

**Matter of Grasso v New York City Tr.**

2008 NY Slip Op 33187(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 111840/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis  
Justice

PART 6

Anthony L. Grasso

INDEX NO.

111840/08

MOTION DATE

10/28/08

MOTION SEQ. NO.

1

MOTION CAL. NO.

NYC TRANSIT, ET AL.

The following papers, numbered 1 to 17 were read on this ~~motion~~ <sup>petition according to</sup> ~~letter~~ <sup>CPLR Art. 78</sup>

PAPERS NUMBERED

1-8

9-14

15-16; 17

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

Answering Affidavits — Exhibits Motion to dismiss ...

Replying Affidavits         

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ <sup>petition is decided</sup>  
in accordance with the accompanying decision,  
order & judgment.

This judgment, order, or decision is final and notice of entry must be obtained by the party. To appear in person at the Supreme Court's Desk (Room 141B).

Dated: 11/25/08

JBL  
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  
NEW YORK COUNTY: IAS PART 6**

-----X  
Application of ANTHONY L. GRASSO,

Petitioner,

Index No. 111840/08

for a judgment pursuant to  
CPLR Article 78

**Decision, Order and Judgment**

-against-

NEW YORK CITY TRANSIT, METROPOLITAN  
TRANSPORTATION AUTHORITY, MANHATTAN  
AND BRONX SURFACE TRANSIT OPERATING  
AUTHORITY, CITY OF NEW YORK, NEW YORK  
CITY TRANSIT OFFICE OF SYSTEM SAFETY,  
TRANSPORT WORKERS UNION OF AMERICA  
(AFL-CIO)

Respondents.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner Anthony L. Grasso brings this Article 78 proceeding seeking to annul the determination of the New York City Transit Authority (“NYCTA”), dated July 31, 2008, to prohibit petitioner from operating a crane on any NYCTA projects or property on the ground that the determination is unlawful, arbitrary and capricious. Petitioner also asserts that the decision is not supported by substantial evidence. Respondents<sup>1</sup> move to dismiss the petition on the grounds that petitioner lacks standing; that the issue is non-justiciable; and, that the determination was rationally based and was not arbitrary and capricious.

<sup>1</sup> Pursuant to a stipulation of discontinuance without prejudice, filed in the County Clerk’s office on September 8, 2008, the action was discontinued as to Manhattan and Bronx Surface Transit Operating Authority, City of New York, New York City Transit Office of System Safety, and Transportation Workers Union of America (AFL-CIO).

*This judgment is not enforceable until the County Clerk has received the original of this judgment. To file a notice of appeal, you must file the original with the County Clerk (Room 1413).*

Petitioner is employed by Southern Crane Group ("Southern") as a crane operator. On June 22, 2005, the NYCTA entered into a \$37 million dollar contract with Southern in which Southern was required to provide for the leasing, operation and maintenance of thirteen (13) cranes at various locations on NYCTA property. According to the papers, Southern only has contracts with the NYCTA and its related entities. Petitioner alleges that he worked exclusively on construction jobs for the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA").

On April 19, 2008, petitioner was operating a crane for a MABSTOA construction project located at 167th Street and Jerome Avenue in New York City. Petitioner was loading materials onto a trailer behind the crane. The window of the crane cab was open. According to the petition, while petitioner was operating the crane, welders and burners were working on a structure directly above petitioner. Petitioner states that sparks, slag and water fell onto him from above, where the welders and burners were working. Although the foreman allegedly told the welders and burners to stop their work, because of the danger to petitioner and the men working on the trailer, they continued working and sparks, slag and water continued to fall.

In addition to fearing for his safety as material fell onto him, petitioner asserts that he was concerned that sparks and slag could fall on the propane tank outside the cab, which could cause an explosion. Petitioner states that he grabbed onto the hand rail, jumped outside the cab onto the fender of the crane, and told the welders and burners to stop burning over the crane. He then jumped back into the cab, and asserts that he "accidentally bumped the swing lever, which swung the boom of the crane toward the structure where the welders and burners were working." It is undisputed that no one was injured and there was no property damage.

The NYCTA investigated the incident. Written statements were requested from the workers who were on the job site that day. A number of NYCTA employees confirmed that the welders and burners had been warned to stop their activities due to the location of the crane just below them. The situation was variously described as “provocative,” “volatile” and “harassing”

In a memorandum dated May 2, 2008, P. Navarro, Vice Chairman, Track Department, of the Transit Workers’ Union, informed an NYCTA official of the incident. The memorandum contends that the track workers were unclear about their orders to continue their work while the crane was beneath them. Navarro and another superintendent agreed that this crane operator should not be permitted to operate a crane again on an NYCTA site, but on April 29, Navarro learned that petitioner was working at another site. One track worker claimed to be afraid to work on the job while petitioner was serving as crane operator. Navarro stated that he was told that petitioner was assigned to operate the crane at another site over the upcoming days, and requested that for the safety of all transit employees, petitioner should not be permitted to operate a crane in the presence of any transit employees.

A meeting was held on May 8, 2008 concerning the April 19 incident.<sup>2</sup> The purpose of the meeting was to determine the facts associated with the incident. A number of workers who were there the day of the incident were present, in addition to officials from the NYCTA. Petitioner and representatives from Southern were also present. No one was sworn in as a witness and no testimony was taken.

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<sup>2</sup> The NYCTA states that this meeting was held at Southern’s request.

Some workers who spoke at the meeting said that petitioner became distracted by the work that was going on, and that he did not realize that the hook was so low. Other workers stated that the crane operator deliberately swung the boom over the structure. There were also written memoranda and comments from workers who were present that day who claimed that petitioner deliberately swung the crane to hit the structure. A number of workers stated that the boom was swung over erratically. A few of the workers stated that before the incident, petitioner said words to the effect that, "I should swing the boom and take all you guys out" or "I am going to take you motherf-----s out."

The minutes of the meeting reflect that petitioner admitted that because he felt his life was in jeopardy, he swung the crane boom "to scare the Welder Burners in retaliation for the slag falling onto the crane." In his affidavit, petitioner denies that he made this statement. Petitioner now asserts that the incident was just an unfortunate accident, and was the result of petitioner trying to remedy a dangerous situation caused by the welders and burners; he claims that he accidentally bumped a lever that moved the crane. In his affidavit in opposition to the motion, he states that although he believed he had set the swing brake before jumping out of the cab, he "had apparently not depressed the pedal enough to stop the crane from moving."<sup>3</sup>

After the meeting, the NYCTA issued a written memorandum to Southern, dated July 31, 2008, stating that "[d]ue to the events that transpired on April 19, 2008 at 167th Street and

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<sup>3</sup> Petitioner explains that the swing brake is similar to the emergency brake of a car, and that if he had pressed harder, the crane would have been held in place.

Jerome Avenue, [i]t has been determined that Mr. A. Grassi [sic- should be Grasso] cannot operate a crane on any NYCT projects or on any NYCT property. This has been determined by the Office of System Safety with concurrence from the TWU.” This is the determination being challenged.

Before turning to the merits of the petition, respondents raise two issues relating to the appropriateness of petitioner’s right to bring the petition. First, they argue that the issue raised is one that is solely within the expertise and exclusive discretion of transit officials, and is non-justiciable. Second, respondents assert that petitioner lacks standing, since there is no privity between the NYCTA and petitioner, who is an employee of Southern and not the NYCTA.

Respondents’ claim of non-justiciability is without merit. Unlike the cases on which respondents rely, this case does not involve a determination concerning the operation and management of the transit system. See, e.g., McKeechnie v. New York City Transit Auth., 130 A.D.2d 466 (2d Dep’t 1987) (finding that an NYCTA determination to deploy transit police to work at certain facilities is a type of management decision that is not reviewable by the courts); Jamaica Chamber of Commerce, Inc. v. Metropolitan Trans. Auth., 158 Misc. 2d 601, 603-04 (Sup. Ct. Queens Co. 1993) (dismissing as non-justiciable a challenge concerning routing of buses and a determination that certain streets should be two-way rather than one-way). While respondents seek to categorize the determination here as one affecting the safety of their workers and the transportation system, this case involves the determination that a single worker is unfit to work on a job assignment for the NYCTA.

As to the standing argument, petitioner has alleged sufficient facts to demonstrate that he will actually be harmed by the challenged determination and that he is within the zone of interest to be protected by the statutory provision under which the NYCTA made its determination. Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004). It is apparent from the allegations that petitioner has satisfied the requirement of an injury in fact, and, for the purpose of getting to the merits of this application, the court will presume that his injury falls within the zone of interest sought to be promoted or protected by the statutory provision under which the NYCTA acted.

Turning to the merits of the petition, the court must first correct a misconception that is set forth in the petition. In his papers and at oral argument, petitioner asserted that the NYCTA held a “hearing” in connection with the incident. The meeting that the NYCTA held cannot in any way be considered an administrative hearing. There was no obligation for the NYCTA to hold a hearing; petitioner was not a NYCTA employee. Indeed, petitioner’s counsel conceded at oral argument that had there been no meeting, and had petitioner been let go, petitioner would have no right to challenge the determination. It is incongruous to hold that the NYCTA’s attempt at fairness by holding a meeting would defeat the NYCTA’s right to make the determination that was made.

Since the NYCTA’s determination was not made as a result of a hearing held and evidence taken, the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination has a rational basis in law. C.P.L.R. § 7803(4); Matter of Sullivan County Harness Racing Ass’n, Inc. v. Glasser, 30 N.Y.2d 269, 277 (1972); Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967). There is no need to transfer this proceeding to the Appellate Division. See C.P.L.R. § 7804(g).

Petitioner argues that the NYCTA, unlawfully and without due process or legal authority, came to the conclusion that petitioner deliberately and purposefully swung the crane into the structure. But, even if the incident was the result of an accident, the NYCTA was within its rights, under the contract, to determine that it would be unsafe for petitioner to operate a crane at an NYCTA jobsite. Article 120, paragraph A of the contract between the NYCTA and Southern expressly provides that

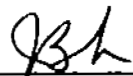
[t]he Contractor shall only employ competent, skillful and faithful people to do the work. Whenever the Project Manager shall notify the Contractor in writing that in his opinion any person on the work is incompetent, unfaithful, or disorderly, such person shall be discharged from the work and not be employed on it.

Once the Project Manager makes this determination, the NYCTA has an absolute right to discharge the employee from the work. Based on the contractual provision, the determination to bar petitioner from working at an NYCTA jobsite is rationally based and cannot be deemed either arbitrary or capricious. See, Matter of Action Electrical Contracting Co., Inc. v. Rivero, 287 A.D.2d 560 (2d Dep't 2001); In re application of Melwood Construction Corp. v. Supp, 256 A.D.2d 124 (1st Dep't 1998); Shahid Enterprises, Inc. v. Rivero, N.Y.L.J., Nov. 1, 2001, at 23, col. 6 (Sup. Ct. Queens Co. 2001). It is of no moment whether the determination was based on the belief that petitioner acted intentionally and used the swing boom in an attempt to intimidate or seek revenge on the NYCTA workers, or whether the loss of control was accidental. The NYCTA had an absolute right to determine that it did not want petitioner working at any NYCTA sites in the future.

The fact that Southern only has contracts with the NYCTA<sup>4</sup> and that the result of the NYCTA's determination is that petitioner is out of a job is not the fault of the NYCTA. The NYCTA is not petitioner's employer. The NYCTA only determined that petitioner is prohibited from operating a crane on any NYCTA projects or on NYCTA property. Petitioner's employment has not been terminated, and if Southern has contracts with other entities, petitioner is not prohibited from working at those jobsites.

Accordingly, the petition is denied and the proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: November 25, 2008

  
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JOAN B. LOBIS, J.S.C.

**NOTICE**  
This judgment of the court is hereby entered. The County Clerk and notary public shall be notified of this judgment. To obtain a certified copy of this judgment, the party must appear in person at the County Clerk's Desk (Room 141B).

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<sup>4</sup> Petitioner asserts at one point in the papers that Southern has contracts exclusively with the NYCTA. In the supporting affirmation of his counsel, however, it is asserted that petitioner's company "works almost exclusively with [the NYCTA]," which means that it is possible that petitioner can be employed elsewhere.