Matter of Bellezza v Swarts

2011 NY Slip Op 32405(U)

September 5, 2011

Supreme Court, Albany County

Docket Number: 625-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
FRANK BELLEZZA, 97-A-4585
A/K/A FRANK LEONARD BELLEZZA, JR.,

Petitioner,

-against-

DAVID J. SWARTS, COMMISSIONER OF
THE NEW YORK STATE DEPARTMENT
OF MOTOR VEHICLES,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2472 Index No.625-11

Appearances: Frank Bellezza
Inmate No. 97-A-4585
Petitioner, Pro Se
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

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State of New York
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Albany, New York 12224
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Orleans Correctional Facility, commenced the above-

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captioned CPLR Article 78 proceeding to compel respondent to expunge certain entries in his New York State driving record, specifically a traffic ticket which he received on March 22, 1996 and a subsequent suspension of his driver's license. The respondent initially made a motion to dismiss the petition on grounds that the petitioner failed to timely serve the order to show cause and petition as directed in an order to show cause dated February 3, 2011. By order dated June 13, 2011 the Court denied the motion to dismiss, but directed the petitioner re-serve the order to show cause, petition, and supporting papers upon the respondent. The petitioner did so, and the respondent has now served an answer.

The respondent first maintains that the instant proceeding is barred by reason that the petitioner failed to exhaust his administrative remedies. It is well settled that before an issue may be considered in a CPLR Article 78 proceeding, it is necessary for the petitioner to exhaust all available administrative remedies (see Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Matter of East Lake George House Marina v Lake George Park Commission, 69AD3d 1069 [3rd Dept., 2010]). This includes seeking review of all issues within the context of an administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Tafari v Artus, 79 AD3d 1468, 1468-1469 [3rd Dept., 2010]).

To briefly review the underlying facts, on March 22, 1996 the petitioner was issued a traffic ticket by reason of operating an uninsured motor vehicle. He failed to appear at the April 28, 1996 court date. On May 6, 1996 the New York State Department of Motor

Vehicles ("DMV") issued a written notification to him that his drivers license would be suspended on May, 28, 1996 by reason of his failure to answer the traffic ticket. It also advised him that if he did not answer the ticket by June 27, 1996 he would be convicted of the charge of operating an uninsured motor vehicle. On June 28, 1996 DMV issued to the petitioner a notice of conviction and license suspension. The notice also indicated that he had been fined $225.00. On March 5, 2007 DMV sent a letter to the petitioner indicating that as a result of not timely responding, a default conviction and suspension had been entered on his driving record. The letter further provided the address where he could mail the fine. On January 15, 2011 the petitioner wrote a letter to DMV in which he suggested that the Frank Bellezza who received the traffic ticket was not the petitioner. In response, DMV initially opened a case with regard to unauthorized use of a driver's license. It conducted a review of New York State records. It apparently found no evidence of identity theft, and by letter dated February 8, 2011 indicated that the case was closed.

Notably, New York State Vehicle and Traffic Law § 226 (3) (b), which governs the suspension of a drivers license by reason of a failure to appear in court recites as follows: "[u]pon application in such manner and form as the commissioner shall prescribe an order and fine shall be vacated upon the ground of excusable default". The petitioner has presented no evidence that this was done. Based upon all of the foregoing, the Court finds that the petitioner failed to exhaust his administrative remedies, by not contesting the validity of the traffic ticket in a timely manner, either in court or in appropriate proceedings before DMV. On this basis alone the petition must be dismissed.

The respondent also maintains that the proceeding is time barred as having been

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commenced after expiration of the four month statute of limitations (see CPLR 217). It is well settled that an administrative determination becomes final and binding, and the applicable statute of limitations begins to run, when the administrative action has its impact upon a party and it is clear that the party is aggrieved thereby (see, Matter of Edmead v McGuire, 67 NY2d 714, 716; New York City Off Track Betting Corp. v State of New York Racing & Wagering Bd., 196 AD2d 15, 18, lv denied 84 NY2d 804; Matter of Hunt Brothers Contractors, Inc. v. Glennon, 214 AD2d 817, 818-819 [3d Dept., 1995]; Matter of Biondo v State Bd. of Parole, 60 NY2d 832, 834; Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 357). It is arguable that DMV's determination to suspend petitioner's license and impose a fine became final and binding (and the statute of limitations commenced to run) on June 28, 1996 when DMV issued its notice of conviction and licence suspension. Apart from the foregoing, the petitioner acknowledges in his petition that on May 8, 2006 he received a printout from DMV of his driving record which showed the open traffic ticket, his failure to appear, and the suspension of his license. Thus, even if it were found that the statute of limitations did not commence to run on June 28, 1996, it commenced at the very latest on May 8, 2006, the date he concedes he received a copy of his driving record showing the suspension of driving privileges. For this reason, the Court finds that the instant proceeding must also be dismissed as being time-barred by the applicable statute of limitations (see CPLR 217).

Turning to the merits, the Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that the agency determination has a rationale basis and is not arbitrary and capricious (see Matter of Peckham

v Calogero, 12 NY3d 424, 431 [2009]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606, 1607 [3rd Dept., 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Matter of Peckham v Calogero, supra), citing Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Prestige Towing & Recovery, Inc. v State of New York, supra).

The petitioner has failed in his burden to demonstrate the DMV's determination is in any respect irrational or arbitrary and capricious. Incidental to the foregoing, he has failed to present evidence in admissible form to show that he was the victim of identity theft. The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

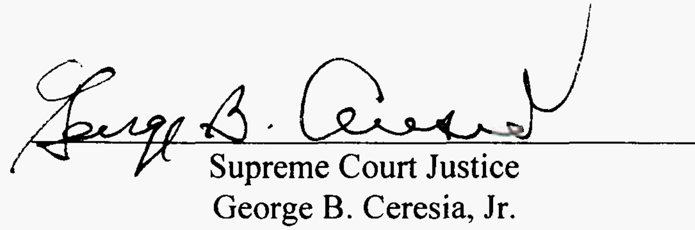
Accordingly, it is

ORDERED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: September 5, 2011
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 3, 2011, Petition, Affidavit of Service, Supporting Papers and Exhibits
2. Respondent's Answer dated July 12, 2011, Supporting Papers and Exhibits