Red Hook Food Corp. v New York City Dept. of Consumer Affairs
2018 NY Slip Op 32709(U)
October 19, 2018
Supreme Court, New York County
Docket Number: 152797/2018
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM
Justice

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INDEX NO. 152797/2018

RED HOOK FOOD CORP.,

MOTION DATE 08/23/2018

Petitioner,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

DECISION AND ORDER

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing documents, the Petition seeking a preliminary injunction enjoining Respondents, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS and NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS ("Respondents") imposition of a $10,000 penalty and revocation of Petitioner, RED HOOK FOOD CORP.'s ("Petitioner") license to sell cigarettes and other tobacco products, and reinstating said license while this action is pending, is denied and the petition is dismissed.

BACKGROUND/CONTENTIONS

This action arises out of alleged violations of New York City Administrative Code provisions regulating the sale of tobacco products and violations of the New York State Public Health Law. On July 7, 2017, the New York City Department of Consumer Affairs ("DCA") inspectors conducted an inspection of Petitioner's place of business at 603 Clinton Street, Brooklyn, New York 11231. During the inspection, the DCA inspectors found evidence of five different violations of New York City Administrative Code provisions regulating the sale of

tobacco products, and a violation of the New York State Public Health Law, including the sale of tobacco to a person under the age of 21.

Thereafter, DCA issued Notice of Violation and Hearing No. 70043024 ("summons 3024") to Petitioner. On three prior occasions, DCA inspectors issued summonses to Petitioner for violations of tobacco regulations. After a hearing held on October 19, 2017, at which DCA provided extensive evidence of the violations it had observed at the subject premises, New York City Office of Administrative Trials and Hearings ("OATH") Hearing Officer, David Pantaleoni, issued a Decision and Order, dated October 23, 2017, sustaining all New York City Administrative Code charges, imposing a $10,000 penalty, and revoking Petitioner's tobacco license. (NYSCEF Doc. No. 6).

In this special proceeding, Petitioner alleges that Respondents arbitrarily and unlawfully found that an employee at Red Hook Food had sold a loose cigarette to an individual under the age of 21 and sold a multi-pack of cigars below the price permitted by law. Petitioner claims that the photographs presented during the hearing did not sufficiently establish that actual tobacco products were sold in this case. Petitioner alleges Hearing Officer Pantaleoni and the DCA arbitrarily and unlawfully revoked Red Hook Food's cigarette and tobacco retail license without proof that the items sold were tobacco products. (NYSCEF Doc. No. 1, ¶10). Petitioner further alleges that Hearing Officer Pantaleoni arbitrarily and unlawfully treated Red Hook Food as a recidivist, despite proof that established Red Hook Food took steps to avoid and prevent unlawful activities and presented satisfactory proof to establish mitigation. (NYSCEF Doc. No. 1, ¶¶8-10).

In opposition to the Petition, Respondents assert that Petitioner has not satisfied its burden of proof for a preliminary injunction enjoining the imposition of the $10,000 penalty.

Respondents contend that the only final agency determination that Petitioner can challenge in this proceeding is OATH's, November 29, 2017 denial of Petitioner's request for an appeal. Respondents note that the Petition does not challenge Hearing Officer Pantaleoni's Recommended Decision, recommending that the New York State Public Health Law charge be sustained and that said Recommended Decision is not ripe for review as DCA has not yet issued a Final Decision and Order adopting, rejecting, or modifying the Recommended Decision, as required by Title 48 RCNY § 6-17(c).

Respondents allege that OATH rationally and reasonably rejected Petitioner's request for an appeal, as Petitioner had not paid the penalty imposed, had not applied for a financial hardship waiver prior to, or at the time of, its appeal, nor had it adequately proven its alleged financial hardship, in accordance with Section 6-19(d) of Title 48 of the Rules of the City of New York.

Respondents contend that Petitioner has not suffered irreparable harm and that the balance of the equities clearly favors the City, since granting the preliminary injunction as proposed by the Petitioner would prevent DCA from engaging in its regular course of business. Additionally, Respondent avers that the City has a greater interest in enforcing it rules and regulations pertaining to the sale of tobacco, including prohibiting the sale of tobacco products to minors, than Petitioner does in avoiding the consequences of its actions and the payment of the penalty. (NYSCEF Doc. No. 13).

STANDARD OF REVIEW/ANALYSIS

"In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (*Matter of Peckham v Calogero,* 12 NY3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009] [internal quotation marks omitted]). "Arbitrary action is without sound basis in reason and is

generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 231,313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). Moreover, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham,* 12 NY3d at 431). When the determination was made after an evidentiary hearing, it will be upheld if the determination is "supported by substantial evidence." CPLR § 7803(4).

The only administrative decision before the court is OATH's November 29, 2017 denial of Petitioner's request for an appeal. Based on a review of the record, OATH's November 29, 2017 final determination denying Petitioner's request to appeal the October 23, 2017 Decision was not arbitrary as it was based on a rational interpretation of the applicable rules and regulations.

Pursuant to Title 48 RCNY § 6-19(d), an appeal by a respondent in a hearing before OATH will not be permitted unless, inter alia, the respondent has already paid the penalties imposed prior to the appeal or a waiver is granted due to financial hardship. See 48 RCNY § 6-19(d). Pursuant to Title 48 RCNY § 6-19(d)(1), an application for a waiver of the prior payment requirement due to financial hardship "must be made before or at the time of filing of the appeal and must be supported by evidence of financial hardship." hardship 48 RCNY § 6-19(d)(1).

Here, Petitioner neither paid the penalty nor properly applied for a financial hardship waiver. Specifically, Petitioner failed to submit evidence to demonstrate financial hardship with its financial hardship application. (NYSCEF Doc. No. 27). The record demonstrates that Petitioner did not pay the $10,000 fine imposed by the October 23, 2017 decision, nor did it establish its entitlement to a waiver due to financial hardship. Accordingly, OATH reasonably

determined that Petitioner had not satisfied the prerequisites for filing an appeal and this court "must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham,* 12 NY3d at 431).

Petitioner's contention that OATH's requirement that a business must pay its penalties in full before filing an appeal, is a violation of due process, is equally without merit. See, *Board of Health Public Review Committee v. New York City, et al.*, 2014 N.Y. Misc. LEXIS 3970, at *23-24 (Sup. Ct. N.Y. Co. (holding that OATH's requirement that fines be paid before challenges to an administrative determination may be made did not constitute a violation of due process).

To the extent Petitioner seeks to challenge the October 23, 2017 decision finding Petitioner guilty of the Administrative Code charges, imposing the $10,000 penalty, and revoking its tobacco license, that Decision is not properly before the court as Petitioner did not follow the proper appeal procedures as set forth in Title 48 RCNY §6-19(e). Even if Petitioner's challenge to Hearing Officer Pantaleoni's October 23, 2017 Decision was properly before the court, such a challenge is without merit, as the October 23, 2017 Decision and Order was entirely rational and the determination was made after an evidentiary hearing, and is "supported by substantial evidence." CPLR § 7803(4); See *Sewell v. New York,* 182 AD2d 469, 472 (1st Dept. 1992).

Petitioner's contention that DCA should have submitted scientific evidence demonstrating that the products depicted in the photographs contained tobacco, ignores the burden of proof in an OATH proceeding. Title 48 RCNY § 6-12(b) provides that a summons is *prima facie* evidence of the facts contained therein; as such, Petitioner was required to present evidence disproving the factual allegations set forth in the summons. Hearing Officer Pantaleoni noted that Petitioner "did not deny the allegations, including those of recidivism, except that of

the sale of loose cigarettes." (NYSCEF Doc. No. 25). As respects Petitioner's denial of the sale of loose cigarettes, the testimony of Inspector Negron provided Hearing Officer Pantaleoni with evidence of illegal conduct, when he testified that Petitioner's employee quoted a price of $0.50 for a loose cigarette. (NYSCEF Doc. No. 25).

Petitioner's contention that it should not have been treated as a recidivist, is equally unavailing. Pursuant to Administrative Code § 17-710, for multiple violations of Administrative Code §§ 17-703, 17-703.2, 17-704, 17-705, and 17-706(a) and (b), "any person who engages in business as a retail dealer shall be subject to the mandatory revocation of his or her cigarette license for such place of business." Administrative Code § 17-710(f) establishes that the mandatory revocation of a license can be waived if a violator can demonstrate by satisfactory proof that before the subsequent violation: the respondent implemented a clear policy for all persons working at the business to strictly comply with the relevant regulations; that it had trained all such persons to comply with that policy; and that it monitored performance of such person to ensure that they adhere to that policy. See Administrative Code § 17-710(f).

Inspector Negron presented proof at the October 19, 2017 hearing that Petitioner had been issued three summonses in the past for violations of Administrative Code §§ 17-704(b), 17-715, 17-176.1, 17-704(b), and 17-715, one of which resulted in a decision sustaining the violation and ordering a fine, which Petitioner paid; one of which resulted in a consent order between Petitioner and DCA in which, by paying a reduced fine, Petitioner admitted guilt; and one of which resulted in Petitioner's payment of a fine for the violation pursuant to a pleading letter. (NYSCEF Doc. No. 24).

Petitioner did not deny the allegations of recidivism, but rather produced a witness at the hearing who testified that "the workers involved in the previous violation were fired and that

there is a policy regarding compliance with tobacco regulations at the store," and that "workers are trained in the office in the back from 1 week to a month with monitoring by store cameras after training is completed:" (NYSCEF Doc. No. 25). Petitioner failed to provide any evidence at the hearing, however to demonstrate that it had actually established a policy and training system to ensure that all employees strictly comply with the Administrative Code, such as written materials or affidavits from any employees substantiating the existence of such a training program.

Hearing Officer Pantaleoni pointed out the incredulity of Petitioner's claim that it had established a policy and training program when he noted that as "[t]he seller in this case was himself only 17 years old, sold a cigar for $1.50 and apparently knew the prices of other tobacco products including those of 'loosies.'" (NYSCEF Doc. No. 25). Accordingly, if a challenge to the October 23, 2017 Decision and Order was properly before the court, the record demonstrates that it was reasonable and rational for Hearing Officer Pantaleoni to find that Petitioner was a recidivist, subject to mandatory revocation of its tobacco license.

Furthermore, Petitioner has not satisfied the burden of showing entitlement to a preliminary injunction as it did not demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of the equities in its favor. See *M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v. Werner*, 126 A.D.3d 859 (2d Dept. 2015).

As noted, OATH reasonably rejected Petitioner's request for an appeal because Petitioner did not comply with the applicable rules and regulations, requiring payment of the penalty or application for a financial hardship waiver prior to the appeal, none of which was done by here. Petitioner's claim that payment of the penalty will force Petitioner to go out of business does not

establish irreparable injury as economic loss does not constitute irreparable harm. *N.Y. City Off-Track Betting Corp. v. N.Y. Racing Ass'n,* 250 A.D.2d 437, 440 (1st Dep't 1998) (prospect of "lost revenues" is insufficient to grant preliminary injunction).

The record demonstrates that a balance of the equities here, favors Respondents as the City clearly has an interest in enforcing rules and regulations that prohibit the sale of tobacco products to minors and the sale of tobacco in general. *Depina v. Educ. Testing Sys*, 31 A.D.2d 744 (2d Dept. 1969); *Greenwich Towers Associates v. McLean, Grove & Co., Is,* 17 A.D.2d 733 (1st Dept. 1962).

Finally, Petitioner is not entitled to a preliminary injunction reinstating its tobacco license because, as noted, it cannot satisfy its burden showing entitlement to a preliminary injunction. Accordingly, it is

ADJUDGED that the application is denied and the petition is dismissed, without costs and disbursements to respondent.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/19/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE