

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, FOURTH DEPARTMENT**

Green Thumb Lawn Care, Inc. v. Iwanowicz

107 A.D.3d 1402 (4th Dep't 2013) · Decided June 7, 2013

SUMMARY

The court upheld an administrative determination that Green Thumb Lawn Care, Inc. and its president violated New York pesticide-application statutes and regulations by failing to provide contracts specifying the total cost and approximate application dates. It also held that blanket waivers of application-date notice were impermissible. The court vacated the lower court's declaratory judgment because no justiciable controversy remained and affirmed dismissal of a challenge to a DEC policy as unripe.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Fourth Department
WRITING FOR THE COURT	Scudder, P.J.; Smith, J.; Centra, J.; Garni, J.; Sconiers, J.
JURISDICTION	New York
DECIDED	June 7, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Consolidated appeals from judgments in two CPLR article 78 proceedings and a declaratory judgment action. The first proceeding challenged an administrative determination by the Acting Commissioner of the New York State Department of Environmental Conservation imposing a penalty for violations of pesticide-application statutes and regulations. The second challenged a DEC policy statement as not ripe for judicial review.
STANDARD OF REVIEW	Administrative action is reviewed to determine whether it was arbitrary and capricious or lacked a rational basis. When the issue is one of pure statutory interpretation, an agency's interpretation receives considerably less weight, and a regulation contrary to clear statutory language receives no weight. Agency action is ripe for judicial review only when the agency has reached a final determination that causes actual, concrete injury that cannot be prevented or significantly ameliorated by further administrative action.

PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Green Thumb Lawn Care, Inc., John Knutson v. New York State Department of Environmental Conservation, Acting Commissioner of the New York State Department of Environmental Conservation

TOPICS

judicial review of agency action

agency adjudication

statutory interpretation

ripeness

administrative law

PRACTICE AREAS

administrative law

environmental law

statutory interpretation

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the Acting Commissioner's determination that petitioners violated ECL 33-1001 and 6 NYCRR 325.40 was arbitrary and capricious or lacked a rational basis.
2. Whether the petitioners were entitled to declaratory relief concerning a 2002 consent order and their ability to obtain waivers of notice of pesticide-application dates.
3. Whether the petitioners' challenge to the DEC's 2005 policy statement was ripe for judicial review.

HOLDINGS

1. The Acting Commissioner's determination was not arbitrary or capricious because the petitioners' agreement omitted the total price and specified application-date ranges that were not approximate, and the blanket waiver theory was inconsistent with the statute's purpose and text.
2. Declaratory relief was improper because no justiciable controversy remained concerning the 2002 consent order, and the requests regarding unidentified future consumers presented hypothetical issues.
3. The challenge was not ripe because the DEC had not applied the 2005 policy to petitioners' determination and petitioners had suffered no actual, concrete injury that further administrative action could not prevent or ameliorate.

KEY QUOTATIONS

“where ‘the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight’” (107 A.D.3d at 1403)

“A declaratory judgment action thus ‘requires an actual controversy between genuine disputants with a stake in the outcome,’ and may not be used as ‘a vehicle for an advisory opinion’” (107 A.D.3d at 1405)

“In order to determine whether an agency determination is final, a two-part test is applied. ‘First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and[,] second, the

injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party’” (107 A.D.3d at 1405-1406)

FACTUAL BACKGROUND

Green Thumb Lawn Care, Inc. and its president, John Knutson, applied lawn-care products without a written contract that complied with statutory and regulatory requirements. The agreement did not state the total price, and the proposed application dates covered ranges extending over more than half of the calendar year rather than approximate application dates. The petitioners also sought to use blanket waivers of notice of approximate application dates, which the Acting Commissioner concluded would undermine the statutory purpose of informing residents when potentially hazardous chemicals would be applied.

PROCEDURAL HISTORY

The DEC charged Green Thumb and Knutson with violating ECL 33-1001 and 6 NYCRR 325.40 by performing residential lawn care without a compliant written contract specifying application dates and total cost. The Acting Commissioner found violations and assessed a penalty. Supreme Court confirmed that determination and issued a declaration concerning notice waivers, while separately dismissing the challenge to the DEC's 2005 policy as unripe. The Appellate Division modified the first judgment by vacating the declaration and dismissing the declaratory-relief claim, and otherwise affirmed both judgments.

DISPOSITION

affirmed

CASES CITED

- Matter of Concetta T. Cerame Irrevocable Family Trust v. Town of Perinton Zoning Bd. of Appeals, 6 A.D.3d 1091, 1092 (3d Dep't 2004)
- Matter of Pell v. Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, 34 N.Y.2d 222, 231 (1974)
- Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dep't of Env'tl. Conservation, 14 N.Y.3d 161, 176 (2010)
- Matter of New York State Superfund Coalition, Inc. v. New York State Dep't of Env'tl. Conservation, 18 N.Y.3d 289, 296 (2011)
- Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 253 (1st Dep't 2006), appeal dismissed, 9 N.Y.3d 1003 (2007)
- Ramunno v. Skydeck Corp., 30 A.D.3d 1074, 1074 (4th Dep't 2006)
- Matter of United Water New Rochelle v. City of New York, 275 A.D.2d 464, 466 (2d Dep't 2000)
- Megibow v. Condominium Bd. of Kips Bay Towers Condominium, Inc., 38 A.D.3d 265, 266 (1st Dep't 2007)
- Matter of County of Niagara v. Dairies, 79 A.D.3d 1702, 1704 (4th Dep't 2010), leave denied, 17 N.Y.3d 703 (2011)

- Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30, 34 (2005), reargument denied, 5 N.Y.3d 824 (2005)

OPINION

PER CURIAM.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered October 13, 2011 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, denied the requests of petitioners-plaintiffs for a declaratory judgment, and declared that 6 NYCRR 325.40 terminated the authority of petitioners-plaintiffs to use notice waivers.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by vacating the declaration and dismissing that part of the amended petition/complaint seeking declaratory relief and as modified the judgment is affirmed without costs. Memorandum: These consolidated appeals arise from an administrative proceeding in which the New York State Department of Environmental Conservation (DEC) alleged that Green Thumb Lawn Care, Inc. (Green Thumb) and its president, John Knutson, had violated statutes and regulations by, inter alia, *1403performing residential lawn care without having a signed contract that specified the dates upon which pesticides would be applied.

As a result of that administrative proceeding, the Acting Commissioner of the DEC ruled that Green Thumb and Knutson violated ECL 33-1001, as well as the regulation promulgated by the DEC with respect to that statute (see 6 NYCRR 325.40), and, inter alia, assessed a penalty. Petitioners-plaintiffs, Green Thumb and Knutson (hereafter, petitioners), commenced a combined CPLR article 78 proceeding and declaratory judgment action to challenge that ruling and, in appeal No. 1, they appeal from a judgment that, inter alia, confirmed the Acting Commissioner's determination and issued a declaration in favor of respondents-defendants, the DEC and the Acting Commissioner (hereafter, respondents).

Petitioners commenced a second CPLR article 78 proceeding to challenge a policy statement issued by the DEC in 2005 and, in appeal No. 2, they appeal from a judgment dismissing that petition. With respect to appeal No. 1, petitioners contend that the Acting Commissioner's determination that they violated the statute and regulation was arbitrary and capricious, and thus that Supreme Court erred in confirming it.

We reject that contention. In general, judicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis (see Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals, 6 AD3d 1091, 1092 [2004]; see generally Matter of Pell v Board of Educ. of Union Free School Dist.

No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). In a situation such as this, however, “where ‘the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight.

And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight’ ” (Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Env'tl. Conservation, 14 NY3d 161, 176 [2010]; see Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Env'tl. Conservation, 18 NY3d 289, 296 [2011]).

When petitioners applied the products at issue, the statute provided that “[p]rior to any commercial lawn application the applicator shall enter into a written contract with the owner of the property or his agent specifying the approximate date or dates of application, number of applications, and total cost for *1404the service to be provided” (ECL former 33-1001 [1]).

In addition, the DEC regulations require that the written contract shall “specify the approximate date or dates of application or applications;... state the total cost of the commercial lawn application service to be provided;... [and] be signed by both the pesticide applicator or business providing the commercial lawn application and the owner or owner’s agent of the property to which the commercial lawn application is to be made; provided, however, the signature of the owner or owner’s agent is not required if the pesticide applicator or business possesses a separate document that specifically evidences the owner or owner’s agent signature as acceptance of the written contract, such as a copy of a prepayment check, in the exact amount specified in the written contract for the agreed-upon services” (6 NYCRR 325.40 [a] [1], [3], [6]).

The legislative history of the statute establishes that it was enacted for two purposes, to wit, to ensure that commercial lawn care businesses did not apply their products without first having a written contract that included the full price to be paid by the consumer, and to ensure that residents were aware when possibly hazardous chemicals were going to be applied to their properties.

Based upon that history, and the unequivocal wording of the statute and regulation, the Acting Commissioner’s conclusion that petitioners’ agreement with the owners of the subject property did not meet either requirement was not arbitrary or capricious.

The total price to be paid for petitioners’ services does not appear anywhere in the agreement, and petitioners concede that it was not the same price as was paid a year earlier pursuant to the contract that petitioners contend was renewed. Furthermore, the dates of application on the document that petitioners sent to the property owner included ranges of dates that encompassed more than half of the calendar year, and thus are patently not approximate dates of application.

Contrary to petitioners' further contention, the Acting Commissioner did not act arbitrarily or capriciously in concluding that petitioners were not permitted to seek a blanket waiver of the approximate dates of application. His conclusion that such waivers would eviscerate one of the core purposes of the legislation is also consistent with the plain wording of the statute and the legislative intent, and thus is neither arbitrary or capricious.

We agree with petitioners' further contention that the court erred in declaring the rights of the parties and instead should have dismissed that part of the amended petition/complaint *1405seeking declaratory relief.

We therefore modify the judgment in appeal No. 1 accordingly. Petitioners sought a declaration of the rights of the parties with respect to a 2002 consent order, and also sought further declarations that petitioners had the right to obtain waivers of the right to notification of the approximate dates upon which petitioners would apply products to the property of other customers.

Pursuant to CPLR 3001, "[t]he supreme court may render a declaratory judgment... as to the rights and other legal relations of the parties to a justiciable controversy." "A declaratory judgment action thus 'requires an actual controversy between genuine disputants with a stake in the outcome,' and may not be used as 'a vehicle for an advisory opinion'" (Long Is.

Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253, 253 [2006], appeal dismissed 9 NY3d 1003 [2007], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:3 at 259; see Ramunno v Skydeck Corp., 30 AD3d 1074, 1074 [2006]).

Here, the court, with the consent of the DEC, dismissed all charges related to alleged violations of the 2002 consent order, and thus no active controversy remained with respect to it. Petitioners' remaining requests seek a declaration that petitioners may act in a certain manner in the future when interacting with other, unidentified consumers, and thus "presented hypothetical issues concerning future events which may or may not occur" (Matter of United Water New Rochelle v City of New York, 275 AD2d 464, 466 [2000]).

Consequently, no justiciable controversy was presented, and the court was required to dismiss the amended petition/complaint insofar it sought declaratory relief (see generally Megibow v Condominium Bd. of Kips Bay Towers Condominium, Inc., 38 AD3d 265, 266 [2007]). Contrary to petitioners' further contention, the court properly dismissed the CPLR article 78 petition in appeal No. 2.

In that proceeding, petitioners challenged the promulgation of the DEC's "Policy DSHM-PES-05-11," concerning "Compliance with Certain Provisions of Commercial Lawn Application Regulations" (2005 policy). The court dismissed the proceeding on the ground that it was not ripe for judicial review.

The test for ripeness is well settled, to wit, a determination must be final before it is subject to judicial review (see CPLR 7801 [1]). “In order to determine whether an agency determination is final, a two-part test is applied. ‘First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and[,] second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party’ ” (Matter of County *1406of Niagara v Dairies, 79 AD3d 1702, 1704 [2010], lv denied 17 NY3d 703 [2011], quoting Matter of Best Payphones, Inc. v Department of Info.

Tech. & Telecom, of City of N.Y., 5 NY3d 30, 34 [2005], rearg denied 5 NY3d 824 [2005]). Here, the Acting Commissioner declined to apply the 2005 policy to the determination at issue, concluding that it was not yet in effect when petitioners applied the lawn care products at issue. Consequently, inasmuch as no “ ‘actual concrete injury’ ” has been inflicted and the injury was in fact “ ‘prevented or significantly ameliorated by further administrative action’ ” (id.), the matter is not ripe for judicial review.

We have considered petitioners’ remaining contentions, and conclude that they are without merit. Present — Scudder, P.J., Smith, Centra, Garni and Sconiers, JJ.