

**Matter of Josey v New York City Dept. of Fin.,
Adjudication Div.**

2010 NY Slip Op 32814(U)

October 6, 2010

Sup Ct, NY County

Docket Number: 102545/09

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA Judge

PART 19

Eric Josey

INDEX NO.

102545/09

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

N.Y.C. Dept. of Finance

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

special proceeding is

~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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: _____

10/6/10

Saliann Scarpulla

J.S.C.

SALIANN SCARPULLA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

In the Matter of the Application of
ERIC JOSEY,

Petitioner,

Index No.:102545/09
Submission Date: 7/7/2010

-against-

NEW YORK CITY DEPARTMENT OF FINANCE,
ADJUDICATION DIVISION,

DECISION AND ORDER

Respondent.

-----X

Petitioner, *pro se*:
Eric Josey
101 West 130th St., Suite 4C
New York, NY 10027

For Respondent:
Michael A. Cardozo
Corporation Counsel for the City of New York
100 Church St., Rm. 5-161
New York, NY 10007

Papers considered in review of this petition:

- Amended Petition 1
- Answer 2
- Mem of Law 3

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HON. SALIANN SCARPULLA, J.

In this Article 78 proceeding, petitioner Eric Josey ("Josey") challenges the January 29, 2009 and July 2, 2009 determinations of the respondent New York City Department of Finance, Adjudication Division ("DOF"), which upheld guilty determinations for two separate parking violation summonses.

On August 30, 2008, Josey was issued a parking violation, Summons # 125045646-0 (the "2008 summons"). The 2008 summons was issued to a rental car,

which Josey admits was in his possession and control at the time, parked in an area of West 130th Street which was designated as "No Parking Anytime." Josey pled not guilty via hearing by mail. Josey argued only because the notice of violation omitted the expiration date of the vehicle registration sticker and indicated that it was not shown, there was insufficient prima facie evidence and a procedural defect which warranted dismissal of the summons.

On December 31, 2008, hearing examiner Administrative Law Judge Edward M. Siegal issued a Decision and Order, which provides:

No defense to the violation is submitted. Respondent claims that the ticket should be dismissed because it was improperly written Respondent's claim is not persuasive because I find that for this out-of-state vehicle (a) all required ticket elements are correctly or reasonably stated, and (b) the Registration Expiration date was not clearly visible when the ticket was issued. Guilty.

The decision and order indicated the total amount due for the violation was \$60.00.

Josey appealed this Decision and Order to the DOF, arguing that "[t]his decision errs as a matter of law." Josey pointed to NYC VTL § 238(2-a)(a), and asserted that the summons did not indicate the condition which caused the registration sticker to be unreadable. On January 29, 2009, the DOF issued its decision, which states "Upon review of the entire record before us, we find no error of fact or law. The Judge's decision is upheld."

On April 18, 2009, Josey was issued another notice of parking violation, summons # 7991264713 (the "2009 summons"). The 2009 summons provides that Josey's car was

parked within seven (7) feet of a fire hydrant, in violation of § 4-08(e)(2). The fine amount was \$115.00. Josey again pled not guilty via hearing by mail. In his “statement of defense,” Josey argued that the summons should be dismissed “pursuant to defective evidence.” In particular, Josey asserted that his car was parked more than fifteen (15) feet from the hydrant, and submitted photographs in support.¹ Josey also requested issuance of a subpoena duces tecum “to compel the production for examination and introduction into evidence, any papers, notes or other thing relevant to complainant’s method for determination of” the location of the vehicle.

On June 8, 2009, Administrative Law Judge Alese Rubinroit issued a determination following a hearing-by-mail on the 2009 summons. Judge Rubinroit found that

Respondent’s general denial of the facts in the summons is not supported by persuasive evidence. Respondent submits 3 photographs which are not persuasive to establish that respondent’s vehicle was not parked within 15 feet of the fire hydrant on the day and time of the violation. Respondent is found guilty of the violation. . . . Total amount due = [\$]115.00.

Josey appealed this decision to the DOF. Josey argued that the photographs submitted show he was parked “before the alternate parking posted sign and faded yellow hydrant zone.” Josey argues that because the summons did not indicate the “method of measurement” from the hydrant, it therefore failed to meet the “substantial evidence”

¹ The photographs submitted by Josey show another car parked where he asserts his car had been parked at the time the 2009 summons was issued.

requirement of VTL §240(2). Josey also notes that the decision of Judge Rubinroit fails to address his request for a subpoena duces tecum.

On July 2, 2009, the DOF issued a decision, finding that “Upon review of the entire record before us, we find no error of fact or law. The Judge’s decision is upheld.”

In his amended verified petition, Josey argues that these determinations were in violation of lawful procedure, “affected by error of law,” the result of abuse of discretion, and arbitrary and capricious.

In opposition to the amended petition, the DOF asserts that its determinations were rational and reasonable, and not arbitrary and capricious. DOF further argues that the fines issued to Josey were not shocking to the conscience.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep’t 1999). “In short, ‘[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.’” *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken ‘without

sound basis in reason and without regard to the facts.” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

In addition, “[t]his Court has the authority to review an administrative sanction that ‘shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.’” *Matter of Toomer v. Rhea*, 2010 NY Slip Op 31130U, at *5 (Sup. Ct. N.Y. Co. April 23, 2010) (quoting *Peoples v. New York City Housing Authority*, 281 A.D.2d 259 (1st Dep’t 2001)).

Turning first to the 2008 summons, Josey has not denied that the rental vehicle he was operating was parked in an area designated “No Parking Anytime.” Instead, Josey challenges the sufficiency of the summons, stating that it does not comply with VTL §238(2-a).² On the 2008 summons, the issuing officer indicated that the registration expiration date of the vehicle was “not shown.” The First Department has held that such a designation on an out of state vehicle satisfies the requirement set forth in VTL §238 (2-a)(a). *See Gold Key Lease v. City of New York Dep’t of Finance*, 276 A.D.2d 322 (1st Dep’t 2000) (“Insofar as respondent agency generally interprets Vehicle and Traffic Law

² VTL §238(2-a)(a) provides:

Where the plate type or expiration date are not shown in either the registration plates or sticker of a vehicle or where the registration sticker is covered, faded, defaced or mutilated so that it is unreadable, the plate type or the expiration date may be omitted from the notice of violation; provided, however such condition must be so described and inserted on the notice of violation.

§ 238 (2-a) as permitting “not available” as a description of a condition preventing an issuing officer from listing the vehicle registration expiration date on a parking summons, this Court will defer to that interpretation of the statute”).

Moreover, it is well settled that the “construction given statutes and regulations by the agency responsible for their administration, ‘if not irrational or unreasonable,’ should be upheld.” *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (citing *Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 N.Y.3d 597, 604 (2005)). Josey has presented nothing to suggest that the DOF construction of VTL§238(2-a)(a) was irrational or unreasonable.

Therefore, the Court finds nothing to support Josey’s claim that the DOF’s finding was arbitrary and capricious. Moreover, the \$60.00 fine issued in association with this summons is not disproportionate, or shocking to the conscience. Accordingly, Josey’s Article 78 petition as it pertains to the 2008 summons is denied.

Similarly, Josey has not met his burden to show that the DOF’s determination to uphold to 2009 summons was arbitrary and capricious. The 2009 summons was issued for parking within seven (7) feet of a fire hydrant. However, parking within fifteen (15) feet of a fire hydrant is prohibited. *See* 34 RCNY§ 4-08(e)(2). Josey argues that his car was not parked in violation of 34 RCNY § 4-08(e)(2), either because the signage near his car created an exception to the rule, or because the summons failed to indicate the method of measurement used. Josey also submitted photographs which he claims support his position. However, there is no dispute that Josey submitted photographs of *another* car

parked in the vicinity of the location indicated in the 2009 summons. Judge Rubinroit found that these photographs did not constitute persuasive evidence, and Josey has failed to establish otherwise.

Therefore, regarding the 2009 summons, the Court finds nothing to support Josey's claim that the DOF's finding was arbitrary and capricious. Additionally, the \$115.00 fine issued in association with this summons is not disproportionate, or shocking to the conscience. Accordingly, Josey's Article 78 petition as it pertains to the 2009 summons is also denied.

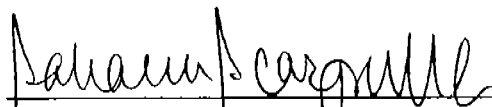
In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioner Eric Josey's petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
October 6, 2010

ENTER:


Saliann Scarpulla, J.S.C.

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