Matter of Cheema v New York City Taxi & Limousine Commn.
2011 NY Slip Op 31890(U)
July 11, 2011
Sup Ct, NY County
Docket Number: 103695/11
Judge: Joan B. Lobis
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[* 1]

SCANNED ON 7/12/2011

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

PRESENT: LOBIS PART 6

Justice

CHOOMA, M

- v -

NYC TAXI & LIMOSINE COMMISSION

INDEX NO. 103695/11

MOTION DATE 5/10/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-28
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

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: 7/11/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

---X

In the Matter of the Application of
MOHAMMAD CHEEMA,

Petitioner,

Index No. 103965/11

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

Decision, Order and Judgment

-against-

THE NEW YORK CITY TAXI & LIMOUSINE COMMISSION ("TLC"); and DAVID YASSKY Commissioner, Chair, and Chief Executive Officer of TLC,

Respondent.

---X

UNFILED JUDGMENT
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JOAN B. LOBIS, J.S.C.:

Petitioner Mohammed Cheema brings this Article 78 proceeding by order to show cause seeking to annul the report and recommendation of a hearing officer from the Office of Administrative Trials and Hearings ("OATH") issued on petitioner's default, recommending revocation of petitioner's license to drive a taxi and a fine of $850. On March 11, 2011, respondent David Yassky, Commissioner of respondent The New York City Taxi and Limousine Commission ("TLC"), accepted the report and recommendation. During the pendency of this proceeding, I stayed Commissioner Yassky's determination, allowing petitioner to continue to work as a taxi driver. For the reasons set forth below, the stay is lifted, the petition is denied, and the proceeding is dismissed.

Pursuant to an extensive investigation of taxicab drivers, TLC discovered that from February 2008 through July 2009, petitioner had overcharged approximately 171 of his passengers by using a more expensive "out-of-New York City" fare rate even though these trips took place within New

York City. By letter dated June 10, 2010, TLC notified petitioner of the findings and offered him a settlement whereby he would agree to surrender his license for one year and pay a $425 fine. If petitioner rejected the settlement, TLC informed him that it would proceed with a hearing in front of OATH. The letter was sent to petitioner's undisputed address, 3126 Coney Island Avenue, Apartment C9, Brooklyn, New York 11235 (the "Address"). Petitioner concedes that he received the letter and attended a settlement conference. He did not accept the offer. By letter dated November 4, 2010 and addressed to the Address, TLC notified petitioner that he had until November 19, 2010 to accept the settlement offer. Petitioner continued to reject the offer.

On or about February 4, 2011, TLC commenced an OATH proceeding against petitioner. According to an affidavit of service from a TLC attorney, the OATH petition and a notice of a February 18, 2011 hearing date were mailed to petitioner at his last known address on February 4, 2011 by first class mail pursuant to TLC's standard mailing practice. Although not stated in the affidavit, the documents were also sent to the Address by certified mail. According to a print-out from the United States Postal Service ("USPS") dated February 18, 2011, USPS attempted to deliver the documents by certified mail on February 8, 2011, but apparently nobody was at petitioner's home to sign for the delivery. Therefore, USPS left a notice of the attempt, which informed petitioner that he had fifteen (15) days to claim the package.

On February 18, 2011, petitioner failed to appear at the hearing before OATH. At the hearing, counsel for TLC introduced the affidavit of service and the USPS print-out. Counsel for TLC also offered a print-out from TLC's records indicating that petitioner's last known address on file was

the Address. The administrative law judge ("ALJ") found the evidence "sufficient basis to move forward on a default;" sustained the charges against petitioner; and recommended that TLC revoke petitioner's license and impose a fine of $850. Thereafter, the ALJ's findings and recommendation were presented to Commissioner Yassky for a final determination. By letter dated February 25, 2011 and addressed to the Address, TLC notified petitioner of the ALJ's findings and recommendation and informed him that he had ten (10) days to object to any of the ALJ's conclusions. Petitioner responded by letter setting forth, inter alia, that he needed his license to support his family. On March 11, 2011, Commissioner Yassky accepted the ALJ's recommendation, revoked petitioner's license, and imposed a $850 fine. This Article 78 proceeding followed.

Petitioner argues that his due process rights were violated in two ways. First, petitioner argues, TLC failed to take reasonable steps to notify him of the hearing, which caused his default. Petitioner argues that TLC knew that the certified mail was never claimed and should have taken additional steps to notify him of the hearing date. Petitioner further claims that he did not receive the first-class mailings. According to petitioner, TLC also violated his due process rights by negotiating a settlement with him while he was pro se and then "arbitrarily" withdrawing the settlement offer. In opposition, TLC argues that the method of service that it employed is presumed, under law, to be "reasonably calculated to achieve actual notice." See 48 R.C.N.Y. § 1-23(b). TLC asserts that the fact that petitioner did not claim the certified mail does not make service ineffectual, since petitioner had notice that USPS attempted delivery by certified mail. Furthermore, TLC argues, there is no indication that the notice by first-class mail was not delivered. As to the withdrawing of the settlement, TLC argues that the offer to settle was a discretionary act and that petitioner has no clear legal right to a

settlement. In reply, petitioner argues that TLC offered better settlements to other taxicab drivers in similar situations; that the evidence against him at the OATH hearing was in an inadmissible form; and that TLC failed to take additional steps to notify him of the hearing.

Service of an OATH petition and notice of a hearing must be "reasonably calculated to achieve actual notice." 48 R.C.N.Y. § 1-23(b). This regulation satisfies due process. See, e.g., In re Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005). Where service by mail is performed pursuant to a regular mailing practice, there is a rebuttable presumption of delivery. See, e.g., In re Cruz v. Wing, 276 A.D.2d 307 (1st Dep't 2000). In order to rebut this presumption, there must be more than "a claim of no receipt[;] there must be a showing that a routine office practice was not followed or was so careless that it would be unreasonable to assume that notice was mailed." Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 830 (1978). The record indicates that petitioner was served by certified mail and first-class mail at his undisputed address. The first-class mail was sent pursuant to a routine mailing practice and there is undisputed evidence that the certified mail reached the Address, but was not claimed. That petitioner did not claim the certified mail does not make service improper since petitioner fails to rebut the presumption that the first-class mail was properly delivered. See Harner, 5 N.Y.3d at 141. Moreover given the fact that petitioner had been responding to TLC's previous notices and in light of the charges against him, it is conceivable that petitioner "was attempting to avoid notice by ignoring the certified mailings." Harner, 5 N.Y.3d at 141.

Turning to petitioner's allegations that TLC improperly withdrew its settlement offer and should be ordered by this court to settle with petitioner, the court cannot compel "the performance of

a discretionary act, but rather only purely ministerial acts to which a clear legal right exists." In re Anonymous v. Comm'r. of Health, 21 A.D.3d 841, 842 (1st Dep't 2005); see also C.P.L.R. § 7803(1). Petitioner fails to identify a ministerial act, i.e. "'a governing rule or standard with a compulsory result,'" that entitles him to the relief he seeks. N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175, 184 (2005) (citation and quotations omitted). Furthermore it cannot be said that it was irrational or arbitrary for TLC to withdraw the settlement offer, because petitioner had over five months to accept the offer and there is no requirement that TLC even offer a settlement. Petitioner's arguments about the sufficiency of the evidence before the ALJ, raised for the first time in reply, cannot be considered by the court. See In re Jain v. New York City Transit Auth., 27 A.D.3d 273, 274 (1st Dep't 2006). Accordingly, it is hereby,

ORDERED that the stay is lifted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July 11, 2011

JOAN B. LOBIS, J.S.C.

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