

Matter of Edl v State of N.Y. Dept. of Law
2008 NY Slip Op 32987(U)
October 31, 2008
Supreme Court, New York County
Docket Number: 115142/07
Judge: Marilyn Shafer
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT:

Marilyn Shapiro
Justice

PART 8

Index Number : 115142/2007

EDL, MICHAEL A.

VS.

STATE OF NEW YORK, DEPT. OF LAW

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 115142-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

_____ were read on this motion to/for _____

<i>Petition</i>	<i>Petition</i>
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	
<i>Notice of Cross Motion -</i>	
Answering Affidavits - Exhibits	<i>Memo of Law</i>
Repeating Affidavits <i>Affirmation</i>	

PAPERS NUMBERED	
1, 2	
3, 4	
5	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *petition* is denied in
accord with the annexed memorandum.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1407).

Dated: 10/31/08

[Signature]
J.S.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 8

----- X

In the Matter of the Application of MICHAEL A. EDL,

Petitioner,

INDEX NO.
115142/07

For a Judgment under Article 78 of the Civil
Practice Law and Rules in the Nature of Mandamus

-against-

STATE OF NEW YORK, DEPARTMENT OF LAW,

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
1415).

MARILYN SHAFER, J.:

This is an Article 78 proceeding in which petitioner seeks a judgment in the nature of mandamus directing the Attorney General (“respondent”) “to comply with the enabling legislation of the New York Lemon Law regarding the promulgation of regulations which conform to the General Business Law § 198-a.”

Respondent cross-moves for an order pursuant to CPLR 3211(a)(7) dismissing the second amended petition on the ground that it fails to state a cause of action.

In 1983 the Legislature enacted GBL § 198-a, known as the New Car Lemon Law (“Lemon Law”), to provide consumers with greater protection than they received under automobile manufacturers’ express limited warranties (see Matter of DaimlerChrysler Corp. v. Spitzer, 7 NY3d 653, 657 [2006]). Under the statute manufacturers are obligated to repair, without charge, a new motor vehicle which fails to conform to express warranties during the first

18,000 miles or two years following delivery of the vehicle, whichever comes first (*id.*). If, after a reasonable number of attempts, the manufacturer fails to correct a defect which substantially impairs the value of the vehicle, the manufacturer must either replace the vehicle or accept the return of the vehicle and refund the purchase price (*id.*). In 1986 the Legislature amended the Lemon Law to give consumers the option of resolving disputes either by arbitration or by a legal action and directed respondent to establish and supervise the arbitration process (*id.* at 658). In 2003 respondent amended the consumer guide and forms by allowing consumers to obtain relief if, during the first 18,000 miles or two years, the vehicle was subject to four or more unsuccessful repair attempts or was out of service for 30 days (*id.*).

In July 2006 petitioner purchased a new 2006 Subaru Outback 3.0. In September 2007 he filed an application for arbitration alleging that his vehicle did not accelerate properly and that the manufacturer refused to make repairs. After a hearing the arbitrator issued a decision dated April 4, 2008 in which she concluded that petitioner did not qualify for a refund or a replacement vehicle under the Lemon Law (see respondent's exhibit A, p 3). In July 2008 petitioner brought this proceeding.

The second amended petition alleges in essence that the regulations promulgated by respondent pertaining to arbitration under the Lemon Law violate consumers' procedural due process rights because the decision form used by the arbitrator contains a total of eight alternative check-off items, each of which guaranty victory for the manufacturer (see petition, ¶¶ 11-13). According to the petition, item 2 on the form, which states that "[t]here were not 4 or more repair attempts for the same problem within 18,000 miles or 24 months, whichever is earlier" (*id.*, ¶ 13) would be present whenever, as in petitioner's case, a manufacturer initially refused to repair a

vehicle. The petition alleges that the presence of item 2 has the effect of: (a) depriving consumers of a right guaranteed by statute; (b) virtually guaranteeing an unfair hearing when repair was refused by the manufacturer; and, (c) establishing a safe harbor for manufacturers and dealers by allowing them to close their service departments and always be victorious under the Lemon Law (*id.*). The petition concludes with a request for an order directing respondent to correct its regulations under the Lemon Law to reflect the intention of the legislature, and directing respondent to recall all arbitration decisions issued on the arbitrator's decision form utilized in petitioner's arbitration (*id.*, p 4).

The court finds that petitioner's application is devoid of merit. The focus of the petition is item 2 (*supra*) in the decision form labeled "Arbitrator's Decision for the Manufacturer." This form is used by an arbitrator only after a hearing in which the arbitrator finds in the manufacturer's favor. Petitioner's allegation that "[t]he form includes 8 check off items ... each of which, if found, by its terms, grants manufacturer's victory" (see petition, ¶ 12) is, at best, misleading. The arbitrator "granted" victory to the manufacturer before the form was filled out.

As noted by petitioner, the form contains eight check off items. These items appear under the heading "Arbitrator's Findings" (see respondent's exhibit A, p 3). Only one of the findings is necessary to support a ruling in the manufacturer's favor (*id.*). Although the petition and the petitioner fail to give any factual background, it appears that petitioner's grievance at the arbitration hearing was that the manufacturer failed to make repairs within 20 days of receiving petitioner's written notice of the dealer's refusal to repair (see petition, second exhibit B [or exhibit D], p 4). After the hearing in which the manufacturer prevailed, the arbitrator checked off four findings corresponding to items 2 (there were not four or more repair attempts), 3 (the

vehicle was not out of service due to repairs for 30 or more days), 5 (the problem did not substantially impair the value of the vehicle) and 6 (the manufacturer did not fail to commence repairs within 20 days of receiving notice of the dealer's refusal to repair) (see respondent's exhibit A, p 3). The findings based on items 2, 3, and 5 merely record undisputed facts and are otherwise irrelevant because they have nothing to do with petitioner's complaint or the arbitrator's decision, both of which focused on the issue of whether the manufacturer failed to commence repairs within 20 days after receiving petitioner's notice of the dealer's refusal to make repairs (*id.*).

There are additional and independent grounds for denying the relief sought by petitioner. "Mandamus lies to compel the performance of a purely ministerial act where there is a clear right to the relief sought ... [and] it will not be awarded to compel an act in respect to which the [body or] officer may exercise judgment or discretion [citations omitted]" (Klostermann v. Cuomo, 61 NY2d 525, 539 [1984]). Petitioner is seeking to have respondent revise regulations under the Lemon Law to comply with the intent of the Legislature. To fathom that intent and thereafter revise the regulations to comport therewith requires considerably more than a purely ministerial act. Furthermore, petitioner has failed to establish any, let alone clear, right to the relief sought.

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioner's application is denied and the petition is dismissed; and it is further

ORDERED and ADJUDGED that respondent's cross-motion is denied as academic.

This constitutes the decision and judgment of the court.

DATED: 10 | 31 | 2008

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 1415).

[Handwritten signature and scribbles]
S.C.