

Matter of Hart v City of New York

2017 NY Slip Op 30034(U)

January 6, 2017

Supreme Court, New York County

Docket Number: 158968/2016

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

In the Matter of the Application of KENNETH HART, HARCO CONSULTANTS CORP., and A.K. VENTURES, INC.,

Index No.: 158968/2016

Motion Date: 01/05/2016

Petitioners,

Motion Seq. No.: 002

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and for other Legal and Equitable Relief,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS and HEARINGS,

Respondents.

The following papers, numbered 1 to 3 were read on this show cause order for a preliminary injunction and cross-motion to dismiss the petition.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>	
	<u>1</u>
	<u>2</u>
	<u>3</u>

Cross-Motion: **Yes** **No**

Upon the foregoing papers, it is ordered that the cross motion shall be granted, the show cause order and petition shall be denied, and the proceeding shall be dismissed.

Respondents are correct that pursuant to CPLR § 7801, an Article 78 proceeding is not available for review of an

Check One: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**

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

administrative agency determination that is not final. Respondents are likewise correct that the denial by the administrative law judge of the Office of Administrative Trials and Hearings (OATH) of petitioners' application for a stay of the OATH hearing pending, inter alia, resolution of the appeal of the Supreme Court, Criminal Term, conviction of a non-party entity, does not constitute a final determination because such denial of a stay, does not "impose a right, or fix some legal relationship as a consummation of the administrative process." See Essex County v Zagata, 91 NY2d 447, 453 (1998).

It must be conceded, as argued by petitioners, that the exhaustion of remedies rule is not an inflexible one where the qualifications to such remedies outlined in Watergate II Apartments v Buffalo Sewer Authority, 46 NY2d 52, 57 (1978) pertain, to wit, that the agency proceeding is either unconstitutional or wholly beyond its power to grant, that resort to such proceeding would be futile, or that its pursuit would cause irreparable injury. See also Capers v Guiliani, 253 AD2d 630, 633 (1st Dept 1998).¹ However, the record before this court reflects no such qualification with respect to the upcoming

¹In light of the exceptions to the applicability of the rule, this court disagrees with respondents that failure to exhaust administrative remedies implicates subject matter jurisdiction, but agrees that the issue is one of the ripeness of a controversy for review or whether the petitioners have a claim under CPLR Article 78.

hearing on the charges and specifications issued against petitioners by the New York City Department of Buildings before OATH.

Contrary to petitioners' argument, the facts before this court are wholly distinguishable from those before the court in Pierne v Valentine, 291 NY 333 (1943). In Pierne, the Court of Appeals reversed the order of the Appellate Division, Second Department, that reversed the prohibition issued by the trial court. The Court of Appeals thereby affirmed the prohibition granted by the Pierne trial court, reasoning that there it was wholly beyond the power of the respondent pension board to conduct a hearing on misconduct charges filed against petitioners after they were no longer New York City employees, having already retired from the police force. Here, unlike the misconduct charges brought against the retirees in Pierne, the DOB charges and specifications issued against petitioners were not ex post facto a determination that petitioners have some vested right to permanent licenses.

The facts before this court are also wholly distinguishable from those presented in Coleman v Daines, 79 AD3d 554 (1st Dept 2010). The issues in Coleman involved solely the construction of the relevant constitutional, statutory or regulatory framework with respect to the agency action and not any substantive factual dispute, unlike the factual dispute that is the crux of the

matter at bar.

Nor have petitioners established any of the elements that would justify a provisional remedy. No irreparable harm is shown, since "the danger of impending ... proceedings is not an injury justifying an injunction." Spellman v Patrick, 90 AD2d 791 (2d Dept 1982). In that regard, petitioners cannot demonstrate that they will suffer irreparable harm, since at the hearing, each will have the right to present evidence of the very defenses that they argue justify the stay of the OATH hearing. Petitioners have not shown futility of any such defenses, since, even were the administrative law judge to consider the facts underlying the criminal conviction in making a recommendation for license revocation, such conviction would not necessarily be dispositive as to such penalty. See Gallo v LiMandri, 102 AD3d 621 (1st Dept 2013). Further, upon exhaustion of the available administrative remedies, should the administrative law judge recommend the revocation of petitioners' licenses, and such revocation recommendation be adopted by the Commissioner of the Department of Buildings, petitioners will have the right to commence an Article 78 proceeding to seek relief from such final determination. See Maggiore v City of New York Department of Buildings, 294 AD2d 304 (1st Dept 2002).

For failure to exhaust the available administrative remedies, the petition fails to state a meritorious cause of

action and must be dismissed pursuant to CPLR 3211(a)(7).

Accordingly, it is

ORDERED that the cross motion to dismiss of respondents City of New York by its Department of Buildings and Office of Administrative Trials and Hearing to dismiss the petition is GRANTED and the show cause order of petitioners for a preliminary injunction is DENIED; and it is further

ORDERED that the petition is DENIED and the stay of the proceedings in the hearing before the New York City Office of Administrative Trials and Hearings is vacated and lifted; and it is further

ORDERED and ADJUDGED that the petition is DENIED and the proceeding is DISMISSED, and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: January 6, 2017

ENTER:

~~_____~~
DEBRA A. JAMES J.S.C.