

DVD Depot, Inc. v State of New York Indus. Bd. of Appeals

2011 NY Slip Op 32311(U)

August 22, 2011

Supreme Court, New York County

Docket Number: 102585/2011

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
DORIS LING-COHAN

PRESENT: _____
J.S.C.
Justice

PART 36

DvD Depot, Inc. and
Martin Goonetilleke
- v -
State of New York Industrial
Bd of Appeals et al.

INDEX NO. 102585/2011
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Article 78
Cross-motion to
dismiss
PAPERS NUMBERED
1, 2, 3
4, 5, 6
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~~ Article 78 proceeding
and cross-motion to dismiss are decided in
accordance with the attached 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).

Dated: 8/22/11

[Signature]
DORIS LING-COHAN J.S.C.
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36

UNFILED JUDGMENT

-----X
DVD Depot, Inc. and
Martin Goonetilleke,
Petitioners,

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

For an Order and Judgment pursuant to Article 78 of the Civil Practice Law and Rules Reviewing the decision of the New York Industrial Board of Appeals in the matter of PR 10-018

Index
Number
102585/2011

-against-

Motion Seq
001

State of New York Industrial
Board of Appeals and New York
State Commissioner of Labor
(PR 10-018),
Respondents.

-----X
Doris Ling-Cohan, J.:

DVD Depot, Inc. (DVD) and Martin Goonetilleke (Goonetilleke) (together, Petitioners) seek to set aside the resolution of decision (the Determination) dated October 20, 2010 of the New York State Industrial Board of Appeals (the Board), which denied Petitioners' administrative appeal, docket number PR 10-1018 (the Administrative Appeal) as untimely and, instead, to direct the Board to resolve the Administrative Petition on the merits (petition, ¶ 11). The Board and the New York State Commissioner of Labor (together, Respondents) cross-move to dismiss this proceeding as untimely and for inadequate service. The petition and cross motion are consolidated for disposition and decided as

indicated below.

Parties' Allegations and Procedural History

Goonetilleke is the president of DVD (Goonetilleke affidavit, ¶ 1). Petitioners assert that DVD was formed in December 2003, but that it did not engage in any business until December 2004 (*id.*). The Administrative Determination found that Petitioners had failed to pay an employee, Ranamuni Dias (Dias), in accordance with the minimum wage laws from December 23, 2003 through April 22, 2008, in the amount of \$30,701.86 and failed to provide Dias proper wage statements during that period. The Administrative Determination directed payment of this underpayment of \$30,701.86, assessed a civil penalty of \$30,701.86 and interest at 16% in the amount of \$6904.13 for a total of \$68,307.85, a civil penalty of \$1000 for failure to keep accurate records and a civil penalty of \$1000 for failure to provide Dias with accurate wage statements.

The Administrative Determination was issued on September 17, 2009. Goonetilleke asserts that Dias was never employed by him or any of his companies (*id.*, ¶ 3), but Petitioners only sought administrative review in mid-January 2010 (*id.*, ¶ 6).

Goonetilleke contends that he was "distracted" due to his wife's illness, that he was traveling to Sri Lanka to care for his sick mother, and that he did not realize that his "fax machine was

broken" and that he had not sent a copy of the Administrative Determination to his attorney (*id.*). He further states once he sent the Administrative Determination to his attorney on January 15, 2010, his attorney filed the Administrative Petition on January 18, 2010 (petition, ¶¶ 14-15) and that, therefore, they did not unduly delay in seeking relief.

Petitioners allege that they have a meritorious claim that Dias was not employed by them, that the Administrative Determination was resolved due to an inadvertent default, and that they should have an opportunity to contest the charges on the underlying merits.

Respondents assert that this petition was sent to them by regular first class mail, rather than personal service or certified mail, return receipt requested, as required by CPLR 307 (Kakalec affidavit, ¶ 3) or by first class mail with an enclosed acknowledgment of receipt, in the manner prescribed by CPLR 312-a. They, therefore, state that the Petitioners have not properly served them, and the petition should be dismissed.

Respondents also argue that the petition is untimely. The Determination was issued on November 5, 2010, and the petition was filed on March 3, 2011, 118 days later, well over the 60 day limitation period provided by the Labor Law. While CPLR 217 generally permits judicial review of an administrative

determination to be commenced within four months of the determination, Labor Law § 102 provides that a review of the Board's determination has a statutory limitations period of 60 days.

Respondents further assert that the challenge of the Administrative Determination was untimely. The Administrative Petition was filed on January 18, 2010, 124 days after the Administrative Determination was issued. and Labor Law § 101 provides for a 60 day limitations period. Respondents contend that the Board's Determination abiding by the 60 day statutory time requirement cannot be held to arbitrary and capricious and, consequently, the petition should be dismissed.

Limitations Periods

Labor Law § 101 (1) provides, in pertinent part, that:

"[A]ny person ... may petition the board for a review of the validity or reasonableness of any ... order made by the commissioner.... Such petition shall be filed with the board no later than sixty days after the issuance of such ... order."

Labor Law § 102 provides, in pertinent part, that:

"1. The decision of the board in a proceeding under [Labor Law § 101] shall be final except that such decision shall be subject to appeal by an aggrieved party in a proceeding under [CPLR Article 78], if such proceeding is commenced within sixty days after the decision is issued."

Petitioners have not disputed that the Administrative Petition was not filed within 60 days after its issuance on September 17, 2009. Goonetilleke asserts that he was "distracted" and didn't notice that his fax machine wasn't working and that he only sent the Administrative Determination to his attorney on January 15, 2010. He states that his attorney was prompt thereafter in filing the Administrative Petition on the next business day, January 18, 2010.

However, Petitioners do not deny receipt of the Administrative Determination and that they failed to meet Labor Law § 101's sixty day deadline. Respondents' decision to abide by the statutory limitations period and reject the Administrative Petition as untimely cannot be held to be arbitrary and capricious.

Additionally, CPLR 217 provides that a proceeding to challenge an agency's determination must be commenced within four months "[u]nless a shorter time is provided in the law authorizing the proceeding." Here, Labor Law §101's shorter sixty day deadline governs. The Determination was issued on November 5, 2010 and Petitioners filed the petition 118 days later, on March 3, 2011. "By failing to commence its CPLR article 78 proceeding within 60 days of the issuance of the IBA's determination, petitioner is barred from doing so" (*Matter of*

Sarbro: VII v State of N.Y. Indus. Bd. of Appeals, 215 AD2d 956, 958 [3d Dept], *lv denied* 86 NY2d 710 [1995]; *see also Matter of Hudacs v Celebrity Limousine Serv. Corp.*, 205 AD2d 155 [3d Dept 1994]). Since the petition was not commenced within Labor Law § 102's limitations period of 60 days, it must be dismissed.

Inadequate Service

Moreover, Respondents have stated that the Petition was not served on them by personal service or by certified mail, return receipt requested, in accordance with CPLR 307, or by first class mail, with the enclosed acknowledgment of service, pursuant to CPLR 312-a, but rather by first class mail only (Kakalec affidavit, ¶¶ 3-4, Exhibit A). Petitioners have failed to deny this and these facts must, therefore, be deemed admitted (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]). Mere mailing by first class mail is inadequate, jurisdictionally defective, and does not confer jurisdiction on a New York State agency (*Matter of Finnan v Ryan*, 50 AD3d 1306 [3d Dept 2008]; *Thompson v State of New York*, 286 AD2d 831 [3d Dept 2001]). Since the petition was not properly served, Respondents' cross motion to dismiss it must be granted.

Order

It is, therefore,

ORDERED that the respondents' cross motion to dismiss the petition is granted; and it is further

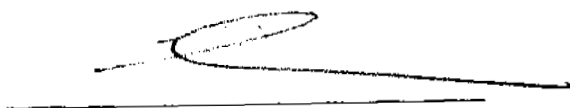
ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements; and it is further

ORDERED that within 30 days of entry of this order, respondents shall serve a copy upon petitioner, with notice of entry.

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: August 22, 2011



Doris Ling-Cohan, J.S.C.

J:\Article 78\dvd.wpd.saks.wpd