

Matter of 556 Driggs Ave., LLC v City of New York
2017 NY Slip Op 30841(U)
April 21, 2017
Supreme Court, New York County
Docket Number: 159157/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
556 DRIGGS AVENUE, LLC,

Index No.: 159157/2016

Petitioner,

DECISION/ORDER

For a Judgment Pursuant to the Provisions
of Article 78 of the New York Civil
Practice Law and Rules,

-against-

THE CITY OF NEW YORK; FIDEL F. DEL VALLE, as
Commissioner and Chief Judge of the NEW YORK
CITY OFFICE OF ADMINISTRATIVE TRIALS AND
HEARINGS; FIDEL F. DEL VALLE, as Chair of the
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; and RICK D. CHANDLER, as Commissioner
of the NEW YORK CITY DEPARTMENT OF
BUILDINGS,

Respondents.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Petition/Verified Petition and Affidavits/Affirmations/Exhibits annexed	<u>1</u>
Answer/Affidavits/Affirmations/Memo of Law and Exhibits annexed	<u>2</u>
Reply Memo of Law/ Affidavits/Affirmations and Exhibits annexed	<u>3</u>

ERIKA M. EDWARDS, J.:

Petitioner 556 Driggs Avenue, LLC moves for a judgment pursuant to Article 78 of the CPLR reversing, annulling and setting aside the determination (“Determination”) of the Appeals Board (“Board”) of New York City Environmental Control Board (“ECB”), dated June 30, 2016, and instead, imposing a mitigated penalty of \$12,500.00. In the Determination, the Board upheld

the Decision and Order of Hearing Officer Stacey Selden (“H.O. Selden”), dated February 19, 2016, finding that signage on Petitioner’s property was advertising signage, as defined in Section 12-10 of the New York City Zoning Resolution, which made Petitioner ineligible for a mitigated penalty of \$12,500.00. Petitioner argues in substance that the Determination was not supported by substantial evidence.

For the reasons set forth herein, since Petitioner raises a substantial evidence issue, Petitioner’s application is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR § 7804(g).

BACKGROUND

Petitioner is the owner of the premises located at 556 Driggs Avenue, Brooklyn, New (“Premises”). Petitioner maintained an advertising sign on the wall of the Premises at the time of a Department of Buildings (“DOB”) inspection in August of 2014. On August 26, 2014, DOB issued the Petitioner a Notice of Violation for allegedly posting an unlawful advertising sign in a residential district in violation of Zoning Resolution § 22-32. DOB sought a fine of \$25,000 for the violation based on a prior violation. As set forth on the Notice of Violation, the Petitioner was scheduled to appear for a hearing before the New York City Office of Administrative Trials and Hearings (“OATH”) on December 12, 2014. Under the penalty schedule regulated by OATH, violations of Zoning Resolution § 22-32 are eligible for a mitigated penalty if the respondent proves that the violating condition was corrected prior to the first scheduled hearing date at ECB.¹

¹ ECB is a tribunal within OATH.

After some delay, including Petitioner's request for two adjournments, Petitioner appeared for a hearing before H.O. Selden on August 7, 2015, and December 18, 2015. During the August 7, 2015, hearing, DOB submitted evidence which included pictures of the premises from August 26, 2014, and December 1, 2014. Petitioner argued that Petitioner should receive a mitigated penalty of \$12,500.00 for the alleged unlawful advertising sign because the sign was removed on September 7, 2014, and replaced by a mural which Petitioner argued was "artwork." DOB argued against Petitioner's eligibility for a mitigated penalty because the alleged "artwork" was really an unlawful advertisement sign for the band *Interpol*'s new album "El Pintore." Therefore, Petitioner did not cure the original violating condition on the Premises. H.O. Selden granted an adjournment for both parties to submit additional evidence on the matter.

On December 18, 2015, the parties presented further evidence and arguments as to whether or not Petitioner was eligible for the mitigation penalty. At the conclusion of the hearing, H.O. Selden allowed the parties to submit additional briefs as to the issue of whether the new sign was artwork or advertising. On February 19, 2016, H.O. Selden rendered her decision finding that the new sign on the Premises was an advertising sign and she did not apply the mitigation penalty. On April 28, 2016, Petitioner appealed the decision of H.O. Selden to the Board. On June 30, 2016, the Board affirmed H.O. Selden's findings.

On October 31, 2016, Petitioner filed the instant petition. Respondents oppose the petition and argue that the court should transfer this proceeding to the Appellate Division, First Department since Petitioner raises the issue of whether the Determination was supported by substantial evidence. Petitioner opposes the request to transfer the matter to the Appellate Division, First Department.

DISCUSSION

In an Article 78 proceeding, the scope of judicial review is limited to whether an administrative agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). Generally, judicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether that determination is supported by substantial evidence (CPLR § 7803[4]; *Matter of Pell*, at 230). However, where the substantial evidence issue of CPLR § 7803(4) is raised, the reviewing court shall make an order directing that the issue be transferred for disposition to a term of the appellate division (CPLR § 7804[g]; *Mason v. Dep't of Bldgs.*, 307 AD2d 94, 98 [1st Dept. 2003]; *Al Turi Landfill v. N.Y. State Dep't of Env'tl. Conserv.*, 98 NY2d 758, 759 [2002]). Furthermore, before transferring the proceeding, the court must dispose of other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue (CPLR § 7804[g]).

The specific issue here is whether the Board's determination, which was made after a full evidentiary hearing was held, was supported by substantial evidence. While Petitioner argues that its petition is based on error of law, in that the Determination was arbitrary and capricious, such claim is intertwined with the substantial evidence issue. Furthermore, Petitioner's Verified Petition at paragraph 22 specifically states, "It [the Determination] is not supported by the evidence before ECB that the signage was in fact non-commercial signage and not advertising signage as defined in the Zoning Resolution." As such, Petitioner is in fact arguing that the Determination was not supported by substantial evidence. Petitioner does not raise any other objections for the court to address.

CONCLUSION

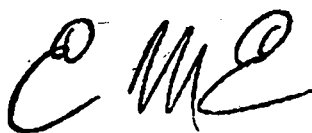
Since the petition involves an issue as to whether a determination made as a result of an evidentiary hearing held, pursuant to direction of law, on the entire record, was supported by substantial evidence, the application by Petitioner is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR § 7804(g). As such, it is hereby

ORDERED that pursuant to CPLR § 7804(g), the application by petitioner seeking to vacate and annul a determination by respondents is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR § 7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that Petitioner is directed to serve a copy of this order with a Subpoena Duces Tecum along with supporting documents upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First Department.

This constitutes the decision and order of the court.

Date: April 21, 2017


HON. ERIKA M. EDWARDS

Erika M. Edwards, J.S.C.