

Nu Way Contr., Inc. v City of New York

2019 NY Slip Op 32678(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 155144/2019

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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NU WAY CONTRACTING, INC.,

Petitioner,

Index No.: 155144/2019

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

-against-

THE CITY OF NEW YORK, DANIEL D. BROWNELL,
Individually and as Chairman of the New York City
Business Integrity Commission, and THE CITY OF
NEW YORK BUSINESS INTEGRITY COMMISSION,

Respondents.

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MELISSA A. CRANE, J.:

In this Article 78 proceeding, petitioner Nu Way Contracting, Inc. (Nu Way) seeks a judgment annulling the March 20, 2019 determination of respondents' the City of New York, Daniel Brownell, individually and as Chairman of the New York City Business Integrity Commission (BIC) and the BIC (collectively, respondents), that denied Nu Way's renewal application for an exemption from licensing requirements and registration to operate as a trade waste business. Nu Way also requests an order granting a preliminary injunction, together with a temporary restraining order, enjoining respondents from taking any action to terminate or interfere with Nu Way's business.¹ Respondents answer and oppose all requested relief. As set forth below, the petition and any injunctive relief are denied, as the BIC's determination has a rational basis.

¹ On May 22, 2019, this court ordered that respondents were temporarily enjoined from interfering with Nu Way's business, pending a hearing on Nu Way's request for a preliminary injunction.

BACKGROUND AND FACTUAL ALLEGATIONS

Nu Way is a “construction services company that provides trucking services for heavy contractors.” (Petition at 3). Bonita Petrillo (Petrillo) formed Nu Way in 2013, she who continues to own and operate the business. Local Law 42, codified from in the Administrative Code of the City of New York title 16-A, was enacted in 1996 “to fully regulate the waste carting business to deter infiltration of the business by organized crime.” *EdCia Corp. v McCormack*, 44 AD3d 991, 991 (2d Dept 2007). Pursuant to Administrative Code § 16-503, the BIC “shall be responsible for the licensing, registration and regulation of businesses that remove, collect or dispose of trade waste” In relevant part, companies that collect trade waste from the premises of a commercial establishment must first register the company with the BIC and obtain a license prior to conducting business. However, “a business solely engaged in the removal of waste materials resulting from building demolition, construction” is still required to register, but can apply for an exemption to the licensing requirement. (Administrative Code § 16-505 (a)).

In 2014, Nu Way submitted an application registration, along with a licensing exemption to the BIC. Petrillo states, “[b]ecause our operation does not transport garbage, the Company is not required to obtain a real license. As the Company business is the transportation [sic] dirt, rock and other construction materials for construction firms, the law does require that we register the Company with the BIC.” (Petrillo aff in support of petition, ¶ 7). The BIC granted Nu Way’s application, effective March 1, 2015, for a period of two years. Two dump trucks were included in the initial approval. In 2016, Nu Way added four additional trucks to the roster.

In March 2017, Nu Way applied to the BIC for its renewal registration and exemption from the trade waste licensing requirements. The BIC staff interviewed Petrillo, who was

represented by counsel. After Petrillo submitted sworn testimony, her counsel emailed the BIC. The email advised that, after Petrillo's interview, she went back to her office and reviewed various documents and bank accounts. Based on this review, Petrillo wanted the opportunity to correct some of the testimony she provided during the interview. The BIC granted Petrillo's request and she submitted an affidavit in April 2018 to supplement her interview.

Pursuant to a letter dated December 12, 2018, Nu Way learned that the BIC's staff was recommending denial of Nu Way's application. The letter stated the following, in pertinent part:

"Based on the record as to the applicant, the Commission's staff recommends that the Commission deny the application because the Applicant lacks good character, honesty and integrity based on the following three independently-sufficient grounds:

"1. The Applicant's sole-disclosed principal knowingly provided false and misleading information during her sworn testimony before the Commission;

"2. The Applicant knowingly provided false and misleading information on its applications; and

"3. The Applicant's principal admitted to repeated violations of the Administrative Code and the Commission's rules."

NYSCEF Doc. No. 22 at 1.

Under the first ground, the BIC noted various conflicting points in Petrillo's testimony. For example, when Petrillo was interviewed in connection with the initial 2014 application, she testified that, although a relative named Adam Dupree (Dupree) was not listed as a principal or an employee of Nu Way on the application, he was a manager. She also testified during the initial interview with the BIC that Dupree purchased a truck for Nu Way, helped process invoices and assisted her in filling out the initial BIC application. Dupree was listed on the 2014 registration application as the person who assisted in preparing the application.

However, when Petrillo was interviewed in 2018, she testified that Nu Way is a small company and that she is the only one who dispatches trucks, handles payroll and handles the business records. When asked about Dupree, Petrillo testified that she has no business relationship with him. She “denied that Dupree ever helped [Nu Way] purchase a truck, answer [Nu Way’s] phone Petrillo initially denied that Dupree even helped her complete the Registration Application . . . until the Commissioner’s staff confronted her with a prior statement that she made to that effect.” *Id.* at 5-6.

According to the BIC’s staff, Petrillo’s testimony also indicated that she is “patently unfamiliar with the operations of [Nu Way] and that undisclosed individuals or companies are or have been in control of [Nu Way].” *Id.* at 6. For instance, despite having at least six trucks added to the roster, Petrillo testified that Nu Way has only operated three trucks. Further, Petrillo testified that Nu Way has been registered with the Westchester Solid Waste Commission since 2013, although the records indicate that Nu Way registered in 2017.

As another example, in 2014, Petrillo testified that Nu Way does not conduct any business with a company named MFM Contracting Corp. (MFM). However, Nu Way’s business records indicated that, in 2014, Nu Way received \$138,000 in payments from MFM. When asked about the cashed checks, Petrillo provided conflicting explanations for the checks. Petrillo also testified that Nu Way never made payments to a construction company named Double A, where her former daughter in law Alice Scarimbolo works, despite bank records indicating that Nu way paid Double A \$300,000. Petrillo testified that she did not know why Nu Way would be paying Double A. The BIC’s staff indicated that this demonstrates, “at a minimum, that Petrillo lacks control over a company for which she claims to be the sole principal.” *Id.* at 6.

Similarly, under the second ground for providing false information on the application, the letter noted that, on her initial and renewal applications, Petrillo had indicated she was the only past or present principal of Nu Way. Dupree was not listed as a principal or even an employee. The letter explained that principal is defined, in relevant part, as “all persons participating directly or indirectly in the control of such business entity.” *Id.* at 11. However, in the affidavit submitted after her 2018 sworn interview, Petrillo wrote that, between 2012 and 2015, due to a medical condition, she was “unable to devote [her] full time and attention to Nu Way.” Petrillo aff dated April 12, 2018, ¶ 7. “Therefore, in 2013, I met with my daughter in law to explain my medical condition and asked if the staff at Double A Contracting could assist me when necessary.” *Id.*, ¶ 10. She continued that the staff at Double A took over the “bookkeeping, payroll, insurance, Worker’s Compensation, and billing and invoicing duties” *Id.* Petrillo provided additional explanations for various checks. Among other supplemental information, Petrillo advised that she “truly forgot [her] medical situation in 2012 through 2015 had an effect on my ability to operate Nu Way by myself” *Id.*, ¶ 17.

Under the third ground, the BIC found that Nu Way violated the Administrative Code and the BIC’s rules. The letter stated that “Commission-issued regulations may not be transferred to or used by any person other than the registrant to whom it was issued.” (NYSCEF Doc. No. 22 at 10). However, Petrillo testified that Nu Way rented out its trucks to other contractors and had no control over who was driving the trucks or where they went. The letter noted, “By permitting other companies to use the Applicant’s trucks in this manner, the

Applicant illegally transferred the Applicant's registration, allowing the registration to be used by someone other than the registrant to whom it was issued" *Id.*²

Also, in violation of the BIC's rules, Nu Way failed to disclose all employees to the BIC in a timely fashion. Pursuant to 17 RCNY § 2-05 (b), registrants are required to disclose vehicle operators and employees within 10 business days of their hire date. However, Petrillo testified that there are two drivers, an office assistant and a mechanic who were not included in the renewal application.

At the conclusion of the letter, Nu Way was advised that it had 10 days from the date of the letter to submit a response to the BIC. Nu Way's counsel requested for an extension of time to submit a response and also asked the BIC to consider amending the recommendation to a conditional approval. The BIC allowed for an extension, but did not agree to a conditional approval.

By letter dated January 22, 2018, Nu Way's counsel submitted a letter to the BIC opposing the denial of the renewal application. Counsel wrote that the denial was improperly based on the "inaccurate statements of a 72 year old woman suffering from symptoms of a tumor causing bleeding in the brain, insisting that she was still able to run and operate her company." (NYSCEF Doc. No. 24 at 1). Counsel continued that, after the deposition, Petrillo "explained her errors in her deposition and provided the staff person with evidence of her medical condition." (*Id.*) Counsel concluded with the following, in relevant part:

"The Staff is recommending the closure of a business with no allegation of impropriety or illegality after years of exemplary operation simply because an older woman operator with a brain injury was inaccurate in certain answer [sic] due to her pride. The history of who has been awarded conditional approvals by the Commission renders this

² Pursuant to Administrative Code § 16-505 (e), formerly Administrative Code § 16-505 (c), "[a] license or registration issued pursuant to this chapter or any rule promulgated hereunder shall not be transferred or assigned to any person or used by any person other than the licensee or registrant to whom it was issued."

recommendation of a denial rather than a conditional approval so unjust as to be arbitrary and capricious.”

Id. at 2.

On March 20, 2019, the BIC accepted the staff’s conclusions and upheld the denial of Nu Way’s renewal application. Nu Way was advised that the denial was effective immediately and that it may not operate as a waste business in the City of New York. The denial concluded with the following, in relevant part:

“The Commission is vested with broad discretion to refuse to issue a license or registration to any applicant it determines lacks good character, honesty and integrity. The record herein demonstrates that the Applicant and its principals – both disclosed and undisclosed – lack good character, honesty and integrity. Accordingly, based on each of the three independently sufficient grounds detailed above, the Commission denies the Renewal Application.”

NYSCEF Doc. No. 25 at 12.

On May 21, 2019, Nu Way commenced this proceeding, seeking an order renewing its license exemption and enjoining respondents from shutting down the business in the interim.

Petrillo explains that, in 2015, she experienced a “medical crisis” that resulted in her experiencing significant anxiety during stressful periods. (Petrillo aff in support, ¶ 9).

According to Petrillo, as a result of her anxiety, of which she is “somewhat ashamed,” she has “come to rely more than usual upon staff and friends to work with [her] on various elements of [her] business.” *Id.*, ¶ 11. During the interview for the renewal application, Petrillo alleges that she experienced a “significant anxiety attack.” *Id.*, ¶ 13. She continues that, as she is “always defensive about running both of my businesses at 72 years old, I did not inform [the BIC attorney] of my medical condition during the interview.” *Id.*

Petrillo claims that, after she recovered from the anxiety attack, she called the attorney who questioned her during the interview. “I told her that I had had an anxiety attack during the

interview and asked to be able to return and go through the questions after I had had a chance to recover. I also sent her all of my medical records The BIC attorney refused my request.” (*Id.*, ¶ 14). According to Petrillo, her application was denied not due to any illegality or impropriety, but because the “BIC attorney did not like how [Petrillo] responded to here [sic] questions during [her] panic attack.” (*Id.*, ¶ 15). Further, although Petrillo offered to hire someone to monitor her business to “reassure the BIC that all is proper,” the BIC “refused” this solution. (*Id.*, ¶ 17). Petrillo concludes with the following, in relevant part:

“I do not understand how the BIC can take away my business that is operated perfectly and serves my customers well, simply because a young attorney does not want to accept that a 72 year old woman owner under significant medication requires more time to handle her questions because of a major anxiety attack. My attorney informs me that her refusal is arbitrary and capricious and that this Court will provide me with a fair opportunity. I hope so.”

Id., ¶ 18.

The petition sets forth that the BIC has illegally refused to accommodate Nu Way’s disability and that it should have provided Petrillo with the opportunity to come back after her anxiety attack had passed.³ Further, according to Nu Way, “it is irrational and bad practice to refuse to allow a registrant to return to provide the facts necessary to permit [sic] rational decision on the impact of the panic disorder on the statement. To simply refuse to accept the evidence on the question renders the decision facially arbitrary and capricious.” *Id.* at 9. Nu Way also argues that the BIC is no longer entitled to deference when making its determinations, stating, “[w]ith the spectre [sic] of organized crime all but eliminated, there is no longer [sic] reason for courts to grant the BIC special deference.” *Id.* at 11.

³ Nu Way argues that Petrillo was denied the reasonable accommodation of being allowed to return and “correct any errors induced by the attack.” Petition at 8.

In support of the request for injunctive relief, Nu Way maintains that all of the criteria have been met entitling it to injunctive relief. First, for the reasons set forth above, Nu Way believes that there is a likelihood of success on the merits in the underlying Article 78 proceeding. Second, Nu Way argues that, as its business will immediately be shut down, it will suffer from irreparable harm if the preliminary relief is not granted. Lastly, Nu Way argues that the balance of equities tips in its favor, because its “business is destroyed if preliminary relief is not granted, while neither Respondents nor any other person or entity is affected in any way if the relief is granted.” *Id.* at 12.

Pursuant to the denial letters, as set forth in detail above, respondents maintain that it was reasonable for the BIC to deny Nu Way’s renewal application based on any of the three grounds. Among other things, respondents note that Nu Way fails to address the underlying reasons for the denial of the renewal application. “[Nu Way] has not indicated how Petrillo’s panic/anxiety disorder, let alone an acute panic attack during the 2018 interview precluded [Nu Way] from accurately answering questions on both the 2014 Registration Application and the 2018 Renewal Application or refraining from repeated violations of the local law and the BIC rules.” Respondents’ Memorandum of Law at 18.⁴

DISCUSSION

In accordance with CPLR 7803 (3), the relevant standard herein is whether the March 20, 2019 determination was arbitrary and capricious.⁵ “In reviewing an administrative agency

⁴ On reply, counsel claims that respondents failed to provide a fact affidavit from a witness with personal knowledge on the matter. However, it is unclear what counsel is referring to, as the petition does not raise a substantial evidence question, nor will the court review any facts that were outside of the record reviewed by the BIC prior to rendering its determination.

⁵ Nu Way appears to seek seeks an order in the nature of mandamus, directing respondents to grant its renewal application for an exemption from license requirements. However, a mandamus to compel “applies only to acts that are ministerial in nature and not those that involve the exercise of discretion,” such as the discretionary act of operating a trade waste business in New York City. *Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127

determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 (2013) (internal quotation marks and citations omitted); *see also* CPLR 7803 (3) (“The only questions that may be raised in a proceeding under this article are . . . 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 . . .”). Once a court finds a rational basis for the agency’s determination, its review ends. (*Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005)).

I. No Failure to Provide Accommodation

At the outset, Nu Way’s request for relief centers around its assertion that Petrillo, its sole principal, was denied a reasonable request for accommodation as a result of a mental illness and that this mental illness caused her to answer questions incorrectly. However, the record belied Nu Way’s claims that it was discriminated against, on the basis of a disability. To begin, at the start of the interview, where she was represented by counsel, Petrillo denied that she was suffering from any medical condition or that she was taking any medication. She also advised the BIC staff that she was able to answer questions truthfully. Then, after the interview, Nu Way’s counsel requested that Petrillo be allowed to correct some of the statements she made during testimony as a result of a subsequent review of the bank statements. Counsel did not mention any disabilities preventing Petrillo from answering questions truthfully during her sworn interview or request an accommodation for a disability.

AD3d 147, 152 (1st Dept 2015) (internal quotation marks and citation omitted); *see also Matter of Breeze Carting Corp. v City of New York*, 52 AD3d 424, 424 (1st Dept 2008) (“Contrary to petitioner’s contention, the granting of a registration [to operate as a construction and demolition debris hauler] is not a ministerial act”).

After the 2018 interview, the BIC allowed Petrillo to submit a supplemental affidavit. In brief, while Petrillo claimed to have suffered from a medical condition between 2012 through 2015, she advised the BIC that she was presently in good health and was able to conduct her own business. At no point in the affidavit did Petrillo mention anxiety, mention having an episode during the interview, or claim that her anxiety caused her to answer questions incorrectly. Moreover, after receiving the initial denial of the renewal application, Nu Way's counsel made no mention of anxiety, but advised the BIC that Petrillo's inaccurate statements resulted from symptoms of a tumor causing bleeding to the brain.

Briefly, as established above, the record indicates that Nu Way never requested any accommodation based on Petrillo's alleged mental illness. Thus, even under the broadest of terms, Nu Way cannot establish any history of disability. (*See e.g. Matter of Flores v Doherty*, 71 AD3d 405, 406 (1st Dept 2010) (no evidence that employer knew of employee's disability prior to termination.))

Moreover, Petrillo and counsel's statements regarding her mental illness and its implications on the interview were only submitted in support of the petition. It does not appear that they were a part of the original record submitted to the BIC. Accordingly, the court cannot consider them at this time. It is well settled that "judicial review of administrative determinations is confined to the facts and record adduced before the agency." *Matter of Santiago v New York City Hous. Auth.*, 122 AD3d 433, 433 (1st Dept 2014) (internal quotation marks and citation omitted).

II. Registration and Renewal Application for an Exemption

Considering the merits of the petition, as noted above, businesses in New York City that collect trade waste from the premises of commercial establishments are required to obtain a

license from, and register with, the BIC, prior to operating their businesses. Administrative Code § 16-509 lists numerous factors the BIC may consider when denying an application. Some of these include failing to provide truthful information in connection with the application and knowingly failing to provide the required information. (See Administrative Code § 16-509 (a) (i) and (b)).

Further, the BIC may refuse to issue a registration to an applicant who has “committed any of the acts which would be a basis for the suspension or revocation of a license pursuant to this chapter or any rules promulgated hereto.” Administrative Code § 16-509 (c) (ii). Pursuant to Administrative Code § 16-513 (a) (i), the BIC may revoke or suspend a license or registration “when the registrant or licensee and/or its principals, employees and/or agents: (i) have been found to be in violation of this chapter or any rules promulgated pursuant thereto.”

After taking Petrillo’s deposition and reviewing the submitted documentary proof, including Petrillo’s supplemental affidavits, the BIC denied the renewal application. It concluded that, based on three “independently-sufficient grounds,” Nu Way lacked “good character, honesty and integrity.”

The court finds that it was rational, based on any of the three grounds, for the BIC to deny Nu Way’s renewal application. Specifically, the BIC found that Nu Way’s sole-disclosed principal knowingly provided false and misleading information both during her interview with the BIC and on her application and affidavit. For instance, in 2014, Petrillo testified that Dupree assisted her with several aspects of the business. Dupree was also listed on the initial application as someone who assisted with preparation. However, in 2018, Petrillo testified that she had no business relationship with Dupree. Similarly, on the renewal application, when asked to disclose past or present principals of the company, petotrone no other person. However, when Petrillo

submitted her supplemental affidavit, she wrote that between 2012 and 2015, due to her medical condition, Dupree was assisting her with several aspects of running the business. Moreover, Petrillo provided conflicting explanations for thousands of dollars in payments made to Nu Way. Courts have specifically held that the “BIC’s finding that [an applicant] had provided false, misleading, and conflicting information in its BIC filings and testimony provided an independent rational basis to deny the application.” (*Matter of Elite Demolition Contr. Corp. v City of New York*, 125 AD3d 576, 576 (1st Dept 2015)).

“BIC has broad discretion to grant or refuse licensure or registration based upon its evaluation of an applicant’s good character, honesty and integrity.” *Matter of C.I. Contr. Corp. v New York Bus. Integrity Commn.*, 128 AD3d 450, 450 (1st Dept 2015) (internal quotation marks and citations omitted). Here, the BIC found that, not only did Petrillo’s testimony directly contradict what was on her applications, it also indicated her lack of basic information on Nu Way’s operations. This interpretation has a rational basis in the law and the court will not substitute its own judgment. It is well settled that “a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion or is contrary to law.” (*Matter of Dempsey v New York City Dept. of Educ.*, 108 AD3d 454, 454 (1st Dept 2013), *affd* 25 NY3d 291 (2015)).

Under the third ground, Nu Way’s sole principal admitted to repeated violations of the Administrative Code and the BIC’s rules. For example, Petrillo rented out BIC-registered trucks to other companies over which she had no control and also failed to disclose several employees on her applications. Even, assuming arguendo, that Petrillo suffered from an anxiety condition during the interview, Nu Way does not provide any connection between Petrillo’s alleged anxiety condition during the interview and the repeated violations of both the Administrative

Code and the BIC's rules. Accordingly, the third ground alone would be sufficient to deny the renewal application. (See e.g. *Matter of C.I. Contr. Corp. v New York Bus. Integrity Commn.*, (128 AD3d at 450-451) ("BIC's denial of petitioner's application had a rational basis Petitioner's principal was a controlling shareholder of that entity and, as such, had a responsibility to ensure that the company performed its work safely and within the bounds of law")).

Nu Way argues, without basis, that the BIC's determinations should not be given deference. However, as the agency charged with overseeing the trade waste industry, the BIC has the expertise in reviewing applications. Contrary to Nu Way's contentions, courts have found that the BIC is specifically empowered to "regulate and oversee the hauling industry." (*EdCia Corp. v McCormack*, 44 AD3d at 994; see also *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. Of Rent Admin.*, 10 NY3d 474, 481 (2008) (internal quotation marks and citations omitted) ("An agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable"))).

Accordingly, as the BIC's March 20, 2019 determination denying Nu Way's registration and renewal application for a license exemption has a rational basis, the court will not disturb it. (See e.g. *Matter of Benidor Rest. v New York State Liq. Auth.*, 127 AD2d 534, 537 (1st Dept 1987) ("An agency determination must be upheld even if the reviewing court would have reached a contrary decision, as long as the determination was rational. . . . Thus, the judicial inquiry is at an end"))).

III. Preliminary Injunction

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities

in its favor.” *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing CPLR 6301. “Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.” *Koultukis v Phillips*, 285 AD2d 433, 435 (1st Dept 2001).

As a result of this decision, Nu Way’s request annulling the BIC’s determination is denied. Therefore, as Nu Way has failed to establish a likelihood of success on the merits, its request for injunctive relief is denied as moot.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that Nu Way Contracting, Inc.’s motion for a preliminary injunction is denied; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed together with costs and disbursements as taxed by the Clerk of the court.

Dated: 9-9-2019

ENTER:



J.S.C.

HON. MELISSA A. CRANE
J.S.C.