

**Matter of Dong Sic Ko v City of N.Y. Dept. of
Fin. Parking Violations Bur.**

2009 NY Slip Op 32804(U)

November 24, 2009

Supreme Court, New York County

Docket Number: 100664/09

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART ~~1A~~ PART 16

PRESENT.

ALICE SCHLESINGER

Index Number : 100664/2009

KO, DONG SIC

vs

CITY OF NEW YORK

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision.

FILED

DEC 02 2009

COUNTY OF NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOV 24 2009

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

DONG SIC KO,

Petitioner,

For a Judgment under CPLR Article 78,

Index No. 100664/09
Motion Seq No. 002

-against-

THE CITY OF NEW YORK DEPARTMENT OF
FINANCE PARKING VIOLATIONS BUREAU,

Respondent.

SCHLESINGER, J.:

FILED
DEC 02 2009
NEW YORK
COUNTY CLERK'S OFFICE

On May 6, 2009, I dismissed this Article 78 petition in a dictated decision on the record and granted a cross-motion by respondent, City of New York Department of Finance Parking Violations Bureau. The cross-motion argued that the Court lacked jurisdiction because the controversy was moot. This was so because respondent had elected to vacate the summons and fine (\$115.00) issued against Mr. Ko "in the interests of justice."

It should be noted that counsel for petitioner, who probably is more interested in these issues and more knowledgeable about them than virtually anyone else, objected to my actions. He argued first that his client had not been made whole having spent \$305 in court costs beside the \$115 fine. But more importantly, he argued that the issues extant, the alleged misapplication of VTL §238(2), which requires that a notice of violation be served personally upon the owner of a vehicle if the operator is not present by affixing such notice to said vehicle in a conspicuous place, and the alleged illegality of 19 RCNY §39-12(b), which prohibits an appeal until payment is made of the assessed fines and

penalties, were in fact matters of public import which recur frequently and therefore should be heard on their merits.

Now before this Court is a motion by petitioner for reargument, in the second instance, and recusal in the first. Why recusal? Because I did say, after informing counsel of my decision, that I would not take kindly to a motion for reargument and that it would be better for the petitioner to simply appeal. This statement is not a ground for recusal. I believed I was knowledgeable about the issues before deciding the motions and believed counsel should take his argument to a higher court if he felt aggrieved. So the first request is denied.

However, as to the second request, for reargument, that is granted. I am now convinced that I should have allowed the petition to be heard on the merits and at the least, directed respondent to answer the claims.¹

In the moving papers, counsel points out how often similar situations regarding "drove off" summonses occur. He states that alleged offenders are regularly convicted and fined, even though he argues there is a lack of personal jurisdiction because service of the summons was not made pursuant to VTL §238(2). He urges that PVB has only those powers conferred by statute. Therefore, even though this Court, in its decision, accepted

¹Although this was not proffered by moving counsel in his papers as a reason for reargument, nor was it commented on by opposing counsel, this Court was shocked that the judgment here filed on July 17, 2009, included costs and disbursements in the sum of \$219.86 in favor of the City Respondent. Not only was the petitioner not truly made whole by the City's untimely decision to dismiss the summons and return the fine of \$115, so that they could cross-move to dismiss in the interests of justice (Mr. Ko was required to spend in excess of \$300 in bringing this petition before the Court), but now there is a judgment entered against him for over \$200. The defensive strategic position the City took should never have been used as a sword to extract more money from him.

the City's argument that due process was complied with because respondent alleged that notices to the petitioner, vis-a-vis the offense, had been sent out to Mr. Ko, counsel says this makes no difference since §238(2) simply does not provide for alternative ways of service.²

With regard to the illegality of RCNY §39-12(b), counsel argues that this Rule is illegal because it is inconsistent with VTL §242. That section, in delineating the appeal procedure, states that such a review may be obtained by merely serving upon PVB a notice of the appeal. In other words, it says nothing about the added requirement of paying the fine.

Respondent, in its opposition, urges in two paragraphs that this Court did not overlook or misapply controlling principles of law. But on reviewing the petition and these additional papers, I believe I did. These issues may not be of world-shaking importance, but they do go to whether government authorities, particularly in enforcement roles, are required to adhere to strict application of their rules and whether, in the case of appeals, such a rule is in conflict with the VTL.

These are not trivial issues and they certainly affect a large number of individuals who confront them regularly. Further, moving counsel soundly argues that the respondent's actions in mooted the petition allows the Bureau to continue practices which may be improper and illegal.

The respondent should have been required to answer these allegations. Therefore, I am vacating my prior decision (and the judgment) and am directing the respondent to file an Answer to the petition on the merits.

²Counsel also points out that the content of those notices were never known so it cannot be assumed they gave Mr. Ko proper notice.

Finally, I am granting leave to petitioner to amend his petition to include relief asking for a declaration that VTL §238(2) applies regardless of whether a driver drives away or not and asking to enjoin respondent from enforcing PVB rule 19 RCNY §39-12(b)(3). Issue has not been joined as of yet and these additional remedies are premised upon the same facts and theories alleged in the petition.

Accordingly, it is hereby

ORDERED, that petitioner's motion for recusal is denied; and it is further

ORDERED, that petitioner's motion for reargument is granted, and upon reargument, the Clerk is directed to vacate this Court's May 6, 2009 decision and the judgment against petitioner entered based upon that decision and to restore this proceeding to the calendar; and it is further

ORDERED, that petitioner is granted leave to amend his petition by serving and filing with the County Clerk an Amended Petition consistent with this decision within ten (10) days hereof; and it is further

ORDERED, that respondent shall serve and file an Answer to the Amended Petition within twenty (20) days of service of the Amended Petition.

This constitutes the decision and order of this Court.

Dated: November 24, 2009

NOV 24 2009

FILED

DEC 02 2009

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

ALICE SCHLESINGER