

Robinson v Mintz

2009 NY Slip Op 30030(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 115572/08

Judge: Joan B. Lobis

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

PRESENT: COBIS
Justice

PART 6

J DEL ROBINSON

INDEX NO. 115372/08

MOTION DATE 11/25/08

MOTION SEQ. NO. 001

NYC DEPT CONSUMER AFFAIRS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-6

7-11

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that _____

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 141B).

PETITION
MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER AND JUDGMENT

Dated: 1/6/09

JBA

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
JOEL ROBINSON d/b/a NATIONAL FUELSAVER
CORP.,

Petitioner,

Index No. 115572/08

-against-

Decision, Order, and Judgment

COMMISSIONER JONATHAN MINTZ, THE NEW
YORK CITY DEPARTMENT OF CONSUMER
AFFAIRS, and THE CITY OF NEW YORK,

Respondent(s).
-----X

JOAN B. LOBIS, J.S.C.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered hereon. In order to obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (10th Floor).

Petitioner, Joel Robinson, d/b/a National Fuelsaver Corp. ("Fuelsaver"), brings this Article 78 petition, by order to show cause, for an order directing Jonathan Mintz, the Commissioner of the New York City Department of Consumer Affairs (the "Department"), and the City of New York to remove an August 28, 2008 press release concerning Fuelsaver from the Department's website. Fuelsaver also seeks an order compelling the Department to issue a press release stating that no charges have been filed against Fuelsaver.

Robinson is the President of Fuelsaver, a Newton, Massachusetts corporation, which manufactures a device known as the Platinum Gas Saver (or Gasaver). On August 28, 2008, the Department issued a press release which announced charges against Fuelsaver for advertising "bogus 'fuel-saving' products to New York City residents." The Department charged Fuelsaver for violating the City's Consumer Protection Law by "boast[ing] [of] fuel-efficiency increases of 22 percent for its Platinum Gas Saver product and tout[ing] a government agency endorsement," both of which were false claims. The press release indicated that the Department intends to seek restitution on

behalf of customers who purchased the Platinum Gas Saver. The press release concludes by asking customers of Fuelsaver to contact the Department through the website or by calling 311.

Fuelsaver asserts that the posting of this information has caused and continues to cause it great financial damage, in that there has been an interference with business, diminution in public perception of the company, and the potential for a multitude of future harm. On November 7, 2008, petitioner, through its attorney, demanded that the press release and name of the company be removed from the Department's website. Petitioner contends that respondents have acted in an arbitrary and capricious manner and have punished petitioner by placing this information on its website. Fuelsaver claims that its due process rights have been violated by the posting on the Internet, when no charges have been brought and no findings have been made.

In response to the petition and the order to show cause, the Department states that petitioner has been charged with violating the Consumer Protection Law, New York City Admin. Code §§ 20-700 to 20-706, and annexes a copy of the eight-page Notice of Violation, dated August 22, 2008, to the opposition papers. The Department argues that it has given Fuelsaver an opportunity to refute the charges, so Fuelsaver cannot claim that it has been denied due process.

As set forth in the New York City Charter, the Department is entitled to enforce all laws relating to the advertising and offering for sale of commodities and goods in the City of New York, and to initiate its own investigation or take appropriate action. New York City Charter § 2203. Prior to enforcing alleged violations of the Consumer Protection Law, the Department must "give

the prospective defendant written notice of the possible action,” to which the alleged violator has five (5) days to respond, in writing, and demonstrate that no “repeated, multiple, or persistent violations have occurred.” Admin. Code § 20-703(d).

The August 22 Notice of Violation charged Fuelsaver with violating Section 5-09 of the Rules of the City of New York, and directed petitioner to appear at the Department headquarters on September 12, 2008 “to resolve the violations.”¹ The impetus for the charge was Fuelsaver’s advertisement in the July 14, 2008 issue of Metro New York and an advertisement for the Platinum Gas Saver on petitioner’s website, www.nationalfuelsaver.com. The advertisement in Metro New York makes the following statements:

Federal Consumer Protection has confirmed the fuel saving described in this advertisement.

* * *

National Fuelsaver Corp. has developed a low cost automotive accessory called the Platinum Gas Saver which is guaranteed to increase gas mileage by 22% while meeting all emission standards.

* * *

After a five year study, the government concluded: ‘Independent testing shows greater fuel savings with the Gas Saver than the 22% claimed by the developer.’

* * *

¹ Although this proceeding was commenced in November, the papers are silent as to whether any in-person meeting has ever occurred. The latest document is a letter, dated November 7, 2008, from petitioner’s counsel to Commissioner Mintz, demanding the removal of the information on the Department’s website concerning Fuelsaver and warning that a lawsuit would be initiated if the information was not removed.

The U.S. Government Federal Test Procedure has now proved that the Robinson Engine Head developed by national Fuelsaver Corp. of Boston delivers 48% more miles per gallon. Don't buy a new car without one. . . .

On August 26, 2008, after the Notice of Violation was served, Karuna Patel, the Director of the Department's Division of Research and Investigations, received a telephone call from Mr. Robinson, Fuelsaver's President, who indicated that he was out of the country and would like to provide the Department with documentation by e-mail. Mr. Robinson provided a written response, including a 1983 decision of a federal court in Massachusetts relating to a case brought by petitioner against the United States Postal Service in which Mr. Robinson successfully challenged an administrative decision of the USPS that he had been engaging in mail fraud.

The Department found that neither the e-mail message nor the attachments refuted the claims and supporting evidence in the Notice of Violation. The Department noted that the mail fraud standard of materially false representations differs from the standard under the New York City Consumer Protection Law. The Department further noted that the decision, which was issued in September 1983, concerned different advertising claims than the ones at issue here. On or about September 3, 2008, the Deputy Director of the Division of Research and Investigation, Dawn Yuster, spoke with Mr. Robinson and explained that he had failed to refute the charges in the Notice of Violation. Ms. Yuster inquired as to whether Mr. Robinson was interested in discussing settlement of the charges, to which he replied he was not. Ms. Yuster informed petitioner that the Department could commence an action against him in the Supreme Court of the State of New York. Fuelsaver commenced this proceeding on November 19, 2008

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

Petitioner's request for an order requiring the Department to remove any reference to Fuelsaver on its website must be denied. There is nothing in the press release that is inaccurate. The press release states that the Department announced charges against Fuelsaver for deceptive advertising. This is a true statement, given the August 22, 2008 Notice of Violation. Fuelsaver was given an opportunity to respond to the Notice of Violation, which it did, on August 26, 2008. Given the insufficiency of its response, in the Department's view, it was neither arbitrary and capricious, nor was it an abuse of discretion, for the Department to notify the public, via its website, that charges were being levied against Fuelsaver.

The Department's determination was based, in part, on statements by two federal governmental agencies. In or about 1991, the federal Environmental Protection Agency ("EPA") reached the conclusion, following tests conducted on the Platinum Gasaver (or Gas Saver), that the Gasaver did not significantly change vehicle emissions or fuel economy, and "did not produce the large—greater than 20 percent—fuel economy benefits claimed by the manufacturer." The EPA

[*7]
found that there was no change in vehicle operation and performance as a result of the device. Second, the Department relied on a website article by the Federal Trade Commission (the "FTC"), entitled "'Gas-Saving' Products: Fact or Fuelishness?" This document, dated September 2006 and modified on July 12, 2007, states that no government agency endorses gas-saving products for cars. The posting notes that "the EPA has evaluated or tested more than 100 alleged gas-saving devices and has not found any product that significantly improves gas mileage."

The documents petitioner presented in response to the charges all pre-dated these statements by the EPA and FTC. The Department reviewed petitioner's submissions and determined that nothing in its submission demonstrated that any governmental agency had endorsed Fuelsaver's products. The Department operated within its statutory authority in posting the information on its website with respect to the charges levied against Fuelsaver. The facts set forth in the press release—that charges are being brought against Fuelsaver—are true: the Department did charge Fuelsaver with violating the Consumer Protection Law by boasting of fuel-efficiency increases of 22% that were endorsed by a governmental agency.

For all of these reasons, the petition is without merit and is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: January 6, 2009

UNFILED JUDGMENT
This judgment has not been entered by the Court. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
COURT OF APPEALS, J.S.C.
BK