

Cheong Mei Inc. v Environmental Control Bd.

2007 NY Slip Op 32379(U)

June 14, 2007

Supreme Court, New York County

Docket Number: 0109860/2006

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

CHEONG MEI INC.

Petitioner,

-v-

ENVIRONMENTAL CONTROL BOARD

Respondent.

INDEX NO. 109860/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to 4 were read on this motion for Article 78 relief.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2+3

Replying Affidavits _____

4

CROSS-MOTION: _____ YES NO

FILED
AUG 01 2007
NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision.

Dated: 6-14-07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
CHEONG MEI, INC.,

Petitioner,

-against-

Index No. 109860/06

ENVIRONMENTAL CONTROL BOARD
of THE CITY OF NEW YORK,

Respondent.

-----X

DONNA M. MILLS, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this Article 78 proceeding (motion sequence number 001), petitioner Cheong Mei, Inc. challenges a determination of respondent New York City Environmental Control Board (ECB), which found that petitioner had violated Administrative Code of the City of New York §§ 10-117 and 10-119 by illegally posting numerous handbills on City property, and fined it a total of \$46,275. Petitioner argues that ECB's decision is arbitrary and capricious and without any factual support, and seeks a judgment vacating that decision, or alternatively, remanding this matter to ECB to permit its principal, Tran Han Ho, to testify in its defense.

In motion sequence number 002, petitioner moves, pursuant to CPLR 3024 (b), to strike respondent's verified answer on the ground that one of respondent's exhibits is not part of the administrative record. Alternatively, petitioner requests, inter alia, that the exhibit be stricken from the record.

Petitioner is a produce vendor that was located at 390 Broome Street in Manhattan during all relevant times. The New York City Department of Sanitation (DSNY) enforces New York

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City's antiposting statutes, which are found in sections 10-117 and 10-119 of the Administrative Code. On five dates in 2004 – May 11, May 13, May 25, June 8, and June 23 – DSNY issued 435 Notices of Violation (NOVs) to petitioner for posting identical handbills on City lampposts and traffic signals. All of the NOVs cited section 10-119, except for the June 8th NOVs, which charged violations of section 10-117, and the June 23rd NOVs, which charged violations of a section 1017 (a).

An administrative hearing was held on the NOVs before an ECB administrative law judge (ALJ) on October 29, 2004. Following the close of the hearing, the ALJ issued a decision in which she permitted amendment of the NOVs that cited section 1017 to section 10-117. The ALJ also sustained the violations, and fined petitioner \$75 for each NOV charging section 10-119 and \$150 for each NOV charging section 10-117, for a total of \$46,275. Petitioner filed written exceptions to the decision, which were denied in a letter dated March 16, 2006.

Initially, this court must determine whether to transfer this proceeding to the Appellate Division. If an Article 78 proceeding raises a question of “substantial evidence,” the trial court is required to transfer the proceeding to the Appellate Division for determination in the first instance (CPLR 7804 [g]). A question of “substantial evidence” is “made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law” (CPLR 7803 [4]). Such a question arises only when a quasi-judicial evidentiary hearing, which is mandated by law, has been held (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]; *Matter of Colton v Berman*, 21 NY2d 322, 329 [1967]). This includes hearings required by constitutional due process or by statute and accompanying regulations (*see New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 203 n 2, *rearg denied* 84

* 4]
NY2d 865 [1994]; *Matter of Bevacqua v Sobol*, 176 AD2d 1, 3 [3d Dept 1992]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7801:2). On the other hand, if the evidentiary hearing is not required by law, the "arbitrary and capricious" test applies, and transfer to the Appellate Division is improper (*see Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of N.Y.*, 62 AD2d 188, 193 [1st Dept], *appeal denied* 45 NY2d 706 [1978]).

Here, petitioner seeks judicial review of ECB's March 16, 2006 determination confirming the ALJ's decision after an evidentiary hearing, which was based upon a transcribed record. The hearing was also required by Administrative Code §§ 10-117 and 10-121 (the penalty provision for section 10-119) (*see* Administrative Code §§ 10-117 [g] ["a person who violates the provisions of subdivision a, b, c, or d of this section shall be liable for a civil penalty of not more than five hundred dollars for each violation which may be recovered in a proceeding before the [ECB]"; 10-121 [b] ["where the notice of violation . . . is issued for breach of the provisions of section 10-119 . . . and sets forth thereon civil penalties only, such process shall be returnable to the [ECB], which shall have the power to impose the civil penalties . . ."]]). Therefore, the petition raises a substantial evidence issue, and this proceeding must be transferred to the Appellate Division. For the same reason, petitioner's motion to strike respondent's verified answer or exhibit, on the ground that a document is dehors the record, is to be decided by that court and not this court (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]).

Before transferring the proceeding, the court must dispose of "other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations

and res judicata, without reaching the substantial evidence issue” (CPLR 7804 [g]). Petitioner argues that the ALJ violated its due process rights by permitting amendment of 52 NOVs to charge section 10-117, and improperly denied it a continuance to obtain a Vietnamese-language interpreter. Claims of procedural due process are dispositive and sufficient to “terminate” the proceeding within the meaning of CPLR 7804 (g) (*Earl v Turner*, 303 AD2d 282 [1st Dept], *lv denied* 100 NY2d 506 [2003]; *McCarter v Franco*, 227 AD2d 358 [1st Dept 1996]). However, neither of these claims has any merit.

In administrative proceedings, the charges need only be “reasonably specific, in light of all the relevant circumstances,” to allow the respondent to prepare an adequate defense (*Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]; *see also Matter of D’Ambrosio v Department of Health of State of N.Y.*, 4 NY3d 133, 140 [2005]). Petitioner’s counsel objected to amendment at the hearing on the basis that DSNY had not shown how a clerical error could have been made, as petitioner argues here. While these NOVs charged violations of a section that does not exist, they also state the nature of the violations. For example, on one of these 52 NOVs, the issuing officer wrote that “At T.P.O. I did see a sticker stating ‘NYC is not for sale. www.sunmei.com’ affixed to a traffic signal stanchion” (Verified Answer, Exh. C, at 18). Thus, these NOVs were of sufficient specificity to apprise petitioner of the violations charged (*see Matter of Feil Louis Broadwell Mgt. Corp. v New York City Env’tl. Control Bd.*, 293 AD2d 381, 382 [1st Dept 2002]). Petitioner has also failed to show that it was somehow prejudiced by the error.

An individual who does not request an interpreter at an administrative hearing or indicate that he will not participate in the hearing without one waives any right he may have had to an interpreter (*Matter of Alvarez v Hernandez-Pinero*, 211 AD2d 466 [1st Dept 1995]; *Matter of*

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Maldonado v Racette, 175 AD2d 963 [3d Dept 1991]). At the hearing, when the ALJ asked petitioner's counsel if she required a continuance for her client's principal to testify, counsel stated that it was unnecessary, and that she was willing to proceed with the hearing (Verified Answer, Exh. A [Hearing Transcript], at 37). Therefore, petitioner cannot now be heard to complain that the ALJ improperly denied a continuance.

Accordingly, it is

ORDERED that the motion (seq. no. 002) by petitioner Cheong Mei, Inc. to strike respondent New York City Environmental Control Board's verified answer implicates an issue of substantial evidence, which shall be decided by the Appellate Division; and it is further

ORDERED that the application by petitioner seeking to vacate and annul a determination by respondent (seq. no. 001) is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804 (g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]).

The Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

Dated: 6-14-07

ENTER:

FILED
AUG 01 2007
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COUNTY CLERK'S OFFICE



J.S.C.