

GFS Inc. v Frieden

2008 NY Slip Op 30024(U)

January 4, 2008

Supreme Court, New York County

Docket Number: 0104913/2007

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Justice

Index Number : 104913/2007
GFS INC.
 vs.
FRIEDEN, THOMAS R.
 SEQUENCE NUMBER : 003
 PROVISIONAL REMEDY

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

 _____ *see*
 _____ *attached*

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

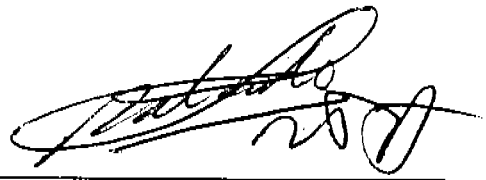
Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

**MOTION IS DECIDED IN ACCORDANCE
 WITH THE ATTACHED MEMORANDUM DECISION**

Dated: 11/4/08



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: PART 61

GFS Inc., d/b/a Jobee's Orient,

Petitioner,

– against –

Thomas R. Frieden, M.D., M.P.H., as Commissioner
 of the Department of Health and Mental Hygiene of
 the City of New York and the Department of Health
 and Mental Hygiene of the City of New York,

Respondents.

DECISION/JUDGMENT

Index No. 104913/07

Seq. No. 3

Present:

Rolando T. Acosta
 Supreme Court Justice

The following documents were considered in reviewing petitioner's motion for leave to reargue its petition brought on by Order to Show Cause, which was transferred to the Appellate Division, First Department pursuant to CPLR 7804(g) by order of this Court dated July 30, 2007, and upon reargument finding that respondents failed to perform a duty imposed upon them by law and directing respondents to perform their statutory duty [that is, granting petitioner a hearing to determine whether petitioner's resumed operations as a food service business constitutes a danger to the public health] or, in the alternative, if this Court finds that petitioner was granted the statutorily mandated hearing, directing that respondent's determination be annulled because such determination was arbitrary, capricious, unreasonable and contrary to law:

| Papers | Numbered |
|--|---------------------------|
| Order to Show Cause and Affirmation | 1-2 (Exhibits A-G) |
| Affirmation in Opposition | 3 |
| Reply Affirmation | 4 |

This Court initially transferred this matter to the Appellate Division, First Department pursuant to CPLR 7804(g) since petitioner had also alleged that if this Court finds that petitioner was granted the statutorily mandated hearing, directing that respondent's determination be annulled because such determination was not supported by substantial

evidence. CPLR 7804(g) states in relevant part:

Where [a substantial evidence issue] is raised, the court shall first dispose of such other objections as could terminate the proceeding . . . without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division. . .

Upon reargument, which this Court hereby grants, it is clear that this proceeding can be terminated without reaching the substantial evidence issue. Accordingly, this Court's July 30, 2007 order transferring this matter to the Appellate Division, First Department is vacated and substituted with the following decision.

On August 8, 2006, as a result of receiving reports that patron who had eaten at Jobee's Orient [a buffet style establishment with separate *a la carte menu*] had become ill, the Department of Health ("DOH") inspected Jobee's and produced an Inspection Report - Notice of Violation noting, *inter alia*, violations 4O (evidence of flying insects) and 9D (heavy accumulation of grease). The reports also stated that a reinspection would occur on or after August 23, 2006.

Relying on its statutory authority to conduct unannounced inspection, on August 14, 2006 DOH inspected and closed Jobee's for "unsanitary conditions" under 14-1.194(c) of the Sanitary Code based on evidence of faulty refrigeration, mildew buildup inside ice machine in kitchen, and facility conditions conducive to pest life observed in that heavy accumulation of grease and old food on floor under deep fryer, wok stove and steamer in kitchen. While DOH was still present, petitioner had the refrigerator fixed and began cleaning the kitchen.

On August 15, 2007, petitioner went to DOH and requested an opportunity to be heard and present proof that continued operation did not constitute a danger to the public health because it had corrected the unsanitary conditions. Rather than granting petitioner such a hearing, DOH instead demanded that petitioner agree to a Consent Order before permitting petitioner to resume operations. The Consent Order, attached as Exhibit A to the instant petition, granted DOH, *inter alia*, the unfettered right to be the sole judge of whether petitioner complied with such order, permitted DOH to unilaterally close Jobee's without the right to appeal, and limited petitioner's ability to sell its business.

According to petitioner, after it refused to sign the Consent Order and demanded a hearing pursuant to 14-1.194(c) of the Sanitary Code, respondent retaliated against petitioner by commencing administrative proceedings – not to determine whether the purported

violations constituted a danger to the public health in accordance with 14-1.194(c) of the Sanitary Code – but to revoke, suspend and/or deny renewal of petitioner’s permit. On the morning of the hearing to revoke, suspend and/or deny renewal of petitioner’s permit, petitioner was once again presented with the Consent Order and told to sign it before the DOH would allow petitioner to resume operations, and avoid the hearing to revoke. The parties were unable to reach an agreement and thus a hearing was held before A.L.J. Kara J. Miller.

On October 4, 2006, ALJ Miller issued her report (petitioner’s Exhibit D) and found that DOH appropriately closed the restaurant based on a pest infestation and an employee having tested positive for salmonella [although the DOH did not cite salmonella in its August 14th report], and recommended that petitioner should not be allowed to reopen until it signed the Consent Order. By order dated October 13, 2006, the Commissioner of the DOH adopted ALJ Miller’s report and recommendation. See Petitioner’s Exhibit E. Thereafter, on December 28, 2006, the Board of Health affirmed the October 13 order. See Exhibit F.

At issue in this case is whether the hearing conducted before ALJ Miller satisfied petitioner’s statutorily entitled hearing pursuant to 14-1.194(c) of the Sanitary Code. A reading of the statute clearly indicates that it did not. Section 14-1.194(c) of the Sanitary Code provides:

The permit-issuing official may suspend a permit and order immediate cessation of operations and service of food at a food service establishment within his jurisdiction when in his opinion continued operation is an imminent hazard to public health. Any person so ordered is to comply immediately, and within 15 days is to be provided with an opportunity to be heard and to present proof that continued operation does not constitute a danger to the public health.

Thus, according to this section, DOH may suspend a permit and order immediate cessation of operations when in its opinion continued operation is an imminent hazard to public health. Accordingly, it ordered immediate cessation of Jobee’s on August 14, 2006 following an inspection, which found refrigeration problems, including mildew in ice machine, and pest and grease buildup. Pursuant to the statutory framework, petitioner was obligated to comply immediately, which it did.

Petitioner, however, was entitled to a hearing to allow it to present proof that continued operation did not constitute a danger to public health within 15 days of the closure. Although a hearing was conducted within the statutorily mandated 15 days, it dealt solely

“with the closing.” See Hearing Transcript at p. 142, line 18-19.¹ Indeed, as a result of that hearing, ALJ Miller found that DOH appropriately closed the restaurant based on a pest infestation and an employee having tested positive for salmonella [although the DOH did not cite salmonella in its August 14th report]. Whether DOH properly closed Jobee’s on August 14, however, says nothing as to whether petitioner’s continued operation would constitute a danger to the public health, especially given petitioner’s willingness to correct any violations. Instead, petitioner is being forced to sign the Consent Order, with unfavorable terms, as a condition for resuming operations, rather than being allowed to show that it could resume operation without endangering the public health. Although this Court is cognizant of recent and much publicized occurrences of health code violations in food establishments and applauds the DOH for its quick action, the procedure used in this case is not what was contemplated by section 14-1.194(c) of the Sanitary Code.

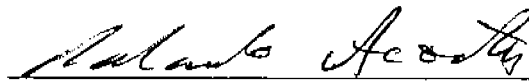
Judicial review under Article 78 of the CPLR is limited to “whether the body or officer failed to perform a duty enjoined upon it by law” or “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion.” CPLR § 7803(1)(3); Matter of Pell v. Board of Educ., 34 N.Y.2d 222 [1974]); DeFoe v. New York City Department of Transportation, 87 N.Y.2d 754 (1996). Here, DOH failed to perform a duty enjoined upon it by law; and, its refusal to grant petitioner the requested statutorily mandated hearing was also arbitrary. City of Long Beach v Flacke, 77 A.D.2d 638 (2nd Dept. 1980)(arbitrary for the Department of Environmental Conservation to fail to comply with mandates of the statute). Accordingly, it is

ADJUDGED that respondents failed to perform a duty imposed upon them by law and accordingly respondents are directed to perform their statutory duty, that is, granting petitioner a hearing pursuant to section 14-1.194(c) of the Sanitary Code to determine whether petitioner’s resumed operations as a food service business constitutes a danger to the public health; and it is further

ORDERED that respondent’s motion to dismiss the petition is denied.

This constitutes the Decision, Judgment and Order of the Court.

Dated: January 4, 2008


Rolando T. Acosta, J.S.C.

1. A hearing on the violations was later held before ALJ Granville on December 11, 2006.

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