

**Matter of Shopsmart Convenience Inc. v New York  
State Off. of Cannabis Mgt.**

2025 NY Slip Op 30311(U)

January 27, 2025

Supreme Court, New York County

Docket Number: Index No. 158249/2024

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL A. GOETZ PART 47**

*Justice*

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**INDEX NO. 158249/2024**

IN THE MATTER OF THE APPLICATION OF SHOPSMART  
CONVENIENCE INC.,

**MOTION DATE 10/10/2024**

Petitioner,

**MOTION SEQ. NO. 001**

- v -

NEW YORK STATE OFFICE OF CANNABIS  
MANAGEMENT, FELICIA REID,

**DECISION + ORDER ON  
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

In this Article 78 proceeding, petitioner, Shopsmart Convenience Inc. (“Shopsmart”) challenges the sealing of its shop, by respondent New York State Office of Cannabis Management, (“OCM”) for one year after it determined that Shopsmart was selling cannabis without a license. Petitioner challenges the decision of Administrative Law Judge (“ALJ”), arguing that the decision was arbitrary, capricious, and unlawful. Shopsmart seeks an order that terminates the sealing order and allows the shop to reopen.

**BACKGROUND**

On July 17, 2024, OCM conducted an inspection of Shopsmart’s business located at 370B 3rd Avenue, New York, NY 10016 (NYSCEF Doc No 1 ¶ 14). As a result of the inspection, OCM issued Shopsmart a Notice of Violation, an Order to Cease Unlicensed Activity, and an Order to Seal, closing the business (*id.*). Shopsmart requested an emergency hearing and it was held on July 24, 2024 (*id.* at ¶ 14 – 16). At the hearing, Shopsmart submitted as affirmative defenses, a lack of personal jurisdiction, contributory fault, and that any cannabis-

related activities were a *de minimis* part of the business (NYSCEF Doc No 22 at p 17). The scope of the hearing was limited to whether the sealing provisions had been met by a preponderance of the evidence (*id.* at 81). OCM had the investigator who performed the inspection testify at the hearing, while Shopsmart did not produce a witness (*id.* at 94).

Following the hearing the ALJ issued a decision on July 30, 2024 (NYSCEF Doc No 6) finding that Shopsmart had been offering cannabis products for sale without a license, that the unlicensed activity constituted more than a *de minimis* part of the activity, and that the activity posed a threat to the public, thereby supporting the sealing order. The ALJ also rejected Shopsmart's improper service argument and that certain evidence should be precluded. Accordingly, the sealing order was extended one year from the date of the decision.

## DISCUSSION

### *Jurisdiction*

As a preliminary matter OCM argues that this court lacks jurisdiction to hear this proceeding because Shopsmart failed to properly effectuate service to commence the proceeding.

CPLR § 7804(c) states:

Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. . . . In the case of a proceeding pursuant to this article against a state body or officers . . . commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated

Thus, a petitioner is required to effectuate service both upon the agency respondent and the Attorney General so that a court can obtain personal jurisdiction over a respondent agency (*see Matter of Robinson v Goord*, 21 AD3d 1150 [3d Dept 2005]). Here, Shopsmart served the OCM (NYSCEF Doc No 12) and only belatedly served the Attorney General's office on October 1, 2024 (NYSCEF Doc No 24). Further, the signed Order to Show Cause directed petitioner to serve the signed Order to Show Cause "upon Respondents' attorneys, NEW YORK STATE ATTORNEY GENERAL'S OFFICE, on or before the 13th day of September, 2024" which Shopsmart failed to do (*see Matter of Robinson v Goord*, 21 AD3d 1150 [3d Dept 2005] [failure to comply with service directives set forth in order to show cause may warrant dismissal]).

However, Shopsmart notes that the Attorney General's Office appeared for oral argument on the TRO that was requested and denied on the Order to Show Cause (NYSCEF Doc No 15). Indeed, the Attorney General's Office uploaded a correspondence on NYSCEF (NYSCEF Doc No 14) requesting remote oral argument be ordered to determine the TRO. While merely appearing in an action without raising the defense of personal jurisdiction does not waive that defense (*Body Glove IP Holdings LP v On Five Corp.*, 217 AD3d 561 [1st Dept 2023]), "[w]hen a [respondent] participates in a [proceeding] on the merits, he or she indicates an intention to submit to the court's jurisdiction over the [proceeding], and by appearing informally in this manner, the [respondent] confers in personam jurisdiction on the court" (*Bayview Loan Servicing, LLC v Zelyakovsky*, 202 AD3d 738, 741 [2d Dept 2022]).

While, respondents' letter explicitly states that "In no way should this letter be construed as a notice of appearance or waiver of any rights, privileges or remedies", considering that Shopsmart did belatedly serve the Attorney General, and considering the lack of prejudice to respondents because they received notice of the proceeding, service on respondents is deemed

effectuated and the petition will not be dismissed for lack of personal jurisdiction over respondents (*see Bank of Am., N.A. v Cord*, 214 AD3d 934 [2d Dept 2023]).

### *Standard of Review*

“In the context of an article 78 proceeding, it is established that judicial review is limited to a determination of whether the administrative decision is arbitrary and capricious, or lacks a rational basis” (*Slesinger v Dept. of Hous. Preserv. and Dev. of City of New York*, 39 AD3d 246, 246 [1st Dept 2007]). “[W]here such rational basis exists, an administrative agency’s construction and interpretation of its own regulations are entitled to great deference” (*id.*). “Moreover, judicial review of administrative determinations is confined to the facts and record adduced before the agency” (*id.* [internal quotation marks omitted]). “An agency action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Figueroa v New York City Hous. Auth.*, 141 AD3d 468, 469 [1st Dept 2016] [internal quotation marks omitted]). “In reviewing an agency’s application of its own regulations, courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case” (*id.* [internal quotation marks omitted]).

### *Exhaustion of Administrative Remedies*

“It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (*Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). A “failure to exhaust [administrative] remedies deprive[s] the court of subject matter jurisdiction over [a petitioner’s] claims” (*Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 64 [2005]) because a court is limited to making a determination of whether an administrative decision was arbitrary and capricious, the agency must be given an “opportunity, in advance of possible judicial review, to prepare a record

reflective of its expertise and judgment”( *Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).


Here NY CANBS § 10(18) states that, “The cannabis control board or board shall have the ... power[ to], [w]hen an administrative decision is appealed to the board by an applicant, registered organization, licensee or permittee, issue a final determination of the office.” Further, NY CANBS § 17(8) states that:

Following a hearing, the board may make appropriate determinations and issue a final order in accordance therewith. Any such order may include financial penalties as well as injunctive relief, including an order to seal a premises in accordance with section one hundred thirty-eight-b of this chapter. The respondent and the office shall have thirty days to submit a written appeal to the board. If any party fails to submit a written appeal within thirty days of the determination of the board the order shall be final.

Here, while Shopsmart filed an administrative appeal, it started this action prior to receiving a final determination by the Board. While Shopsmart contends that it is entitled to review because it establishes that “an administrative remedy would be futile” (*Matthews v Barrios-Paoli*, 270 AD2d 152, 152 [1st Dept 2000]), nothing in the record supports this position. “Generally, ... [a court] will not entertain a claim of futility based on delay because adjudicatory delay by an agency does not authorize a court to intervene in an administrative proceeding before a final determination absent extraordinary circumstances” (*Matter of Schenectady Nursing and Rehabilitation Ctr., LLC v Shah*, 124 AD3d 1023, 1024 [3d Dept 2015]). Here, petitioner has not presented extraordinary circumstances warranting court action before a final determination is made by the OCM Board. Therefore, because Shopsmart failed to exhaust its administrative remedies at the OCM, the court lacks subject matter jurisdiction to hear this matter and the petition must be dismissed.

Accordingly, it is,

ORDERED that the application is denied, and the petition is dismissed, with costs and disbursements to respondents.

  
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1/27/2025  
DATE

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PAUL A. GOETZ, 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"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
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