

<b>Matter of Delakas v Mintz</b>
2011 NY Slip Op 30670(U)
March 21, 2011
Supreme Court, New York County
Docket Number: 0100739/11
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
CYNTHIA S. KERN J.S.C.

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

PART 52

JERRY DELAKAS,

INDEX NO. 100739/11

- v -

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

JONATHAN MINTZ,

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached 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: 3/21/11

cgk  
CYNTHIA S. KERN 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  
COUNTY OF NEW YORK: Part 52

-----x  
In the Matter of the Application of

JERRY DELAKAS,

Petitioner,

Index No. 100739/11

For an Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

**DECISION/ORDER**

-against-

JONATHAN MINTZ, in his capacity as Commissioner  
of the NEW YORK CITY DEPARTMENT OF  
CONSUMER AFFAIRS,

**UNFILED JUDGMENT**  
Respondent has not been entered by the County Clerk  
This judgment 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 (Robin

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Notice of Cross Motion and Answering Affidavits.....	_____ _____
Replying Affidavits.....	_____ 2 _____
Exhibits.....	_____ 3 _____

Petitioner Jerry Delakas brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to vacate and annul a determination made by the New York City Department of Consumer Affairs (the "DCA"), dated January 6, 2011 (the "Determination"). In the Determination, the DCA denied petitioner's application for a license to operate an existing newsstand located at the northwest corner of Astor Place and Lafayette Street, New York, New York. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner has operated a newsstand located at the northwest corner of Astor Place and Lafayette Street, New York, New York (the "Newsstand") continuously and without interruption since 1987, approximately twenty-four years. The license to operate the Newsstand was originally issued in the name of Katherine Ashley, who is now deceased. According to petitioner, Ms. Ashley and petitioner agreed that petitioner would operate the Newsstand on a daily basis in exchange for a weekly fee of \$75.00, which petitioner has paid continuously since 1987. Ms. Ashley would, however, remain the only person actually licensed to operate said Newsstand.

However, under Title 20 of the New York City Administrative Code, an individual cannot operate a newsstand unless he or she is licensed to do so. Additionally, under 6 RCNY § 1-01.1:

- (a) No applicant for a license or a renewal thereof shall fail to provide complete and truthful responses to all the information requested on an application for such license or renewal thereof and any documents related thereto.
- (b) No applicant for a license or renewal thereof shall conceal any information, make a false statement or falsify or allow to be falsified any certificate, form, signed statement, application or report to be filed with an application for a license that is to be issued by the department or for a renewal thereof.

Furthermore, Admin. Code § 10-154 provides the following:

Any person who shall knowingly make a false statement or who shall knowingly falsify or allow to be falsified any certificate, form, signed statement, application or report required under the provisions of this code or any rule or regulation of any agency promulgated thereunder, shall be guilty of an offense and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars or imprisonment of a term of not more than sixty days or both.

Thus, it appears that the arrangement petitioner maintained with Ms. Ashley was illegal under the laws of the City of New York.

Ms. Ashley died in 2006 and bequeathed to petitioner her interest in the Newsstand so that petitioner would continue to operate the Newsstand on a daily basis and succeed Ms. Ashley as franchisee of the Newsstand. Petitioner received notice of the bequest by way of a probate notice on or about August 6, 2006, which informed petitioner that the notice did "not require any action on [petitioner's] part." The license to operate the Newsstand, however, was instead transferred by the DCA to Ms. Ashley's surviving spouse, Sheldon Ashley, as sole licensee of the Newsstand. On December 11, 2008, a license to operate the Newsstand was reissued by the DCA in the name of Mr. Ashley. As per the illegal arrangement with Ms. Ashley, petitioner continued to pay Mr. Ashley \$75.00 a week in order to operate the Newsstand.

During his lifetime, however, Mr. Ashley did not transfer the license to operate the Newsstand to petitioner, and upon Mr. Ashley's death, the interest in the Newsstand franchise passed to the Estate of Sheldon Ashley (the "Estate"). The Estate has authorized petitioner to continue to operate the Newsstand. On September 20, 2010, the Estate timely applied for a renewal license. On or about September 24, 2010, the Estate received notice from the DCA by mail stating that the Estate could not be granted a license because under Admin. Code § 20-229 the DCA may only issue a license to persons operating such franchises as their principal employment and an "estate of a deceased cannot maintain employment."

On December 6, 2010, petitioner filed a Renewal License Application to operate the Newsstand and to have title to the license issued in his name, as per 6 RCNY 2-64(a)(12), which states:

Death or disability of licensee. At the discretion of the Commissioner or his or her designee, upon the death or permanent disability of the person who was licensed to operate a newsstand at a location, DCA may accept an application for a license to operate such existing newsstand where:

- (A) the applicant is a dependent spouse, dependent domestic partner, dependent child or one-time employee of the former licensee, or bears another pre-existing, established relationship to such former licensee that included financial dependence on such licensee;
- (B) the applicant demonstrates to DCA that the operation of such newsstand will be his or her principal employment; and
- (C) the applicant is a person to whom the grant of such license would be in the interests of fairness. The Commissioner may grant a license to such an applicant who meets the burden of demonstrating eligibility to operate such an existing newsstand where the conditions in this paragraph (12) have been met, the applicable license and application fees have been paid, the New York certification of authority to collect New York sales tax has been provided, and the newsstand meets all other applicable requirements of this Part including, but not limited to, a qualifying inspection by DOT.

In his application, petitioner attempted to demonstrate his eligibility for the license by showing

(A) a “pre-existing, established relationship” which included financial dependence on said relationship, (B) that the operation of the Newsstand constitutes petitioner’s principal employment, and (C) that issuance of the license, given petitioner’s investment of time, energy and resources over the last 24 years is “in the interests of fairness.”

Petitioner’s application was denied on January 6, 2011 in a letter (the “denial letter”) from Juan L. Orozco, Jr., Director of Licensing for the DCA, for failure to demonstrate “that the [DCA] should exercise discretion to issue a license to [petitioner] under 2-64(a)(12).” The denial letter failed to provide an explanation as to why petitioner’s application was denied other than that petitioner failed to sufficiently demonstrate that the DCA should exercise its discretion.

Petitioner now moves pursuant to Article 78 of the CPLR for an order vacating and annulling the DCA's denial of his application for a license to operate the Newsstand.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1<sup>st</sup> Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that the DCA's decision to deny petitioner's application for a license to operate the Newsstand had a rational basis. As an initial matter, under 6 RCNY § 2-64(a)(12), it is in the Commissioner's discretion whether to grant an application to operate a newsstand. Even if an applicant meets the requirements set forth in the statute, the Commissioner is not required to grant the application. Second, the respondent had a rational basis for denying the application based on the position that petitioner engaged in a fraudulent, under-the-table arrangement with the Ashleys whereby he paid them \$75.00 a week in exchange for the opportunity to operate the Newsstand. As more fully explained above, although the Ashleys held themselves out as the owners and operators of the Newsstand on paper at the

DCA, the Ashleys illegally rented their City-issued license to petitioner. Thus, the DCA was rational in not considering petitioner's reliance on this fraudulent arrangement.

Finally, even if the DCA were to overlook the fraudulent arrangement between the Ashleys and petitioner, the record clearly supports the finding that petitioner failed to meet the requirements set forth in 6 RCNY § 2-64(a)(12) for the transfer of the Newsstand's license upon the death of Mr. Ashley. It was rational for the DCA to determine that petitioner did not demonstrate that he had a financially dependent relationship with either of the Ashleys that would entitle him to the license transfer under 6 RCNY § 2-64(a)(12). While petitioner argues that he became financially dependent on the income from the Newsstand, that argument is without merit. Petitioner was financially dependent on the license itself, and not on the licensee, as required by the statute.

Because the record clearly supports the DCA's decision, the court finds that there is a rational basis for its determination. It is therefore

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

Dated: 3/21/11

Enter: CSK  
J.S.C.

**CYNTHIA S. KERN**  
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).