

**Matter of Ahmed v Department of Fin.**

2010 NY Slip Op 33379(U)

December 3, 2010

Supreme Court, New York County

Docket Number: 402052/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

**IA** PART 16

Jennifer Ahmed

INDEX NO.

402058/0

MOTION DATE

- v -

MOTION SEQ. NO.

001

Dept. of Finance

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

*cross-motion by respondent to dismiss is granted and the petition is denied and the proceeding is dismissed without costs or disbursements in accordance with the 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).

DEC 03 2010

Dated:

December 3, 2010

*Alice Schlesinger*

ALICE SCHLESINGER 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  
COUNTY OF NEW YORK

-----X  
In the Matter of the Application of  
JENNIFER AHMED,

Petitioner,

Index No. 402052/10  
Motion Seq. No. 001

-against-

DEPARTMENT OF FINANCE,

Respondent.

-----X  
SCHLESINGER, J.

Petitioner Jennifer Ahmed commenced this Article 78 proceeding representing herself challenging the issuance of six Notices of Violation ("NOV") by the Parking Violations Bureau (PVB) for various alleged parking infractions. Respondent Department of Finance, which governs PVB fines, has cross-moved to dismiss the petition on procedural grounds.

On January 4, 2010, the PVB issued petitioner two NOVs, numbered 717417003-1 (Exh A to Cross-Motion) and 717417004-3 (Petition Exh 13), respectively stating that her vehicle's inspection sticker had expired and that the vehicle registration sticker had been "mutilated" Petitioner was fined \$65 for each violation. On January 5, 2010, Mr. Albert Lavin, who apparently held a power of attorney for petitioner and has been representing her in all proceedings, challenged the issuance of these two NOVs in a hearing before Administrative Law Judge Richard M. Horowitz. At the hearing, petitioner argued that his registration was valid and not mutilated and that the NOVs were defective because they improperly identified the "body type" of his vehicle as a "van" rather than a "utility" vehicle, as listed on his registration sticker.

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By Decision and Order dated January 5, 2010 (Exh. B to Cross-Motion)<sup>1</sup>, ALJ Horowitz upheld both NOVs. According to the decision, petitioner had brought the original registration sticker to the hearing, and the ALJ directly observed it. The ALJ then held as follows: "Obviously, the registration sticker is not properly displayed, as it is here at the hearing with tape all over it, and this also makes it not a persuasive defense that the summons misstates the information on the sticker, because issuer could not read the sticker." Petitioner then filed an administrative appeal, which respondent determined on January 13, 2010 upholding the two NOVs, and finding "no error of fact or law" (Exh. C).

On January 12 2010, petitioner was issued an additional NOV, numbered 742100993-0 assessing a fine of \$115.00 for an "unaltered commercial vehicle" (Exh E). In addition, on February 20, 2010, three more NOVs were issued, 741669563-6 assessing a fine of \$65.00 for a "missing plate" and 741669561-2 assessing a fine of \$115.00 for parking during hours not permitted int the area (Exh E) and NOV 741669562-4 assessing a fine of \$115 for "unaltered commercial vehicle" (Petition Exh 9). Petitioner challenged these four NOVs before Administrative Law Judge Carl P. Kanev, who upheld them in a decision issued after a hearing on April, 14, 2010, without any specific findings of fact or law (Exh. F).

Petitioner filed an administrative appeal on the same day. According to an Affirmation in support of the Cross-Motion provided by Ellen Young, the Director of the Parking Division of the Legal Affairs Division of the New York City Department of

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<sup>1</sup> All further Exhibits are attached to respondent's Cross-motion unless otherwise noted.

4] Finance, petitioner's appeal was rejected because he was denied leave to appeal as a poor person and failed to pay the fines prior to the appeal (Aff ¶ 9).

Petitioner commenced this Article 78 proceeding by Order to Show Cause signed on August 4, 2010 seeking to annul the PVB's determination and to have all six NOVs dismissed as defective under Section 238 of the Vehicle and Traffic Law. According to petitioner, respondent erred in rejecting his defense that the NOVs are defective and subject to dismissal because they improperly list his vehicle as a van rather than a utility vehicle. In its cross-motion, which does not address the merits of petitioner's claim, respondent argues that the petition should be dismissed on three procedural grounds. Although respondent only addresses four out of the six challenged NOVs discussed above, all six will be addressed here.

The Court rejects respondent's first argument that the petition should be dismissed under CPLR § 7804 because it lacks allegations and a verification. The papers that petitioner submitted to this Court included a duly verified petition. As the petition sets forth allegations similar to those stated in the Order to Show Cause, respondent had ample notice of petitioner's claims.

However, respondent correctly asserts that petitioner is barred by the Statute of Limitations from challenging the January 4 NOVs. According to CPLR § 217, a petitioner must bring an Article 78 proceeding within 120 days from the date of an agency's final determination. With respect to the January 4 NOVs numbered 717417003-1 and 717417004-3, respondent issued a final determination on January 13, 2010. Thus, petitioner's time to challenge that determination expired in May 2010. Because petitioner did not commence this proceeding until August 2010, his claims regarding these two NOVs are clearly time-barred and must be dismissed.

5]

With respect to the remaining NOV's, respondent asks the Court to remand them on the ground that petitioner has not obtained a final determination on his administrative appeal and therefore has failed to exhaust all administrative remedies. According to CPLR § 7801, an Article 78 proceeding cannot be used to challenge an agency determination unless that determination is final. As noted above, respondent indicates that petitioner did submit an application to the PVB to appeal these four NOV's, but the application was rejected because petitioner had been denied leave to proceed as a poor person and had failed to pay the fines prior to the appeal. As no copy of any decision was provided by either party, it appears that no final determination has been made regarding petitioner's appeal of the four NOV's numbered 742100993-0, 741669562-4, 741669563-6, and 741669561-2. Therefore, the Court will grant respondent's request to remand the issues relating to those NOV's for a determination of the appeal, after which petitioner may initiate a new Article 78 proceeding if as he wishes to challenge that determination.

Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss the petition with respect to NOV's 717417003-1 and 717417004-3 is granted on the ground that the claims relating to those NOV's are time-barred; and it is further

ORDERED that respondent's cross-motion to dismiss the petition with respect to NOV's 742100993-0, 741669562-4, 741669563-6, and 741669561-2 is granted to the extent of remanding those NOV's to the agency for a final determination of petitioner's appeal; and it is further

[\* 6]  
ADJUDGED that the petition of Jennifer Ahmed is denied and the Article 78 proceeding is dismissed without costs or disbursements.

Dated: December 3, 2010

DEC 03 2010

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

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