

**Matter of Global Network Communications, Inc. v
New York City Dept. of Info.
Tech.**

2009 NY Slip Op 30943(U)

April 23, 2009

Supreme Court, New York County

Docket Number: 104338/09

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
GLOBAL NETWORK COMMUNICATIONS, INC.
Petitioner,

INDEX NO. 104338/09

MOTION DATE April 15, 2009

-against-

MOTION SEQ. NO. 001

NEW YORK CITY DEPARTMENT OF
INFORMATION TECHNOLOGY and
TELECOMMUNICATIONS

MOTION CAL. NO. _____

Respondent.

The following papers, numbered 1 to 7 were read on this petition pursuant to CPLR article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: Yes No

Upon the foregoing papers the Order to Show cause and petition pursuant to CPLR article 78 is decided in accordance with the accompanying decision and judgment.

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: 4/23/09

O. P. Sherwood
O. PETER SHERWOOD, 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: IAS PART 61

-----x
In the Matter of the Application of
GLOBAL NETWORK COMMUNICATIONS, INC.,

DECISION AND
JUDGMENT

Petitioner,

Index.: 104338/09

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules in the Nature of Mandamus ,

-against-

NEW YORK CITY DEPARTMENT OF INFORMATION
TECHNOLOGY and TELECOMMUNICATIONS,
Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
of this judgment, a copy must be served on the County Clerk
appear in person at the Judgment Clerk's Desk (Room

-----x
O. PETER SHERWOOD, J.:

Motion sequence numbers 1 and 2 and a cross-motion were heard at the same time and are consolidated for purposes of disposition in accordance with this decision and the decision issued from the bench following oral argument on April 15, 2009.

In deciding the motions and cross-motion, the court considered the petitioner's Order to Show Cause with Temporary Restraining Order, dated March 30, 2009, (motion sequence no. 1); the petition, dated March 27, 2009, together with exhibits "A" through "C"; respondent's Notice of Cross-Motion to Dismiss, dated April 13, 2009; affirmation of Assistant Corporation Counsel (ACC) Diana M. Murray, dated April 13, 2009, together with exhibits "A" through "L", and the affidavit of Stanley Schor, sworn to on April 15, 2009, both in opposition to the Order to Show Cause and in support of the cross-motion; petitioner's Order to Show Cause with Temporary Restraining Order (unsigned) submitted April 10, 2009 (motion sequence no. 2); affirmation of Mayne Miller, Esq., dated April 8, 2009; affidavit of Ronald Massie, sworn to on April 7, 2009; verified amended petition, together with exhibit "A"; affirmation of Mayne Miller, Esq., dated April 14, 2009, in opposition to cross-motion; reply affirmation of ACC Diana Murray, dated April 15, 2009, in support of cross-motion to dismiss and in opposition to the Order to Show Cause; and the oral arguments made by counsel.

The background facts and a history of the multiple lawsuits brought by petitioner, Global Network Communications, ("Global"), in an effort to continue unlicensed operation of private pay telephones ("PPT") on New York City streets are set forth in the recent decision United States Court

of Appeals for the Second Circuit (“Second Circuit”) captioned *Global Network Communications, Inc. v. City of New York* (____ F.3d _____, 2009 U.S. App. LEXIS 7177 [2d Cir. April 8, 2009]) (“*Appeal*”) and will not be recounted here. The lawsuits, including this Article 78 proceeding, result from a determination of the New York City Department of Information Technology and Telecommunication (“DoITT”) to deny Global’s application for a PPT franchise evidence of Global’s principal’s ties to organized crime, a past history of fraud by Global and its evasion of Global’s financial obligations to the City.

In the first motion, Global is seeking a final judgment annulling a determination of DoITT as set forth in a letter dated, February 25, 2009, to remove 50 unlicensed PPTs (“February 25, 2009 Letter”) and a preliminary injunction to enjoin DoITT and its contractors from removing the PPTs on only five days notice without a hearing and instead to allow for removal of the PPTs on a much slower schedule than has been demanded by the City (motion sequence no. 1).

In the second motion, Global has requested leave to amend the petition to add a third cause of action to prevent the disposition by DoITT of 83 PPTs as set forth in an “Invoice” dated, March 27, 2009 (“March 27, 2009 Letter”), without adequate notice and opportunity for an evidentiary hearing, and imposition of an “unconscionable amount” of \$55,380.00 to reimburse the City for the cost of removal. It also requests an interim order restraining the City from disposing of the 83 PPTs pending the outcome of this Article 78 proceeding (motion sequence no. 2).

The City has opposed the motions and has cross-moved to dismiss the petition as barred under the principals of *res judicata* and *collateral estoppel* (“cross-motion”). The court will address the cross-motion first because it is due to be granted, thereby rendering Global’s motions moot.

The petition contains two causes of action. The second cause of action which seeks an injunction pending a decision in the *Appeal* has been withdrawn because it has been decided (*see id.*). In its first cause of action, Global claims that the determination that is the subject of the February 25, 2009 Letter and the regulations pursuant to which DoITT is acting are in violation of law and of Global’s due process rights for the following reasons:

- 1) The letters did not allow the possibility that Global could sell its PPT locations;
- 2) The absence of a current franchise procedure for PPTs has deprived Global of due process by preventing Global from obtaining a fair and reasonable price for the assets;
- 3) The absence of a current franchise procedure also constitutes a barrier to entry into the telecommunications market in violation of the Telecommunications Act of 1996;

- 4) Global never had an evidentiary hearing or reasonable opportunity to contest the alleged non-payment of required fees; and
- 5) The alleged failure to pay required fees “implies” an admission that DoITT has treated telecommunications providers in a discriminatory fashion; and
- 6) The requirement to remove the fifty (50) PPTs within five days in order to avoid the added expense of reimbursing the City for the cost of removal is physically and economically impossible to meet.

At oral argument on the motions and cross-motion, counsel for Global acknowledged that these claims, except the last, are now foreclosed as a result of the decision in the *Appeal*. Global continues to challenge the speed at which it is being required to remove the PPTs. Petitioner pleads that it lacks the resources to remove any more than one or two PPTs a day. In its proposed third cause of action, Global alleges that the amount DoITT charges for removal is “exorbitant”.

The claim Global continues to press and the claim it seeks to add are barred by the doctrine of *res judicata* and *collateral estoppel*. Moreover, these claims amount to challenges to DoITT’s method of enforcement of its regulations which are within the discretionary authority of the agency and may not be disturbed by the court absent proof that the agency’s actions are either irrational or unreasonable.

The Second Circuit held that the denial of a franchise to Global did not violate substantive or procedural due process. Under the principals of *collateral estoppel*, Global is barred from challenging the effects of DoITT’s actions, including the timetable for removal of PPTs (*see id.* at *46; *Ryan v. New York Tel. Co.*, 62 NY2d 494 [1984] and *Green v. Montgomery*, 96 NY2d 693 [2001]). The claim that is the subject of Global’s proposed third cause of action is also barred under the doctrine of *res judicata* which bars re-litigation of issues that either were or could have been raised in the earlier case (*see Smith v. Russell Sage College*, 54 NY2d 185, [1981]; *Wilkins v. American Export Isbrandtsen Lines*, 46 AD2d 244 [1st Dept 1974], *affd.* 38 NY2d 758 [1975]). Global could have challenged the statutory timeframe for removal of unauthorized PPTs. In fact, Global complained in the *Appeal* about an earlier determination of DoITT, dated December 7, 2007, requiring the removal of 41 PPTs within five days (*see* Affidavit of Ronald Massie attached as Exhibit J to Affirmation of Diana M. Murray, dated April 13, 2009).

The court will not substitute its interpretation of a statute for that of the agency charged with its enforcement so long as the agency’s interpretation “is neither irrational, unreasonable nor

inconsistent with the governing statute” (*Pell v. Bd. of Educ.*, 34 NY2d 222 [1974] [internal quotation marks excluded]; and *Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98 [1997] [same]). DoITT lawfully exercised its enforcement authority in ordering removal of the PPTs within five (5) days of the dates of the notices sent to Global. Global’s application for an award of a public pay telephone application was denied on March 11, 2005. That decision was upheld by a Justice of this court in November 2005 who held that Global’s due process rights had not been violated (*see Global Network Communications, Inc. v. Menchini*, No 109531/05 [N.Y. Sup. Ct. Nov 28, 2005]). In August 2007, a federal district court judge denied Global’s challenge to DoITT’s decision to deny the franchise (*see Global Network Communications, Inc. v. City of New York*, 507 F. Supp. 365 [SDNY 2007]). In January 2008, another federal district court judge refused to enjoin DoITT from proceeding to remove illegal PPTs (*see Global Network Communications, Inc. v. City of New York*, 2008 U.S. Dist. LEXIS 4906 [SDNY January 22, 2008][Sand, J.]). On April 8, 2009, the Second Circuit affirmed the decisions of the district court (*see Appeal*).

Throughout this four-year period, Global has had ample opportunity to remove its illegal PPTs from City streets. Apparently, Global elected to do nothing hoping instead to avoid or delay compliance through litigation. Global cannot now complain that DoITT is using an “Indianapolis speedway approach...in a race to remove all of [Global’s] PPTs”. To the contrary, DoITT has exercised considerable patience and restraint in its efforts to effect compliance with the law.

DoITT’s cross-motion to dismiss the complaint should be granted. Global’s request for leave to amend the petition is denied for failure to state a cause of action. The proposed third cause of action is barred under the doctrine of *res judicata* and the timetables set by DoITT are matters that are well within the discretion of the agency.

The motions for temporary and permanent relief are denied as moot. If the court were to decide these motions, the court would deny them for the reasons stated at oral argument. Global has not satisfied the requirements for grant of a preliminary injunction (*see State of New York v. Fine*, 72 NY2d 967, 968-69 [1988]).

For the reasons set forth above, it is

ORDERED and ADJUDGED that the cross-motion of respondent DoITT to dismiss the petition is granted; and it is further

ORDERED that Global’s motion (motion sequence no. 1) for a preliminary injunction and a final judgment relating to the determination of DoITT, dated February 25, 2009, to remove 50 PPTs is denied as moot; and it is further

ORDERED that Global's motion (motion sequence no. 2) for a temporary restraining order relating to the disposition of 83 PPTs as set forth in an Invoice issued by DoITT and, dated March 27, 2009, is denied as moot; and it is further

ORDERED that so much of the motion as seeks leave to amend the petition to add a third cause of action is denied; and it is further

ORDERED and ADJUDGED that the petition is hereby dismissed.

This constitutes the decision, order and judgment of the court.

DATED: April 23, 2009

ENTER,



O. PETER SHERWOOD
J.S.C.

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).