

Matter of Edison Parking, LLC v City of New York

2010 NY Slip Op 33245(U)

November 10, 2010

Sup Ct, NY County

Docket Number: 105465

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

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Index Number : 105465/2010
EDISON PARKING, LLC
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

n 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

FILED


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

and petition
and this case
transferred to the
Appellate Division, First Dept

Dated: Nov 10 2010



HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X
In the Matter of the Application of
EDISON PARKING, LLC,

Petitioner,

DECISION/ ORDER
Index No.: 105465
Seq. No.: 001

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

PRESENT:
Hon. Judith J. Gische
J.S.C.

-against-

**THE CITY OF NEW YORK, THE CITY OF
NEW YORK DEPARTMENT OF BUILDINGS,
ADMINISTRATIVE ENFORCEMENT UNIT AND
THE CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD,**

Respondents.
-----X

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

Papers	Numbered
Notice of Petition and Verif Petition, exhs	1
Verified Answer, exhs	2
Reply w/JRM affirm	3

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

GISCHE J.:

This action by petitioner Edison Parking, LLC ("EP") is for a Judgment under Article 78 of the CPLR, revoking, annulling and setting aside the decision on appeal made by the Chairman of the Environmental Control Board on January 21, 2010 ("decision on appeal"). Respondents, who are jointly represented, have answered the petition and seek an order transferring this matter to the Appellate Division of the

Supreme Court, First Department on the basis that a "substantial evidence" issue is raised (CPLR § 7804[g]). EP disagrees and argues that the objections raised can, and should, be decided because they could terminate this proceeding.

For the reasons that follow, the court agrees that this case must be transferred to the Appellate Division:

The Department of Buildings issued a violation to "Edison Parking, LLC" for construction work being done at the parking facility located at 451 9th Avenue, New York, New York ("lot"). The lot is owned by non-party 451 9th, LLC. According to EP, the property is licensed to and operated by "Edison NY Parking, LLC" ("ENYP"), an entity which, according to EP, is an entirely distinct company.

A hearing was held before an administrative law judge ("ALJ") on June 5, 2008 ("hearing") and after the hearing, the ALJ issued her decision and order. Her decision was that EP had proved it is a distinct company from ENYP although both companies have the same mailing address, similar names, and that EP exerted no control over the lot. Thus, the ALJ ordered the violation dismissed.

The respondents appealed the ALJ's order. On appeal (Appeal No. 47365), the Chairman of the Environmental Control Board reversed the ALJ's decision stating:

"the Board finds that petitioner [DOB] named the proper party in citing 'Edison Parking' than 'Edison NY Parking.' The Board agrees with [DOB] that the issuing officer's failure to include 'NY' in the Respondent's name was a *de minimus* error. Respondent has not shown how it was prejudiced by the omission of 'NY'..."

EP argues that the chairman's decision is arbitrary, capricious and without a rational basis because EP presented evidence that EP and EPNY are entirely separate

entities.

DISCUSSION

Judicial review of an administrative determination made as the result of a hearing required by law is limited to whether that determination is supported by substantial evidence (see Matter of Silberfarb v. Board of Coop. Educ. Servs., 60 N.Y.2d 979, 981 [1983]; Verdell v. Lincoln Amsterdam House, Inc., 27 A.D.3d 388, 390 (1st Dept 2006); Whitten v. Martinez, 24 A.D.3d 285 [1st Dept 2005]). Article 78 prohibits the Supreme Court from reaching the issue of whether an agency determination is supported by substantial evidence and requires that such petitions be transferred to the Appellate Division (Verdell v. Lincoln Amsterdam House, Inc., *supra* at 390 *internal citations omitted*).

Since petitioner is challenging the respondents' determination as being against the weight of the evidence at the hearing held before the ALJ, this proceeding must be transferred to the Appellate Division, First Department in accordance with CPLR §§ 7803 (4) and 7804 (g) because there is a substantial evidence issue (Al Turi Landfill v. N.Y. State Dep't of Env. Conserv., 98 NY2d 758, 760 [2002]; Carson v. New York City Housing Authority, 25 A.D.3d 462 [1st Dept 2006]; Matter of Porter v New York City Hous. Auth., 42 AD3d 314 [1st Dept 2007]).

Although CPLR § 7804 (g) authorizes the Supreme Court to decide any issues that would terminate this proceeding, there are mixed questions of law and fact in this case and petitioner has raised issues of substantial evidence that mandate the transfer of this petition to the Appellate Division (Santiago v. East Midtown Plaza Housing Co.,

Inc., 59 A.D.3d 174 [1st Dept 2009]).

Conclusion

Based upon the foregoing,

IT IS HEREBY

ORDERED that the petition seeking the vacatur and annulment of respondent's decision is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR § 7804 (g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant of law, is, on the entire record, supported by substantial evidence [CPLR 7803 (4); CPLR 7804 (g)]; and it is further

ORDERED that the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this Order with Notice of Entry; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision, order and judgment of the court.

Dated: New York, New York
November 10, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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