Construction Trucking Assn. Inc. v Metropolitan Transp. Auth.
2008 NY Slip Op 31446(U)
May 21, 2008
Supreme Court, New York County
Docket Number: 0110787/2007
Judge: Paul G. Feinman
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SCANNED ON 5/27/2008

[* 1]

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

Construction Trucking Association
- v -
DNC
MTA

INDEX NO. 110787/07

MOTION DATE 2/6/08

MOTION SEQ. NO. 001

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 ...	
Answering Affidavits — Exhibits	see attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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 141B).

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

Dated: 5/21/08

J.S.C.

Check one: ✓ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 2]

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

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CONSTRUCTION TRUCKING ASSOCIATION INC.
f/k/a ROAD TRANSPORT ASSOCIATION INC.,
RANCO SAND and STONE CORP., ALMAR
SUPPLY, INC.,

Petitioners,

For an Order pursuant to CPLR Article 78

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,
TRIBOROUGH BRIDGE & TUNNEL AUTHORITY
and PETER S. KALIKOW, as chairman of the
Metropolitan Transportation Authority,

Respondents.

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Index No. 110787/2007
Mot. Seq. No. 001
Subm. Date 2-6-2008

Appearances:

Petitioners:
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Papers considered in this Article 78 proceeding and this application for a preliminary injunction:

Papers	Numbered
Order to Show Cause, Verified Petition, Emergencey Affirmation and Exhibits	1
Verified Answer, Respondents' Memorandum of Law, Appendix (Vols. 1 -III)	2-6
Petitioner's Pre-Hearing Memorandum of Law	7
Petitioner's Reply Memorandum of Law	8
Feb. 12, 2008 Affirmation of Ira J. Lipton and Exhibits	9
Transcripts of Preliminary Injunction hearing held 8-7-07 and 8-16-07*	10-11

*The court has also considered the various exhibits admitted into evidence at the hearing (Petitioners' Exhibits 2 -11 and Respondents' Exhibits A - H.

PAUL G. FEINMAN, J.:

This Article 78 proceeding arises from respondents enforcing an 80,000 pound maximum weight limit for trucks traveling on the Throgs Neck and Triborough Bridges. Petitioners are companies operating a sand quarry, a construction materials trucking company, and an

association of construction industry organizations and trucking firms who claim to have been adversely affected by respondents' enforcement of the weight limit.

The six-count verified petition (Petition) claims that respondents acted in an arbitrary and capricious manner in prohibiting bridge access, altering prior agreements allowing such access, failing to properly maintain bridges and tunnels and misapplying toll funds, and failing to perform a study under the State Environmental Quality Review Act (SEQRA). The petition also claims that respondents' failure to honor divisible load permits (DLPs) constitutes a taking without due process of law, and seeks injunctive relief.

On August 7, 2007, petitioners moved, by order to show cause, for a preliminary injunction and a temporary restraining order (TRO), enjoining respondents from interfering with the utilization of the bridges and tunnels of the New York Metropolitan Transportation Authority (MTA), other than the Bronx-Whitestone Bridge and the Throgs Neck Bridge for vehicles over 105,000 pounds, by vehicles due to weight where that weight is within the weight allowed pursuant to a valid New York State and/or New York City DLP. Petitioners' motion also seeks an order directing respondents to comply with the terms of an alleged settlement agreement entered into with petitioners in October 2005, and enjoining respondents from misapplying and diverting state toll funds collected at the bridges and tunnels of the MTA to projects unrelated to the operation and maintenance of those bridges and tunnels and directing the proper application of those funds.

On August 7, 2007, after hearing from both sides, the court denied the requested TRO and set the matter down for a prompt hearing on whether a preliminary injunction should issue. After hearing expert testimony on August 16, 2007, the court issued an Interim Order denying

petitioners' oral application to amend the order to show cause concerning the TRO, finding that the evidence adduced did not support a finding of a likelihood of success on the merits. Thus, the Interim Order constituted a ruling only on petitioners' request for a TRO. The court did not make a final determination on petitioners' request for a preliminary injunction, which is presently before the court.

The essence of petitioners' claims is that respondents' allegedly new restrictions were implemented without a rational basis and have "the outcome of destroying business, increasing costs of construction dramatically and impacting neighborhoods." Petition, ¶ 8.

Respondents submit the affidavit and expert testimony of Kenneth Serzan (Serzan), a vice president of Parsons engineering firm. On August 3, 2007, the Throgs Neck Bridge engineering office contacted Serzan to report red flags in connection with respondent Triborough Bridge & Tunnel Authority's (TBTA) biennial inspection. The red flags "noted heavy deterioration (that is, corrosion due to rust) and cracking of the webs along the bottom flange of the stringer ends at the expansion joints of the approach spans." Serzan Aff., ¶ 4. According to Serzan, "[s]tringers bear the direct wheel load of the vehicles traveling on the bridge via the orthotropic deck." *Id.*

Parsons conducted additional inspections on August 4, 2007, which revealed deterioration and cracking in multiple adjacent stringers of the center lane, where trucks up to 105,000 pounds had been directed to travel. *Id.*, ¶ 5. Serzan states that some of the cracks were "active," meaning that they were growing. *Id.*, ¶ 6. Recent inspections of suspended spans "detected additional locations of stringer deterioration in the median lanes." *Id.*, ¶ 7.

Serzan concluded that, because cracking was found in multiple adjacent stringers on the approach spans, a passing overweight truck could cause a failure of those stringers, resulting in a

significant deck deformation downward (that is, a depression in the roadway) six inches deep. *Id.*, ¶ 9. Serzan concluded that such a deck deformation could result in a vehicle hitting the edge of the deck and causing a severe accident with potentially catastrophic results. *Id.*

Based upon these results, on August 4, 2007, Serzan recommended that TBTA restrict the maximum gross weight of vehicles crossing the bridge to 80,000 pounds until the permanent repairs are completed on the approach spans, and the suspended spans are inspected and necessary repairs are made. *Id.*, ¶ 10. After subsequent analyses, Serzan recommended that six-axle vehicles weighing 105,000 pounds or less could be permitted in the center lane at 10 miles per hour, with escorts, and that other vehicles would be addressed on a case-by-case basis. He also recommended that additional engineering evaluations be performed before overweight vehicles are permitted to cross the Throgs Neck Bridge without special conditions.

Thereafter, respondents issued a notice to the attention of "truckers using the Throgs Neck Bridge," which provided that, beginning August 8, 2007, "vehicles with New York City or State Divisible Load permits weighing up to 105,000 lbs. will no longer be able to travel across the Throgs Neck Bridge without an MTA B&T permit." Petition, Ex. A. This notice also provided that "[a]ll vehicles weighing more than 80,000 lbs. will be required to follow the established procedure and apply in advance for a permit for Special Handling ... ." *Id.* Serzan's affidavit is consistent with his expert testimony at the hearing held on August 16, 2007.

Petitioners claim that an 80,000 pound limit is also being enforced at the Triborough Bridge. Respondents submit the affidavit of Rocco D'Angelo (D'Angelo), the director of the Triborough Complex and deputy chief engineer for the TBTA. D'Angelo is "responsible for all design and construction that takes place at the facility, and for maintaining the facility in a good

state of repair." D'Angelo Aff., ¶ 3. D'Angelo states that the TBTA does not honor DLPs on the Triborough Bridge, because "[o]verloaded vehicles can seriously damage the structure of the TBTA's bridges," which "is particularly so at the Triborough, ... the oldest of the seven bridges in the TBTA system. Accordingly, TBTA will permit an overweight vehicle to travel over the Triborough only by prior arrangement, which we will consider on a case by case basis." *Id.*, ¶ 5. TBTA permits an overweight vehicle to cross the Triborough Bridge "subject to special conditions designed both to limit the stress to the structure of the Bridge and to avoid impeding the flow of traffic," including accompaniment by escorts and limitations on speed, lanes of travel, and hours during which such vehicles may cross. *Id.*, ¶¶ 5-7. D'Angelo states that, allowing petitioners to cross the Triborough Bridge, at will, with overweight vehicles, will pose significant risk to the truckers and the public. *Id.*, ¶ 6.

According to D'Angelo, TBTA's 2006 biennial inspection of the Triborough Bridge revealed a load rating "suitable to take gross vehicle weights of up to 54,000 pounds on 3 axles," and the lowest rating for an individual member controls the rating for the bridge. *Id.*, ¶¶ 7, 8. D'Angelo states that petitioners' 105,000 pounds trucks, "even with the weight spread over six axles, places greater weight on the structure of the Bridge than what it was originally designed for, and well above the maximum rating for the controlling members." *Id.*, ¶ 8. According to D'Angelo, TBTA cannot warrant that the Triborough Bridge is structurally safe for petitioners' proposed use, because TBTA has not yet performed a structural analysis using petitioners' truck loading. *Id.*, ¶ 11.

D'Angelo claims that, regardless of the structural issues, "trucks of the weight Petitioners propose limit the life expectancy of the roadway, and cause roadways to deteriorate at a faster

rate than would otherwise be the case" (*id.*, ¶ 12), and that "[f]requent passage of overloaded trucks can impose incremental distress which has the direct effect of reducing the service life of the bridge structure" (*id.*, ¶ 13). D'Angelo states that the toll plaza and its access ramps are situated over an area of Randall's Island populated with administrative buildings, employees and pedestrians, and that since 2005, there have been at least two instances of sections of concrete falling to the ground: one from the Bronx Toll Plaza to an area adjacent to an active access ramp; the other fell to an area where office trailers have been installed and where TBTA employees work. *Id.*, ¶ 14.

Petitioners argue that they are entitled to a preliminary injunction. Respondents counter that petitioners have not shown a likelihood of success on the merits of their claims, and that, therefore, current law setting forth the 80,000 pound weight limit should be enforced.

"The drastic remedy of a preliminary injunction is appropriate only where the moving party has established a likelihood of success on the merits, irreparable injury in its absence of such relief and a balancing of the equities in its favor." *Matter of Non-Emergency Transporters of New York, Inc. v Hammons*, 249 AD2d 124, 127 (1st Dept 1998), citing CPLR 6301.

"[R]egulation of the weight of vehicles for the purposes of highway safety and protection of highways and bridges is a valid exercise of State power." *Intrastate Trucking Corp. v White*, 185 AD2d 697, 697 (4th Dept 1992), citing *South Carolina State Highway Dept. v Barnwell Bros.*, 303 US 177 (1938). "[T]here is no absolute right on the part of any person to use the highways in an unreasonable manner, so that life may be endangered or the highway may be injured and rendered impassable." *Town of Waterford v L.B. Brockett Lumber Co.*, 227 App Div 422, 425 (3rd Dept 1929).

Section 566 of New York's Public Authorities Law states that the TBTA serves a "public purpose" and is "performing an essential governmental function ... ." Moreover, "where an agency adopts a regulation that is consistent with its enabling legislation ..., the rule has the force and effect of law." *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals*, 2 NY3d 249, 254 (2004) (internal citation omitted). Through section 553 of the Public Authorities Law, the New York State Legislature

> has imposed upon the [TBTA] the duty to operate and control the vehicular tunnels, bridges and other facilities which constitute its project, and has granted to it the power to regulate their use. The grant of such authority necessarily implies the power to impose all such reasonable conditions in relation to the use of such facilities as will tend to provide for the general welfare and safety of those who use them.

People v Malmud, 4 AD2d 86, 92 (2d Dept 1957).

21 NYCRR 1021.2 (a) (3) provides TBTA's current weight restrictions for "[t]unnels and bridges--limit of 80,000 lbs., as prescribed by New York State Department of Transportation regulations." Section (b) provides that "[n]o vehicles exceeding the limits above set forth shall be permitted in or upon the facilities, except by prior arrangement made through the officer in charge of the facility."[1]

Thus, as a preliminary matter, it is not clear to the court that petitioners' claims involve judicial review of an administrative determination "involving the exercise of discretion." Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7801:3. Rather, it

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[1] Section 385 of New York's Vehicle and Traffic Law also accepts 80,000 pounds as the maximum weight limit for vehicles on its roadways, and that provision and related regulations "governing the issuance of divisible load overweight permits" have been declared constitutional. *Intrastate Trucking Corp.*, 185 AD2d at 697.

appears that respondents merely enforced a valid weight regulation, and petitioners make no showing that mandamus is an appropriate remedy, pursuant to article 78 of the CPLR.

In any event, in a mandamus to review proceeding, the standard of review "is whether the agency determination was arbitrary and capricious or affected by an error of law." *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Serv.*, 77 NY2d 753, 758 (1991). In other words, the court's "review is limited to whether a rational basis existed for respondents' determinations (*Matter of New York State Socy. of Surgeons v Axelrod*, 77 NY2d 677, 685 [1991]). An agency's interpretation of the statutes it administers should be upheld if not unreasonable or irrational." *Matter of Non-Emergency Transporters of New York, Inc. v Hammons*, 249 AD2d at 127; *see also Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005) ("'[t]he judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body' [citation omitted]").

Here, as described above, the affidavits of Serzan and D'Angelo, and the testimony of Serzan at the hearing held on August 16, 2007, provide a rational basis for determining to enforce the regulatory weight restrictions on the Throgs Neck and Triborough Bridges. Moreover, at the hearing on this motion, petitioners' own expert, Siamak Pourhamidi (Pourhamidi), conceded that TBTA engineers "could reasonably conclude that it would be best for the maintenance and repair and condition of their bridge to limit the truck weight to the 80,000-pound limit." 8/16/07 Tr., at 181; *see also* 8/16/07 Tr., at 165, 170 (stating that Pourhamidi was "not testifying ... that the conclusions that Mr. Serzan made are unreasonable"). Pourhamidi also testified that vehicular travel over the bridge was safer at 80,000 pounds than 105,000 pounds. *Id.* at 190 ("[t]he safety factor is, less than 105,000, you have a safety factor. In

other words, you have heavier load, you have reduced safety factor").

In addition, respondents submit the affidavits of Brian Rowback (Rowback) and James Fortunato (Fortunato). Rowback is an engineer employed as chief operating officer of the New York State Department of Transportation (DOT). According to Rowback, TBTA never entered into an agreement to honor on its facilities the DLPs issued by the DOT. Rowback states that DLPs issued by the DOT, pursuant to section 385 of the Vehicle and Traffic law, expressly state that they are not valid within the boundaries of New York City or on the facilities of any TBTA bridge or tunnel. With his affidavit, Rowback submits DLP application forms, which confirm his statement that DLPs are not valid on TBTA bridges. Rowback Aff., Exs. 1-5.

Fortunato is the chief of the special operations divisions within the operations department of the TBTA, and he is responsible for TBTA law enforcement. Fortunato states that he is not aware of any agreement that TBTA would allow overweight trucks on its bridges if they carried DLPs issued by the DOT. Fortunato states that, to the contrary, TBTA officers consistently prohibit overweight trucks, those exceeding 80,000 pounds, from using TBTA facilities except under special conditions prescribed by the TBTA for each individual facility.

This evidence from the engineers and officials responsible for maintaining the bridges establishes a rational basis for determining to enforce the regulatory weight restrictions, in order to keep the bridges safe for public travel and to protect them from further damage and deterioration pending the necessary repair work. Therefore, petitioners have not established a likelihood of success on the merits of their first and second causes of action.

Petitioners' third cause of action seeks injunctive relief for respondents' alleged arbitrary and capricious failure to perform its duties and improper diversion of toll monies. However, this

cause of action is not justiciable. *See Matter of New York State Inspection, Sec. and Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239 (1984) ("lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review"); *see also Jones v Beame*, 45 NY2d 402, 407 (1978) ("it is untenable that the judicial process, at the instance of particular persons and groups affected by or concerned with the inevitable consequences of the city's fiscal condition, should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast municipal enterprise should conduct its affairs").

Petitioners' fourth cause of action claims that respondents' failure to honor DLPs amounts to a taking without due process of law.

"The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, [citation omitted], provides that 'private property' shall not 'be taken for public use, without just compensation.'" *Phillips v Washington Legal Found.*, 524 US 156, 163-64 (1998). Drawing on federal precedents, the Court of Appeals has set out a two-part test for substantive due process violations, whereby claimants must establish: (1) that they possess "a cognizable property interest"; and (2) "that the governmental action was wholly without legal justification." *Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617, 627 (2004). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 628 (quotation marks and citation omitted).

While it is doubtful that petitioners can establish a property interest in the DLPs, the court need not reach this issue because, for the reasons discussed above, respondents demonstrated that

their actions are not arbitrary and capricious, but rather, are rationally based upon concerns for public safety, and the protection of the bridges from further damage and deterioration pending the necessary repair work. Therefore, petitioners have not shown a likelihood of success on their fourth cause of action.

Petitioners' fifth cause of action alleges that respondents' failure to perform a SEQRA study prior to acting was arbitrary and capricious. However, as the Court of Appeals stated in *Society of Plastics Indus., Inc. v County of Suffolk*:

> the requirement that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes. This is particularly meaningful in SEQRA litigation, where challenges unrelated to environmental concerns can generate interminable delay and interference with crucial governmental projects. We have recognized the danger of allowing special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA for such purposes.

77 NY2d 761, 774 (1991).

Here, the Petition claims that respondents' purported actions will cause "a sharp increase in the price of concrete, asphalt and construction aggregates" (Petition, ¶ 36), which "'will result in a major adverse economic impact to the region'" (*id.*, ¶ 37). Petitioners claim that "'price gouging as well as the utter inability to complete construction projects on time would be unavoidable.'" *Id.*, ¶ 38. The Petition avers that the MTA's action will cause "a 10% increase in the price of concrete from the increase in the cost of sand alone" (*id.*, ¶ 40), and that one large transporter of construction materials "just spent over $1.9 million dollars for new vehicles," which will be rendered useless by MTA's action (*id.*, ¶ 41). These financial considerations are not within the zone of interest sought to be protected by SEQRA. *Society of Plastics Indus., Inc.*,

77 NY2d at 774; *see also Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 (1990) ("to qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature").

Petitioners do claim that TBTA's enforcement of weight limitations will cause an "increase in the air and noise pollution generated by the trucks." Petition, ¶ 36. However, petitioners do not claim that they will "suffer direct harm, injury that is in some way different from that of the public at large." *Society of Plastics Indus., Inc.*, 77 NY2d at 774.

In their reply memorandum of law, petitioners argue that they "will suffer from an increase in the noise and air pollution generated by the very large increase in the number of DLP vehicles caused by the proposed action," and that they will experience the increased pollution differently because of their proximity to the increased pollution. Petitioners' Reply Mem. of Law, at 21. However, this conclusory claim does not satisfy petitioners' burden "of demonstrating that they have suffered an environmental injury that is in some way different from that of the public at large. Although the petitioners attempt to couch their allegations in terms of potential environmental harm, it is clear that the only injury alleged is a potential economic one." *Matter of Blue Lawn, Inc. v County of Westchester*, 293 AD2d 532, 534 (2d Dept 2002); *see also Matter of New York Horse and Carriage Assn. v Council of City of New York*, 169 AD2d 547, 547-548 (1st Dept 1991) ("[s]ince petitioner's objections to Local Law No. 89 [a law regulating horse-drawn carriages] mainly concern the law's adverse economic impact on petitioner, and not its environmental impact, petitioner lacks standing to assert a claim based on [SEQRA]"). Thus, petitioners lack standing under SEQRA, and, therefore, they have not shown a likelihood of success on their fifth cause of action.

Furthermore, in balancing the equities, any inconvenience to petitioners resulting from having to comply with the weight restrictions is outweighed by respondents' need to protect the bridges from further damage and to safeguard the public. Thus, the sixth cause of action for injunctive relief cannot succeed.

In conclusion, the petitioners have failed to establish any basis for injunctive relief and not have established any basis for annulling any of the respondents' determinations or actions as arbitrary or capricious. Simply put, the petition seeks to have to the court inappropriately intervene in the respondents' management of the two bridges at issue. When as here there is an articulated basis for the actions taken, and that basis has any amount of support in the record, regardless of whether it is the action the court would have taken were it in the business of managing bridges, the court's review is complete. It is not for the court to determine which of various options for repairing the bridges and/or preventing their further deterioration is the best or wisest. Rather, the court must defer to the expertise of the agency and authority's involved. Accordingly, it is

ORDERED that petitioners' motion for a preliminary injunction is denied as is the petition to annul various determinations of the respondents; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed together with costs and disbursements.

This is the decision, order and judgment of the court.

Dated: May 21, 2008

ENTER:

J.S.C.

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 141B).