

**Matter of City Bros., Inc. v Business Integrity
Commn.**

2013 NY Slip Op 33427(U)

December 4, 2013

Supreme Court, New York County

Docket Number: 101324/13

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: KERN
Justice

PART 55

CITY BROTHERS, INC.
-v-

INDEX NO. 101 324/13

MOTION DATE _____

BUSINESS INTEGRITY COMMISSION

MOTION SEQ. NO. 001

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.

RECEIVED
DEC 05 2013
MOTION SUPPORT OFFICE
THE SUPREME COURT-CIVIL

FILED
DEC 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/4/13

CK, J.S.C.

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

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 55

-----X

In the Matter of the Application of

CITY BROTHERS, INC.,

Petitioner,

Index No. 101324/13

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

DECISION/ORDER

-against-

BUSINESS INTEGRITY COMMISSION,

Respondent.

-----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 : _____

FILED

Papers DEC 06 2013 Numbered

Notice of Motion and Affidavits Annexed.....	NEW YORK	1
Answering Affidavits.....	COUNTY CLERKS OFFICE	2
Replying Affidavits.....		3
Exhibits.....		4

Petitioner City Brothers, Inc. brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge a determination made by respondent Business Integrity Commission ("BIC") denying petitioner's application to renew its license to operate as a trade waste business. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about February 11, 2008, petitioner filed an application (the "Application") with BIC for a license to operate a trade waste collection, removal or disposal business (the "trade waste license"). The Application required numerous

disclosures, including the names of all principals of the applicant business and the identification of any gifts valued at \$1,000.00 or more during the past three years to the applicant business or to any principal of the applicant business. The Application listed the following three principals: Mayra Alvarez ("Mayra") as President, Sonia Aguilar ("Sonia") as Vice President and Jessica Alvarez ("Jessica") as Treasurer. The Application identified no gifts to the applicant business or to the principals of the applicant business valued at \$1,000.00 or more during the last three years. Further, the Application listed an office address of 62-31 62nd Road, Middle Village, NY 11385 and a garage address of 176 Woodward Avenue, Queens, NY 11385. As required, each of the three principals executed a certification swearing to the completeness and truthfulness of the information contained in the Application. Thus, on June 18, 2008, BIC issued a Licensing Order granting permission, effective July 1, 2008, to petitioner to operate a trade waste collection, removal or disposal business.

On May 7, 2009, a BIC investigator conducted a site visit at the garage address provided by petitioner in the Application. However, the investigator found no signs that petitioner was using that address to conduct any business. On May 11, 2009, BIC investigators conducted a site visit at the office address listed by petitioner in the Application. However, upon arriving at the address, the investigators found no one present at the property. Thus, a BIC investigator telephoned Mayra, who admitted that the garage and the office addresses had changed. Based upon these two site visits and Mayra's statements, BIC issued two violations to petitioner for failing to notify BIC of material changes to its application, including the new office and garage addresses. Petitioner subsequently pled guilty to the violations and agreed to pay a fine of \$5,000.00 to satisfy the penalties.

Subsequent to the May 2009 telephone conversation with Mayra, BIC investigators met her at the “new” garage address. During the meeting, Mayra informed the investigators that Tito Alvarez (“Tito”) “is the real owner” of petitioner. Based on this information, on June 25, 2009, BIC conducted a deposition of Mayra, who appeared without counsel. At the deposition, she was told she could stop the proceedings at any time to obtain an attorney and she acknowledged that she could read, write and understand English and was told that if she did not understand any question, she should say so. The questions at the deposition were focused primarily on the role of the three named principals in the business and the nature of Tito’s involvement. At the deposition, Mayra testified that her responsibilities in the business are limited to handling paperwork and billing and that the other two named principals, Sonia and Jessica, performed nothing more than ministerial tasks in line with the duties of a secretary. With regard to Tito’s involvement in the business, Mayra testified that it was Tito’s idea to start the business; that Tito made an initial \$30,000.00 contribution to the business which matched the investment of each of the three named principals; that the main office address is located at Tito’s house; that Tito was the point person for the purchase of petitioner’s trucks; that Tito negotiates prices directly with customers; that Tito participates equally in business decisions with the three named principals; and that Tito is the only person who collects income from petitioner. Additionally, when asked whether Tito is an owner of petitioner, Mayra responded: “He is an owner but for some reason he didn’t want to put his name in the corporation....”

In June 2010, petitioner submitted to BIC an application to renew its trade waste license (the “Renewal Application”). The Renewal Application listed Mayra, Sonia and Jessica as the only principals of petitioner and listed Tito as a vehicle operator. Additionally, the three named

principals certified that the Renewal Application was complete and truthful. The Renewal Application was never approved but was held in a “pending” state and petitioner was authorized to continue operating until BIC made its final determination. In June 2012, petitioner submitted to BIC a second application to renew its trade waste license (the “Second Renewal Application”). Once again, the Second Renewal Application listed Mayra, Sonia and Jessica as the only principals of petitioner and listed Tito as a vehicle operator. Additionally, the three named principals once again certified that the Second Renewal Application was complete and truthful.

On or about August 21, 2013, BIC served petitioner with a document entitled “Notice to the Applicant of Grounds to Deny the License Renewal Application of City Brothers, Inc. to Operate as a Trade Waste Business” (the “Recommendation”). The Recommendation was based on evidence that petitioner provided false and misleading information concerning the identity of petitioner’s principals to BIC in its initial Application, Renewal Application and Second Renewal Application. On or about September 11, 2013, BIC received petitioner’s response to the Recommendation, which included affidavits from Mayra and Tito asserting that the information contained in the three applications was true and accurate because Tito is not an owner of petitioner but merely a “seed stage investor” interested in helping his family members launch a business.

On September 19, 2013, BIC issued its final determination denying petitioner’s Second Renewal Application on the ground that the evidence demonstrated that petitioner lacked good character, honesty and integrity based upon its failure on multiple occasions to provide truthful, non-misleading information to BIC. Specifically, BIC found that petitioner submitted three applications which all improperly excluded Tito as a principal of the business and explained that

the importance of truthfulness on the applications “is crucial to the Commission’s mission to ensure proper oversight of the carting industry” as “[u]ndisclosed principals and employees makes proper oversight impossible and provides inroads for the reemergence of the type of criminal activity that historically has had a stronghold on the industry.” By Order to Show Cause and Petition dated September 26, 2013, petitioner commenced the instant proceeding seeking a temporary restraining order (“TRO”) enjoining respondent from enforcing its final determination pending this court’s determination of petitioner’s Article 78 petition and challenging the final determination as arbitrary and capricious. This court granted petitioner’s application for a TRO and now addresses the merits of the Article 78 petition.

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 231 (internal citations omitted).

In the instant action, the petition must be denied as respondent’s final determination

denying petitioner's Second Renewal Application had a rational basis. Pursuant to New York City Administrative Code ("Admin. Code") § 16-508(a), an applicant for a trade waste license must submit an application to BIC that includes "(i) a list of the names and addresses of all principals of the applicant business, including any manager or other person who has policy or financial decision-making authority in the business; and (ii) a list of the names and job titles of all employees and prospective employees of the applicant business who are or will be engaged in the operation of the trade waste business; and (iii) such other information as the commission shall determine by rule will properly identify such employees and prospective employees." The BIC may "refuse to issue a license to an applicant who lacks good character, honesty, and integrity." Admin. Code § 16-509. In making said determination, the BIC may consider the failure by the "applicant to provide truthful information in connection with the application...." and whether the applicant "knowingly failed to provide the information and/or documentation required by the commission...." Admin. Code §§ 16-509(a)(i) & 16-509(b). In the instant action, BIC rationally concluded that petitioner lacked the requisite "good character, honesty and integrity" to possess a trade waste license because it failed to provide accurate information with respect to petitioner's principals on three applications as required by the Admin. Code. Specifically, BIC rationally found that petitioner failed to disclose Tito as a principal of petitioner based on Mayra's testimony that it was Tito's idea to start the business; that Tito is the point person for truck purchases for petitioner; that Tito is responsible for negotiating prices with customers; that Tito participates equally in business decisions with the three named principals; that Tito is the only person to receive financial compensation; and that Mayra's duties and those of Sonia and Jessica consist of nothing more than secretarial work. As the Admin. Code defines

the term “principal” as a person “participating directly or indirectly in the control of such business entity...”, it was rational for BIC to conclude that Tito was a principal of petitioner and therefore, had to be included on all three applications submitted by petitioner. *See Ridge Transport Systems, Inc. v. City of New York*, 95 A.D.3d 1217 (2d Dept 2012)(upholding a determination by the New York City Police Department denying a permit to a company due to its repeated failure to identify a principal of the company in its applications). Moreover, to the extent that Tito’s initial \$30,000.00 contribution to petitioner was merely a gift to the three named principals, that investment should have been disclosed on all three applications.

Petitioner’s assertion that Mayra’s testimony should be discredited on the ground that BIC investigators took advantage of her limited English proficiency and the fact that she appeared at the deposition without an attorney is without merit. At the start of the deposition, Mayra was informed of her right to legal representation and she chose to proceed without counsel. Further, during the preliminary questioning, Mayra affirmed that she was able to read, write and understand English and coherently responded to all questions asked of her in English.

Accordingly, the petition is denied and dismissed in its entirety. As this court has now resolved the instant Article 78 petition, the TRO granted by this court in September 2013 is hereby vacated. This constitutes the decision and order of the court.

Dated: 12/4/13

FILED

Enter: _____

CR
J.S.C.

DEC 06 2013

**NEW YORK
COUNTY CLERK'S OFFICE**