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| Matter of Van Lines v City of N.Y. Dept. of Fin. Parking Violations Bureau |
| 2009 NY Slip Op 30089(U) |
| January 13, 2009 |
| Supreme Court, New York County |
| Docket Number: 106783/08 |
| Judge: Walter B. Tolub |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

WALTER B. TOLUB

PRESENT: _____

PART 15

Justice

Index Number : 106783/2008

MEYERS VAN LINES, INC.,

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 106783-08

MOTION DATE 9/19/08

MOTION SEQ. NO. #007

MOTION CAL. NO. _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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).

Dated: 1/13/09

WALTER B. TOLUB 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 15

-----X
In the Matter of the Application of

MEYERS VAN LINES

Petitioner,

Index No. 106783/08
Mtn Seq. 001

For a Judgment under CPLR Article 78

-against-

THE CITY OF NEW YORK DEPARTMENT OF
FINANCE PARKING VIOLATIONS BUREAU,

Respondent.

-----X

WALTER B. TOLUB, J.:

This Special Proceeding arises out of the issuance of eleven (11) parking summonses to vehicles owned by petitioner's corporation. The summonsed vehicles are enrolled in respondent's "Fleet Program," a free and voluntary program created under 19 RCNY §39-03 which allows commercial organizations to receive computer-generated logs of all summonses that have been issued to license plate numbers registered to their organization during a given time period.

Participants of the Fleet Program are notified of issued summonses on three occasions, and with the issuance of each notification, are provided with time in which to respond. If no response is made within the allotted time, a default judgment is entered against the corporation and a fine is assessed. The assessed fine requires payment within seven days of issuance (19

Handwritten notes and stamps:
"I have reviewed the..."
"The City of New York..."
"Department of Finance..."
"Parking Violations Bureau..."
"Case No. 106783/08..."
"Mtn Seq. 001..."
"Walter B. Tolub, J." (signature)

[* 3]

§ RCNY 39-10). A similar requirement applies to judgments rendered by respondent after a hearing (19 RCNY § 39-10(h)).

Petitioner enrolled in the Fleet Program in 2002. Between July and November 2007, petitioner was notified of a total of eleven parking summonses which had been issued to his vehicles. When petitioner failed to respond to the multiple notices issued under the Fleet Program, respondent issued petitioner a total of four notices indicating that default judgments were to be entered on the respective outstanding summonses (see, Cross Motion, Exhibits E, F).

At petitioner's request, respondent held a hearing before Administrative Law Judge Stanley Weinberg on February 21, 2008 to address the summonses at issue. Notwithstanding petitioner's arguments, the default judgments were upheld and petitioner was fined a total of \$1,735.00 (see, Notice of Cross Motion Exhibit H). The decision issued by ALJ Weinberg directed petitioner to pay the assessed fine within seven days of the decision, and further advised petitioner that they had thirty days in which to appeal (id.).

Petitioner submitted an application to appeal the ALJ decision on April 1, 2008. That application was denied because at the time of filing, petitioner failed to pay the full amount of the fine imposed at the hearing (Petition, Exhibit L). In pertinent part, the form letter explaining the reason for the

denial reads as follows:

Your Documents are returned to you for one of the following reasons:

[***]

The Notice of Appeals will be reviewed upon payment of the hearing decision fine amount. Submit proof of payment (Copy of front and back of a cancelled check or money order, internet confirmation, etc.).

[***]

If you wish to appeal, please resubmit your claim and the above requested documentation attached to this letter within 10 days to

NYC DOF PVO/Appeals Unit

66 John Street 3rd Floor

New York New York 10038

Failure to comply [sic] is deemed an abandonment of your appeals.

[***]

(id.).

In response to this letter, petitioner commenced this Special Proceeding on May 15, 2008. On May 22, 2008, petitioner paid the fine assessed by ALJ Weinberg. By this Article 78 application, petitioner seeks an order annulling Respondent's denial of petitioner's application to vacate the default judgments or alternatively, an order compelling respondent to accept petitioner's notice of appeal from the hearing determination. Petitioner additionally seeks a declaration that respondent has no power to condition administrative review on payment of a fine; a declaration that respondent has no power to uphold a default judgment incorporating a late penalty in excess

of \$10 (ten dollars) unless respondent first sends petitioner a second notice of violation pursuant to VTL 235(2)(a)(2); a declaration that respondent has no power to render a default judgment without first sending petitioner a notice of impending default judgment pursuant to VTL 241(2); and costs and disbursements of this proceeding. Respondent cross-moves to dismiss this proceeding pursuant to CPLR 3211(a)(7).

Discussion

The court notes that the parties concede that the only remaining issue to be addressed in this application is the question of whether respondent may precondition an application for the appeal of a defaulted summons upon the payment in full of all of the fines and penalties assessed with that summons, and whether this rule, set forth under 19 RCNY 39-12(b)(3)¹ is

¹19 RCNY 39-12(b)(1)-(3) reads as follows:

(b)(1) A respondent aggrieved by the decision of a hearing examiner upon a plea of denying liability may obtain a review thereof by serving upon the Bureau, within thirty days of the entry of such decision, a notice of appeal setting forth the reason why the decision should be reversed or modified. The notice of appeal shall be in such form and filed at such place as may be prescribed by the Director. No appeal may be had from a plea of guilty, which has been entered at the hearing.

(b)(2) The filing of a notice of appeal shall not stay the enforcement of a final determination, unless so directed by the Appeals Board on written application or unless the respondent, on or before the filing of said notice of appeal, shall have posted a cash or recognized surety company bond in the full amount of the final determination appealed from. In lieu thereof, the respondent may pay the fines and penalties assessed, subject to reimbursement thereof in appropriate circumstances.

inconsistent with VTL 242 and therefore unenforceable (see, Petitioner's Affirmation in Opposition to Respondent's Cross-Motion; "Two Concessions," Dennis Boshnack).

Judicial review of agency determinations traditionally limit the court's scope of analysis to whether the challenged determination was rationally based, or whether it was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion (CPLR 7803; Pell v. Board of Education, 34 NY2d 222, 231 [1974]; Chinese Staff & Workers Association v. City of New York, 68 NY2d 359, 363 [1986]; Flacke v. Onodaga Landfill Systems, Inc., 69 NY2d 355 [1987]). See generally, Barr Altman, Lipshie and Gorstman; New York Civil Practice Before Trial, [James Publishing 2008] §42:200-244).

When the challenge focuses on the language of a statute, the court must focus on the legal interpretation of that statute (Matter of Moran Towing and Transportation Co., Inc. v. New York State Tax Commission, 72 NY2d 166, 173 [1988]), and consider both the purpose of the enacted legislation and its objectives (People v. Ryan, 274 NY 149, 152 [137]). Agency determinations which run counter to the clear wording of a statutory provision are

(b)(3) No appeal shall be permitted unless the fines and penalties assessed by the Hearing Examiner are paid, or the respondent shall have posted a cash or recognized surety company bond in the full amount of the final determination appealed from.

afforded little weight (Raritan Development Corp. v. Silva, 91 NY2d 98, 103 [1997], and those in complete conflict with the clear wording of a statutory provision are not to be upheld (id.; see also Kurcsics v. Merchants Mutual Insurance Co., 49 NY2d 451, 459 [1980])).

As touched upon earlier, the challenge in this application focuses on respondent's rule, 19 RCNY 39-12(b)(3), which requires the payment of the challenged fine in full before an appeal of that fine may be filed and considered. Petitioner contends that because there is no express requirement under VTL 242 which requires payment of the amount of a determination prior to consideration of its appeal, respondent's rule may not be enforced.

Petitioner supports his argument with the decision issued in the case of Ahl v. Howard (12 Misc 3d 870 [Sup. Ct. Monroe County 2006]). The Ahl case involved a rule created and adopted by the Bureau of Parking and Municipal Code Violations in Rochester, NY (the "Rochester Bureau") which, much like the rule imposed by respondent, required the payment of the assessed parking violation fine as a prerequisite for filing an appeal of the assessed fine. The court in Ahl concluded that the challenged rule² as written by the Rochester Bureau conflicted with the

² The language of the challenged rule (identified in the Ahl decision as "Rule 10.2") stated that no appeal "shall be permitted unless the fines and penalties assessed by a Final

language of the VTL.

This court however, disagrees that the same holding should be applied here.

Although petitioner correctly points out that under VTL 242 there is no requirement that a fee or fine be paid prior to consideration of an appeal, the judgment itself is not stayed unless the aggrieved party posts a bond pursuant to VTL 242(5).³ Thus, while it appears that it is permissible to appeal a judgment and determination under VTL 242(5), the judgment, absent the posting of a bond, remains enforceable, and would presumably be subject to financial penalties if not timely paid.

Contrary to petitioner's arguments, it appears that the language of RCNY 39-12(b)(2) and (b)(3) mirrors the requirements set forth under VTL 242(5). The payment or bond requirement is required to stay the enforcement of the judgment, and, if the appellant is successful, the monies are returned (RCNY 39-12(b); Cross Motion, Exhibit I). The language of the challenged statute is therefore not inconsistent with VTL 242 and is enforceable. Accordingly, it is

ADJUDGED that petitioner's application is denied; and it is

Determination of a Hearing Examiner are paid, or the Respondent shall have posted in escrow a cash or recognized surety company bond in the full amount of the Final Determination appealed from" (Ahl, 12 Misc 3d 870, 872).


³The court notes that the Ahl court noted this provision in a footnote, but did not discuss the provision further.

further

ADJUDGED that respondent's cross-application to dismiss is granted and the within petition is dismissed.

This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 1/13/67



HON. WALTER B. TOLUB, J.S.C.