

<b>Matter of Jiashu Xu v City of New York</b>
2022 NY Slip Op 34330(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 161487/2021
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

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

-----X  
INDEX NO. 161487/2021  
MOTION DATE 05/07/2022  
MOTION SEQ. NO. 001

IN THE MATTER OF APPLICATION OF JIASHU XU,  
Petitioner,

- v -

THE CITY OF NEW YORK, CITY OF NEW YORK  
DEPARTMENT OF BUILDINGS

**DECISION + ORDER ON  
MOTION**

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

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

The following reads on an Order to Show Cause, that was returnable on March 8, 2022 at 2:30 p.m. A Virtual Microsoft Teams Appearance was held where both sides appeared.

The Order to Show Cause sought an Order i) pursuant to Article 78, to declare the Respondents’ actions arbitrary, capricious, unreasonable, unconstitutional and wholly beyond their grant of power, in regards to interpretation and enforcement of New York City Building Code § 28 – 401.19; ii) pursuant to Article 78, to lift the suspension of Petitioner’s General Contractor and Construction Superintendent Licenses because Respondents allegedly did not introduce any personal knowledge of the alleged violations during trial, and therefore laid no groundwork for the findings. Further, the Order to Show Cause Ordered a Stay of the Commissioner of the New York City Department of Buildings suspension of Petitioner’s licenses.

This Court issued an Interim Order on or about March 9, 2022 where it was, “ordered that the Stay of the Commissioner of the New York City Department of Buildings suspension of Petitioner’s licenses is now lifted; the suspension of Petitioner’s General Contractor and

Construction Superintendent Licenses are now suspended as per Commissioner of the New York City Department of Buildings Order” (see NYSCEF Doc. No. 32).

Per the Petition, “Petitioner was charged with 86 OATH Hearings Division summonses, including 62 violations which were classified as Class 1 immediately hazardous violations. After trial at the New York City Office of Administrative Trials and Hearings, the Administrative Law Judge found that [Department of Buildings] had proven Petitioner had acted negligently, incompetently or disregarded applicable laws. By a decision dated September 24, 2021 (“Report and Recommendation”), Honorable [...], A.L.J., wherein [...] suspended the license of general contractor and construction superintendent (“GC and CS”) Jiashu Xu for a period of two years. The Decision was sent to the Commissioner for adoption/rejection or modification. By letter dated December 17, 2021 (“Decision”), [Department of Buildings] suspended Petitioner’s licenses and registrations. The suspensions occurred despite other tradesmen similar to Petitioner whose licenses and/or registrations have not been suspended for similar misconduct” (see NSYCEF Doc. No. 1 Pars. 6 – 11). Plaintiff exhibits the Report and Recommendation (see NYSCEF Doc. No. 2) along with the Decision of the Department of Buildings to suspend Petitioner’s license (see NYSCEF Doc. No. 3).

Respondents’ memorandum of law raises the issue of transfer to the Appellate Division,

“[w]here, as here, a substantial evidence issue, as is set forth in CPLR 7803(4) and 7804(g), is raised and where no other ‘objection in point of law’ dispose of the matter, the Court ‘shall’ make an order directing that the proceeding be transferred for disposition to a term of the Appellate Division, in this instance to the First Department.

Here, substantial evidence review pursuant to CPLR 7803(4) is required, as the final agency determination challenged herein was made as a result of a hearing at which evidence was taken pursuant to direction by law. Accordingly, the Court should transfer the instant Article 78 proceeding to the Appellate Division, First Department, for substantial evidence review.

The stay of the suspension of petitioner's Registrations pending the hearing of this matter (the Order to Show Cause signed by this Court on January 3, 2022, annexed as Exhibit L) implicates substantial safety concerns. Therefore, respondents ask this Court to not continue its stay of the suspension of petitioner's two Registrations and to not issue the preliminary injunction pending the adjudication of this matter that petitioner implicitly requests" (see NYSCEF Doc. No. 31 Ps. 7 – 8).

CPLR 7803(4) states, "[t]he only questions that may be raised in a proceeding under this article are whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

CPLR 7804(g) states, "[i]f the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced."

Respondents state, "[o]n January 3, 2022, this Court issued a [Temporary Restraining Order] staying the suspension of petitioner's Registrations during the pendency of this proceeding. The [Temporary Restraining Order] was issued contrary to CPLR 6313(a), pursuant to which 'No temporary restraining order may be granted ... against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties'" (see NYSCEF Doc. No. 31 P. 24)

Respondents continue, "[t]he Report and Recommendation of [Administrative Law Judge] [...] details all of the evidence that had been adduced at trial and sets forth findings of fact that were supported by that evidence. This matter should then be transferred to the Appellate Division, where the determination of the [Department of Buildings] Commissioner should be sustained as having been supported by substantial evidence" (see NYSCEF Doc. No. 31 Ps. 27 – 28).

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 said subsection. 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 by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that the Stay of the Commissioner of the New York City Department of Building’s suspension of Petitioner’s licenses is now lifted; the suspension of Petitioner’s General Contractor and Construction Superintendent Licenses are now suspended as per Commissioner of the New York City Department of Buildings Order pending a full and final decision by the Appellate Division; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh)].

10/6/2022  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" 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