SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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LAMAR ADVERTISING OF PENN, LLC,

Petitioner,

- v -

THE CITY OF NEW YORK, FIDEL DEL VALLE, and THOMAS FARIELLO,

Respondents.

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INDEX NO. 155436/2019

MOTION DATE 02/11/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30

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

ORDER

Upon the foregoing documents, it is

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

DECISION

In this article 78 proceeding, petitioner Lamar Advertising of Penn, LLC seeks a judgment reversing and annulling the February 4, 2019 Appeal Decision and Order (Decision) made by respondents The City of New York; Fidel F. Del Valle, as Commissioner and Chief Judge of the New York City Office of Administrative Trials and Hearings (OATH); and Thomas Fariello, as Acting Commissioner of the New York City Department of

Buildings (DOB) (collectively, respondents), which found petitioner liable for civil fines in the amount of $30,000. Petitioner seeks to have the subject summonses dismissed.[1] Respondents answer and oppose the petition.[2] For the reasons set forth below, the petition is denied and the proceeding is dismissed.

Background and Factual Allegations

Petitioner is a registered Outdoor Advertising Company (OAC). At all relevant times, petitioner was a tenant, and maintained outdoor signage, at a premises located at 1595 Forest Avenue, Staten Island, New York. On August 31, 2017, DOB issued three summonses to petitioner, alleging that it violated Administrative Code § 28-105.1 by displaying signs without a permit. DOB "is charged with the responsibility of enforcing the provisions of the [New York City Zoning Resolution] Zoning Resolution related to the placement of advertising signage throughout the City of New York." NYSCEF Doc. No, 13, Respondents' memorandum of law at 4. The signs are identified as "Fidelis Care," "Kars 4 Kids," and "1-800-366-7773." The

[1] Petitioner also sought attorneys' fees but later withdrew that demand.

[2] Respondents note that, "[a]s of the date of this Verified Answer, Thomas Fariello is not the Acting Commissioner of DOB. The Commissioner of DOB is Melanie E. La Rocca." NYSCEF Doc. No. 12, Answer at 1.

violations were classified as Class one, each having a penalty of $10,000.

Administrative Code § 28-105.1 states that it is "unlawful to . . . operate any sign . . . until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code".

OAC and Outdoor Advertising Business (OAB) are defined as follows:

> "OUTDOOR ADVERTISING COMPANY. A person, corporation, partnership or other business entity that as a part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business.
>
> "OUTDOOR ADVERTISING BUSINESS. The business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of New York available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on the same or a different zoning lot and whether such sign is classified as an advertising sign pursuant to section 12-10 of the zoning resolution."

Administrative Code § 28-502.1.

In pertinent part, section 12-10 of the Zoning Resolution (ZR) defines an advertising sign as one "that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot."

OAC summonses are designated as Immediately Hazardous, Class 1, "where the violation and penalty are necessary as an economic disincentive to the continuation or the repetition of the violating condition." Section 102-01 (b) (1) of Title 1 of the Rules of the City of New York (RCNY).

OATH Hearing

On May 4, 2018, an Office of Administrative Trials and Hearings (OATH) hearing was held on the matter. Hearing Officer Marc Weiner (HO Weiner) presided and the parties submitted evidence, were represented by counsel and also provided post-hearing briefs.

In essence, petitioner conceded that it did not have permits for the subject signage and that it is a registered OAC. However, petitioner argued, among other things, as the subject signs were of a non-commercial nature, it was not acting as an OAC when it provided space for those signs. As a result, petitioner believes that it should not be subjected to the heightened Class 1 penalties, which are normally applicable to OACs for these types of summonses. Petitioner requested that respondents amend the charges to Class 2 penalties. When respondents failed to do so, petitioner maintained that the "Summonses should be dismissed since class is an element of the

charge that [respondent] has the burden to prove". NYSCEF Doc. No. 18 at 1.

Petitioner cited Appeal No. 1600644, NYC v 200-202 Realty LLC, in support of its position that, as the signs were noncommercial, Class 1 violations should not be applicable and the charges should be dismissed. In that case, for a monthly fee, the property owner, who had been renting space to a church, allowed the church to put up a sign on the building wall. The sign displayed, among other things, the availability of religious services and counseling. The property owner had initially been charged with Class 1 violations for, "acting as OAC, failing to obtain an OAC registration number while engaging in the outdoor advertising business." NYSCEF Doc. No. 18 at 12. The issues on appeal to OATH's Appeals Unit (Appeals Unit, or Board), were whether the cited sign was an advertising sign as defined in ZR Section 12-10 and whether the violations were properly charged as Class 1. The Board disagreed with the "hearing officer's conclusion that the sign was an advertising sign," and dismissed the charges. It held the following, in relevant part:

> "[B]ecause the Board holds that the cited sign does not direct attention to a business, profession, commodity, service or entertainment, the Board finds that [the property owner[did not make space on signs situated on its building available to others for advertising purposes, is

> therefore not an OAC, and is not required to register as such with DOB."

Id. at 14.

Respondents' Arguments to the Hearing Officer

Respondents claimed that petitioner, a registered OAC, was properly charged with the Class 1 violations, regardless of the nature of the signs. According to respondents, as set forth above, the definitions of OAC and OAB "do not require that [respondents] identify any specific sign- only that [petitioner] is either 'holding itself out' or 'engaged in' the OAB." NYSCEF Doc. No. 19 at 3. They reiterate that, "[c]certainly, in merely obtaining status as a registered OAC . . . [petitioner] holds itself out as engaged in the OAB." Id. Respondents further argued that they had no discretion in the charges. "The Code does not authorize [respondents] to charge a registered OAC any other way." *Id.* at 4.

Hearing Officer's Determination

HO Weiner upheld the charges and penalties. Pursuant to a decision dated July 5, 2018, HO Weiner noted that "no permit was presented" for the three subject signs. He further indicated how the parties agreed that the subject signs are non-commercial in nature. Nevertheless, he concluded that the class one

penalties were appropriate. He stated the following, in relevant part, concluding that

> "[Petitioner was] acting as an OAC . . . and the class one designation is appropriate, whether the signs were commercial or of a noncommercial nature is not the issue and the signs fall under the definition of ZR-10. There is no differentiation between the words commercial and noncommercial in the definition."

NYSCEF Doc. No. 20 at 3.

HO Weiner addressed petitioner's cited case and found that it was not comparable. He stated, "Appeal 1600644, although dealt with the issue of a church and its sign, the Respondent was the owner of the cited property and not an OAC." Id.

Petitioner appealed HO Weiner's decision to the Appeals Unit. Pursuant to the Decision dated January 24, 2019 and officially mailed on February 4, 2019, the Board affirmed HO Weiner's determination and upheld the charges and monetary penalties. The Board concluded that petitioner "was an OAC with respect to the three cited signs installed without required permits; therefore the three Code § 28-105.1 violations with which it was charged were properly designated as Class 1." NYSCEF Doc. No. 25 at 4. The Board similarly found that petitioner's reliance on Appeal No. 1600644, "is not well-founded." The Board continued:

> "In that case the Board found the sign at issue, which displayed the time and place of a church service, did not

> direct attention to 'a business, profession, commodity, service, or entertainment.' Therefore, in making space on its building available for that sign, the respondent, who was not otherwise alleged to have made space for signs available, did not make space on a sign available for advertising purposes. It therefore was not engaged in the outdoor advertising business and so not an OAC as those terms are defined in Code § 28-502.1."

Id.

The Board summarized that petitioner herein is a registered OAC, whose business is to make space available on signs for advertising purposes. It concluded, in pertinent part:

> "The Board agrees; the 'economic disincentive' necessary to discourage OACs from making space on signs available without the required permits is not lessened because the cited signs were noncommercial. *See* 1 RCNY § 102-01(b)(1); DOB v Lamar Advertising of Penn LLC. Appeal No. 1800537 (July 26, 2018) (finding work-without-a-permit charges properly designated Class 1 where OAC respondent made space available for noncommercial signs)."

Id.

In Appeal No. 1800537, noted above, the same petitioner was charged with heightened penalties for operating different signs without a permit. Petitioner had also argued that, as the signs were noncommercial, it did not act as an OAC when it provided space for those messages. A different hearing officer rejected petitioner's arguments, and the Appeals Unit similarly upheld the penalties. It stated, in relevant part:

> "[Petitioner] is a self-identified registered OAC in the business of selling advertising on signs. Whether the specific signs in this case fall within the definition of

> advertising signs is not relevant where [petitioner] concedes it is an OAC, as the Class 1 designation applies based on the nature of the entity, that is OACs. As correctly noted by the hearing officer, since there is no dispute that [petitioner] is an OAC, a further analysis of whether the advertising content is commercial or not is irrelevant to the statute."

NYSCEF Doc. No. 24 at 12.

Instant Proceeding

Shortly after receiving the Board's determination, petitioner filed this article 78 proceeding. Petitioner argues that it was arbitrary and capricious for the Board to conclude that heightened Class 1 penalties should apply. According to petitioner, the record indicates that the signage is noncommercial, it "does not act as an outdoor advertising company engaged in the outdoor advertising business when it displays such signage." Petition, ¶ 18. Petitioner is seeking to have the Board's order annulled and also requests to have the summonses, rendering petitioner liable for $30,000 in penalties, dismissed.

Respondents' Opposition

According to respondents, to the extent that this proceeding presents a question as to whether the Board's determination is supported by substantial evidence, the

proceeding should be transferred for review to the Appellate Division, First Department. In any event, respondents argue that the court should uphold the determination as it was reasonable, rational and supported by substantial evidence. Respondents state that the entity conducting the business, not the type of signs themselves, renders whether an entity is an OAC. They reiterate that the Board previously considered the same arguments in Appeal No. 1800537. Nonetheless, the Board held that an OAC is subject to a Class 1 violation for operating noncommercial signage without a permit. It concluded that "since [that petitioner] is an OAC and engaged in the OAB, it is subject to a Class 1 violation." NYSCEF Doc. No. 13, memorandum of law at 13 (internal quotation marks and citation omitted). Respondents continue that, "[f]or the Appeals Unit to go against its own precedent would itself be arbitrary and capricious." *Id.*

Respondents further argue that, while petitioner requested that the court dismiss the subject summonses, this type of mandamus relief is not available.

Petitioner's Opposition

Petitioner does not agree that this proceeding warrants transfer to the Appellate Division. According to petitioner, the "underlying Petition does not present a question of

substantial evidence as specified under CPLR 7803 (4)." NYSCEF Doc. No. 30, petitioner's memorandum of law at 3. Petitioner is seeking review of the Board's interpretation of the statutory provisions and does not dispute the underlying facts of the dispute. It continues that this is a "pure question of law . . . whether the non-commercial, nonadvertising signage operated by Petitioner, a registered [OAC] is subject to heightened Class 1 penalties." Id. at 4. In addition, although this is a question of statutory interpretation, petitioner argues that respondents should not be extended deference. "This is not a case where DOB has any special competence of expertise as an administrative agency to divine the legislative intent of the City Council when it adopted the relevant provisions of the Administrative Code." Id. at 7.

Petitioner again concedes that it did not have permits for the subject signs and that it is a registered OAC. However, it believes that the Board erred in imposing heightened Class 1 penalties, as "the signage is not advertising signage but, instead, non-commercial signage appropriately the subject of Class 2 penalties." Id. at 6. Petitioner argues that here, as in, Appeal 1600644, it should not be considered an OAC. Furthermore, "the economic disincentive rationale for the imposition of a Class 1 penalty falls apart when charitable,

not-for-profit, non-commercial signs, such as those at issue here, are involved." Id. at 8. Petitioner also argues that since respondents failed to amend the charges Class 2, they should be dismissed.

DISCUSSION

Transfer to the Appellate Division is Not Necessary

As an initial matter, respondents allege that, to the extent a question of substantial evidence is raised, this proceeding should be transferred to the Appellate Division. Petitioner argues that a transfer is not warranted, as the relevant facts are not in dispute.

Under CPLR 7803 (4), an Article 78 proceeding may question "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." Pursuant to CPLR 7804 (g), when the issue of substantial evidence is raised, the court shall transfer the matter to the Appellate Division. However, "[w]here the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding." CPLR 7804 (g). see e.g. Matter of Sunrise Manor Ctr. for Nursing & Rehabilitation v Novello, 19 AD3d 426, 427 (2d Dept 2005) ("The issues framed by

the pleadings submitted to the Supreme Court involved questions of law only, and no 'substantial evidence' question (CPLR 7803 [4]), was, in fact, presented. Thus, the transfer of the proceeding to [the Appellate Division] pursuant to CPLR 7804 (g) was improper").

The decision of whether or not the proceeding must be transferred to the Appellate Division is one for this court, not for the parties. See Matter of Bonded Concrete v Town Bd. of Town of Rotterdam, 176 AD2d 1137, 1137 (3d Dept 1991). In the present situation, the court finds that the material facts used by the respondents to make its administrative determination are not in dispute. Petitioner accepts the facts as presented at the OATH hearing. "What is disputed by petitioner is respondents' interpretation of certain statutes and regulations, and their application to the facts, matters which Supreme Court rightly determined were within its province to review in the first instance." Matter of Westmount Health Facility v Bane, 195 AD2d 129, 131 (3d Dept 1994). As a result, no substantial evidence issue is raised which would require transfer to the Appellate Division. Therefore, the question before the court is "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).

CPLR 7803 (3)

In accordance with CPLR 7803 (3), the relevant inquiry Lis whether the February 4, 2019 Decision was arbitrary and capricious. "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. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Matter of Murphy v New York State Div. of Hous. & Community Renewal, 21 NY3d 649, 652 (2013) (internal quotation marks and citations omitted); *see also* CPLR 7803 (3) ("The only questions that may be raised in a proceeding under this article are . . . . 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"). Once a court finds a rational basis for the agency's determination, its review ends. Matter of Hughes v Doherty, 5 NY3d 100, 107 (2005).

Petitioner argues that the issue here is one of statutory interpretation and that respondents should not be extended deference. Nonetheless, as conceded by petitioner, OATH "is a

City agency designated in the New York City Charter and Administrative Code . . . to adjudicate . . . violations of the provisions of the [Zoning Resolution] and Administrative Code including violations by [OACs]." NYSCEF Doc. No. 1, Petition, ¶ 3.

Here, petitioner argues that respondents improperly relied on an expansive reading of the definition of an OAB to apply the heightened penalties applicable to an OAC. In addition, the noncommercial messages on petitioner's signs are, by definition, not made available for advertising purposes.

As stated in Tommy & Tiny, Inc. v Department of Consumer Affairs of the City of New York, 95 AD2d 724 (1st Dept 1983):

> "[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight." (Matter of Herzog v Joy, 74 AD2d 372, 375.) Absent an arbitrary and capricious regulation or interpretation of said regulations, courts should defer to the agency. "[I]t is not necessary that the Legislature supply administrative officials with rigid formulas in fields where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute[s] the very essence of the programs. Rather, the standards prescribed by the Legislature are to be read in light of the conditions in which they are to be applied." (*Matter of Nicholas v Kahn*, 47 NY2d 24, 31, citing *Matter of Broidrick v Lindsay, 39 NY2d 641, 646; Matter of Sullivan County Harness Racing Assn. v Glasser, 30 NY2d 269, 276-277.*)

For the reasons stated in Tommy and Tina, Inc., the court finds that it was rational for respondents to subject petitioner

to Class 1 penalties as an OAC for operating three signs without a permit.

As discussed, OACs are charged with heightened Class 1 violations of Administrative Code § 28-105.1, for unlawfully operating a sign without a permit. An OAC is, by definition, a business that engages in advertising or holds itself out as engaging in the OAB. OAB is subsequently defined as the business of making space on signs for advertising services. As noted, petitioner is a registered OAC, whose business is to make space on signs available to others for advertising purposes. Although petitioner argues that a non-commercial message is by definition, not available for advertising purposes, there is no distinction between commercial and noncommercial in the Zoning Resolution. Appeal No. 1600644, NYC v 200-202 Realty LLC, cited by petitioner is distinguishable on its facts. There is no dispute that although the signs were found to be noncommercial, the property owner was not a registered OAC, in contrast to petitioner at bar. Thus, the court finds it was rational for respondents to charge petitioner as an OAC, regardless of the nature of the signs.

Petitioner argues that, in light of the charitable and nonprofit nature of the signs, there was no economic disincentive rationale for imposing the heightened penalties.

Nevertheless, "[a] court's role in an article 78 proceeding of this nature is not to determine the merits de novo, but to decide whether the [agency's] decision was rational, based on the evidence actually before them." Matter of Luisi v Safir, 262 AD2d 47, 50 (1st Dept 1999). There is no distinction between commercial and noncommercial signs in 1 RCNY § 102-01 (b) (1), which is the provision classifying outdoor advertising violations as heightened Class 1 violations. It is undisputed that petitioner, a registered OAC, displayed signs without a permit. As a result, this court "cannot say that it was arbitrary and capricious" for respondents to conclude that this economic disincentive is not lessened due to the noncommercial nature of the signs. Id.

In addition, although addressed in a different context, when faced with the question of whether "the penalty schedule set forth in Administrative Code of the City of New York § 28-502.6 is discriminatory because it subjects OACs and non-OACS to different fines for the same conduct," the Appellate Division, First Department, has held that "[e]qual treatment of the two categories of business is not required because OACs and non-OACs are not similarly situated." OTR Media Group, Inc. v City of New York, 83 AD3d 451, 453 (1st Dept 2011). It stated that "in contrast to OACs, non-OACs do not engage in, or hold themselves

out as engaging, the outdoor advertising business." Id. (internal citation omitted). It further noted that "penalty schedule differentiates based on the type of entity that violates the regulations, rather than the content of the advertisement". Id. Finally, "increased penalties were necessary to deter violations by OACs in particular." Id.

Respondent's application for mandamus relief is unavailing for the foregoing reasons.

12/7/2020
DATE

DEBRA A. JAMES, 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