

Matter of Elite Demolition Contr. Corp. v City of New York
2013 NY Slip Op 33180(U)
December 12, 2013
Sup Ct, NY County
Docket Number: 154789/2013
Judge: Anil C. Singh
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PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

DEMAND
ELITE CONTRACTING
- v - EC
CITY OF NY

INDEX NO. 154789/13
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

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

Dated: 12/12/13

ACC
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

Exemption Application of

ELITE DEMOLITION CONTRACTING
CORPORATION and FABIO BORDONE, on
behalf of Elite Demolition Contracting Corporation,
Petitioners,

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

-against-

THE CITY OF NEW YORK, SHARI C. HYMAN,
individually and as Chairman of the New York City
Business Integrity Commission and THE CITY OF
NEW YORK BUSINESS INTEGRITY
COMMISSION,

Respondents.

INDEX NUMBER 154789/2013
Motion Sequence 001
**DECISION, ORDER &
JUDGMENT**

HON. ANIL C. SINGH, J.:

Petitioners Elite Demolition Contracting Corporation (Elite) and Fabio Bordone (Bordone) move, by order to show cause, to enjoin respondents the City of New York, Shari C. Hyman, individually and as Chairman of the New York City Business Integrity Commission and the City of New York Business Integrity Commission (together as BIC) from interfering with Elite’s day-to-day business operations, and, pursuant to CPLR Article 78, to approve Elite’s registration renewal application, sometimes referred to as the exemption application. On May 21, 2013, the court granted Elite a temporary restraining order (TRO) against BIC interfering in Elite’s day-to-day business operations.

Factual Background

BIC licenses companies in New York City’s private carting industry in an effort to

combat the influence of organized crime. New York City Administrative Code §16-505 (a) controls the granting of exemption applications; “a business solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation shall be exempt from the licensing provisions of this subdivision.” Grant of an exemption is based upon BIC’s review of the exemption application, accompanied by a “listing [of] all principals of such business.” *Id.*

Elite removes construction and demolition debris from work sites. It claims to be currently involved with 69 local projects, employing between 80 and 107 employees, depending on the season. Petition, ¶ 73. Bordone states that he purchased Elite in August 2009, and claims to have turned it into a profitable enterprise since. Bordone aff, ¶ 1. BIC granted Elite a licensing exemption twice before Elite submitted a third application in October 2011. On April 19, 2013, BIC gave notice of the grounds to recommend denial of the application for four “independently sufficient reasons:”

- Vincenzo Bordone (VB), Bordone’s father, “Who the Commission Previously Found to Lack Good Character, Honesty, and Integrity, is an Undisclosed Principal of the Applicant.”
- Elite is related to four companies denied applications, due to unsatisfactory character, honesty and integrity.
- Elite provided false and misleading information to BIC.
- Elite failed to pay taxes, fines, penalties, or fees to local, state and federal agencies.

Petition, exhibit A (BIC Notice).

Elite responded to the BIC Notice, on May 5, 2013, asserting that BIC had “not even [made] an allegation that Elite operated in anything other than an exemplary manner. There is no allegation of criminal activity.” *Id.*, exhibit B. Elite proposed to be subjected to a forensic accounting and a monitor as conditions of the renewal of its license.

On May 13, 2013, BIC denied Elite's registration renewal application, and barred it from operating a trade waste business. *Id.*, exhibit C (BIC Denial). At slightly greater length, it examined and reiterated the four independently sufficient reasons previously given to recommend denial of the application.

The instant petition was filed on May 23, 2013, seeking to compel BIC to approve Elite's exemption application.

Discussion

BIC contends that Elite is no more than "a successor company or alter ego" of Metro Demolition Contracting Corp. (Metro), Circle Interior Demolition, Inc. (Circle), Phantom Demolition Corp. (Phantom) and/or World Class Demolition Corp. (World), all of whom had previously been denied licenses or renewals by BIC. BIC Denial at 4. While these waste carting companies were nominally owned by one or more of VB's other sons, Maurizio, John and Carlo Bordone, BIC charges that these companies were "owned and/or controlled by Vincenzo Bordone . . . [who] has a long history of placing companies he owns or controls in the names of others, attempting to avoid the payment of taxes, union obligations and scrutiny by the Commission." *Id.* at 7.

According to the documents provided by BIC in the instant action, Metro applied for a licensing exemption on August 30, 1996. Verified Answer, exhibit 16. It identified VB and Carlo as 50/50 owners of the company. On December 1, 1996, Metro filed an application for a license renewal, listing Carlo as 100% owner of the company and VB as president. *Id.*, exhibit 17. Subsequently, BIC denied Metro a license renewal on May 8, 2007, because Metro allegedly failed to pay taxes and administrative fines, failed to provide required information and/or documentation, and provided it false and misleading information. *Id.*, exhibit 18. This denial

cited several inconsistencies regarding Metro's ownership – specifically, an earlier application, sometime in 2004, listing VB and Carlo as owners and principals; a letter from VB, dated July 2, 2004, stating that he “is no longer a decision maker of Metro,” replaced by Carlo, John and Maurizio (*id.* at 7, n 1); and the application then under review, certified by VB, stating that he is Metro's only principal.

The document package herein also contains Circle's licensing application, dated November 21, 2005. Verified Answer, exhibit 19. It names Carlo as Circle's sole owner. On May 8, 2007, BIC denied Circle's application (*id.*, exhibit 21), in spite of a letter, sent by Circle on August 15, 2006, withdrawing its application (*id.*, exhibit 20). The denial charged that, while Carlo disclosed his co-ownership of Metro to BIC in 2004, he now claimed to have resigned from Metro in mid-2002, and to not have any current affiliation with Metro. BIC suggested that “Carlo attempted to conceal his affiliation with Metro Demolition Contracting Corp. because he believed such an affiliation would result in the denial of the instant application.” *Id.*, exhibit 21, § III (A) (2). BIC's denial of Circle's application only mentions VB in passing as the co-owner of Metro.

Phantom's initial licensing application is dated August 24, 2004. Verified Answer, exhibit 22. John and Maurizio are listed as equal owners of the company. This application was granted, and Phantom filed a renewal application on February 6, 2007. BIC made its determination on November 7, 2008, in a decision that jointly addressed World's licensing application. Verified Answer, exhibit 25. World submitted an application dated January 1, 2006, identifying Joanne DiBiase as World's sole owner. *Id.*, exhibit 23. On August 8, 2006, however, World revised its application by listing Maurizio as 100% owner, as of July 26, 2006. *Id.*, exhibit 24.

BIC's joint denial found that "the totality of the evidence clearly demonstrates that the operations and ownership of the Applicants are so intertwined with each other and with Metro and Circle that their applications are reasonably be [sic] considered together, and that they are considered in light of the Commission's previous findings that Metro and Circle lacked good character, honesty, and integrity." Verified Answer, exhibit 25. BIC found that Metro, Circle, Phantom and World, called the Bordone companies, "share[d] common offices, ownership, management and supervision." *Id.* at 9. Additionally, they shared main office, mailing and garage addresses, equipment, and personnel, and serviced customers interchangeably. BIC cited a National Labor Relations Board (NLRB) decision, of July 16, 2007, that the Bordone companies are alter egos of each other, that VB "maintain[ed] a high level of control of the operations of Phantom, notwithstanding the fact that his sons were owners of that company," and that "the evidence here reveals that the Bordone family had little use or respect for corporate formalities, and believed that it could simply form and utilize a new company, any time it had problems with unions." *Id.* at 10-11.

When Bordone testified before BIC on September 14, 2010, he said that he joined Elite in September 2009. Verified Answer, exhibit 8 (Bordone tr) at 6. However, a July 14, 2009 certification submitted to BIC by Elite listed him as vice-president since June 2008, without an ownership interest. *Id.*, exhibit 4. This title and date of hire were repeated in Elite's November 4, 2009 license renewal application, which also identified Marco Semilia (Semilia) and Donato Nicolo (Nicolo) as 50/50 owners at the time.¹ *Id.*, exhibit 6. When shown this document, Bordone maintained that it was "technically" correct, because legal papers had not yet been executed to make him the owner. Bordone tr at 36-39.

¹ Semilia is identified as Nicolo's nephew. There is no evidence that they have a family link to Bordone.

When Bordone assumed ownership of Elite, he said that he was supposed to “make the monthly payment on all the trucks, pay the union, pay the taxes, you know, not have anything go back to them [Semilia and Nicolo].” Bordone tr at 25. He testified that he used \$15,000 of his own funds and borrowed \$150,000 from his mother to put into the business. Buying into Elite with its existing registration, rather than starting a new business, had an important advantage. “I sort of already knew that this was going to become an issue so far as what my last name was and who my family is and things like that.” *Id.* at 57. “My brothers, my father, even cousins . . . [said] they’re going to see your last name and they’re not going to approve you.” *Id.* at 58.

Bordone insists that “my father does not own, manage or control Elite. I own, manage and control Elite; no one else.” Bordone aff, ¶ 7. He makes this emphatic statement because he believes that BIC’s denial of the renewal application is “founded principally upon the allegation by BIC staff that my father is an undisclosed principal of Elite.” *Id.* Bordone asserts that “VB has no criminal history, nor have any allegations of criminal behavior ever been made concerning him.” *Id.*, ¶ 8. He concedes that his father has been denied licensing three times by BIC. Bordone claims that these denials, for companies other than Elite, arose “out of judgments against VB’s company by the IRS and a labor union and that VB failed to provide requested information.” *Id.* VB’s sworn affidavit, dated May 16, 2013, avows that he “do[es] not directly or indirectly, own, manage, operate or control Elite. My son, Fabio, directly and indirectly, owns, manages, operates and controls Elite.” Petition, exhibit D, ¶ 2.

Most of BIC’s opposition to Elite’s application is rooted in Bordone’s family. His brothers separately or jointly have been in the waste hauling business for years, sometimes with VB, his father. John and Maurizio, as owners of Phantom, were arrested and pled guilty, on November 4, 2004, to operating a trade waste business without a license. Metro, of course, VB’s

enterprise, left a trail of unpaid fines and taxes. The only explicit link between VB and Elite, however, is an anecdote that BIC recounts in the BIC Notice and the BIC Denial. When a BIC investigator allegedly observed an Elite truck removing trade waste at a Manhattan job site, Bordone appeared, made a telephone call, and then VB appeared.

“Vincenzo Bordone asked the investigator if there was anything wrong with ‘his truck.’ Vincenzo Bordone affirmatively told the Commission investigator that he owned both the truck and Elite. Vincenzo Bordone also stated this is ‘our job site.’ When the investigator asked the driver of the Elite vehicle who Vincenzo Bordone is, the driver confirmed, ‘that is the owner and boss of the company.’”

BIC Denial at 9. BIC concludes that “Vincenzo Bordone is an undisclosed principal [of Elite] who controls the Applicant.” *Id.*

Bordone offers a different version of the same event. He claims that he stopped at the work site and spoke to the BIC investigator present.

“Mr. Bordone explained that he was the owner and manager of Elite and that he would take care of any issues that arose during the inspection. . . . [Bordone left, VB arrived and] the driver, who knew he was Mr. Bordone’s father, told him the truck might be getting a ticket for generating dust. Immediately, an official acting man came up to VB and asked him what he was doing there and who he was. VB provides sworn testimony that he wanted to help the driver and his son by talking the official out of writing the ticket. He said he was the owner of the truck.”

Bordone aff, ¶ 18.

Bordone’s wife is World’s office manager; he has worked at Metro and World. The four brothers own SB Realty,² the owner of Elite’s garage, according to Bordone’s testimony before BIC, on September 14, 2010. Bordone tr at 31-32. He stated that SB Realty had been owned by VB, but that he passed it on to his sons years earlier, at a time when Bordone was a child. *Id.* at 32. He also said that Elite rents office space from Metro Interior Demolition (MID), now owned by Bordone’s mother and Maurizio, after being transferred from VB. *Id.*

² BIC identifies this entity as FB Realty in its denial of the applications of World and Phantom, dated November 7, 2008. Verified Answer, exhibit 25 at 8 n 6.

Legal Standards

An article 78 proceeding may only ask “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” CPLR 7803 (3). “Judicial review of a discretionary administrative determination is limited to deciding whether the agency’s actions were arbitrary and capricious. The agency’s determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result.” *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept 1998) (citation omitted); *see also Matter of Chinese Staff & Workers’ Assn. v Burden*, 88 AD3d 425, 429 (1st Dept 2011) (“It is not the role of the court to weigh the desirability of the proposed action or to choose among alternatives, resolve disagreements among experts, or to substitute its judgment for that of the agency”), *affd* 19 NY3d 922 (2012).

Analysis

Two earlier applications from Elite were approved by BIC, before Bordone took ownership with the help of funds from his mother, at a relatively early age with modest experience. He testified that he worked summers and part-time at Metro during college, and at World for one year after graduation. Bordone tr at 7-8. After a two-year interval in the music business, he bought into Elite. *Id.* at 6-7.

Bordone testified that he had cleared up Elite’s ECB violations and New York State tax liabilities, but still owed the federal government about \$80,000. Bordone tr at 28. According to a judgment and lien search conducted by BIC on May 7, 2013, the Internal Revenue Service has docketed close to \$204,000 against Elite. BIC Denial at 10. These obligations seem to be several years old. BIC also found an outstanding ECB fine of \$2,250. *Id.* If nothing else, BIC could reasonably have found that Elite is not meeting its business and financial responsibilities in

an industry with little tolerance for misconduct.

VB was central to other BIC investigations, and his presence, disclosed or deduced, in the operation of the four other companies was sufficient to deny them licensing. Here, only a disputed anecdote connects him directly to Elite, and, ultimately, justifies to BIC the end of Elite's waste carting business. The record shows that Metro, with VB as a disclosed owner, was found, in 2007, to "avoid the payment of taxes, [and] union obligations," resulting in denial of its license renewal. Circle was found to have failed to pay a settlement with BIC for several administrative violations, and to have unsatisfied judgments with the New York State Department of Taxation and Finance and the New Jersey Building Laborers Statewide Benefits Fund. Additionally, BIC concluded that "Carlo unsuccessfully attempted to demonstrate that Metro and the Applicant [Circle] are not affiliated." Verified Answer, exhibit 21 at 10 n 6. Phantom was denied license renewal and World an initial license "because the Commission recently found that two related companies – Metro Demolition Contracting Corp., and Circle Interior Demolition Corp. – lacked good character, honesty, and integrity and denied their applications." Verified Answer, exhibit 25, § IV (A) (1). Phantom was also charged with failing to pay a \$732,631 judgment to various union benefit funds originally levied against Metro. Similarly, World was implicated in Metro's failure to pay this judgment by its admission that it had "entered into negotiations . . . to resolve all claims for union benefits, and more particularly the judgment entered herein." *Id.*, § IV (A) (3). In sum, as BIC perceived it, Metro went bad and had a toxic influence on any related enterprise.

Despite Bordone's contentions that he operates Elite independently of the influence of his father and brothers, statute ultimately favors BIC's determination in the instant action. According to New York City's Administrative Code § 16-501 (d) (1) (iii) defining a "principal" in the trade waste industry, "an individual shall be considered to hold stock in a corporation

where such stock is owned directly or indirectly by . . . the children, grandchildren and parents of such individual.” Accepting Bordone as the sole share owner of Elite, as he insists, brings VB and his checkered reputation into the ambit of Elite’s operations. Additionally, Bordone acknowledges receiving family funds to buy into the business. On that basis, BIC’s findings are not arbitrary and capricious, but rather are consistent with its past rulings about Bordone family enterprises in the waste carting business. The instant motion and the underlying petition, therefore, are denied, and the proceeding dismissed.

Accordingly, it is

ORDERED that petitioners’ Elite Demolition Contracting Corporation and Fabio Bordone, on behalf of Elite Demolition Contracting Corporation, motion, pursuant to CPLR Article 78, to compel respondents the City of New York, Shari C. Hyman, individually and as Chairman of the New York City Business Integrity Commission and the City of New York Business Integrity Commission to approve Elite’s registration renewal application is denied; and it is further

ORDERED that the temporary restraining order against respondents issued by this court on May 21, 2013, is lifted; and it is further

ADJUDGED that the Petition is denied, and the proceeding is dismissed.

DATED: December 12, 2013

ENTER:

HON. ANIL C. SINGH
SUPREME COURT JUSTICE


J.S.C.