

Matter of J.P. & Assoc. Props. Corp. v NYC Env'tl. Control Bd.
2017 NY Slip Op 30615(U)
March 30, 2017
Supreme Court, New York County
Docket Number: 156576/2016
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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In the Matter of the Application of

J.P. & Associates Properties Corp.,

Petitioner,

Index No. 156576/2016

Motion Seq: 001

DECISION & ORDER

-against-

HON. ARLENE P. BLUTH

**NYC ENVIRONMENTAL CONTROL BOARD, NYC
OFFICE OF ADMINISTRATIVE TRIALS AND
HEARINGS, NYC DEPARTMENT OF BUILDINGS,**

Respondents.

**For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules**

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The cross-motion by respondents is denied and this matter is remanded to the Office of Administrative Trials and Hearings (OATH) to hear petitioner's appeal provided that petitioner pay the \$70,000 fine or post a bond for that amount within 30 days of entry of this decision and order in this e-filed case.

Background

This proceeding arises out of billboard-type signs located at 687 Meeker Avenue, Brooklyn, New York. Petitioner displayed two signs at this property promoting the law offices of John J. Ciafone. Petitioner claims that Mr. Ciafone, as the sole shareholder of petitioner, owns the property through petitioner and also owns the law firm described on the signs. DOB issued multiple violations against petitioner on the grounds that these signs violated applicable rules.

Petitioner argues that at the hearing held before ECB, it argued that petitioner was not acting as an Outdoor Advertising Company (OAC) because the signs only promoted the legal business of petitioner's principal (Mr. Ciafone) and Mr. Ciafone conducted occasional client meetings inside 687 Meeker, which rendered the signs as an accessory use rather than advertising.

At the hearing, respondents asserted that Mr. Ciafone was not using the signs as an accessory use and that petitioner was operating as an OAC without a permit because petitioner and Mr. Ciafone's law firm constituted two separate businesses.

The ECB hearing officer sustained 7 violations against petitioner and issued monetary penalties of \$10,000 for each violation by ECB decision dated February 22, 2016. The appeal was due thirty days after the decision was served upon petitioner.

Under the rules then existing (which have since been changed), in order for the appeal to be considered, within twenty days after the decision was served upon it, petitioner was required to either pay the \$70,000 penalty, post a bond for that amount or obtain a waiver of these financial requirements by submitting a financial hardship application.

Current Motion to Dismiss

Respondents move to dismiss on the ground that petitioner did not first exhaust its administrative remedies. The fact is that by the time petitioner was notified that his hardship application was denied, it was too late to appeal the ECB decision.

On March 21, 2016 petitioner sent in an extension of time to file an appeal and a form application for a financial hardship waiver. That form explicitly states that petitioner had to send in support for its request; petitioner wrote "no documents" instead of submitting information to

support the hardship request. About an hour after petitioner submitted this application to ECB, petitioner received an email requesting proof of hardship; that email requested "proof of hardship . . . by 5 p.m. [on] Tuesday March 22, 2016" (affirmation of Weinblatt in support of respondents' cross-motion, exh D). Instead of waiting until March 22, petitioner emailed a document entitled "Statement of Income and Expenses for 2014" on March 21, 2016.

That Statement had little information on it except for numbers and it contains no verification or signature - basically, it is just a printout of a spreadsheet. Petitioner never followed up with further information. The request was rejected on April 7, 2016 (*id.* exh E). Respondents' letter rejecting the request states that petitioner's request was rejected because the hardship waiver was rejected and petitioner did not pay or post a bond within 20 days of the date the hearing decision was served (*id.*).

To sum up the facts, petitioner waited until the last minute to put in its application for a waiver, and it failed to submit any documents. The ECB was kind enough to give petitioner another chance to submit documents, and petitioner responded with a document that did not support the waiver. By the time the financial waiver application was officially denied, it was too late to file an appeal.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable"

(*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

“[O]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (*Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57, 412 NYS2d 812 [1978]). “The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury” (*id.*).

The central question for this Court on respondents’ motion to dismiss is the process by which petitioner sought an appeal. Under the previous OATH ECB rules (48 RCNY § 3-73 is now repealed), petitioner had 20 days to pay the fine, post cash or a surety company bond in the full amount imposed by the decision, or seek a financial hardship waiver. The financial hardship waivers were granted in the sole discretion of the executive director.

That process was inherently flawed because the time to file the financial hardship application is exactly the same (20 days) as the time to pay the fine or post the bond. It makes no sense to post the bond or deposit the money and simultaneously ask for a waiver; obviously, if you demonstrate that you can do the former, there is no reason to grant the waiver. So in order to be fair, there needed to be a time frame after receiving the rejection of the waiver request for the applicant to scramble to post the bond or deposit the money. It was a fundamentally unfair process for those, like petitioner, whose financial hardship waiver is denied after the time to pay

or post the bond has lapsed. Although respondents rationally rejected that application based on the documentation provided, that does not make the process fair.

This unfairness is buttressed by the fact that an entity considering whether to appeal a decision is not specifically informed that seeking a waiver might foreclose their right to appeal. For instance, the financial hardship application fails to explicitly state that an applicant could be prevented from pursuing an appeal if the application is rejected after the time to pay or post a bond has passed. Petitioner should have had the opportunity to pay the fine or post a bond after the financial hardship application was rejected.

Summary

This decision is based only on the process by which petitioner was able to seek an appeal at that time. ECB gets credit for responding within an hour of the submission of petitioner's financial hardship application and for submitting a final decision within two weeks. And the decision to reject the financial hardship waiver was rational because petitioner submitted a self-created document without any verification. In order to confirm those numbers, ECB would have had to make multiple requests for further documents even though the burden was on petitioner to provide documents in the initial application.

The motion to dismiss for failure to exhaust administrative remedies is denied only because petitioner should have had the opportunity to pay the fine or post a bond after the financial hardship application was rejected. However, rather than directing respondents to answer, this Court remands this proceeding back to OATH for a final determination on the subject violations *provided that* petitioner posts a bond or pays the fine within 30 days of notice of entry of this e-filed decision. As stated above, respondents rationally denied the financial

hardship waiver application and this Court has no interest in permitting petitioner to receive a free appeal when it failed to provide proper documentation showing its inability to pay. The Court deems this relief just, equitable and proper given the circumstances in this proceeding.

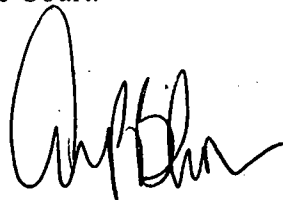
Accordingly, it is hereby

ORDERED that the cross-motion by respondents is denied; and it is further

ORDERED that this proceeding remanded back to OATH for a final determination on the seven violations provided that petitioner pay the \$70,000 fine or post a bond for the full amount within 30 days of notice of entry of this order.

This is the Decision, Order and Judgment of the Court.

Dated: March 30, 2017
New York, New York



HON. ARLENE P. BLUTH, JSC