

<b>Matter of Stair v Swartz</b>
2008 NY Slip Op 31808(U)
June 18, 2008
Supreme Court, New York County
Docket Number: 0104017/2008
Judge: Lewis Bart Stone
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lewis Bart Stone  
**HON. LEWIS BART STONE** Justice

PART 525

STAIR

INDEX NO. 104017/04  
104017/2008

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -  
Swartz et al

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 motion and cross motion  
are decided in accordance with  
attached Decision & Order.

**FILED**

JUN 30 2008

CLERK'S OFFICE

Dated: 26 June '08

Lewis Bart Stone  
**HON. LEWIS BART STONE** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

-----	X	
In the Matter of the Application of	:	
BRYAN STAIR,	:	DECISION AND
	:	ORDER
Petitioner,	:	
	:	
For an Judgment Pursuant to Article 78 of Civil	:	
Practice Law and Rules	:	
	:	INDEX NUMBER
-against-	:	104017/08
	:	
DAVID J. SWARTZ, New York Sate Commissioner	:	
of Motor Vehicles and ANDREW M. CUOMO,	:	
New York State Attorney General,	:	
	:	
Respondents.	:	
-----	X	

Hon. Lewis Bart Stone:

This proceeding was commenced by Petitioner, Bryan Stair, by Order to Show Cause, issued by this Court on March 26, 2007, pursuant to Civil Practice Law and Rules ("CPLR") Article 78 to set aside the revocation of his driver's licence by respondent, David J. Swartz, New York State Commissioner of Motor Vehicles ("DMV") and Andrew M. Cuomo, New York State Attorney General ("Cuomo") and to remand the matter to DMV for a Revocation Hearing pursuant to Vehicle and Traffic Law ("VTL") §1194(2)(c). Stair also sought a preliminary injunction to prevent DMV from enforcing its suspension order until the new Revocation Hearing

sought by Stair has been completed.

Stair was arrested following an automobile accident on August 26, 2007 and charged with driving while impaired and under the influence of marijuana and alcohol. Because the Court where he was arraigned believed he refused to take a chemical test, his driver's license was suspended pursuant to VTL §1194(b). Under VTL §1194(c), a person whose license is suspended under VTL §1194(b) is entitled to a Revocation Hearing on three limited grounds. Such hearing may be waived by the licensee and a failure to appear constitutes a waiver of a Revocation Hearing.

Stair did not attend the Revocation Hearing and his license was revoked. He subsequently petitioned for a new Hearing, claiming he had no notice of the Revocation Hearing, which petition was denied by DMV. Stair asserts that such denial was improper.

Cuomo appeared at this Court on April 1, 2007, the return date, and opposed Stair's request for a preliminary injunction and requested time to interpose an answer and provide a record. Swartz did not appear on the return date and Cuomo asserted that Stair's Order to Show Cause had not been properly served on Swartz as required by the Order to Show Cause. By Decision and Order dated April 23, 2008, the Court denied Stair's motion for a preliminary injunction with leave to renew, and adjourned the matter so that Swartz could appear and answer and so that Cuomo could answer

and provide a record so that the Court may decide this proceeding on its merits. The respondents have since jointly filed an answer and record dated April 24, 2008. Stair also filed a Reply Affirmation on April 29, 2008. In such Reply Affirmation, Stair did not renew his application for Preliminary Injunction.

Accordingly, all matters are now before the Court.

Initially, the Attorney General seeks dismissal from this proceeding on the grounds that it is not a proper party respondent. The Court agrees.

On the day of the accident and arrest, Stair was arraigned before the Hon. Ellen Coin, a Judge of the Criminal Court of the City of New York, New York County, in the presence of counsel. The Court record shows that at the arraignment Judge Coin advised Stair that his license was suspended. The record also contains a copy of "Notice of Temporary Suspension and Notice of Hearing" ("Notice") under VTL §1194, stating that because of Stair's "alleged refusal to submit to a chemical test," a Revocation Hearing was required to be held setting forth the date and place of such Hearing and the consequences of Stair's failure to appear. Judge Coin's initials and stamp are affixed on a line at the bottom over the words "Judge or Clerk of the Court sign above to indicate that motorist was handed this notice of Temporary Suspension."

Stair initially claims that he had no notice or "knowledge" of the Notice. The

same day Stair stood before Judge Coin with counsel at his side, he had been in an auto accident, totaling his car, after which he was allegedly standing in the street smelling of alcohol and shouting incoherently, admitting he had drunk and driven and later refused a chemical test. Whether Stair's lack of awareness of the Notice given in Court was caused by his alcoholic state, the shock of being arraigned, or by real or feigned memory loss is irrelevant. He was represented by counsel at the arraignment and the record endorsed by the Court shows the Notice was given. No objection was made at the arraignment to the suspension of the license for failure to take a chemical test. Giving such Notice was sufficient to subject Stair to the Revocation Hearing and the consequences of his failure to attend.

The Revocation Hearing was held on the date set forth in the Notice shown by the Court record. Because Stair did not appear, his driver's license was revoked. After being notified of such revocation of his license, Stair applied November 2, 2007, for a new hearing and supplemented such request by his letter of December 11, 2007. His request for a new hearing was denied and he was advised of such denial by DMV by letter of November 15, 2007. On December 1, 2007, Stair applied to the Administrative Law Judge ("ALJ") who conducted the Revocation Hearing from which he was absent, and who had also denied Stair's request for a new hearing, to "revisit" the matter, and also wrote to the DMV Appeals Board on December 3, 2007.

On January 28, 2008, the DMV Appeals Board, after reviewing Stair's submissions, affirmed the ALJ's denial of Stair's application to reopen the hearing, thus confirming the suspension of his license.

Stair now challenges the denial of his petition for rehearing, arguing that under the VTL, a motorist who fails to appear at a Revocation Hearing is entitled to a new hearing as of right upon request and that those provisions of DMV Regulations which accord DMV discretion to determine whether a new hearing should be allowed, are invalid as they exceed DMV's statutory authority.

As this Court's inquiry under CPLR Art. 78 may include an inquiry into whether the DMV Appeals Board made its determination "in violation of a lawful procedure," Stair's assertion may be considered by this Court.

Stair's argument is essentially that, as the last sentence of VTL §1192(2)(c) reads:

"Failure by such person [a charged motorist] to appear for the scheduled hearing shall constitute a waiver of such hearing, provided however, that such person may petition the Commissioner for a new hearing which shall be held as soon as practicable."

DMV Regulations (15 NYCRR §127.8) which states "any person who is deemed to have waived a hearing under these circumstances may request a rehearing within a reasonable time, which shall, if such request is granted [emphasis added], be held as

soon as practicable,” exceeds the statutory authority of §1192(2)(c) to the extent of adding the term “if such request is granted.” Accordingly, Stair argues, an application for a rehearing must be granted as of right, as the statute itself sets no conditions for a rehearing. The Respondents counter that the Regulations are properly within the statutory parameters of VTL §1194.

While Stair is correct that regulations issued by a government agency may not exceed the statutory authority for the issuance for such regulations and may not contradict or negate express statutory provisions, this Court must determine whether the Regulations are indeed unauthorized and contradict express statutory provisions. Neither party has cited controlling precedent or other authority on the issuance relying on analysis and argument instead.

To determine what rules and regulations are appropriate, the Court must first inquire whether the statute is unequivocal or ambiguous, and to do so must apply the usual principle of statutory interpretation.

In construing a statute, a Court must not “merely read the bare end product of the legislative labors, but rather they read the statute in light of the state of facts...which prompted the enactment,” McKinney’s Statutes §95. Here, the Legislature balanced the desirability of promptly suspending licenses of those who refused to take a breath test with the necessity to accord a factual hearing before

taking such a punitive step as a driver's license is almost a necessity in many parts of the State. The importance to this scheme of penalizing the failure to take a test is to avoid problems of proof and self incrimination on the one hand, and to obviate the need to physically extract blood or other information from drivers stopped for DWI on the other.

In determining whether a rule or regulation adopted by an agency is outside of the authority granted to the agency or in conflict with an express statute, the Court must give substantial deference to the interpretation of the statute in question by the agency issuing the rule or regulation, and may only find the agency's interpretation of the statute improper if there is no reasonable basis for such interpretation. The Court may not substitute its own interpretation for that of the agency unless there is no such reasonable basis for the agency's determination.


Here the DMV Regulation considers the purpose of the proviso in the statute to be a safety valve to protect against extraordinary but excusable events, through which a driver failed to attend a hearing, such as a subway breakdown, sudden illness or a road closing due to a natural disaster. Absent such a proviso, a driver with a meritorious defense who is prevented from appearing at a Revocation Hearing through no fault of his own, would lose his license under the remainder of the statutory mandate. Such construction is not an arbitrary or capricious interpretation,

when viewed in the context of the purpose of VTL §1192(2). Accordingly, this Court finds that the Regulation itself is valid. Further, the finding that Stair did not present adequate evidence of matters out of his control which prevented him from attending the hearing so as to make the denial of the rehearing under the Regulation an arbitrary and capricious application of the Regulation for the DMV to allow him to reopen the hearing is not arbitrary or capricious.

The Cross Motion is granted, the Attorney General is dismissed as a party to the Proceeding and the Petition is dismissed.

This is the Decision and Order of the Court.

DATED: JUNE 18, 2008  
NEW YORK, NEW YORK

  
\_\_\_\_\_  
Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**  
JUN 30 2008  
NEW YORK  
COUNTY CLERK'S OFFICE