

Matter of Sanders v Lawsky

2013 NY Slip Op 32219(U)

September 17, 2013

Supreme Court, New York County

Docket Number: 100670/13

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100670/2013

URY SANDERS, MARCIE L.

vs

LAWSKY, BENJAMIN M.

Sequence Number : 001

ARTICLE 78

PART 40B

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

per attached

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

FILED

SEP 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

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SEP 20 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: 9/17/13

HON. PETER H. MOULTON, J.S.C.

- 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
COUNTY OF NEW YORK: PART 40 B

-----X

In the Matter of the Application of
MARCIE L. URY SANDERS,

Petitioner,

For a judgment under Article 78 of
the CPLR Annulling the Final
Determination and Order of the
State of New York, Department of
Financial Services,

Index No. 100670/13

-against-

Benjamin M. Lawsky, Superintendent
of Financial Services, and the NEW
YORK STATE DEPARTMENT OF FINANCIAL
SERVICES,

FILED

SEP 20 2013

Respondent.

PETER H. MOULTON, J.S.C.:

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Petitioner seeks an order, pursuant to Article 78 of the CPLR,
annulling, vacating and setting aside respondent's Final
Determination and Order, dated April 10, 2013 (the
"Determination"). Petitioner also seeks a stay of enforcement of
the Determination pending decision on her Article 78 proceeding,
pursuant to CPLR § 7805 and Insurance Law § 2124. The
Determination revoked petitioner's license to act as a Property
Casualty Broker based on an evidentiary hearing held on October 4,
2012 and the hearing officer's revised decision, dated February 7,
2012. By letter dated April 18, 2013, petitioner was notified that
her revocation was effective April 29, 2013. By filing this
proceeding, petitioner received an automatic 30 day stay under

Insurance Law § 2124.¹

The basis of the revocation was respondent's finding that petitioner used dishonest practices or demonstrated incompetence or untrustworthiness based on acts occurring during the years 2007-2009. Specifically, the Determination concluded that the record supported the fact that (1) petitioner misrepresented the limits of coverage to an insured D & J Service, Inc. ("D & J") or permitted someone else to do so in her name, (2) failed to cooperate with respondent's investigation, and (3) permitted her husband, whose license had been revoked in 1993, to transact business under her license.² The Determination notes that the evidence combined with petitioner's decision not to testify permitted the hearing officer to draw a strong inference that petitioner's husband was involved.

¹Insurance Law § 2124 provides that:

The commencement of a proceeding under article seventy-eight of the civil practice law and rules, to review the action of the superintendent in suspending or revoking or refusing to renew any certificate under this article, shall stay such action of the superintendent for a period of thirty days. Such stay shall not be extended for a longer period unless the court shall determine, after a preliminary hearing of which the superintendent is notified forty-eight hours in advance, that a stay of the superintendent's action pending the final determination or further order of the court will not unduly injure the interests of the people of the state.

²Petitioner did not appear or testify at the hearing but her counsel presented the testimony of a handwriting expert and maintained that an unknown person falsified petitioner's signatures and the notary on the certificate of insurance issued to D & J.

Shortly before this Article 78 proceeding was commenced, petitioner's husband, who owns fleets of commercial vehicles, was convicted of a multi-million dollar scheme to defraud insurance companies concerning the use of those vehicles, in order to obtain lower insurance premiums.

Arguments

Petitioner argues that the evidence "cannot properly be deemed 'substantial evidence' to support the serious charges." The evidence included testimony by a non party investigator implicating petitioner's husband in the issuance of the certificate of insurance to D & J (who did not testify) based on statements made to him by D & J. Petitioner asserts that the hearing officer's February 7, 2013 decision contained inconsistent findings concerning petitioner's husband's activities. Petitioner also argues that respondent improperly shifted the burden of proof, violated the State Administrative Procedures Act, and violated her due process and Fifth Amendment and spousal privileges not to testify because of a pending criminal investigation against her husband.³ Petitioner also states that the penalty shocks the

³Petitioner acknowledges that the law permits an adverse inference to be drawn in civil actions or administrative proceedings when a party invokes the Fifth Amendment. However, petitioner argues that the hearing officer's failure to consider the facts and legal issues produced an unconstitutional result, especially because counsel for D & J indicated that the company would not testify under subpoena and would "invoke all privileges

conscience and absent a stay, she "will not be able to maintain my insurance business which is my source of income for myself and my children."

In opposition, respondent argues that this proceeding should be transferred to the Appellate Division First Department, pursuant to CPLR 7804 (g), because the questions raised by petitioner relate to whether substantial evidence supports respondent's determinations.⁴ Respondent also asserts that petitioner is not entitled to a stay under CPLR § 7805 or Insurance Law § 2124. Respondent contends that petitioner waived that right by signing the Stipulation of Discontinuance in Sanders v New York State Department of Financial Services, Index Number 103077/12 which provided that petitioner agreed not to "further seek to stay, enjoin, or otherwise delay this matter in any forum."⁵ Additionally, respondent maintains that petitioner has not demonstrated a likelihood of success, irreparable harm, or that the equities lie in her favor, which petitioner agrees must be demonstrated in order to obtain a stay under CPLR § 7805. Nor has

available to them because this matter involved a parallel SDNY criminal investigation."

⁴Petitioner consents to a transfer if a stay is granted pending a determination by the First Department.

⁵Petitioner's prior Article 78 sought to reopen a prior hearing, held on default. The proceeding was resolved by the Stipulation of Discontinuance, in favor of a hearing held on October 4, 2012.

she demonstrated, respondent asserts, entitlement to a stay under Insurance Law § 2124 because she has not shown that the public would not be harmed. Respondent cites petitioner's husband's conviction in April, 2013.

In reply, petitioner reiterates her arguments and asserts that respondent's answer was not timely served. Respondent disputes that the answer was untimely in its supplemental affirmation.⁶

Discussion

Pursuant to CPLR 7804 (g), prior to a transfer based on substantial evidence, the court must "first dispose of such other objections as could terminate the proceeding" (CPLR 7804 [g]).⁷

⁶Petitioner maintains that service of the answer was made on Monday May 27, 2013 (Memorial Day) when the answer should have been served Friday May 24, 2013. Petitioner argues that she suffered prejudice as a result, where her reply was served on May 28, 2013. Respondent contends that the answer was served on Thursday May 23, 2013, by email, as petitioner's counsel had previously agreed. Even if counsel did not agree to service by email, the answer is deemed timely served in light of the lack of prejudice.

⁷The court asked for additional submissions regarding whether petitioner's due process, Fifth Amendment and spousal privilege arguments constitute such an objection. Respondent submitted an email dated June 13, 2013; petitioner did not submit any further argument. Respondent's email cites a litany of cases (see e.g., *Matter of Coleman v. Rhea*, 104 AD3d 535, 536 [1st Dept 2013] [due process claim should have been transferred along with other claims because the petition raised an issue of substantial evidence; matter was treated as if it had been transferred to the appellate court for de novo review]; *Matter of McMillian v. Kerik*, 306 AD2d 17, 18 [1st Dept 2003] [same]). Respondent also cites the legislative history of CPLR 7804(g), which was the result of a 1990 amendment that was proposed by the Chief

The petition is transferred to the First Department because none of petitioner's arguments constitute objections (see e.g., *Matter of Spano v. New York State Racing & Wagering Bd.*, 72 AD3d 404, 405 [1st Dep't 2010] [supreme court erred in entertaining petitioner's unlawful search argument before transferring the proceeding based on substantial evidence since that argument did not constitute such other objections as could terminate the proceeding]; *Matter of Putnam Cos. v. Shah*, 93 AD3d 1315, 1316 [4th Dept 2012] [due process claim should not have been decided by the supreme court, but should have been transferred because an objection in point of law is one raised by respondent in the answer or by petitioner in response to new matter contained in the answer and petitioner's due process contention does not fall into either of those categories]).

Moreover, a transfer of the entire proceeding is required because the due process, Fifth Amendment and privilege claims (and the shocks the conscience argument) requires inquiry into the administrative record (see e.g., *Matter of Hamilton v. Selsky*, 13 AD3d 844, 845 [3d Dept 2004] ["[O]ur review of the hearing

Administrator of the Courts, on the advice of the Advisory Committee on Civil Practice (see L. 1990, ch 575, § 1). In explaining the proposed amendment, the Advisory Committee recommended that the lower court pass only on those objections that can result in dismissal, i.e., lack of jurisdiction, statute of limitations, and res judicata (see Report of the Chief Administrator of the Courts, at 64-65 [1983]).

transcript does not disclose that the Hearing Officer was biased or that the determination flowed from any alleged bias"]; *Matter of McMillian*, 306 AD2d at 18 ["Petitioner's contention that his trial in absentia violated due process is unavailing since the record establishes that petitioner, although notified of the disciplinary proceeding, chose not to attend"]. This court cannot usurp a function of the appellate court (see Report of the Chief Administrator of the Courts, at 65 ["[t]ransfer of substantial evidence cases to the Appellate Division is premised on the fact that in such cases there has already been a plenary hearing before an administrative agency, giving rise to a full record, and that review of that record should be the responsibility of an appellate-level court"]).

The Court also declines to issue a stay under CPLR § 7805 or to schedule a hearing to determine if a stay should be issued under Insurance Law § 2124. Respondent's argument, that the Stipulation of Discontinuance signed in the prior Article 78 proceeding bars the application, is not persuasive. The reference in the Stipulation to petitioner's agreement not seek to stay, enjoin or otherwise delay "this matter in any forum" is ambiguous. This reference is contained in a paragraph commencing with the sentence "Petitioner will be fully prepared to proceed with the presentation of her case at the time of the October 4, 2012 hearing." Thus, the reference to "this matter" which appears in the very next sentence,

might refer only to an attempt to stay the hearing in any forum, as opposed to a subsequent challenge to a determination resulting from the hearing. In fact, respondent notes that the hearing officer denied, based on the Stipulation, respondent's renewed request to stay the hearing because of the pending criminal investigation.

However, the court denies petitioner's application for a stay. While petitioner disputes respondent's findings and points out that respondent has not cited her for any further wrongdoing, petitioner has not distanced herself in any manner from her husband, who has now been convicted of multiple counts of fraud. Instead, and it is uncontested, that she has defended the charges against her by blaming an unknown person for the misrepresentations made under her own license to D & J. The court cannot find that petitioner has demonstrated that the equities lie in her favor, such that a stay of enforcement of respondent's revocation is appropriate under CPLR § 7805, or, that a hearing is necessary to determine whether a stay under Insurance Law § 2124 will not unduly injure the interests of the people of the state. While petitioner certainly had the right to chart her course, it does not come without consequences. This decision is without prejudice to petitioner seeking a stay from the First Department under CPLR § 7805.

It is hereby

ORDERED that the proceeding is respectfully transferred to the Appellate Division, First Department for disposition pursuant to

CPLR 7804 (g) as it involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

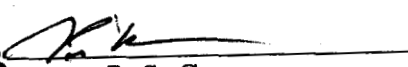
ORDERED that petitioner's application for a stay is denied; and it is further

ORDERED that the Clerk of the Court transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

The foregoing shall constitute the decision and order of this court.

This Constitutes the Decision and Order of the Court.

Dated: September 17, 2013

FILED ENTER:
SEP 20 2013 
NEW YORK J.S.C.
COUNTY CLERK'S OFFICE
HON. PETER H. MOULTON