To Be Argued By:
LINDSAY GARROWAY
Time Requested: 30 Minutes

APL-2018-00164
New York County Clerk's Index Nos. 101770/15, 100303/16,
101768/15, 101769/15, 101767/15

Court of Appeals

STATE OF NEW YORK

Index No. 101770/15

In the Matter of the Application of

FRANKLIN STREET REALTY CORP.,

Petitioner-Appellant,

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

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

(*Caption continued on inside cover*)

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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March 7, 2019

Index Nos. 100303/16 and 101768/15

In the Matter of the Application of

J.P. & ASSOCIATES PROPERTIES CORP.,

Petitioner-Appellant,

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

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101769/15

In the Matter of the Application of

41-03 31 AVENUE REALTY CORP.,

Petitioner-Appellant,

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

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101767/15

In the Matter of the Application of

23-06 JACKSON AVENUE REALTY CORP.,

Petitioner-Appellant,

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

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

CORPORATE DISCLOSURE STATEMENT

PURSUANT TO 22 NYCRR §§ 500.1(f), APPELLANTS FRANKLIN STREET REALTY CORP., J.P. & ASSOCIATES PROPERTIES CORP., 41-03 AVE REALTY CORP., AND 23-06 JACKSON AVENUE REALTY CORP. ARE AFFILIATES, BUT HAVE NO PARENTS OR SUBSIDIARIES.

STATEMENT PURSUANT TO RULE 500.13(a)

Upon information and belief, as of the date of the completion of this Brief, there is no related litigation pending before any court.

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PRELIMINARY STATEMENT

The remedy Petitioners[1] seek in this appeal is extremely narrow: affording John Ciafone, an individual who owns buildings whereupon he posted signs promoting his law office, the defense recognized in the exception to the OAC rules granted to other violation recipients, as in *Nativo*. To apply this defense in this one case, with unique facts, would not create a broad precedent for actual Outdoor Advertising Companies to avoid liability for sign violations as proposed by Respondents.

Petitioners' case rests on a plain language reading of the statutes that apply to the business of signage in New York City.[2] Rather than acknowledge this plain reading, Respondents again attempt to obscure the explicit exception to the broad definition of an Outdoor Advertising Company ("OAC") created by the Environmental Control Board in *NYC v. Joseph Nativo*, ECB Appeal No. 1000307 (August 19, 2010). Respondents continue to propose that a more natural meaning of "others" includes corporate personhood, a formal fiction used to shield individuals from liability. The truth is that that there is no "other" from John J. Ciafone, Esq., who is both the owner of the subject buildings through corporate names and the sole person operating the small law office promoted on the signs.

[1] All terms defined in Petitioners' opening brief, dated January 7, 2019, will have the same meaning herein.

[2] Including New York City Administrative Code § 26-259(b) and (c) and § 28-502.6.2.

Neither the Appellate Division, nor Respondents in their opposing brief, offer an "other" that benefits from the signs bearing Mr. Ciafone's likeness and name. Respondents state, "Legally, it does not matter that Ciafone, P.C.'s principal, John J. Ciafone, claims to have an interest in the corporate petitioners." (Respondents' Br., p. 2). Except, legally, it did matter in *Nativo*. Contrary to Respondents' disingenuous attempts to distinguish *Nativo*, neither Joseph Nativo nor Petitioners meet the statutory definition of an OAC.

Accordingly, Respondents should be found to have acted in an arbitrary and capricious manner and the determination of the ECB Appeals Board should be annulled.

ARGUMENT

POINT I: RESPONDENTS' ARGUMENTS ON PRESERVATION ARE MISGUIDED, AS THE *NATIVO* EXCEPTION IS CLEARLY NOT THE ONLY ISSUE BEFORE THE COURT

With remarkable alacrity, Respondents cursorily dismiss Petitioners arguments separate from the primary issue raised on appeal without recognition of the litigation history of this matter.

As stated by New York Supreme Court Judge Schlomo Hagler in his Decision and Transfer Orders, the case was transferred pursuant to CPLR § 7804(g) to the Appellate Division, First Department, because he believed there was an issue of substantial evidence relating to the accessory use argument submitted in

the Article 78 Petition. (Petitioners' Br., A50-A54). Clearly, this argument was asserted below. Contrary to Respondents' claim that "the issue is effectively unpreserved," Petitioners must have preserved this argument for it to have formed the basis of the transfer to the Appellate Division. (Respondents' Br., p. 30). The lower court overlooks the very purpose of CPLR § 7804(g), which states:

> Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding. N.Y. C.P.L.R. 7804 (McKinney).

Respondents improperly attempt to limit the issues for review by the Court, proclaiming that a transfer order is the final disposition of this issue instead of conceding that the issue was raised at each stage in the litigation of this matter.

Additionally, Respondents improperly state that the argument regarding the constitutionality of the City's outdoor advertising laws was "never presented to the lower courts." (Respondents' Br., p. 31). As a general rule, an appellate court will

not consider an issue that was not raised in the lower court. *Gayz v. Kirby*, 41 A.D.3d 782, 783 (2007). However, this argument was raised at the very first ECB hearing in this matter. Mr. Ciafone himself argued before the Administrative Law Judge that "the NOVs attack the respondent's rights of free speech." (Petitioners' Br., A59, A92, A101, and A114). Each ALJ included in their Hearing Decisions that "[t]his court has no jurisdiction to adjudicate constitutional free speech claims. However, respondent [Petitioner in this action] has preserved its record should further proceedings follow." (Petitioners' Br., A60, A85, A93, A103, and A116).

The ECB Appeals Board expressly states in repeated decisions that they will not entertain constitutional arguments.[3] As such, the administrative court level is not the proper tribunal for the adjudication of such claims. If the issue cannot be preserved by stating such on the hearing record, when the forum refuses to decide on such claims, what other method exists for constitutional arguments to be preserved? Citizens must be permitted to challenge city ordinances as violating their constitutional rights, and Mr. Ciafone raised this challenge at his initial administrative hearing. To deny consideration of this issue because the administrative courts refuse to rule on such claims leaves the power of the City unchecked to run roughshod over the basic rights of its inhabitants.

[3] *NYC v. 102.7 WNEW/Infinity Broadcasting Corp.*, Appeal Nos. 41228-41327 (January 27, 2004), *NYC v. Harlem Yacht Club*, Appeal Nos. 36316 & 36317 (May 25, 2004), and *NYC v. Mushekhay Yadgarov*, Appeal No. 1500277 (April 30, 2015).

POINT II: RESPONDENTS IMPROPERLY ATTEMPT TO RELITIGATE THE FACTUAL ISSUE OF THE OWNERSHIP OF EACH CORPORATE ENTITY DESPITE THE FACT THAT IT WAS STIPULATED BELOW

In their Reply, Respondents attempt to obscure the essential issue before the Court of Appeals by questioning a fact that was stipulated from the initial hearing of this matter. For the first time, Respondents question the nature of Mr. Ciafone's ownership of each Petitioner corporation. (Respondents' Br., p. 9-10, 20). However, whether Mr. Ciafone is the property owner of the subject buildings under corporate names was not disputed at the hearing in this matter, or previously on appeal. A58, A84, A91, A101, A113. ALJ Morrick clearly states in his Decision and Orders, "[i]t is uncontested that Mr. Ciafone owns the cited building." A58, A91. The Court of Appeals is not the appropriate venue to reopen facts that were not previously challenged.

Respondents raise a completely moot point. Ironically, Respondents spend much of their brief arguing that Mr. Ciafone failed to preserve various issues on appeal. In fact, the City waived its arguments on this point by not contesting Mr. Ciafone's ownership designation at the initial hearing. (Petitioners' Br., A58, A84, A91, A101, A113).

POINT III: CITY COUNCIL DID NOT INTEND TO INCLUDE PETITIONERS IN THE STATUTORY DEFINITION OF "OUTDOOR ADVERTISING COMPANY"

Respondents rely on a speculative assessment of the intent of City Council in the Administrative Code to include small business owners such as John Ciafone in their statutory scheme to prevent Outdoor Advertising Companies from profiting without appropriate licenses and permits. In fact, they couch their entire argument on an analysis of the objective of City Council in passing such laws. Respondents state, "[t]he Council knew how to limit the class of 'others' when defining the 'outdoor advertising business'; it just opted not to do so." (Respondents' Br., p. 20). However, as revealed in Respondents own Addendum of Memorandum in Support of Local Law 2001/14 and 2005/31, City Council proposed these rules specifically to distinguish between the owner or managers of buildings and OACs, and state "in recognition of the fact that OACs **rather than individual property owners** play a key role in creating the visual blight these signs represent, Local Law 14 introduced regulation of OACs and their portfolio of holdings." (Emphasis added) (RAdd.6). The Memorandum expose a clear intent of these rules to specifically address the activity of "Outdoor Advertising Companies," rather than building owners advertising their own businesses. City Council states, of OACs:

> These companies control or manage advertising space on outdoor signs, which they sell or lease to others for the display of advertising. Under the new regulations, such companies would be prohibited from selling or leasing

> space on buildings in New York City unless they are registered with the Department of Buildings. An owner or manager of a building who markets advertising space on such building directly to advertisers would be exempt from the new regulations. (RAdd.2).

As the Memorandum emphasize, these laws clearly intend to limit the commercial activity of companies in the business of selling or leasing sign space. They also specifically exempt owners or managers of buildings which market to advertisers.

Additionally, more recently, the Respondent's interpretation of City Council's intent regarding the purpose of the OAC laws is belied by the new *Awnings Act*, which was enacted by the New York City Council on February 9, 2019 as Local Law 28. This new law creates waivers of sign violation penalties and a moratorium on the issuance of new sign violations to small businesses. Contrary to the position of Respondents, this law reflects City Counsel leniency in the enforcement of signage violations against small businesses. Respondents' position is anti-small business, in opposition to the stated intent of City Council to protect such businesses from the overeager enforcement of signage penalties.

Recognizing the *Nativo* defense in Mr. Ciafone's case would not cause a catastrophic confusion of all violations issued in New York City, as dramatically imagined by Respondents. (Respondents' Br., p. 23). The vast majority of violations concerning the sign violation statutes are issued to companies with the intended and primary purpose of commercial advertising, not the promotion of

small businesses owned by the same individual. The burden to prove such a narrow defense would rest solely on the recipient of the subject violations. There would be no additional requirement for City inspectors to unravel ownership stakes; in fact, there would be no additional requirement at all to issue such violations. The "practical understanding of the enforcement process" laid out by Respondents would not be impacted by finding the exception created in *Nativo* also applies to Mr. Ciafone's signs. (Respondents' Br., p. 22).

CONCLUSION

The Court should reverse the order of the Appellate Division, First Department. Petitioners respectfully request that this Court grant the relief requested in Petitioner's underlying Article 78 Petitions – annulling the determination of the ECB Appeals Board and finding that Respondents have acted in an arbitrary and capricious manner.

Dated: New York, New York
March 7, 2019

Respectfully submitted,

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the reply brief, exclusive of the statement of the status of related litigation, the corporate disclosure statement, the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section, and any addendum containing material required by subsection(h) of this Part is 1,839 words.

Dated: New York, New York
March 7, 2019

Respectfully submitted,

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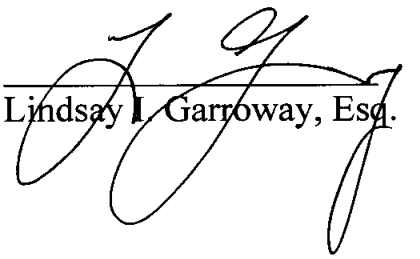

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