

Matter of R & S Circus Produce Corp. v Business Integrity Commn. of the City of N.Y.

2010 NY Slip Op 30867(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 113661/09

Judge: Joan A. Madden

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

PRESENT: How Jacob A. Winkler
Justice

PART 11

R+S Cucis Produce

INDEX NO. 113661109

MOTION DATE 11/10/09

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

The Business Integrity Comm.

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 Article 78 proceeding is decided in accordance with the attached memorandum Decision, Order & 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 141B).

Dated: April 6, 2010

[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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

In the Matter of the Application of
R AND S CIRCUS PRODUCE CORP.,

Petitioner,

Index No. 113661/09

-against-

THE BUSINESS INTEGRITY COMMISSION OF THE
CITY OF NEW YORK,

JOAN MADDEN, J.:

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appear in person at the Supreme Court Clerk's Desk (Room

In this proceeding, pursuant to Article 78 of the CPLR,
petitioner moves, by order to show cause, for an order directing
respondent to approve petitioner's application for registration
as a wholesale business at the New York City Terminal Market in
the Bronx, New York (Hunts Point Market).

FACTS

Petitioner R and S Circus Produce Corp. (R&S) applied for
registration with the Business Integrity Commission of the City
of New York (BIC) as a wholesaler at Hunts Point Market in
October 2007. Prior to this proceeding, R&S commenced an Article
78 proceeding, in the nature of mandamus, in March 2009, seeking
to require BIC to determine to either grant or deny the
application that was pending at that time (index No. 103667/09).
On April 15, 2009, this court (Figueroa, J.) granted the
petition, and ordered BIC to render a decision no later than 100
days from the date of receipt of notice of entry of his decision.
On the one hundredth day, July 31, 2009, BIC rendered a

determination, which is the subject of this petition for mandamus for review. R&S contends that BIC based its determination on its conclusion that Silvestro LoVerde (LoVerde), the president and principal of R&S, knowingly associated with a member of organized crime, and that he provided false and misleading information to BIC.

LoVerde acknowledges that he conducted business with Frank Cali (Cali), but asserts that at the time that he ceased doing business with Cali, Cali had not been arrested or charged with a crime. Cali was an acting captain in the Gambino organized crime family, who was arrested in February 2008. Cali resolved the criminal case pending against him by pleading guilty to one count of extortion conspiracy on June 3, 2008. LoVerde, although admittedly friendly with Cali, denies he was aware of Cali's organized crime connections.

DISCUSSION

Petitioner brings this proceeding seeking review of the determination of respondent, and to require BIC to grant its application to be a registered wholesaler at Hunts Point Market. In order to meet its burden, petitioner must demonstrate that respondent had no rational basis upon which to reach its conclusion, and acted arbitrarily and capriciously in denying the application. *Matter of DeFoe Corp. v. New York City Dept. of Transp.*, 87 NY2d 754, 760 (1996); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and*

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Mamaroneck, Westchester County, 34 NY2d 222, 230-231 (1974).

Petitioner has failed to meet its burden.

The BIC was created in order to regulate various industries, including the public wholesale markets. New York City Charter § 2101. The statutory scheme created by Local Law 28 of 1997 (Local Law 28) provides that a business may not operate within a public wholesale market without first applying for registration with BIC, and being granted that registration. The purpose behind this statutory scheme was to rid the wholesale markets, and particularly, the Hunts Point Produce Market, of the influence of organized crime. To that end, BIC is empowered to refuse to register an applicant "who lacks good character, honesty and integrity." Administrative Code of the City of New York (Administrative Code) § 22-259 (b). In reaching its determination, BIC

may consider, but not be limited to: (i) failure by such applicant or person to provide truthful information in connection with the application; ... (v) association with any member or associate of an organized crime group as identified by a federal, state or city law enforcement or investigative agency when the applicant for registration or photo identification card knew or should have known of the organized crime associations of such person.

Id.

BIC denied petitioner's application based on its assessment that LoVerde did not possess the requisite good character, honesty and integrity, based upon his knowing association with Cali, and based on his providing false and misleading information

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to the BIC.

Association with Cali

LoVerde contends that, at the time that he conducted business with Cali, he did not know that Cali was involved in organized crime, and that Cali was arrested and charged with a crime only after LoVerde ceased doing business with him. LoVerde further asserts that the business enterprise in which he was involved, Bontel USA Corp. (Bontel), has never been involved in any illegal activity.

The record before BIC demonstrates that LoVerde maintained a personal relationship with Cali since LoVerde's arrival in the United States in 1987, and that he was involved in business with Cali since 2003. His personal relationship included going to Cali's wedding, visiting his home, and vacationing with him. Cali became an associate of the Gambino crime family at some time prior to 1994. LoVerde met with Cali regularly at Café Italia, a known hangout of members of organized crime, and he invested over \$170,000 in Bontel, which was Cali's business. Additionally, LoVerde was a close friend, business partner and business associate of Frank Inzerillo (Inzerillo) since 1998. Inzerillo has been identified by law enforcement officials as an associate of the Gambino crime family, and was a conduit for Cali.

All of these facts support BIC's conclusion that LoVerde knew, or should have known, about Cali's connection with

6] organized crime.

Knowingly Provided False and Misleading Information

Additionally BIC denied the application pursuant to Administrative Code § 22-259 (b) (i), based upon LoVerde's failure to provide truthful and non-misleading information. BIC concluded that LoVerde tried to minimize his relationship with Cali, and his knowledge of Cali's organized crime status. LoVerde stated that he and Cali did not have a social relationship, but then testified that he went on vacation with him and a group of other people from the neighborhood (including Inzerillo) several times, and invested substantial funds with Cali without conducting due diligence. He also knew details about Cali's personal life, which negated his claim that he had no social relationship with him. Further, although LoVerde testified that he severed all connection with Bontel, the documentary evidence that he presented did not support that conclusion.

One of the questions in BIC's information form asked whether LoVerde ever associated with any person having ties with organized crime or who had been convicted of a felony. LoVerde certified that the information contained in the form was complete and truthful on July 23, 2007. LoVerde responded "No" to this question. Ex. 4. Further, LoVerde did not indicate that he had ever "heard or read an allegation or rumor that" Cali was

connected to organized crime when asked to complete his knowledge regarding the names of people on a list. When confronted with this failure, LoVerde stated that "if you don't know if somebody is charged, you can't really say that it's organized crime." LoVerde Deposition, at 113. He also acknowledged that he had heard that Cali was charged with crimes related to organized crime, but claimed that he did not understand the instructions on the information form.

Based on this record, it cannot be said that BIC's determination was arbitrary or capricious, or without rational basis. BIC had a reasonable basis to conclude that LoVerde was being evasive, and attempted to mislead BIC with respect to his connection with Cali.

BIC had reason to believe that LoVerde was being evasive, at the least, with respect to other people about whom he was questioned. For example, he testified that he had never heard or read that his uncle, Rosario, or his uncle's brothers, John and Giuseppe "Joseph" Gambino, were associated with organized crime, although he acknowledged knowing that Rosario was incarcerated since before LoVerde arrived in this county, and that John went to jail shortly after LoVerde arrived in the U.S., and was recently released. LoVerde claims that he had no idea why they were in jail.

All of the testimony before BIC provided ample basis for it

to determine that LoVerde was attempting to mislead BIC with respect to his connection with, and knowledge of, many of the people who were involved with organized crime and frequented Café Italia while LoVerde was there. Thus, the BIC determination was not without rational basis, nor was it arbitrary and capricious. Consequently, the petition is denied.

It is noted that LoVerde made the same offer to take a lie detector test before BIC. BIC declined the offer, finding that it is in the best position to evaluate the totality of the record.

In its reply papers, R&S maintains that there are material relevant facts in dispute, which require a hearing; specifically, whether LoVerde knew or should have known that Cali was involved in organized crime, and whether LoVerde provided false or misleading information to BIC. While BIC concludes that if LoVerde did not know of Cali's involvement with organized crime, it was the product of willful ignorance, R&S counters that such a conclusion requires resolution of a factual issue, and a hearing must be held. Petitioner also points to LoVerde's offer to take a lie detector test to prove that he was being honest.

As is well established, arguments that are raised in reply are not addressed by the court. *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992). Reply papers are intended to address issues raised in opposition, not to bring forth new arguments at

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a point at which the opposition has no opportunity to respond. *Id.* Thus, petitioner's demand for a hearing or jury trial, was improperly raised and, therefore, is denied. Similarly, petitioner's request for disclosure and its request that this court prohibit the BIC from posting its determination on its website are improperly raised in reply, and are denied.

In any event, given the record before the BIC and the agency's right to determine the issues before it, no hearing or jury trial is warranted. In addition, BIC provide no legal basis for prohibiting BIC from posting its determination on its website.


CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: April 1, 2010

ENTER:



J.S.C.

UNFILED JUDGMENT
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