

Matter of Broadway Collision & Towing, Inc. v Mintz
2012 NY Slip Op 30930(U)
April 4, 2012
Sup Ct, New York County
Docket Number: 111165/11
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCARPULLA
Justice

PART 19

BROADWAY COLLISION & TOWING
- v - DMC
NYC DEPT OF CONSUMERS
AFFAIRS

INDEX NO. 111165/11
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

FILED JUDGMENT
This judgment has 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).

Upon the foregoing papers, It is ordered that this motion

petition is
motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
ARR 07 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/4/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
In the Matter of the Application of
BROADWAY COLLISION & TOWING, INC.,
and DANIEL STEININGER,

Petitioners,

Index No.: 111165/11
Submission Date: 11/02/2011

For an Order and Judgment under and pursuant
to Article 78 of the CPLR and for other relief,

- against-

JONATHAN MINTZ, as Commissioner of the New
York City Department of Consumer Affairs, and
NEW YORK CITY DEPARTMENT OF
CONSUMER AFFAIRS,

DECISION AND ORDER

Respondents.

-----X
For Petitioner:
Lazzaro Law Firm, P.C.
360 Court Street
Brooklyn, NY 11231

For Respondents:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of petition:

- Order to Show Cause 1
- Verified Petition 2
- Aff in Opp 3
- Aff in Opp 4
- Mem of Law in Opp 5
- Reply Aff. 6

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).

HON. SALIANN SCARPULLA, J.:

In this special proceeding, petitioners Broadway Collision & Towing, Inc.
("Broadway") and Daniel Steininger ("Steininger") (collectively "petitioners") seek an
order pursuant to Article 78 of the CPLR reversing the September 16, 2011 determination
by respondents Jonathan Mintz, Commissioner of the New York City Department of

Consumer Affairs (“Mintz”), and the New York City Department of Consumer Affairs (“DCA”), (collectively “respondents”) revoking Broadway’s Tow Truck Company License and Second Hand Dealer General License (“licenses”), and DCA’s refusal to make Broadway eligible to participate in the Direct Accident Response Program (“DARP”), and its failure to settle the matter with petitioners, as arbitrary, capricious and unlawful.¹

As stated in the verified petition, Broadway is licensed by DCA as a towing business in the City of New York. Broadway was owned and operated by Richard Turek (“Turek”) until July 2010.² On or about July 29, 2010, Turek and Steininger entered into a contract for Turek to sell his interest in Broadway to Steininger for \$299,000.00. Pursuant to the sales contract, Steininger made an initial payment of \$100,000, and then later made monthly payments of \$8,500.00.

¹ Petitioners also sought a temporary restraining order and preliminary injunction to prevent DCA from revoking Broadway’s licenses and barring Broadway from participating in DARP.

² Broadway and Turek also initiated an article 78 proceeding against respondents, challenging the removal of Broadway from the DARP program for failure to comply with subpoenas duces tecum. *See Broadway v. Mintz*, Index No. 111052/11. As a result of the charges brought against Broadway and Turek for failure to comply with the subpoenas, a hearing was held before Administrative Law Judge Judith Gould (“Gould”) on May 10 and 17, 2011. Gould issued a recommendation that Broadway be fined \$350 and have its license suspended for fifteen (15) days. By Decision and Order dated June 10, 2011, principal Administrative Law Judge James M. Plotkin did not approve Gould’s recommendation, and instead fined Broadway \$500 and revoked Broadway’s license. Broadway pursued an administrative appeal of the decision, and obtained DCA’s agreement to stay the revocation pending the resolution of the administrative appeal.

As alleged in the verified petition, Steininger currently owns Broadway and Turek has no legal interest remaining in Broadway. However, Steininger learned that DCA threatened to revoke Broadway's tow license and to make Broadway ineligible for DARP "due to the management of the former ownership." In July 2010, DCA suspended Broadway from DARP. *See Broadway v. Mintz*, Index No. 111052/11.

As new owner, in or around August 2011, Steininger with counsel, attempted to negotiate with DCA, through DCA's Deputy General Counsel Sanford Cohen ("Cohen"), to retain Broadway's tow licenses and be reinstated in DARP. Petitioners state that tentative agreements were reached whereby Steininger would pay a \$50,000 fine to DCA and cooperate with any DCA investigation into the sale of Broadway, and in exchange DCA would reinstate Broadway's tow licenses and Broadway would be eligible to again participate in DARP after a one (1) year suspension. However, after negotiations, petitioners assert that DCA, through Cohen, refused to go forward with the agreed upon settlement. Petitioners noted that DCA settled with many other tow companies for violations involving similar allegations.

Petitioners now assert that DCA's decision was arbitrary and capricious, as it failed to follow a clear standard in deciding appropriate punishment, as evidenced by DCA's inconsistent and arbitrary decisions and settlements for the various tow companies which were alleged to have violated similar rules.

In opposition, DCA argues that Steininger withheld the fact of his ownership of Broadway for more than a year while DCA pursued its investigation into Broadway and

defended the Turek Article 78 proceeding. Cohen asserts that DCA learned of Steininger's ownership of Broadway on or about August 10, 2011, from Steininger. DCA further argues that Steininger's purchase of Broadway voided Broadway's Towing license as of the date of the purchase, and that Steininger knew the license was voided, and thus rendered Broadway ineligible to participate in DARP for at least one year. DCA asserts that Steininger kept silent regarding his ownership while "Turek hid, from this Court and the [DCA], the fact that he had sold all of his interest in Broadway"

DCA alleges that from July 29, 2010, the date of the contract of sale until August 10, 2011, Steininger "had participated in a fraud to conceal the true ownership of Broadway," and that the fraud prevented the immediate voiding of Broadway's tow license, allowed Broadway to remain in DARP until January 2011, and obtain a stay of the revocation of Broadway's license in June 2011.

However, DCA, after learning of Steininger's purchase of Broadway, offered a settlement, in the form of a fine and barring Broadway and Steininger from towing for one year. According to DCA, only when the parties were unable to reach a settlement, DCA informed Broadway, by letter dated September 2, 2011, that DCA had received information that Turek sold his interest in Broadway to Steininger³, and that as a result Broadway's licenses were void. DCA gave Broadway until September 13, 2011 to

³ DCA concedes that Steininger informed it of the sale, and cites no other source for "learning" the information.

provide evidence showing that Steininger did not purchase more than 10% of Broadway's stock.

In a letter dated September 16, 2011, DCA informed Broadway that in the absence of any evidence that Steininger did not purchase more than 10% of Broadway's stock, its licenses were revoked. The letter does not provide the legal or statutory basis for the revocation. DCA now notes that § 20-110 of the Administrative Code provides for the automatic voiding of a tow license where the tow company is sold without prior approval by the DCA, and that under Administrative Code § 20- 518(a)(4), when a company loses its tow license, it becomes ineligible for DARF.

DCA states that Broadway lost its second hand dealer license because the application filed in March 2011 falsely listed Turek as Broadway's owner, in violation of 6 RCNY §1-01.1.⁴ Moreover, DCA asserts that it did not treat Broadway differently than other companies with which it settled, but rather that the settlements offered to those companies were based on different sets of circumstances.

Lastly, DCA asserts that the settlement negotiations it had with Broadway and Turek were premised on Broadway's failure to comply with the subpoenas, while DCA believed that Turek was the sole owner of Broadway. It contrasts the settlement negotiations it had with Broadway and Steininger, whom it characterized as participating

⁴ 6 RCNY §1-01.1 provides that an applicant for a license or renewal must "provide complete and truthful responses to all the information requested on an application. . . ." In addition, an applicant may not conceal "information, make a false statement or falsify or allow to be falsified any certificate, form, signed statement, application or report required to be filed with an application for a license."

“in the fraudulent concealment of the true ownership of Broadway in administrative proceedings before DCA . . . [and] fraudulently maintaining for a year a towing license voided upon Broadways’ sale on or about July 29, 2010.” As a result, DCA maintains that any settlement with Broadway and Steininger was contingent on them being banned from towing for one year.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep’t 1999). “In short, ‘[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.’” *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken ‘without sound basis in reason and without regard to the facts.’” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

Steininger avers that Turek owned Broadway until July 2010, at which time Steininger became the owner. Pursuant to section 20-110 of the Administrative Code,

such a change in ownership is to be approved by the DCA.⁵ DCA asserts that Turek, Broadway and Steininger concealed this information from the DCA. DCA asserts that it “learned of” the change in ownership on August 10, 2011, but does not provide the source of that information other than from Steininger himself.

Administrative Code §20-504 provides that

After due notice and opportunity to be heard, the commissioner may refuse to renew any license required under this subchapter and may suspend or revoke any such license upon the occurrence of any one or more of the following conditions . . . (c) the person holding a tow truck operator's license, or the person holding a license to engage in towing . . . have made a material false statement or concealed a material fact in connection with the filing of any application pursuant to this subchapter

Emphasis added.

Similarly, pursuant to Administrative Code § 20-104(e)(1), DCA is authorized *upon notice and a hearing* to impose penalties “for the violation of . . . any of the provisions of any . . . law, rule or regulation, the enforcement of which is within the jurisdiction of the department . . . provided that such violation is committed in the course of an is related to the conduct of the business, trade or occupation which is required to be licensed” (emphasis added).

⁵ Administrative Code 20-110 provides that “[w]here any person or organization becomes the beneficial owner of ten percent or more of the stock of an organization to which a license has been granted . . . if such person or organization previously did not hold at least a ten percent interest, such license shall immediately become void unless prior written approval of the commissioner or the commissioner's designee is obtained.”

The September 16, 2011 revocation letter fails to provide Broadway and Steininger the basis for the license revocation. Further, the Administrative Code makes it clear that the commission “may” revoke a license “[a]fter due notice and opportunity to be heard.” The hearing before Gould, which resulted in the stayed revocation of Broadway’s license was only addressed to the charges relating to Broadway’s and Turek’s compliance with DCA’s subpoenas. DCA’s revocation of Broadway’s licenses in the letter dated September 16, 2011, for Steininger’s failure to produce evidence that he did not purchase 10% or more of Broadway’s stock, were never the subject of a hearing.

Because Broadway and Steininger have not had adequate notice and an opportunity for a hearing on the license revocation premised on ownership issues, the September 16, 2001 determination by the DCA is arbitrary and capricious, and lacks a rational basis. It is well settled that the “construction given statutes and regulations by the agency responsible for their administration, ‘if not irrational or unreasonable,’ should be upheld.” *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (citing *Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 N.Y.3d 597, 604 (2005)). Here, however, assuming that the revocation is premised on the Administrative Code, it is clear that the DCA’s construction of the Administrative Code is unreasonable, as it failed to afford Broadway and Steininger notice of the provisions upon which it was relying on or the opportunity for a hearing.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Broadway Collision & Towing, Inc. and Daniel Steininger to vacate the decision of respondents Jonathan Mintz, as Commissioner of the New York City Department of Consumer Affairs and the New York City Department of Consumer Affairs on September 16, 2011 is granted; and it is further

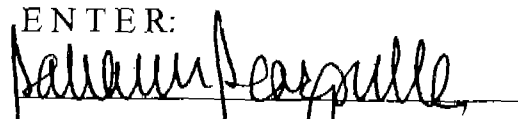
ORDERED and ADJUDGED that the matter is remanded to the New York City Department of Consumer Affairs for notice and an opportunity to be heard regarding DCA's assertion that Steininger and or/Broadway violated the Administrative Code; and it is further

ORDERED that the motion by petitioners Broadway Collision & Towing, Inc. and Daniel; Steininger for a preliminary injunction and temporary restraining order is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
April 4, 2012

ENTER:

Saliann Scarpulla, J.S.C.

UNFILED JUDGMENT
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).