

**People v Amigone Funeral Home, Inc.**

2014 NY Slip Op 33458(U)

March 24, 2014

Supreme Court, Erie County

Docket Number: I-2716-2013

Judge: Henry J. Nowak

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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PEOPLE OF THE STATE OF NEW YORK,  
The NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, and  
JOSEPH J. MARTENS, COMMISSIONER OF  
THE NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, by  
ERIC T. SCHNEIDERMAN, Attorney General  
for the State of New York,

Petitioners,

vs.

AMIGONE FUNERAL HOME, INC.,  
AMIGONE VENTURES, L.P.,  
AMIGONE ENTERPRISES, INC., and  
SHERIDAN PARK, INC.,

Respondents.

MEMORANDUM DECISION  
AND ORDER

INDEX NO. I-2716-2013

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HENRY J. NOWAK, J.S.C.  
Justice Presiding

I. CLAIMS BY THE PARTIES

Petitioners bring the instant petition for a permanent injunction and penalties pursuant to ECL § 71-2103. Specifically, petitioners claim that respondents violated 6 NYCRR §§ 211.1 and 219-4.5 (a), as well as their May 27, 2009 air facility registration that previously authorized operation of a crematory located at 2600 Sheridan Drive in Tonawanda, New York. Respondents move to dismiss the petition pursuant to CPLR § 404 (a), contending that a July 25, 2012 Interim Assurance of Discontinuance [hereinafter "AOD"] is a complete bar to the petition.

## II. PAPERS CONSIDERED

In support of their petition, verified on September 23, 2013, petitioners submitted and the court considered the following:

- the affidavit of Alfred Carlacci, a regional air pollution control engineer for the New York State Department of Environmental Conservation, sworn to on September 20, 2013;
- the September 24, 2013 affirmation of Assistant Attorney General Jane C. Cameron, Esq.;
- the affidavit of Jennifer Nalbone, an Environmental Scientist employed by the New York State Attorney General's Office, sworn to on September 24, 2013;
- the affidavit of Rebecca Newberry, lead community organizer in the Town of Tonawanda for the Clean Air Coalition of Western New York, sworn to on September 23, 2013;
- the affidavits of Joseph Emminger, sworn to on September 12, 2013, and Lisa M. Chimera, sworn to on September 18, 2013, both members of the Town Board of the Town of Tonawanda;
- the affidavits of 43 people who live in the neighborhood adjacent to 2600 Sheridan Drive in Tonawanda, New York; and
- 127 exhibits submitted along with the affidavits.

In support of respondents' motion, the court considered:

- the affidavit of Robert E. Knoer, Esq., sworn to on October 28, 2013;
- the affidavit of Anthony P. Amigone, Sr., sworn to on October 28, 2013;
- the affidavit of Ernest Kassoff, national sales manager for Facultatieve Technologies, sworn to on October 25, 2013;
- the answer to the petition, verified on October 28, 2013; and
- eight exhibits submitted along with the affidavits.

In addition, the court considered oral argument by counsel for all parties on November 6, 2013, as well as memoranda of law submitted by counsel for all parties both before and after oral argument.

### III. SUMMARY OF POSITIONS

Petitioners bringing this action pursuant to Executive Law § 63 (12), which empowers the Attorney General to bring a special proceeding seeking injunctive relief whenever any person engages in repeated illegal acts or otherwise demonstrates persistent illegality in carrying on, conducting or transacting business. The illegal activities that petitioners allege are (1) that respondents caused or allowed emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which unreasonably interfered with the comfortable enjoyment of life or property, in violation of 6 NYCRR § 211.1; and (2) that respondents emitted visible emissions from their crematory with a six-minute average opacity of 10 % or greater, in violation of 6 NYCRR § 219-4.5 (a). Because respondents' May 27, 2009 air facility registration required compliance with application air pollution regulations, including the sections referenced above, petitioners claim that respondents violated the air facility registration as well.

Respondents do not dispute that neighbors have made complaints about the crematory during the time it was in operation from 1991 to July 2012, but point out that they have never been found in violation of any air pollution or noise limits. The basis for their motion, however, is that the AOD resolved all allegations of violations in the petition as well as all civil penalties that may be available to petitioners. In fact, respondents contend that the mere commencement of the petition is a breach of the AOD.

The AOD (Petitioners' Exhibit 100) contains ten specific stipulations of the parties. The first provides for an initial period for six months whereby respondent Sheridan Park, Inc. [referred to in the AOD as the "Operator"] would cease operating the crematory, from July 22, 2012 through January 22, 2013. The second stipulation requires respondents to take steps during that time to secure an alternative location for the crematory facility and apply for all required state and local government approvals. Petitioners do not contend that respondents failed to do so, and the record reflects extensive efforts by respondents to find an alternative location for the crematory.

The third stipulation permits respondents to recommence operation of the crematory within the six-month period, as long as three conditions are met:

- a. The Operator will provide proof to the Attorney General of a final state or local government determination foreclosing the possibility of relocation; and
- b. The Operator will retain a reputable third-party consulting firm with expertise in crematory operations to determine the validity of and develop recommendations for on-site operational changes that will address the Residents' concerns regarding odors, soot, smoke and noise and further insure compliance with the law; [and]
- c. The recommendations of said consultant, together with Sheridan Park's proposed implementation of those recommendations, must be submitted to DEC and the Attorney General for review. As part of this submission, the Operator may request DEC and Attorney General approval to re-commence operations prior to January 22, 2013, with such approval to be solely within the discretion of DEC and the Attorney General.

The fourth stipulation is entitled "Notice." It provides that respondents must give petitioners two weeks' written notice before reopening the crematory, and one week's notice of the consultant's report referred to in section "b" of the third stipulation, as set forth above.

Respondents contend that the notice provision remains in effect indefinitely and is not limited to

the six-month time period referred to in the first three stipulations. Petitioners agree with respect to the first part of the “Notice” provision; the petition alleges that “[i]f six months passed, as it has, and Amigone wished to reopen the crematory, it was required to serve two weeks’ notice of same to the State” (September 23, 2013 Petition, ¶ 63). However, petitioners claim that the AOD did not impose a continuing obligation that respondents retain a third-party consultant and forward a plan showing operational and equipment changes to petitioners before re-opening at the present site. Respondent contends that it does.

The fifth paragraph of the AOD, entitled “Entire Settlement,” provides:

This Interim Assurance shall constitute the entire agreement of the parties with respect to settlement of the alleged violations specifically referenced herein and is in full satisfaction of all civil and criminal claims that were or could have been raised with respect thereto by the Attorney General and the New York State Department of Environmental Conservation.

There is no dispute that the AOD references the same violations alleged in the petition. It is also stipulated that the day after the AOD was signed, respondents ceased operating the crematory on Sheridan Drive. There is no allegation of any violations after the AOD was signed.

#### IV. FINDINGS OF THE COURT

This court finds that the July 25, 2012 interim AOD remains in effect indefinitely. If respondents wish to open the crematory at the current location, they first must provide two weeks’ actual written notice to the Attorney General advising of any plan to renew operation. Second, respondents must retain a reputable third-party consulting firm with expertise in crematory operations, to determine the validity of and develop recommendations for on-site operational changes that will address the residents’ concerns regarding odors, soot, smoke and


noise and further insure compliance with the law. Third, at least seven days before recommencing operation, respondents must submit a report of such recommendations along with their proposed implementation to the DEC and the Attorney General.

This court further finds that pursuant to the "Entire Settlement" stipulation in the AOD, petitioners may not bring any civil or criminal claim referenced in the AOD, which include all of the claims alleged in the petition. That provision is not ambiguous, particularly when read in conjunction with the ninth stipulation of the AOD, which provides that the AOD "shall not be construed to prohibit the Attorney General from exercising his authority to prosecute any **future** violation of the law" (emphasis added). Accordingly, the petition is dismissed.

In regard to respondents' claim for attorney's fees based upon frivolous conduct, this court does not find that the petition was completely without merit. One of petitioner's claims sought injunctive relief, after counsel for respondents referred to the possibility of re-opening on July 30, 2013 (Petitioners' Exhibit 117A). Therefore, respondents will be responsible for their own attorney's fees.

This decision constitutes the order of this court.

ENTER:

  
HENRY J. NOWAK, J.S.C.

**GRANTED**

MAR 24 2014

BY   
ELAINE J. XENOS  
COURT CLERK