

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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In the Matter of the Application of  
QUICK START CONSTRUCTION CORP.

TRIAL/IAS PART 31  
NASSAU COUNTY

Petitioner,

Index No.: 3461/12  
Motion Seq. No.: 01  
Motion Date: 04/17/12  
**XXX**

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules declaring that the actions of the Nassau County Office of Consumer Affairs and its Commissioner were arbitrary, capricious and an abuse of discretion.

- against -

MADELYN FARLEY, COMMISSIONER NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS, and THE NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS,

Respondents.

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**The following papers have been read on this application:**

	Papers Numbered
<u>Order to Show Cause, Affirmation, Petition and Exhibits</u>	<b>1</b>
<u>Verified Answer, Affidavit in Opposition and Exhibits, Affirmation in Opposition and Exhibit and Respondents' Objections in Point of Law</u>	<b>2</b>
<u>Reply Affirmation and Exhibit</u>	<b>3</b>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner moves, pursuant to CPLR Article 78, for an order staying the suspension of its home improvement license and for an order reversing the determination of respondents which suspended petitioner's homeowners improvement license. Respondents oppose the application.

Petitioner is a domestic corporation operating in the business of home improvement. Respondents issued petitioner its home improvement license.

Petitioner submits that, on or about September 15, 2010, an individual named Kevin Chin filed a complaint with respondents requesting a refund of monies paid for the home improvement job petitioner was doing on his home. Mr. Chin made said request because the “[j]ob (home renovation) was stopped at end of July because vendors, subcontractors, expiditors (*sic*) and sales reps were not being paid. Very little work was done since then. Asked contractor to show escrow account and what cost they have incurred up to this point of work done so far - company said they spent all money collected. They did not show the escrow account to me. Home renovation was supposed to be done by Aug 21, 10 (*sic*).” *See* Petitioner’s Petition Exhibit A. On September 21, 2010, respondents sent a letter to petitioner advising it of said complaint and that a reply in writing to said complaint was due to respondents within ten days. The letter advised petitioner that failure to reply in writing within ten days may result in the issuance of a violation which is punishable by a fine not to exceed \$5,000.00. *See id.* Petitioner argues that nowhere in said letter does it state that petitioner’s license could be suspended or that petitioner could be directed to pay the homeowner a significant amount of money.

Petitioner further submits that, on October 1, 2010, Robert Chiarello, President of petitioner corporation, met with Paula Siegelbaum, an investigator for respondents, and the homeowner, Mr. Chin, at the homeowner’s residence. The purpose of said meeting was to conduct an “inspection to review a complete punchlist written by Mr. Chin to ascertain what parts of the contract needed to be completed.” *See* Petitioner’s Petition Exhibit B. The Investigator’s Report from this inspection indicates that “[d]ue to the fact that Mr. Chin did not supply a complete punchlist as required by Investigator Siegelbaum and that Mr. Chin notified same that he did not want the vendor [petitioner] to return to finish/repair any of the work, a

complete inspection of every room was not done. However, there was evidence that substantial work had been completed, such as roofing, siding, sheetrock, taping and spackling, new wood floor load, some electrical and plumbing, etc.” Investigator Siegelbaum concluded said report with the following list: “Action Required: The vendor must provide this office with a comprehensive response to all issues. Supporting documentation required: all sub contractors used on the site including but not limited to roofer, framer, electrician, plumbers, tiling specialist, etc; proof of legal action against Gerald Denmark; proof of legal action against the plumber who placed the lien on the home and all correspondence between vendor and plumber (proof of bond); signed additional work orders; bank account information for the escrow account that the Chin’s funds are held in as required by New York General Business Law; agreements/receipt/statements between the vendor and his sub contractors showing the agreed to amounts for the work they were hired to complete; and any other supporting documents the vendor sees necessary. All documents due in this office by Friday, October 8, 2010. Consumer must provide to this office a complete punchlist of items to be completed or that need to be repaired; 2 estimates for such work from licensed contractors; engineer’s report that the consumer had on site but needed to make copies; complete building department file including permit application and inspections records. All documents due in this office by Friday, October 8, 2010.” *See id.*

Petitioner alleges that it sent its response to the October 1, 2010 Investigator’s Report on October 7, 2010. *See* Petitioner’s Petition Exhibit C. Petitioner claims that the next thing that it received from respondents was a letter, dated November 15, 2010, advising petitioner of four violations, that an appearance was required on December 7, 2010 for a hearing and that failure to comply would result in maximum fines and suspensions of its license. *See* Petitioner’s Petition Exhibit D.

Petitioner adds that the December 7, 2010 hearing was adjourned to December 16, 2010.

On December 16, 2010, petitioner appeared with counsel, but neither Mr. Chin, nor his new contractor, appeared. Petitioner argues that the estimate of Mr. Chin's new contractor was relied upon by respondents even though Mr. Chin was ordered to provide two estimates by licensed contractors. Petitioner further argues that due to the non-appearance of Mr. Chin and his new contractor neither one was available for cross-examination by petitioner's counsel.

On December 17, 2010, respondents sent petitioner a letter which included a "punchlist from the file that may aid you in your attempt to determine a fair resolution to this complaint. I have also enclosed photos that were not reviewed at the hearing that may give you a better idea of the issues Mr. Chin, and the building inspector have with the construction." The letter then contained a list of items that petitioner needed to furnish to respondents by January 7, 2011. *See* Petitioner's Petition Exhibit E. Petitioner notes that two of the four violations were disposed of by paying fines of \$600.00 and \$150.00 on December 16, 2010. *See* Petitioner's Petition Exhibit F.

On September 17, 2010, respondents issued a decision with respect to the complaint filed by Mr. Chin. *See* Petitioner's Petition Exhibit G. The decision states that "[i]t is the determination of this office that Quick Start must satisfy all liens placed on the consumer's residence and submit proof of same to your investigator within two weeks of the date of this letter. Furthermore, Kevin Chin does not owe Quick Start any money because the work performed is substandard according to the engineer's report. And the new contractor's estimate, based on that same report, will require Mr. Chin to spend an additional \$182,750 to repair and complete the job....The original amount of the contract was \$342,000 with \$34,875 in extras accepted by Mr. Chin, adding up to \$376,875. The consumer paid \$271,000 to Quick Start, leaving a balance of \$105,875 **for completion of a satisfactory job**. Now Mr. Chin has to pay \$182,750 to BNL Construction, adding \$76,875 to his cost to repair or do over renovations. This additional burden of \$76,875 must be borne by Quick Start Construction Corp. if Quick Start wants to keep its Nassau County home improvement license....On the charge of Violation No.

664 for failing to comply with the building laws of the Village of Flower Hill Building Dept., the fine is \$2,000. On the charge of Violation No. 665 for not being financially responsible, the fine is \$2500....Failure to comply with these orders will result in the suspension of your home improvement license.” *See id.*

On November 4, 2011, petitioner, through its attorney, timely protested the above decision. *See* Petitioner’s Petition Exhibit H. On November 17, 2011, respondents sent a letter to petitioner’s counsel which stated, “I have received and read your appeal regarding the Quick Start Construction Corp. decision. This office holds administrative hearings. There is no witness testimony of cross examination. The investigator assigned to the case represents the consumer at the hearing. It is my determination, after carefully reviewing the evidence, that the hearing officer’s decision stands. Your letter of appeal states that copies of the escrow account were provided, but the account shows no monetary balance, just expenditures. There is no record of deposits received from Mr. Chin and promptly posted to the account. In addition, you claim all liens have been satisfied, but provided no evidence.” *See* Petitioner’s Petition Exhibit I.

On February 23, 2010, respondents sent petitioner a letter which stated, “[p]lease be advised, effective immediately, your Nassau County Home Improvement license has been SUSPENDED due to a failure to comply with a decision of The Office of Consumer Affairs. Under these conditions, you will no longer be permitted to solicit or engage in any new business in the home improvement industry and you must return your home improvement license to this office immediately. However, you must honor all contracts made before this suspension. Your failure to adhere to the above-named conditions may result in the initiation of legal action against you.” *See id.*

Petitioner argues that is was denied due process in failing to be advised of the nature of the proceeding and the possibility of being ordered to pay the homeowner a significant amount of money, as well as being denied the opportunity to refute, cross-examine or confront witnesses.

Petitioner further submits that “the actions of the respondent were arbitrary and

capricious.” Petitioner contends that “[r]espondent based its decision entirely on one estimate submitted by the homeowner,...., after the homeowner was directed to supply two contractor estimates....It is respectfully submitted that this action alone requires a finding that the actions of the respondent were arbitrary and capricious and violated petitioner’s rights to due process. The estimate by BNL, merely gives a summary of those items BNL deemed to be incorrect without giving a breakdown as to the cost for each item, what represented material, what represented labor, the profit and any other information which would assist in verifying this estimate. The inherent risks of relying on a single estimate for damages were recognized by the respondent in requiring two estimates as well as the procedure in small claims court where two estimates are required to prove damages....To award the homeowner such a significant amount of money upon one estimate or guesswork, is certainly arbitrary and capricious and violates petitioners basic rights of due process....Petitioner was not given an opportunity to cross-examine BNL or Mr. Chin. The courts of this state have held that although a hearing conducted conducted (*sic*) by administrative officials acting in a judicial or quasi-judicial capacity may be informal, and technical rules of evidence may be disregarded, fundamental requirements of fair trial entitles a party whose rights are being determined to be fully appraised of proof to be considered with the concomittant (*sic*) opportunity to cross-examine witnesses.”

Petitioner additionally contends that “[a]ll of the notices given to petitioner dealt only with specific violations. No notice was given at any time advising petitioner that he would be ordered to pay the homeowner money. The fines that were imposed pursuant to the alleged violations have been paid and therefore it is submitted that his license should not be suspended.

In opposition to the application, Paula Siegelbaum, respondents’ Investigator, submitted an Affidavit which stated, “[t]here are several pertinent documents that are not attached to Quick Start’s papers that were presented at the hearing. The first were two documents reflecting inspections by the Village of Flower Hill building inspector. These reports of inspection, dated October 13, 2010, indicate that the work performed by Quick Start (or one of its sub-contractors,

did not comply with the village code....Also considered by Consumer Affairs was the report of another company retained by the consumer....Another inspection of the consumer's home was conducted by Kim Y. Lim, P.E." *See* Respondents' Affidavit in Opposition Exhibits A, B and C.

Respondents further submit that "Quick Start claims that it can satisfy its uncontested violation of the NCAC [Nassau County Administrative Code] by paying the fines assessed against it, but that is where liability should end. Quick Start therefore argues that it should be permitted to continue its business, with its license intact, despite the facts that its work did not satisfy building codes, that it left the consumer with unsatisfied mechanic's liens against the consumer's property, that it failed to account for the monies paid it by the consumer and the consumer is now required to have the work completed (and perhaps redone) by another home improvement company and despite the fact that pursuant to the authority granted it under the NCAC, Consumer Affairs ordered Quick Start to remedy these problems. There is simply nothing arbitrary, capricious or unauthorized by law with the orders of Consumer Affairs."

Under the Nassau County Administrative Code ("NCAC"), respondents are given the authority to issue home improvement licenses, to conduct hearings or charges brought against licensees and to impose fines or suspend or revoke licenses, as appropriate. *See* Nassau County Administrative Code §§ 21-11.4, 21-11.13 and 21.11.8. Under NCAC §§ 21.11.7(6) and 21.11.7(7), respondents are authorized to suspend the license of any person pending with any order and may arrange for the redress of injuries or damage caused by any violation of this article and may otherwise provide for compliance with the provisions and purposed of this article.

Respondents contend that, with respect to the investigation of the complaint filed against petitioner, "[w]hile Quick Start provided 'voluminous documentation'...a review of the documents provided by the petitioner demonstrates that while many documents were submitted, they did not bear on the issues raised by the investigator's report."

Respondents further submit that the hearing officer in the instant action heard and weighed the evidence presented and wrote a decision based upon the credible evidence. They add

that the hearing officer had ample evidence to draw the conclusions that were drawn and that “[t]he actions taken by the by (*sic*) Consumer Affairs was wholly authorized under the NCAC and it cannot be said that the determination of the hearing officer was not based without a sound basis in reason. Indeed, Quick Start conceded liability on the violations.”

With respect to petitioner’s argument that the administrative proceeding was flawed in that neither Mr. Chin, nor his contractor, appeared and therefore were not available for cross-examination, respondents submit that this contention is without merit as “[h]earsay is properly admissible in administrative proceedings, and if sufficiently relevant and probative may even constitute substantial evidence....Indeed, hearsay evidence may form the sole basis for an agency’s ultimate determination under appropriate circumstances.”

With respect to petitioner’s argument that its due process rights were violated, respondents submit that “the fact that petitioner was advised of the violations and provided with a hearing at which to address the charges coupled with the fact that the actions taken by Consumer Affairs were wholly authorized by the NCAC does not constitute a violation of its rights of due process. Quick Start contends that it was denied due process in that it was not ‘advised of the nature of the proceeding and the possibility of being ordered to pay the homeowner a significant amount of money...’. Petition ¶18. It thus appears that Quick Start is arguing that it should be able to leave a consumer with liens on his home, with the contracted job unfinished and requiring remediation and simply pay the penalties imposed by Consumer Affairs without any further redress for the consumer, presumably to continue such practices with the next unsuspecting consumer.” Respondents argue that petitioner was not only afforded the right to contest the charges made against it during the hearing, but was also afforded the opportunity to submit further documentary evidence in support of its defense. *See* Petitioner’s Petition Exhibit E. “Given that the petitioner was given notice of the charges against it, was afforded a hearing at which the charges could be contested, was represented by counsel at the hearing and moreover was provided an additional opportunity to provide proof in support of its defenses, the fact that it



was unaware of the penalties that could be imposed (despite being in the NCAC) does not raise due process concerns.” Respondents contend that the procedures followed and the penalties assessed in the matter involving petitioner were all authorized by the NCAC and, therefore, it cannot be said that respondents’ determination was arbitrary and capricious or an abuse of discretion.

Respondents further argue that “[i]t cannot be said that requiring the petitioner to pay the difference between the original contract amount and the cost to complete the work it originally agreed to do is unfair, arbitrary or capricious. This is particularly so given the express authorization given to Consumer Affairs to require a licensee to resolve a valid consumer complaint. Petitioner contends that the payment of the fines associated with the four charged violations should suffice for the violations of the administrative code. However, it simply cannot be said that the payment of several thousand dollars in fines for violations of the NCAC accomplishes the legislative purpose of NCAC Title D-1, that is, to safeguard and protect the homeowner against abuses on the part of home improvement contractors. As is evidenced by this case, to accept petitioner’s argument would permit licensees to leave a consumer’s home improvement job uncompleted and noncompliant with code, with unpaid liens against the consumer’s property with the licensee being about to walk away from the job to another with only having paid a few thousand dollars in fines. Consumer Affairs acted with the authority granted to it by the legislature in the interests of protecting the consumer.”

It is noted that “[w]here, as here, an administrative agency takes action without an evidentiary hearing, the standard of review is not whether there was substantial evidence in support of the determination (CPLR §7803(4)), but rather, whether the determination had a rational basis and was not ‘arbitrary and capricious.’” *Ball v. New York State Dept. of Environmental Conservation*, 35 A.D.3d 732, 826 N.Y.S.2d 698 (2d Dept. 2006). *See also Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995); *Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dept. 2002). Petitioner’s application for relief is predicated upon CPLR §

7803(3). The questions that subdivision 3 lists as permissible in an Article 78 proceeding are:

whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed ....See CPLR § 7803(3).

Since the determination of respondents was not based on a full evidentiary hearing (nor was it required to), in determining the validity of the respondents' determination this Court must examine whether, given the facts, respondents' decision was untenable as a matter of law – *i.e.* “arbitrary and capricious.”

The Court of Appeals has made it clear that “arbitrary and capricious” is action taken “without sound basis in reason and ... without regard to the facts.” *Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). Moreover, it is well settled that “[i]n a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination” *Ball v. New York State Dept. of Environmental Conservation, supra* at 733. See also *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 626 N.Y.S.2d 1(1995). Judicial review of an administrative determination is limited to the grounds invoked by the agency. See *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 77 N.Y.2d 753, 570 N.Y.S.2d 474 (1991). Therefore, the Court's function is not to re-determine the issue or to weigh the evidence the administrative agency had before it.

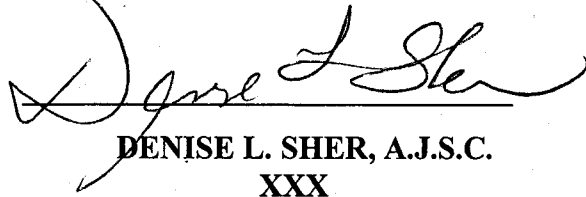
There is no indication to the Court that respondents did not act after careful and deliberate consideration of the facts and evidence at hand. Respondents provided petitioner ample opportunities to refute the allegations raised in Mr. Chin's complaint, including providing petitioner a hearing and the chance to submit additional documentation after said hearing. The decision of respondents was based on full consideration of all the evidence and was neither

arbitrary, capricious or irrational.

Accordingly, petitioner's application, pursuant to Article 78 of the CPLR, for an order for staying the suspension of the home improvement license of petitioner and reversing the determination of the respondent which suspended petitioner's homeowners improvement license is hereby **DENIED**. The stay of the suspension of petitioner's homeowners license is hereby lifted.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.  
XXX

Dated: Mineola, New York  
July 19, 2012

**ENTERED**  
JUL 24 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE