

**Zenk Pedicab Rental & Operation, Inc. v New York
City Dept. of Consumer Affairs**

2013 NY Slip Op 30695(U)

April 3, 2013

Sup Ct, New York County

Docket Number: 103519/12

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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APPLICATION OF ZENK PEDICAB RENTAL &
OPERATION, INC. and OSMAN ZENK,

Petitioners,

Index No. 103519/12

For a judgment pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

Decision, Order, and Judgment

NEW YORK CITY DEPARTMENT OF CONSUMER
AFFAIRS,

Respondent.

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

Petitioners, Zenk Pedicab Rental & Operation, Inc., and Osman Zenk, bring this proceeding under Article 78 of the New York Civil Practice Law and Rules. Petitioners seek annulment of a final determination by Respondent New York City Department of Consumer Affairs (“DCA” or the “Agency”), dated April 11, 2012. In that decision, the Agency denied the application of Zenk Pedicab Rental & Operation, Inc. for renewal of its pedicab business license. For the reasons set forth below, the petition is granted.

Petitioner Osman Zenk began driving a pedicab in 2003. In 2004, he incorporated his pedicab business as Zenk Pedicab Rental & Operation, Inc. (“Zenk Pedicab” or “Company”). In 2007 Zenk sold 30 used pedicabs to his mother-in-law, Elda Pastor Medina, who subsequently opened her own pedicab business, Cycle Cab, Inc.

In 2007, New York City began regulating the operations of pedicab businesses. See N.Y. City Admin. Code §§ 20-248 et seq. In conjunction with that law, the Agency promulgated

regulations. 6 R.C.N.Y. §§ 2-405 et seq. The Code limits pedicab owners to 30 pedicab registration plates. N.Y. City Admin. Code § 20-251(d). Zenk, as owner and President of Zenk Pedicab, successfully applied for a license on behalf of the Company and was issued 30 registration plates. His mother-in-law, as owner of Cycle Cab, Inc., also obtained a license and 30 registration plates for her pedicab operation. Both subsequently had their licenses renewed.

In February 2011, a New York Post article singled out Petitioner Zenk as a Turkish immigrant who arrived “here” in 2002 with “\$2,000 in his pocket” and “eating ‘bananas all day’” while pedaling his pedicab “12 hours a shift.” Candice M. Giove, *A Wheel Cheater*, N.Y. Post, Feb. 20, 2011. The article related that Zenk rented pedicabs from his “pedicab palace” on West 57th Street, a garage where he stores and rents storage for pedicabs, in violation of the 30-registration-plate rule. As a result of this article, the DCA investigated Petitioner’s business and his mother-in-law’s business. Both Petitioner Zenk and his mother-in-law were issued subpoenas duces tecum and were deposed by the DCA’s legal staff.

Following the DCA’s investigation, Zenk Pedicab’s license to renew was denied in a letter by the Deputy General Counsel of DCA, dated April 11, 2012.¹ The letter cited Section 20-251(d) of the Administrative Code of the City of New York, which in pertinent part provides “No pedicab business or pedicab owner shall hold more than thirty registration plates at any one time. A pedicab business shall be deemed to have more than thirty registration plates if: (1) an owner of such pedicab business has a direct or indirect beneficial interest in one or more other pedicab

¹Mr. Zenk’s mother-in-law’s application, however, was granted.

businesses and the businesses together have more than thirty registration plates; (2) a family member of the owner of such business has a direct or indirect beneficial interest in one or more other pedicab businesses and the businesses together have more than thirty registration plates” The DCA concluded that Mr. Zenk’s mother-in-law was a “family member” for purposes of Section 20-251(d). “Family member” is defined in the statute to mean “a member of the immediate family, including, but not limited to, a spouse, domestic partner, sibling, child, grandchild, parent, or grandparent.” N.Y. City Admin. Code § 20-249(a). The Agency also found that together with his mother-in-law Mr. Zenk held more than thirty registration plates.

The DCA further informed Petitioners that even if Mr. Zenk’s mother-in-law were not a family member for purposes of the Code, “it is apparent” that Mr. Zenk had “a beneficial interest” as prohibited under Section 20-251(d) in his mother-in-law’s pedicab business. In support of that conclusion, the DCA recited five factors gleaned from its investigation arising out of the New York Post article: 1) Zenk Pedicab had sold Cycle Cab, Inc., its pedicabs; 2) Cycle Cab, Inc., rents storage space for its pedicabs from Zenk Pedicab; 3) Ms. Pastor Medina, as owner of Cycle Cab, Inc., does not manage the day-to-day operations of her pedicab business but rather employs a business manager, Julio Saldero, who had been referred to her by her son-in-law, Mr. Zenk; 4) Mr. Zenk distributes the pedicabs for businesses that store pedicabs in his garage to drivers who appear at the garage to rent pedicabs from the companies; and 5) the business manager to whom Mr. Zenk referred his mother-in-law at one time had worked for Mr. Zenk’s wife. The Agency further informed Mr. Zenk that his application was additionally denied because he lacked “the integrity and honesty required of licensees by section 20-101 of the Code” in failing to admit in his application

to the beneficial interest and family member relationship that the Agency concluded existed as a matter of law.

Mr. Zenk and Zenk Pedicab now petition under Article 78 to challenge the DCA's determination. In conjunction with this proceeding, this Court has enjoined the Agency from redistributing the 30 registration plates that were previously held by the former licensee, Zenk Pedicab. Oral argument was held on December 4, 2012.

No hearing has been held in this action. While Petitioners contend that they should have been provided with a hearing, it is well-settled that denials of license renewals do not require that process. E.g., Daxor Corp. v. N.Y. Dep't of Health, 90 N.Y.2d 89, 100 (1997).

Petitioners "are, of course entitled to administrative review that is not arbitrary, capricious or tainted by bias." Id. In an Article 78 proceeding, a court reviews an administrative action to determine, among others, whether an agency's decision violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); In re Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where the issue is limited to "pure statutory interpretation," a court is not required to defer to an agency but rather should consider the plain language of the statute. E.g., In re Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2012).

In this case the DCA denied Zenk Pedicab's license on the grounds that its owner had

a disqualifying family member relationship or alternatively had a beneficial interest in Cycle Cab, Inc. In reaching that legal conclusion the DCA construed the terms “family member” and “beneficial interest” under the Code.

This Court finds that the DCA’s denial of Zenk Pedicab’s license renewal is affected by an error of law and, therefore, is arbitrary and capricious. I first consider DCA’s statutory construction of the phrase “family member.” The test for a court deferring to an agency’s statutory interpretation lies where an agency’s interpretation has “warrant in the record’ and a reasonable basis in law.” In re Howard v. Wyman, 28 N.Y.2d 434, 438 (1971) (quoting N.L.R.B. v. Hearst Pubs., 322 U.S. 111, 131 (1944)). While there is no disagreement in this record that the owner of Cycle Cab, Inc., is Mr. Zenk’s mother-in-law, nowhere in its papers does DCA cite any reasonable basis in law, either statute, regulation or case law, to support its claim that Mr’s Zenk’s mother-in-law is a member of his immediate family as that term is defined in Section 20-249(a).

This Court’s own independent review of the statutory and regulatory scheme governing pedicabs shows no basis to defer to the Agency’s construction over the plain language of the statute. In 2007, New York City amended Title 20 of the Administrative Code, which governs consumer affairs. Chapter 2 of that Title governs licenses and subchapter 9 was added to regulate pedicabs. See N.Y. City Admin. Code §§ 20-248 et seq. In enacting the statute, the City included a definitions section. Id. § 20-249. Section 20-249 defines the term “family member” as “a member of the immediate family, including, but not limited to, a spouse, domestic partner, sibling, child, grandchild, parent, or grandparent.” N.Y. City Admin. Code § 20-249(a). Thus, only immediate family members trigger the prohibitions set forth in Section 20-251, limiting those to 30 registration

plates. E.g., Caba v. Raj, 63 A.D.3d 578, 581 n.2 (1st Dep’t 2009) (citing canon of statutory construction that the specific governs the general); Uhlfeder v. Weinshall, 47 A.D.3d 169 (1st Dep’t 2007) (under eiusdem generis canon of construction general phrase becomes limited by specific words preceding it). In considering the plain meaning of the term “immediate family,” this Court notes that term relates to a “person’s parents, spouse, children, and siblings.” Black’s Law Dictionary 620 (7th ed. 1999). The phrase, “family member,” as limited to “immediate family,” moreover, was included with the enactment of the original legislation in 2007, and its definition has remained unchanged, even when the City amended its definitions section in 2009. N.Y. City Local Law No. 53 (2009).

Nor will this Court defer to the Agency’s construction of the term, “beneficial interest,” over the plain language of the statute. Nowhere in its papers does DCA define the term, “beneficial interest,” let alone provide any reasonable basis in law, either statute, regulation or case law, to support its construction. The term, “beneficial interest,” arises from equity, typically involving an interest in income not involving legal title. E.g., Black’s Law Dictionary 149 (7th ed. 1999); cf. N.Y. City Admin. Code § 20-249(b) (defining “owned” or “owns” as “possession with good legal title”).

Moreover, this Court’s own review of the statutes and regulations governing pedicabs in this City indicates that “beneficial interest” as it appears in Section 20-251 refers to the black letter legal term described above. In 2007 when New York City first regulated pedicabs, the City Council enacted Section 20-252, which governs the issuance of pedicab business licenses. That provision, not cited by the DCA, states that the Commissioner shall promulgate rules whether a license may

remain valid after “any change in the beneficial ownership of a pedicab business, including, without limitation, any such change resulting from a direct or indirect, voluntary or involuntary, sale or transfer of a beneficial ownership interest.” Id. § 20-252(d). Indeed, the Agency’s regulations provide that a license is terminated upon change of beneficial ownership. 6 R.C.N.Y. § 2-418. That regulation provides that a pedicab license is void upon a person obtaining beneficial ownership of a licensee. Id. §§ 2-418(a)-(b). In 2009, therefore, when the Code was amended to include newly-added Section 20-251’s adoption of the 30-registration-plate limit, the term “direct or indirect beneficial interest” contained in the new section was well-understood under the existing provisions of the Code and regulations governing the pedicab businesses.

DCA’s construction of this record as showing a beneficial interest is unwarranted. Petitioner Zenk’s lessor relationship in renting storage space arises out of a legal interest, which is reflected in this record by a lease agreement. Similarly, the vendor relationship arising from the 2007 sale of used pedicabs is supported by uncontroverted proof in this record that Cycle Cab, Inc., paid at least \$25,000 for that equipment. The only remaining bases cited by the Agency to support its legal conclusion that a “beneficial interest” exists are 1) Mr. Zenk’s referral of a job candidate to his mother-in-law; Ms. Pastor Medina uses a business manager to run the day-to-day operations of her business for her, and 2) Mr. Zenk’s control over distribution of the pedicabs that companies store in his garage to the pedicab drivers, who the record shows are independent contractors of the businesses in issue. For the DCA to conclusorily state to this Court that these indicia legally constitute a beneficial interest by Mr. Zenk in Cycle Cab, Inc., under Section 20-251, without more, is simply not founded in any reasonable basis of the law. N.Y. City Pedicab Owners’ Ass’n v. N.Y. City Dep’t of Consumer Affairs, 61 A.D.3d 558, 558 (1st Dep’t 2009) (agency may not make a

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“unilateral ruling . . . at variance with” statute) (quoting Two Assocs. v. Brown, 127 A.D.2d 173, 183 (1st Dep’t 1987)). The Agency offers no evidence to support its characterization of these acts as reflecting a “beneficial interest,” such as payments or any other benefits flowing from those acts. It follows from this Court’s conclusions of law that Mr. Zenk’s failure to acknowledge a beneficial interest or family member relationship as defined under the Code does not render him lacking in honesty and integrity under Section 20-101 of the Code. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and the proceeding is remanded to the Agency for further proceedings consistent with this order and judgment; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: April 3, 2013

ENTER:



JOAN B. LOBIS, J.S.C.