

<b>Matter of Association of Contr. Plumbers of the City of N.Y., Inc. v LiMandri</b>
2010 NY Slip Op 32932(U)
October 1, 2010
Sup Ct, NY County
Docket Number: 118309/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHF

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 118309/2009  
ASSOCIATION OF CONTRACTING  
VS.  
LIMANDRI, ROBERT  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and therefore an entry cannot be served based hereon. To obtain an entry counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 10/1/10

[Signature]  
HON. JUDITH J. GISCHF 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: PART 10

-----X  
In the matter of the application of  
Association of Contracting Plumbers  
of the City of New York, Inc., Acting  
of Behalf of All its Members,

Decision/Order

Petitioner,

Index No.: 118309/09  
Seq. No.: 001

For a judgment under Article 78 of the  
Civil Practice Law and Rules

Present:  
Hon. Judith J. Glische  
J.S.C.

-against-

Robert LIMandri, as Commissioner of the  
Department of Buildings of the  
City of New York,

Respondent.

**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).

-----X  
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review  
of this (these) motion(s):

Papers	Numbered
OSC, GPC affirm., SO affd., Petition .....	1
Resp n/m (3211; 7804) w/MVS affirm, exhs .....	2
Resp affirm (MVS) in further support .....	2A
Pet opp w/GPC affirm, SDO affid .....	3
Pet affirm (GPC) in further support w/exhs .....	3A
Steno Minutes 6/10/10 .....	4

-----X  
*Upon the foregoing papers, the decision and order of the court is as follows:*

This is a special proceeding brought pursuant to Article 78 of the CPLR. Petitioner, Association of Contracting Plumbers of the City of New York, Inc. ("ACPCNY" or "Petitioner"), is a trade association representing approximately 70 plumbing contractors. Respondent is the Commissioner of the New York City

Department of Buildings ("DOB" or "Respondent"), the agency charged with enforcing the Building Code and the Zoning Resolution, including administering the LIC2: License Application ("LIC2") process concerning license renewals for master plumbers.

The court has before it petitioners' verified petition and respondents' pre-answer cross-motion to dismiss the petition (CPLR §3211[a][2]). Petitioner challenges certain questions on DOB's LIC2 master plumber license renewal application form as being without any rational basis. DOB contends that its licensing process is rationally based. In any event, DOB claims that the petition should be dismissed because it is not ripe for review, petitioner lacks standing and that the requested relief of mandamus is not available.

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbor Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 A.D.3d 744 [3d Dept, 2003]). It is similar to the analysis made on a motion to dismiss brought pursuant to CPLR § 3211. (Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 [1998]; Sanders v. Winship, 57 N.Y.2d 391 [1982]). Thus, the court's inquiry is whether the petitioner has a cause of action, not whether it has stated one. (Guggenheimer v. Ginzberg, 43 N.Y.2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2d Dept, 1983]).

**Underlying Facts**

The DOB is the agency authorized to issue master plumber licenses (See New York City Charter § 643; Admin. Code §§ 28-401.4, 28-401.10). ACPCNY claims that the DOB's use of the LIC2 form for master plumber renewal licenses seeks impermissible information that is not otherwise required for renewal under the applicable provision of the Administrative Code. Petitioner acknowledges that the Administrative Code permits the DOB to consider violations of criminal laws and the failure to pay fines related to professional dealings with the City. It argues, however, that contrary to the narrowly tailored grounds set forth in the New York City Administrative Code ("Admin. Code") (§§28-401, 28-408) regarding the renewal of a license, the LIC2 requests responses to the following overly broad questions:

- (a) Have you ever been convicted or pled guilty to an offense anywhere (an offense is defined as a violation, misdemeanor or felony)?
- (b) Do you owe any penalties or fines to the City of New York?
- (c) Does any company or business you have been associated with under your Department-issued license owe any fines, penalties or fees to the City of New York that were incurred during your association with that company or business?

If an applicant answers any of the questions referenced above in the affirmative, the applicant must then complete form LIC34: Licensing Supplemental Affidavit (LIC34"). The LIC34, however, only permits applicants to

provide limited information to explain their responses. The LIC34 provides: "(a) if you have been convicted of an offense, explain fully in the boxes below; (b) if you, or the company/business with which you have been associated, have outstanding penalties, fines or fees owed to the City of New York, list them below." Both the LIC2 and the LIC34 require an applicant's sworn signature, made under the penalty of perjury.

ACPCNY claims that by requiring such a broad range of information the plumbers are at risk of inadvertently providing false statements in order to secure renewal of their licenses. Based on the forgoing the petitioner seeks a judgment and order, in the nature of a mandamus, directing the DOB to repeal the LIC2, and/or correct the deficiencies in the LIC2.

Respondent cross-moves to dismiss the petition, claiming that the Petitioner's concerns with the LIC2 form are merely speculative and thus, are not ripe for review. Respondent also claims that petitioner has no standing to raise these claims. Moreover, respondent argues that petitioner is not entitled to mandamus relief because the DOB has no statutory obligation to amend their form in the manner Petitioner proposes.

**Discussion**

For the reasons that follow, the Court concludes that the petition must be dismissed.

**The Petition is not Ripe For Review**

Section 7801(1) of the CPLR provides that an Article 78 proceeding is not available to challenge a determination which is not final, (Matter of Committee to

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Save Beacon Theater v. City of New York, 146 A.D.2d 397, 403 [1989]). To prevent the court from entangling itself in disagreements where the injury is merely speculative and may never occur the Court must: (1) determine whether the issue is appropriate for judicial resolution and (2) evaluate the hardship to the parties of withholding court consideration (Abbott Labs v. Gardner, 387 U.S. 136 [1967]; Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510 [1986]). In deciding whether an administrative action is appropriate for judicial review, the Court looks to whether the administrative action is final and whether the decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury (Church of St. Paul, 67 N.Y.2d at 519). "Administrative actions as a rule are not final unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Essex County v. Zagata, 91 N.Y.2d 447, 454 (1998). Moreover, "the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." Church of St. Paul, 67 N.Y.2d at 520.

Based on the applicable law the Court concludes that the instant petition is not ripe for review. Although the LIC2 form has been in use for master plumber license renewal applications since July 2008, petitioner has failed to provide a specific instance in which any of its members have actually been harmed. It has not identified a single instance where one of its members has been denied license renewal on account of the challenged questions or where a member has been prosecuted or penalized for perjury. If and when a renewal application is

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denied, the applicant is entitled to notice and an opportunity to be heard before the DOB may make any final determination to refuse to renew the license. See Admin. Code § 28-401.12. This access to further due process renders the mere publication of the LIC2, a non-final agency determination and the injuries petitioner alleges as hypothetical and speculative. Petitioner and its members will suffer no hardship by having judicial review postponed until there is a definitive injury.

### The Petitioner Lacks Standing to Sue

The lack of injury also means that the petitioner lacks standing to sue. Standing is a threshold requirement for a plaintiff seeking to challenge governmental action. Where, as here, an organization seeks to establish standing to sue on behalf of its membership, it must show (1) injury in fact – meaning more than mere conjecture, that the plaintiff will actually be harmed by the challenged administrative action; and (2) that the injury asserted falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted (New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 [2004]; Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 773 [1991]). The showing requires that: (1) at least one of its members would have standing to sue, (2) it is representative of the organizational purposes it asserts and (3) the case would not require the participation of individual members (Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y., 75 A.D.3d 412 [2010]; New York State Assn. of Nurse Anesthetists, 2 NY3d at 211; Rudder v Pataki, 93 N.Y.2d 273, 278 [1999]; Matter of

Dental Socy. of State of N.Y. v. Carey, 61 N.Y.2d 330, 333-334 [1984]). In this case, petitioner has failed to demonstrate that one or more of its members has suffered an injury in fact. Specifically, ACPCNY has not established that any of its members has been denied a renewal of a license based upon the information provided in the disputed sections of the LIC2 form.

The Petitioner is Not Entitled to Mandamus

Mandamus is not the appropriate relief for the wrong claimed. Under Article 78, “[m]andamus is available...only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.” N.Y. Civil Liberties Union v. State of New York, 4 N.Y.3d 175, 184 (2005). Mandamus is not an appropriate remedy to “compel an act in respect to which the officer may exercise judgment or discretion.” Klosterman v. Cuomo, 61 N.Y.2d 525, 540 (1984). Mandamus lies only where the right to relief is clear and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion (Vestal Teacher’s Ass’n v. Vestal Cent. School Dist., 5 A.D.3d 922, 923 [3d Dept., 2004]). Mandamus to compel is not the appropriate form of relief herein. There is no statutory requirement as to how the DOB must word its master plumber license renewal application form. While DOB may only deny an application or renewal application upon certain grounds enumerated in the Administrative Code, there is no statutorily mandated application form that prevents DOB from exercising its discretion on how to illicit information needed to make such a determination.

A Declaratory Judgment is Not Appropriate

Even if the court considers the relief as seeking declaratory judgment, the petition would need to be dismissed. "It is basic that a court should decline to apply the discretionary relief of declaratory judgment (CPLR 3001; James v. Alderton Dock Yards, 256 N.Y. 298 [1931]) to 'administrative determinations unless there arise in the context of a controversy 'ripe' for judicial resolution (Abbott Labs, 387 U.S. at 148). The ripeness doctrine and the related rule that there must be 'an actual controversy between genuine disputants with a stake in the outcome' (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:3, p. 356) serve the same purpose: 'to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems' (4 Davis, Administrative Law § 25:1, at 350 [2d ed])." Church of St. Paul, 67 N.Y.2d at 518. Thus, as for the reasons previously indicated in this decision, the petition is not ripe for review and, consequently, declaratory judgment is not available.

**Conclusion**

In accordance with this decision, *It is hereby*

**ORDERED and ADJUDGED** that the cross-motion to dismiss the petition is granted.

This shall constitute the decision and order of the court.

Dated: New York, New York  
October 1, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Glische, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain a copy, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1118). Page 8 of 8 -