

**North Fork Mgt. & Maintenance LLC v New York
State Dept. of Labor**

2010 NY Slip Op 33684(U)

December 14, 2010

Sup Ct, Suffolk County

Docket Number: 36058/2009

Judge: William B. Rebolini

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AMENDED
MEMORANDUM

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

<p>North Fork Management & Maintenance LLC,</p>		<p><u>Index No.:</u> 36058/2009</p>
<p>Plaintiff,</p>		<p><u>Motion Sequence No.:</u> 003; CDISPO: SETTJ</p>
<p>-against-</p>		<p><u>Motion Date:</u> 10/26/09 <u>Submitted:</u> 10/6/10</p>
<p>New York State Department of Labor,</p>		<p><u>Motion Sequence No.:</u> 004; MG</p>
<p>Defendant.</p>		<p><u>Motion Date:</u> 10/26/09 <u>Submitted:</u> 10/6/10</p>

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In this CPLR article 78 proceeding the petitioner seeks a judgment in the nature of mandamus directing the respondent New York State Department of Labor to grant the petitioner a formal hearing on the violations filed against the petitioner; and determining that the violations filed against the petitioner were unfounded as well as arbitrary and capricious. The petitioner further seeks a judgment reducing the civil penalties assessed petitioner by the respondent from \$30,000 to \$2,500. The motion by respondent for a dismissal of the petition is granted. The motion having been made after the service of a verified answer, the proceeding is dismissed on its merits.

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Petitioner is the owner and developer of a certain parcel of real property located at 102 Main Street (SR 25) in Smithtown, New York. The parcel, a former lumber yard and retail store, was developed with seven separate structures of varying sizes ranging from a small storage shed to an expansive product showroom. On March, 12, 2009, in response to an anonymous complaint that the petitioner was demolishing the structures on the property without first removing asbestos products from the buildings, the respondent New York State Department of Labor (Labor Department), sent an investigator to the site.

Following an on-site inspection, the respondent Labor Department served the petitioner on March, 26, 2009 with six separate Notices of Violation each citing four different violations of the Labor Law and regulations governing asbestos removal. The four violations generated from the petitioner's failure to comply with the Labor Law's 1) licensing requirements and procedures, 2) certification and training requirements, 3) adequate asbestos survey requirements, and 4) removal of asbestos requirements. The first two violations relate to the Labor Law's licensing, certification and training requirements and each of the notices referred to Labor Law §§902[1][4], 909[1][a] and the corresponding regulations 12 NYCRR Parts 56-3.1[a], 56.3-2.[a]. In explaining the violation of 12 NYCRR §56-3.1[a], the Inspector stated that the petitioner partially demolished the structure and disturbed asbestos and presumed asbestos-containing material; the petitioner is not a New York State licensed asbestos abatement contractor nor did the petitioner engage a licensed contractor. In explaining the petitioner's violation of 12 NYCRR §56-3.2[a] the Inspector noted that employees of the petitioner disturbed asbestos containing materials during the partial demolition of six of the structures on the property. These employees were not trained and certified to disturb or handle asbestos. The Notices of Violation also informed the petitioner that based upon its failure to comply with 12 NYCRR Part 56-3.1[a] and 12 NYCRR Part 56-3.2[a] in the demolition of the six structures the petitioner had been assessed a penalty of \$ 5,000 per structure for a total of \$ 30,000 payable within 30 days from receipt of each notice.

The third violation related to the petitioner's failure to provide an adequate asbestos survey in conformance with 12 NYCRR Part 56-5.1[a] and the fourth violation related to the petitioner's failure to engage in the proper removal of the asbestos as mandated by 12 NYCRR Part 56-5.1[h]. The Notices of Violation did not set forth any penalty for these violations.

The petitioner commenced the instant Article 78 proceeding seeking a judgment directing the respondent to afford the petitioner a formal hearing on the aforementioned violations, and/or vacating the penalties against the petitioner because they were imposed without a formal hearing and on the basis that the penalties imposed were arbitrary and capricious. Although the petitioner casts the relief sought as being in the nature of a writ of mandamus, the petitioner has not specified whether it seeks mandamus to compel or mandamus to review.

Labor Law §902 [1] provides, in pertinent part, "It shall be unlawful for any contractor to engage in an asbestos project unless such contractor has a valid asbestos handling license issued by the commissioner." 12 NYCRR §56-3.1[a] provides in pertinent part, "No asbestos contractor shall

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engage in an asbestos project unless such asbestos contractor has a valid asbestos-handling license issued by the commissioner.” Section 902[4] of the Labor Law provides in pertinent part “It shall be unlawful for any contractor to engage in or to permit a person employed by the contractor, including but not limited to handlers, project designers, inspector and management planners, to engage in work on an asbestos project or to supervise persons engaging in work on an asbestos project unless such persons and supervisor has a valid asbestos handling certificate.” 12 NYCRR § 56-3.2[a] provides, in pertinent part, “No asbestos contractor shall engage in or permit a person employed by the asbestos contractor to engage in or supervise work on an asbestos project unless each such person has a valid asbestos handling certificate issued by the commissioner appropriate to the work performed by such person on an asbestos project as defined in this Part. Training for all types [of] asbestos handle certificates shall meet all requirements established by the New York State Department of Health.”

Section 909[1][a] of the Labor Law, states, in pertinent part, “The commissioner may impose a civil penalty upon a contractor of up to two thousand five hundred dollars for the initial violation of section 902 of this article and up to four thousand dollars for the second or subsequent violation of such section”. Section 909[1][b] provides, in relevant part, that “[i]f after an investigation and a formal hearing, the commissioner finds that a contractor has violated any provision of this article, *other than section 902 or any rule or regulation promulgated hereunder*, the commissioner shall by order which shall describe in detail the nature of the violation or violations, assess the contractor a civil penalty of not more than the greater of twenty five percent of the monetary value of the contract upon which the violation was found to have occurred or five thousand dollars per violation [*emphasis added*].”

The extraordinary remedy of mandamus lies against a governmental agency or officer only to compel the performance of a purely ministerial act and only where there exists a clear legal right to the relief sought (see, Klostermann v. Cuomo, 61 NY2d 525 [1984]; Legal Aid Soc’y of Sullivan County, Inc. v. Scheinman, 53 NY2d 12 [1981]; Kusky v. Town of Islip, 266 AD2d 460 [2nd Dept., 1999]). The availability of mandamus to compel performance by an agency or officer “depends not on the applicant’s substantive entitlement to prevail, but on the nature of the duty sought to be commanded, i.e. mandatory, nondiscretionary action” (Hamptons Hosp. & Med. Center, Inc. v. Moore, 52 NY2d 88 [1981]), and the right to performance “must be so clear as to not admit of reasonable doubt or controversy” (Association of Surrogates & Supreme Ct. Reporters v. Bartlett, 40 NY2d 571, 574 [1976], quoting Burr v. Voorhis, 229 NY 382, 387 [1920]; see, Rosen v. Brewster, 160 AD2d 946 [2nd Dept., 1990]). Mandamus is therefore appropriate to compel acts that officials are duty bound to perform, regardless of whether they may exercise their discretion in doing so. A body can be directed to act, but not how to act, in a manner as to which it has the right to exercise its judgment (Bonanno v. Town Bd. of Babylon, 148 AD2d 532 [2nd Dept., 1989] citing Klostermann v. Cuomo, 61 NY2d 525 [1984]).

Applying these principals to the matter at hand, it is clear that the petitioner did not have a clear legal right to a formal hearing before the commissioner assessed the \$30,000 penalty for the

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petitioner's various violations of the licensing, certification and training law and regulations. Labor Law §909[1][b] specifically excludes violations of the licensing, certification and training provisions from the statutorily mandated pre-assessment penalty hearing. The petitioner has thus failed to demonstrate entitlement to mandamus to compel such a hearing with regard to these violations. As to the third and fourth categories of violations, the petitioner's failure to provide an adequate asbestos survey in conformance with 12 NYCRR Part 56-5.1[a] and the petitioner's failure to engage in the proper removal of the asbestos as mandated by 12 NYCRR Part 56-5.1[h], the respondent agrees that the petitioner is entitled to a formal hearing before a penalty may be imposed upon the petitioner for such violations. In fact, the respondent has supported its opposing papers with proof that the petitioner has been given notice of a formal hearing scheduled for a date certain. Inasmuch as the Court has not been advised as to whether the hearing was conducted on the date certain, the respondent shall forthwith schedule a new date for the hearing, if the hearing was not conducted.

The petitioner's final request for relief, a reduction in the \$30,000 penalty imposed for the violations under Labor Law §902, is considered as a request for mandamus to review. In a proceeding in the nature of mandamus to review, the court examines an administrative action involving the exercise of discretion. Mandamus to review resembles certiorari, except that in a certiorari proceeding a quasi-judicial hearing normally is required and the reviewing court has the benefit of a full record (see, Matter of Anonymous v. Commissioner of Health, 21 AD3d 841 [1st Dept., 2005]). Moreover, it is well settled that reviewing courts are not entitled to interfere in the exercise of discretion by an administrative agency or tribunal unless there is no rational basis for the exercise or the action complained of is "arbitrary and capricious" (Pell v. Board of Education, 34 NY2d 222 [1974]). Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law. A penalty must be upheld unless it is "so disproportionate to the offense as to be shocking to one's sense of fairness," thus constituting an abuse of discretion as a matter of law. This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or the harm to the agency or the public in general (Kelly v. Safir, 96 NY2d 32 [2001]).

In enacting Article 30 of the Labor Law and its implementing regulations, the Legislature expressly noted that "exposure to asbestos, a known carcinogenic agent, creates a serious risk to the public health and safety." The Legislature also noted that the risks associated with asbestos are exacerbated by the improper and uninformed manner in which some contractors and their employees handle asbestos. The Legislature thus declared, "its purpose and policy [is] to reduce asbestos related hazards by encouraging proper training of persons employed to design, implement or inspect asbestos projects and those who supervise or employ them, by requiring the licensing of contractors and the certification of individuals involved in asbestos projects..." In light of the serious nature of the petitioner's violation of the Labor Law's statutory and regulatory licensing, training and certification provisions regarding asbestos removal, the respondent's imposition of a \$2,500 fine for each of the petitioner's 12 violations of Labor Law §902 and 12 NYCRR Parts 56-3.1[a] and 56-3.2[a], for a total penalty of \$ 30,000 is not so disproportionate to the offenses as to be shocking to

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one's sense of fairness. Accordingly, the petition is denied and the proceeding is dismissed. The matter is remitted to the respondent Labor Department for the holding of formal hearings on the claimed violation of 12 NYCRR Parts 56-5.1[a] and 56-5.1[h], if necessary.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: December 14, 2010


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION