

**In the Matter of the Application of FORMICA  
CONSTRUCTION INC., ROSEMARIE FORMICA,  
WILLIAM FORMICA, JR., and KENNETH  
FORMICA,**

**DECISION & ORDER  
HON. JOSEPH J. MALTESE**

*Petitioners,*

*against*

**JONATHAN MINTZ, Commissioner,  
THE NEW YORK CITY DEPARTMENT OF  
CONSUMER AFFAIRS**

**Respondents.**

The following items were considered in the review of this motion to annul the denial of the New York Department of Consumer Affairs granting a home improvement license pursuant to CPLR Art. 78.

<b><u>Papers</u></b>	<b><u>Numbered</u></b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>4</b>
<b>Order to Show Cause</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Petitioner's motion to annul the denial of the New York Department of Consumer of Affairs in granting a Home Improvement License to Formica Construction, Inc. pursuant to CPLR Article 78 is granted. Respondent's cross-motion to change venue pursuant to CPLR § 7804(b) is denied in its entirety.

### **Facts**

The action before the court arises out of a denial by the New York City Department of Consumer Affairs ("the City") to grant a Home Improvement License to Formica Construction, Inc. On June 7, 2007 Kenneth Formica ("Kenneth"), applied for and the City accepted Kenneth's application to renew Formica Construction's license to operate as a home improvement contractor. On said application Kenneth listed himself as the sole employee of Formica Construction. The previous application dated July 7, 1998 listed the equitable owners of the

corporation with a 10% or greater ownership interest in the corporation as being William Formica, who subsequently passed away, and Kenneth Formica. The roster of employees only included Kenneth Formica, listed as “super.”

Rosemarie Formica and William Formica, Jr.’s names do not appear any where on the initial application for Formica Construction to operate as a home improvement contractor; nor do they appear on the subsequent renewal application.

On February 5, 2007 prior to Kenneth’s renewal application being filed with the City, he pled guilty to negligent homicide as a result of a construction accident which he supervised on December 15, 2003 in which one employee died and another sustained injuries. The criminal court sentenced Kenneth to serve sixteen weekends in prison, commencing the week from Saturday, March 17, 2007 to Sunday, July 1, 2007. Kenneth sentence required him to report to prison on Saturday morning at 9:00 A.M. and remain there until Sunday night at 6:00 P.M. Along with his weekend incarceration, the criminal court required Kenneth pay a \$5,000.00 fine. At the time of Kenneth’s application on behalf of Formica Construction he was currently serving his criminal sentence.

Petitioners moved this court by Order to Show Cause on originally placed on the calendar for December 14, 2007 to have the City’s denial of Formica Constructions application annulled. Pursuant to the terms of the order, respondent was to serve petitioners’ attorney with answering papers. Respondent personally served petitioner with an Answer and Notice of Cross Motion on December 12, 2007 at 2:00 P.M. Subsequently, both parties requested that the hearing on this motion be adjourned three times, on December 14, 2007, January 4, 2008, and January 25, 2008. The Order to Show Cause was fully submitted to the court for consideration on February 8, 2008.

### **Discussion**

Respondent’s cross-motion is timely despite petitioners’ argument to the contrary. However, an evaluation of the merits of respondent’s motion requires a finding that Richmond County is the appropriate venue for this Article 78 proceeding.

This court does not share respondent's view that proper venue is New York County. Contrary to respondent's position, CPLR § 506(b) can be interpreted to allow the current Article 78 proceeding to continue in the Supreme Court in Richmond County. The relevant statute states in pertinent part that "[a] proceeding against a body or officer shall be commenced in any county within the judicial district . . . where the material events took place . . ."<sup>1</sup> In this case, the City is basing its decision to deny petitioner a Home Improvement License on incidents that occurred on Staten Island. Therefore, the expeditious adjudication of this matter requires that the case be tried in Richmond County where all relevant witnesses either reside or work.

Turning to the merits of the motion before this court, this court finds that the City failed to demonstrate requisite correlation from Kenneth's prior felony conviction and the home improvement license he sought by application. As part of Kenneth's guilty plea he obtained a Certificate of Relief from Disabilities that specifically stated that "relieve[s] the holder of all forfeitures, and of all disabilities and bar no employment . . ." It is the public policy of this State to " . . . encourage the licensure and employment of persons previously convicted of one or more criminal offenses."<sup>2</sup> It therefore follows that when a public agency or private employer decides to deny employment or licensure of a convicted criminal it bears the burden of demonstrating that there is a direct connection between the employment or licensure and the prior criminal act.

In determining whether an application for a license should be denied the public agency must evaluate applicant's prior criminal conviction in light of the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

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<sup>1</sup> CPLR § 506(b).

<sup>2</sup> Correction Law § 753.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.<sup>3</sup>

The Court of Appeals in *Arrocha v. Board of Educ. Of City of New York* states that this statute “. . . creates a presumption of rehabilitation where . . . the applicant has obtained a certificate of relief from disabilities.”<sup>4</sup>

The denial of licensure dated July 18, 2007 denied Kenneth a home improvement license due to a “recent felony conviction, related to the license sought.”<sup>5</sup> The City did not elaborate on its reasoning until it petitioners’ order to show cause compelled the City to lay bare its reasoning. In its answering papers the City asserts that it met its burden to establish a direct connection between Kenneth’s prior criminal action and the licensure he sought under Correction Law §§ 752 and 753. Specifically, the City stated that Kenneth’s knowing failure to follow OSHA regulations when digging a trench that subsequently collapsed killing one individual and injuring another directly correlated with the work conducted by home improvement contractors. The City reasoned that “[h]ome improvement contractors perform manual labor and must comply with

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<sup>3</sup> Correction Law § 753.

<sup>4</sup> 93 NY2d 361 [1999].

<sup>5</sup> Marangos. Order to Show Cause Exhibit A.

OSHA's regulation."<sup>6</sup>

As petitioners' correctly argue the type of work that led to the unfortunate incident that led to Kenneth's conviction occurred during a his supervision of a new construction. The City fails to adequately cite any specific duties of a home improvement contractor that involve similar duties of a supervisor of a new construction work site.

### **Conclusion**

This court finds that the burden of proof on a public agency or private employer to justify the denial of an application for a license is substantial. As the City failed to come forward with evidence directly correlating Kenneth's prior criminal conviction with the duties specifically performed by home improvement contractors; the denial of Kenneth's application was therefore improper.

Accordingly, it is therefore

ORDERED, that the denial of the New York Department of Consumer Affairs dated July 18, 2007 and Jonathan Mintz to grant petitioners a Home Improvement License is annulled; and it is further

ORDERED, that the New York Department of Consumer Affairs is directed to grant petitioners a Home Improvement license within ten days of the receipt of this order.

ENTER,

DATED: March 17, 2008

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>6</sup> Mintz. Affirmation, at 20 ¶ 56.

