

Cunningham v City of New York

2011 NY Slip Op 34284(U)

March 10, 2011

Supreme Court, New York County

Docket Number: 102405/11

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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STEPHEN CUNNINGHAM and 214 SULLIVAN : Index No. 102405/11
CATERERS, INC., :

Petitioners, :

- against - :

THE CITY OF NEW YORK, MAYOR MICHAEL R. :
BLOOMBERG, NEW YORK CITY DEPARTMENT :
OF BUILDINGS, and NEW YORK CITY :
DEPARTMENT OF BUILDINGS COMMISSIONER :
ROBERT D. LIMANDRI, :

Respondents. :

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioners move for a preliminary and permanent injunction with respect to respondents' order to vacate petitioners' eating and drinking establishment, known as Sullivan Room (the "premises").

Sullivan Room is located in the basement of 218 Sullivan Street, New York, New York. During an inspection of the premises on January 28, 2011, the Department of Buildings issued eleven violations, mostly relating to the means of egress from the premises. Following the inspection, the New York City Department of Buildings (DOB) received a request from the Mayor's Office of Special Enforcement (OSE) to vacate the premises. Scott Pavan, the Acting Deputy Borough Commissioner for Manhattan within the DOB, approved the vacate order, "as I believed the means of egress posed an imminent danger to life or public safety." Scott Pavan 3/3/11 Aff., ¶ 6. The vacate order states, rather unclearly, that it was issued "because there is

imminent danger to life or public safety or safety of the occupants or to property, in that illegal eating and drinking establishment, cabaret, occupied as place of assembly without providing required means of egress.” Scott Pavan 3/3/11 Aff., Ex. A.

The eleven violations and their remedies include:

- Illegal use as cabaret. Remedy is to eliminate “musical entertainment” and dancing.
- Illegal number of occupants. Limit number of occupants to seventy-four.
- Exit passageways partially blocked by garbage or furniture. Remove the garbage or furniture.
- Illegal locking mechanisms on doors. Remove illegal locking mechanisms.
- Fire doors that do not automatically close. Install fire doors that automatically close.
- Illegal roll-down gate above an exit door. Remove illegal roll-down gate.
- Lack of fire rated materials on ceiling and in egress passageways. Install fire rated materials on ceiling and in egress passageways.
- No documentation indicating that flammable material hung on ceiling and on furniture throughout the cellar, including the exit passageways, was treated with fire resistant chemicals. Produce such documentation.
- Improper sprinkler heads located in exit passageways that will not properly disperse water in the event of fire. Install proper sprinkler heads.
- Defective lighting over an exit door. Install proper lighting.
- An exit door obstructed by curtains. Remove curtains.

Vladimir Pugach 3/3/11 Aff., ¶¶ 10-14, Exs. B-L.

Petitioners seek an order enjoining respondents from enforcing the vacate order on the ground that the violations were easily remedied and did not warrant the closing of the premises.

The DOB determination to issue the vacate order will be upheld unless it is shown that the determination “was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). The test is whether the determination is “without sound basis in reason and is generally taken without regard to the facts.” Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result

of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record.” Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff’d 11 NY3d 859 (2008).

During a hearing held March 4, 2011, petitioners argued that the violations, while real, were quickly reparable and did not require the closing of the premises. Testimony was heard from Vladimir Pugach, the DOB inspector, detailing the violations he observed; Andrew L. Pettit, the architect for the premises, who testified that all of the violations had been remedied as of his visit there February 28; Lisa C. Yarborough, petitioner’s expediter; and petitioner Steven Cunningham, the premises owner, who testified as to the economic harm resulting from the closure.

Since the violations did exist, it cannot be said that respondents acted without regard to the facts. Because respondents acted pursuant to their authority and within their expertise, the Court must refrain from substituting its own judgment for theirs, even though it does appear that the violations were easily remedied and did not require closing the premises, especially in light of the ongoing economic harm to petitioners.

The Administrative Code of the City of New York, §§ 28-204.2 (Order to certify correction) and 28-207.4.3 (Rescission), provides a procedure for obtaining the rescission of an order to vacate. Petitioners have indicated that they are complying with that procedure. Once they have submitted their Certificates of Correction, respondents should quickly take the necessary steps to allow Sullivan Room to reopen.

Accordingly, it is

ADJUDGED that the petition is granted to the extent that, once petitioners submit Certificates of Correction addressing each of the violation notices, respondents are directed to perform all necessary inspections and other steps to determine if the premises is fit to reopen, within three business days of service of notice of entry of this order, or submission of all relevant Certificates of Correction, and it is further

ADJUDGED that the petition is denied in all other respects.

Dated: MAR 10 2011

llb
CAROLE E. HUFF
J.S.C.
[Signature]
clerk

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