

**Matter of Porcelli v Swarts**

2008 NY Slip Op 31441(U)

May 23, 2008

Supreme Court, Albany County

Docket Number: 0086322/0071

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
MICHAEL PORCELLI,

Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION and ORDER**  
**INDEX NO. 8632-07**  
**RJI NO. 01-07-ST8235**

-against-

DAVID J. SWARTS, Commissioner,  
New York State Department of Motor Vehicles,

Respondent.

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Supreme Court Albany County All Purposes Term, May 9, 2008

**APPEARANCES:**

Joanne Porcelli, Esq.  
Attorney for Petitioner  
64-31 Central Avenue  
Glendale, New York 11385

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
Attorney for the Respondent  
(James J. Seaman, Esq. AAG)  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

Petitioner commenced the instant Article 78 proceeding alleging he was improperly found guilty of violations of the Vehicle and Traffic Law and denied his constitutional right of due

process. Petitioner asserts in conclusionary fashion that respondent's determination is arbitrary and capricious. Respondent seeks by motion the dismissal of the petition pursuant to CPLR 3211(a)(1),(2), (5) and (7).

Respondent moves to dismiss the petition for failure to obtain jurisdiction over the respondent alleging the Article 78 petition is untimely. The petitioner alleges he was denied his Sixth Amendment right to counsel and confrontation and his Fifth Amendment and Fourteenth Amendment right to due process.

On October 20, 2004, the petitioner was charged with violating V & T Law § 398-c(1) for operating a vehicle repair shop without being registered; V & T Law 398-k(2) for displaying a sign indicating his shop was registered; and V & T Law § 398-e(1)(g) for fraudulent or deceptive practice in holding himself out as a fully registered facility.

The initial DMV administrative hearing was scheduled for June 3, 2005. At petitioner's request, the hearing was adjourned until August 2005. The August 2005 hearing was again adjourned at petitioner's request until March 15, 2006. DMV adjourned the matter until May 19, 2006. That date was adjourned until August 1, 2006. On the morning of the hearing, petitioner's counsel sought an adjournment for an alleged medical condition which was denied. The Administrative Law Judge delayed the hearing in order for petitioner's attorney to obtain substitute counsel. No attorney appeared and the hearing was conducted with the petitioner present. Petitioner's attorney was given until August 8, 2006 to submit a Memorandum of Law on behalf of his client. Respondent maintains the Memorandum was not submitted as directed by the law judge. On August 9, 2006, the petitioner was found guilty of operating a repair shop without being registered and for displaying a sign for a shop that was not registered. The

Administrative Law Judge assessed the statutory penalties of \$1,200.00. Petitioner's appeal to the DMV Repair Shop Review Board was denied on May 10, 2007. On June 29, 2007, DMV notified the petitioner that his administrative appeal was denied. On October 29, 2007, petitioner commenced this CPLR Article 78 proceeding.

Respondent seeks to dismiss the petition pursuant to CPLR 3211 (a)(5) on the grounds that the proceeding was not timely commenced under the applicable Statute of Limitations (See, CPLR § 217). A CPLR Article 78 proceeding is commenced through the filing of the petition (See CPLR 304). It is the clerk's act of date stamping the petition which determines whether or not a matter is timely (Grant v. Senowski, 95 NY 2d 605)

In order to be timely filed, an Article 78 proceeding needed to be commenced no later than four months following receipt of the determination issued on June 29, 2007, in this instance, October 29, 2007 (Hauver v. New York State Division of Parole, 236 AD 2d 751, lv denied 89 NY 2d 815). It is well settled that the statute of limitations period does not begin to run until a petitioner receives notice of the final administrative determination and not upon the issuance thereof. (Matter of Biondo v. New York State Bd. of Parole, 60 NY 2d 832). The petitioner timely commenced this Article 78 proceeding on October 29, 2007 within four months from the date he received notice of the denial of his appeal. Respondent's motion to dismiss the petition as time barred pursuant to CPLR 3211(a)(5) is denied.

V & T Law § 398-f(2) provides for the establishment of an administrative Repair Shop Review Board. Administrative appeals are governed by V & T Law § 398-f(3). V & T Law § 398-f(b)(3) provides for a review of transcripts by the Review Board if paid for and submitted to the Board by the petitioner. If the petitioner fails to provide a transcript of the record within 30

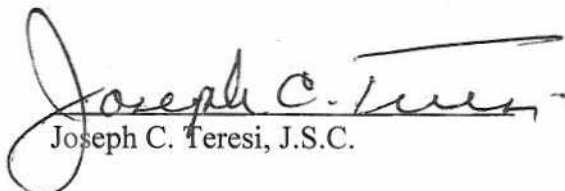
days thereafter, the appeal is deemed untimely. (see, 15 NYCRR § 82.15(d)(1)).

Respondent's motion to dismiss the petition for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted. Petitioner's administrative appeal was denied by the DMV Repair Shop Appeals Board for failing to submit a transcription deposit for the production of the transcript. The Board determined it could not "properly review appellant's factual claims without the hearing record." Petitioner "having failed to submit a transcript of the hearing to the Review Board, petitioner, himself, has deprived the Board of its ability to consider claims based on insufficient evidence." (Shalit v. State of New York Dept. of Motor Vehicles, 153 Misc. 2d 241; Richmond Hill Service Station, Inc. v. New York State Department of Motor Vehicles, 92 AD 2d 688). The Court of Appeals has held, "petitioner's failure to submit a copy of the hearing transcript to the Board precludes this Court from addressing whether substantial evidence supported this administrative decision." (Matter of Brady v. Department of Motion Vehicles, 98 NY 2d 625). The record reveals the petitioner failed to provide the Board with a transcript which precluded the Board from reviewing the minutes of the administrative hearing. Without a transcript, it was not irrational or improper for the Board to affirm the credibility findings of the Administrative Law Judge. (Matter of Berenhaus v. Ward, 70 NY 2d 436), nor can the penalty imposed be deemed shocking to one's senses. (Matter of Pell v. Board of Educ., 34 NY 2d 222).

All papers, including this Decision and Order are being returned to the attorneys for the respondents. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
May 23, 2008

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition dated October 28, 2007;
2. Verified Petition dated October 28, 2007 with attached exhibits 1-10;
3. Notice of Motion dated January 18, 2008;
4. Respondent's Memorandum of Law dated January 18, 2008;
5. Affirmation of Joanne Porcelli, Esq. dated April 15, 2008;
6. Respondent's Reply Memorandum of Law dated May 7, 2008.