Apple Towing Co., Inc. v New York City Dept. of Consumer & Worker Protection
2021 NY Slip Op 31191(U)
April 8, 2021
Supreme Court, Kings County
Docket Number: 518787/2020
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 8th day of April, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

APPLE TOWING CO., INC.,
Petitioner,

For a Judgment in the Nature of Mandamus to Review Pursuant to Article 78 of the Civil Practice Law and Rules And for a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules,

- against -

The New York City Department of Consumer and Worker Protection,
Respondent.

Index No.: 518787/2020

Motion Seq. # 1 & 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Order to Show Cause, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Order to Show Cause	2
Memorandum of Law in Support of Order to Show Cause	3
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	4
Affirmation in Opposition to Cross-Motion	5
Petitioner's Reply Affirmation, Affidavit and Exhibits	6

Upon the foregoing papers, Apple Towing Co., Inc. ("Petitioner") moves this Court by Order to Show Cause for an Order (a) annulling and vacating the New York City Department of Consumer and Worker Protection's ("Respondent") determination dated April 7, 2020, finding that Petitioner violated NYAC §§ 20-518(b)(4); 20-509.1; 20-519(c)(1) and 20-519(c)(3); (b) annulling and vacating Respondent's determination denying Petitioner license renewal pursuant to NYC Code §§ 20-504(a) and 20-504.1(b); (c) granting Petitioner general and compensatory damages according to proof at trial; (d) awarding Petitioner reasonable

attorneys' fees, costs and expenses according to statute; (e) allowing Petitioner to operate under a tow truck operational license; (f) permitting Petitioner to continue its status quo operations and use of its license during the pendency of this action; and (g) granting such other and further relief as this Court deems just, proper and equitable. Respondent cross-moves this Court for an Order, (a) pursuant to CPLR § 3211(a)(7) dismissing Petitioner's first, third, fourth, fifth and sixth causes of action, as Petitioner fails to state a cause of action upon which relief may be granted; and (b) for such other and further relief as this Court deems just and proper.

Background

This case is brought under a hybrid Petitioner, which requests relief under Article 78 of the CPLR and several other remedial doctrines. Petitioner is a tow truck company that requires a license from the City of New York to engaging in towing. Previously, Petitioner held tow truck company license number 0832895-DCA. The rate a tow truck company charges a motorist in the City of New York is heavily regulated by Respondent and depends on which City program the vehicle is being towed under, among other factors.

On April 27, 2018, Respondent subpoenaed Petitioner's towing records from January 1, 2016 through the subpoena date. Petitioner responded to the subpoena and refused to produce documents it was required to maintain. Specifically, Petitioner claimed that it could not provide certain documents because the documents were seized by the District Attorney in a criminal investigation. However, under New York City Code § 20-516, a towing company is required to keep electronic copies of its records. Subsequently Petitioner turned over certain subpoenaed documents. It is undisputed that Petitioner overcharged its customer on over 400 occasions by including charges that are prohibited by regulations. On November 21, 2018,

Respondent sent Petitioner a Notice of Intent to Deny, explaining that it intended to deny Petitioner's license renewal application for the overcharges. On July 31, 2019, Petitioner provided a written response.

Respondent denied Petitioner's license renewal application by Final Notice of Denial dated April 7, 2020. Respondent cited the Petitioner's overcharges, withholding of documents and failure to maintain records as reasons for the denial.

Discussion

Article 78 Relief

It is well settled that an entity subject to an administrative decision may challenge such determination pursuant to Article 78 of the CPLR. Moreover, under Article 78 this Court has the power to grant Petitioner the relief to which it is entitled. **CPLR § 7806**. However, this Court cannot vacate an administrative decision if the decision was rational and not arbitrary and capricious. ***Pell v. Board of Education of Union Free School, 34 N.Y. 2d 222 (1974).*** If the reviewing court finds that the agency determination has a rational basis, the determination must be sustained. ***Matter of Navaretta v. Town of Oyster Bay, 72 A.D.3d 823 (2d Dep't 2010).*** Additionally, an agency's interpretation of the statutes and regulations that it administers is entitled to deference and must be upheld if reasonable. ***508 Realty Assocs., LLC v. New York State Div. of Hous. & Cmty. Renewal, 61 A.D.3d 753, 755 (2d Dep't 2009).***

Under New York City Code § 20-504, "[a]fter due notice and opportunity to be heard, the commissioner may refuse to renew any license required under this subchapter and may suspend or revoke any such license" if

> "the person holding a tow truck operator's license, or the person holding a license to engage in towing or where applicable its officers, principals, directors, employees, or stockholders owning more than ten percent of the outstanding stock of the corporation have been found by the commissioner to have violated any provisions of this subchapter or any rule promulgated thereunder."

On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true. ***Leon v. Martinez, 84 N.Y.S.2d 83, 87 (1994).*** "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." ***Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977).*** "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." ***Id.***

Petitioner advances several meritless explanations for why it believes Respondent's administrative decision was arbitrary and capricious. First, Petitioner contends that Respondent's subpoena was overly broad and used to magnify what Petitioner considers *de minimis* violations. Petitioner does not explain how the agency that regulates vehicular towing subpoenaing a regulated towing company is overbroad. Furthermore, although Petitioner responded to the subpoena by stating it objected to the subpoena as overbroad, Petitioner also stated it intended to comply with the subpoena and did not challenge the subpoena at the administrative level. Finally, even if the violations in question are *de minimis*, Respondent is,

nevertheless, empowered to deny renewal of a towing license for any violations, under New York City Code § 20-504.

Second, Petitioner argues that the Notice of Intent to Deny was insufficient and not reasonably specific. However, the Notice of Intent to Deny lists New York City Code provisions it alleged Petitioner to have violated, delineates the City programs its alleged Petitioner to have overcharged for and gives several examples of the conduct alleged to constitute violations. Accordingly, the Court finds that the Notice of Intent to Deny Petitioner's license renewal was reasonably specific.

Third, Petitioner contends that Respondent's administrative process denied Petitioner due process by not providing a "due process hearing" and only allowing Petitioner to be heard via documentary submissions. Petitioner does not cite any authority to support its contention that due process under the United States Constitution and/or the New York Constitution requires a hearing for an agency to deny licensing renewal. Moreover, the Appellate Division, Second Department has held that the due process interest in renewal of a licenses does not necessitate a hearing. ***Matter of Marsala v. City of Long Beach, 111 A.D.3d 834 (2d Dep't 2013) appeal denied 22 N.Y.3d 1124 (2014).***

Fourth, Petitioner maintains that Respondent ignored its precedent in denying Petitioner's license renewal. Specifically, Petitioner claims that Respondent allowed one of its competitors, Runway Towing Corp., to operate its towing business even though it engages in the same unlawful overcharging practices as Petitioner. To support its claim that Runway Towing Corp. overcharges its customers, Petitioner proffers a Complaint in a Federal Court action and two billing statements, which were purportedly created by Runway Towing Corp. A

Complaint merely expresses allegations and has no dispositive value. One of the purported bills is completely illegible. The other purported bill appears to charge one customer some of the same overcharges Petitioner charged its customers. However, this bill is not verified and Petitioner does not explain how it came to possess this bill. Furthermore, it is unknown if Respondent was previously aware of this single instance of overcharging. Accordingly, this single bill does not support Petitioner's contention that Respondent ignored its precedent.

Fifth, Petitioner argues that Respondent is prohibited from denying the renewal of a tow truck license under these circumstances because of 6 New York City Code § 6-36. This section provides a penalty schedule for towing violations, which does not allow respondent to *revoke* a tow truck license upon the licensee's first violation. However, Petitioner confuses the tow truck license revocation with denial of relicensing. In this case, Respondent denied Petitioner's application for a tow truck license. The penalty schedule in 6 New York City Code § 6-36 does not abrogate Respondent's power to deny the renewal of a license under New York City Code § 20-504.

Turning now to Petitioner's request for attorneys' fees, costs and expenses. Petitioner does not provide any basis for an award of these disbursements. Furthermore, "[t]he general rule is that in Article 78 proceedings the prevailing party may not collect attorneys' fees from the loser unless an award is authorized by agreement between the parties or by statute or by court rule." ***Dechberry v. Cassano, 157 A.D.3d 499, 500 (1st Dep't 2018) (internal citation omitted).***

Accordingly, the Order to Show Cause is denied in all respects and the restraining order contained in the Order to Show Cause is vacated. As requested in Respondent's Memorandum

of Law, the second cause of action in the Petition, requesting relief under Article 78 of the CPLR, is dismissed.

Declaratory Judgment

Petitioner seeks a declaratory judgment declaring that it was entitled to a license renewal and Respondent therefore lacked a legitimate basis in denying said renewal. That relief is duplicative of the relief properly requested under Article 78 of the CPLR. "Generally, a declaratory judgment action is not the proper vehicle to challenge an administrative procedure, where judicial review by way of article 78 proceeding is available." ***Greystone Mgmt. Corp. v. Conciliation & Appeals Bd. of City of New York, 62 N.Y.2d 763, 765 (1984).*** Accordingly, the branch of the cross-motion seeking to dismiss the first cause of action of the Petition is granted.

Injunctive Relief

Petitioner requests injunctive relief enjoining Respondent from taking all actions predicated upon or in furtherance of its denial of license renewal because Respondent acted beyond the scope of its statutory authority and/or statutory duty. The proper vehicle for this relief is Article 78 of the CPLR. See, ***Santiago v. Blum, 75. A.D.2d 596 (2d Dep't 1980).*** Moreover, this separate cause of action is duplicative of relief requested under Article 78. Accordingly, the branch of the cross-motion seeking to dismiss the third cause of action of the Petition is granted.

Due Process Violation

As stated previously, Petitioner has failed to make out a claim for a violation of its due process rights under the United States Constitution and/or the New York Constitution. The

branch of the cross-motion seeking to dismiss the fourth cause of action of the Petition is, therefore, granted.

Tortious Interference

Petitioner alleges that Respondent engaged in tortious interference with Petitioner's business relations by allowing Petitioner's competitors to exclusively service Arterial Highway segments through a no-bid process. Additionally, Petitioner contends that Respondents allowed competitors, who engaged in the same overcharging practices as Petitioner, to continue operating their towing businesses. To prevail on a cause of action to recover damages for tortious interference with business relations, a plaintiff must prove (a) that it had a business relationship with a third party; (b) that the defendant knew of that relationship and intentionally interfered with it; (c) that the defendant's actions were motivated solely by malice or otherwise constituted illegal means; and (d) that the defendant's interference caused injury to the plaintiff's relationship with the third party. ***684 East 222nd Realty Co., LLC v. Sheehan, 185 A.D.3d 879, 879-880 (2d Dep't 2020).*** Petitioner has not demonstrated any of the requisite elements. Accordingly, the branch of the cross-motion seeking the dismissal of the fifth cause of action of the Petition is granted.

Selective Enforcement/Equal Protection

Petitioner alleges that Respondent engaged in selective enforcement of the New York City Code which was motivated by Respondent's intention to discriminate against Petitioner because Petitioner's shareholders had been indicted. A cause of action for selective enforcement "arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such

as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." ***Bower Assoc. v. Town of Pleasant Val., 2 N.Y.3d 617, 631 (2004).*** In the present case, Petitioner has not established either element required for its selective enforcement claim. Accordingly, the branch of the cross-motion seeking the dismissal of the sixth cause of action of the Petition is granted. For the foregoing reason, it is HEREBY

ORDERED that Petitioner's Order to Show Cause is DENIED in all respects; and it is further

ORDERED that the restraining order contained in the Order to Show Cause is vacated; and it is further

ORDERED that Respondent's cross-motion is GRANTED, dismissing the Petition in its entirety.

Petitioner's remaining contentions are without merit.

This is the Decision and Order of the Court.

E N T E R

HON. LOREN BAILY-SCHIFFMAN