

**Matter of Phantom Demolition Corp. v Mansfield**

2009 NY Slip Op 33068(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 115697/2008

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

In the Matter of the Application of,  
PHANTOM DEMOLITION CORP.

INDEX NO. 115697/08

Petitioner,

MOTION DATE Nov. 7, 2009

-against-

MOTION SEQ. NO. 001

MICHAEL J. MANSFIELD, as Commissioner of,  
THE NEW YORK CITY BUSINESS INTEGRITY  
COMMISSION,

MOTION CAL. NO. \_\_\_\_\_

Respondent.

The following papers, numbered 1 to 7 were read on this petition for an judgment pursuant to CPLR article 78

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

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits \_\_\_\_\_

5-6

Replying Affidavits \_\_\_\_\_

7

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 compelling respondent to issue a renewal of petitioner's registration to operate a trade waste business in the City of New York is decided pursuant to the accompanying 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 1415).

Dated: December 21, 2009

O. P. Sherwood  
O. PETER SHERWOOD, 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):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61**

-----X  
**In the Matter of the Application of  
PHANTOM DEMOLITION CORP.,**

**Petitioner,**

**-against-**

**DECISION, ORDER  
AND JUDGMENT**

**MICHAEL J. MANSFIELD, as Commissioner  
of THE CITY OF NEW YORK BUSINESS  
INTEGRITY COMMISSION,**

**Index.: 115697/2008**

**Respondent.**

-----X  
**In the Matter of the Application of  
WORLD CLASS DEMOLITION CORP.,**

**Petitioner,**

**-against-**

**MICHAEL J. MANSFIELD, as Commissioner  
of THE CITY OF NEW YORK BUSINESS  
INTEGRITY COMMISSION,**

**Index.: 117292/2008**

**Respondent.**

**In Article 78 Proceedings for Writs of Mandamus.**

-----X

**O. PETER SHERWOOD, J.:**

Before the court are two separately filed petitions to review a determination of the New York City Business Integrity Commission ("Commission") denying the application of petitioner, Phantom Demolition Corp. ("Phantom") for renewal of its registration to operate as a trade waste business solely engaged in removal of construction and demolition debris ("Renewal Application") and the application of petitioner, World Class Demolition Corp., ("World Class") to register to operate in the same business ("Application"). On November 28, 2008, Justice Jacqueline Silbermann signed an order to show cause temporarily enjoining the Commission from enforcement of its determination denying Phantom permission to operate a trade waste business in New York

**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 1417).*

City. On March 4, 2009, respondent, Michael J. Mansfield, as Commissioner of the Commission, filed a cross-motion to dismiss the Phantom petition for failure to exhaust its administrative remedies. On January 30, 2009, World Class submitted a notice of petition and petition seeking to reverse and annul the determination of the Commission deny its Application. Subsequently, both petitions were transferred to this court. The separately filed petitions are consolidated for purposes of disposition. Having reviewed the petitions, the cross-motion and the papers submitted in support, the Court has concluded that the petitions and cross-motion must be denied.

Vincent Bordone, three of his sons (John, Carlo and Maurizio) and other members of his family are in the trade waste business which they operate (or operated) through four corporate entities that share common offices, management and supervision. It is alleged that the companies interchange personnel, share customers and use the same equipment. Vincent, John and Carlo are principals of Metro Demolition Contracting Corp. ("Metro"). Carlo is the principal of Circle Interior Demolition Corp. ("Circle"). Maurizio and John are principals of Phantom. World Class was formed on October 17, 2005, two weeks after a consent judgment in favor of the Mason Tenders Trustees District Council of Greater New York and the Trustees of Various Benefit Funds of the District Council ("Mason Tenders ") in the amount of \$732,631 was "so ordered" against Metro. The Application listed Joanne DiBliase ("DiBliase") as the principal of World Class. DiBliase is a clerical employee of Phantom. Her cousin, Marisa Mangione who is a clerical employee of Metro, is the spouse of Maurizio. In July 2006, DiBliase's interest in World Class was transferred to Maurizio. Thereafter, World Class amended its license application to name Maurizio as its sole principal.

Phantom was granted a license to operate as a trade waste business on February 1, 2005. That license expired on January 31, 2007. On February 6, 2007, Phantom applied for renewal of the license. On May 5, 2007, the Commission found Metro and Circle lack good character, honesty and integrity and on that basis denied their applications for license renewal.

On May 27, 2009, after conducting an investigation that included taking the deposition of DiBliase and Maurizio, the staff of the Commission issued a 19-page report recommending that the Commission deny the application of World Class and the renewal application of Phantom ("Staff Recommendation"). Pursuant to Title 17 of the Rules of the City of New York ("RCNY") §2-08, World Class and Phantom were notified of the right to file written objections within ten (10)

business days of being notified of the Staff Recommendations, *i.e.* by June 1, 2008. As a result of a series of extensions to which the Commission consented, petitioners were given three months, until September 1, 2008, to file their submissions. World Class made its submission on November 4, 2008. Phantom elected not to file objections.

On November 7, 2008, the Commission issued its decision essentially adopting the staff recommendations and denying the Application and Renewal Application. The Commission determined (1) that Metro, Circle, Phantom and World Class were alter agos; (b) that two related companies - Metro and Circle - were denied licenses due to lack of good character, honesty, and integrity; (3) that World Class and Phantom engaged in "numerous instances of unregistered trade waste removal activity;" (4) that World Class and Phantom "failed to pay taxes and other obligations for which judgments have been entered;" and (5) that World Class and Phantom "knowingly failed to provide information and/or documentation to the Commission and have provided false or misleading information to the Commission in connection with the application (*see* Decision of the Business Integrity Commission Denying the Application of World Class Demolition, Inc., for a Registration to Operate as a Trade Waste Business and Denying the Renewal Application of Phantom Demolition Corp., for a Registration to Operate a Trade Waste Business, dated November 7, 2008, ["Commission Decision"]) a copy of which appears as Exhibit E to petition of World Class).

### DISCUSSION

The Commission argues that by failing to avail itself of the opportunity to submit opposition papers to the Staff Recommendations, Phantom waived its right to seek judicial review of the determination of the Commission and that the petition should be dismissed for failure to exhaust administrative remedies. Although Phantom is required to exhaust its administrative remedies prior to seeking review in the courts, it was under no obligation to respond to Staff Recommendations upon pain of forfeiture of its right to obtain judicial review of the Commissioner's determination. Pursuant to 17 RCNY §2-08, the staff of the Commission is required to notify the applicant in writing of its reasons for any recommendation to deny a license. The applicant is permitted - - not required - - to respond in writing to the Staff Recommendations setting forth the reasons the applicant believes the Staff Recommendations should be rejected. After the Commission makes its determination, Phantom is entitled to seek judicial review.

Administrative agencies enjoy broad discretionary power when rendering determinations on matters they are empowered to decide. Judicial review of an agency's exercise of discretion is limited in scope. Section 7803 of the CPLR provides in pertinent part:

The only questions that may be raised in a proceeding under this article are:

Whether a determination was made in violation of lawful procedure, was affected 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.

In *Pell v. Board of Education*, 34 NY2d 222, 231 (1974) the Court of Appeals stated:

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." Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*internal cites omitted*).

Under the arbitrary and capricious standard, the court will review an administrative agency's determination for rationality or reasonableness and overturn an administrative action only if the record reveals no rational or reasonable basis for it. The reviewing court does not examine the facts *de novo* to reach an independent determination (*see Marsh v. Hanly*, 50 AD2d 687 [3d Dept 1975]). Further, the reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated." *Purdy v. Kreisberg*, 47 NY2d 354, 358 (1979).

A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (*see Sewell v. City of New York*, 182 AD2d 469 [1<sup>st</sup> Dept], *appeal denied*, 80 NY2d 756 [1992]). Unless the reviewing court finds that the agency acted in excess of its jurisdiction, in violation of a lawful procedure, arbitrarily, or in abuse of its discretion, the court has no alternative but to confirm the agency's decision (*see Pell*, 34 NY2d at 231).

World Class contends that by ruling on its application along with the re-application of Phantom, it was denied specific notice of the reasons for denial of its "renewed application" (*sic*) in violation of its due process rights. Specifically, World Class asserts that many of the findings that "applicants" failed to meet certain criteria for registration under NYC Administrative Code §16-506

falsely attributes to it claims that are based on allegations against the co-applicant, Phantom.

The court disagrees. First, the Commission found that World Class and Phantom, Metro and Circle are alter egos. That finding is well supported (*see* Decision, pp 8-11). Second, Maurizio is a principal of both Phantom and World Class and therefore, is an “applicant” as to both the Application and Renewal Application. Finally, it is well settled that administrative agencies have discretion to consolidate matters (*see Bayron v. New York State Dep’t of Motor Vehicles*, 28 AD2d 993 [1<sup>st</sup> Dept 1976] lv to appeal denied, 21 NY2d 643 [1968]; *Asbestos Industries of America, Inc. v. NYS Dep’t of Labor*, 224 AD2d 414 [2d Dept 1966]; *Reisner v. Board of Regents*, 142 AD2d 22, 30 [3d Dept 1988]). The Commission Decision may not be set aside merely because the acts of one alter ego were attributed to another or because the applications were reviewed and decided together.

Pursuant to Administrative Code §16-509(b), the Commission “may refuse to issue a license or registration to an applicant ... who has otherwise failed to demonstrate eligibility for such license under this chapter or any rules promulgated pursuant hereto.” An applicant includes both the “business entity submitting an application ... and each principal thereof.” Administrative Code §16-501(a). *See also* Administrative Code §§16-501(d) and 6-509(a)(vii).

Here, the Commission rationally found that World Class was a “thinly veiled alter ego” of Phantom, Metro, and Circle. Since the Commission previously denied both Metro and Circle’s registration applications because they lack the requisite good character, honesty, and integrity, it found that the application of World Class should also be denied. Specifically, the Commission found that

[t]he four companies share common offices, ownership, management and supervision. They also implement complementary labor policies, interchange personnel with each other, and perform the same services for the same customers using the same equipment... The Applicant’s response does not dispute any of these facts...

In addition to sharing principals, the Bordone companies have shared main office, mailing, and garage addresses... The Bordone companies share equipment... The Bordone companies share personnel... The Bordone companies service customers interchangeably... The Applicant’s response does not address any of the above mentioned facts. Instead, the Applicant’s response simply states, without citing any evidence, that Maurizio “was never a principal” of Metro and Circle.

*See* Commission Decision, pp 9-10.

The Commission's findings are rational. The administrative record reveals that World Class shared, among other things, principals, offices, vehicles, and employees with Phantom, Metro, and Circle. Maurizio Bordone, the sole principal of World Class, was also a principal for Metro and Phantom. World Class occupies offices at 56-00 Grand Avenue, Maspeth, NY 11378, which was owned by FB Realty with Phantom, Metro, and Circle. FB Realty is owned by Maurizio, Carlo, John, and Fabio Bordone. World Class also occupies 56-14 Grand Avenue, Maspeth, NY 11378 with Metro and Circle. Metro owns these premises. Moreover, World Class obtained six of its eight vehicles from Phantom, Metro, and Circle. Except perhaps in one instance, World Class could not show that it acquired the vehicles in arms length transactions.

In reaching its determination that World Class and Phantom were alter egos of Metro and Circle, the Commission also considered a July 16, 2007 decision issued by National Labor Relations Board which found that "Phantom is an alter ego of ... Metro, ... and that Circle and World Class are alter egos with Metro and Phantom." The Commission's findings are rational and may not be overturned by this court.

The Commission also found that Phantom and World Class attempted to circumvent the Commissioner's authority and engaged in numerous instances of unregistered trade waste activities. These findings are supported by evidence in the administrative record. It includes evidence of the arrest of John and Maurizio as the owners of Phantom for operating a trade waste business without a license. Each pleaded guilty to attempted unlicensed carting and paid fines. On March 30, 2006, World Class was charged administratively with operating an unlicensed waste removal business. It subsequently entered into a stipulation of settlement.<sup>1</sup>

The finding that Phantom and World Class failed to pay taxes and other obligations for which judgments have been entered is supported by evidence before the Commission. That evidence includes a consent judgment against Metro and a default judgment against Phantom in favor of the Mason Tenders for unpaid fringe benefit contributions and other obligations. In a Stipulation and

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<sup>1</sup>That the stipulation of settlement was signed before Maurizio replaced DiBiase as principal of World Class or does not contain an admission of liability, does not render evidence of unlicensed waste carting witnessed by Commission staff irrelevant in the proceedings before the Commission.

Order of Settlement, dated "as of" March 16, 2009, World Class acknowledged the indebtedness. The record also includes evidence of judgments against Metro for unpaid federal taxes and unemployment contributions.

The Commission's findings that Phantom, World Class and their principals knowingly failed to provide it with information and have provided the Commission with false or misleading information in connection with the application is well supported. The record includes the failure of DiBiase to disclose her close connection with the Bordone companies, Maurizio's central role in the business of World Class before shares of the company were transferred to him and the true owners of equipment that was transferred to World Class. It also includes failure to disclose the principals of Phantom.

In sum, there is sufficient evidence in the administrative record to support the Commission's determination. Petitioners' request to reverse and annul the determination of the Commission as unsupported by substantial evidence must be denied.

Accordingly, it is

**ORDERED** and **ADJUDGED** that the petition of Phantom is **DENIED** and that the petition is **DISMISSED**; and it is further

**ORDERED** and **ADJUDGED** that the petition of World Class is **DENIED** and the petition (Index No.: 117292/2008) is **DISMISSED**; and it is further

**ORDERED** that the Cross-Petition of respondent (Index No.: 115697/2008) is **DENIED**.

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

**DATED:** December 21, 2009

ENTER,  
  
O. PETER SHERWOOD  
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).