

Matter of Smith v City of New York

2007 NY Slip Op 32724(U)

August 22, 2007

Supreme Court, New York County

Docket Number: 0103417/2007

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE

PART 50A

Index Number : 103417/2007

28

SMITH, GHANI

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{Cross} motion is granted in part and denied in part in accordance with annexed Decision and Order.

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

FILED

SEP 05 2007

NEW YORK COUNTY CLERK

Dated: 9/5/2007

[Signature]

J.S.C.

HON. LEWIS BART STONE

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: PART 50

----- X
 In the Matter of the Application of :
 GHANI SMITH, :
 : DECISION AND
 Petitioner, : ORDER
 :
 For an Order Pursuant to Article 78 of :
 the Civil Practice Law and Rules : INDEX NUMBER
 : 103417/07
 - against- :

THE CITY OF NEW YORK, MICHAEL BLOOMBERG:
 as Mayor of the City of New York; and THE CITY OF
 NEW YORK DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION, EMILY LLOYD, as Commissioner of
 the City of New York Department of Environmental
 Protection,
 Respondents, :

FILED
 SEP 05 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

----- X
 Hon. Lewis Bart Stone:

This proceeding was commenced by Petitioner Ghani Smith ("Smith") by Notice of Petition dated March 13, 2007, pursuant to Civil Practice Law and Rules ("CPLR") Article 78 against City of New York, its Mayor, the City Department of Environmental Protection, and its Commissioner (collectively "DEP"), seeking Smith's reinstatement to a position from which he was dismissed, and for back pay, interest and fringe benefits from the time of his dismissal from the position. On May 24, 2007, DEP in lieu of answering the petition, made a Cross-Motion to dismiss the petition for the failure to state a cause of action. In its Cross-Motion, DEP reserved

its right, pursuant to CPLR §7804(d), in the event the Court denies such motion to serve its answer to the petition.

For the purposes of determining DEP's Cross-Motion to dismiss for failure to state a claim, this Court must accept the facts as set forth in the Petition as true.

FACTS

Smith had been employed by DEP as a construction laborer in a competitive civil service position for over eighteen years until he was terminated by DEP effective November 14, 2006. One requirement for his position is that he possess and maintain a valid New York State Motor Vehicle Class B Commercial Driver's Licence (the "License"). Smith had such license.

On or about September 30, 2006, the New York State Department of Motor Vehicles ("DMV") mistakenly suspended Smith's License for Smith's failure to maintain insurance coverage on his personal automobile. In fact Smith had maintained such coverage at all relevant times and DMV eventually corrected its own error and rescinded the suspension of Smith's License on December 2, 2006. Accordingly, since this controversy arose until the present, Smith has been, in fact, in possession of a License.

Becoming aware of the September 30, 2006, suspension, DEP, in October 29, asked Smith to attend a meeting at DEP to discuss such suspension. Smith did not attend the meeting. In November 2006, DEP again requested Smith to attend a meeting to discuss the suspension. Smith also did not attend the meeting. Subsequently, DEP terminated Smith's employment in a letter dated November 13, 2006, which recited:

“Because you do not possess the required license for your position, you are hereby terminated from your position of Construction Laborer with the Agency, effective upon your receipt of this notice.”

Learning, about two weeks later, that DMV's suspension of his License was rescinded, Smith commenced this proceeding for reinstatement, effective November 14, 2006.

For the purpose of this decision on DEP's Cross-Motion, this Court need not address the issue of Smith's failure to meet with DEP to discuss the “suspension” of his License, or whether the excuse set forth for such failure in his petition would be sufficient.

CONCLUSIONS OF LAW

As recited in the letter of termination and as asserted by DEP in its brief, Smith was not fired for his failure to meet with DEP, but instead was fired for his failure

to maintain the License. Accordingly, Smith cannot argue that he was entitled to a hearing under New York Civil Law §75, to which he would have been entitled had DEP wished to terminate him for failing to attend the meetings, and DEP cannot assert that Smith's failure to meet is relevant to the issues before this Court. Similarly, issues raised by Smith as to when he received notice of the License "suspension" and from whom are irrelevant, as Smith's termination was based solely on his failure to maintain the License which was a condition of his employment.

It cannot be questioned that a failure to maintain a License may constitute grounds for termination of a person for whom a License is a condition of employment. In Moogan v. State Dep't of Health, 8 AD3d 68 (1st Dept. 2004), lv denied, 3 NY3d 612 (2004), the First Department held:

"There is no factual issue to be determined at a hearing, in light of the fact that petitioner's EMT certification was unquestionably suspended by the Health Department, and that such certification is a requirement for employment with the Fire Department."

Similarly, in Felix v. City Dep't of Citywide Admin. Services, 3 NY3d 498 (2004), the Court of Appeals held that Felix's failure to maintain City residence was a condition of his employment and a basis for termination, without the need for a Civil Service Law §75 hearing. In Felix, there was a factual dispute as to whether in fact Felix was a resident and a factual determination that he was not.

Thus, presented here is the issue whether Smith did or did not have the License; if he did not, he could be forthwith terminated, and if he did, his termination was arbitrary and capricious.

DMV is the governmental agency that issued the License. Accordingly, it is to their acts that this Court must look to decide this matter. DMV, in its letter of December 2, 2005 to Smith recited, that the suspension of Smith's License had been "rescinded." Black's Law Dictionary (7th ED 1999) defines "rescind," in the non-contract context, as "to make void; to repeal or annul." Webster's Third New International Dictionary (1993) defines "rescind," in the non-contract context, as "to do away with; take away; remove, take back; annul; cancel." Thus, by its act to rescind its earlier suspension, DMV restored the status of Smith's License to the status quo ante DMV's act of suspension. By using the term "rescind" instead of reinstate or restore, DMV made it clear that as far as it was concerned, Smith always had his License, without any gap in licensure.

As Smith's qualification for his job was based on his being Licenced by DMV, Smith's petition states a cause of action that DEP's action in firing Smith for a lack of the License may be unsustainable as arbitrary and capricious because as a result of the rescission of DMV's prior decision, rendering its nullity, Smith always had the License. Under the fact pattern here, neither Moogan, where Moogan did not in fact

have a license nor Felix where Felix was found as a matter of fact, after a hearing, not be a city resident, apply.

Accordingly, this Court finds that Smith's Petition states a cause of action and hereby denies that portion of DEP's Cross Motion which seeks dismissal of Smith's Petition for the failure to state a claim. The Court, however, grants DEP the second part of its Cross-Motion and accordingly DEP may file its answer to the Petition within twenty days following the service of this Order with Notice of Entry.

This is the Decision and Order of the Court.

DATED: AUGUST 22, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
SEP 05 2007
NEW YORK
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