

Benitez v New York City
2012 NY Slip Op 31905(U)
July 9, 2012
Sup Ct, NY County
Docket Number: 401045-2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 401045/2012
BENITEZ, VICTOR
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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).

Dated: 7/9/12


HON. EILEEN A. RAKOWER, J.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

UNFILED JUDGMENT

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VICTOR BENITEZ,

Plaintiff,

Index No.
401045-2012

**DECISION
and ORDER**

NEW YORK CITY AND THE NEW YORK
CITY BOARD OF EDUCATION,

Motion Seq. 001

Defendant.

-----X
HON. EILEEN A. RAKOWER:

Defendants New York City ("City") and The New York City Board of Education ("BOE") bring this motion for an order dismissing the complaint of Plaintiff Victor Benitez ("Plaintiff") on behalf of Volleyball for Adults, pursuant to CPLR §3211(a)(1) and (7) and §7803(3). Plaintiff does not oppose.

On September 14, 2012, Plaintiff applied for and paid \$7,104.00 for an Extended Use Permit ("Permit"). The school issued the Permit for use of the school's gymnasium for adult sports recreation activities for a six month period beginning October 14, 2011 and ending April 22, 2012. On January 29, 2012, while Plaintiff was using the school premises under its Permit, a stabbing incident occurred in the school's gymnasium among the participants of Plaintiff's adult sports recreation activities. On February 1, 2012, the school's principal, Celeste Douglas, determined that in light of the January 29, 2012 stabbing incident and resulting police involvement, it was in the school's best interest to immediately terminate the permit effective January 29, 2012.

Plaintiff alleges that BOE breached the terms and conditions of the Permit that was issued on September 14, 2011 by P.S. 57, located at 125 Stuyvesant Avenue, Brooklyn, New York. Plaintiff contends that because of the School's termination of

the Permit, he suffered damages in the amount of \$40,104.00 as follows: (1) \$7,104.00, which represents the cost of the Permit; and (2) \$33,000.00, which represents the lost income Plaintiff would have derived through his use of the school's gymnasium for a six month period pursuant to the Permit.

The Permit is subject to the provisions of Education Law §414 and Chancellor's Regulation D-180, which was issued on March 24, 2010 and governs the extended use of school buildings. Subsection M of section II titled, "Review and Approval of Permit Application," provides,

DOE may terminate any Permit at any time when it is in the best interest of the DOE. Absent an emergency, a minimum of one week notice will be provided. In the event of termination, DOE shall refund a pro-rata portion of the Permit amount."

"A claim improperly brought in a plenary action can, in the Court's discretion, be converted into an Article 78 proceeding." (*See CPLR 103(c); First Nat'l City Bank v. New York Finance Administration*, 36 NY2d 87 [1975]). "The courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its prosecution." (*See, Manshul Construction Corp v. Board of Education of the City of New York*, 154 AD2d 38 [1st Dept 1990]). As the school had the statutory authority to issue a final and binding determination, the decision is subject to review as an Article 78 proceeding. (*See, Carson v. NYC Department of Sanitation*, 271 AD2d 380 [1st Dept 2000]).

Pursuant to Article 78, the standard of review is whether the determination is made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious. (*See, CPLR 7803[3]*) Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare a determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Principal Douglas' decision to terminate Plaintiff's Permit resulted from the stabbing incident that occurred among participant of Plaintiff's adult sports recreation

[* 4]

activities. As such, the decision to terminate the Permit was rational, lawful, and neither arbitrary nor capricious, as it was taken in the best interest of the school.

Inasmuch as Plaintiff seeks damages for lost income, the provision of Regulation D-180, bars plaintiff from recovering lost income. Subsection L under section I titled, "Use of School Buildings," of Regulation D-180 provides,

School premises may not be used for commercial purposes except for flea market operations authorized pursuant to Chancellor's Regulations A-650.

The Permit incorporates by reference Chancellor's Regulation D-180, by stating,

I/We agree to observe all the rules and regulations contained in the SOPM chapter of Extended Use of School Buildings, and in this application, to conform to all applicable New York State laws and regulations governing the extended use of school buildings.

Plaintiff's complaint alleges that it complied with all the terms of the agreement, however, Plaintiff was using the Permit to derive income for a business of adult sports recreation. Therefore, Plaintiff's claim for \$33,000.00 in lost income due to the cancellation of the permit is in violation of the terms and conditions of the permit. As a result, Plaintiff cannot recover for lost income.

Wherefore, it is hereby,

ORDERED that the action is converted to an Article 78 proceeding; and it is further

ORDERED and ADJUDGED that the determination of the Board of Education was not made in violation of lawful procedure, affected by an error of law, and was not arbitrary and capricious; and it is further

ORDERED that the action is dismissed, without opposition.

This constitutes the decision and order of the court. All other relief requested

is denied.

Dated: July 9, 2012


EILEEN A. RAKOWER, J.S.C.

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