

Matter of Durudogan v City of New York

2013 NY Slip Op 31629(U)

July 19, 2013

Sup Ct, New York County

Docket Number: 100065/13

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

Index Number : 100065/2013
DURUDOGAN, AGAH
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 6/3/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to for Art 78 Petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-8

Answering Affidavits — Exhibits _____ | No(s). x mot: 9-11

Replying Affidavits _____ | No(s). 12

Upon the foregoing papers, it is ordered that this motion is

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

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

Dated: 7/19/13

Joan B. Lobis, J.S.C.

JOAN B. LOBIS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
IN THE MATTER OF THE APPLICATION OF
AGAH DURUDOGAN,

Petitioner,

Index No. 100065/13

-against-

Decision, Order, and Judgment

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, and RAYMOND W. KELLY,
Commissioner of the NYPD,

Respondents,

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

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

Agah Durudogan petitions under Article 78 of the Civil Practice Law and Rules for an order vacating a determination terminating his employment as a police officer with the New York City Police Department. Petitioner challenges the penalty as excessive. Respondents cross-move to dismiss the petition under Rule 3211(a)(7) of the Civil Practice Law and Rules for failure to state a cause of action. For the following reasons, the cross-motion is granted.

In support of Respondents' cross-motion, Respondents attach the agency's determination as an exhibit and incorporate by reference the exhibits attached to the petition, including performance evaluations, commendations, and a transcript of the disciplinary hearing that involved several days of hearings, witnesses, and exhibits.

At the time of the events in this case, Officer Durudogan had been employed by the

New York City Police Department since 1994, first as a cadet and then as a police officer. In February 2011, a disciplinary hearing was held relating to numerous charges of misconduct. That hearing was conducted on three days over a period of several months. Following its conclusion, the hearing examiner found that Officer Durudogan had engaged in several acts of misconduct. It was established that in May 2007, the officer, while off-duty, had been involved in a traffic dispute with a traffic enforcement agent after the officer refused to move his vehicle out of an intersection. In the course of the argument, the officer exited his vehicle; the hearing examiner also found that the officer spat on the agent and was otherwise discourteous.

The hearing examiner also found that, two years later, Officer Durudogan was involved in another dispute while off-duty. In September 2009, Officer Durudogan acknowledged that he had engaged in pushing with his girlfriend. A week later the two were involved in a verbal dispute that led to a police response. In each incident, however, contrary to Department requirements, Officer Durudogan failed to request that a patrol supervisor appear. In addition to these disputes involving Officer Durudogan, the record also contained findings that the officer violated requirements involving sick leave. He pleaded guilty to charges that in November 2008 and January 2010, he was absent without permission while on sick report.

In light of these findings, the hearing examiner recommended in pertinent part that Officer Durudogan be dismissed. The examiner further recommended, however, that the dismissal be held in abeyance for one year, during which time Officer Durudogan would remain on the force at the discretion of the Police Commissioner and Officer Durudogan could be terminated "at any time

without further proceedings.” In September 2012, the Police Commissioner dismissed Officer Durudogan from the Department.

Officer Durudogan now petitions this Court to vacate his dismissal, alleging that the penalty is excessive. Section 7803(3) of the Civil Practice Law and Rules authorizes this Court to review whether an agency determination was an “abuse of discretion as to the measure or mode of penalty or discipline imposed.” A penalty must be upheld unless it “shocks the judicial conscience.” E.g., Reese v. Rhea, 96 A.D.3d 430, 430 (1st Dep’t 2012). Petitioner also disputes the agency’s consideration of hearsay introduced at his disciplinary hearing relating to an investigator’s interview with Officer Durudogan’s girlfriend regarding the September 2009 incidents. Respondents have cross-moved to dismiss the petition for failure to state a cause of action. C.P.L.R. Rule 3211(a)(7).

In general a motion to dismiss under Rule 3211(a)(7) will fail if within the four corners of the pleading there are discernable facts that show a cause of action. E.g., Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The Court must accept as true the facts alleged in the pleading and those in the non-moving party’s submission opposing the motion to dismiss, and accord the plaintiff all favorable inferences. E.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011). Where the moving party presents evidence outside the four corners of the pleading, such as affirmations and exhibits, however, this Court shall determine “whether the proponent of the pleading has a cause of action, not whether he has stated one.” Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep’t 1999), aff’d, 94 N.Y.2d 659 (2000) (quoting Guggenheimer, 43 N.Y.2d at 275). “[B]are legal conclusions, as well as factual claims either inherently incredible or

flatly contradicted by documentary evidence,' are not presumed to be true and accorded every favorable inference." 257 A.D.2d at 81 (quoting Kliebert v. McKoan, 228 A.D.2d 232, 232 (1st Dep't 1996)). In cross-moving pursuant to Rule 3211(a)(7) to dismiss Durudogan's petition for failure to state a cause of action, Respondents attach proof from the administrative record and incorporate by reference other proofs attached as exhibits to Durudogan's petition. Respondents' memoranda of law address the merits of Durudogan's petition. Accordingly, the Court will determine whether the petitioner has a cause of action, and not merely whether he has stated one. Biondi, 257 A.D.2d at 81.

This Court finds Respondents' cross-motion to be persuasive. Having reviewed the administrative record in this case and considered relevant factors including the nature of the conduct established, the Petitioner's length of record, the number of violations established, and the time period over which the violations occurred, under the totality of the circumstances, the penalty of dismissal for the relevant conduct established in this case does not shock the judicial conscience. E.g., Batyreva v. N.Y.C. Dep't of Educ., 95 A.D.3d 792, 792 (1st Dep't 2012). Nor does the record's containing hearsay from Officer Durudogan's girlfriend change this result. E.g., Grossman v. Kralik, 217 A.D.2d 625, 626 (2d Dep't 1995). Accordingly, it is

ADJUDGED that the cross-motion to dismiss the petition is granted; and it is further

ADJUDGED that the proceeding is dismissed in its entirety.

Dated: July 19, 2013

ENTER:

UNFILED JUDGMENT

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JOAN B. LOBIS, J.S.C.