

**Matter of Chinatown Carting Corp. v Business
Integrity Commn. for City of N.Y.**

2007 NY Slip Op 30667(U)

February 14, 2007

Supreme Court, New York County

Docket Number: 0109473/2006

Judge: Walter B. Tolub

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PRESENT:

WALTER B. TOLUB

PART 15

Index Number : 109473/2006

CHINATOWN CARTING

vs

BUSINESS INTEGRITY COMMISSION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 12/21/2006

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This Judgment, Order, Decision, or Determination of the County Clerk and not the County Clerk's Office. To obtain copies of this Judgment, Order, Decision, or Determination, you must appear in person at the Judgment Clerk's Desk (Room 1415).

IN ACCORDANCE WITH RULE 141.1(b) MEMORANDUM DECISION

Dated: 2/14/07

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 15

-----x
IN THE MATTER OF CHINATOWN
CARTING CORP.,

Petitioner,

DECISION and JUDGMENT

For a Judgment Pursuant to CPLR Article 78

v.

Index. No. 109473/06

THE BUSINESS INTEGRITY COMMISSION
FOR THE CITY OF NEW YORK,

Respondent.

-----x
TOLUB, WALTER, J.S.C.

Petitioner, Chinatown Carting Corp. ("Chinatown") moves for a judgment annulling the June 20, 2006 decision of respondent, The Business Integrity Commission for the City of New York ("BIC") denying Chinatown's application for renewal of its license to operate as a trade waste business. Chinatown asserts that BIC's decision was arbitrary, capricious and not supported by substantial evidence.

BACKGROUND

In the 1950's, Nicholas Tragni, Sr. ("Nicholas, Sr.") and his partner, Anthony DeMarco, ("DeMarco") established Chinatown, a waste management business. In 1986, DeMarco sold his share of the business to Nicholas, Sr.'s wife, Irene Tragni ("Irene") and in 1991, Nicholas, Sr. and Irene transferred ninety-two percent (92%) of Chinatown's corporate stock to their four sons: Damon, Sr., Wayne, Peter, and Nicholas, Jr. When Nicholas, Sr. died, his shares passed to Irene.

In 1996, Chinatown submitted an application to BIC to be licensed as a trade waste

This judgment is final and subject to appeal. To obtain a writ of certiorari, the party must appear in person at the Justice's Desk on 12/15/06.

business. Following a background check, BIC staff advised Chinatown that it would recommend that Chinatown's license application be denied. However, before BIC rendered a final decision on the licensing application, Chinatown sought BIC's approval to sell its assets to a new entity, Chinatown Waste Corp., whose principal was Damon, Sr.'s son, Damon, Jr. In 2002, before the sale of Chinatown's assets was approved or consummated, Irene died, and her shares in the company passed to her four sons. The proposed sale of Chinatown's assets was thereafter abandoned, and litigation among the Tragni brothers ensued.

Notwithstanding the litigation, BIC issued a licensing order permitting Chinatown to operate a trade waste business, effective April 1, 2003. By signing the licensing order, Chinatown consented to be bound by the following conditions:

1. "The applicant shall timely file all tax returns and timely pay all taxes due and owing in any jurisdiction."
2. "The applicant shall not employ, retain the services of, or do business with any person or entity. . .who has consented or agreed not to be involved in the trade waste industry."
3. "The Applicant shall have in place a monitor, with the mission of monitoring the good character, honesty and integrity of the Applicant"
4. "The applicant shall fully fund the operations of the monitor and shall pay all fees and expenses of the monitor and other professionals at usual and customary rates within thirty days of presentment."

(Verified Ans., Ex. C, pp. 4-6).

By signing the order, Chinatown also agreed "that violation of any one of the conditions constitutes sufficient grounds for revocation of its license" (Verified Ans., Ex. B, p.10).

On April 4, 2003, Damon, Sr. executed a debarment affidavit prohibiting him from working, or being otherwise involved in the trade waste industry for the remainder of his life.

Damon Sr.'s debarment was based on his involvement in a conspiracy that involved illegal activities¹ related to the trade waste industry in New York City (Verified Ans., Ex. D). On April 9, 2003, Peter executed a similar debarment affidavit. Peter's debarment was based on his 1981 conviction for an industry related felony (Verified Ans., Ex. H).²

On February 14, 2005, Chinatown submitted a license renewal application to BIC. Commission staff conducted an investigation and, on April 28, 2006, the staff issued a 26 page opinion recommending that BIC deny the renewal application because: 1) Chinatown failed to pay taxes related to its business; 2) Chinatown sought to defraud its creditors, including the State of New York and the City of New York, by conveying money into personal checking accounts and 3) Chinatown otherwise violated the terms of its licensing order by employing Peter Tragni after his debarment and failing to timely pay all fees and expenses of the monitor. Chinatown was given an opportunity to respond to this recommendation.

After several delays, Chinatown submitted a response to the staff recommendation wherein it argued that all sales tax returns for 2003 through 2006 had been filed and all sales tax had been paid. It attached documents evidencing the satisfaction of two state tax judgments in the amount of approximately \$85,000 and it attached several tax returns, some of which were

¹ Damon Sr. was part of a conspiracy resulting in the indictment of eighteen individuals for charges including commercial bribery, grand larceny, money laundering, and restraint of trade (see, Verified Answer, Exhibit B, June, 2006 BIC Order denying Chinatown's application for renewal of its license, p. 10).

² In 1981, Peter was arrested and charged with burglary in the third degree and attempted burglary in the third degree (People v. Tragni, 449 NYS2d 923 [May 5, 1982]). These charges were based on his participation in a scheme to remove a safe from a Manhattan jewelry store by drilling holes through an adjacent wall and into a 3,000 pound safe. Apparently, Peter and another Chinatown employee positioned two of petitioner's trucks in front of the store and revved their engines in an attempt to both shield the illicit activity from public view and to mask the sounds of the drills being used on the targeted building (see also, Verified answer p. 18; Exhibit B, Exhibit I).

unsigned. Wayne and Chinatown's attorney, Timothy P. Coon ("Coon"), also argued that the \$472,689 state tax judgment was filed against Damon Tragni, Sr. as the responsible party and that the judgment is not Chinatown's debt. They also claim that, at this time, there is an ongoing dispute with New York City regarding the amount of corporate tax owed by Chinatown. Wayne also claimed that the "Wayne Tragni Management" bank account was established to permit Chinatown to pay its creditors, not to defraud them.

In his June 5, 2006 affidavit to BIC, Coon averred that after April 2003, Peter Tragni had no involvement with the operation of Chinatown and all the work Peter did for Chinatown was in connection with Chinatown's pending litigation against Damon, Sr. Coon also stated that, since his debarment, Peter has been threatening to ruin Chinatown.

Moreover, both Wayne and Coon stated that Chinatown did not pay the monitor's fees in a timely fashion because in 2003 and 2003 it had other financial pressures and did not remain current with every obligation. Wayne asserted that all of the Monitor's fees have now been paid.

On June 20, 2006, BIC issued its decision denying Chinatown's license renewal application.

The June 20, 2006 Opinion of BIC

A. BIC found that Chinatown violated the terms of its licensing order by employing Peter Tragni and funneling money to Peter after he was debarred from the carting industry. BIC found that from the date of the debarment until December 2004, Peter performed waste flow surveys on behalf of Chinatown and solicited business from potential customers on behalf of Chinatown. BIC also found that Peter retrieved Chinatown's mail from the post office and operated vehicles and removed and transported containers on behalf of the Chinatown. BIC found that Peter also assisted, supervised and gave directions to Chinatown's employees and followed the trucks of a

rival carter and recorded the rival's activity. In support of these findings BIC cited the transcript of a telephone conversation between Peter and Nicholas, Jr. (Verified Ans. Ex. B, p. 14); Peter Tragni's testimony (Verified Ans., Ex.S) and the affidavit of Timothy P. Coon (Petition, Ex. 1, pp.13-15).

BIC also found that, following his debarment, Peter received numerous checks from the "Wayne Tragni Management Account" exceeding the \$50,000 value of his shares in Chinatown³. The BIC cited Wayne's September 22, 2003 deposition wherein he testified that following Peter's debarment, Chinatown paid Peter a \$15,000 profit distribution, or a retroactive pay increase (p. 46-48).⁴ Thereafter, in its response to the staff recommendation, Chinatown claimed that the excess payments represented back wages. In addition, BIC stated:

The Applicant's response also clearly admits that in addition to making prohibited payments to Peter, the Applicant, through its attorney, 'designated Peter' to 'follow' a competitor's truck, to 'provide a listing' of a competitor's customers, to 'review all of the old Chinatown banking statements and categorizing (sic) checks and charge card purchases. It does not matter whether the Applicant or the Applicant's attorney 'designated' or directed Peter to perform tasks that were in clear violation of his debarment affidavit and the Applicant's Licensing Order. In either case, the response concedes that the Applicant knowingly "employed, retained the services of, or did business with" a person who is debarred from the trade waste industry in New York City.

(Petition, Ex. 1, pp. 15-20).

B. BIC found that Chinatown failed to timely pay its taxes and other government

³ Following Peter's debarment, the remaining brothers, Wayne and Nicholas Jr., purchased Peter's shares which were valued at \$50,000 (Petition, Ex. 3, para. 15).

⁴ In fact, bank records revealed that between May 28, 2003 and December 20, 2004, Peter received \$82,248 from Chinatown.

obligations because, according to a June 6, 2006 judgment and lien search, it owed over \$1 million in taxes, interest and penalties to New York State and New York City and that Chinatown has only submitted proof that one judgment cited in the staff recommendation, in the amount of \$57,557 was satisfied. BIC stated that on numerous occasions, prior to issuing the denial, it informed Chinatown that it must resolve all its tax debts or enter into a formal agreement to do so prior to the expiration of its license, but, despite these warnings, the judgments remain unsatisfied and no formal agreements with the tax authorities exist. BIC found that Chinatown's continued denial of these liabilities is demonstrative of its lack of good character, honesty and integrity (Petition, Ex. 1, pp. 24-27).

C. BIC found that Chinatown did not dispute that it failed to pay the Monitor's fees and expenses within thirty (30) days of presentment in violation of the licensing order. BIC also found that Chinatown's excuse for this failure-- that it had to meet other financial obligations-- was unpersuasive (Petition, Ex. 1, pp. 27-29).

D. BIC found that there was substantial evidence that Chinatown sought to defraud its creditors, and in particular the State of New York, by conveying money into personal checking accounts. BIC stated that, at his deposition, Wayne testified that he opened the "Wayne Tragni Management Account" after the State's second tax levy on Chinatown's business account in order to keep the business active and not have the State close him out (Verified Ans., Ex. Z, pp. 488, 570).

Following BIC's licensing decision, Chinatown commenced this Article 78 proceeding.

Chinatown's Argument in Support of the Petition

Chinatown argues that BIC ignored or disregarded the evidence it presented to refute the staff recommendations. It claims that Peter was not employed by Chinatown following his

debarment and that it submitted transcriptions of telephone messages from Peter to Nicholas to BIC that demonstrate that Peter was vindictive and that he only claimed to be involved in Chinatown's business in order to destroy Chinatown. Moreover, Chinatown claims that Peter's picking up mail was merely a menial task that does not constitute employment in the trash carting industry and that Peter's reviewing bank statements and following a competitor's truck were related to the litigation against Damon, Sr. Chinatown also argues that the excess money paid to Peter was back wages and that the Monitor overseeing Chinatown's business never reported any untoward activity between Chinatown and Peter.

As for Chinatown's alleged tax liability, Chinatown argues that it has filed all outstanding New York State and New York City tax returns and paid all its New York State taxes. Chinatown argues that the \$472,650 tax judgment was filed against Damon Tragni, Sr. , not Chinatown. It also contends that it is involved in an ongoing dispute with New York City regarding the extent of its tax liability.

Chinatown also argues that it established the "Wayne Tragni Management Account" as a way to pay its creditors, not defraud them and that all of the Monitor's expenses have now been paid.

DISCUSSION

Because of a history of corruption and anti-competitive conduct in the commercial carting industry, the New York City Council, in 1996, enacted comprehensive remedial legislation, now known as Local Law 42 of 1996, designed to remedy these abuses. Section 1 of the law, states in pertinent part:

Enactment of this chapter is intended to enhance the city's ability to address organized crime corruption, to protect businesses who utilize private carting

services, and to increase competition in the carting industry with the aim of reducing consumer prices.

LOCAL LAW 42

Upon the enactment of Local Law 42 of 1996 (See, Title 16-A of the New York City Administrative Code, Sections 1 et seq.), BIC's predecessor, the Trade Waste Commission, assumed regulatory authority for licensing businesses that remove, collect or dispose of trade waste. Local Law 42 provides that all trade waste businesses must be licensed by BIC and that BIC may refuse to issue a license to any applicant who it determines, in the exercise of its discretion, lacks good character, honesty and integrity. Pursuant to Local Law 42, in determining whether to issue a license to an applicant, BIC may consider, among other things, whether the applicant has provided truthful information in connection with its application and whether it has failed to pay any tax, fine, penalty or fee related to the applicant's business for which judgment has been entered by an administrative tribunal of competent jurisdiction.

STANDARD OF REVIEW

Administrative agencies enjoy broad discretionary power when rendering determinations on matters they are empowered to decide. Judicial review of an agency's exercise of discretion is limited in scope. Section 7803 of the CPLR provides in pertinent part:

The only questions that may be raised in a proceeding under this article are:

* * *

3. whether 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, including abuse of discretion as to the method or mode of penalty or discipline imposed;

In Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974) the Court of Appeals stated:

The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.

(Internal citations omitted).

Under the arbitrary and capricious test a court will review the rationality or reasonableness of the agency's determination. The reviewing court does not examine the facts de novo and will overturn the administrative action only when there is no rational or reasonable basis for that action (Marsh v. Hanley, 50 A.D.2d 687 [3rd Dept 1975]). A rational or reasonable basis for an agency determination exists if there is evidence in the record to support its conclusion (Sewell v. City of New York, 182 A.D. 2d 469 [1st Dept 1991], app. denied, 80 N.Y.2d 756 [1992]).

Under these standards, it cannot be said that BIC's actions were arbitrary or irrational as there is sufficient evidence in the record to support BIC's conclusion that Chinatown violated one or more of the terms of its Licensing Order.

Peter Tragni's Services for Chinatown Carting

The administrative record contains sufficient evidence to support BIC's finding that, despite Chinatown's agreement in the licensing order that it would "not employ, retain the services of, or do business with any person or entity . . . who has consented or agreed not to be involved in the trade waste industry" (Verified Ans., Ex. C), it retained the services of Peter

Tragni, who on April 10, 2003, signed a debarment affidavit in which he agreed not to participate in any way in the affairs of any waste collection business in New York City (Verified Ans., Ex H).

The BIC considered Chinatown admission in its response to BIC staff's recommendation that it used Peter Tragni's services to investigate certain aspects of Chinatown's claims in litigation against Damon, Sr. and that Peter reviewed Chinatown's old bank statements at the request of its attorney to further assist with that litigation (Petition, Ex. 4, pp.8-9 and Ex. 3 p.7).

BIC also considered Peter Tragni's March 14, 2005 affidavit wherein he admitted that between April 10, 2003 and December 2004, at the direction of Wayne and/or Nicholas Tragni, he: 1) followed a competitor's trucks and recorded the identity of the competitor's customers; 2) performed waste flow surveys for Chinatown's customers; 3) solicited business from potential customers on behalf of Chinatown; 4) drove trucks and picked up and removed containers on behalf of Chinatown and 5) picked up mail from the post office and delivered it to Chinatown (Verified Ans. Ex. S). The BIC found that these admissions were corroborated by other evidence including Chinatown's admissions in its response , and the transcript of a telephone message from Nicholas, Jr. to Peter in early January, 2004 wherein Nicholas clearly stated that Chinatown had asked Peter to follow a competitor's trucks and record information about the competitor's customers (Ans. Ex. V, pp. 14-16).

Moreover, BIC's finding of a continuing financial relationship between Chinatown and Peter was supported by bank records showing that Chinatown paid Peter more than \$82,000 following his debarment. This amount exceeded the valuation of Peter's shares (\$50,000) by more than \$32,000 (Verified Ans., Ex. T). The BIC found that Chinatown failed to submit any

evidence in support of its explanations that the money paid to Peter was either profit sharing (Ans. Ex. AA, p.41) or a retroactive raise (Ans. Ex. AA, p. 46-48) and/or back wages (Ans. Ex. EE, p.17). It appears that the BIC correctly found Chinatown's explanations for the overpayment were incredible.

Chinatown's continuing tax liabilities

A. New York State

BIC conducted a lien search on June 6, 2006 and determined that Chinatown owed New York State more than \$1 million in outstanding taxes. BIC found that Chinatown's claim that it only owes \$1,793.36 in state taxes was not supported by evidence from the State of New York demonstrating that all judgments had been satisfied and Chinatown did not submit proof that a \$472,650 tax judgment was solely against Damon, Sr. (Pet., Ex. 3, para. 12). In fact, the evidence submitted by Chinatown (Pet., Ex. 5, Attachment A), including a May 8, 2006 New York State Consolidated Statement of Tax Liabilities, demonstrates that Chinatown does owe outstanding taxes, interest and penalties (Petition, Ex. A, pp.2-3). Therefore, BIC's determination that Chinatown has failed to satisfy its New York State tax liabilities is reasonable.

Pursuant to Administrative Code Section 16-509(a)(x), "the failure to pay any tax, fine, penalty or fee related to the applicants business for which . . . judgment has been entered . . ." reflects adversely on an applicant's integrity. Accordingly, BIC's finding that Chinatown lacks good character, honesty and integrity because of its failure to meet its state tax obligations is also reasonable.

B. New York City

The evidence submitted by Chinatown demonstrates that it is currently embroiled in an

ongoing and arguably legitimate dispute with the City regarding whether or not tax returns have been filed for 1996, 1999 and 2000 and the amount of tax that is due, if any, for those tax years (Pet, Ex. 5, Attachment B). Accordingly, it does not appear that Chinatown has violated that part of the licensing order requiring it to pay all New York City taxes due and owing.

C. Chinatown's Off the Books Transactions

The BIC found that besides failing to pay the above discussed taxes, Wayne Tragni acknowledged, in his testimony, that Chinatown has had customers who were 'off the books' and that he collected cash payments from these customers (Verified Ans., Ex. AA, p. 125). Furthermore, Wayne admitted that he paid at least four employees 'off the books' (Verified Ans., Ex. AA, pp. 208-209). In its response, Chinatown did not address or explain these transactions. Therefore, the BIC rationally determined that Chinatown has failed to pay additional taxes, including payroll taxes, in violation of the Licensing Order.

Failure to Make timely Payments to the Monitor

Pursuant to the Licensing Order, Chinatown agreed to fully fund the operations of the monitor and pay all the "monitor's fees and expenses . . . within thirty days of presentment". Chinatown failed to timely pay the monitor's expenses despite reminder letters from BIC dated June 24, 2004 and July 20, 2004 (Verified Ans. Ex. M). By letter to BIC dated July 22, 2004, Chinatown admitted that it had not made full payment to the monitor (Ans., Ex. N). Thus, the BIC's finding that Chinatown had violated the terms of the licensing order that required timely payments to the monitor is rationally based.

Chinatown's Attempt to Defraud its Creditors

BIC found that, "by establishing the Wayne Tragni Management Account to elude the

State of New York and others from levying money from its accounts, the Applicant's principals committed fraud by insolvency"⁵ (Petition, Ex. 1, pp. 29-30).

At his deposition, Wayne admitted that he began depositing all of Chinatown's income into the "Wayne Tragni Management Account" after New York State's second levy against Chinatown's account for sales tax allegedly due and owing (Verified Ans., Ex. Z, p. 506). According to Wayne, the state's actions left him unable to pay Chinatown's bills and payroll, and thus, after consulting with his accountant, he used the Wayne Tragni Management Account, which had been established in November 2002, to pay his creditors, not defraud them. Wayne states that the funds were used only to pay Chinatown's expenses and that he did not commingle personal funds in this account. Moreover, Wayne states that he has paid all New York State sales tax for 2003 through 2006 using this account (Petition, Ex. 3, p. 4).

In addition, Chinatown's attorney states, in his affidavit in response to the staff recommendation, that the use of the Wayne Tragni Management Account was revealed to the BIC monitor, and it is undisputed that the monitor reported this banking arrangement to the BIC as early as November, 2003 (Petition, Ex. 4, p.4).

The BIC's reliance on Wayne's statement that he put Chinatown's income in the Wayne Tragni Management Account so that it would not be captured by New York State tax authorities is insufficient to establish that Wayne's actions constituted an "intent to defraud". Indeed, it is uncontroverted that the BIC monitor and the BIC knew about this account as early as November,

⁵ The crime of fraud in insolvency (New York Penal Law Section 185.00) occurs "when a person. . . with the intent to defraud any creditor and knowing that. . . a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he (a) conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of any interest in the debtor's estate."

2003. In addition, the BIC has failed to proffer any evidence that the State, or any of Chinatown's other creditors were not paid, or frustrated in their ability to collect a debt, or that any of Chinatown's creditors have claimed to have been defrauded because Chinatown transferred its income into the Wayne Tragni Management Account. Thus, on the evidence presented, it was unreasonable for the BIC to find that Chinatown's use of the Wayne Tragni Management Account constituted an intent to defraud its creditors.

CONCLUSION

Here, the BIC's findings that Chinatown violated its licensing order by: 1) failing to timely pay New York State Taxes and other government obligations that are due and owing; 2) retaining the services of an individual debarred from the carting industry; 3) maintaining a continuing financial relationship with an individual debarred from the carting industry and 4) failing to pay the monitors fee's in a timely manner are supported by the administrative record, and thus, the BIC's decision denying Chinatown's application for a license to operate a trade waste removal business on the grounds that it violated its 2003 Licensing Order and that it lacks good character, honesty and integrity was rational and reasonable.

Accordingly, it is ordered that petitioner's application is denied and the within petition is dismissed.

This decision constitutes the judgment of the court.

DATE 2/14/07

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This judgment is hereby entered by the J.S.C. Clerk
and notice of entry is hereby given to the County Clerk
obtain entry, return to the County Clerk's Office. To
appear in person at the County Clerk's Desk (Room
141E).