

**Matter of Wright Mtge. Bankers, Inc. v State of N.Y.
Banking Dept.**

2011 NY Slip Op 32383(U)

August 24, 2011

Sup Ct, NY County

Docket Number: 115776/10

Judge: Joan B. Lobis

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

PRESENT: Juan B. Lobis

PART 6

Index Number : 115776/2010
 WRIGHT MORTGAGE BANKERS, INC.
 vs.
 STATE OF NEW YORK BANKING DEPT.
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE 6/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1-17
18-46

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
 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).

Upon the foregoing papers, it is ordered that this motion

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

Dated: 8/24/11

[Signature]
 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
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of

Wright Mortgage Bankers, Inc.,

Petitioner,

Index No. 115776/10

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules

Decision, Order, and Judgment

- against -

THE STATE OF NEW YORK BANKING
DEPARTMENT,

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).

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Wright Mortgage Bankers, Inc. ("Wright Mortgage") brings this proceeding under Article 78 of the C.P.L.R., seeking an order vacating, annulling, setting aside, and reversing the Order of Revocation issued by respondent State of New York Banking Department (the "Banking Department") on or about March 31, 2010, and the Banking Department's subsequent determination, dated August 6, 2010, to deny petitioner's application to reopen the adjudicatory proceeding regarding the revocation. The Banking Department answers and asserts various affirmative defenses.

In New York, in order to make more than five mortgage loans in a year, unless an exemption applies, mortgage banks are required to obtain a license from the Superintendent of Banks, who is the head of the Banking Department. Banking Law § 590(2). Applicants for a mortgage banker's license must show that they have access to credit (Banking Law § 591[1][a]) in an amount not less than \$1,000,000 from an approved unaffiliated banking institution. 3 N.Y.C.R.R.

§ 410.1(b)(2). The Superintendent determines whether the banking institution qualifies for approval.

Id. A list of approved credit line providers is published by the Banking Department.

Petitioner's mortgage banker's license was suspended by the Banking Department as a result of the underlying proceedings. City National Bank of New Jersey ("City National") had been petitioner's longstanding line of credit provider. The record reflects that by letter dated August 2, 2001, the Banking Department notified City National that it did not meet the requirements to be an approved line of credit provider. However, by subsequent letter dated August 6, 2001, the Banking Department notified City National that it had been approved as a restricted warehouse line of credit provider solely as to Wright Mortgage. The August 6, 2001 letter informed City National that it could only be approved as an unrestricted credit line provider when its net worth exceeded \$50,000,000, and that the Banking Department would review its approval of City National annually.

The Banking Department did not review City National again until 2008, when it reviewed all line of credit providers. By letter dated October 10, 2008, the Banking Department contacted City National to determine whether it intended to continue to be an approved credit line provider. City National did not initially respond to the October 10, 2008 letter. Petitioner's line of credit with City National then expired on March 17, 2009. Accordingly, by letter dated March 23, 2009, the Banking Department informed petitioner that its line of credit had expired; that City National was no longer an approved line of credit provider; that it had until April 3, 2009, to secure a warehouse line of credit of not less than \$1,000,000 with an approved provider; and that failure to do so would result in the suspension of its license and the commencement of a revocation hearing.

Petitioner sets forth that given the state of the economy in 2009 and the many bank failures and mergers, very few banks were extending credit to even the most qualified prospective borrowers. By letter dated June 25, 2009, Wright Mortgage's deadline to submit documentation of its line of credit was extended to July 25, 2009. In August 2009, City National apparently requested re-approval as a line of credit provider. The Banking Department determined that City National did not meet the criteria to be an approved line of credit provider and informally advised it so, after which City National withdrew its request.

By letter dated September 28, 2009, Deputy Superintendent Rholda L. Ricketts informed Wright Mortgage that due to its failure to maintain a line of credit in an amount of not less than \$1,000,000 provided by a banking institution approved by the Superintendent, its mortgage banker's license was being suspended and it was prohibited from issuing mortgage loans or accepting applications for mortgage loans on real property located in New York State. The September 28, 2009 letter was accompanied by an order suspending petitioner's license.

On or about November 6, 2009, the Banking Department designated Jean Marie Brescia as the hearing officer for Wright Mortgage's revocation proceeding and notified petitioner that the hearing would take place on November 24, 2009, on charges that Wright Mortgage had violated Part 410.1(b)(2) of the Superintendent's Regulation (13 N.Y.C.R.R. § 410.1[b][2]) in failing to demonstrate and maintain an existing line of credit of at least \$1,000,000. Petitioner was provided with a summary of the rules governing the adjudicatory process, which set forth that petitioner was entitled to reasonable notice of the proceeding and an opportunity to be heard; that petitioner was

entitled to file a written answer by delivering one to the Banking Department within three days of the hearing; that petitioner had the right to be represented by counsel at the hearing and to present testimony, evidence, and oral and written argument; that petitioner had the right to seek subpoenas for discovery; that parties to proceedings pertaining to the revocation of a license were entitled to disclosure of the opposing party's evidence; that adjournments must be requested in writing and would be granted at the superintendent's discretion upon good cause shown; that petitioner's failure to appear or be represented at the hearing without a prior adjournment could result in a decision by the hearing officer; and that, in the event that petitioner failed to appear or be represented at the hearing without a prior adjournment, an application to re-open the hearing could be made in writing within four months of the effective date of the opinion and decision upon a showing that there were valid reasons for the absence at the hearing.

By letter dated November 16, 2009, petitioner sought a 60-day adjournment of the hearing date due to the illness and recent surgery of the principal of Wright Mortgage, Gerald Wright,¹ and the fact that Wright Mortgage would be seeking discovery and needed time to serve discovery requests and review responses. Ms. Ricketts denied Wright Mortgage's request for a 60-day adjournment via telephone call on November 20, 2009. Petitioner subsequently requested a 30-day adjournment to December 24, 2009, and agreed to remain voluntarily suspended until that date. By letter dated November 30, 2009, Ms. Ricketts approved the 30-day adjournment and Hearing Officer Brescia signed an interim order adjourning the proceeding to December 24, 2009.

¹ Gerald Wright is an attorney admitted to practice law in the State of New York and appears in this action as counsel for Wright Mortgage.

On or about November 27, 2009, the Banking Department received petitioner's "First Discovery Request" which was essentially a notice for discovery and inspection of all documents and correspondence from the past five years concerning banking institutions approved by the Superintendent to provide warehouse lines of credit; the criteria that must be met by a banking institution in order to be approved to issue warehouse lines of credit; any changes to the approval criteria; and any statutes or legislation revising or changing the approval criteria. The Banking Department processed petitioner's discovery request as a request under the Freedom of Information Law ("FOIL") (Article 6 of New York Public Officers Law) "because the requested material did not pertain to the issue concerning Petitioner's hearing," i.e., whether petitioner was in compliance with Part 410.1(b)(2). By letter dated December 7, 2009, the Banking Department acknowledged receipt of petitioner's "FOIL request" and set forth that it anticipated responding to the request within twenty (20) days.

By letter to Ms. Ricketts dated December 18, 2009 (not received by the Banking Department until December 24, 2009), petitioner requested a second 30-day adjournment of the hearing on the grounds that Mr. Wright was still unwell and that the Banking Department's response to Wright Mortgage's discovery requests remained outstanding; however, Ms. Ricketts was apparently out of the office during this period of time. Having not received a response to its request for an adjournment, petitioner's attorney telephoned the Banking Department on or about December 23, 2009, and later that same day faxed its request for a 30-day adjournment to Jerry Kocka, a bank examiner at the Banking Department. In response, the Banking Department advised Wright Mortgage, over the telephone, that there was no basis for a further adjournment.

The hearing took place on December 24, 2009, without Wright Mortgage making an appearance. Assistant counsel for the Banking Department Monique Holmes, Esq., appeared for respondent. At the start of the hearing, Hearing Officer Brescia and Ms. Holmes discussed Wright Mortgage's request for an adjournment. Ms. Holmes reported that the Banking Department was not consenting to another adjournment and that Wright Mortgage had neither served subpoenas nor requested copies of the documents that the Banking Department was submitting as evidence. Hearing Officer Brescia noted that petitioner's discovery demand did pertain to warehouse lines of credit but questioned the relevancy of the requested documents. She determined that the fact that the Banking Department had not yet responded to petitioner's request for documents was irrelevant to the issue of petitioner's requested adjournment. Hearing Officer Brescia then denied petitioner's request for an adjournment on the grounds that a previous 30-day adjournment had already been granted; that there was no indication to her that the Banking Department had previously agreed to an adjournment beyond December 24, 2009; and that counsel for Wright Mortgage could have appeared at the hearing, in person, to make a case for an adjournment, but did not do so.

The hearing proceeded in Wright Mortgage's absence. Ms. Holmes presented testimony from two witnesses, Jerry Kocka and Perry Polhemus. Mr. Kocka testified as to petitioner's adjournment requests. Mr. Polhemus testified as to petitioner's failure to maintain a line of credit of no less than \$1,000,000 from March 17, 2009, to the date of the hearing, and the Banking Department's notifications to Wright Mortgage regarding its obligation to secure a line of credit.

On December 28, 2009, Hearing Officer Brescia issued her Findings of Fact and Recommended Decision. She noted that she had denied petitioner's request to adjourn the hearing

as petitioner had made no attempt to substantiate Mr. Wright's health concerns and as the outstanding "discovery requests" were not made pursuant to any recognized method for obtaining information in an administrative hearing. Hearing Officer Brescia found that the Superintendent's Regulations require every mortgage banker to maintain a line of credit of at least \$1,000,000 and that a license is contingent upon maintaining such a line of credit. The Banking Department had presented evidence clearly establishing that Wright Mortgage had not filed proof of maintenance of its line of credit with an approved provider, and therefore Wright Mortgage had failed to comply with the Superintendent's Regulation § 410.1(b)(2). Hearing Officer Brescia found that the Superintendent was authorized to revoke Wright Mortgage's license (~~see~~ Banking Law § 595(1)) and she recommended that the Superintendent do so.

By letter dated December 30, 2009, the Banking Department provided records in response to petitioner's "FOIL request." The documents included a list of lines of credit providers and a copy of Superintendent's Regulation § 410.1(b)(2) which regulates approved credit line providers.

On or about March 31, 2010, upon review of the hearing transcript and Hearing Officer Brescia's findings, the Banking Department issued an Order of Revocation, revoking Wright Mortgage's mortgage banker license for failure to comply with Banking Law § 597 and Superintendent's Regulation § 410.1(b)(2). The Order of Revocation ordered that Wright Mortgage's name as a mortgage banker be struck from the roll of licensed mortgage bankers and that Wright Mortgage immediately turn in its license. By correspondence to Mr. Wright at Wright

Mortgage dated April 7, 2010, Ms. Ricketts summarized the revocation proceedings; enclosed copies of the hearing transcript, the Hearing Officer's decision, and an executed Order of Revocation; and directed petitioner to turn in its license to the Banking Department by April 30, 2010.

On or about May 19, 2010, petitioner applied to reopen the hearing. The application set forth that Mr. Wright had undergone a surgical procedure in early November that had prevented him from traveling or being away from home for extended periods of time. Due to Mr. Wright's health complications, petitioner had initially requested a 60-day adjournment of the hearing date from Ms. Ricketts. Petitioner claimed that Ms. Ricketts had advised petitioner that the Banking Department would only consent to adjournments in increments of a maximum of thirty days and "that the proper procedure" would be to request an initial 30-day adjournment and then make a second request for another 30-day adjournment if petitioner wanted a full sixty days. The application set forth that when petitioner's attorney discussed the adjournment procedure with Ms. Ricketts, he noted that thirty days from November 24, 2009 would be Christmas Eve but he never expected that the hearing would go forward on Christmas Eve. The application set forth that during the week before Christmas Eve, petitioner unsuccessfully tried to contact Ms. Ricketts for a further adjournment, but she was out of the office. Then, on December 23, 2009, the person that petitioner eventually reached from the Banking Department, Jerry Kocka, accused petitioner of making an untimely request for an adjournment and the hearing went forward the next day despite petitioner's explanation to the contrary. The application set forth that it was "manifestly unfair" that the hearing was held in Wright Mortgage's absence given the Banking Department's knowledge that Wright Mortgage was seeking a further adjournment in accordance with Ms. Ricketts' instructions. The

application also set forth that Wright Mortgage was entitled to know why numerous banks, including City National, were removed from the list of approved credit line providers. Based on the aforementioned statements, the application set forth that there were valid reasons for Wright Mortgage's failure to appear at the hearing and requested that the hearing be reopened after Mr. Wright received further discovery from the Banking Department.

The Banking Department opposed Wright Mortgage's application to reopen the hearing, primarily on the grounds that regardless of the adjournment issue, petitioner was not eligible for a mortgage banker's license due to its failure to maintain a line of credit from an approved provider. In reply, petitioner argued that whether or not Wright Mortgage would be issued a new license was irrelevant because Wright Mortgage was challenging the propriety and constitutionality of the hearing having been held in its absence.

On August 6, 2010, Hearing Officer Brescia denied Wright Mortgage's application to reopen the hearing. She set forth that Supervisory Procedure G § 111.8(a)(1) permitted a hearing officer to reopen a hearing at which a party failed to appear if that party established that "there were valid reasons for having failed to appear." She addressed Wright Mortgage's three reasons for failing to appear at the hearing: the continued illness of Mr. Wright; the fact that the hearing was scheduled on Christmas Eve; and the Banking Department's failure to provide discovery. She found that Mr. Wright's illness was not a valid reason for failing to appear because Wright Mortgage could have addressed this issue in a number of ways, such as appearing at the hearing by counsel with documentation substantiating the claim of illness to make an application for an adjournment on the

record; appearing at the hearing by counsel with Mr. Wright participating by telephone; or submitting proof that it had the requisite line of credit, obviating the need for a hearing. As to the issue of Christmas Eve, Hearing Officer Brescia found that this was not a valid reason for not appearing because Wright Mortgage had itself requested the adjournment to December 24, 2009. As to the purported outstanding discovery request, Hearing Officer Brescia reiterated that Wright Mortgage's demand for discovery was improper but that it could have sought subpoenas or asked the Banking Department for copies of the evidence it planned to use at the hearing, neither of which it did. She found that even if Wright Mortgage had been entitled to responses to its discovery demands, the requested discovery did not pertain to the only issue in dispute, whether or not a sufficient line of credit was being maintained. Accordingly, Hearing Officer Brescia found that petitioner had not shown a valid reason for failing to appear at the hearing and denied the application. This proceeding to challenge that denial, and the original revocation, followed shortly thereafter.

Petitioner argues that the Banking Department's determination to deny the application to reopen the hearing was arbitrary and capricious. Petitioner contends that it did not default on the hearing because it was willing to appear when Mr. Wright was well enough to prepare for and attend the hearing. Petitioner further complains that the Banking Department never fully responded to its discovery demands and that the hearing should have been adjourned until the Banking Department fully responded. Petitioner avers that it was improper for Hearing Officer Brescia to determine that its discovery demands were irrelevant to the proceedings. Petitioner contends that it was denied an opportunity to be heard on the revocation of its license and thus was deprived of its right to due

process under the Fourteenth Amendment of the United States Constitution. Wright Mortgage further sets forth that the Banking Department did not give adequate notice that City National was no longer an approved line of credit provider, and maintains that it could not secure a new line of credit provider given the state of the economy.

In answering, the Banking Department asserts, *inter alia*, that the petition fails to state a claim or facts sufficient to constitute a claim upon which relief can be granted and that petitioner does not have standing to raise the constitutional arguments in the petition. Respondent further asserts that it had a rational basis to revoke petitioner's mortgage banker's license and that its determination to do so was neither arbitrary and capricious nor an abuse of discretion because the evidence was unequivocal that petitioner had violated 3 N.Y.C.R.R. § 410.1(b)(2) in failing to maintain a line of credit in an amount not less than \$1,000,000 provided by an unaffiliated banking institution or financial entity approved by the Banking Department.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Pell, 34 N.Y.2d at 231 (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. "In this regard, the court's scope of review

is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing the underlying factual determinations.” In re Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) (citation omitted).

Pursuant to the Banking Department’s Supervisory Policies and Procedures regarding administrative adjudications, if a party fails to appear at a hearing, the hearing officer may reopen the hearing and take further action if the applicant makes a written application that demonstrates, to the hearing officer’s satisfaction, valid reasons for having failed to appear. 3 N.Y.C.R.R. SP G § 111.8(a)(1). In reviewing the record, it is clear that Hearing Officer Brescia had a rational basis for denying petitioner’s application to reopen the hearing. Her decision on petitioner’s application to reopen addressed petitioner’s three stated reasons for not appearing at the hearing and provided detailed, rational explanations derived from the statutes and regulations as to why those reasons were not valid excuses. The court notes that petitioner does not contest the underlying finding that it is not currently—nor has it been since March 2009—in compliance with Superintendent’s Regulation § 410.1(b)(2). Petitioner basically complains that Hearing Officer Brescia’s refusal to reopen the hearing effectively deprived Wright Mortgage of the opportunity to present mitigating evidence relevant to the issue of the revocation; however, compliance with the Superintendent’s Regulation § 410.1(b)(2) is not subject to mitigating factors or discretion. In general, a default is excusable if a party shows a reasonable excuse and a meritorious defense; petitioner herein has not shown that it could have disputed the charge that it has not maintained a line of credit from an approved banking institution in an amount no less than \$1,000,000 since its line of credit with City National expired on March 17, 2009, regardless of whether it had a valid reason for not appearing at the hearing.

Furthermore, petitioner was on full notice from the summary of procedures (see S.A.P.A. § 301[3]) that its failure to appear or be represented at the hearing could result in a decision rendered by the hearing officer in its absence. See also 3 N.Y.C.R.R. SP G § 111.7. Despite its awareness that the Banking Department had neither approved a postponement of the commencement of the hearing (see 3 N.Y.C.R.R. SP G § 111.6[a]) or consented to an adjournment (see 3 N.Y.C.R.R. SP G § 111.6[c]), Wright Mortgage did not appear at the hearing to make its application for an adjournment before the presiding hearing officer. See 3 N.Y.C.R.R. SP G § 111.6(b). Nevertheless, even in petitioner's absence, Hearing Officer Brescia duly considered petitioner's request for an adjournment. Petitioner had a number of options available to it, but ultimately decided to default in appearing at the December 24, 2009 hearing despite knowing that the hearing was going forward, and as such, the hearing was conducted in petitioner's absence pursuant to the New York State Administrative Procedures Act § 301 and 3 N.Y.C.R.R. SP G § 111.7.

As set forth above, the petition fails to demonstrate that the underlying determinations violated lawful procedure, were affected by an error of law, or were arbitrary and capricious or abuses of discretion. C.P.L.R. § 7803(3). Accordingly, it is hereby

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

Dated: August 24, 2011

UNFILED JUDGMENT

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 JOAN B. LOBIS, J.S.C.