

**Runway Towing Corp. Inc. v New York City Dept. of
Consumer & Worker Protection**

2021 NY Slip Op 34112(U)

August 27, 2021

Supreme Court, New York County

Docket Number: Index No.: 152746/2021

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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INDEX NO. 152746/2021

RUNWAY TOWING CORP. INC.,

MOTION DATE 08/20/2021

Petitioner,

MOTION SEQ. NO. 001

For a Judgment pursuant to Article 78 of the Civil Practice
Laws & Rules,

- v -

DECISION + ORDER ON
MOTION

THE NEW YORK CITY DEPARTMENT OF CONSUMER
AND WORKER PROTECTION,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 21, 22,
23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50,
51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64

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

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is granted as follows:

- (1) The final determination of respondent New York City
Department of Consumer and Worker Protection, dated
January 25, 2021, denying the application of petitioner
to renew its tow truck license (license number 1196757-
DCA) dated April 17, 2020 is annulled only to the extent
of vacating the denial of such application; and
(2) The herein proceeding is remanded to respondent for, in
accordance with this decision, a determination of
penalties proportionate to the violations of New York

City Administrative Code (NYC Code) §§ 20-518(b)(4), 20-519(c)(1)(3) and 20-509.1 by which petitioner charged tow fees more than the amounts permitted thereunder and failed to maintain and/or produce each and every document responsive to a subpoena in violation of NYC Code § 20-516 and 6 RCNY § 2-378, as found by respondent.

DECISION

Petitioner contends that respondent's denial of the application to renew its tow truck license violated its rights to due process, as petitioner was entitled to an evidentiary hearing at which it could testify and call witnesses in its defense, and respondent would be required to establish the rationale for such denial by substantial evidence.

To the contrary, respondent asserts that, while petitioner would have been entitled to such an evidentiary hearing on a determination whether to revoke or suspend an existing license, petitioner's application to renew the expiring license required only a hearing in which petitioner, in response to the notice of intent to deny renewal, was permitted to submit records and other documentary evidence for respondent's consideration. According to respondent, having afforded petitioner such due notice and an opportunity to be heard, respondent made its determination that denied petitioner's renewal application in a manner that complied with due process standards. Respondent

asserts that such denial was rational, and neither arbitrary, nor capricious, nor otherwise unlawful.

This court agrees with respondent. As stated in Testwell, Inc v New York City Dept of Bldgs, (80 AD3d 266, 273-274 [1st Dept 2010] [bolding added]),

"Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood . . . In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment' (*Bell v Burson*, 402 US 535, 539 [1971]; *Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], cert denied 523 US 1074 [1998]). Accordingly, due process may prevent the revocation or suspension of a license without notice and a hearing. However, Testwell's license was not revoked or suspended. Rather, the license expired on June 17, 2009, after which the Department issued its July 8, 2009 letter setting forth the interim condition for Testwell's continued operations pending renewal. **Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing** (see *Daxor Corp.*, 90 NY2d at 97-98 [finding a clinical laboratory had no property right in an initial or renewed license even though the lab had operated for years under a city license and provisional state licenses]; *Matter of M.S.B.A. Corp. v Markowitz*, 23 AD3d 390 [2005]; *Matter of Active Appliance Corp. v County of Suffolk*, 251 AD2d 659 [1998])."

In addition to finding appropriate due process was afforded petitioner, this court finds rational and neither arbitrary nor capricious, respondent's finding that petitioner violated the following local laws and traffic rules and regulations that set forth maximum tow charges, including prohibition of credit card surcharges, and electronic record keeping requirements:

NYC Code § 20-518(b)(4) (no DARP charge exceeding one

hundred and twenty-five dollars);

NYC Code § 20-509.1 (no Arterial Tow charge exceeding one hundred twenty-five dollars);

NYC Code § 20-519(c)(1) (no ROTOW tow charges exceeding one hundred twenty-five dollars or one hundred-forty dollars, with respect to vehicles weighing less and more than, respectively, ten thousand pounds);

Rules of the City of New York § 4-07(i)(3)(i) (\$25 fee for gasoline, replacement of tire, battery charge only to enable vehicle to continue under its own power, but not in addition to tow charges);

Rules of the City of New York § 2-378(g)(5) (format and preservation of electronic records).

In its petition (NYSCEF Doc No 1, ¶ 23), petitioner states in pertinent part:

"It is arbitrary and capricious for the suspension or revocation of a license for de minimis or non-willful violations and or where a monetary fine or penalty can achieve the goal of ensuring compliance with applicable laws, statutes, rules and regulations."

Although the foregoing assertions of the petition mischaracterizes respondent's decision as a "suspension or revocation of a license", rather than the denial of license renewal, in the opinion of this court, to the extent that such petition alleges "de minimus or non-willful violations and or where a monetary fine or penalty can achieve the goal of ensuring compliance with applicable laws, statutes, rules and regulations", it brings up for review the question whether respondent's "denial of license renewal, was too harsh, indeed so disproportionate to these offenses as to be

'shocking' to one's sense of fairness" (Taverna El Pulpo, Inc v New York State Liquor Authority, 103 AD2d 701, 703 [1st Dept 1984]).

The court is persuaded that respondent's assessment of the ultimate penalty, the denial of renewal is too harsh in this instance.

The opinion in Apple Towing Co, Inc v NYC DCWP (Supreme Ct Kings County Index No. 518787/2020), which respondent cites in opposition to the petition, is instructive. Underlying the denial of license renewal to petitioner tow truck company in that special proceeding was petitioner tow truck company's initial refusal to produce any documents in response to the subpoena. Ultimately, such petitioner was found to have overcharged its customers on over 400 occasions.

In contrast, by paragraph 19 of its Answer (NYSCEF Document No. 26), respondent admits that "Petitioner provided DCA with responses to DCWP's January 17, 2020 subpoena duces tecum". By such admission, respondent answers paragraph 19 of the Petition (NYSCEF Doc No 1) that "petitioner produced upward of 50,000 records." Further, the 237 tow overcharges in a two-year period assessed by petitioner, though by no means de minimus, are only slightly more than half of the 400 instances of overcharges over a two-year period that were the basis of the renewal denial in Apple Towing, supra.

Given its operation as a licensed tow trucking company for

seventeen years (License Number 1196757-DCA), now employing thirty-five vehicles, thirty drivers and nine managerial staff, fourteen years of which petitioner operated free of any adjudicated violations, the court finds the punishment of non-renewal shockingly grave in its consequences. See Ronall Restaurant, Inc v New York State Liquor Authority, 45 AD2d 682 (1st Dept 1974) (disapproval of renewal excessive where, for twenty-nine years, licensee conducted business free of any untoward incident or misconduct by owners).

Examples of lesser penalties that respondent has the discretion to impose are probation during which on a monthly basis, petitioner would submit invoices/receipts for all tows, and verification of maintenance of electronic records, for review by respondent; revision by petitioner of its invoices to provide notice to customers of the maximum legal tow charges and prohibited charges, which revisions would require review and approval by respondent; and restitution/refund to customers of overcharge amounts, plus a monetary fine for each violation to be paid by petitioner to respondent.

Debra A. James

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8/27/2021

DATE

DEBRA JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: