Genting N.Y., LLC v. New York City Envtl. Control Bd.

Supreme Court of New York, New York County

April 30, 2019, Decided

450344/2018

Reporter
2019 N.Y. Misc. LEXIS 2267 *; 2019 NY Slip Op 31290(U) **

[**1] GENTING NEW YORK, LLC, Petitioner, - against - NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and FIRE DEPARTMENT OF NEW YORK, Respondents. INDEX NO. 450344/2018

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: [*1] PRESENT: HON. VERNA L. SAUNDERS, Justice.

Opinion by: VERNA L. SAUNDERS

Opinion

DECISION AND ORDER

Petitioner, Genting New York, LLC, commenced this Article 78 proceeding seeking an order to annul and vacate the determination of the New York City Environmental Control Board ("ECB") which sustained the Office of Administrative Trials and Hearings ("OATH") Hearing Officer's December 27, 2016 decision and order regarding a violation of the New York City Fire Code at 110-00 Rockaway Boulevard, Jamaica, New York 11420 ("subject premises").

Pursuant to a Memorandum of Understanding ("MOU"), annexed as *Petitioner's Exhibit F*, petitioner Genting New York, LLC subleases the subject premises from The New York Racing Association, Inc. ("NYRA"). NYRA has a ground lease with the State of New York. The petitioner Genting New York, LLC operates Resorts World Casino on the subject premises and has a video lottery license with the New York State Division of Lottery pursuant to the MOU. Resorts World Casino is a multi-faceted operation with retail stores, a food court, bars, entertainment shows, and event spaces. It serves ten million patrons annually.

On September 12, 2016 at 5:00 P.M. and September 19, 2016 at 11:46 A.M., the New York City Fire Department [*2] ("FDNY") responded to fire alarms at the subject premises. On September 26, 2016, the FDNY issued petitioner a summons (NOV 012057637H) for its failure to prevent unnecessary and/or unwarranted alarms in violation of the Rules of the City of New York. *3 RCNY 907-01(c)* states that it is unlawful to transmit two (2) or more unnecessary or unwarranted alarms in any three-month period.

On November 14, 2016, OATH conducted a hearing regarding the summons and impending civil penalties imposed. At the hearing, petitioner argued that FDNY had no jurisdiction to issue summonses to enforce New York City's fire code as against Resort World as it is located on New York state property. On December 26, 2016, OATH Hearing Officer Therese Tomlinson rendered a decision finding petitioner in violation of 3 RCNY 907-01 and ordered a mitigated penalty as petitioner conducted a timely correction of the defect causing the [**2] unwarranted alarms. Specifically, the hearing officer determined that petitioner's jurisdiction argument was not supported by statutory authority citing OATH Appeal #160414, *NYC v Genting NY L.L.C.*, provided by FDNY during the hearing. Therein, it was held that the FDNY are first responders and imposition of FDNY [*3] rules and regulations ensure the safety of those responders and the public-at-large.

On January 25, 2017, petitioner filed an appeal with the ECB of the Hearing Officer's December 26, 2016 decision. Thereafter on April 26, 2017, the ECB affirmed the OATH decision finding that it was supported by law and by a preponderance of evidence. Specifically, the ECB cited to multiple prior decisions involving the petitioner and "substantially identical records" which held that the FDNY has jurisdiction over State-owned premises. Additionally, the ECB determined that the cost and danger to public safety presented by unnecessary and/or unwarranted alarms is not lessened when FDNY responds to a State-owned property.

Now, petitioner seeks judicial review of the ECB's decision affirming Hearing Officer Tomlinson's December 26, 2016 decision. Petitioner argues that the ECB decision upholding the OATH determination was "arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitution of the United States and the State of New York, statutes, laws, ordinances, rules and regulations..." In support of its argument, petitioner asserts that as an initial matter, the FDNY failed [*4] to oppose its appeal, and further, that there was no independent statutory basis for OATH's decision. Specifically, petitioner claims that it provided Hearing Officer Tomlinson with a July 9, 2013 Memorandum from the New York State Division of Homeland Security and Emergency Services concerning fire and building code citations and permits issued by New York City to state agencies with custody of state-owned buildings in the City of New York; the deed for the subject premises which established The People of the State of New York as the owner; an affidavit from Bryan D. Stevens, manager of the New York State Division of Homeland Security and Emergency Services Office of Fire Prevention and Control ("OFPC"); and the Memorandum of Understanding between The New York Racing Association, Inc., (which has a ground lease for the subject premises with the State of New York), and the petitioner, its sublessor.

Respondents oppose the petition arguing that the Hearing Officer's decision was reasonable, rational, and not contrary to law and thus, the ECB's decision to sustain it was reasonable, rationale, and not contrary to law. Respondents further argue that there is no evidence or statutory authority [*5] offered tending to establish that the FDNY lacked jurisdiction to issue the summons. Additionally, respondents contend that despite assertions to the contrary, petitioner is not an agent of the State; that there is a legitimate public interest in allowing for the continued enforcement of the City fire code upon the subject premises; and finally, that the proceeding should be transferred to the Appellate Division, First Department for a substantial evidence review.

In its reply, petitioner avows it is not raising a question of substantial evidence and as such, this Court is the appropriate venue.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it [**3] was arbitrary or capricious, or whether it was affected by an error of law. (See *CPLR § 7803(3)]; Matter of Pell v Board of Educ.*, 34 NY2d 222, 230, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]; *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758, 573 N.E.2d 562, 570 N.Y.S.2d 474 [1991]). In a special proceeding pursuant to 22 NYCRR §202.57, the scope of judicial review is limited to whether the Division's determination was arbitrary, capricious, or lacking a rational basis. (*McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 671 N.Y.S.2d 461 [1st Dept 1998]).

"[A]larms, which trigger an emergency response, are costly and endanger the public safety." See *3 RCNY § 907-01(b)*. "In any premises having a fire alarm system or a smoke detector [*6] that automatically transmits signals to the Department or a central station, the owner (including any lessee) of the premises shall be responsible for preventing the transmission of unnecessary or unwarranted alarms and shall be liable for any violations of this section." *3 RCNY § 907-01 (c)(1)*. "It shall be unlawful to transmit two (2) or more unnecessary or unwarranted alarms in any three-month period." *3 RCNY § 907-01 (c)(2)*.

As an initial matter, this court finds that based upon petitioner's assertions and the arguments advanced, this petition is properly before this Court as the question presented is whether the ECB's decision to uphold the determination of OATH Hearing Officer Tomlinson was arbitrary and capricious.

Upon review of the papers submitted, this Court finds that the ECB's decision to affirm the December 26, 2016 OATH determination was rational and reasonable. It is undisputed that there were unwarranted alarms at the subject premises on September 12, 2016 at 5:00 P.M. and September 19, 2016 at 11:46 A.M. In fact, during the OATH hearing, the petitioner submitted two incident reports which documented the occurrences and further indicated that the cause of the false alarms had since been remedied. (See OATH hearing [*7] transcript and Genting's OATH hearing exhibits, *Respondent's Exhibit C and D, respectively*.) The Rules pertaining to unwarranted and/or unnecessary alarms are straightforward. Pursuant to 3 RCNY 907-01, petitioner was not issued a summons until after the second unwarranted alarm. Moreover, the ECB's decision to sustain the December 26, 2016 decision was not arbitrary and capricious as Hearing Officer Tomlinson's decision was based upon petitioner's undisputed violation of the law, public policy concerns, and precedent within the administrative forum. In reaching a

decision, the hearing officer relied upon the allegations made by the FDNY inspector and the appeal decision offered by FDNY which pointed out legitimate and substantial public safety concerns, as well as, the lack of any specific statutory authority which would exempt the petitioner and/or the subject premises from the regulations.

Ultimately, as the respondents indicate, there are no State firefighters and the cost and danger to public safety presented by unnecessary and/or unwarranted alarms is not lessened when the FDNY responds to a State-owned property. Here, the danger is even more significant when a casino filled with thousands [*8] of people react to fire alarms and approaching firetrucks. If the court was persuaded by petitioner's argument, the City would be required to respond to all alarms, whether false or unwarranted, to ensure the safety of the public. But, in the event of a false alarm, divest the City of jurisdiction and shield the petitioner from penalty despite the impact on public safety and the consumption of City time, money, and resources. In the case of a fire alarm, the first responder to any property within the City of New York, whether state or [**4] city-owned, is the FDNY. The Rules were created to protect those responders and the public-at large, including the ten million patrons who visit Resorts World Casino annually, and must be enforced. Thus, the Environmental Control Board's decision was rational and reasonable and not arbitrary or capricious. Accordingly, it is hereby

ORDERED and ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondent. Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

April 30, 2019

/s/ Verna L. Saunders

HON. VERNA L. SAUNDERS, JSC