

Bellet Constr. Co., Inc. v LaRocca

2021 NY Slip Op 32230(U)

November 8, 2021

Supreme Court, New York County

Docket Number: Index No. 152529/2021

Judge: Laurence L. Love

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE **PART** **63M**

Justice

-----X

BELLET CONSTRUCTION CO., INC., WAYNE BELLET

Petitioners,

- v -

MELANIE LAROCCA,

Respondent.

-----X

INDEX NO. 152529/2021

MOTION DATE 07/29/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

The following Petition seeks an order i) annulling the Order of the Commissioner of the Department of Buildings (“DOB”) – Melanie LaRocca, dated November 18, 2020, that revoked Bellet’s Special Rigger’s License; or ii) granting a rehearing on the basis of newly discovered evidence; or in the alternative, iii) remit to the trial court for reconsideration of the revocation penalty.

Respondent submitted a verified answer on July 23, 2021 (see NYSCEF Doc. No. 22). The verified answer has affirmative defenses of i) “[t]his proceeding should be transferred to the Appellate Division, First Department ... a CPLR 7803(4) substantial evidence review is required, ii) revoking petitioner’s license based on ... violation of Administrative Code 28 – 401.19(6) and (11) was based upon substantial evidence, and iii) the “newly discovered evidence” of the Environmental Control Board (“ECB”) proceedings and OATH (Office of Administrative Trials and Hearings) tribunal hearing have different purposes and can result in different penalties.

Petitioner states, “[i]n a trial before Administrative Law Judge Noel Garcia (‘ALJ’). The evidence adduced at the trial, among other things, established that Bellet *was not operating under his Special Rigger’s License* at the time and indeed was doing no work that required the use of a suspended scaffold. A riggers license is only required when a suspended scaffold is utilized. [T]he Court found that upon a reading of the section 28 – 401.19, the Commissioner was within the law in concluding that *any* license held by a licensee is subject to revocation even when a licensee was not working under it, as was done in the case at bar. As is more fully developed in the memorandum of law, it is clear that the Court below failed to closely scrutinize each subsection, including subsection seven, which *limits* the Commissioner’s authority to situations where a licensee is acting only under a license he was issued. Indeed, the ALJ committed a mistake of law in failing to properly construe the entire section at issue.” (see NYSCEF Doc. No. 1 Par. 6, 13).

Petitioner’s memorandum of law states, “[s]pecifically, Section 28 – 401.19(7), states that the Commissioner ‘may impose the penalty of revocation for ‘failure to comply with this Code [...] *related to the trade* for which the individual is licensed [...].’” The court neglected to discuss this Subsection” (see NYSCEF Doc. No. 10 Par. 3).

STATUTORY FRAMEWORK

Section 1049 of the New York City Charter authorizes the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (“OATH”) to “direct the office ... with respect to its management and structure” and to “establish rules for the conduct of hearing.”

DOB is empowered to “enforce, with respect to buildings and structures, such provisions of the building code, ... , labor law and other laws, rules and regulations as may govern the construction of buildings ... in the city (see New York City Charter § 643).

Title 28 of the Administrative Code contains the New York City Construction Codes, which include the New York City Building Code (see Administrative Code § 28 – 101.1). The purpose of the New York City Construction Codes is to provide reasonable minimum requirements and standards, based upon current scientific and engineering knowledge, experience and techniques, and the utilization of modern machinery, equipment, materials, and forms and methods of construction, for the regulation of building construction in the City of New York in the interest of public safety, health, welfare and the environment, and with due regard for building construction and maintenance costs (see Administrative Code § 28 – 101.2).

Administrative Code § 28 – 404.2 explains where a specialized license is required for the erection of a particular scaffold. Pursuant to Administrative Code § 28 – 404.2, a special rigger license authorizes the holder to: 1) “install or use or a suspended scaffold;” and 2) “hoist or lower any article not exceeding 2,000 pounds (907 kg) in weight on the outside of any building with a hoisting machine, provided the manufacturer rated capacity of such hoisting machine does not exceed 2,000 pounds (907 kg).”

No specialized license is required to erect or use a supported scaffold. Specifically, Administrative Code § 28 – 404.2 does not preclude a special rigger from erecting or using a supported scaffold. “Workers who install, adjust, repair, maintain, inspect, or remove a supported scaffold that is 40 feet ... or more in height, including the person supervising such, shall, at a minimum, have completed a department-approved training program or course that is at least 32 hours long and shall complete a department-approved 8-hour refresher program or course every 4 years thereafter.” Building Code § 3314.4.5.1.

A scaffold is defined in Building Code § 3302.1 as “any temporary elevated platform and its supporting structure (including points of anchorage) used for supporting workers or workers

and material, including but not limited to supported scaffolds, suspended scaffolds, and mobile scaffolds” (see Building Code § 3302.1).

Administrative Code § 28 – 404.2 explains where a specialized license is required for the erection of a particular scaffold. Pursuant to § 28 – 404.2, a special rigger license authorizes the holder to: 1) “install or use or a suspended scaffold;” and 2) “hoist or lower any article not exceeding 2,000 pounds (907 kg) in weight on the outside of any building with a hoisting machine, provided the manufacturer rated capacity of such hoisting machine does not exceed 2,000 pounds (907 kg).

Pursuant to Administrative Code § 28 – 401, which is the Article applicable to the licensing and registration of those engaged in building work, “the provisions of this article shall apply to all licenses issued by the department pursuant to this chapter. All applicants and licensees shall comply with the provisions of this article as well as the specific requirements applicable to the particular license as set forth in other articles of this chapter” (see Administrative Code § 28 – 401.2).

Administrative Code § 28 – 401.9 authorizes the Commissioner to revoke or suspend a special rigger license.

§28 – 401.19 Suspension or revocation of license or certificate of competence.

The commissioner shall have the power to suspend or revoke a license or certificate of competence and/or to impose a fine not to exceed twenty-five thousand dollars for each finding of violation, and/or to order any holder thereof to repair damage resulting from any act or omission as set forth in this chapter or in rules, for any of the following:

(6) Negligence, incompetence, lack of knowledge, or disregard of this code and related laws and rules;

(7) Failure to comply with this code or any order, rule, or requirement lawfully made by the commissioner including failure to cooperate with investigations related to the trade for which the individual is licensed conducted by the commissioner or other government entity;

(11) Engaging or assisting in any act that endangers the public safety and welfare.

Section 104 – 07 of Title 1 of the Rules of the City of New York is entitled “Suspension or Revocation” and states, in pertinent part:

(a) Hearing concerning disciplinary proceedings pursuant to Administrative Code § 28 – 401.19 seeking suspension or revocation, with or without penalties, against any licensee or holder of certificate[s] issued by the Department shall be held before the Office of Administrative Trials and Hearings pursuant to 1 RCNY 105 – 05 and shall be governed by the rules of procedure utilized at that tribunal.

(c) The administrative law judge assigned to hear any matter specified in this rule shall submit his or her proposed findings of fact and recommended decision to the Commissioner.

STATEMENT OF FACTS

On or about June 5, 2019, Petitioner Bellet subcontracted the façade work to Mohammed A. Bhutta, a licensed special rigger, where Bhutta’s wokers performed brick pointing and miscellaneous brick replacement for the exterior façade of the premises. On June 22, 2019, a worker fell off the supported scaffold that had been erected to facilitate the façade work and died (see NYSCEF Doc. No. 40 Par. 47).

By OATH petition dated August 30, 2019, DOB brought a series of Charges and Specifications against Petitioner, alleging in pertinent part violations of 1) Administrative Code 401.19(6) – by demonstrating negligence, incompetence, lack of knowledge, or disregard of the

Administrative Code ... 2) Administrative Code 28 – 401.19(7) – by failing to comply with the Code or any order, rule, or requirement lawfully made by the Commissioner including failure to cooperate with investigations ... 3) Administrative Code 28 – 401.19(11) – by engaging or assisting in an act that endangers the public safety and welfare (see NYSCEF Doc. No. 40 Par. 48).

A letter from the NYC Buildings, dated September 3, 2019, states, “[e]ffective immediately, the New York City Department of Buildings (“Department”) is hereby suspending your *Special Rigger License No. 005221* issued by the Department on July 27, 2019” (see NYSCEF Doc. No. 24).

On December 12, 2019, Petitioner appeared at OATH for part one of his administrative trial. Various permits were submitted along with expert testimony. Upon review of the evidence submitted by the parties and testimony elicited at the trial, ALJ Garcia rendered a Report and Recommendation dated November 9, 2020 recommending a revocation of Petitioner’s Special Rigger License (see NYSCEF Doc. No. 40 Par. 130). ALJ Garcia set forth in his findings and conclusions, where he stated that “the proven specifications are sufficient to establish [Bellet and Bhutta] were negligent, incompetent, lacked knowledge of or disregarded relevant laws and engaged or assisted in acts that endangered the public safety and welfare” (see NYSCEF Doc. No. 35).

Petitioner makes a distinction between a special rigger license and a regular license and that ALJ Garcia could not revoke the special rigger license because no work was performed under that license. A review of ALJ Garcia’s decision explains the distinction and jurisdiction to revoke licenses.

DOB rules require an individual to hold a special rigger license to erect a suspended scaffold, which hangs down from a building roof,

or for hoisting items with a weight limit of 2,000 pounds. But here, no suspended scaffold was used and no items were hoisted. Instead, the façade work was performed using a supported scaffold, which is erected from the ground up, and for which a special rigger license is not required. Respondents added that since the rules do not explicitly state that a license can be revoked for work performed outside the scope of the license, any interpretation to the contrary is vague and lacks fair warning.

DOB countered that although the work performed by respondents did not require a special rigger license, as licensees, respondents are obligated to follow all DOB rules, especially those pertaining to safety. Therefore, DOB argued that it had jurisdiction to seek revocation of respondents' licenses.

The New York City Charter charges DOB with enforcing “such provisions of the building Code ... as may govern the construction, alteration, maintenance, use, occupancy, safety, ... mechanical equipment and inspection of buildings or structures in the city.” NYC City Charter 643.

Under the Article applicable to licenses and registrations related to building work, the Administrative Codes states that “[t]he provisions of this article shall apply to *all licenses* issued by the department pursuant to this chapter. *All applicants and licenses* shall comply with the provisions of this article *as well* as the specific requirements applicable to the particular license as set forth in the other articles of this chapter” 23 – 401.2. Accordingly, the Code places licensees on notice that they are bound by all license and enforcement provisions, and not just the requirements related to a specific license.

By Final Determination dated November 18, 2020, DOB revoked Petitioner's Special Rigger License (see NYSCEF Doc. No. 36).

CPLR 7803 provides in relevant part, “[t]he only questions that may be raised in a proceeding under this article are: (3) whether a determination was made in violation of lawful procedure ... (4) whether a determination made ... supported by substantial evidence.”

“Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard” (see *Pell v. Board of Educ.*, 34 N.Y.2d 222 [1974]). The reviewing


court “ may not substitute its own judgment of the evidence for that of the administrative agency but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency’s determination is predicated” (see *Purdy v. Kriesberg*, 47 N.Y.2d 354, 358 [1979]).

Petitioner alleges that ALJ Garcia abused his discretion by failing to stay the Administrative Trial despite pending ECB (Environmental Control Board) summonses, which were based on the same DOB Charges and Specifications against petitioner at OATH. Petitioner argues that since eleven (11) of the thirteen (13) summonses were ultimately dismissed by ECB in future proceedings, those dismissals are therefore controlling on OATH, constituting newly discovered evidence, and warranting a remand.

Based on a review of the above referenced statutes and facts the court simply can not concur with petitioners position. ECB proceedings and OATH tribunal trials have different purposes and can result in different penalties. There is simply no basis to grant petitioners application.

Administrative Code § 28 – 401 makes clear that, “the provisions of this article shall apply to all licenses issued by the department pursuant to this chapter.”

ADJUDGED that the application is DENIED and the petition is dismissed, with costs and disbursements to respondent; and it is further

<u>11/8/2021</u> DATE					 LAURENCE LOVE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE