

Matter of Serra v New York City Dept. of Bldgs.

2013 NY Slip Op 30085(U)

January 16, 2013

Sup Ct, New York County

Docket Number: 103555/12

Judge: Cynthia S. Kern

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SCANNED ON 1/22/2013

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

PRESENT: _____
Justice

PART _____

Index Number : 103555/2012
SERRA, RALPH
vs
NYC DEPARTMENT OF BUILDINGS
Sequence Number : 001
ARTICLE 78

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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

FILED

JAN 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/16/13

CR, J.S.C.

1. CHECK ONE:
2. CHECK AS APPROPRIATE: MOTION IS:
3. CHECK IF APPROPRIATE:

- CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER
 SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

RALPH SERRA,

Petitioner,

Index No. 103555/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

FILED

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS,

JAN 18 2013

Respondent.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Ralph Serra ("petitioner") brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul, vacate and set aside a determination made by the New York City Department of Buildings (the "DOB") dated April 18, 2012. In its decision, the DOB denied petitioner's application for a Site Safety Manager's Certificate. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about January 19, 2010, petitioner applied to take the Site Safety Manager examination. On the application, petitioner stated that he was qualified

to receive a Site Safety Manager Certificate because he had eight years practical experience in construction supervision within the last ten years and five years supervising the construction of major buildings. On the application, petitioner also indicated that he was employed with Tishman Construction from September 1994 until January 2010 and that while he worked for Tishman Construction, he “overs[aw]/[s]upervise[d] construction activities on major buildings including Hoisting-Safety-Maintenance of jobsites and [w]orker assignments.” Additionally, petitioner stated on the application that he satisfactorily completed a 40-hour Site Safety Manager Course.

Petitioner took and passed the Site Safety Manager examination on May 27, 2010. Petitioner was thereafter required to submit a Background Investigation Questionnaire and all required documents to the DOB’s Buildings Special Investigations Unit (the “BSIU”) within 60 days of passing the examination. On or about June 20, 2010, petitioner submitted to BSIU a Background Investigation Questionnaire and the additional documentation purporting to show his qualifications for the Site Safety Manager Certificate. In the Employment Section of the application, petitioner alleged that between January 2000 and June 2010, he was employed by Tishman Construction (“Tishman”) in the capacity of a laborer and General Labor Foreman. While employed by Tishman, plaintiff alleged his duties included cleaning pedestrian walkways, installing fire extinguishers by staircases, supervised workers engaged in general housekeeping, the installation and maintenance of fall protection, hoisting and delivery operations and the dewatering of a site. Petitioner also submitted letters from his Tishman supervisors dated June and July 2010 which largely mirrored the information he provided on his application.

On July 21, 2010, petitioner met with BSIU Investigator Schultz who informed petitioner

that the duties and responsibilities he had listed on his application may not qualify him for a Site Safety Manager Certificate and that he needed to submit additional letters with more information regarding his duties. On petitioner's Verification of Employment/Experience Form dated August 20, 2010, Lap Yan, petitioner's former supervisor, stated that petitioner was a General Labor Foreman/Supervisor from May 2010 and that in that capacity, he supervised the maintenance of the jobsite, supervised flagmen and supervised the fencing of pedestrian walkways for the project. Mr. Yan added that "Applicant has worked on major bldgs. but this project does not qualify as a major bldg." Petitioner also provided the DOB with a signed and notarized letter dated August 27, 2010 from Joseph Capone, the Vice President of Tishman Construction verifying that petitioner was employed by them and providing a list of some of the buildings petitioner worked on and a generalized list of some of petitioner's duties. On January 24, 2012, petitioner, in a final attempt to establish that he had the requisite qualifications, submitted a copy of his 32-hour Scaffold Builder Certificate and his Fire Site Safety Certificate to the DOB.

By letter dated January 18, 2012, DOB informed petitioner that his application was denied due to "[i]nsufficient practical experience." The DOB explained that

While [petitioner] may have worked on major buildings for five years, he did not obtain the required eight years experience in construction supervision. According to the documentation provided the candidate did not show that he obtained the required full time experience directly supervising employees working in relevant construction trades in furtherance of building construction based on the description of his duties and responsibilities. All the letters (six) from his supervisors at Tishman state [petitioner's] title was that of a General Labor Foreman and described his daily duties as: Supervise general housekeeping; supervise the installation and maintenance of fall protection; supervise the dewatering for the project site; supervise all temporary scaffold installation; supervise hoisting and delivery operations. These duties and responsibilities would not be considered full time experience directly supervising employees working in

relevant construction trades in furtherance of building construction.

By letter dated April 3, 2012, petitioner requested that the DOB reconsider its determination as there was a “misunderstanding of the experience requirements that [petitioner] submitted.”

Petitioner added that “[i]t is also clear that [he has] more than fulfilled the requirements of having eight (8) years of supervisory experience in the last ten years in High Rise/Major Building Construction.” By letter dated April 18, 2012, the DOB denied petitioner’s request for reconsideration and reaffirmed its determination denying petitioner’s application as he “did not provide any new information as part of [his] request.” By Notice of Petition dated August 15, 2012, petitioner commenced the instant Article 78 proceeding seeking, *inter alia*, a judgment reversing, annulling and setting aside the DOB’s determination denying his application for a Site Safety Manager Certificate.

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); *see Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)(“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at

