

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

PRESENT: GOODMAN
Justice

PART 17

NEW YORK DIAT CONTRACTING CORP.

INDEX NO.

110906/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -
THE CITY OF NEW YORK,
ET AL

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*portion is decided
per attached.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: 9/16/10

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17**

-----x
In the Matter of the Application of

NEW YORK DIRT CONTRACTING CORP.,

Index No. 110906/09

Petitioner,

For a Judgment Pursuant to Article 78

-against-

THE CITY OF NEW YORK, MICHAEL MANSFIELD,
individually and as Chairman of the New York City
Business Integrity Commission, and the NEW YORK
CITY BUSINESS INTEGRITY COMMISSION,

Respondents.
-----x

Emily Jane Goodman, J.S.C.:

In a proceeding pursuant to Article 78, petitioner New York Dirt Contracting Corporation, a company that engages in the removal of waste materials resulting from demolition, construction, alteration or excavation, alleges that the denial of its two renewal applications submitted to the New York City Business Integrity Commission (BIC) was arbitrary and capricious, and an abuse of discretion. In addition, petitioner alleges that BIC's failure to provide him with copies of certain documents relied upon by BIC in making its determination violated its due process rights.

Petitioner requests the reversal and remand of the BIC's denial of its renewal applications for exemption from licensing and registration to operate as a trade waste entity.

Petitioner also requests a order granting a preliminary injunction, together with a temporary restraining order, enjoining respondents City of New York (the City), Michael

Mansfield (Mansfield), individually and as Chairman of BIC, and BIC (together, respondents) from taking any action to terminate, enjoin or otherwise interfere with the day-to-day operation and business activities of petitioner or any of its principals, employees or agents, including, without limitation, contacting any entities with which petitioner conducts business for the purpose of interfering with the business of petitioner, provided, however, respondents may continue to enforce the operational rules applicable to registrants found in Subchapter G of Title 17 of the Rules of the City of New York.

BACKGROUND

Petitioner, a large transporter of aggregates in the metropolitan region, is currently responsible for the transportation of all of the stone aggregates generated by the Manhattan Access Tunnel Project (the tunnel project) for the Metropolitan Transportation Authority (MTA). The hauling of construction and demolition debris by a commercial transporter is regulated by BIC, pursuant to the trade waste licensing and regulatory scheme, codified in Title 16-A of the Administrative Code of the City of New York (Administrative Code) in 1996. The purpose of the trade waste licensing and regulatory scheme is to help eradicate racketeering and corruption in the trade waste industry.

As part of its operation, petitioner must register with BIC as exempt from the agency's licensing requirements. In 1996, petitioner applied for and was granted licensing exemption and a registration to operate as a trade waste entity. As a result, petitioner has operated continually since 1996. The most recent approval for petitioner's exemption from licensing requirements and trade waste registration was February 3, 2005.

So that it could continue to operate as a trade waste business, petitioner submitted

applications for exemption from licensing and for trade waste registration on February 15, 2007 and April 17, 2009 (the renewal application).¹ However, after conducting a thorough review and investigation of petitioner's application, in its decision, dated July 31, 2009, BIC denied petitioner's renewal application for a registration to operate a trade waste business on the ground that petitioner lacked the requisite "good character, honesty and integrity" to become a BIC licensee.

DISCUSSION

PETITIONER'S REQUEST FOR THE REVERSAL AND REMAND OF BIC'S DENIAL OF ITS RENEWAL APPLICATION FOR EXEMPTION FROM LICENSING AND REGISTRATION TO OPERATE AS A TRADE WASTE ENTITY

It is well settled that judicial review of an administrative agency determination is limited to whether the determination was arbitrary and capricious, that is, without a rational basis in the administrative record (*see* CPLR 7803 [3]; *Matter of Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363-364 [1999]; *Matter of Scherbyn v Wayne-Finger Lakes Board of Cooperative Educational Services*, 77 NY2d 753, 757-758 [1991]; *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 [1974]; *Matter of Climent v Board of Education of Community School District No. 22*, 288 AD2d 312, 313 [2d Dept 2001]). "[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Arrocha*, 93 NY2d at 363, quoting *Matter of Pell*, 34 NY2d at 232 (emphasis in original; citation omitted); *Matter of*

¹The 2007 renewal application was pending and pursuant to BIC's policy, petitioner was allowed to continue operation during this period.

Partnership 92 LP & Building Management Company v State of New York Division of Housing & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end" (*Paramount Communications v Gibraltar Casualty Company*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell*, 34 NY2d at 231).

Pursuant to Local Law 42, BIC is "responsible for the licensing, registration and regulation of businesses that remove, collect or dispose of trade waste" (Administrative Code § 16-503). Any business that intends to haul trade waste must obtain a license from BIC (Administrative Code § 16-505 [a]). In addition, Administrative Code § 16-505 (a) states, in pertinent part:

Notwithstanding the provisions of this subdivision, a business solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation shall be exempt from the licensing provisions of this subdivision where, except... no principal of such applicant is a principal of a business or a former business required to be licensed ... such exemption shall be made by the commission upon its review of an exemption application, which shall be in the form and contain the information prescribed by rule of the commission and shall be accompanied by a statement by the applicant describing the nature of the applicant's business and listing all principals of such business.

After consideration of the information contained in petitioner's renewal application for license or registration as a trade waste business, and after giving the applicant "notice and the opportunity to be heard," BIC may deny a license where it has determined that the applicant "lacks good character, honesty and integrity" (Administrative Code § 16-509 [a]; *see Tocci Brothers, Inc. v Trade Waste Commission of City of New York*, 251 AD2d 160, 160-161 [1st Dept

1998] [where there was ample evidence that applicant lacked good character, honesty and integrity, Court held that respondent Trade Waste Commission did not act arbitrarily and capriciously, or irrationally, when it denied petitioner a license]).

Administrative Code § 16-509 (a) identifies several factors that BIC may consider when assessing a license application, such as whether the petitioner associated with any member or associate of an organized crime group, as identified by a federal, state or city law enforcement or investigative agency (Administrative Code § 16-509 [a] [vi]), and whether the petitioner provided truthful information to the Commission (Administrative Code § 16-509 [a] [i]) (*see Matter of DeCostole Carting, Inc. v Business Integrity Commission of City of New York*, 2 AD3d 225, 225[1st Dept 2003] [rational basis for findings that petitioner, who participating in mob-controlled waste cartel's property rights system and failed to provide truthful information to agency, did not possess requisite "character, honesty and integrity" for licensure, determination was not arbitrary and capricious]; *Matter of Sindone v City of New York*, 2 AD3d 125, 126 [1st Dept 2003] [evidence indicating that petitioner gave untruthful or misleading information and did business with a known organized crime figure provided a rational basis for the challenged determination]).

Here, BIC articulated three reasons for its determination to deny petitioner's renewal application: (1) that petitioner's president and sole shareholder, Edward Raffetto (Raffetto), knowingly associated with Greg DePalma (DePalma), a known member of an organized (Gambino) crime family and convicted racketeer; (2) that petitioner violated the terms of the Registration Order issued to it by BIC on February 16, 2005, insofar as petitioner knowing associated with members and associates of organized crime and convicted racketeers; and (3) that

petitioner failed to provide truthful and complete information on its renewal applications.

Whether Raffetto Knowingly Associated with DePalma, A Known Member of Organized Crime

A review of the administrative record in this case, which includes Raffetto's June 28, 2007 deposition testimony, as well as the trial transcript and other public filings in the federal case of *United States v Gregory DePalma* (05 Cr. 228 [AKH]) (the federal case), wherein Raffetto testified against DePalma (the trial testimony), supports BIC's conclusion that petitioner voluntarily initiated contact with DePalma to get help for his business, as well as for protection, even though he was aware of DePalma's connection with organized crime.

Specifically, Raffetto testified that DePalma offered his services to Raffetto for the payment of \$700 per week, in cash. After agreeing to the arrangement, Raffetto began making said payments to Raffetto in 2003. Raffetto also made at least two other payments, "under the table," to DePalma around Christmas of the year 2003 and 2004. Sometimes, Raffetto would deliver the payments to DePalma at a Westchester nursing home, where a member of DePalma's family resided. Raffetto also directed his employee, Pat Cascione, to make some of the cash payments. In fact, Raffetto testified that he only ceased making the weekly cash payments to DePalma after DePalma was arrested in March of 2005.

Petitioner argues that BIC's denial of its renewal application is arbitrary and capricious in light of a letter it submitted from Christopher P. Conniff (Conniff), the Assistant United States Attorney, written at the request of petitioner. In this letter, dated May 3, 2007, Conniff casts petitioner as a victim of extortion perpetrated by DePalma. To this effect, in the letter, Conniff stated that petitioner "assisted the Government in the prosecution of [the federal case] by meeting

with us on several occasions and testifying at the DePalma trial” (Exhibit E, Christopher P. Conniff Letter, dated May 3, 2007). In addition, Conniff noted that, in the federal case, which involved the prosecution of 32 individuals, including a number of high-ranking members of the Gambino Organized Crime Family, “DePalma was convicted on all counts relating to his extortion of [petitioner’s] company” (*id.*).

However, as noted previously, BIC reviewed Raffetto’s deposition testimony, as well as the trial testimony and other public documents filed in the federal case, and rationally concluded that petitioner voluntarily initiated the contact with DePalma while aware that he was a member of an organized crime family, and petitioner continued to make cash payments until DePalma was arrested.

Whether Petitioner Violated the Terms of the February 16, 2007 Registration Order, Insofar as Petitioner Knowingly Associated with Members and Associates of Organized Crime and Convicted Racketeers

Here, citing the trial testimony, BIC determined that petitioner “associated with and continued to pay DePalma, a captain in the Gambino organized crime family, for at least one month after Raffetto signed the Registration Order” (Respondents Affirmation in Opposition, Exhibit A, BIC’s Decision to Deny Petitioner’s Application, July 31, 2009, at 13). As this violation demonstrated petitioner’s lack of honesty, integrity and character, BIC’s denial of petitioner’s application was not arbitrary and/or capricious.

Whether Petitioner Failed to Provide Truthful and Complete Information on Its Renewal Applications

As respondents assert, petitioner’s disclosure of his relationship with members of organized crime on his applications was not sufficiently forthcoming or indicative of the actual

situation at hand. For example, on both the 2007 and 2009 renewal applications, petitioner responded to the question regarding whether petitioner had any associations with members of organized crime as follows: "Mr. Raffetto has had several conversations with Mr. Gregory DePalma. Mr. Raffetto will provide whatever additional information required by the Commission" (Respondents Affirmation in Opposition, 2007 and 2009 Renewal Applications, Exhibits C and G).

However, as respondents assert, petitioner failed to disclose his associations with Dominick Pizzonia (Pizzonia), a captain in the Gambino organized crime family, and Robert Persico (Persico), an associate in the same. To that effect, in his deposition, Raffetto testified that, not only did Persico call him, upon release from prison, but Raffetto continued doing business with Persico's company, meeting with him in various locations. In addition, Raffetto testified that his relationship with Pizzonia only ended when DePalma interceded on Raffetto's behalf.

Respondents also found that petitioner failed to provide a truthful response to the question regarding whether he or any of his employees had ever been convicted of any criminal offense or been the subject of any criminal charges. To this question, petitioner responded in the negative, although, in fact, in August of 2003, Raffetto was arrested for driving while intoxicated, a misdemeanor. Raffetto thereafter pled guilty to driving while ability-impaired by alcohol.

In response, petitioner argues that he informed his counsel of the arrest and plea, and it was his counsel who failed to include the information on the applications. This argument is to no avail, however, as petitioner certified that the information included in the applications was true

and accurate.

Whether BIC Violated Petitioner's Due Process Rights

Petitioner argues that BIC denied it its due process rights by failing to provide it with copies of all documents considered by the Commission prior to making its determination. However, as noted in the case of *Sanitation and Recycling Industry, Inc. v City of New York* (107 F3d 985, 995 [2d Cir 1997]), where the grant of a license is discretionary, like the one in the case at bar, an applicant cannot claim a property right in possibly obtaining that license or registration in the future (*see also Morillo v City of New York*, 178 AD2d 7, 13 [1st Dcpt 1992]). Therefore, as petitioner has not demonstrated that it had a protected property interest in a trade waste license, it has not demonstrated that respondents deprived it of due process.

In any event, as noted in BIC's recommendation, petitioner was not only provided with the non-public documents that it relied on in reaching its determination, it also provided petitioner with a courtesy copy of Raffetto's trial testimony, a public document, and petitioner has not demonstrated that the documents provided did not satisfy procedural due process.

Accordingly, since respondents did not act arbitrarily and capriciously, or irrationally, in denying petitioner's license, we perceive no basis upon which that denial might be disturbed (*see Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 230-231; *Tocci Brothers, Inc. v Trade Waste Commission of the City of New York*, 251 AD2d at 161).

PETITIONER'S REQUEST FOR AN ORDER GRANTING A PRELIMINARY INJUNCTION TOGETHER WITH A TEMPORARY RESTRAINING ORDER ENJOINING RESPONDENTS FROM TAKING ANY ACTION TO TERMINATE, ENJOIN OR OTHERWISE INTERFERE WITH ITS DAY-TO-DAY OPERATIONS

To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*Coinmach Corporation v Alley Pond Owners Corporation*, 25 AD3d 642, 643 [2d Dept 2006]). "The purpose of a preliminary injunction is to maintain the status quo pending determination of the action" (*id.*; *Schweizer v Town of Smithtown*, 19 AD3d 682, 682 [2d Dept 2005]). The decision to grant or deny a preliminary injunction rests within the sound discretion of the Supreme Court (*Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604 [2d Dept 2004]).

Petitioner argues that remand of the renewal denial is critical and required in this case, because, if the temporary relief requested is not granted, petitioner's business, which employs 30 workers, will have to close. In addition, said business will never be able to reopen, as the closure will result in a default of its contractual obligations to transport 80-100 truck loads of aggregate per day from the tunnel project for the MTA, and petitioner will be immediately terminated from the project. Further, huge liability costs will quickly generate, and petitioner's reputation as a responsible contractor will make it difficult for it to attain future work in today's poor economic climate.

Here, although respondents do not object to the temporary relief sought in petitioner's application, in light of the aforementioned decision denying petitioner's request for reversal and remand of BIC's denial of its renewal applications for registration to operate as a trade waste

entity, plaintiff's request to maintain the status quo is denied as moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ADJUDGED that the part of the petition requesting reversal and remand of BIC's denial of petitioner's renewal applications for exemption from licensing and for registration to operate as a trade waste entity is denied and the proceeding is dismissed with costs and disbursements as taxed by the Clerk, and the motion is otherwise denied.

This Constitutes the Decision and Judgment of the Court.

DATED: April 16, 2010

ENTERED

J.S.C.

EMILY JANE GOODMAN

~~Official Court Seal~~
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).