State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 7, 2021 529328

LYELL PARTY HOUSE, INC.,
Doing Business as
THE DIPLOMAT PARTY HOUSE
and as SARKSI CATERERS,
Appellant, MEMORANDUM AND ORDER

v

NEW YORK STATE DEPARTMENT OF
LABOR, COMMISSIONER,
Respondent.

Calendar Date: November 24, 2020

Before: Lynch, J.P., Clark, Aarons, Pritzker and Reynolds Fitzgerald, JJ.

Panzarella & Coia, PC, Rochester (Richard Coia of counsel), for appellant.

Letitia James, Attorney General, Albany (Joseph M. Spadola of counsel), for respondent.

Pritzker, J.

Appeal from an order of the Supreme Court (Connolly, J.), entered May 21, 2019 in Albany County, which granted defendant's motion to dismiss the complaint.

Plaintiff owns and operates two hospitality businesses in the City of Rochester, Monroe County that employ service staff members – The Diplomat Party House, which hosts large events,

and Sarkis Caterers, which provides drop-off catering services. Defendant, as relevant here, is charged with enforcing Labor Law § 196-d which, among other things, forbids employers to "demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." In an effort to clarify the statute, defendant adopted the Hospitality Industry Wage Order (hereinafter the Wage Order), which was effective January 2011 and is codified at 12 NYCRR part 146. The Wage Order and regulations, among other things, clarify what constitutes a gratuity and details notice requirements that employers must follow when informing customers about gratuities.

Almost eight years after the adoption of the regulations at issue, in October 2018, plaintiff commenced this CPLR 3001 action seeking, among other things, a declaration that 12 NYCRR 146-2.18 (b) and 146-2.19 (a)-(c) are ambiguous, overbroad and unconstitutionally void for vagueness, that defendant exceeded her authority in adopting the Wage Order and that, insofar as the Wage Order only advances a policy goal as opposed to imposing a specific rule, defendant violated the State Administrative Procedure Act. In regard to 12 NYCRR 146-2.19 (a)-(c), plaintiff posited that the regulation's structure is so illogical that an employer cannot discern whether it must comply with each subsection individually or a combination thereof. In lieu of answering, defendant moved to dismiss the complaint, contending, among other things, that plaintiff failed to present a justiciable controversy and failed to challenge the Wage Order or regulations before the Industrial Board of Appeals (hereinafter IBA) pursuant to Labor Law § 657.[1] Plaintiff opposed the motion, contending that it had sufficiently set forth a justiciable controversy and that compliance with Labor Law § 657 was unnecessary. Supreme Court subsequently granted the motion and dismissed the complaint, finding that plaintiff

[1] Although Labor Law § 657 (2) refers to the "board of standards and appeals," the IBA replaced that body in 1975 and assumed its functions, powers and duties (see Matter of National Rest. Assn. v Commissioner of Labor, 141 AD3d 185, 189 n 1 [2016]).

failed to establish a justiciable controversy. Plaintiff appeals.

We affirm, albeit on a different ground. The complaint must be dismissed because plaintiff failed to comply with Labor Law § 657 (a) (2), which provides that the IBA has exclusive initial jurisdiction over the issues raised by plaintiff regarding the Wage Order and subsequent regulations (see Lyons & Co. v Corsi, 3 NY2d 60, 66-67 [1957]). In particular, "a party seeking to review the reasonableness of any wage order or any part thereof must, before going to the courts, seek a review before the [IBA]" (id.). To that end, Labor Law § 657 (2), which applies to both wage orders and regulations promulgated therefrom, requires that an aggrieved party file a written petition with the IBA "within [45] days after the date of the publication of the notice of such order or regulation." The IBA has the authority to review the "validity or reasonableness of any rule, regulation or order made by [defendant]" (Labor Law § 101 [1]). Then, after the IBA issues its ruling, a party has the right to bring a direct appeal to this Court (see Labor Law § 657 [2]), rather than to Supreme Court.

The IBA's scope of review is similar to the review that this Court exercises upon a properly filed direct appeal (see Matter of National Rest. Assn. v Commissioner of Labor, 141 AD3d 185, 190 [2016]). In general "[t]he IBA assesses whether a wage order is 'contrary to law'" (id., quoting Labor Law § 657 [2]) and an aggrieved party is "entitled to argue that the wage order is contrary to some provision of the Federal or State Constitution or laws, or that it is beyond the power granted to [defendant], or that it is based on some mistake of law" (Matter of National Rest. Assn. v Commissioner of Labor, 141 AD3d at 190 [internal quotation marks, brackets and citation omitted]). Here, the issues raised by plaintiff in its complaint involve the "validity and reasonableness" (Labor Law § 657 [2]) of the Wage Order and regulations and thus would have been properly before the IBA, yet no proceeding was ever commenced.[2] This

[2] As noted by the Court of Appeals in Lyons & Co. v Corsi (3 NY2d at 67), the constitutionality of a statute, as opposed to the validity and reasonableness of a wage order or

presents a fatal jurisdictional defect and, inasmuch as plaintiff did not avail itself of any relief before the IBA, dismissal of its action on this ground is proper.

Lynch, J.P., Clark, Aarons and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order is affirmed, without costs.

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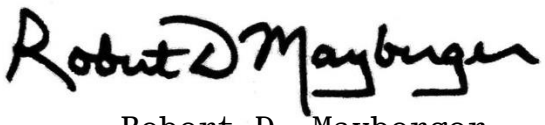

Robert D. Mayberger
Clerk of the Court

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regulations, may be subject to a separate action. However, the constitutionality of a statute has not been challenged here.