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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of

JT TAI & CO. INC.,
Petitioner,

-against-

For a Judgement Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

THE CITY OF NEW YORK; ROBERTO VELEZ, as Chief Administrative Law Judge of the NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; SUZANNE BEDDOE, as Executive Director of the NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; and ROBERT LIMANDRI, as Commissioner of the NEW YORK CITY DEPARTMENT OF BUILDINGS,
Respondents.

INDEX NO. 117410/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion by petitioner(s) for a an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the appeals board of the New York City Environmental Control Board (ECB).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

In this Article 78 proceeding, petitioner, JT Tai & Co. Inc. (JT Tai), seeks an order: (1) reversing, annulling and setting aside the August 13, 2009 decision of the appeals board of

New York City Environmental Control Board (ECB) (the Board); (2) affirming the Administrative Law Judge's (ALJ) recommended decision and order in its entirety; and, (3) thus, holding that the ECB is precluded from issuing penalties exceeding $25,000.00 under Administrative Code § 26-262.

For the reasons set forth below, the petition is denied.

BACKGROUND

Petitioner is a property owner that has leased space on its premises located at 591 Third Avenue, New York, New York (the Premises) to outdoor advertising companies to display advertising signs. Beginning in 1993, petitioner entered into a five-year lease with Allied Outdoor Advertising, Inc. (Allied), providing for Allied's placement of outdoor advertising signs on the Premises. Thereafter, the lease was extended by Allied's successor-in-interest, Eller Media Company for seven years, and then to non-party Clear Channel Outdoor Inc. (Clear Channel), as successor-in-interest, for an additional seven years.

On March 19, 2007, a DOB inspector issued four notices of violation (NOV) to petitioner for the display of advertising signs. The violations included, among other things, erecting signs that exceeded the maximum space allowable.

On February 7, 2008, a hearing was held before ALJ Laura Fieber, wherein it was determined that while the outdoor advertising signs were installed on the Premises in violation of the zoning rules and administrative code, petitioner was not an outdoor advertising company (OAC) as defined under Administrative Code § 26-259, and therefore, not subject to the fines imposed by Administrative Code § 26-262. ALJ Fieber declined to issue the higher monetary penalties associated with an OAC. Specifically, the ALJ held "I ... reject [the DOB's] assertion that the mere entering into a lease and collecting rent from, an OAC, in and of itself is sufficient to establish that a landlord is an OAC, particular when, at the time of violation it has a lease with a registered OAC." The ALJ issued civil penalties applicable to a non-OAC.

The DOB appealed, arguing that the ALJ incorrectly ruled that JT Tai was not an OAC as defined under the Administrative Code §§ 26-259 (b) and (c).[1] On August 18, 2009, the Board reversed the decision holding that JT Tai was an OAC engaged in the outdoor advertising business sufficient to trigger the higher civil penalties set forth under the Administrative Code § 26-262. Specifically, § 26-259 (b) of the Administrative Code provides that an outdoor advertising company is "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." Under subsection (c) of § 26-259, outdoor advertising business "means the business of selling, leasing, marketing, managing or otherwise directly or indirectly making space on signs situated on buildings and premises within the City of New York available to others for advertising purposes."

Based on those definitions, the Board, on August 13, 2009, held that "an OAC is an entity that as part of its regular conduct of business, directly or indirectly makes space on signs available to others for advertising." The Board reasoned, among other things, that "the current statutory language of 'directly and indirectly' making signs available to others is sufficiently broad to include the rental of space by a property owner to a registered OAC" (see Notice of Petition, Exh. I). Further, the Board gave deference to the DOB's interpretation of Section 49-01, of Title 1 of the Rules of the City of New York (Rule 49-01),[2] "as exempting owners who merely lease space to a registered OAC only from registration requirements" holding that such interpretation "is consistent with the purpose of the statute" (*id.*). As such, it imposed the

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[1] Administrative Code §§ 26-259 and 26-262, as adopted by Local Laws 14 and 31, were repealed by Local Law 33 of 2007, and are currently set forth in the Plumbing Code 28-502.1 - Definitions, and 28-502.6 - Criminal and Civil Penalties. For purposes of this motion, the court will use the former sections of the Code as they were in effect at all relevant times herein.

[2] Rule 49-01 provides that for purposes of that rule, owners and managers involved strictly to the extent of leasing space to a registered OAC will not be considered in the outdoor advertising business.

greater civil penalties of $10,000 for each of the four offenses.

On December 10, 2009, petitioner filed the instant petition seeking annulment of the Board's decision and order.

DISCUSSION

The standard of review in this Article 78 proceeding is whether the DHCR's "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]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assocs. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

While deference is generally given to an administrative agency's interpretation of the statutes it enforces, when the question is one of pure statutory reading and analysis, as here, there is little basis to rely on the expertise of that agency (*see Matter of Belmonte v Snashall*, 2 NY3d 560 [2004]). Therefore, we must first look to the plain reading of the statute to determine its intent (*Matter of M.B. v Staten Island Dev. Disabilities Svcs. Office*, 6 NY3d 437 [2006]).

As a preliminary matter, respondents argue that the matter must be transferred to the Appellate Division, because it involves a question of substantial evidence. A petitioner can either challenge the decision as not being supported by substantial evidence, or that it is not rationally based, and therefore is arbitrary and capricious (*Matter of Mason v Department of Bldgs. of City of N.Y.*, 309 AD2d 94 [1st Dept 2003]). Under CPLR 7804 (g), a case presenting a question of substantial evidence must be transferred to the Appellate Division (*id.*; Matter of *Padilla v Levy*, 300 AD2d 62 [1st Dept 2002]). It is not the parties' characterization of the issues that determines whether a proceeding must be transferred *(see Matter of Robinson v Finkel*, 194 Misc 2d 55 [Sup Ct NY County 2002], *aff'd* 308 AD2d 355 [1st Dept 2003] [internal citation and quotation marks omitted]).

Here, petitioner concedes that there is no dispute with respect to the facts, and questions only the Board's interpretation of the Administrative Code. As the question presented concerns the interpretation of law, transfer to the Appellate Division is not warranted (*see Matter of Rosenkrantz v McMickens*, 131 AD2d 389, 390 [1st Dept 1987]; *Matter of Robinson, 194 Misc 2d at 64, citing Matter of Duboff Elec. v Goldin, Inc.*, 95 AD2d 666 [1st Dept 1983]).

At issue herein is whether the Board acted arbitrarily and capriciously in determining that petitioner was an OAC, engaging in the outdoor advertising business by leasing space to a registered OAC. Petitioner argues that the Board applied an erroneous standard in holding that it was an OAC because the statutes were not intended to include property owners who lease space to OACs.

Section 26-259 (b), as adopted under Local Law 14, formerly provided that an OAC "shall not include the owner or manager of a building or premises who markets space on such building or premises directly to advertisers." In 2005, Local Law 31 was enacted, which enhanced enforcement procedures relating to outdoor advertising signs, and deleted the aforementioned language from section 26-259 (b) as quoted above.

Petitioner argues that the deletion of the last sentence was not intended to expand the class of liable parties to all property owners leasing space, but was intended to eliminate a narrow exception applied to those property owners who were directly leasing/marketing space to advertisers. The court is not inclined to agree. Looking at the plain language of the statutes, an OAC is defined as a business entity, that, as part of its regular business, among other things, engaged in the outdoor advertising business (Admin. Code § 26-259 [b]). An entity is engaged in the outdoor advertising business when it "leas[es] ... or otherwise directly or indirectly mak[es] space or signs situated on buildings and premises within the city of New York available to others for advertising purposes" (Admin. Code § 26-259 [c]). If the City Council intended to exclude property owners who lease advertising space to registered OACs, it would have expressly provided so.

To the extent that petitioner argues that the Board has taken conflicting positions as to whether property owners who lease advertising space to an OAC, citing *NYC v Edison Second Avenue. Ms. Prop. LLC* , ECB Appeal No. 46894 (2009) and *NYC v Tribeca Tower, Inc., ECB* Appeal No. 46583 (2009), the court finds otherwise. As respondents point out, while the two cases were decided on the same day, the Board in *Edison* held that Local Law applies "only to OACS and do[es] not extent to or include premises owners", but found so because the violations therein predated the enactment of Local Law 31. In *Tribeca Tower*, the violations occurred in 2007, after the enactment of Local Law 31. Therefore, it cannot be said that there is any inconsistency in the findings.

Moreover, while petitioner asserts that the Rule § 49-01 suggests that property owners shall not be considered engaging in outdoor advertising business where they lease space to an independent registered OAC, this is only applicable to filing a single registration of those signs, and is inapplicable herein. The Board, holding in favor of respondents, found its analysis consistent with the purpose of the statute. There is nothing irrational in so finding.

As such, the court holds that the Board's decision was not arbitrary and capricious and must be upheld.

In light of the foregoing, the remaining arguments need not be addressed.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs on disbursements to respondents.

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 8-25-10

Enter:

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**