

**Stallone Testing Labs., Inc. v Department of Bldgs.
of the City of N.Y.**

2009 NY Slip Op 32052(U)

September 9, 2009

Supreme Court, New York County

Docket Number: 111426/09

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

STALLONE TESTING LABORATORIES
- v - INC
NYC DEPT OF BUILDING

INDEX NO. 177426/09
MOTION DATE _____
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 _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion seq. 002 and decided in accordance with the underlying memorandum decision.

FILED
SEP 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: T15 PART 15

-----x
STALLONE TESTING LABORATORIES, INC.,

Index No. 111426/09

Petitioner,

-against-

THE DEPARTMENT OF BUILDINGS OF THE CITY
OF NEW YORK,

Mtn Seq.001,002

Respondent.

Pursuant to Article 78 of the CPLR

-----x
WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are validated for disposition
and decided in accordance with the accompanying memorandum
decision.

Petitioner seeks the same relief in motion sequence 001 and
002; (1) a preliminary injunction vacating and setting aside the
determination of the Department of Buildings ("DOB") suspending
Petitioner's license as a concrete testing laboratory; (2) for an
order directing the DOB to proceed with a hearing commenced
before the Office of Administrative Trials and Hearings ("OATH");
and (3) an order enjoining the DOB from suspending, revoking or
modifying Stallone's license pending the outcome of a hearing and
final determination by OATH.

Facts

Petitioner, Stallone Testing Laboratories, Inc.
("Stallone") is a concrete testing laboratory. The laboratory
tests building materials and is relied upon by construction

engineers to obtain licenses from the DOB. A license is obtained from the DOB once the engineers submit the laboratory testing results as evidence of the stability and safety of the construction materials. Petitioner was issued a license by the DOB on August 25, 1994.

On or about July 31, 2009, the DOB suspended Stallone's license from July 31, 2009 through August 6, 2009¹. The DOB notified Stallone of the suspension by letter dated July 31, 2009. The letter stated that a former Stallone Director, Jay Adams, misused his stamp, seal and signature and jeopardized public safety. As such, the DOB suspended Stallone's license "until such time as the suspension may be lifted or set aside pursuant to a hearing at the Office of Administrative Trials and Hearings [OATH] or other tribunal" (Petition, Ex. A).

The DOB served Stallone with a Petition and Notice of Scheduled Expedited Hearing, dated August 3, 2009. The Notice stated that, *inter alia*, the license was suspended based upon evidence which reflected that Stallone engaged in or assisted an act that endangered public safety. Specifically, the DOB claimed that Stallone falsified Concrete Mix Design Reports, Concrete

¹It should be noted that during the suspension period, Stallone continued to perform concrete testing (Sirakis Aff).

²It should also be noted that the license suspension was lifted at approximately 11:13 AM on Friday August 7, 2009, the day after the OATH hearing, and the suspension was reinstated at approximately 4:53 PM that same day.

Field Test Inspection Records and Concrete Compressive Strength Results (Petitioner's Ex. B; Admin. Code §29-140.19; Sirakis Aff.). The DOB further claimed that a contractor relying on such reports would be making decisions about construction design and about the reliability of the concrete mix chosen, without legitimate information thereby compromising public safety.

Stallone and the DOB appeared before OATH on August 6, 2009. The DOB offered a recording of Mr. Adam's as the basis for the license suspension. The recording was of an interview of Mr. Adam by the Buildings Special Investigations Unit ("BSIU") where Mr. Adam admitted that he allowed Stallone's vice president, who was not a licensed engineer, to stamp, seal and sign Adam's name on documents. Stallone objected to the evidence and submitted a Memorandum of Law to the OATH Administrative Law Judge ("ALJ"), without notice to the DOB, setting forth the objection (Petitioner's Ex. D).

The ALJ provided the DOB until August 13, 2009 to file its response and adjourned the hearing to August 25, 2009. Since the OATH hearing, there has been no final determination made and Stallone's license continues to be suspended.

By this Petition, Stallone seeks an order vacating and setting aside the determination of the DOB suspending Petitioner's license, an order directing the DOB to proceed with a hearing commenced before OATH and an order enjoining the DOB

from suspending, revoking or modifying Stallone's license pending the outcome of a hearing and final determination by OATH.

Discussion

Petitioner seeks to vacate the suspension of its license and enjoin the Respondents from suspending the license until a final determination is made.

In order to obtain a preliminary injunction, plaintiffs must show (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable injury if the preliminary injunction is denied; and (3) that the equities are in their favor. (W. T. Grant Company v. Robert Z. Srogi, 52 N.Y.2d 496 [1981]).

Petitioner argues that the Administrative Code of the City of New York does not provide for an extension of the five day suspension.

Admin. Code §28-401.19.1 provides:

The commissioner shall not revoke or suspend a license certificate of competence for any cause or impose any other sanction on a licensee unless and until the holder has been given at least five calendar days prior to written notice and an opportunity to be heard. However, when the public safety may be imminently jeopardized the commissioner shall have the power, pending a hearing and determination of charges, to forthwith suspend any license for a period not exceeding five working days.

(Admin. Code §28-401.19.1)

Petitioner has been afforded the opportunity to be heard.

The Court considers the government's interest in protecting public safety as well as the loss of livelihood of the Petitioner and its employees due to the suspension (Matthews v. Eldridge, 424 US 319[1976]). If the allegations asserted against Petitioner are true, Petitioner poses a serious danger to the public by misinforming engineers and contractors that the materials used are strong and safe enough to be used as intended. Such misinformation impedes on the structural integrity of buildings and structures and endangers the public at large.

Moreover, any delay in the hearing, requiring the continued suspension of Petitioner's license and causing a delay in obtaining a final determination by the ALJ, was caused by Petitioner submitting a Memorandum of Law without notice to Respondent. This is the ALJ's stated reasoning for adjourning the hearing to August 25, 2009.

Additionally, Petitioner fails to demonstrate irreparable injury. Irreparable injury occurs when an award of monetary damages would not adequately compensate Petitioner (US Re Cos v. Scheerer, 41 Ad3d 152 [1st Dept 2007]). Here, Petitioner could be reimbursed for any loss sustained while its license is suspended as it is purely economic.

Lastly, the balancing of the equities clearly lies in Respondent's favor as the public interest is best served by Petitioner's license being suspended pending a final

determination of OATH.

Accordingly, it is

ORDERED that the Petition is dismissed; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/9/09

HON. WALTER D. TOLUB, J.S.C.

FILED
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NEW YORK