Rose Group Park Ave. LLC v New York State Liq. Auth.
2019 NY Slip Op 32310(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 160944/2018
Judge: Eileen A. Rakower

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

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ROSE GROUP PARK AVENUE LLC,

Petitioner,

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

- against -

THE NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

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Index No. 160944/2018

DECISION and ORDER

Mot. Seq. #001

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Rose Group Park Avenue LLC ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking to annul Respondent New York State Liquor Authority's (the "SLA") determination denying Petitioner's application to change the class of its license from a beer-and-wine license to an on-premises liquor license. Specifically, Petitioner seeks the Court to order that the SLA shall not invoke the 200-foot rule in considering Petitioner's application. The SLA opposes.

Central Presbyterian Church ("Central Presbyterian") cross moves to intervene in the Article 78 proceeding pursuant to CPLR § 7802(d). There is no opposition.

Jeff Fox ("Fox") cross moves, seeking the Court to grant permission to file an Amicus Curiae brief. The SLA opposes.

Background and Facts

Under the Alcoholic Beverage Control Law ("ABCL") § 64(7)(a) (the "200-foot rule"), the SLA may not issue an on-premises liquor license to any establishment

located on the same street as and within 200 feet of another building occupied exclusively as a place of worship or as a school.

In 2006, Petitioner began leasing space at 583 Park Avenue (the "Premises"). The Premises is on the same street as and within 200 feet of a seven-story building at 593 Park Avenue owned by Central Presbyterian. Petitioner and the SLA both agree that Central Presbyterian holds various religious activities at 593 Park Avenue.

Since 2007, Petitioner began conducting catered events on the Premises. Petitioner holds a beer-and-wine license and is allowed to serve wine, beer, and cider.

During the 2018-2019 school year, Central Presbyterian rented one floor in 593 Park Avenue to the Geneva School of Manhattan (the "Geneva School"), a religious school not affiliated with Central Presbyterian. Central Presbyterian contends that the Geneva School is a member of the Association of Classical Christian Schools, an advocacy organization for classical Christian education. Central Presbyterian Mem. at 5. The Geneva School uses the rented floor for its pre-kindergarten programs ("preschool"). The preschool offers day care classes and bible reading classes for children between two-and-a-half and four years old. Petitioner's Reply Mem. at 2.

At the beginning of 2018, Petitioner contends that it became aware of the preschool operating at 593 Park Avenue. On June 7, 2018, Petitioner filed an application with the SLA seeking to change the class of its current beer-and-wine license to an on-premises liquor license (the "Class Change Application"). The Class Change Application expressly claimed that 593 Park Avenue is not used exclusively as a church.

On July 10, 2018, in response to Petitioner's Class Change Application, the SLA wrote to Central Presbyterian, asking for information about Central Presbyterian's activities at 593 Park Avenue and if there are any non-religious activities taking place in the building. On July 17, 2018, Central Presbyterian sent a letter to the SLA stating that Central Presbyterian conducts worship services, including weddings, bible studies, concerts, and lectures at 593 Park Avenue. Central Presbyterian also stated that the Geneva School holds certain classes, such as "biblical worldview" on the rented floor only during school hours.

On July 25, 2018, the SLA denied Petitioner's application based on the 200-foot rule. On August 17, 2018, Petitioner sought reconsideration by the SLA regarding its application for an on-premises liquor license.

On November 23, 2018, Petitioner filed a Verified Petition as an Article 78 proceeding.

On December 6, 2018, the SLA provided Petitioner with its written decision denying Petitioner's request for reconsideration. The written decision explained that 593 Park Avenue still constitutes a place used exclusively for worship under the 200-foot rule, despite the presence of the Geneva School.

On February 12, 2019, Central Presbyterian cross moved to intervene and opposed the Article 78 Petition.

On February 20, 2019, Fox cross moved seeking leave to file an Amicus Curiae brief in support of the Article 78 Petition. Fox is a member of the clergy, holding a certificate in Kosher supervision.

I. Central Presbyterian's Motion to Intervene

Central Presbyterian, the owner of 593 Park Avenue, contends that the Court should grant its Motion to Intervene because it is an "interested person" and it will be "directly affected by the outcome." Central Presbyterian's Mem. at 7. Central Presbyterian asserts that it is an "interested person" because it is a church and it is protected by the 200-foot rule. *Id.* In its supporting memorandum, Central Presbyterian asserts that Petitioner and the SLA both consent to Central Presbyterian's Motion to Intervene. *Id.* at 16. No opposition was filed. Therefore, Central Presbyterian's Motion to Intervene is granted.

II. Jeff Fox's Motion to File an Amicus Curiae Brief

Fox seeks the Court to grant leave to file an Amicus Curiae brief in support of Petitioner's Article 78 proceeding. After oral argument on June 25, 2019 and for the reasons stated on the record, Fox's motion to file an Amicus Curiae brief is denied. Fox's Amicus Curiae brief raises the issue of whether the 200-foot rule is unconstitutional, which is "outside of the four corners of the litigation" before the Court. Court Hearing Tr. June 25, 2019 at 6:14.

III. Petitioner's Article 78 Verified Petition

a. Parties' Contention

Petitioner contends that the SLA's determination was arbitrary and capricious because the SLA wrongfully applied the 200-foot rule. First, Petitioner argues that the SLA erred in considering 593 Park Avenue as a place used exclusively for worship. Petitioner argues that the SLA's decision is inconsistent with its precedent - that the presence of a preschool not affiliated with the church in a church-owned building renders the building one not used exclusively as a place of worship. Pet. Mem. at 2. Petitioner cites SLA's ruling on Amali Restaurant,[1] where the SLA granted an on-premises liquor license to Amali restaurant despite the restaurant located within 200 feet of a French episcopal church. Petitioner's Reply Mem. at 10. Petitioner cites a letter from the SLA Chief Executive Officer to Petitioner's landlord, where the CEO explained that the 200-foot rule does not apply to Amali Restaurant because "[as the French episcopal church] shares the building with the Children's All Day School, the building is not occupied exclusively as a place of worship." Petitioner's Verified Petition. Ex. O. Petitioner argues that, because the Geneva School is not affiliated with Central Presbyterian and operates a preschool on the rented floor in 593 Park Avenue, 593 Park Avenue is not used exclusively as a place of worship.

Second, Petitioner argues that the Geneva School's preschool did not qualify as a "school" for the purpose of the 200-foot rule. Pursuant to the SLA's Divisional order 176:

> [O]nly those buildings occupied exclusively as public grammar and high schools and semi-public and private schools as are conducted for the same purpose are . . . "school" within the meaning of [the 200-foot rule] . . . . College, normal schools, business schools, nurse's training schools and similar schools are not considered "school" . . . *See* https://sla.ny.gov/system/files/documents/2018/10/divisional-school-176.pdf (last accessed June 6, 2019).

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[1] Regarding SLA's decision on Amali restaurant, no judicial action has been brought by Amali restaurant regarding its liquor license application. Petitioner and the SLA did not submit SLA's written decision nor hearing transcript of the Amali proceeding. According to Mark Frering's Affirmation submitted by SLA, "[Amali restaurant's] proximity to the French episcopal church and the day care facility known as Children's All Day School (CADS) . . . was not raised as an issue at the time of application." Frering's Affirmation ¶ 3, ¶ 6. The only issue raised in the application with respect to the 200-foot rule was whether the restaurant was within 200 foot of Church of Christ United Methodists ("Methodist Church"). *Id.* ¶ 4. "Evidence was submitted indicating that the Methodist Church was approximately 200' away, and that therefore Amali was eligible for a full liquor license." *Id.* ¶ 5.

In opposition, the SLA contends that the 200-foot rule applies, and the denial of Petitioner's Class Change Application was reasonable and rational. The SLA's Ans. at 96.

Regarding Petitioner's argument that 593 Park Avenue is not used exclusively as a place of worship, the SLA contends that the CEO's letter does not represent the rulings of the SLA. The SLA contends that, in determining whether 593 Park Avenue is used exclusively as a place of worship, the appropriate test is whether the Geneva School's activities on the rented floor is incidental to, and is not inconsistent with, the predominant character of 593 Park Avenue as a place of worship. The SLA's Mem. at 7. The SLA reasoned that the Geneva School is a religious school; Geneva School's use of space at 593 Park Avenue was limited to two classrooms, three storage rooms, and an office on the seventh floor; and the preschool program not only provides child care classes but also "bible knowledge" class. The SLA's Mem. at 7. The SLA and Central Presbyterian conclude that the preschool was an incidental use of Central Presbyterian's building and consistent with Central Presbyterian's Christian mission.

The SLA contends that Petitioner's argument involving the Amali restaurant - that the SLA had two inconsistent determinations on similar set of facts - is "unsupported." The SLA's Ans. at 33. The SLA "[a]ffirmatively aver that the proximity of [the French episcopal church] to Amali was never raised by anyone during Amali's licensing proceeding in 2007 and thus never considered by SLA." The SLA's Ans. at 33. The SLA also argues that "there isn't actually a single determination by [SLA] that ever said that . . . a religious preschool's activities on a place of worship's grounds constitute more than an incidental use that essentially negate that building's character." Court Hearing Tr. June 25, 2019 at 17:16-21. The SLA argues that Petitioner did not cite any case law except the CEO's letter to explain the Amali proceeding, and the letter is "not a determination." *Id.* at 18:7-9. The SLA concludes that "there is simply no past determination that is inconsistent with the SLA's determination in Rose Group." *Id.* at 18:2-3.

Moreover, the SLA contends that Petitioner's assertion that the preschool is not a "school" for the purpose of the 200-foot rule is both wrong and legally irrelevant. The SLA argues that Petitioner's argument is wrong because a preschool could be a "school" and Petitioner had incorrectly interpreted the Divisional Order 176. The SLA cited the court in *111 E. 22nd Management Corporation v. N.Y. State Liquor Authority*, which stated that a preschool may be a school under the 200-foot rule, and the Divisional Order 176, in essence, excludes merely educational institution

above high school level and trade schools from the definition of "school."152 Misc. 2d 842, 845 (Sup Ct, NY County 1991). Furthermore, the SLA argues that the argument is legally irrelevant because the preschool is an incidental use of the church building and does not detract from the predominant nature of Central Presbyterian's religious mission. The SLA contends that the building is used exclusively as a place of worship and, therefore, the 200-foot rule applies.

Similarly, Central Presbyterian contends that the SLA correctly invoked the 200-foot rule and denied Petitioner's Class Change Application on reasonable and rational grounds. Central Presbyterian Mem. at 16. Central Presbyterian argues that the preschool constitutes an incidental use consistent with the predominant character of 593 Park Avenue as a church building. Central Presbyterian argues that the Geneva School and Central Presbyterian share a consistent Christian mission; specifically, the Geneva School ascribes its existence to "Jesus Christ and for the glory of God" on its website, requires students' families to sign "a Statement of Faith," and teaches courses such as "biblical" or "Christian-based worldview." Central Presbyterian Mem. at 18.

b. Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 (Sup Ct, NY County 1977). Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 (2000). One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" *See* CPLR 7803 (3). "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 (1987). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 (1st Dept 2010).

Under the 200-foot rule, the SLA is required to deny any application for an on-premises liquor license "on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship." ABCL § 64(7)(a). According to SLA Divisional Order 319, "the discretion of the Authority shall be exercised in such a manner as to give the fullest

protection . . . to educational institution [and] churches . . . . every reasonable doubt be resolved in favor of the religious or educational institution involved." SLA, Divisional Order 319, at 1 (1952).

A building is "occupied exclusively" as a church within the meaning of the 200-foot rule where "its primary or paramount use is as a church, even though there is an incidental use not inconsistent . . . from the predominant character of the building as a church." *Fayez Restaurant, Inc. v. State Liquor Authority*, 66 N.Y.2d 978, 978 (1985). Incidental uses include, but not limited to, fund-raising activities for the church or the non-profit organizations; use of the building by "other religious organizations or groups for religious services or other purposes"; "social activities by or for the benefit of the congregants"; and "use of the building by non-congregant members of the community for private social functions." ABCL § 64(7)(d-1). The list of examples of incidental use is a non-exhausted one. *See id.*

A preschool is not excluded from the definition of "school" for the purpose of the 200-foot rule. *See 111 E. 22nd Management Corporation,* 152 Misc. 2d at 845. The intention of the legislature was to "remove the masses or our school-going children and youth as far as possible from the influence of the liquor traffic . . ." *In re Townsend*, 195 N.Y.214, 222 (1909). The July 1945 Divisional Order of SLA, "in essence, merely excludes educational institutions above high school level and trade schools from the definition." *111 E. 22nd Management Corporation,* 152 Misc. 2d at 844. "There is nothing in the [Divisional Order] that would indicate that students attending preschools, which were not common in 1945, were not entitled to the protection intended to be afforded by the 200-foot barrier." *Id.* Therefore, "[the] legislative protection includes student attending institution providing education at an age earlier than that normally provided by our public school." *Id.* at 845.

c. Discussion

Petitioner has failed to demonstrate that the SLA's denial of Petitioner's Class Change Application was without a reasonable and rational basis. SLA's determination was rationally based on ABCL § 64(7)(a) - that the SLA may not issue on-premises liquor license to any establishment located on the same street as and within 200 feet of another building used exclusively as a place of worship or as a school. In determining whether 593 Park Avenue is used exclusively as a place of worship, the SLA considered whether the Geneva School's preschool detracted from the Christian vision of Central Presbyterian. The SLA determined that 593 Park Avenue's "primary or paramount use" is still as a church, and the preschool is an incidental use not inconsistent with the predominant character of 593 Park Avenue.

See Fayez Restaurant, Inc., 66 N.Y.2d at 978. Petitioner failed to establish that the SLA's decision is inconsistent with SLA's prior decisions. Therefore, the SLA's determination is not arbitrary and capricious and should not be disturbed by the Court. Petitioner's Verified Petition is denied.

Wherefore, it is hereby,

ORDERED that the Petition is denied; and its further

ORDERED that the Petition is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JULY 31, 2019

Eileen A. Rakower, J.S.C.