

Matter of Diaz v New York City Dept. of Parks & Recreation

2013 NY Slip Op 30549(U)

March 20, 2013

Supreme Court, New York County

Docket Number: 103795/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 103795/2012
DIAZ, MARTIN
vs.
NYC DEPARTMENT OF PARKS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 1/15/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 30, were read on this motion to for Art. 78 Petition.

Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits _____	No(s). <u>1-14</u>
Answering Affidavits — Exhibits _____	No(s). <u>15-28</u>
Replying Affidavits _____	No(s). <u>29</u>
	Sub-reply <u>30</u>

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

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
Order & Judgment

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

Dated: 3/20/13
JMB

JBL J.S.C.
JOAN B. LOBIS

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
NEW YORK COUNTY: IAS PART 6**

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

MARTIN DIAZ,

Petitioner,

Index No. 103795/12

-against-

Decision, Order, and Judgment

NEW YORK CITY DEPARTMENT OF PARKS
AND RECREATION,

UNFILED JUDGMENT

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

Respondent
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).

-----X
JOAN B. LOBIS, J.S.C.:

Martin Diaz brings this petition under Article 78 of the New York Civil Practice Law and Rules. Petitioner seeks annulment of a final determination by the New York City Environmental Control Board. That determination reversed the administrative law judge's recommended decision and order dismissing violations issued to Petitioner by the New York City Department of Parks and Recreation (DPR or Agency). Respondent opposes the petition.¹ For the reasons set forth below, the petition is granted.

Petitioner Martin Diaz is a food vendor, who is also a veteran with service-related disabilities. He has a mobile food vendor license issued by the New York City Department of Health and sells hot dogs, pretzels, and beverages from a pushcart. On September 14, 2011, while working in Central Park near the Metropolitan Museum of Art, Diaz received a notice of violation for

¹Respondent points out that the pro se petitioner erroneously cited the DPR as respondent, while the determination before this Court was issued by the New York City Environmental Control Board (ECB). Accordingly, the ECB prepared the verification in answering the petition.

refusing to move his pushcart. The DPR officer cited Diaz under Section 1-03(c)(1) of Title 56 of the Rules of the City of New York, which prohibits a person from failing "to comply with the lawful direction or command" of an officer. The officer based the directive to move on New York General Business Law Section 35-a, which, among other things, limits the amount of space that a specialized vending licensee can take up at a given location and limits the number of specialized vending licensees in particular areas.² Petitioner continued to receive ten additional, similar violations through October 22, 2011.

Petitioner challenged these violations, and a hearing was held before an administrative law judge with the Office of Administrative Trials and Hearings on December 6, 2011. At the hearing, DPR officers appeared, representing the Agency. Mr. Diaz was represented by his employer, Danny Rossi, who is not an attorney but who is also a former member of the armed services with service-related disabilities and who has separately filed an Article 78 petition relating to Section 35-a violations. Sergeant Asha Harris of the DPR testified that she issued the violations because General Business Law Section 35-a (Section 35-a) does not specify food, and, therefore, she contended that its language applies to all vending. In support of his challenge to the violations, Diaz's representative argued that Section 35-a does not apply to food vendors.

The administrative law judge determined that Section 35-a did not apply to food vendors. Construing the phrase "hawk, peddle, vend and sell goods, wares, merchandise or solicit

²Specialized vending licensees are veterans with service-related disabilities who have been licensed by DCA to "hawk, peddle, vend and sell goods, wares or merchandise or solicit trade." Gen. Bus. Law § 35-a(1)(a).

* 4]

trade," under Section 35-a(1)(a), the administrative law judge found that language referred to general, non-food, vending. He noted that food vending licenses are issued by the New York City Department of Health and Mental Hygiene (DHMH). Nor is there anything in Section 35-a relating to the DHMH. The administrative law judge noted, in contrast, that general vending licenses are issued by the Department of Consumer Affairs (DCA). Since he concluded that General Business Law Section 35-a did not apply to food vendors, he deemed the notices of violation unlawful.

The Agency appealed the administrative law judge's determination to the New York City Environmental Control Board (Board). The Board reversed, reinstated the notices of violation and imposed a fine of \$2,750.00. In reaching its conclusion the Board found that General Business Law Section 35-a applied to food vendors. It noted that the owner of the pushcart, Elizabeth Rossi, had previously stipulated to using her cart in accordance with all of the placement restrictions set forth in Section 35-a in exchange for discontinuing an earlier Article 78 petition that she had filed pro se against the DHMH and DCA. In reversing, the Board further construed the word "goods," which appears within the phrase, "goods, wares or merchandise" under the statute, as defined in the dictionary to include food products such as baked goods. The Board noted by comparison that Article 2 of the Uniform Commercial Code has been construed to include food products such as potatoes and vinegar within the ambit of contracts for goods. Finding that Section 35-a did apply to food vendors, the Board went on to find that the statute's priority restrictions limiting the number of vendors and restrictions relating to the size of vending units were violated. Diaz now petitions to annul that determination.

[* 5]

In an Article 78 proceeding, a court reviews an administrative action to determine whether an agency's decision violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where the issue is limited to "pure statutory interpretation," a court is not required to defer to an agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2012).

The New York State legislature has long recognized the plight of war veterans in creating protective legislation. More than 100 years ago the General Business Law Section 32 first authorized veterans to have the right to hawk, peddle, vend and sell goods, wares or merchandise. Kaswan v. Aponte, 142 Misc.2d 298, 300 (Sup. Ct. N.Y. County 1989). That protection was expanded in the enactment of Section 35 of the General Business Law, which singled out disabled veterans for even greater protection. See, e.g., Kaswan v. Aponte, 160 A.D.2d 324 (1st Dep't 1990) (Section 35 entitles disabled veterans as a special class to peddle goods on city streets).

By 1998, however, the New York state legislature determined that certain restrictions on those rights were needed. It enacted General Business Law Section 35-a, which authorizes the local licensing authority in cities having a population of at least one million to create "specialized vending licenses to honorably discharged members of the armed forces of the United States who are physically disabled as a result of injuries received while in the service" to hawk, peddle, vend and sell goods, wares or merchandise. These specialized vending licenses (SVLs), in turn, are regulated by the further subsections of Section 35-a.

[* 6]

In contrast, Title 17 of the New York Administrative Code regulates health. Among other things it regulates the Department of Health and Mental Hygiene and addresses licenses and permits issued by that department. Subchapter two of Title 17 is dedicated to food vendors, and within that subchapter a food vendor is defined as one who “hawks, peddles, sells or offers food for sale at retail in any public space.” N.Y.C. Admin. Code § 17-306. Subchapter two regulates licensees’ operations, including but not limited to restrictions on the placement and locations of vending units. *Id.* § 17-315.

While the administrative tribunals in this case looked to extrinsic sources such as case law, dictionary definitions, and administrative rulings to construe Section 35-a, this Court has examined the language of Section 35-a and finds that the New York state legislature did reference food vendors. Subsection 35-a(11) provides the following:

Where the city of New York authorizes general vending, through permit, auction, lottery or any other method subsequent to the effective date of this subdivision other than temporary general vendor licenses issued in connection with street fairs on any block face, street or avenue specified in a paragraph (a) of subdivision seven or subdivision seven-a of this section, the prohibitions and restrictions in this section on vending by specialized vending licensees will not apply on such block face, street or avenue and the number of specialized vending licensees authorized per block face, street or avenue will, at a minimum, be equal to the greatest number of any single type of *other vendor including but not limited to food, general, or vendors of written matter and others similarly situated on such block face, street or avenue.*

Gen. Bus. Law § 35-a(11) (emphasis added). As Subsection 11 of Section 35-a shows, the legislature was aware of and distinguished food vendors from specialized vending licensees in crafting the statute.

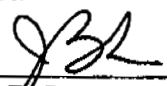
7]

Additionally the regulations governing specialized vending licensees further show that the provisions of Section 35-a have been interpreted to apply to non-food vending only. The Department of Consumer Affairs, which is charged with issuing general vendor licenses, explicitly excludes food vending from the purview of general vendor licenses. N.Y.C. Admin. Code § 20-452(b) (definition of general vendor "shall not include a food vendor" regulated by DHMH). Title Six of the Regulations of the City of New York sets forth the Department of Consumer Affairs's regulations. Chapter 2 of that title addresses licenses. Subchapter AA in turn addresses general vendors and within that subchapter at Section 17-315 appear the regulations for specialized vending licensees.

Based on this Court's review of both the statutory and regulatory schemes implicated in this case, I find that the Board's interpretation that the state legislature intended to include food vendors within the category of SVLs under Section 35-a of the New York General Business Law is erroneous. This Court finds as a matter of law that the law does not apply to food vendors, and, therefore, the Agency directives to move were unlawful. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and the proceeding is remanded for further proceedings consistent with this decision.

Dated: March 20, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
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