

<b>Silberzwieg v New York City Dept. of Fin.</b>
2007 NY Slip Op 32058(U)
July 6, 2007
Supreme Court, New York County
Docket Number: 0103829/2007
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK COUNTY

HON. PAUL G. FEINMAN  
HON. PAUL G. FEINMAN

PRESENT: FEINMAN  
Justice

PART 52

SILBERZWIEG, MATTHEW

INDEX NO. 103829/07

MOTION DATE 4/25/07

MOTION SEQ. NO. 01

MOTION CAL. NO. 7

- v -

N.Y.C. DEPT. OF FINANCE,  
ET AL.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2,3  
4,5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION / ORDER / JUDGMENT.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: 7/6/07

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
MATTHEW SILBERZWIEG,  
Petitioner,

-against-

Index No. 103829/2007  
Submission Date 4/25/2007  
Mot. Seq. No. 001  
Cal. No. 7

NEW YORK CITY DEPARTMENT OF FINANCE,  
NEW YORK CITY SHERIFF'S DEPARTMENT,  
and NEW YORK CITY POLICE DEPARTMENT,  
Respondents.  
-----X

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Papers considered in review of this Article 78 proceeding

<b>Papers</b>	
Order to Show Cause .....	1
Verified Answer & Memo of Law..... <sup>1(B)</sup>	2, 3
Response.....	4
Certificate of Relief from Disabilities <sup>1</sup> .....	5

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, Counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B).

**PAUL G. FEINMAN, J.:**

In this CPLR Article 78 proceeding, petitioner Matthew Silberzwieg seeks to annul, as arbitrary, capricious, and an abuse of discretion, the determination of the Deputy General Counsel of the New York City Department of Finance (the DOF), dated December 28, 2006. That determination by the DOF denied petitioner's request to vacate a November 20, 2006 determination of the Agency's Sheriff's Division suspending petitioner from participating in Sheriff's and Marshall's Division Program auctions. Petitioner also seeks to enjoin respondents from interfering with his participation in such events.

<sup>1</sup>Received on notice to the respondents on May 29, 2007 while the petition was *sub judice*.

Petitioner asserts that he is in the business of buying cars at auction for resale to members of the general public (Ord. to Show Cause, Silberzwieg Aff. ¶¶ 3-6). By letter dated November 20, 2006, the Sheriff's Division of the DOF notified petitioner that it would no longer accept bids from him at its auctions, "by virtue of [petitioner's] recent felony conviction and the actions leading up to the current criminal prosecution." (Ord. to Show Cause Ex. 1). The notice stated that petitioner was "immediately suspended," that his suspension would "become a permanent bar on December 20, 2006," and that he would be physically removed from the premises should he attempt to participate in any future auctions. It also indicated that he had 10 days to respond in writing.

Petitioner's counsel timely wrote to the DOF asserting that it had no guidelines for excluding members of the public from participating in Sheriff Division auctions, there were no procedures for background investigations, and that inasmuch as the Sheriff's Division did not bar all felons from participating in public auctions, its determination to suspend and bar petitioner was without legal basis (Ord. to Show Cause Ex. 2). The Deputy General Counsel responded by letter dated December 28, 2006, that after considering the request, the original determination would stand, in particular as "the City of New York was the victim of the crime for which [petitioner] stands convicted" (Ord to Show Cause Ex. 3). Petitioner thereafter commenced this proceeding by order to show cause.

In answer to the petition, respondents state that on November 1, 2006, petitioner was convicted, in Richmond County, for Criminal Possession of a Forged Instrument in the Second Degree (Penal Law § 170.25), a Class D felony, and thereafter sentenced on January 19, 2007, to five years probation (Ver. Ans. ¶¶ 16). The felony complaint underlying petitioner's 2005 conviction states that on August 5, 2004, petitioner submitted an altered Department of Motor

Vehicles Official Business Certificate to Sergeant John Schwartz of the Sheriff's Office (Ver. Ans. Ex. B). Petitioner was charged with altering an official business record of the Motor Vehicle Department and presenting it with the intent to receive a tax exemption not otherwise allowed to him. Respondents allege that the underlying act took place in connection with, or during the course of a DOF auction in August 2004 (Ver. Ans. ¶ 14-15). Petitioner admits this conviction (Ord. to Show Cause Silberzwieg Aff. ¶¶ 7-8).<sup>2</sup>

In support of the instant application for CPLR Article 78 relief, petitioner asserts that respondents' reliance on his conviction to bar his participation in DOF auctions violates Correction Law § 752, enacted in 1976 in an attempt to eliminate the effect of bias against ex-offenders in obtaining employment (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 611 [1988]). The statute provides that:

No application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicants having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or
- (2) the issuance of the license or granting of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

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<sup>2</sup> Respondents also annex a felony complaint filed against petitioner, in Nassau County, on June 27, 2006, charging petitioner with two D felonies involving forged instruments, the actions which allegedly occurred at another DOF auction in 2001. As respondents have not submitted an affidavit from a DOF official with personal knowledge as to when the agency in fact learned of the allegations, the court will not presume that in fact the agency was aware of petitioner's alleged actions before it suspended him in November 2006. According to petitioner's attorney, petitioner will be allowed to plead to the violation of disorderly conduct (PL 240.20) (Response ¶ 6).

(Correction Law § 752). Petitioner argues that he has made his livelihood by attending DOF auctions, acquiring vehicles and reselling them for a profit, and that his ability to earn a living in this manner has now been unfairly denied. After oral argument and submission of the written papers, petitioner proffered a permanent Certificate of Relief from Disabilities, issued on May 17, 2007, which indicates that he is relieved of all legal bars to licenses and employment except as to weapons and the occupations of “accountant bookkeeper, insurance agent, bank officer, bank teller[,] stock broker or securities broker.” He argues that because there is no legal bar to his returning to his mode of earning a living, and the law is in favor of assuring that felons are fairly treated in the workplace, respondents have violated his rights and arbitrarily and capriciously refused to reinstate his privilege to attend the auctions.

Upon careful examination, the Court concludes that the cited section of the Correction Law does not apply to petitioner, as he is not required to be licensed to attend and bid on vehicles at the DOF auctions. Nor is he an employee or potential employee of the DOF or any related agency. Were section 752 of the Correction Law to be relevant, it could be argued that subsection (1) which allows the denial of a license or employment where there is a “direct relationship between one or more of the previous criminal offenses and the specific license or employment sought,” applies to the facts at hand, since the forged document was proffered as part of the auction process.

Petitioner’s arguments under the Due Process and Equal Protection clauses of the United States and New York State constitutions (U S Const., amend XIV, §1, NY Const., art I §11), are also unavailing. The fact that respondents’ determination prevents petitioner from participating in DOF auctions and buying and reselling automobiles, does not rise to the level of a constitutional “taking” under the Due Process clause. Auction sales are conducted for the benefit of the public,

not for the individual profit of the bidder (*Tayar v City of New York*, 61 Misc 2d 612 , 613 [Sup Ct, Kings County], *affd* 35 AD2d 690 [2d Dept 1970]), and petitioner has no constitutionally protected property interest in his method of doing business (*see Matter of Daxor Corp v State of NY Dept. of Health*, 90 NY2d 89 [1997]; *Matter of Ribotsky v Lupkin*, 114 Misc 2d 913, 921 [Sup Ct, NY County 1982], *citing Board of Regents v Roth*, 408 US 564 [1972]; *see also Yaman v D'Angelo*, 420 F Supp 2d 114, 122, 123 [WD NY 2005]). Petitioner's argument under the Equal Protection clause, that respondents have no guidelines, criteria, or procedures for excluding felons from participating in public auctions, and thus, do not treat all persons similarly situated the same (*see City of Cleburne, Tex. v Cleburne Living Center*, 473 US 432 [1985]) is contextually infirm. Respondents did not, as asserted by petitioner, single him out for exclusion based upon any suspect classification, or denominate petitioner as a class of one (*see Village of Willowbrook v Olech*, 528 US 562, 564 [2000]). In this matter, the action taken by the Sheriff's Division was in direct response to petitioner's act of submitting a forged or altered document to the Sheriff at auction. Petitioner's argument that respondents should not have considered the actions underlying his conviction, is without merit (*see e.g. Matter of Posner v Committee on Professional Standards, Third Judicial Dept.*, 147 AD2d 889 [3<sup>rd</sup> Dept 1989] [both nature of misconduct and consequences suffered as a result of conviction considered]; *Matter of Ribotsky v Lupkin*, 114 Misc 2d 913 [remand to agency directed where exact nature of offenses underlying conviction were not outlined]).

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v*

*Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept. 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974], quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609; see also *Matter of Arrocha v Board of Educ. of the City of N.Y.*, 93 NY2d 361, 363 [1999]; *Klein v Levin*, 305 AD2d 316 [1<sup>st</sup> Dept. ], *lv denied* 100 NY2d 514 [2003]; *Matter of Idant Labs. v State of NY Dept. of Health*, 243 AD2d 369 [1<sup>st</sup> Dept 1997]).

The Department of Finance, established pursuant to Chapter 58 of the New York City Charter (§§1501, et seq.), is charged with the duty of performing “those functions and operations of the city which relate to the administration and collection of all taxes, assessments and charges imposed by the city, the collection of arrears due the city and all other sums due the city...,” and with, “the receipt and safekeeping of all money paid into the city treasury and payment of money out of the treasury” (NY City Charter § 1504). The office of City Sheriff is a division within the DOF, “subject to the supervision and control of the commissioner of finance” (N.Y. City Charter § 1526). Pursuant to County Law §650, the Sheriff is an officer of the court and conservator of the peace within the county. Petitioner’s conviction, which is premised on proof beyond a reasonable doubt of the underlying facts, provides a rational basis for respondents in the exercise of their inherent authority to protect the integrity of the processes and proceedings with which they have been entrusted (see *Natelson v Portfolio*, 291 NY 290, 295 [1943]; *Oakwood Island Yacht Club, Inc. v Board of App. of the City of New Rochelle*, 32 Misc. 2d 677 [Sup. Ct, Westchester County 1961]), to prohibit petitioner from participating in DOF auctions (see, e.g. *Matter of Bando v Sullivan*, 290 AD2d 691, 692 [3<sup>rd</sup> Dept 2002]; *Matter of DiMonda v Bristol*, 219 AD2d 830 [4<sup>th</sup> Dept 1995];

*Matter of Benvenuto v Suffolk County Dept. of Consumer Affairs*, 144 AD2d 455, 456 [2d Dept. 1988]; see also *Marinaccio v Boardman*, 2005 WL 928631, \*22 [ND NY 2005] [plaintiff's criminal conviction relating to events that occurred on agency's contract site were material to determination regarding plaintiff's bids for future agency contracts]). Moreover, petitioner was not entitled to an evidentiary hearing with respect to respondents' determination, as there was no issue of a license which had been suspended or revoked (*Matter of Bando v Sullivan*, 290 AD2d at 692-93; *Matter of Idant Labs.*, 243 AD2d at 370; *Matter of Benvenuto v Suffolk County Dept. of Consumer Affairs*, 144 AD2d at 456-57).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and that "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*, 34 at 232-234). Respondents' determination to permanently bar petitioner from participating in DOF auctions cannot be seen as so disproportionate to the offense, in light of all the surrounding circumstances, as to shock one's sense of fairness (see *Verney v New York State Liquor Auth.*, 94 NY2d 779 [1999], *Matter of Pell*, 34 N.Y.2d at 233). Petitioner arguably did not raise the issue of excessive penalty in his counsel's letter to the DOF General Counsel, which was the administrative proceeding, and even if he had, his newly asserted allegations that some of the charges were dropped, that he agreed to plead guilty to lesser charges (Response ¶¶ 4-6), or that he has been issued a certificate of relief from disabilities which does not

ban him from his former way of earning a living, have no bearing on the existence of the November 1, 2006 conviction relied upon, and would not, in any event, necessitate a different result (*see Matter of Bando v Sullivan*, 290 AD2d at 692; *Matter of DiMonda v Bristol*, 219 AD2d 830).

It should be emphasized that it is not for this court to substitute what it might have done were it the administrative agency. Rather, the court's role is limited to determining whether there is any reasonable basis to support the DOF's determination and action. Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). That its determination may have harsh and, in the eyes of some, unfair consequences is not the standard of review. The record does not support a determination that respondents' actions were either arbitrary or capricious.

Accordingly, the petition must be denied. It is

ORDERED and ADJUDGED, that the petition is denied, and the proceeding is dismissed.

Dated: July 6, 2007  
New York, New York

ENTER :

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).