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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of RICHARD CHALK,

Petitioner,

-against-

TIM B. LENNON, DEPUTY COMMISSIONER OPERATIONS AND CUSTOMER SERVICES NEW YORK DEPARTMENT OF MOTOR VEHICLES,

Respondents,

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 # 01-12-ST3997 Index No. 4943-12

Appearances: Richard Chalk
Inmate No. 88-T-1070
Petitioner, Pro Se
Green Haven Correctional Facility
594 Rt 216
Stormville, NY 12582

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Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Laura A. Sprague,
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of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Green Haven Correctional Facility, has commenced the instant CPLR Article 78 proceeding to a review determination which suspended his motor

vehicle operator's license in 2004, and in 2010 and 2012, determinations to deny his application to renew his operator's license. The respondent has made a motion pursuant to CPLR 3211 to dismiss on grounds that the petition fails to state a cause of action, that the proceeding is untimely commenced, and that the petitioner failed to exhaust his administrative remedies.

Turning first to the question of whether the petition states a cause of action, it is well settled that in response to a motion pursuant to CPLR 3211, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (see Nonnon v The City of New York, 9 NY3d 825 [2007]; Leon v Martinez, 84 NY2d 83, 87; ARB Upstate Communications LLC v R.J. Reuter, L.L.C., 93 AD3d 929, 930 [3d Dept., 2012]; Lazic v Currier, 69 AD3d 1213 [3rd Dept., 2010]; Gizara v The New York Times Company, 80 AD3d 1026, 2027 [3d Dept., 2011]; Gray v Schenectady City School District, 86 AD3d 771, 772 [3d Dept., 2011]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268, 275). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (see Nonnon v The City of New York, supra; Leon v Martinez, supra; Lawrence v Miller, 11 NY3d 588 [2008]). Only affidavits submitted by the plaintiff in support of his or her causes of action may be considered on a motion of this nature (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636; Allen v City of New York,49 AD3d 1126, 1127 [3rd Dept., 2008]; Gray v Schenectady City School District, supra). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal

theory, not whether there is evidentiary support for the complaint (see People v Coventry First LLC, 13 NY3d 758 [2009]; Leon v Martinez, supra; Pietrosanto v Nynex Corp., 195 AD2d 843, 844 [3rd Dept., 1993]; IMS Engineers-Architects, P.C. v State of New York, 51 AD3d 1355[3rd Dept., 2008]).

In the Court's view, the petition could be broadly read to include a cause of action to challenge the suspension of his driver's license by reason of unjustified confusion on the part of the Department of Motor Vehicles ("DMV") with regard to his correct social security number. With regard to petitioner's application to renew his driver's license, the Court observes that none of the letters from DMV which returned his application contain language indicating that the application has been denied. Rather, they simply request that additional information be submitted. Again, reading the petition broadly, to the limited extent that the petitioner alleges what might be construed as a constructive denial of his license renewal application (which he alleges is arbitrary and capricious by reason that DMV has renewed his license in the past without imposing additional requirements), the Court finds that the petition adequately states a cause of action. Within the foregoing framework, the Court finds that the motion must be denied on this ground.

Turning next to the statute of limitations defense, the Court notes that "when a party moves pursuant to CPLR 3211 (a) (5) for a judgment dismissing a claim on the ground that it is barred by the statute of limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed" (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept., 1990]; see also Matter of Jackson v Fischer, 67 AD3d 1207, 1208 [3rd Dept., 2009]; Matter of Estate of

Rodken [Gordon], 270 AD2d 784, 785 [3d Dept., 2000). In addition, the four month statute of limitations under CPLR 217 does not commence until the petitioner receives notice of the determination (see Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, [3d Dept., 2010]). Until then, the petitioner is not aggrieved (see Matter of Biondo v. New York State Board of Parole, 60 NY2d 832 [1983]; see also Matter of Hawking v. Russi, 193 AD2d 1032 [3d Dept., 1993]).

With regard to the suspension of petitioner's license, the petitioner acknowledges being aware of the suspension at least as far back as January 22, 2007. In addition, he acknowledges receipt of the December 14, 2010 letter from DMV "on or about" that date. The four month statute of limitations as to the foregoing two matters has long since expired.

With regard to the February 13, 2012 letter from DMV, the petitioner acknowledges that he received the letter on April 24, 2012. The petition, verified on August 23, 2012, was file stamped by the Office of Albany County Combined Courts on August 29, 2012. Even if the February 13, 2012 letter (received by the petitioner on April 24, 2012) could be deemed a separate cause of action, the Court finds that the petition was not timely filed within four months of accrual (see CPLR 217).

The Court finds that the respondent demonstrated, prima facie, that the proceeding was not timely commenced within four months of accrual of the cause of action with regard to suspension of petitioner's driver's license, or the causes of action with regard to the alleged failure to renew his license (see Matter of Abreu v Hogan, 72 AD3d 1143 [3rd Dept., 2010]; Matter of Jackson v Fischer, 78 AD3d 1335, 909 N.Y.S.2d 681, [3rd Dept., 2010]; Matter of Watson v Goord, 39 AD3d 1044, 1044 [3rd Dept., 2007]; Matter of Detorres v

Goord, 40 AD3d 1306, 1307 [3rd Dept., 2007]). As to these determinations, the Court finds that the statute of limitations has expired, and the motion to dismiss must be granted.

The Court observes that the petitioner, in his reply, points out that the respondent sent him letters dated August 28, 2012[1] and September 27, 2012[2]. These letters, which post-date the petition, do not operate to extend the statute of limitations with regard to the prior determinations.

Turning next to respondent's argument concerning petitioner's failure 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]).

As the respondent points out, Vehicle and Traffic Law § 261 recites, in part, as

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[1]The August 28, 2012 determination recited: "You need to send your full name, birth date and client I.D. number for us to locate your records. Then we can help you to renew."

[2]The September 27, 2012 determination recites: "According to our records your license expired 5/27/2010 which is over the two year grace period which means that you will have to retest for permit and take your road test."

follows:

> "1. Right of appeal. Whenever a license, certificate, permit or any privilege is denied, suspended or revoked by the commissioner pursuant to this chapter, except where such action is based upon a conviction as a result of which such action is required by statute or is based upon a determination rendered under the provisions of article two-A of the vehicle and traffic law, the holder thereof may appeal such determination pursuant to the provisions of this article and such regulations as may be promulgated by the commissioner. In addition, following an adjudicatory proceeding conducted pursuant to section four hundred seventy-one-a of this chapter, an aggrieved party may appeal the commissioner's decision pursuant to the provisions of this article and such regulations as may be promulgated by the commissioner. Notwithstanding the provisions of this subdivision, appeals from determinations made pursuant to article twelve-A of this chapter shall be governed in accordance with the provisions of that article.
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> "2. Time limitations. No appeal shall be reviewed if it is filed more than [fig 1] sixty days after written notice was given of the determination appealed from."

The petitioner acknowledges that he has not taken an administrative appeal of any of the letters he cites in his petition. The Court is mindful that the exhaustion rule need not be followed in certain limited circumstances, such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (see, Watergate v Buffalo Sewer, supra). In this instance the petitioner wholly failed to present evidence to support any of the exceptions to the rule which requires exhaustion of remedies.

The Court finds that the petitioner failed to exhaust his administrative remedies, and that therefore the petition must be dismissed on this ground, as well.

Accordingly it is

ORDERED, that the motion be and hereby is granted; and it is

ORDERED, that the petition be and hereby is dismissed.

This shall constitute the decision and order of the Court. The original decision/order returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order 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: March 4, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 10, 2012, Petition, Supporting Papers and Exhibits
2. Notice of Motion Dated November 7, 2012, Supporting Papers and Exhibits
3. Petitioner's Reply Affirmation sworn to November 14, 2012