

**Frosenberg Holdings, LLC v Suffolk County
Portable Fire Extinguisher**

2008 NY Slip Op 32015(U)

July 10, 2008

Supreme Court, Suffolk County

Docket Number: 0029111/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 29111/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 FROSENBERG HOLDINGS, LLC
 d/b/a ACCURATE FIRE PROTECTION
 SYSTEMS,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

SUFFOLK COUNTY PORTABLE FIRE
 EXTINGUISHER AND AUTOMATIC FIRE
 EXTINGUISHER SYSTEMS SERVICING
 BOARD and THE COUNTY OF SUFFOLK,

Respondents.

ORIG. RETURN DATE: OCTOBER 22, 2007
 FINAL SUBMISSION DATE: FEBRUARY 14, 2008
 MTN. SEQ. #: 007 (001) (003) (005)
 MOTION: MD

ORIG. RETURN DATE: OCTOBER 22, 2007
 FINAL SUBMISSION DATE: FEBRUARY 14, 2008
 MTN. SEQ. #: 008 (002) (004) (006)
 CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 13 read on this motion _____
 FOR A JUDGMENT PURSUANT TO ARTICLE 78 _____.

Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Administrative Return 7; Memorandum of Law 8; Reply Affirmation and supporting papers 9, 10; Reply Affirmation and supporting papers 11, 12; Sur- Reply Affirmation and supporting papers 13; it is,

ORDERED that this petition for a judgment, pursuant to CPLR 7803(2) and 7803(3), vacating and annulling the decision of the SUFFOLK COUNTY PORTABLE FIRE EXTINGUISHER AND AUTOMATIC FIRE EXTINGUISHER SYSTEMS SERVICING BOARD ("Board") dated June 26, 2007, denying the license application request of petitioner, and directing respondents to

issue a license to petitioner to service portable fire extinguishers and fixed fire extinguisher systems in Suffolk County; and for a judgment, pursuant to CPLR 317(b), declaring that the actions of respondents denying the license application of petitioner are *ultra vires* and without legal force and is effected by an error of law, is hereby **DENIED** in its entirety; and it is further

ORDERED that this cross-motion by respondents for an Order enjoining petitioner from operating within Suffolk County and imposing civil fines against petitioner in the amount of \$45,000.00, is hereby **GRANTED** to the extent provided hereinafter.

By letter dated June 26, 2007, respondent Board denied petitioner's application for a license to service portable fire extinguishers and fixed fire extinguisher systems in Suffolk County. The reason stated therein was that the Board discovered a discrepancy in the application. In response to a question regarding whether the firm or any owner has ever appeared before or been investigated by a regulatory body for a violation in the conduct of a business, petitioner marked "no." The Board indicated, however, that records of the United States Department of Transportation ("DOT") showed that Accurate Fire Protection Systems, and its principal MARTIN RANKIN, were investigated by the DOT and the subject of a 2004 Default Order ("Default Order") finding that Accurate Fire Protection Systems violated federal laws. As such, the Board denied the application.

Thereafter, petitioner's former counsel sent a letter to the Board, dated July 17, 2007, objecting to the denial and explaining that: (1) petitioner "FROSENBERG HOLDINGS, LLC d/b/a ACCURATE FIRE PROTECTION SYSTEMS" was not the subject of the Default Order; and (2) Mr. Rankin believed that "to the best of his knowledge" he had never appeared before or been investigated by a regulatory body for a violation in the conduct of a business. Therefore, Mr. Rankin marked "no" on the application. In response to the letter of July 17, 2007, the Board sent a letter to petitioner's counsel, dated July 31, 2007, wherein the Board indicated, among other things, that it conducted a further review of petitioner's application, including a review of records relative to a March 22, 2007 inspection of petitioner's premises. The inspection had revealed critical and other deficiencies which were allegedly never cured by petitioner. The Board informed petitioner that pursuant to Suffolk County Code § 294-12, an applicant

must meet certain minimum requirements, and petitioner had not met those requirements. Accordingly, the Board reaffirmed its denial.

Petitioner has now commenced this Article 78 proceeding for a judgment vacating and annulling the decision of the Board dated June 26, 2007, and directing respondents to issue a license to petitioner to service portable fire extinguishers and fixed fire extinguisher systems in Suffolk County. Petitioner also moves for a judgment, pursuant to CPLR 317(b), declaring that the actions of respondents denying the license application of petitioner are *ultra vires* and without legal force and is effected by an error of law. However, CPLR 317(b) does not relate to actions of a Board or County that are allegedly *ultra vires*. As such, this branch of petitioner's application is **DENIED**.

Petitioner argues that respondents' denial was arbitrary, capricious, not based upon substantial evidence, and without rational basis. Further, petitioner argues that the applicable provisions of the Suffolk County Code do not set forth any standards of review for the Board in determining whether to grant or deny a license application.

In opposition, respondents have filed a cross-motion for an Order enjoining petitioner from operating within Suffolk County, and imposing civil fines upon petitioner in the amount of \$45,000.00. Respondents allege that despite the denial of June 26, 2007, and the cease and desist order contained therein, petitioner continues to operate in Suffolk County. Respondents argue that although the Default Order was issued against an entity known as "Rankin Industries, Ltd. d.b.a. Accurate Fire Protection Systems," Mr. Rankin is the principal member of that entity as well as the petitioner herein, which similarly does business as "Accurate Fire Protection Systems." Further, respondents alert the Court that the March 22, 2007 inspection of petitioner's premises revealed over nineteen (19) deficiencies, six of which were serious in nature. As these deficiencies were allegedly uncorrected by petitioner at the time of the application process, they served as an additional basis for the denial.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681

[2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). 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 (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*).

Article II of Chapter 294 of the Suffolk County Code governs the application process. In particular, section 294-12 provides that each person engaged in the business of servicing portable fire extinguishers or automatic fire extinguishing systems shall meet certain minimum requirements. Respondents allege that petitioner had not met those requirements. Petitioner has not refuted this allegation. Moreover, as discussed hereinabove, the question on the application at issue asked whether the firm *or any owner* has ever appeared before or been investigated by a regulatory body for a violation in the conduct of a business. Despite the change in the name of the entity, Mr. Rankin is a principal of both entities, and respondents have submitted documentation from the New York State Department of State in support thereof.

In view of the foregoing, the Court finds that the decision by respondents to deny the application was neither arbitrary nor capricious, and with a rational basis in fact and law (see *Hughes v. Doherty*, 5 NY3d 100 [2005]; *Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). After investigating the matter upon receipt of petitioner's application, respondent properly considered the discrepancy in petitioner's application, and upon further investigation, the factors delineated in Section 294-12 of the Suffolk County Code. Therefore, respondents' denial of the application had a rational basis, was supported by the evidence presented, and was not an abuse of discretion. Accordingly, the instant petition is **DENIED**.

With respect to respondents' cross-motion, to be entitled to preliminary injunctive relief with respect to a violation of its ordinance, a municipality need not meet the traditional three-prong test. Instead, it must demonstrate both a likelihood of success on the merits and that the balancing of equities weighs in its favor (*see Town of Thompson v Braunstein*, 247 AD2d 753 [1998]; *City of Albany v Feigenbaum*, 204 AD2d 842 [1994]; *Town of Lake George v Dehaan*, 192 AD2d 820 [1993]). A preliminary injunction will not be granted absent a showing that there is a clear right to such relief on the undisputed facts presented (*Town of Smithtown v Carlson*, 204 AD2d 537 [1994]).

The Court has weighed the elements necessary for the granting of injunctive relief to respondents, and finds that an injunction is warranted herein. Respondents have submitted uncontroverted proof, including affidavits of local business owners, affidavits of Fire Marshalls, and other documentation, demonstrating that petitioner continues to operate in Suffolk County without a license and in contravention of the directives of the Board. Based upon the foregoing, the Court finds that respondents have made a strong showing of a likelihood of success on the merits. Further, in balancing the equities, the Court finds that the scale tips in favor of respondents, as petitioner continues to operate in Suffolk County without a license, in violation of the cease and desist order originally issued on June 26, 2007, and utilizing a facility that was found to have numerous deficiencies. Petitioner has not denied that it continues to operate, nor has it alleged that it rectified all of the deficiencies found at its facility. Moreover, petitioner's continued operations could have an adverse effect on the health, safety, and welfare of the populace of Suffolk County. Accordingly, that branch of respondents' cross-motion for an Order enjoining petitioner from operating within Suffolk County is **GRANTED**.

With respect to that branch of respondents' cross-motion for the imposition of civil penalties against petitioner, respondents have submitted substantial proof that petitioner operated in violation of the cease and desist order on nine occasions, to wit: July 7, 2007, August 22, 2007, August 24, 2007, August 31, 2007, September 5, 2007, September 11, 2007, two occasions on September 13, 2007, and September 25, 2007. As discussed, petitioner has not refuted these allegations. Subdivision A of section 294-16 of the Suffolk County Code provides that a violation of any provision of Article II or of any rule or regulation promulgated thereunder shall be punishable upon proof thereof by the

payment of a civil penalty in the sum of not more than \$5,000.00 for each violation. As such, respondents seek the imposition of civil penalties in the sum of \$45,000.00 for the nine violations asserted herein. However, the aforementioned subdivision relied upon by respondents specifically indicates that such fines shall be recovered in *a civil action*. As the instant matter is not a civil action, but rather a special proceeding filed pursuant to Article 78 of the CPLR, this branch of respondents' cross-motion is **DENIED**, without prejudice to the commencement of a civil action seeking such relief.

The foregoing constitutes the decision and Order of the Court.

Dated: July 10, 2008



HON. JOSEPH FARNETI
Acting Justice Supreme Court