

**Five Boro Elec. Contrs. v New York City Dept. of
Bldgs.**

2012 NY Slip Op 31684(U)

May 16, 2012

Supreme Court, Queens County

Docket Number: 7114/12

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Five Boro Electrical Contractors
Association, Inc.,
Plaintiff,
- against -

Index
Number: 7114/12
Motion
Date: 5/1/12

New York City Department of Buildings,
New York City Office of Administrative
Trials and Hearings, New York City
Environmental Control Board, and The
City of New York,

Motion
Cal. Number: 6

Defendants.

Motion Seq. No.: 1

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The following papers numbered 1 to 14 read on this motion by plaintiff for a preliminary injunction.

Papers
Numbered

Order to Show Cause-Affirmation-Affidavits-Exhibits.. 1-7
Affirmation in Opposition-Affidavits-Exhibits..... 8-12
Reply..... 13-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff, a not-for-profit corporation representing more than 300 independent electrical contractors, for a preliminary injunction pursuant to CPLR 6301 enjoining the City from enforcing amendments to Title 1, Chapter 100, Subchapter B, §102-01(i) and (j), promulgated by the Department of Buildings (DOB), and Title 48, Chapter 3, Subchapter G, §3-103, promulgated by the Environmental Control Board (ECB), of the Rules of the City of New York (RCNY), pending determination of a declaratory judgment action heretofore commenced by plaintiff for an order invalidating said amendments is denied.

Local Law 33 of 2007 revised the New York City Building Code, Mechanical Code and Fuel Gas Code, effective July 1, 2008 (the 2008 Code). Prior to the revision, DOB inspectors could note a violation but could not issue a notice of violation (NOV) returnable before

the ECB for the imposition of penalties. The 2008 Code provided for the issuance of NOV's by the DOB returnable before the ECB. Section 28-204.1 of the 2008 Code states:

Any person who shall violate or fail to comply with any of the provisions of this code, the 1968 building code, the zoning resolution or other laws or rules enforced by the department or with any order issued pursuant thereto shall be liable for civil penalty that may be recovered in a proceeding before the environmental control board. Such proceeding shall be commenced by the service of a notice of violation returnable before the board. Such notice of violation may be issued by employees of the department or of other city agencies designated by the commissioner and may be served by such employees or by a licensed process server.

Section 28-201.2 of the 2008 Code also reclassified violations as immediately hazardous violations, major violations and lesser violations. Sections 28-201.2.1 and 2.2 requires the Commissioner to classify certain listed violations as immediately hazardous and major violations, respectively.

Concurrently with the 2008 Code revision, the DOB, pursuant to the City Administrative Procedure Act (NYC Charter §1041 et seq), promulgated 1 RCNY §102-01. Subsection (a) thereof tracks the language of § 28-204.1 and states:

Pursuant to §28-204.1 of the Administrative Code, any person who shall violate or fail to comply with any provision or provisions of law enforced by the Department or with any order issued pursuant thereto shall be liable for a civil penalty that may be recovered in a proceeding before the Environmental Control Board (ECB). Such proceeding shall be commenced by the service of a notice of violation (NOV) returnable before the board. Such notice of violation may be issued by employees of the Department or of other city agencies designated by the Commissioner and may be served by such employees or by a licensed process server.

1 RCNY §102-01 also classified violations as Class 1 - immediately hazardous violations, Class 2 - major violations, or Class 3 - lesser violations, and lists particular violations under this classification system. Included in the list of violations is a category designated as "miscellaneous violations" classified as Class 1, 2 and 3. The provisions of the 2008 Code did not apply to

the Electrical Code and, therefore, the DOB could not issue NOV's for Electrical Code violations, and the aforementioned classification scheme did not apply to the Electrical Code.

In 2009, a proposed amendment to the Electrical Code was submitted to the City Council. This proposed amendment, inter alia, essentially followed the 2008 Code's scheme of authorizing the DOB to serve NOV's returnable before the ECB for the imposition of penalties. The proposed amendment was introduced in the City Council in March 2010 and a hearing was held before the Committee on Housing and Buildings on September 21, 2010. Plaintiff appeared at the hearing and opposed the administrative aspect of the amendment which would authorize the DOB to issue NOV's returnable before the ECB but did not oppose the technical provisions of the new proposed Electrical Code. A second hearing was held on June 14, 2011 and, after amendments were made to the original proposed provisions, the amendment was passed by the City Council on said date and was signed into law by the Mayor on June 28, 2011 as Local Law 39 of 2011. Local Law 39 of 2011 amended, inter alia, §27-3021.2 of the Administrative Code relating to the imposition of penalties for noncompliance with the Electrical Code technical standards so as to subject the violator "to penalties and other enforcement actions in accordance with the provisions of chapter 2 of title 28 of the administrative code". The latter's provisions include §28-204.1 of the Administrative Code, heretofore cited, which authorizes the DOB to issue NOV's returnable before the ECB.

The DOB, thereafter, commenced the process of amending 1 RCNY §102-01 to reference the Electrical Code and to list 35 categories of violations under the Electrical Code and classify them as either Class 1, 2 or 3 violations for the purpose of issuing ECB violations. On October 26, 2011, a notice of public hearing regarding the proposed new rule was published in the City Record, pursuant to the City Administrative Procedure Act (City Charter §1043). The notice stated, inter alia, that §102-01(i) was to be amended to reference the Electrical Code for purpose of issuing ECB violations and subdivision (j) was to be amended to list 35 categories of Electrical Code violations.

The notice proposed that §102-01(i) be amended to read as follows, with new matter being indicated by being underlined:

Section 1, Paragraph (2) of subdivision (i) of section 102-01 of subchapter B of chapter 100 of title 1 of the Rules of the City of New York is amended and a new paragraph (8) is added, to read as follows:

(2) Chapter 1 of Title 27 of the NYC

Administrative Code (also known as the "1968 Building Code") and Chapter 3 of the same (also known as the "Electrical Code"). References to these chapters of Title 27 of the NYC Administrative Code begin with "27-" (for example, "27-371"). The citation "27-Misc." refers to provisions of Title 27 that are not specifically designated elsewhere in the table.

(8) Electrical Code Technical Standards. References to sections of the National Fire Protection Association NFPA 70 National Electrical Code as adopted and/or amended by New York City begin with "EC" (for example, "EC 250.14"). The citation "EC-Misc" refers to provisions of the Electrical Code Technical Standards that are not specifically designated elsewhere in the table.

Subdivision (j) was to be amended to list 35 Electrical Code violations, setting them forth in a table describing the specific violations, classifying them as Class 1, 2 or 3 violations and referencing the Electrical Code and Administrative Code sections where those violations may be found. Some of the 35 types of violations are listed two or three times because they can be either Class 1, Class 2 or Class 3 violations. Included in this list are three entries for violations described as "Miscellaneous violation of the Electrical Code Technical Standards", with the applicable section of law set forth as merely "EC-Misc" and classified as Class 1, 2 and 3 violations, respectively.

It is the creation of this "miscellaneous" violation classification in subdivision (j), and the associated "EC-Misc" section of law designation, along with the explanatory language to the citation "EC-Misc" in subdivision (i), to which plaintiff objects. A public hearing was held on December 1, 2011 at which representatives of plaintiff appeared and presented statements opposing the rule.

In conjunction with the DOB's process of amending 1 RCNY §102-01, the ECB began the process of promulgating 48 RCNY §3-103, providing for penalties associated with the DOB violations. A notice of public hearing was published in the City Record on November 25, 2011 and a public hearing was held on December 28, 2011.

On January 13, 2012, 1 RCNY §102-01 was adopted by the Commissioner, with an effective date of March 1, 2012. On January 26, 2012, 48 RCNY §3-103 was adopted, with an effective date of

March 2, 2012. Notwithstanding these effective dates, the DOB decided to give the industry additional time to assimilate the new rules and forbear from issuing NOV's for unlicensed electrical work until May 1, 2012 and from issuing NOV's for technical violations of the Electrical Code until June 4, 2012.

Plaintiff seeks to invalidate 1 RCNY §102-01 and 48 RCNY §3-103 upon the grounds that they were wrongfully promulgated, that they are ultra vires and that they are void for vagueness and therefore violative of plaintiff's due process rights.

Plaintiff contends that the subject rules were wrongfully promulgated because the DOB and ECB failed to provide them with notice of the proposed rule changes in their legislative agenda and failed to provide plaintiff individually with notice of the proposed rule changes. Plaintiff also contends that 1 RCNY §102-01 and 48 RCNY §3-103 must be invalidated because the DOB and ECB failed to provide plaintiff individually with notice of the proposed rule changes pursuant to §1043(b)(2) and (b)(3)(b) of the Charter.

Plaintiff also contends that the amendments to 1 RCNY §102-01 and 48 RCNY §3-103 that added a miscellaneous category of violations were ultra vires acts of the DOB and ECB and rendered the rules too vague to be enforceable and thus are violative of plaintiff's constitutional due process rights.

Plaintiff argues that the addition of a "miscellaneous" Class 1, Class 2 and Class 3 violation category by the DOB and the promulgation of a schedule of fines/penalties for NOV's issued by the ECB under the "EC-Misc" category violated the mandate of the City Council as expressed in the Administrative Code and thus exceeded their rule-making powers. Plaintiff argues that the DOB, in promulgating 1 RCNY §102-01, and the ECB, in promulgating 48 RCNY §3-103, with respect to the new miscellaneous category of violations, have implemented policies not intended by the City Council and thus usurped the authority of the City Council to make public policy decisions, and that the new violation schedule for miscellaneous violations is too vague to be enforceable.

A preliminary injunction may only be granted if the movant establishes all of the following three requirements: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction and (3) that a balance of the equities in favor of granting of an injunction (see DiFabio v Omnipotent Communications, Inc., 66 AD 3d 635 [2nd Dept 2009]; Ruiz v Meloney, 26 AD 3d 485 [2nd Dept 2006]).

Plaintiff contends that electrical contractors would be faced with fines of potentially up to a maximum of \$25,000 for Class 1 violations, which "could very well drive Plaintiff's members out of business." Plaintiff's complaint of economic hardship by the imposition of fines and its speculative contention that some of its smaller member might be driven out of business if a \$25,000 maximum fine were assessed fails to satisfy the irreparable harm requirement for the granting of a preliminary injunction.

Irreparable injury is one for which money damages are insufficient and, therefore, economic loss does not constitute irreparable harm for purposes of a preliminary injunction (see DiFabio v Omnipotent Communications, Inc., supra).

Since plaintiff has failed to demonstrate irreparable harm so as to merit the granting of a preliminary injunction, the Court need not reach, and will not decide, the remaining factors necessary for the granting of an injunction.

Accordingly, the motion is denied.

Dated: May 16, 2012

KEVIN J. KERRIGAN, J.S.C.