

Matter of Evan Auto, Inc. v Swarts

2008 NY Slip Op 30592(U)

February 19, 2008

Supreme Court, New York County

Docket Number: 0114393/2007

Judge: Walter Tolub

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PRESENT: WALTER B. TOLUB

PART _____

Index Number : 114393/2007
EVAN AUTO, INC.,
vs.
SWARTZ, DAVID J.
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 114393-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

re 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 ACCOMPANYING MEMORANDUM DECISION

FILED
FEB 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/19/08

WALTER B. TOLUB c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
In the Matter of the Application of
EVAN AUTO, INC and ABRAHAM HEBY

Petitioners,

Index No. 114393/07
Mtn Seq. 001

-against-

DAVID J. SWARTS, COMMISSIONER OF THE
DEPARTMENT OF MOTOR VEHICLES OF THE
STATE OF NEW YORK,

Respondent.

-----x
WALTER B. TOLUB, J.:

By this motion Petitioner seeks an order vacating the determination rendered by the State of New York Department of Motor Vehicles, which reinstated the revocation of Petitioner's Inspection Station Licence. Respondent cross-moves for an order to dismiss pursuant to CPLR §217 because the statute of limitations has run.

Facts

The Petitioner, Evan Auto, Inc. ("Evan") is an automobile repair shop licensed by the state of New York to inspect and repair motor vehicles. Abraham Heby is the principal of Evan.

On or about November 7, 2004, the Department of Motor Vehicle Automotive Facility inspector, Mr. Chin, conducted a concealed identity investigation of Petitioner's inspection station. Inspector Chin came to the station with a vehicle and requested that it be inspected. A technician placed the vehicle

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on a dynamometer but failed to conduct a safety inspection on the vehicle. Inspector Chin claims that the technician never checked any of the safety components of the vehicle such as the brakes and brake components, steering and suspension components and failed to check the operation of the headlights and taillights.

A finding was made by an Administrative Law Judge that Petitioner violated Vehicle and Traffic Law §303(e)(1) and Petitioner's inspection license was revoked. Petitioner appealed the determination of the Administrative Law Judge, and the license revocation was stayed pending Petitioner's administrative appeal.

On or about March 28, 2006, the Administrative Appeals board issued a "decision of appeal". That decision affirmed the findings of the Administrative Law Judge that the Respondent Evan had failed to conduct a vehicle inspection in conformance with departmental rules and regulations and failed to conduct the required safety portion of the inspection of the motor vehicle. The result of the decision was that the inspection license was revoked.

Notice of the Appeals Board's decision, and the accompanying final determination was delivered to counsel for the Petitioners on April 13, 2006. Thereafter, on June 27, 2007, the Department of Motor Vehicles Bureau of Consumer and Facility Services issued a notice of reinstated revocation of inspection station.

Discussion

Petitioners' motion is denied and the cross-motion is granted as the claims against the DMV are time barred.

Article 78 of the CPLR provides a four month statute of limitations for challenging an Agency's final determination. CPLR §217 provides that unless a shorter time is provided, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the Petitioner.

Petitioner argues that the statute did not begin to run until June 27, 2007, the date that the Department of Motor Vehicles Bureau of Consumer and Facility Services issued a notice of reinstated revocation of inspection station. However, as noted above, the statute of limitations in an Article 78 proceeding begins to run from the date the final administrative determination was issued and become binding. (CPLR §217).

Here, the denial determination made by the Appeals Board was made on March 28, 2006. Petitioners concedes that they had notice of the DMV's Appeal Board's final administrative determination to reinstate the revocation of Petitioners' licence on April 13, 2006. Therefore, any motion to challenge the Appeal Board's determination should have been brought no later than August 13, 2006. This proceeding was not brought until November 8, 2007, more than a year and a half after receiving the final

determination of the Appeal's Board.

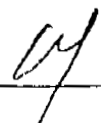
Accordingly it is

ORDERED that Petitioner's motion is denied; and it is further

ORDERED that Respondent's cross-motion is granted and the proceeding is dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/19/08



HON. WALTER B. TOLUB, J.S.C.

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