

Jakubiak v New York City Dept. of Bldgs.

2013 NY Slip Op 32516(U)

October 15, 2013

Supreme Court, New York County

Docket Number: 100744/13

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
ZBIGNIEW JAKUBIAK,

Index No. 100744/13

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

MOTION DATE _____

-against-

MOTION SEQ. No. 001

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondent.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... f

Answering Affidavits- Exhibits _____

UNFILED JUDGMENT

Replying Affidavits _____

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). NO

CROSS-MOTION: YES

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 10/15/13

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: - FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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ZBIGNIEW JAKUBIAK,

Petitioner,

For a Judgment Pursuant to Articles 30 and 78 of
the Civil Practice Law and Rules,

Index No. 100744/13

- against-

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondent.

----- X

DONNA MILLS, J.:

The petitioner Zbigniew Jakubiak (petitioner) brings this Article 78 proceeding for a judgment: (1) reversing, annulling, or otherwise setting aside respondent’s refusal to renew petitioner’s general contractor registration, on the basis that such refusal is arbitrary, capricious and irrational; or (2) alternatively, declaring petitioner to be of good moral character within the intendment of Correction Law § 752, and New York City Administrative Code § 28-401.12 (13), so as to mandate renewal of the registration; or (3) alternatively, declaring respondent to be equitably estopped from refusing to renew the registration.

Petitioner is a general contractor (Administrative Code of City of NY §§ 28-401.3, 28-401.4) licensed by, and registered with, the respondent New York City Buildings Department (respondent). On October 27, 2009, petitioner pled guilty to the class A misdemeanor of offering a false instrument in the second degree. Respondent was sentenced to a \$200.00 fine, and one

year probation with a conditional discharge. While petitioner's own application for a special rigger's license was pending, petitioner signed the name of his deceased partner on a series of forms filed with the City. The filed forms required the signature of a licensed special rigger, and petitioner's deceased partner was a licensee. Petitioner did not receive his special riggers license until November 2006.

In 2010, respondent, with full knowledge of the conviction, renewed petitioner's general contractor's license. In 2012 petitioner received a certificate of relief from disabilities. In 2013, respondent refused to renew petitioner's general contractor's license on the ground that petitioner is of "poor moral character" (Administrative Code §§ 28-401.6, 28-401.13) in that he was convicted of a criminal offense "where the underlying act arises out of the individual's professional dealings with the city" (Administrative Code § 28-401.19 [12]).

Petitioner makes the following arguments. Petitioner relied to his detriment on respondent's prior determination not to seek disciplinary action regarding the registration or prevent petitioner's previous renewal. Respondent failed to apply all eight factors required by the Correction Law. Respondent failed to provide due process prior to making its determination. Respondent failed to offer petitioner a proper hearing. Petitioner's conduct does not constitute poor moral character. Respondent is equitably estopped from failing to renew the registration.

In opposition, respondent makes the following arguments. Respondent's determination not to renew petitioner's general contractor registration was rational and reasonable and supported by the record. Petitioner's prior criminal conviction demonstrated poor moral character that adversely reflects on his fitness to hold a general contractor's registration. Petitioner's prior criminal conviction arose out of petitioner's dealings with the City of New

York. The evidence set forth in the verified petition regarding another license applicant is outside of the administrative record and should not be considered by the court. The petition fails to state a cause of action as respondent cannot be compelled to perform a discretionary act. Petitioner's due process rights were not violated by respondent when it made its determination to deny his renewal general contractor registration application. Petitioner has no right to a hearing. Respondent cannot be estopped from discharging its statutory duties, nor rectifying its administrative error.

Judicial review of a determination of a body or officer is limited to whether the 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" (CPLR 7803 [3]). It is well-settled law that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion or is contrary to law (*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 [1974]). The standard of review of an agency decision denying the privilege of a license is whether the decision is arbitrary and capricious (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]).

The determination to deny petitioner's renewal application for a general contractor's license was in violation of lawful procedure and lacked a rational basis. Respondent acted arbitrarily and capriciously in failing to extend to the petitioner the mandatory presumption of rehabilitation that attaches to a certificate of relief from disabilities (*Matter of Dellaporte v New York City Dept. of Bldgs.*, 106 AD3d 446 [1st Dept 2013]).

Correction Law § 752 which is entitled "Unfair discrimination against persons previously

convicted of one or more criminal offenses prohibited" provides:

“No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of good moral character when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual;
- or
- (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Correction Law § 750 (3) defines "Direct relationship" as

“that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.”

Under Correction Law § 753, the following eight specific factors must be considered in making the determination under Correction Law § 752:

- “(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.”

The "direct relationship" exception and the "unreasonable risk" exception to this general rule may be resorted to only upon a consideration of each of the eight factors enumerated in Correction Law § 753. "A failure to take into consideration each of these factors [would] result[] in a failure to comply with the Correction Law's mandatory directive" (*Matter of Acosta v New York City Dept. of Educ.*, 16 NY3d 309, 316 [2011]).

The denial of petitioner's renewal application is not supported by the evidence. The certificate of relief from disabilities he received creates a presumption of rehabilitation. Moreover, respondent did not consider and properly balance all the factors (*Matter of Greenberg v Wrynn*, 86 AD3d 437, 437 [1st Dept 2011]).

Petitioner applied for his own special rigger's license before, but received his license just months after, he forged his deceased partner's signature on the forms. Therefore, petitioner had the requisite practical experience and ability to sign off as a licensed rigger at the time he forged the signatures, and the public was not endangered. Furthermore, as result of all of the trouble caused, petitioner is now the least likely person to ever file a form without a proper licensee's signature.

In petitioner's favor are the public policy of this state to encourage the licensure of persons convicted of criminal offenses, the three-year lapse of time since the occurrence of his criminal offense, the relative minor nature of the offense (a misdemeanor), evidence of his rehabilitation, and the fact that the public was not endangered. Weighing against these factors, however, are petitioner's mature age (35) at the time of the offense, and the fact that petitioner's conviction arose out of petitioner's dealings with the City.

Based on the foregoing, the court concludes that respondent violated appropriate

procedures, because it did not consider all of the Correction Law factors, and that its determination was arbitrary or capricious, and lacks a rational basis.

Accordingly, it is

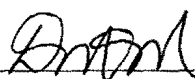
ADJUDGED that the petition is granted as follows:

The determination of respondent New York City Department of Buildings, dated April 30, 2013, denying petitioner' application to renew his general contractor's registration, is vacated and annulled, and the matter is remanded to respondent for further proceedings consistent herewith, and it is further

ADJUDGED that petitioner having an address at 3 Macchia Court, Deer Park, NY, 11729, do recover from respondent costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and that respondent have execution therefor.

Dated: 10 / 15 / 13

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

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).