

**Matter of Big Apple Testing Inc. v New York  
City Dept. of Bldgs.**

2010 NY Slip Op 30418(U)

March 1, 2010

Supreme Court, New York County

Docket Number: 100031/10

Judge: Alice Schlesinger

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SCANNED ON 3/4/2010  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
Justice

~~PLA~~ PART 16

Big Apple Testing, Inc.

INDEX NO. 100031/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

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

- v -

NYC DEPT. OF BUILDINGS

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

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

**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  
1478).**

Dated: MAR 01 2010

Alice Schlesinger  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X

In the Matter of the Application of

BIG APPLE TESTING INC.,

Petitioner,

Index No. 100031/10  
Motion Seq. No. 001

For a Judgment under and pursuant to Article 78 of  
the Civil Procedure Law and Rules,

-against-

THE NEW YORK CITY DEPARTMENT OF  
BUILDINGS,

Respondent

-----X  
SCHLESINGER, J.:

**UNFILED ARGUMENT**  
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 1412).

Before the Court is a petition brought by Big Apple Testing, Inc. ("BAT") asking to annul the denial by the New York City Department of Buildings ("DOB") of its application for renewal of its concrete testing laboratory license dated September 4, 2009. Petitioner wants its license reinstated. Alternatively, BAT wants the matter remanded to DOB for a "notice and hearing consistent with applicable law" [petition, ¶4(b)]. Finally, in the interim and until the time of the requested hearing, petitioner is requesting a preliminary injunction, reinstating its license. Respondent opposes all relief.

BAT has held a Concrete Testing Laboratory License since September 25, 1992. The last time it was renewed was on February 4, 2008. The licenses have to be renewed on a yearly basis. One of the issues here, therefore, is when did this particular license expire. It is an important issue because the main reason DOB denied the renewal was its finding that petitioner continued to do concrete testing at various specified locations after its license had expired on September 15, 2008. It should be noted that the prior license did, on its face, have an expiration date of September 15, 2008.

Petitioner argues that, despite the noted September expiration date, the license should have expired on February 4, 2009. Counsel relies on §26-137 of the Administrative Code which provides that licenses of this type "shall expire one year from the date of issuance thereof."

Yet, despite this legal argument, BAT's Director and President Khalil Jaffarpour, swears that he did execute and mail BAT's application for a renewal on September 10, 2008. However, in DOB's Answer, there is evidence that the envelope containing this application is postmarked October 27, 2008 and was received by DOB on October 28, 2008 with a renewal check dated October 24, 2008.

In any event, beginning with an October 28, 2008 letter to Mr. Jaffarpour from Gus Sirakis, PE and Deputy Director of DOB's Office of Technical Certification and Research ("OTCR"), DOB directed BAT to cease work because it had come to the Department's attention that BAT had been performing concrete tests after its license had expired. The letter also asked for a list of all testing that had occurred after the license expiration date. Joe Barsallo, Project Coordinator for Big Apple, responded to this letter on October 30, 2008 wherein he provided such a list of clients.

What followed next was a November 18, 2008 letter from Siun Derkhidam at DOB requesting certain additional information so as to process the renewal application. Specifically requested was the most recent report of the Cement and Concrete Reference Laboratory ("CCRL") cyclical tour of inspection for 2006 or later, a notarized letter by the Lab Director that all CCRL deficiencies had been corrected, and a list of all technicians employed by BAT with copies of their certifications. Another letter, dated November 25, 2008, from DOB to petitioner followed, again telling BAT to cease work and providing it with a checklist of items necessary to have its renewal application acted upon.

Mr. Jaffarpour responded to the November 18 request from Derkhidam in a December 10, 2008 letter, indicating that the requested information had been already sent under separate cover. But on December 24, 2008, Mr. Derkhidam responded by saying, in part, that a current CCRL inspection report was missing.

In response to this, BAT arranged for a CCRL inspection on January 19, 2009, wherein a report by CCRL dated February 20, 2009 was produced. This report was sent to Mr. Derkhidam in a letter dated February 25, 2009. What followed then were several telephone calls and followup e-mails by BAT to Mr. Sirakis to request information on the license renewal. Mr. Sirakis responded in a three-page letter dated July 10, 2009 and revised July 13, 2009 by Sirakis, informing Jaffarpour in bold print "The Department has nonetheless considered your application and now proposes to deny it based on the following." Three reasons were cited for this decision: 1) testing with an expired license, 2) failure to provide CCRL assessments (on a timely basis), and 3) lack of knowledge of the Building Code and National Standards governing concrete testing.

At the conclusion of this letter of intent to deny, BAT was told it had 15 calendar days from the date of the notice to dispute this determination by contacting "Ms. Dehine White at (212) 566-3290 to schedule a meeting, at which time, as required by NYC Administrative Code §28-401.12, you will be afforded an opportunity to be heard with respect to NYC-DOB's intent to deny renewal of Big Apple's expired Concrete Testing Laboratory License." But upon receipt of this letter, Mr. Jaffarpour immediately (on July 14, 2009) contacted Ms. White by phone to schedule a meeting. Ms. White, in an e-mail, asked that this request be put in writing, and on July 16, 2009 petitioner did precisely that.

But a meeting did not occur, not then or ever. For in response to the July 16, 2009 request for the meeting that BAT had been told it was entitled to, Mr. Sirakis in a letter of

July 31, 2009, while acknowledging the July 16 letter, asked for:

additional information in writing, stating the reasons why the Department should grant your request for license renewal notwithstanding the finding recited in the Department's revised letter of July 13, 2009. Upon review of the information, **you will be contacted with a date and time for an appointment** with OTCR (emphasis added).

Soon after, on August 6, 2009, Mr. Jaffarpour wrote Mr. Sirakis a responsive letter. He began it by making a plea to Mr. Sirakis to meet with him and explain his answers. With regard to item (1), he advised that the expired tests had not been officially filed and rather were for the client's information. With regard to item (2), he acknowledged his not having provided a timely CCRL report and promised it would not happen again. With regard to item (3), he indicated that, in fact, he had "complete knowledge of field testing information..." and provided a sample of a field report from October 2007 indicating as much. The paragraph is somewhat confusing, however. Perhaps that is why petitioner ended the letter the way he began it, by saying:

Even though we were negligent for late filing, based on the above explanation, I hope that you will give me the opportunity to meet you and assure you that even though we do very little concrete listing but we do it right.

Instead of setting up the meeting that had been offered and repeatedly requested, what followed was the final September 4, 2009 denial letter, this time from First Deputy Commissioner Fatma M. Amer. Commissioner Amer therein made findings that testing had occurred after expiration of the license and that Big Apple had displayed a lack of knowledge of the substantive standards governing concrete testing. The Commissioner then stated in the letter:

Because your August 6 letter effectively concedes the facts at issue, there is no need for further opportunity to be heard.

I find the following. First, contrary to the argument by counsel for petitioner, BAT does not have a right to a full-blown hearing to contest the non-renewal of its license. While it is true that a revocation or suspension of a license would include such a hearing, and while it is true that the basis for revocation and/or suspension is virtually the same as for a non-renewal, the law does make a distinction between such results. A case cited by respondent, *Daxor Corp. v. New York Department of Health*, 90 NY2d 89 (1997), stands for this proposition that an applicant for renewal of a license does not have a sufficient property interest requiring a hearing.

Having said that, however, I do find that basic fairness under these circumstances entitles petitioner to at the very least a fair face-to-face meeting with a neutral representative of the Department of Buildings. In the first instance, BAT was offered such a meeting more than once. In the July 13 letter, Mr. Jaffarpour was specifically told that the denial was a proposal only, one that could be disputed with an opportunity to be heard.

Second, I disagree with DOB's September 4, 2009 denial letter wherein it interpreted Jaffarpour's August 6, 2009 letter as effectively conceding the facts at issue. I find that while the letter may be somewhat confusing and while it does acknowledge, lateness of the CCRL inspection, it concedes none of the allegations. And it should be noted that the denial does not rely on the untimely CCRL inspection. The Department had dropped that allegation from the three charges to which BAT was asked to respond .

Third, I find that the allegations, at least in part, appear to be of a rather technical nature and certainly do not appear to smack of fraud or unsafe practices. As was pointed

out in the petition, BAT has been conducting its business pursuant to a license since 1992, a period of 17 years, apparently without event except for license renewals occasionally filed for late but always granted.

Finally, I find that I cannot issue a preliminary injunction ordering the reinstatement of the license pending this remand. The three criteria necessary for such relief are not met here. First, as to likelihood of success on the merits, since there do appear to be technical deficiencies, it is not for this Court to substitute its judgment on the issue of renewal for that of the Department. Second, it is hard to find irreparable injury since it is merely the loss of business which is at stake. Also, the petitioner waited until January 25, 2010 to file its amended petition, while the denial had occurred months earlier. This delay indicates a less than urgent situation. Finally, in balancing the equities, I cannot say they tip in petitioner's favor since we are dealing with a highly regulated industry that affects the safety of the public. It is ultimately a decision to be made by the Department, not the Court, as to whether BAT should get its license.

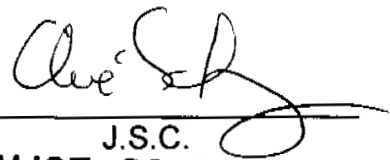
Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent of remanding this matter to the Department of Buildings for a face-to-face meeting consistent with the terms of this decision.

This constitutes the decision and judgment of this Court.

Dated: March 1, 2010

MAR 01 2010



J.S.C.

ALICE SCHLESINGER

**UNFILED JUDGMENT**  
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