### **This Action**

The dispute between the parties regarding the interpretation of the statutory and regulatory scheme focuses on three areas: first, the meaning of the phrase "commercial establishment," as used in sections 16-116, 16-501, and 16-505 of the Administrative Code in defining trade wastes; second, the significance of the language governing the exception from licensing for collection of trade wastes; and finally, the extent, if any, of BIC's discretion to deny an exemption from the licensing requirement.

### **Commercial Establishment**

The term "commercial establishment" is used repeatedly in Local Law 42, both in defining trade wastes, directing who must obtain a licensed waste hauler, and stating who must obtain a license, or an exemption from licensing, for removal of waste. Nowhere in the Administrative Code is the term "commercial establishment" defined.

In its amended complaint, Rapid posits that commercial establishments are establishments such as retail stores,

restaurants, mercantile, manufacturing, and similar establishments. See Amended Complaint, ¶ 22. Rapid contends that occupants of residential premises and other non-commercial premises<sup>3</sup> are not required to comply with section 16-116 with respect to the removal of their wastes; that C&D wastes generated at such locations do not constitute trade wastes, pursuant to section 16-501; and that such C&D wastes are not governed by the licensing requirements of section 16-505. Since, according to Rapid, it only removes C&D debris from residential and other non-commercial premises, it is not required to obtain a license from BIC or to obtain an exemption from the licensing requirements.

BIC argues that the term "commercial establishment" refers to the entity involved in the generation of waste, and not the location of the waste. Therefore, waste resulting from a construction or demolition project carried out by a contractor is encompassed by the licensing scheme, because the contractor constitutes the "commercial establishment responsible for removing its wastes," regardless of whether the project was located at a business or a residence. According to BIC, even where the waste is generated by a do-it-yourself homeowner, who merely hires a carting company to provide bins and remove the debris, the carter constitutes the "commercial establishment"

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<sup>3</sup> In the letter accompanying billing receipts submitted to BIC pursuant to stipulation, Francine Najjar indicates that Rapid services Kingsboro Psychiatric Center.

responsible for removing wastes.

Generally, an agency's interpretation of the statute and regulations under which it functions is given great deference if that interpretation is not unreasonable or irrational. *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988); *Matter of Arif v New York City Taxi and Limousine Commn.*, 3 AD3d 345, 346 (1<sup>st</sup> Dept 2004).

At least to the extent that BIC interprets the phrase "commercial establishment" to apply to the entity that generates the waste, the court does not find BIC's interpretation to be either irrational or unreasonable. Thus, a commercial contractor which carries out either construction or demolition, and contracts to have the wastes removed from the site, constitutes a "commercial establishment" for the purposes of the scheme, the wastes generated constitute trade wastes, and the licensing provisions are triggered.

There is no need for the court to rule on the interpretation urged by BIC, that the carter constitutes the "commercial establishment" when the wastes are generated by a do-it-yourself homeowner, or to opine on whether such an interpretation can withstand scrutiny, in light of the fact that, the provision which defines "trade waste" as putrescible and non-putrescible substances that are "discarded or rejected by a commercial establishment" focuses on the generation of those wastes, rather

than merely on the entity that carts them away for disposal.

Nor does the court opine on Rapid's argument, premised on the assumption that a business of disposing of trade wastes is not covered by Local Law 42 where it is solely in the business of delivering waste bins to homeowners to haul away the C&D material generated in the course of their own do-it-yourself projects. That is not the case here. For, even assuming that Rapid only picks up C&D material generated at residences, the receipts submitted by Rapid, pursuant to its stipulations with BIC, demonstrate that, at those sites, it regularly picks up materials that are generated by commercial construction or demolition contractors.<sup>4</sup>

#### **Exception to Licensing Requirements**

Rapid contends that, because neither Francine Najjar, nor her husband Joseph Najjar, has ever been engaged in the class seven or the class three category of licenses, and neither has been a principal in a business required to be licensed, Rapid is exempt from the licensing requirements of section 16-505 of the Administrative Code, and need not file an application for exemption.

Rapid's argument turns on the following language in section 16-505 (a) which sets forth those entities exempt from the

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<sup>4</sup> In any case, Rapid's receipts also suggest that it also picks up wastes at some commercial locations, as its amended complaint suggests at paragraph 5.

licensing requirements:

Notwithstanding the provisions of this subdivision, a business solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation shall be exempt from the licensing provisions of this subdivision where, except in regard to the principals of a business solely in either or both of the class seven or the class three category of licensees as defined in rules previously promulgated by the commissioner of consumer affairs pursuant to subchapter eighteen of chapter two of title twenty of this code, no principal of such applicant is a principal of a business or a former business required to be licensed pursuant to this chapter or such former subchapter eighteen.

According to BIC's interpretation of the provision, any business engaged solely in the removal of C&D materials need not obtain a trade waste license, so long as the principal of that business is not, or was not, the principal of a business required to be licensed pursuant to Local Law 42. The exception to the exemption from licensing does not apply, however, to companies whose principals were also the principals of another C&D business.

Plaintiff's request for relief before this court, however, is not that BIC erred by not determining Rapid's licensing exemption application. Rapid goes further, and asserts that because its business and principal fall within the exemption language, it need not even *apply* for an exemption from licensing. In so arguing, Rapid appears to ignore the following sentence in section 16-505, which is quite clear, and which states:

Grant of such exemption shall be made by the commission upon its review of an exemption application, which shall be in the form and contain the information prescribed by rule of the commission and shall be accompanied by a statement by the applicant describing the nature of the applicant's business and listing all principals of such business.

Administrative Code § 16-505 (a) (emphasis supplied).

Accordingly, a business which argues it is exempt from the licensing requirement, must seek that exemption by applying and providing the information mandated pursuant to 17 RCNY § 2-03. If the exemption is granted, the business will be issued a registration. See Administrative Code § 16-507 (a), which refers specifically to "a business issued a registration by reason of the grant of an exemption from the requirement for a license pursuant to section 16-505 of this chapter."

Furthermore, since, as Rapid indicates, its business encompasses the actual construction and demolition of buildings, and the removal of that C&D material which it generates, Rapid is required to register as a self-hauler, pursuant to section 16-505 (b) which states: "[i]t shall be unlawful for any person to remove, collect or dispose of trade waste that is generated in the course of operation of such person's business . . . without first having registered with the commission."

Therefore, Rapid's argument that it need not even apply for an exemption from the licensing requirement fails.

### **BIC's Authority Regarding License Exemptions**

Finally, in its third cause of action, Rapid contends that once it has applied for an exemption from licensing pursuant to section 16-505, BIC is required to grant the exemption. Rapid relies on the language of section 16-505 (a) which states: "Grant of such exemption shall be made by the commission upon its review of an exemption application...." The Appellate Division has recently rejected the argument that grant of such an exemption is mandatory, stating:

Administrative Code § 16-509 (b) permits the BIC to "refuse to issue a license or registration to an applicant ... who has knowingly failed to provide the information and/or documentation required by the [BIC]" ... (emphasis added). In sum, the BIC may "review" the application for an exemption registration (Administrative Code § 16-505 [a]), may investigate any matter within its jurisdiction (Administrative Code § 16-504 [c]), and may deny such application in those cases where the applicant fails to provide the necessary information, or knowingly provides false information (Administrative Code § 16-509 [b]).

*Matter of Attonito v Maldonado*, 3 AD3d 415, 418 (1<sup>st</sup> Dept 2004).

Therefore, Rapid's argument that BIC must grant an exemption on the mere filing of an application fails.

Accordingly, it is hereby

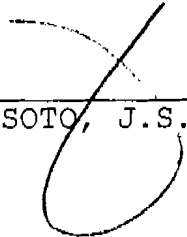
ORDERED that defendants' motion for a summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: New York, New York  
November 8, 2004

ENTER:

  
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FAVIOLA A. SOTO, J.S.C.

Copies mailed

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