

**Matter of Jay's Greenpoint Sta., Inc. v New York
State Dept. of Health**

2010 NY Slip Op 30403(U)

March 3, 2010

Supreme Court, Albany County

Docket Number: 9633-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
JAY'S GREENPOINT STATION, INC.,

Petitioner,

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

DECISION and ORDER
INDEX NO. 9633-09
RJI NO. 01-09-ST0914

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,
NEW YORK STATE DIVISION OF THE LOTTERY
and NEW YORK STATE DEPARTMENT OF TAX
AND FINANCE,

Respondents.

Supreme Court Albany County All Purpose Term, February 5, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner commenced this Article 78 proceeding challenging the Respondents' suspension of its licenses to sell tobacco products and lottery tickets at its gasoline service station/convenience store located at 3515 Greenpoint Avenue, Long Island City, New York

(hereinafter “the store”). Respondents answered, oppose the petition and set forth two objections in point of law. Although Respondents failed to set forth any factual proof to substantiate their objections in point of law; because Petitioner failed to demonstrate that the Respondents’ actions were arbitrary and capricious, the petition is dismissed.

Respondents’ actions will not be disturbed, unless Petitioner demonstrates that such actions were “arbitrary, capricious, or irrational”. (Matter of Voelker v. State of NY Commr. of Taxation & Fin., 50 AD3d 1187 [3d Dept. 2008]). It is axiomatic that this Court “may not substitute [its] discretion for that of the agency”. (Matter of F&W Oldsmobile v. State of NY Commn. of Taxation & Fin., 106 AD2d 792 [3d Dept. 1984]).

On this record, the facts underlying the suspensions are undisputed. Petitioner’s store was previously owned by King’s Greenpoint Station, Inc. (hereinafter “King’s”) and managed by Bolla Management. In December 2008, while King’s owned the store, it sold a tobacco product to a minor. This was not its first violation, and the City of New York Department of Consumer Affairs charged it with the violation. King’s pled guilty to the violation, on March 9, 2009, accepting a fine and a six month suspension of its licenses to sell tobacco products and lottery tickets. Respondents did not enforce such suspension until September 2009.

Less than one month prior to King’s guilty plea, King’s sold its ExxonMobil dealership franchise (hereinafter “franchise”) for the store to Petitioner. Petitioner had been formed the month before the sale, by the filing of its Certificate of Incorporation. The Certificate specifies Bolla Management and its address, as the address where service of process is directed to be mailed for Petitioner. Petitioner submits the Contract of Sale and Promissory Note, which demonstrate that Petitioner was required to make no up front payment for the franchise, but

rather the entire purchase price was paid by an unsecured promissory note. Conspicuously absent from the petition is any proof that the purchase price reflects the market value of this franchise. Nor, on this record, did the sale include a lease or sale of the real property where the store is located, or an assignment of lease. Only an unexplained "Rent Schedule" was attached as part of an incomplete agreement in which ExxonMobil Oil Corporation purportedly consented to the above sale.

Moreover, the Petitioner candidly admits the familial relations between the owners of the purchaser and seller. Petitioner's president and sole shareholder is Jeetinder Paul Singh (hereinafter "Jeetinder"). The president and sole shareholder of both King's and Bolla Management is Harvinder Singh (hereinafter "Harvinder"). Jeetinder is Harvinder's son.

With this proceeding, Petitioner failed to demonstrate that Respondents' imposition of the above suspension on Petitioner was arbitrary and capricious. Tax Law §480-a(1)(e) provides:

"The commissioner may refuse to register as a retail dealer or may revoke the registration of a retail dealer where the applicant's or retail dealer's place of business is at the same premises as that of a retail dealer whose retail dealer registration has been revoked and where such revocation is still in effect, unless the applicant or retail dealer provides the commissioner with adequate documentation demonstrating that such applicant or retail dealer acquired the premises or business through an arm's length transaction as defined in this paragraph and that the sale or lease was not conducted, in whole or in part, for the purpose of permitting the original registrant to avoid the effect of the previous revocation for the same premises. For purposes of this paragraph, "arm's length transaction" means a sale of a fee or all undivided interests in real property, or lease of any part thereof, or a sale of a business, in good faith and for valuable consideration, that reflects the fair market value of such real property or lease, or business, in the open market, between two informed and willing parties, where neither is under any compulsion to participate in the transaction, unaffected by any unusual conditions indicating a reasonable possibility that the sale or lease was made for the purpose of permitting the original registrant to avoid the effect of the previous revocation for the same premises. The following sales or leases shall be presumed not to be arm's length transactions unless adequate documentation is provided demonstrating that the sale or lease was not conducted, in whole or in part, for the purpose of permitting the original registrant to avoid the effect of the previous

revocation for the same premises:

- (i) a sale between relatives; or
- (ii) a sale between related companies or partners in a business; or
- (iii) a sale or lease affected by other facts or circumstances that would indicate that the sale or lease is entered into for the primary purpose of permitting the original registrant to avoid the effect of the previous revocation for the same premises. (emphasis added)

Such section initially authorizes Respondents to impose King's suspension on Petitioner because the business are being conducted at the same premises. As demonstrated by Respondents and conceded by Petitioner, because of the familial ownership of the purchaser and seller, Tax Law §480-a(1)(e)'s presumption against an "arms length transaction" finding applies. On this record, Petitioner failed to rebut such presumption or demonstrate that Respondents' finding, that the presumption was not rebutted, was arbitrary or capricious. Specifically, Petitioner failed to offer competent proof that its purchase of the franchise was for "valuable consideration, that reflects the fair market value of such... business, in the open market." (Tax Law §480-a[1][e]). The father and son's unsupported statements that this was an arms length transaction are insufficient. Moreover, the continuation of the prior management company's address for mailing of process, the timing of the sale and the financial details of the transaction, all as set forth above, confirm that Respondents decision to impose King's suspension on Petitioner was not arbitrary, capricious or irrational.

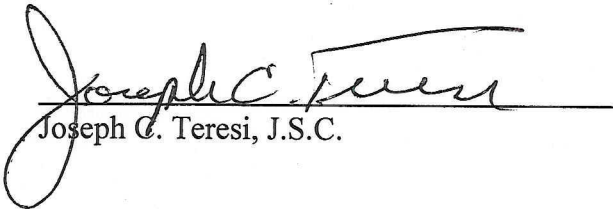
Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 9, 2010
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated November 18, 2009, Verified Petition, dated November 11, 2009, with attached Exhibits "A" - "F", Affidavit of Harvinder Singh, dated November 11, 2009, with attached Exhibits "A" - "B", Affirmation of Frederick Altman, dated November 16, 2009, with attached Exhibit "A".
2. Answer, dated January 27, 2010, Affidavit of Carmen Ferriero, dated January 27, 2010, Affidavit of Michael Cambridge, dated January 19, 2010, with attached Exhibits "1" - "7"; Affidavit of Maribeth McGinnis, dated January 26, 2010, with attached Exhibits "A" - "F".
3. Affidavit of Jeetinder Singh, dated February 2, 2010, with attached Exhibit "A"; Affidavit of Martin Fliegel, dated January 3, 2010, with attached Exhibits "A"; Affirmation of Frederick Altman, dated February 4, 2010, with attached Exhibits "A" - "B".