

Asencio v New York City Dept. of Bldgs.

2023 NY Slip Op 32239(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 152819-2023

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.LYNN R. KOTLER, J.S.C.

PART 8

Hector Asencio

INDEX NO. 152819-2023

- v -

MOT. DATE

The New York City Department of Buildings

MOT. SEQ. NO. 001

The following papers were read on this motion to/for Art. 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s).

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s).

Replying Affidavits

NYSCEF DOC No(s).

In this proceeding, petitioner Hector Asencio ("Asencio") seeks an order pursuant to CPLR Article 78 annulling the determination made by the respondent, the New York City Department of Buildings ("Dept of Buildings") which denied petitioner's application for reinstatement of his New York City Master Plumbers License and Respondent's written disapproval dated February 14, 2023. Petitioner has filed the petition together with a proposed Order to Show Cause ("OSC"). The court signed the OSC and ordered that "the service of a copy of the [OSC] together with the papers upon which it is based" had to be served upon the respondent by personal service before April 7, 2023. Asencio has submitted an affidavit of service demonstrating that the OSC and accompanying papers were served upon the respondent on March 31, 2023 via serving it personally upon Lorell Smith, the Receptionist at the Dept of Buildings, who represented that she is authorized to accept service on behalf of the Dept of Buildings pursuant to CPLR 311(a)(1). Therefore, the Order to Show Cause is considered on default. Despite such service, the respondent has not answered the petition and its time to do so has not been extended by the court. Therefore, petitioner has established that the respondent has defaulted in appearing in this action and the petition will be considered without opposition.

The facts, according to the petition verified by Asencio, are as follows. In or around June 26, 2017, Asencio was requested to appear and the Dept of Buildings' Department of Investigation ("DOI") to discuss his business practices. On July 20, 2017, Asencio appeared at the DOI with counsel and underwent an interview with Investigator Mary Kwong and Staff Attorney Sezhad Sookall, Esq. As a result of the interview, the DOI conducted an in-depth investigation into Asencio's business practices which culminated in a finding that Asencio had violated New York City Administrative Code by failing to properly control and supervise his master plumbing business. Asencio entered into a stipulation of settlement with the Dept of Buildings dated May 21, 2018 which set forth the charged imposed against Asencio and the disciplinary actions resulting therefrom.

Dated: 7/5/23

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

The stipulation provides that from the date of its execution, Asencio had to enter a 3-month wind-down period during which he could only complete open jobs and could not file any new applications which require a Master Plumbers License. This three-month wind down took place from May 21, 2018 to August 21, 2018. After the three-month wind down, Asencio's New York City Master Plumbers License (the "license") was suspended for a one-year period from August 21, 2018 to August 21, 2019. So long as he complied with the terms of the agreement, Asencio's license was to be reinstated at the end of the suspension, on August 21, 2019. Following the suspension and reinstatement, the license was placed on probation for a two-year period, from August 21, 2019 to August 21, 2021. Additionally, Asencio was required to pay a fine of \$15,000 due within 30 days after the end of the suspension period, or within 30 days of August 21, 2018. The payment could take place in a single lump sum or in fifteen monthly payments of \$1,000.

Asencio turned over his master plumber plate and seal to the Dept of Buildings on August 21, 2019 as required by the stipulation and did not perform any work which required his license for a period of one year. Asencio's license expired during the term of the suspension, effective April 26, 2019. Foreseeing this issue, Asencio made attempts to renew his license during his period of suspension and did so in accordance with the Dept of Buildings' policies. These efforts were declined because of the suspension. Upon the completion of the one-year suspension, the Dept of Buildings did not reinstate Asencio's license. On or about January 12, 2020, Asencio appeared at the office of the Dept of Buildings located at 280 Broadway, New York, New York to speak with a representative about having his license reinstated. He was told that he needed to discuss his case with Mr. William Hinckley. However, upon his return to the office four days later, he was told that Mr. Hinckley was unavailable. Asencio sent multiple emails to Dept of Buildings representatives but was unsuccessful in getting his license reinstated.

On March 20, 2020, Governor Cuomo issued Executive Order 202 et. seq. which had the consequence that the Dept of Buildings severely limited its operations and effectively shut down avenues of communication for licensing purposes. On June 8, 2022, Asencio's attorney, Keith M. Casella, Esq. ("Casella") sent an email to Dept of Buildings investigator Chureshma Dean seeking assistance with the reinstatement of Asencio's license. Dean referred the matter to staff attorney Matthew Sienkiewicz who stated in an email that in order to have his license reinstated, Asencio would need to

pay a deposit toward the outstanding fine; submit an affidavit stating his plan for prepayment of the balance of the fine, including a statement that he acknowledges that if violated the terms of his repayment plan, he would be subjected to additional discipline by the Respondent; Upon receipt of the downpayment, his plan for repayment and the plan is accepted, Mr. Asencio would be referred to Licensing Unit where he would need to meet the requirements for renewal.

On June 28, 2022, Asencio executed the affidavit showing his proposal for repayment of the fine and submitted it to Mr. Sienkiewicz. However, Asencio was worried that there was no assurance that a deposit payment towards the fine would result in the reinstatement of his license. When pressed on the issue, Mr. Sienkiewicz deferred the matter to Ms. Annemarie Walters. Email correspondence continued without satisfaction of reassurance of the reinstatement of Asencio's license. On January 30, 2023, Asencio sent an email to another representative of the Dept of Buildings, Ms. Leon, in which he included a complete application for renewal of his license and ancillary documents to show continued competency in the plumbing trade during the period of his suspension.

On February 14, 2023, representative of the Dept of Buildings, Mr. Reynaldo Cabrera, advised that Asencio's license would not be reinstated or renewed and that he would need to reapply for a new license. The justification for this decision was that "[f]irst, Mr. Asencio may not have his license reinstated as that is no longer an option available under current law. Next...to date, Mr. Asencio has yet to pay any portion of the fine as he was required per the stipulation." With regard to the option no longer being available under current law, in November of 2022, a code update eliminated the license reinstatement option. Asencio argues that this determination is arbitrary and capricious because he has fulfilled every

term and condition of the Stipulation of Settlement, and thus the refusal of the Dept of Buildings to reinstate his license is without justification of a sound good faith basis.

This Article 78 petition ensued, wherein petitioner seeks: 1) to annul the Dept of Buildings' determination which denied his application for reinstatement of his New York City Master Plumbers License pursuant to CPLR § 7803(3) because the determination was arbitrary and capricious and was an abuse of discretion; and 2) to order respondent to abide by the terms of the Stipulation of Settlement dated May 18, 2018 and reinstate Asencio's license.

Respondent has not responded to the petition.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]). In an Article 78 to annul an administration's determination, the petitioner has the burden of demonstrating that the determination was arbitrary and capricious (see *Matter of Stanton v. Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2d Dept 2007]).

Asencio argues that the determination of the Dept of Buildings denying his application for reinstatement of his license is arbitrary and capricious and an abuse of discretion because the denial went against the stipulation that the Dept of Buildings made with Asencio. Asencio argues that he has complied fully with the stipulation and therefore, that the Dept of Buildings' decision not to reinstate his license violates the agreement between the parties.

The court disagrees. It finds that Asencio did not comply fully with the stipulation and finds that the Dept of Buildings' reading of the stipulation was rational. While it is true that the stipulation asserts that Asencio would have his master plumber's license reinstated following the one-year period of suspension, the stipulation also states that:

A payment of Fifteen Thousand dollars and 00/100 (\$15,000.00) shall be paid by [Asencio] by Certified, Bank or Cashier's Check or United States Postal Money Order, made payable to the order of the New York City Department of Buildings and mailed to the License Disciplinary Unit... This fine will become due thirty (30) days after the end of the suspension period.

Nothing in the stipulation conditions payment of the monies due until after the reinstatement of the license occurs. In fact, the stipulation clearly states that payment, or partial payment, would become due thirty days after the suspension period ended. Asencio was given fifteen months' notice that a payment would become due on that date. Yet no payment was made 30 days after the suspension term ended. In fact, to date, Asencio has made no payment towards the fine. Yet, the Dept of Buildings gave another opportunity for Asencio to make a payment in the June 24, 2022 email from Mr. Sienkiewicz. In that email, the Dept of Buildings provided Asencio with another route to reinstatement of his license by submitting a payment plan for the \$15,000 fee and submitting a first payment according to that plan. Asencio submitted the payment plan, but again failed to submit any payment as directed.

The court understands that Asencio sought to "hedge his bets" by not turning in the first payment thirty days after the end of the suspension plan until his license was reinstated. It understands that Asencio sought to "hedge his bets" again by not turning in the first payment when he submitted his payment plan in accordance with Mr. Sienkiewicz's email in case the reinstatement never occurred.

However, in doing so, he violated the terms of the stipulation and the terms of the alternative route to reinstatement that the Dept of Buildings set forth. The Dept of Buildings itself stated that the lack of payment was one reason that the reinstatement of Asencio's license was denied. Therefore, the Dept of Buildings acted rationally in denying the reinstatement of his Master Plumbers License.

Accordingly, Asencio has failed to establish that the Dept of Buildings' denial of his reinstatement application was irrational, arbitrary or capricious. Rather, the denial of Asencio's application was reasonable in light of his failure to pay any part of the penalty fee owed. Therefore, the petition is denied and this proceeding is dismissed.

In accordance herewith, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

7/5/23
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.