

Matter of J.C. Landscape Contr. Corp. v City of N.Y. Bus. Integrity Commn.
2009 NY Slip Op 31315(U)
June 15, 2009
Supreme Court, New York County
Docket Number: 112115/08
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUSTICE SHIRLEY WERNER KORRINGA

PRESENT: _____

PART 54

Index Number : 112115/2008
J.C. LANDSCAPE CONTRACTING
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 112115/08
MOTION DATE 3/12/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Article 78 petition
this motion to/for _____

PAPERS NUMBERED

1
2, 3

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

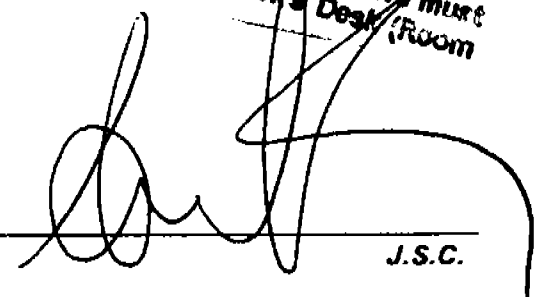
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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).

Dated: 5/16/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

-----X
In the matter of the Application of

J.C. LANDSCAPE CONTRACTING CORP.,

Petitioner,

Index No.: 112115/08

for a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION and
ORDER**

- against -

THE CITY OF NEW YORK BUSINESS
INTEGRITY COMMISSION,

Respondent.

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

KORNREICH, SHIRLEY WERNER, J.:

Petitioner J.C. Landscape Contracting Corp. brings this Article 78 proceeding, seeking a judgment setting aside, vacating or otherwise modifying respondent's determination to deny its application to renew its registration to operate as a trade waste business. Respondent the City of New York, Business Integrity Commission (BIC) opposes.

I. Background

A. New York City Carting and Trade Waste Industry

Historically in New York City, the carting and trade waste industry was controlled by an organized crime cartel. *See Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 989-90 (2d Cir. 1997). A majority of the City's more than 200,000 commercial businesses are required to contract with carting companies to remove their waste. Those services are provided by several hundred companies. *See id.* at 990. During the mid-1990s, the Manhattan District Attorney obtained multiple racketeering indictments against dozens of individuals and firms operating within the trade waste industry, including certain high profile organized crime

figures. This led the City Legislature to enact Local Law 42, which was designed to eliminate the criminal element prevalent within the industry.

B. Local Law 42 and the BIC

Enacted in 1996 and codified as Title 16-A of the Administrative Code, Local Law 42 established the Trade Waste Commission, the agency responsible for the licensing and registration of businesses that remove, collect or dispose of trade waste. Administrative Code §§ 16-502, 16-503. "Trade waste" is defined as, *inter alia*, garbage, refuse, street sweepings and construction and demolition debris. *Id.* § 16-501(f)(1). In 2001, a city charter revision created a new agency named the Organized Crime Control Commission and consolidated the registration and regulatory authority of the trade waste industry into that agency. Subsequently, Local Law 21 of 2002 changed the name of that agency to BIC.

Local Law 42 makes it unlawful for any person or business to remove trade waste, generated in the course of its business, without first registering with BIC. Administrative Code § 16-505(b). An applicant for registration is required to provide BIC with information including the nature of the business, the identity of the vehicle to be used for the removal of trade waste and the financial or employment relationships between the principals and the business. *Id.* § 16-507(a). If BIC Staff recommends that BIC deny an application for registration, the applicant has a limited time to oppose the recommendation, prior to BIC making a final determination. *See* 17 Rules of the City of New York (RCNY) § 2-08. A license or registration may be refused to an applicant "who has knowingly failed to provide the information and/or documentation required by the [BIC]" Administrative Code § 16-509(b).

Registration is valid for two years. *Id.* § 16-506(a). During this time, the registrant is required to notify BIC within ten business days of "any changes in the ownership composition of

the registrant, . . . the arrest or criminal conviction of any principal of the business, or any other material change in the information submitted on the application for registration.” *Id.* § 16-507(b); *see also* 17 RCNY § 2-05(b).

C. This Case

Petitioner provides landscaping services. As the nature of its business involves removing clippings from the work site, it must first register with BIC. It first registered with BIC as a trade waste business in January 2003.

On November 11, 2004, petitioner’s sole principal, Gerardo J. Carbonaro, was arrested on three charges, as the result of a domestic incident with his then wife. He also was subject to an order of protection. On December 6, 2004, Carbonaro was again arrested on two charges, related to the earlier incident.

On December 28, 2004, petitioner submitted an application to renew its registration with BIC (Renewal Application). On the Renewal Application, petitioner answered Question 6 in the negative: “Have you or any of your principals, employees, or affiliates been convicted of any criminal offense in any jurisdiction, or been the subject of any criminal charges in any jurisdiction?”

On February 16, 2005, the charges brought against Carbonaro on November 11, 2004 were adjourned in contemplation of dismissal. He remained subject to the order of protection and was required to participate in an alcohol treatment program. In satisfaction of the charges brought against him on December 6, 2004, he pled guilty to a violation.

On May 24, 2005, Carbonaro was arrested and charged with violating Penal Law § 175.35, Offering a False Instrument for Filing in the First Degree. It is alleged that he filed a false instrument, the Renewal Application, with BIC with the intent to defraud BIC. On July 18,

2007, Carbonaro pled guilty to violating the lesser charge of Penal Law § 175.30, Offering a False Instrument for Filing in the Second Degree.

On February 29, 2008, after conducting a background investigation of petitioner's Renewal Application, BIC Staff recommended denial of petitioner's December 28, 2004 application. The recommendation stated that it was based on the independently sufficient findings that Carbonaro had: (1) failed to disclose his prior arrests and criminal charges on the Renewal Application and that he had (2) pled guilty to offering a false instrument for filing in the second degree, in connection with his failure to disclose his prior arrests and criminal charges on the Renewal Application. On March 25, 2008, petitioner opposed the recommendation, alleging that Carbonaro had not knowingly provided false information on the Renewal Application, believing at the time that he had no criminal record.

On June 24, 2008, after considering the BIC Staff's recommendation and petitioner's response, BIC denied petitioner's Renewal Application. It based the determination on the following independently sufficient reasons: "1. The Applicant, by its sole principal, failed to provide truthful information to the [BIC] in connection with its Renewal Application; 2. The Applicant's sole principal was convicted of Offering a False Instrument for Filing, in violation of New York State Penal Law § 175.30." BIC Decision, Ans, Exh N, at 1-2. This petition followed.

II. Conclusions of Law

A court reviewing an Article 78 proceeding must judge the propriety of an agency action solely on the reasons cited by the administrative body. *See Scherbryn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). The court must not interfere with the agency's determination "unless there is no rational basis for the exercise of discretion" or it is arbitrary and capricious. *Matter of Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). Moreover, a

rational or reasonable basis for an administrative agency's determination exists if there is evidence in the record to support its conclusion. *Sewell v. City of New York*, 182 A.D.2d 469, 473 (1st Dept. 1992), *appeal denied* 80 N.Y.2d 756 (1992). In sum, only the following questions may be raised in an Article 78 proceeding: "[w]hether a determination was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803.

Petitioner argues that BIC's denial of its Renewal Application to operate as a trade waste business was arbitrary, capricious and not supported by the record. BIC, however, contends that its determination satisfies the Article 78 standard of review. Specifically, BIC argues that the record contains overwhelming evidence that petitioner "has knowingly provided false and misleading information to the [BIC] and has failed to provide the information and/or documentation required by the [BIC]." Resp Br, at 24, quoting BIC Decision. It contends that, pursuant to Administrative Code § 16-507© and § 16-509(a), BIC may deny a registration renewal application where it finds that the applicant "lacks good character, honesty and integrity." It further argues that, in making such a finding, BIC may consider the "failure of such applicant to provide truthful information in connection with the application." Administrative Code § 509(a). Finally it argues that, pursuant to Administrative Code § 507(b) and 17 RCNY § 2-05(b), BIC may consider the failure of a registrant to inform BIC of any arrests or criminal convictions of any of its principals.

Indeed, BIC rejected petitioner's explanation that Carbonaro believed, based on information he received from his criminal lawyer, that he had no criminal record at the time of submitting the Renewal Application, which he claims resulted in his not reporting his recent

arrests and criminal charges. BIC found that this explanation was not supported by the factual record. Rather, at the time petitioner submitted the Renewal Application, Carbonaro had recently been arrested twice, arrests which petitioner failed to report to BIC, pursuant to the statutory requirements. It found a clear contradiction between petitioner's explanation and the fact that the criminal charges pending against Carbonaro were not disposed of until February 16, 2005, almost two months after petitioner submitted its Renewal Application. Thus, based on the factual record, BIC determined that Carbonaro knew he had been the subject of criminal charges during the preceding two months.

Moreover, BIC found that petitioner's explanation is further contradicted by Carbonaro's pleading guilty to Penal Law § 175.30 Offering a False Instrument for Filing in the Second Degree, which provides that a person is guilty of such a charge "when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will . . . become a part of the records of such public office or public servant." BIC reasoned that by pleading guilty to this charge, Carbonaro admitted that he knowingly filed a written instrument, the Renewal Application, with BIC, a public office, while knowing that it contained false information and would become part of BIC's records.

BIC now argues that petitioner has failed to exhaust its administrative remedies and is, therefore, barred from challenging the agency's determination. *See* CPLR 7801; *Watergate II Apartments v. Buffalo Sewer Auth.* 46 N.Y.2d 52, 57 (1978); *Irizarry v. New York City Police Dept.*, 260 A.D.2d 269, 270 (1st Dept. 1999). It claims that petitioner failed to contest the BIC Staff's recommendation to deny petitioner's Renewal Application based on Carbonaro pleading guilty to Penal Law § 175.30 and is, therefore, now barred from seeking judicial review. BIC

emphasizes that this was an independently sufficient finding, which alone supports the dismissal of the petition.

Petitioner contends that its challenge of BIC's determination is ripe for judicial review because it has exhausted its administrative remedies. By letter dated March 25, 2008, petitioner contested the BIC Staff's recommendation. It supplemented the letter with an affidavit of Carbonaro and an affirmation of his counsel. Both documents speak to Carbonaro's belief that he had no criminal record at the time of filing the Renewal Application and acknowledge his guilty plea to Penal Law 175.30.

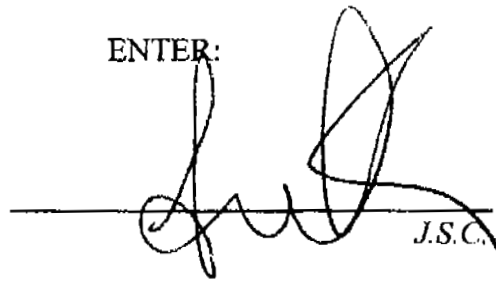
An agency determination is not ripe for judicial review until the petitioner challenging that determination has exhausted its administrative remedies. *See Walton v. New York State Dept. of Corr. Servs.*, 8 N.Y.3d 186, 195 (2007); CPLR 7801 (no agency determination shall be challenged in an Article 78 proceeding "which is not final or can adequately reviewed by appeal to a court or some other body or officer . . ."). Pursuant to the Rules of the City of New York, if the BIC Staff recommends that the BIC deny an application for registration, the applicant has a limited time to oppose the recommendation in writing, stating why it believes it should not be denied such registration, prior to the BIC making a final determination. *See* 17 Rules of the City of New York § 2-08.

Here, petitioner opposed the BIC Staff's recommendation by denying that it knowingly reported false information on the Renewal Application, but it did not oppose the recommendation on the basis of Carbonaro's guilty plea to Penal Law 175.30. Therefore, since this independently sufficient basis was unchallenged by petitioner, the court finds that petitioner has failed to exhaust its administrative remedies. *See Walton*, *supra*; CPLR 7801.

If the court were to consider the petition on the merits, the outcome would be the same. BIC's determination is supported by evidence in the record and is not arbitrary or capricious. See *Matter of Pell, supra; Sewell, supra*. Accordingly, it is

ORDERED and ADJUDGED that the application by petitioner seeking to set aside, vacate or otherwise modify the determination by the BIC is denied with prejudice, the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

ENTER:

 J.S.C.

June 15

Dated: ~~May 27~~, 2009
New York, NY

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).