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

PRESENT: Hon. John A. Michalek PART 11

Justice

Index Number : 101133/2010

IVERSON, DWAYNE

VS.

N.Y.S. DEPT OF MOTOR VEHICLES

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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~~ petition is decided in accordance with the annexed Memorandum Decision Order + 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).

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

Dated: October 13, 2011

J.S.C.

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: PART 11

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In the Matter of the Application of
DWAYNE IVERSON,,

Index No.: 101133/10

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES TRAFFIC VIOLATIONS BUREAU
APPEALS BOARD,

Respondents.

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JOAN A. MADDEN, J.:

Petitioner Dwayne Iverson ("Cherry") brings this Article 78 proceeding annulling the determination of respondents regarding certain traffic tickets issued in February and May 2008, and staying the enforcement of recording certain violations on his record and suspension of his license. Respondent opposes the relief sought in the amended petition[1] and argue that it raises issues of substantial evidence which should be transferred to the Appellate Division, First Department, pursuant to CPLR §7804(g).

Background

At issue here are three traffic tickets issued to Iverson for speeding on May 1, 2008 ("the May tickets"), and another ticket issued for speeding on February 2, 2008 ("the February ticket"). Following the issuance of the tickets, Iverson pleaded not guilty and appeared in traffic court. At a hearing on the record held before Administrative Law Judge (""ALJ") Gaveau, who found

[1]By interim order dated March 12, 2010, the court gave petitioner leave to amend the petition and respondents time to answer the amended pleading.

Iverson guilty of violating VTL § 375(12-a)(2) and two counts of New York City Traffic Rule ("NYCTR") § 4-06(a)(1)(47 miles per hour in an unposted 30 mile-per-hour zone) and fined him the maximum amount of $150 and place four points on Iverson's license. The Appeals Board affirmed ALJ Gaveau's findings.

With respect to the February ticket, Iverson pleaded not guilty and a hearing was held before ALJ Zolkoski. Following the hearing, ALJ Zolkoski found Iverson guilty of violating VTL § 1180(d)(speed in zone) based in part of the police officer's testimony that his laser gun recorded Iverson's traveling at a speed of 105 miles an hour, and fined Iverson $350, plus a $50 surcharge, and suspended his license for sixty days. The Appeals Board affirmed ALJ Zolkoski's findings.

Iverson now challenges the determinations on various grounds including the errors in the summonses issued in connection with the tickets warrant dismissal of the violations and that the ALJ's made various errors in connection with the evidence before it, including its assessment of the testimony of the officers issuing the tickets. Iverson seeks both to annul the respondents' determination but also to stay the suspension of his license and the recording of the points on his record.

Iverson's request for a stay is denied. The granting of a stay under 7805 is a drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief. City of New York v 330 Continental, LLC, 60 AD3d 226, 234 (1st Dept 2009); Peterson v Corbin, 275 AD2d 35 [2d Dept], lv dismissed, 95 NY2d 919 (2000). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the

equities in the movant's favor. CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the motion must be denied. Faberge Intern., Inc. v Di Pino, 109 AD2d 235 (1st Dept 1985). Here, a review of the record indicates that Iverson has not met this standard. Moreover, to the extent Iverson challenges the sixty-day suspension of his license which began in or about March 2010 , his request is moot.

Pursuant to CPLR §7804(g), a case presenting a question of substantial evidence must be transferred to the Appellate Division. Padilla v. Levy, 300 AD2d 62 (1st Dep't 2002), lv denied, 100 NY2d 502 (2003). "That section mandates such a transfer where one of the bases for the challenge to administrative action is that the determination was not supported by substantial evidence." Mason v. Dep't of Bldgs., 307 AD2d 94 (1st Dep't 2003). Here, Iverson challenges the decisions of ALJ Gaveau and ALJ Zolkoski made after a hearing on the record, and such a challenge presents questions of substantial evidence. See Casalino Int. Demolition Corp. v. State Dept. of Motor Vehicles Traffic Violations Appeals Bureau Bd., 261 AD2d 615, 616 (2d Dept 1999)(holding Supreme Court should have transferred proceeding challenging conviction for operating an overweight truck to the Appellate Division); Solomon Oliver Contracting Corp. v. Adduci, 201 AD2d 979 (4th Dept 1994)(transfer of petition challenging the sufficiency of evidence for violation in connection with operation of vehicle).

However, to the extent that the petition raises issues relating to errors of law that could terminate the proceeding without considering the substantial evidence questions, the Supreme Court should consider these issues in the first instance. Robinson v. Finkel, 194 Misc2d 55 (Sup. Ct. NY Co. 2002), aff'd, 308 AD2d 355 (2003). Here, to the extent Iverson argues that

certain inaccuracies on the face of the summonses rendered them procedural defective, he raises a legal issue for this court. With respect to his allegations that the May tickets were insufficient based on the officer's failure to include make and model of the devices used to find the speeding violation, Iverson waived this objection by failing to raise it before ALJ Gaveau. See Corona Ready Mix v. State of New York Depart of Motor Vehicles, 226 AD2d 630, 631 (2d Dept 1996)(petitioner's argument related to the notice provided by summons was not preserved for review as it was not raised at the hearing).

Iverson also alleges that the February ticket was defective as it indicated a violation of VTL § 1180(d) and at the hearing the police officer testified that there was a violation of VTL § 1180(b).[2] This argument is without merit. It is clear from the record that Iverson was charged with, and convicted of, violating VTL § 1180(d), which prohibits speeding in the excess of the maximum established speed limits. The February ticket indicates that Iverson was driving 100 miles per hour in a 50 per mile hour zone, and the police officer testified at the hearing that Iverson was in a 50 mile per hour zone at the time he was issued the February ticket. VTL § 1180(b), which provides that the maximum speed limit is 55 miles per hour is inapplicable here since Iverson was charged with exceeding a speed limit of 50 miles per hour, and to the extent the officer erred in identifying the proper section at the hearing, such an error does not provide a sufficient basis for dismissing the violation.

Next, Iverson alleges that the February ticket should be dismissed as it provided an inaccurate description of the location of the place of occurrence as "E/B [Eastbound] Bruckner

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[2]At the hearing, Iverson apparently argued that the summons was insufficient because the officer did not write out the violation but only filled in circles next to the pre-printed violation of VTL § 1180(d).

[* 6]

[at]E138 Street." As this description is consistent with the officer's testimony, it cannot be said, as a matter of law, that it is facially insufficient.

The remaining allegations in the petition, including Iverson's contention that the officer should not have been permitted to read from his notes, raises issues of substantial evidence, and thus the balance of this proceeding must be transferred to the Appellate Division, First Department, pursuant to CPLR §7804(g).

In view of the above, it is

ORDERED that Iverson's request for Article 78 relief on the ground of the facial insufficiency of the May and February tickets is denied; and it is further

ORDERED that Iverson's request for injunctive relief is denied; and it is further

ORDERED that the request to reverse respondents' determinations is respectfully transferred for disposition, pursuant to CPLR §7804(g), to the Appellate Division, First Department. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to a direction at law, is on the entire record, supported by substantial evidence. (CPLR 7803(4)); and it is further

ORDERED that the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with the notice entry.

Dated: October 13, 2010

J.S.C.