Matter of Take Two Outdoor Media LLC v Board of Stds. & Appeals of City of N.Y.
2013 NY Slip Op 32590(U)
October 22, 2013
Supreme Court, New York County
Docket Number: 100293/2013
Judge: Carol E. Huff
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SCANNED ON 10/23/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL E. HUFF
Justice

PART 32

Index Number : 100293/2013
TAKE TWO OUTDOOR MEDIA LLC.
vs.
BOARD OF STANDARDS AND APPEALS
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 decided in accordance with accompanying memorandum decision

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

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: OCT 22 2013

______, J.S.C.
CAROL E. HUFF

1. CHECK ONE: .... [X] 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of : Index No. 100293/13
TAKE TWO OUTDOOR MEDIA LLC,

Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against -

BOARD OF STANDARDS AND APPEALS OF THE :
CITY OF NEW YORK,

Respondent. :

--x

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the "Resolution" of respondent dated January 8, 2013, which upheld the decision of non-party New York City Department of Buildings ("DOB") rejecting petitioner's application to register an illuminated outdoor advertising sign. This court's decision in a related matter with the same caption and essentially identical facts (Index No. 100294/2013) is being issued simultaneously herewith.

The facts are not in dispute. In 1998, petitioner erected a rectangular advertising sign measuring 19.5 feet high by 48 feet wide on the roof of a six-story building located on the south side of Laight Street between Varick Street and St. John's Lane (the "Sign"). The 936-square-foot Sign is located approximately 317 feet east of the exit roadway (the "Exit Roadway") of the Holland Tunnel in Manhattan. The Sign can be seen from the roadway but is partially obstructed by "including, but not limited to, a building, several light poles and a traffic sign" (Petition at ¶

[* 4]

6).

Petitioner received approvals for the Sign from DOB when it was first raised in 1998 and again in 2005. The relevant regulations changed since 2005 such that petitioner applied to re-register the Sign. Respondent contends that, under current regulations, the Sign is not permitted "as of right" pursuant to NYC Zoning Resolution § 32-63, and that to establish legal non-conforming use status, petitioner had to establish that the sign was lawfully established originally. Respondent further contends that DOB mistakenly approved the Sign in 1998 and 2005, and that the Sign remains unlawful (not "permitted") under current regulations.

The relevant provision, whose key terms are reflected in the earlier regulations, is contained in current Zoning Resolution § 42-55, which provides:

> (a) Within 200 feet of an arterial highway . . . , signs that are within view of such arterial highway . . . shall be subject to the following provisions:
>
> (1) no permitted sign shall exceed 500 square feet of surface area; and
>
> (2) no advertising sign shall be allowed; nor shall an existing advertising sign be structurally altered, relocated or reconstructed.

The dispute centers on the terms "within view" and "approach." Petitioner contends that the Sign does not fall within the regulations at all because it is neither within view of nor an approach to an arterial highway.

The Resolution will be upheld unless it is shown that it "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974).

[* 5]

> Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute. Ultimately, however, legal interpretation is the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement. Where as in the instant case "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight."

Moran Towing & Transp. Co. v New York State Tax Commn., 72 NY2d 166, 173 (1988), quoting Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 (1980) (other citations omitted).

Within view. Chapter 49 of the Rules of the City of New York (Outdoor Signs) defines "within view" as follows: "The term 'within view' shall mean that part or all of the sign copy, sign structure, or sign location that is discernible." Title 1 RCNY § 49-01. Zoning Resolution § 42-55(c)(2) requires regulation for signs "whose message is visible" from an arterial roadway. Even though it concedes that the Sign can be seen from the Exit Roadway, petitioner argues that it is partially obscured and was never intended to be directed at motorists on that roadway, but is directed at motorists on Varick Street. It contends that the legislative intent was to regulate only signs aimed at arterial highway motorists.

However, petitioner does not support its contention with respect to legislative intent, and there is no getting past a plain reading that the Sign is "discernible" or "visible" from the Exit Roadway (and thus "within view"), even if it is partly obscured or only briefly visible.

Approach. The Zoning Resolution's Appendix H list of arterial highways includes "Holland Tunnel and Approaches." Title 1 RCNY § 49-01 defines "approach" as follows: "The term 'approach' as found within the description of arterial highways . . . shall mean that portion

of a roadway connecting the local network to a bridge or tunnel and from which there is no entry or exit to such network." Petitioner argues that the plain meaning of approach requires a "leading toward," and that by using the word the legislature intended not to include exit roadways.

However, the legislature has provided a different meaning for "approach" that defines it as the roadway "connecting the local network to a bridge or tunnel. . . ." The Exit Roadway does connect the local network to the Holland Tunnel. Petitioner's contention that the legislature's use of the word "to" in "connecting . . . to" a tunnel means it intended to exclude exit roadways is unpersuasive. It would seem that the legislature, if that were its intent, would simply state it.

Petitioner also contends that the DOB should be estopped from enforcing the current regulations because it had issued approvals before. Administrative agencies are, however, "free, like the courts, to correct a prior erroneous interpretation of the law." Charles A. Field Delivery Service, Inc. v Roberts, 66 NY2d 516, 519 (1985).

Finally, petitioner's contention that the Resolution constitutes an impermissible infringement of its commercial free speech rights is contrary to the ruling in Clear Channel Outdoor, Inc. V City of New York, 594 F3d 94 (2d Cir 2010), where the Second Circuit upheld zoning regulation in this context.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: OCT 22 2013

J.S.C.

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