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

PRESENT: Joan B. Lobis PART 6

Justice

Index Number : 115096/2010
INDEPENDENT TESTING
VS.
LIMANDRI, ROBERT D.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 12/17/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-33
Replying Affidavits	34-37

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition

Petition
THIS ~~MOTION~~ IS DECIDED IN ACCORDANCE WITH THE 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 141B).

Dated: 2/14/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

----------X

INDEPENDENT TESTING LABORATORIES, INC.,

Petitioner,

Index No. 115096/10

-against-

Decision, Order, and Judgment

ROBERT D. LIMANDRI, as Commissioner of the Department of Buildings of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE CITY OF NEW YORK

Respondents,

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JOAN B. LOBIS, J.S.C.:

Petitioner Independent Testing Laboratories, Inc., ("ITL") brings this proceeding under Article 78 of the C.P.L.R. to annul the decision by respondent Robert D. Limandri, as commissioner of The New York City Department of Buildings (the "DOB"), to revoke ITL's license to test concrete. The other respondents are the DOB and the City of New York. For the reasons discussed below, the petition is denied and the proceeding is dismissed.

ITL is a concrete testing agency. Concrete testing agencies that are licensed by the DOB have a statutory duty to perform field and laboratory tests of concrete mixtures. As is relevant to the petition herein, an incident in 2008 regarding ITL's testing practices caused the DOB to initially reject ITL's 2009 application to renew its concrete testing license. To resolve the proceedings regarding the DOB's initial rejection of ITL's renewal application, ITL and the DOB entered into a settlement agreement dated August 2, 2010 (the "Agreement"). The Agreement set forth that ITL's license would be restored and remain active for the period of July 4, 2010 to October 3, 2011. During this period, ITL would be on probation. The Agreement set forth that if ITL took

any action or engaged in any conduct for which "suspension and revocation [were] warranted under the New York City Construction Code", the DOB could "immediately suspend ITL's license and take such further action as is necessary to revoke ITL's license at an expedited hearing at the Office of Administrative Trials and Hearings[.]" Pursuant to the Agreement, the DOB would notify ITL by letter and e-mail of any "factually substantiated claims" related to misconduct, to which ITL could respond in writing. If ITL raised factual disputes in its response, the matter would go to a hearing. The parties agreed that no hearing would take place absent a factual dispute.

The Agreement also required ITL to hire an independent monitor to submit reports and audits on ITL's concrete testing operations every three months until October 3, 2011. The independent monitor was also responsible for designing a quality assurance and quality control plan. ITL was further required to pay the DOB $1,000 a month for fifteen months from July 4, 2010 to October 3, 2011. The checks were required to be mailed by the first of the month. The parties agreed that should ITL fail to comply with the provisions of the Agreement, the DOB was empowered to revoke ITL's license without a hearing.

On August 13, 2010, ITL was testing lightweight concrete being poured by On Time Ready Mix Corp. ("On Time") at 132-29 Blossom Avenue in Queens, New York (the "Blossom Avenue Site"), when a DOB inspector performed an unscheduled inspection. According to a letter from the DOB to ITL dated October 22, 2010 (the "Notice Letter"), the DOB inspector observed an ITL laboratory technician testing concrete without proper photograph identification. The inspector determined that the technician's recordings of the weight of the concrete were grossly inaccurate for

the type of "lightweight" concrete being used and that the technician did not have an air meter, a tool used to test lightweight concrete. The DOB inspector also observed two On Time concrete trucks deliver concrete that was contaminated with debris, including plastic, Styrofoam, bricks, and wood; the DOB observed that the contaminated concrete was cast into the structure. According to the Notice Letter, the technician from ITL told the DOB inspector "that it had been going on all day," but he took no steps to "complain to the concrete producer, failed to alert the structural engineer, and failed to contact anyone at ITL that there was anything wrong with the concrete being poured on site." The DOB inspector issued notices of violation to ITL for failure to have an air meter and for the technician's failure to have photograph identification, to On Time for delivering concrete containing unacceptable material, and to the general contractor for having unacceptable concrete. Papers annexed to the petition indicate that petitioner sent a letter to the DOB on or about August 17, 2010, addressing the issues in the notice of violation that the DOB inspector had issued on August 13, and alerting the DOB to the presence of debris in the concrete delivery trucks.

ITL reported the results of the August 13, 2010 tests to the structural engineers in October 2010, nearly two months after the concrete had been poured. The report remarked that the concrete delivery trucks contained debris and that ITL's inspector told the drivers that the loads should "come clean from the plant[.]" In the Notice Letter, the DOB asserted that the report contained "incredible results for the weight of the concrete."[1]

[1] The results list the unit weight of the concrete at 164 and 172.4 pounds per cubic foot ("pcf"), but the DOB maintains that lightweight concrete typically weighs between 110 and 120 pcf.

By the Notice Letter, ITL was put on notice that the DOB was suspending its license. The DOB charged ITL with ignorance and/or conscious disregard of the professional standards in concrete testing and the Building Code based on the August 13, 2010 incidents and the report issued by ITL in October 2010 (hereinafter "Charge 3"). The DOB maintained that the foreign materials were now permanently encased in the concrete, and that removal of the debris could only take place by demolition. The DOB was concerned that the structural integrity of the concrete had been compromised. The DOB also contended that the report was untimely. Other charges—that ITL had failed to remit the $1,000 payments to the DOB by the first of each month, as per the Agreement (hereinafter "Charge 1"), and that ITL's independent monitor had sent an audit report three weeks late and had failed to send a quality assurance and control plan (hereinafter "Charge 2")—were also included in the Notice Letter. ITL had until November 4, 2010, to respond to the charges in the Notice Letter.

ITL responded to the DOB's charges by letter dated October 26, 2010 (the "Response"). Regarding Charge 1, ITL maintained that it had sent checks totaling $2,000 by certified mail to the DOB on August 3, 2010, the day after the Agreement became effective, but through no fault of its own, the DOB did not receive the checks until August 13, 2010. ITL attached a copy of the certified mail receipt to the Response as proof that it timely sent the checks. However, ITL set forth that it had also hand delivered a replacement check to the DOB on August 10, 2010. ITL stated that it sent payment for the next installment on September 1, 2010, in keeping with the Agreement, and mailed a check for the next two installments on September 24, 2010. Regarding Charge 2, ITL maintained that the first periodic report was due three months from the date of the

Agreement and not the first day of the renewal period, July 4, 2010. Thus, ITL had planned to submit the report and audit, as well as the quality control and assurance plan, by November 3, 2010.

As to Charge 3, ITL admitted that its laboratory technician did not have photograph identification. ITL further set forth that prior to August 13, 2010, it was unaware that it would be testing lightweight concrete at the Blossom Avenue Site. ITL admitted that it did not have an air meter on site when the DOB inspector arrived. ITL's main office sent an air meter to the Blossom Avenue Site, "once ITL became aware that its job required the testing of lightweight concrete and upon request of the DOB inspector." ITL stated that once it had obtained the proper equipment, the lightweight concrete was accurately measured.

With regard to the contaminated concrete, ITL maintained that its technician did not observe any debris in the concrete that was actually poured and did not make any admissions to the DOB inspector. ITL asserted that On Time's trucks had appropriate filters that prevented foreign materials from being poured into the Blossom Avenue Site and that "the only foreign material observed was what remained after the trucks completed the pours—and was not cast into the structure." ITL further contended that the DOB inspector "was simply not in position to see the pour" and therefore could not have observed the alleged contaminated concrete. ITL asserts that it did provide the DOB with a letter on August 18, 2010, detailing the debris, and thereby going "above and beyond its . . . duties."

ITL admitted that it did not provide the Blossom Avenue Site's structural engineer

with compression test results on August 13, 2010, but only because "such results are not available until 28 days after the pour." Then, ITL's own internal review must occur before the results are reported to engineers. Thus, ITL contends, there was no undue delay in providing the results to the structural engineer. ITL maintained that "the significant issue is whether the poured concrete passed the compression results," which it did. ITL closed its letter with a request for a hearing, contending that there were "sharp issues of fact" in dispute.

According to ITL, the parties had scheduled a hearing for November 10, 2010; however, by letter dated November 1, 2010 (the "Revocation Letter"), Mr. LiMandri refused to send the matter to a hearing. Based on his review of the Response and supplemental information provided by ITL to the DOB on October 27, 2010, Mr. LiMandri concluded that there were no factual issues in dispute and that ITL had violated the Agreement. ITL's license was immediately revoked. The Revocation Letter does not contain a recitation of the facts or the charges set forth in the Notice Letter.

In this petition, ITL argues that the grounds for which the DOB revoked its license "are patently insubstantial, if not false, and on their face contrary to any requirements of the Building Code[.]" ITL maintains that it has no duty or authority to stop concrete pours under the Administrative Code. ITL argues that if it had such responsibility, the DOB inspector would have issued it a notice of violation. Regardless, ITL maintains that it went "above and beyond its strict statutory and contractual duties" by reporting the presence of debris in the concrete delivery trucks to the DOB in the August 17, 2010 letter it sent to the DOB addressing the violations it had been

cited for on August 13. Additionally, ITL argues that the concrete poured into the structure was not contaminated, as the debris did not enter the structure but remained in the trucks, and because the ITL's test results showed that the concrete in the structure was "above design strength." ITL also denies that its laboratory technician informed the DOB inspector that contaminated pours were happening throughout the day. Petitioner concedes that the technician did not have photograph identification at the Blossom Avenue Site on August 13, 2010, but argues that this "inadvertent failure . . . had no effect on the qualifications of ITL's tester or his performance of the concrete testing." It also admits that it did not have an air meter at the Blossom Avenue Site, but maintains that this mistake is excusable. ITL asserts that it reported the results of its testing to the Blossom Avenue Site's structural engineer as soon as its report was complete. ITL sets forth that all other reports, the quality assurance plan, the quality control plan due, and the payments due to the DOB were all submitted to the DOB in a timely fashion. Ultimately, because ITL has rational explanations for all of the charges cited in the Notice Letter, it argues that the DOB acted arbitrarily, capriciously, and in error of law in revoking ITL's license without giving it an opportunity for a hearing on the charges as required pursuant to the law and the Agreement.

The DOB argues that its determination that ITL had breached the Agreement was rational, reasonable, and not as a result of an abuse of discretion nor an error of law. Respondent agrees with petitioner that ITL's explanation for the untimely payments and the untimely submissions from the independent monitor are not unreasonable. However, the DOB now contends that the independent monitor's report that it did eventually receive "is of questionable value." Apparently, ITL e-mailed the DOB an initial monitor report on October 22, 2010. The independent

monitor's report is in the form of a memorandum from Steve Lerman, a consultant from "SIL Consulting, Inc." to the president of ITL, and is written on ITL letterhead. To the DOB, this reasonably calls into question the independence of the monitor and ITL's ability to comply with the Agreement. Additionally, the report does not indicate that the monitor conducted a field observation, as required by the Agreement. The DOB argues that the report only served to further cast doubt on ITL's ability to comply with the Agreement.

Focusing on Charge 3, the DOB asserts that there is no material factual dispute requiring a hearing because ITL violated the terms of the Agreement and the Building Code. Section 28-1905.6.1 of the Building Code sets forth the duties and responsibilities of a licensed concrete inspector, including that test results shall be promptly distributed to the registered design professional of record, concrete producer, owner, and contractor. Section 28-1905.10.3 sets forth that concrete contaminated with foreign materials shall not be deposited in a structure; in a footnote, the DOB indicates that it interprets this statute to mean that once concrete has been contaminated, it must be rejected, even if the contaminants are removed from the concrete with a strainer, as ITL contends. ITL admitted that its laboratory technician observed foreign material in the concrete at the Blossom Avenue Site. ITL did not promptly report the contaminated concrete to the structural engineer. ITL did not stop the pouring of contaminated concrete. Having failed to prevent contaminated concrete from being poured, and having failed to promptly report the contaminated concrete to the structural engineer, the DOB maintains that ITL has no grounds to dispute that it violated §§ 28-1905.6.1 and 10.3. Additionally, the DOB raises the fact that petitioner did not have the correct air meter to measure lightweight concrete on August 13, 2010, a violation of the Building

Code for which DOB issued a Notice of Violation. Therefore, consistent with the Agreement, the DOB revoked petitioner's license for its failure to comply with the terms of the Agreement and the Building Code.

In reply, ITL objects to the DOB's attempts to add a charge against ITL that the independent monitor's report was inadequate. ITL further argues that the DOB's interpretation of the Building Code as requiring a concrete testing laboratory to stop a concrete pour if it observes debris in the concrete trucks is irrational. ITL maintains that there is simply no language in § 28-1905.6.1 that imposes a duty on a laboratory technician from a licensed concrete inspector to stop a concrete pour at a construction site. Also, a laboratory technician is not trained in or responsible for construction methods. Nor does a laboratory technician have authority to halt construction. Moreover, in this instance, there was a DOB inspector on site, so if anyone was responsible for stopping the pour, the DOB inspector should have taken action, which it did not. ITL maintains that its duty (assuming it has such a duty) to report foreign materials in the concrete to the DOB was rendered moot by the fact that a DOB inspector was at the construction site observing the same things and issued violations. ITL argues that DOB's expansion of § 28-1905.6.1 in the aforementioned manner is arbitrary and capricious, and that the DOB has effectively created a new regulation, without notice, in its interpretation of the existing § 28-1905.6.1. ITL contends that, as the concrete testing facility, it was not issued a violation at the Blossom Avenue Site for delivering or having unacceptable concrete simply because it is not responsible for the composition of the concrete under the Building Code and therefore could not violate that Code provision. Regardless, ITL maintains that even if one were to accept the DOB's interpretation of the Building Code, there

are substantial issues of fact, entitling ITL to a hearing prior to the revocation of its license.

In an Article 78 proceeding to review an administrative agency's determination, the court must determine "'whether there is a rational basis for the action in question or whether it is arbitrary and capricious.'" In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), quoting In re Gilman v. New York State Div. of Hous. & Comm. Renewal, 99 N.Y.2d 144, 149 (2002). An arbitrary and capricious action is one "taken without sound basis in reason or regard to the facts." Peckham, 12 N.Y.3d at 431 (citations omitted). The courts must uphold an agency's determination if it has a rational basis. Id. Further, an agency's rational "interpretation of its own regulations in its area of expertise" is given deference by the courts. Id. (citation omitted). See also District Council 37, Am. Fed'n of State, County, & Mun. Employees, AFL-CIO v. City of New York, 22 A.D.3d 279, 283 (1st Dep't 2005); In re Feigenbaum v. Silva, 274 A.D.2d 132, 136 (1st Dep't 2000).

The DOB's determination that § 28-1905.6.1 of the Building Code required ITL to immediately report to the Blossom Avenue Site's structural engineer that the concrete being poured at the Blossom Avenue Site contained unacceptable debris has a rational basis. Construing § 1905.6.1 to affirmatively obligate a concrete testing agency to report irregularities in concrete before the concrete work is completed supports the DOB's duty to maintain safe structures and ensure that concrete is properly tested. The DOB's determination that ITL violated the Building Code, therefore, is not irrational or unreasonable and shall not be disturbed. Additionally, the DOB's interpretation of § 28-1905.10.3 of the Administrative Code that any use of contaminated concrete, even if the contaminants do not become part of the structure, is prohibited, has a sound basis in the

DOB's duty to ensure safe construction, and is not irrational or unreasonable. ITL's claims that it did not have a duty to report on the contaminated concrete is undermined by the fact that the report that it did eventually provide to the structural engineers detailed the debris that it found in the concrete pour.

It was not irrational or unreasonable for the DOB to determine that the report that ITL provided to the structural engineers was untimely under Section 1905.6.1. That section requires that all reports be issued "promptly" and—given the obvious safety issues with poured, set, and hardened concrete that has been contaminated and possibly compromised—it is not irrational or unreasonable for the DOB to interpret § 1905.6.1 to require concrete testing agencies to immediately issue a report if it believes that the concrete is contaminated. ITL's contention that it satisfied its duty to report by writing a letter to the DOB on August 17, 2010, is immaterial, because the DOB has cited ITL for failing to notify the structural engineer of the contimanted concrete, not for failing to notify the DOB.

It was not irrational or unreasonable for the DOB to deny ITL a hearing on the charges. ITL does not dispute that one of its workers observed debris in the truck and did not report it to the structural engineers until October 2010. Even if the court were to find that ITL had no duty to report on the contimanted concrete, ITL admitted to having an technician at the Blossom Avenue Site without proper photograph identification or proper measuring equipment. Furthermore, ITL did not dispute the assertion that its initial measurements of the lightweight concrete as reflected in the report to the structural engineers were grossly inaccurate and not in conformity with the generally

accepted weights for lightweight concrete. Although a hearing may have been justified for the dispute over the timeliness of payments and submissions from the independent monitor and the DOB's assertion that ITL had a duty to stop the work is unsupported by law, the undisputed charges detailed herein were sufficient grounds for the revocation of ITL's license under the terms of the Agreement. Accordingly, it is hereby

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

Dated: February 14, 2011

JOAN B. LOBIS, J.S.C.

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).