

Roemer v Limandri

2012 NY Slip Op 31417(U)

May 18, 2012

Sup Ct, New York County

Docket Number: 112840/11

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

Index Number : 112840/2011
ROEMER, JAMES T.
vs.
LIMANDRI, ROBERT D.
SEQUENCE NUMBER : 001
ARTICLE 78 CAL # 88

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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	
1	✓
2, 3	
4	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion . . .

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION ~~FOR~~ JUDGMENT.

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: 5/18/12
MAY 19 2012

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
JAMES T. ROEMER,

Index No. 112840/11

Petitioner,

Motion Date: 2/28/12

Motion Seq. No.: 001

- against -

DECISION AND JUDGMENT

ROBERT D. LIMANDRI as the Commissioner of the
New York City Department of Buildings,

Respondent.

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).X

-----X
BARBARA JAFFE, JSC:

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By amended verified petition dated November 10, 2011, petitioner brings this Article 78 proceeding seeking a judgment directing respondent to renew his class A Hoisting Machine Operator (HMO) license and awarding him costs and attorney fees. By verified answer dated January 26, 2012, respondent opposes.

I. PERTINENT BACKGROUND

On October 4, 1988, respondent issued petitioner an HMO license, which was renewed continuously until 2011. (Amended Verified Petition, dated Nov. 10, 2011 [Pet.], Exh. 1).

In 2003, petitioner was convicted in federal court of Conspiracy to Receive Fraudulent Monies, Making and Receiving an Unlawful Labor Payment, Engaging in Monetary Transactions, and Obstruction of Justice related to a fraudulent construction scheme whereby he

and others conspired to overbill the developer, the Metropolitan Transportation Authority, for union labor by secretly inflating the rates paid to and the hours worked by the union employees. Petitioner owned or controlled three of the companies that were part of the scheme, including a construction company, and he was also the treasurer of one of the unions. (Verified Answer, dated Jan. 26, 2011 [Ans.], Exh. G).

The same year, petitioner was also convicted in federal court of Conspiracy to Defraud the United States and Tax Evasion related to a conspiracy whereby he paid employees of his construction company off-the-books and willfully failed to withhold federal and other taxes, and filed false individual tax returns. (*Id.*, Exh. H). Also in 2003, petitioner pleaded guilty in criminal court to first-degree Offering a False Instrument for Filing. (Pet., Exhs. 2, 5).

On September 12, 2003, petitioner was sentenced in federal court to serve 41 months in prison and three years of probation, and was ordered to pay fines and restitution in the sum of \$2.5 million. (Ans., Exh. K).

In his 2008 license renewal application, petitioner indicated that he had pleaded guilty to or been convicted of a crime, the details of which he disclosed on the application. (Pet., Exh. 2). Respondent renewed the license, effective from September 15, 2008 to September 30, 2011. (*Id.*). On June 29, 2009, respondent re-issued the license. (*Id.*, Exh. 7).

In April 2011, petitioner received a letter from respondent's Special Investigations Unit directing him to appear for a meeting related to his license. (*Id.*).

In July 2011, respondent petitioned OATH to revoke petitioner's license based on three charges: (1) fraudulent dealings pursuant to Administrative Code § 28-401.19(5); (2) conviction of an offense where the underlying act arises out of the individual's professional dealings with

the city or another governmental entity pursuant to Administrative Code § 28-401.19(12); and (3) poor moral character pursuant to Administrative Code § 28-401.19(13). All of the charges arise from petitioner's 2003 criminal convictions. (*Id.*, Exh. 3). On or about August 23, 2011, petitioner answered the petition. (*Id.*, Exh. 4).

As petitioner's license was set to expire on September 30, 2011, petitioner submitted a renewal application and again listed his criminal offenses. (*Id.*).

By letter dated September 27, 2011, respondent advised petitioner that it was reviewing his renewal application but needed more information, specifically, a typed and notarized explanation of the circumstances surrounding his convictions as well as the reasons he believed the application should be granted, and suggested that he submit evidence of rehabilitation and his pre-sentence and probation reports. (*Id.*, Exh. 5).

By letter dated October 11, 2011, petitioner submitted his typed explanation, along with: (1) a letter from his probation officer stating that petitioner paid his required restitution on schedule, maintained steady employment and a stable residence, did not miss any scheduled reports or test positive for illegal substances, and showed no signs of criminal behavior; (2) a memorandum in aid of sentencing submitted to the federal court by petitioner's criminal attorney; and (3) 13 letters of recommendation, both personal and professional. (*Id.*, Exh. 6).

By stipulation dated December 8, 2011, the parties agreed to adjourn oral argument on the instant petition pending respondent's issuance by December 14, 2011 of a determination on petitioner's renewal application. (Ans., Exh. O).

By letter dated December 13, 2011, respondent advised petitioner that he did not meet the requirements for renewal of his license pursuant to section 28-401.12 of the Administrative Code

as petitioner had engaged in fraudulent dealings and had not satisfied the good moral requirement for renewal. Respondent also stated that it had denied renewal pursuant to Correction Law § 752 as “licensed [Hoist Machine Operators] are also responsible for maintaining logs and the sign offs of equipment safety which are submitted to hoist machine owners . . . The [DOB] depends on the integrity of these licensees to accurately report accidents and be truthful in their dealings with the [DOB].” (Ans., Exh. P). Respondent thus concluded:

Your [criminal] convictions . . . bear a direct relationship to your fitness and ability to perform the duties and responsibilities of an HMO. As a Licensed HMO, Class A, you are authorized to operate the largest cranes in New York City. The [DOB] relies on its HMOs trustworthiness and honesty as [DOB] inspectors cannot oversee the daily operations of every crane site in the city . . . Furthermore, the charges to which you plead guilty alleged the involvement of an organized crime family in relation to your union activities. The [DOB] has a substantial interest in protecting the general safety and welfare of the public by removing all influence of organized crime in the construction industry.

Although the acts that led to this conviction occurred over ten years ago, you were over thirty-two years old, presumably a responsible adult who should not have engaged in such conduct. Despite the evidence submitted attesting to your character, the sentencing judge determined that your blatant disregard for the law warranted a serious penalty. For the federal charges alone you were sentenced to 41 months imprisonment, three years’ probation and order to pay over \$2.5 million in restitution. Although in response to the [DOB]’s request you provided personal reference letters, you have not presented sufficient evidence of rehabilitation in light of the above. Your fraudulent conduct clearly stemmed directly from a position of trust and authority, and the [DOB] has a vital interest in preventing the corruption that your acts demonstrated.

(Ans., Exh. P).

II. GOVERNING LAW

Pursuant to New York City Administrative Code § 28-401.4, no person may engage in work covered by the New York City Construction Codes unless he or she is licensed to do so by the New York City Department of Buildings (DOB). All applicants for a license must be, among

other things, of good moral character. (Administrative Code § 28-401.6). The Commissioner of the DOB may suspend or revoke a license based on a licensee’s “poor moral character that adversely reflects on his or her fitness to conduct work regulated by the code,” or a “conviction of a criminal offense where the underlying act arises out of the individual's professional dealings with the city or any other governmental entity,” or fraudulent dealings. (Administrative Code §§ 28-401.19[5], [12], [13]).

An application to renew a license must be made at least 30 days prior to its expiration. (Administrative Code § 28-401.12). The DOB may refuse to renew a license, after notice and an opportunity to be heard, on the same grounds upon which it may deny, suspend, or revoke a license. (*Id.*). The DOB may also seek to suspend or revoke a license it has issued upon notice and an opportunity to be heard. (Administrative Code §§ 28-401.19, 28-401.19.1).

Correction Law § 751 provides that a person’s license may not be denied or acted adversely upon by reason of the licensee’s prior criminal conviction or by a finding of a lack of good moral character unless: (1) there is a direct relationship between the prior criminal offense and the specific license held or (2) the continuation of the license would involve an unreasonable risk to the safety or welfare of others. A direct relationship is found when “the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.” (Correction Law § 750[3]).

In considering the effect of a criminal conviction on a person’s license, the public agency must consider the following factors:

- (a) New York State public policy to encourage the licensure and employment of

- previously-convicted persons;
- (b) the specific duties and responsibilities necessarily related to the person's license or employment;
- (c) the bearing, if any, the criminal offense for which the person was convicted will have on his or her fitness or ability to perform one or more of such duties or responsibilities;
- (d) the lapse of time since the criminal offense;
- (e) the person's age at the time of the criminal offense;
- (f) the seriousness of the offense;
- (g) any information produced by the person or on his or her behalf regarding his or her rehabilitation and good conduct; and
- (h) the public agency's legitimate interest in protecting the safety and welfare of others.

(Correction Law § 753[1]).

III. CONTENTIONS

Petitioner argues that respondent should have approved the application, and that as respondent had previously renewed and re-issued the license despite his criminal convictions, its failure to renew it now based on the same convictions and absent any further criminal activity is arbitrary and capricious. He also alleges that a determination not to renew his license would violate New York Correction Law § 752, which prohibits the denial of a license based solely on a previous criminal conviction. (Pet.).

Respondent asserts that its determination was rational and lawful based on the nexus between the facts underlying petitioner's convictions and the responsibilities of an HMO and that petitioner's lack of trustworthiness and character adversely reflect on his fitness to hold an HMO license. It contends that as a government agency, it is not estopped from denying renewal now even though it renewed the license in 2008 and re-issued it in 2009, and in any event, it did not commence investigating petitioner's convictions until June 2010. Respondent also argues that it properly considered the factors set forth in the Correction Law. (Mem. of Law, dated Jan. 26,

2012).

In reply, petitioner maintains that respondent improperly denied his license renewal without first holding an OATH hearing, that respondent discriminates against those convicted of crimes, and that respondent has yet to issue a decision after the OATH hearing on the issue of its revocation of petitioner's license. He denies that there is a direct relationship between his criminal offenses and his ability to operate a crane or that renewing his license will create an unreasonable risk to property or the safety of the general public. Petitioner also denies that the duties of an HMO include maintaining logs and sign offs on equipment safety, observing that the Administrative Code confers that responsibility on crane owners, and asserts that his only duty is to operate a crane safely, which he has done for over 23 years. (Reply Affirmation, dated Feb. 3, 2012).

IV. ANALYSIS

Pursuant to the relevant statute, DOB was required only to give petitioner notice and an opportunity to be heard prior to determining whether to renew the license. As petitioner does not dispute that he was given notice and opportunity to be heard, there is no basis for his contention that the DOB improperly refused to renew the license absent an OATH hearing. (See *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266 [1st Dept 2010] [no property interest in renewal of expired license and thus no constitutional due process right to hearing on renewal application; petitioner received statutorily-required notice and opportunity to be heard as respondent sent letter advising that it was considering renewal application and gave petitioner opportunity to submit response]).

Respondent's determination that petitioner had engaged in fraudulent dealings and

possessed poor moral character that reflected adversely on his fitness to perform the duties of an HMO was supported by evidence of the nature and circumstances of petitioner's crimes, especially as they were related to petitioner's work in the construction industry, and was thus neither arbitrary and capricious nor irrational. (*See Matter of Duffy v LiMandri*, 93 AD3d 411 [1st Dept 2012] [determination revoking HMO license supported by evidence that petitioner's conviction of conspiracy to commit extortion demonstrated poor moral character which adversely reflected on fitness to hold HMO license, especially as crime related to construction industry]; *Matter of Inglese v LiMandri*, 89 AD3d 604 [1st Dept 2011], *lv denied* 18 NY3d 807 [2012] ["(p)etitioner's conviction of a crime directly related to the use of (an HMO) license demonstrates poor moral character that adversely reflects on his fitness to hold a licensed position in the construction industry"]; *Testwell, Inc.*, 80 AD3d at 278 [respondent's denial of renewal not arbitrary and capricious as petitioner's misconduct directly related to work for which it was issued license]; *Matter of Persico v New York City Dept. of Bldgs.*, 34 Misc 3d 1204[A], 2011 NY Slip Op 52424[U] [Sup Ct, New York County 2011] [determination to revoke HMO license rational as petitioner's crime directly related to work as HMO]).

Respondent also properly considered the factors set forth in Correction Law § 753, including petitioner's age, the seriousness of his offenses, evidence of his good character, and lack of evidence of his rehabilitation, and concluded reasonably that the offenses of which petitioner was convicted bore a direct relationship to his HMO license as the crimes occurred while petitioner was working on a construction project and also involved his construction company, and that petitioner's lack of trustworthiness and honesty raised concerns about whether he would pose an unreasonable risk to the safety and welfare of the public. (*See Matter of*

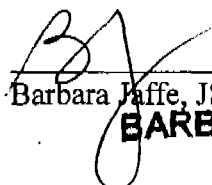
Wunderlich v New York State Educ. Dept., Comm. on the Professions, 82 AD3d 1345 [3d Dept 2011], *lv denied* 17 NY3d 715 [respondent considered factors in finding that crime was directly related to license and took place short time ago, and no evidence given as to rehabilitation]; *Matter of City Servs. v Neiman*, 77 AD3d 505 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011] [respondent permitted to deny license based on prior convictions as it concluded rationally that convictions directly related to license sought]; *Matter of Persico*, 34 Misc 3d 1204[A], 2011 NY Slip Op 52424[U] [respondent considered factors including petitioner's age, work responsibilities, seriousness of crime, and "good conduct" in recommending revocation of HMO license; also direct relationship shown between crime and license]).

V. CONCLUSION

Accordingly, it is hereby . . .

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

ENTER:


 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

DATED: May 18, 2012
 New York, New York

MAY 18 2012

UNFILED JUDGMENT

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