245 Empire Grocery & Deli Corp. v New York City Dept. of Consumer & Worker Protection
2024 NY Slip Op 32887(U)
August 2, 2024
Supreme Court, New York County
Docket Number: Index No. 155267/2024
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** — *Justice* | **PART** 36

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245 EMPIRE GROCERY & DELI CORP.,
Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION and THE OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,
Respondents.

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INDEX NO. 155267/2024

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, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for **ARTICLE 78** .

Petitioner, 245 Empire Grocery & Deli Corp, a convenience store located at 245 9th Avenue, New York, NY (hereinafter, the "premises"), moves the court, pursuant to Article 78, for an order reversing, annulling or setting aside a suspension of its business license. Petitioner was issued a summons for the unlicensed sale of e-cigarettes on December 1, 2022, after an inspection of the premises. The hearing for the violation was scheduled for January 17, 2023. Petitioner failed to appear for the January 17, 2023, hearing with the New York City Office of Administrative Trials and Hearings ("OATH"), and OATH subsequently issued a default judgment with a fine of $13,700.00. The New York City Department of Consumer and Worker Protection (hereinafter, "DCWP") issued a final decision on November 16, 2023, adopting OATH's findings, and added an additional penalty of $950.00, bringing the total to $14,650.00. Petitioner moved to vacate the default judgment on May 20, 2024, claiming that it did not appear for the January 17, 2023, hearing due to an exceptional circumstance. Petitioner claimed to have missed the hearing on January 17, 2023, because its president, Fuad Ali, had to travel outside the United States in December 2022 to attend to his mother's health issues. That motion to vacate was denied. On May 23, 2024, the DCWP suspended petitioner's tobacco license.

According to petitioner, OATH used the improper standard to deny its motion to vacate the default judgment issued on February 10, 2023, and grant a new hearing date. Petitioner maintains that the decision denying the motion to vacate the default judgment was arbitrary and capricious in that it failed to explain why the rationale provided in the motion, i.e., its president, Fuad Ali, traveling outside the United States to visit his sick mother, was not an exceptional circumstance.[1] (NSYCEF Doc. No. 1, *verified petition*). In support of the instant application, petitioner attaches a copy of the default judgment decision (NYSCEF Doc. No. 6, *default judgment*), Fuad Ali's passport (NYSCEF Doc. No. 8, *passport*), denial of the motion to vacate

[1] The denial language reads "[y]our request was submitted more than one (1) year after the date of the default decision and did not establish the exceptional circumstances prevented you from appearing."

(NYSCEF Doc. No. 10, *decision denying the motion to vacate*) and the DCWP final decision (NYSCEF Doc. No. 11, *final decision*). Petitioner also submits the affidavit of Arafat Ali, who claims to be petitioner's manager and the son of company president Fuad Ali, stating that petitioner did not appear at the hearing on January 17, 2023, because Fuad Ali was unaware of the failed inspection of the premises, and that petitioner's employees did not notify Fuad Ali of same (NYSCEF Doc. No. 5, *Arafat Ali's affidavit*).

Respondents oppose the application, arguing that both the DCWP's May 23, 2024, final determination suspending petitioner's tobacco license and OATH's denial of petitioner's motion to vacate the default judgment were not arbitrary and capricious. They contend that DCWP is vested with the discretion to suspend a license where, as here, the petitioner has a final judgment outstanding against it for more than 60 days, in the amount of $500.00 or more. According to respondents, suspension of petitioner's license is supported by the record because the November 16, 2023, final decision expressly states that "failure to comply with this order within thirty (30) days from the date of this Decision and Order may result in suspension of respondent's DCWP license." On May 23, 2024, the date of the suspension, the petitioner had a final Decision and Order outstanding for 189 days, from November 16, 2023, to May 23, 2024, and had outstanding fines in an amount greater than $500.00. Specifically, petitioner owed $14,650.00 at the time of suspension. Hence, they assert that DCWP lawfully suspended petitioner's license.

According to respondents, Rules of City of New York Department of Consumer Affairs (48 RCNY) § 6-21(f) requires that where a petitioner is found to be in default but fails to move to vacate the default until more than one year after the default is issued, the petitioner must establish that "exceptional circumstances" prevented it from appearing at the hearing. They set forth that even though petitioner moved to vacate the default judgment on May 20, 2024, citing exceptional circumstances,[2] it did not submit documentary evidence, i.e., a printout copy of the airline ticket, in support of its claim that Fuad Ali was out of the country and therefore unaware of the subject summons. In addition, respondents assert that a copy of the passport submitted by petitioner shows that Fuad Ali left the United States at least one month after the subject summons was issued and petitioner does not explain why any of its representatives did not appear for the hearing on January 17, 2023. Thus, respondents maintain that OATH's denial of petitioner's motion to vacate the default was not arbitrary and capricious as it correctly held that petitioner failed to establish that exceptional circumstances prevented it from attending the hearing.

Next, respondents articulate that petitioner is not entitled to a preliminary injunction in the form of a stay of suspension of petitioner's license because it fails to satisfy the standard for a preliminary injunction. They argue that petitioner fails to show a likelihood of success on the merits because the DCWP's suspension of petitioner's license was lawful. Respondents further contend that any foreseeable harm to petitioner is purely economic and, thus, insufficient to satisfy the prong of irreparable harm. According to respondents, petitioner fails to demonstrate what, if any, immediate and irreparable harm would come to it absent an injunction. Lastly, they assert that the petitioner cannot demonstrate that the equities weigh in its favor as the DCWP's interest in protecting the public and disincentivizing entities from illegally selling e-cigarettes

[2] OATH has the discretion, in exceptional circumstances and in order to avoid injustice, to consider a respondent's request for a new hearing after default made more than one year from the date of the default decision.

outweighs any economic interest petitioner may have in the sale of its tobacco products. (NYSCEF Doc. No. 17, *memo of law*).

In reply, petitioner claims that it is not seeking to dismiss the underlying charges but rather seeks an opportunity to defend against the charges at an OATH hearing. According to petitioner, OATH imposed the maximum fines associated with the violations because of the default. It posits that if the instant motion is granted and petitioner is afforded an opportunity to appear before OATH, the penalties may be substantially less, even if petitioner is nevertheless found liable for the violations. Addressing respondents' argument that no documentary evidence was submitted in support of the exceptional circumstances claim, petitioner submits a copy of Fuad Ali's return flight ticket to the United States. (NYSCEF Doc No. 28, *June travel return document*). Petitioner asserts that respondents filed their opposition before it could furnish them with a copy of the return flight ticket (NYSCEF Doc. No. 27, *reply affirmation*).

The standard of review in this Article 78 proceeding is whether the respondents' 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" (CPLR 7803[3]). A special proceeding commenced pursuant to Article 78 to challenge an administrative agency's final determination, such as this one, must be made within four months after the determination becomes final (see CPLR 217[1]).

The DCWP is authorized to issue, transfer, renew, revoke, suspend cancel licenses and permits. (New York City Charter § 2203[c]). New York City Charter § 2203(h)(1) provides that powers conferred upon the DCWP may be exercised by the office of administrative trials and hearings. "The court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz v Brown*, 80 NY2d 998, 1001 [1992]). Whether an administrative decision is arbitrary and capricious depends on whether the determination "'is without sound basis in reason and is generally taken without regard to the facts'" (*Matter of Galaxy Bar & Grill Corp. v New York State Liq. Auth.*, 154 AD3d 476, 482 [1st 2017], citing *Pell v Board of Education*, 34 NY2d 222, 231 [1974]). A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (see *Sewell v New York*, 182 AD2d 469, 473 [1st Dept. 1992]). As such, "[i]f the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion" (*Sullivan County Harness Racing Ass'n v Glasser*, 30 NY2d 269, 278 [1972]). Requests submitted "for a new hearing after default made more than one (1) year from the date of the default decision" may be granted upon a showing of "exceptional circumstances and in order to avoid injustice" (48 RCNY § 6-21 [f]).

Here, petitioner's motion is denied insofar as it has not persuaded the court that OATH's and DCWP's administrative decisions were arbitrary and capricious. Petitioner had ample opportunity to challenge the OATH and DCWP decisions and avoid suspension of its license. The default judgment was issued against petitioner in February 2023, and no payment was made between the issuance of said decision and order and the issuance of the final decision in November 2023 by DCWP. Furthermore, the November 2023 Order expressly states that "[f]ailure to comply with this order within thirty (30) days from the date of this Decision and

Order may result in suspension of Respondent's DCWP license." When DCWP suspended petitioner's license on May 23, 2024, the November 2023 Order had been outstanding for 189 days and petitioner had nevertheless failed to pay any of the fines. There is a rational basis for OATH's determination that petitioner's rationale proffered in its motion to vacate the default judgment did not constitute an exceptional circumstance such that vacatur of the default judgment and a new hearing were warranted. Ascertaining what constitutes exceptional circumstances involves a case-by-case determination (see *Windermere Pro ps. LLC v. City of New York,* 2023 NY Slip Op 30337[U], **7 [Sup Ct, NY County 2023]). Although petitioner argues that it was unaware of the hearing on January 17, 2023, because Fuad Ali traveled outside the United Stated in December 2022, this is not supported by the proof submitted (see *1930 Homecrest Realty LLC v City of NY*, 2024 NY Slip Op 30015[U], **7-9 [Sup Ct, NY County 2024]). Fuad Ali's passport and a copy of the return flight tickets do not demonstrate he was unaware of the hearing. (NYSCEF Doc. Nos. 8; 28 *passport; June travel return document*). Also, petitioner does not explain why any of its representatives, including Arafat Ali, who claims to be petitioner's manager and Fuad Ali's son, could not have appeared for the hearing. Given the above, petitioner's application is denied. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that petitioner's application is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

August 2, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	X	**CASE DISPOSED**			☐	**NON-FINAL DISPOSITION**
	☐	**GRANTED**	X	**DENIED**	☐	**GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐	**SETTLE ORDER**			☐	**SUBMIT ORDER**
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**			☐	**FIDUCIARY APPOINTMENT**	☐ **REFERENCE**