

Business Integrity Comm'n v. D&D Salvage Corp.

OATH Index No. 1913/14, mem. dec. (May 2, 2014)

Violation No. TWC-208989

Respondent's motions to dismiss the notice of violation and to depose a witness are denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
BUSINESS INTEGRITY COMMISSION
Petitioner
- against -
D&D SALVAGE CORP.
Respondent

MEMORANDUM DECISION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the New York City Business Integrity Commission ("BIC" or "Commission"), brought this proceeding pursuant to section 16-518(a) of the New York City Administrative Code, and rule 1-03 of title 17 of the Rules of the City of New York, after it issued Violation Number TWC-208989 against respondent, D&D Salvage Corp. Petitioner alleges that on January 2, 2014, respondent collected trade waste without a license issued by the Commission, in violation of section 16-505(a) of the Administrative Code.

On April 8, 2014, respondent filed a motion to dismiss the Notice of Violation ("NOV") on the grounds that it fails to state a factual basis to support the allegation that respondent violated section 16-505(a) of the Administrative Code. On April 15, 2014, respondent filed a second motion for leave to depose the BIC investigator who issued the NOV.

For the reasons set forth below, respondent's motions are denied.

ANALYSIS

Motion to Dismiss

Petitioner alleges respondent collected trade waste in the form of scrap metal without a license. According to the NOV, on January 2, 2014, at approximately 2:55 p.m., a BIC

investigator observed a black 2009 Freightliner truck with NY license plates being used to collect and transport scrap metal materials, including wiring and cables from 100 Church Street in New York City.

Respondent moved to dismiss the NOV on the grounds that it fails to state a factual basis sufficient to support the allegation that respondent engaged in unlicensed activity. In support of the motion, respondent proffers two arguments. First, scrap metal is not trade waste as defined in section 16-501(f) of the Administrative Code, because the scrap metal was sold by its owner and was not waste, useless, worthless, disposed of, or discarded. Second, respondent argues that the scrap metal was not collected from a commercial establishment.

In its opposition, petitioner contends that the motion to dismiss should be denied because the scrap metal respondent collected from the premises was trade waste that was generated as construction and demolition debris from on-going construction work being done at the premises. Moreover, according to petitioner, an agency's interpretation and construction of its own regulations and the legislation under which it functions are to be accorded special deference so long as the interpretation is not irrational or unreasonable. Finally, petitioner maintains that contrary to respondent's assertion in its moving papers, the evidence will establish that the scrap metal was collected from a commercial premise.

Pretrial motions to dismiss are generally disfavored in OATH practice and have been granted only in the clearest cases of a petitioner's failure to state a viable claim. *Dep't of Correction v. LaSonde*, OATH Index No. 2526/11, mem. dec. at 2 (July 8, 2011); *see also Comm'n on Human Rights ex rel. Hsu v. HSBC Bank*, OATH Index No. 522/09, mem. dec. at 4 (Jan. 22, 2010) (motion to dismiss complaint on basis that respondent was improper party denied); 48 RCNY § 1-50 (Lexis 2013) ("In cases referred to OATH for disposition by report and recommendation to the head of the agency, motions addressed to the sufficiency of the petition or the sufficiency of the petitioner's evidence shall be reserved until closing statements."). Moreover, "the burden of establishing the legal necessity of dismissal is particularly high in a case such as this because the tribunal makes recommended findings that are submitted to the referring agency for final decision." *LaSonde*, OATH 2526/11 at 2.

The party seeking dismissal bears the burden of establishing that the relief sought must be denied as a matter of law and the party opposing dismissal can defeat such a motion "if it has asserted a set of facts that, if proven, would subject respondents to liability. . . ." *HSBC Bank*,

OATH 522/09 at 5. In considering a motion to dismiss, the tribunal accepts the facts alleged in the petition as true and accords the petitioner “the benefit of every possible favorable inference.” *Id.* at 4.

Section 16-505(a) of the Administrative Code provides

It shall be unlawful for any person to operate a business for the purpose of the collection of trade waste from the premises of a commercial establishment required to provide for the removal of such waste pursuant to the provisions of section 16-116 of this code, or the removal or disposal of trade waste from such premises, or to engage in, conduct or cause the operation of such a business, without having first obtained a license therefor from the commission pursuant to the provisions of this chapter.

Petitioner alleges that respondent violated this provision by collecting scrap metal from a commercial building. In its motion, respondent argues that scrap metal does not fall within the definition of trade waste set forth in the Administrative Code because it is not “discarded or rejected ... as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection.” Admin. Code § 16-501(f). According to respondent, the scrap metal at issue here was purchased by respondent and has a commodity value that takes it outside the definition of trade waste. In addition, respondent contends that the respondent did not collect scrap metal from a commercial establishment because he did not enter onto the premises or collect the scrap metal from the curbside adjacent to the premises as alleged in the NOV.

Petitioner charges that respondent collected trade waste in the form of scrap metal from a commercial establishment. Accepting the facts in the NOV as true, respondent would be subject to liability for violating section 16-505(a) of the Administrative Code. Moreover, respondent’s motion papers raise issues of law and fact, including one of first impression for this tribunal regarding whether scrap metal falls within the definition of trade waste. Determination of issues raised in this matter would benefit from the development of a full record. *See LaSonde*, OATH 2526/11 at 3 (where respondent stated there were issue of facts and law in motion papers, motion to dismiss was premature); *See also, Matter of Saladino*, OATH Index No. 2412/13, mem. dec. at 2 (Jan. 10, 2014) (“summary judgment should be cautiously exercised where there are novel issues of law, since OATH for the most part issues recommended decisions which are subject to review”).

Accordingly, respondent’s motion to dismiss is denied.

Motion to Depose

Respondent filed a motion for leave to depose the BIC investigator who issued the NOV prior to the hearing. In its initial moving papers, respondent makes a bare-bones request for permission to depose the BIC investigator, without setting forth the basis for its request. In its answer, petitioner maintained that respondent failed to set forth good cause for deposing the investigator as is required by the OATH Rules of Practice 1-33(b). In its amended motion for leave to depose the investigator, respondent contends that deposition is “necessary to establish the underlying factual predicate for issuance of the NOV,” and for use in support of respondent’s motion to dismiss and at trial.

Under OATH’s rules of practice depositions are “extraordinary discovery devices” that are permissible upon motion “for good cause shown.” 48 RCNY § 1-33(b). This tribunal has consistently held that the threshold for permitting depositions is stricter than the “material and necessary” standard that is applicable to “as of right” discovery devices, such as requests for the production of documents. *Matter of Kushner*, OATH Index Nos. 2736/09 & 2737/09 at 4 (June 11, 2009). Thus, the party seeking permission to take a deposition must show a “special heightened need” before this extraordinary discovery device will be authorized. *Kushner*, OATH 2736/09 & 2737/09 at 4; *Matter of Tenants of 223 15th Street*, OATH Index No. 2399/08, mem. dec. at 2 (Oct. 17, 2008); *Tenants of 51-55 West 28th Street v. Jo-Fra Properties, Inc.*, OATH Index No. 1019/05, mem. dec. at 2 (July 19, 2005) (citing *Conflicts of Interest Bd. v. Katsorhis*, OATH Index No. 1531/97, mem. dec. at 10 (June 27, 1997)).

Here, respondent has failed to assert or establish a special need for taking the deposition that outweighs and justifies the associated costs, burdens, and delays. See *Fire Dep’t v. Callan*, OATH Index No. 1733/05, mem. dec. at 2 (May 19, 2005). Accordingly, respondent’s motion is denied.

The hearing in this matter will proceed as scheduled, on Thursday, May 22, 2014.

Astrid B. Gloade
Administrative Law Judge

May 2, 2014

SUBMITTED TO:

CHRISTOPHER MAHON

Acting First Deputy Commissioner

APPEARANCES:

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