

Matter of Hernandez v Lancaster

2007 NY Slip Op 30675(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0402640/2006

Judge: Charles J. Tejada

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Charles J. Tejada, Justice PART 50N

In the Matter of the Application of
LOURDES HERNANDEZ,
Petitioner

INDEX NO. 402640/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

FOR AN ORDER PURSUANT TO ARTICLE 30 AND ARTICLE 78 OF
THE CIVIL PRACTICE LAW AND RULES

-AGAINST-

PATRICIA J. LANCASTER, as Commissioner of the
New York City Department of Buildings; EMILY LLOYD,
as Commissioner of the New York City Department
of Environmental Protection and Chair of the New York
City Environmental Control Board, and 34 Realty, LLC.,
Respondents.

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

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 Petition is denied as per the
attached Opinion, Decision and Order.

Dated: March 27, 2007

ENTER: 
J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS 50N

-----X

In the Matter of the Application of
LOURDES HERNANDEZ,

Petitioner,

For a judgment pursuant to Article 30 and Article 78 of
the Civil Practice Law and Rules

-against-

Index No.: 402640/06
OPINION, DECISION AND
ORDER

PATRICIA J. LANCASTER, as Commissioner of the New
York City Department of Buildings, EMILY LLOYD, as
Commissioner of the New York City Department of
Environmental Protection and Chair of the New York
City Environmental Control Board, and 34 Realty, LLC.,
Respondents.

-----X

TEJADA, C.J., J.S.C

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Petitioner, Lourdes Hernandez ("petitioner"), seeks Article 78 relief pursuant to the Civil Practice Law and Rules (CPLR): [1] vacating respondent, New York City Environmental Control Board's (ECB), decision and order incorporating the terms of the stipulation between the respondents, New York City Department of Buildings (DOB) and 34th Realty LLC and upholding the Notice of Violation (NOV) # 34512269N: [2] dismissing the underlying violation; [3] declaring that 15 RCNY §§ 31-35 and 31-84 violate the Due Process clauses of the US and New York Constitutions because they deprive petitioner of notice and an opportunity to be heard before respondent ECB; [4] declaring that respondents DOB's policy and practice of issuing NOV's classifying lawful, licensed family and group family day care use of residential premises as contrary to a residential certificate of occupancy and/or contrary to residential use violates New York CLS Social Services Law (SSL) §390 (12); [5] enjoining respondent DOB from issuing NOV's classifying lawful, licensed family and group family day care use of residential premises as contrary to a residential certificate of occupancy and/or contrary to residential use; [6] enjoining respondent DOB to adopt policies and procedures and issue written guidance to ensure that its inspectors and other staff adhere to applicable New York State Law, including

SSL §390 (12); and, [7] awarding petitioner costs and disbursements.

The respondents assert, inter alia, that ECB's determination, based upon 15 RCNY §§ 31-35 and 31-84 did not violate petitioner's due process rights; that DOB's policy and practice of issuing NOV's to family day cares located above the first floor of non fire proof multiple dwellings is lawful and not preempted by state law; that the stipulation which resolved the NOV in question was not affected by an error of law, arbitrary or capricious or the result of an abuse of discretion; and, that ECB's determination to not vacate the stipulation between DOB and respondent 34 Realty, LLC to permit petitioner to intervene was not arbitrary or capricious, an abuse of discretion or affected by an error of law.

Petitioner commenced this proceeding seeking a stay of a housing eviction action commenced against her by respondent 34 Realty LLC in Civil Court of New York, New York County captioned *34 Realty LLC v. Pedro Hernandez and Lourdes Hernandez*, index # L&T 073108/06, pending a hearing and final determination in this matter.

The proof upon which respondent's determination is based establishes the following: Petitioner, Lourdes Hernandez, resides with her family in and provides child care out of her rent stabilized apartment at 34 Hillside Avenue, Apt 2A. Petitioner has resided in the subject apartment with her family for approximately 13 years and has operated her group family day care program in the subject apartment for the past seven years. Petitioner is licensed by the New York State Office of Children and Family Services to provide child care under license ID# 00122583GFDC.

On or about March 21, 2006, respondent DOB issued a Notice of Violation and Hearing #34512269N, alleging, inter alia, that respondent landlord is in violation of New York City Administrative Code § 27-217 (Change of Occupancy and Use) in that the occupancy of apartment #2A is:

"contrary to that allowed by the certificate of occupancy or BLDG. DEPT RECORDS. At APT (sic) 2A there is a daycare that displayed license #00122583GFDC. However according to BLDG Dept RECORDS (DEPARTMENTAL MEMORANDUM JULY 12, 1994)(DEPT MEMORANDUM July 6, 1976) FAMILY GROUP DAY CARE ARE NOT ALLOWED IN NON FIRE-PROOF MULTIPLE DWELLING ABOVE 1ST FL (sic) REGARDLESS OF LICENSE. Remedy: DISCONTINUE ILLEGAL USE."

The NOV was issued to respondent 34 Realty LLC with a cure date of May 1, 2006 and a hearing date of May 11, 2006.

Prior to the scheduled hearing date respondent 34th Realty LLC (Landlord), and respondent DOB, entered into a stipulation pursuant to 15 RCNY §31-84, which included an admission of the violation. The stipulation was converted into a decision and order of respondent ECB imposing a monetary penalty of \$400.00 on respondent Landlord. Thereafter, respondent Landlord commenced an eviction proceeding against Mrs. Hernandez after she was served with a ten day notice to cure the violation and based on the NOV and the related fine.

A review of the record before this Court reveals that the building where petitioner resides and maintains her business as a group family day care is a non-fire proof, multiple dwelling. The New York State Social Services Law (SSL) governs the licensing and registration of child day care in New York.

SSL§390(12) regulates the manner in which other city and government agencies can impact a group family day care and family day care in a non-fire proof, multiple dwelling. In particular, SSL§ 390(12)(b) provides:

(b) Notwithstanding any other provision of law: for the purposes of this subdivision, no local government may prohibit use of a single family dwelling for family day care or group family day care where a permit for such use has been issued in accordance with regulations issued pursuant to this section; nor may any local government prohibit use for family day care or group family day care, of a multiple dwelling classified as fireproof or prohibit use for family day care or group family day care, of a dwelling unit located on the ground floor of a multiple dwelling not classified as fireproof, where in either case a [fig 1] registration or license for such use has been issued in accordance with regulations adopted pursuant to this section and such use is otherwise permitted under state fire and safety standards (the state code) and under any other existing standard for permitted uses of the multiple dwelling.

Petitioner's group family day care business operates out of her second floor apartment in a non-fire proof, multiple dwelling owned by respondent 34th Realty LLC. Therefore, her business is regulated by SSL§ 390(12) (b).

With regard to the stipulation and final determination of the NOV issued by respondent ECB to respondent 34th Realty LLC, the parties involved in an NOV proceeding are entitled to settle the matter prior to the adjudication date by way of a stipulation.

15 RCNY §31-84 Stipulation in Lieu of Hearing provides:

“(a) At any time prior to the issuance of the hearing officer's recommended decision and order the petitioner may offer the respondent a settlement of the matter by stipulation in lieu of further hearing. The stipulation shall contain an admission of the violation, the further facts stipulated to, if any, the amount of the penalty to be imposed, and the compliance ordered, if any.

(b) If entered into by respondent and filed with the tribunal prior to the first scheduled hearing date, in the manner and form set by the tribunal, the stipulation shall be reviewed by the board. Within a reasonable time after receipt of such stipulation, the board shall cause to be issued a final decision and order incorporating the terms of said stipulation or, if the stipulation is not acceptable to the board, the matter will be rescheduled for further hearing.”

As such, the manner in which the respondents entered into the stipulation and final determination to the NOV proceeding was neither arbitrary, capricious or an abuse of discretion nor was made in violation of lawful procedure or was affected by an error of law.

Moreover, the NOV was issued to respondent 34th Realty LLC for the actions of its tenant, the petitioner, in operating the group family day care above the first floor in the non-fire proof multiple dwelling in violation of DOB and SSL regulations. Petitioner was well aware of the reason for the NOV yet continued operating her group family day care. The options presented to petitioner at that point were to either cease the operation of its group family day care until the NOV was resolved between the respondent-litigants, seek another location to conduct her business or intervene in the NOV adjudicatory proceedings and present a defense to the NOV action.

Despite petitioner's knowledge of the NOV and the reason for its issuance, petitioner did nothing to cure the violation nor did she attempt to intervene in the ECB proceeding to contest the validity of the NOV or the viability of the laws as applied to the operation of her group family day care considering the fact that she would be directly or adversely affected by an order of respondent ECB. See, RCNY § 31-35 (Motions to Intervene (a)(1) As of Right.)

The function of the Court upon an application for relief under CPLR Article §78 is to determine, upon the proof before the administrative agency, whether the determination has a rational basis in the record or was arbitrary and capricious. *Fanille v. NYC Conciliation and Appeals Board*, 90 A.D. 2d 756 (1st Dept. 1982) *aff'd* 58 N.Y. 2d 952 (1983). It is well settled that in reviewing an agency's decision the only determination to be made is “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.” CPLR §7803 [3]; *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 230-231, 356 NYS 2d 833 (1974).

Based on the record before the agency and the arguments of the parties this Court finds that respondents acted in accordance with the statutes applicable to group family day care businesses in non-fire proof multiple dwellings, that petitioner’s business operates on a floor other than the first floor of a non-fireproof building, that ECB’s stipulation with the Landlord, based upon 15 RCNY §§ 31-35 and 31-84, did not violate petitioner’s due process rights. Further, this Court finds that ECB’s determination denying petitioner’s request to vacate the stipulation, re-open the NOV and allow her to intervene, was neither arbitrary or capricious, an abuse of discretion or contrary to law.

Lastly, petitioner fails to meet their burden of proof, as to the requested injunctive relief and declaratory relief.

For the reasons stated above, the petition must be denied in its entirety.

This constitutes the decision, opinion and order of this Court.

New York, New York
March 27, 2007



J.S.C.

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