

Matter of Diaz v New York City Dept. of Health & Mental Hygiene

2013 NY Slip Op 32360(U)

September 25, 2013

Supreme Court, New York County

Docket Number: 100846/13

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JOAN B. LOBIS

Index Number : 100846/2013

DIAZ, MARTIN

PART 6

vs

NYC DEPARTMENT OF HEALTH

Sequence Number : 001

INDEX NO. _____

MOTION DATE 8/29/13

ARTICLE 78

MOTION SEQ. NO. _____

The following papers, numbered 1 to 23, were read on this motion to for Art. 78 Petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition No(s) 1-4

Answering Affidavits — Exhibits _____ No(s) 5-9

Replying Affidavits _____ No(s) 10-23

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

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER & JUDGMENT

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).

Dated: 9/25/13

JOAN B. LOBIS, 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
NEW YORK COUNTY: IAS PART 6**

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

MARTIN DIAZ,

Petitioner,

Index No. 100846/13

-against-

Decision, Order, and Judgment

NEW YORK CITY DEPARTMENT OF HEALTH AND
MENTAL HYGIENE,

Respondent.

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

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

Martin Diaz, acting pro se, brings this petition under Article 78 of the New York Civil Practice Law and Rules. He challenges the denial of his application for a restricted area mobile food vending permit and seeks to compel the Respondent, the New York City Department of Health and Mental Hygiene (DOH), to give him priority on the waiting list for a citywide mobile food permit. The DOH opposes the petition. For the reasons set forth below, the petition is denied.

Petitioner Martin Diaz is a Navy veteran with service-related disabilities. Since 2009, Mr. Diaz has had a mobile food vendor license issued by the DOH and sells hot dogs, pretzels, and beverages from pushcarts of disabled veterans who already have mobile food vending permits. On March 22, 2013, Petitioner Diaz and another food vendor licensee, Barbara Morris, applied for restricted area mobile food vending permits.

That same month this Court issued a series of decisions, including Rossi v. New York City Department of Parks and Recreation, Index No. 103794/2012, 2013 N.Y. Misc. LEXIS

1092 (N.Y. County Sup. Ct., Mar. 20, 2013)¹ (collectively the “March 2013 Decisions”). In the March 2013 Decisions, food-vending veterans with service-related disabilities, including Petitioner Diaz, challenged notices of violation that they had received in operating hot dog pushcarts. The violations generally cited the New York City Department of Parks and Recreation regulation, Section 1-03(c)(1) of Title 56 of the Rules of the City of New York, which prohibits a person from failing “to comply with the lawful direction or command” of an officer. The legal authority upon which the directive to move was based was New York General Business Law Section 35-a. That state statute, among other things, limits the amount of space that a specialized vending licensee can take up at a given location and limits the number of specialized vending licensees in particular areas. Under Section 35-a, the New York City Department of Consumer Affairs (DCA) issues specialized vending licenses that restrict by location, size of vending area, and number of vendors per area, among others, veterans with service-related disabilities who are general vendors. This Court, construing the face of the statute, found that Section 35-a distinguishes general vendors, who are regulated by the DCA, from certain other types of vendors, including food vendors, who are regulated by the DOH. It held that Section 35-a, which was enacted as a narrow exception restricting certain veteran protections provided under New York General Business Law Sections 32 and 35, did not extend to food vendors.²

¹Related proceedings appear at Belkebir v. New York City Department of Parks and Recreation, Index No. 103796/2012, 2013 N.Y. Misc. LEXIS 1097 (N.Y. County Sup. Ct., Mar. 20, 2013); Diaz v. New York City Department of Parks and Recreation, Index No. 103795/2012, 2013 N.Y. Misc. LEXIS 1098 (N.Y. County Sup. Ct., Mar. 20, 2013); and Rossi v. New York City Department of Parks and Recreation, Index No. 103792/2012, 2013 N.Y. Misc. LEXIS 1117 (N.Y. County Sup. Ct., Mar. 20, 2013).

²No motion to reargue or renew was submitted following the March 2013 Decisions. The Respondent in those proceedings has filed notices of appeal.

In response to the March 2013 Decisions, holding that the veterans' restrictions enacted under General Business Law Section 35-a did not extend to food vendors, the DOH issued a letter dated April 1, 2013, signed by its General Counsel, Thomas Merrill, addressed to "To Whom It May Concern" (the "Merrill Interpretation"). General Counsel Merrill interpreted this Court's decision as requiring that since the veterans' restrictions under Section 35-a did not extend to food vendors, the general protections for veterans under General Business Law Sections 32 and 35 did not apply to them either.³ General Counsel Merrill threatened "appropriate enforcements [sic] proceedings" against these disabled veteran food vendors for any failure to comply with all local laws regulating food vending regardless of any previous exemptions.

On April 15, 2013, the DOH denied Barbara Morris's application for a restricted area mobile food vending permit. Steven Linden, Director of Licensing for the DOH wrote to Ms. Morris that "due to ongoing litigation, you may submit an application for a 'restricted area' mobile food vending permit only if you have a contract from the Department of Parks and Recreation authorizing you to vend on Parks property."

As a result of the April 15 denial, Petitioner Diaz brought this Article 78 petition in June. He seeks an order compelling the DOH to issue him a restricted area mobile food vending permit and declaring that he need not contract with the Parks Department to be eligible for that permit. Additionally he claims that he is entitled to priority on the waiting list for a citywide full-term mobile food vending permit.

³The DOH was not a party to the proceedings in the March 2013 Decisions.

Later, on June 27, 2013, in separate proceedings, this Court denied cross-motions by the DOH to dismiss petitions by similarly-situated food vendors seeking a declaration that the Merrill Interpretation was ultra vires, and that the state legislature's protections for veterans continued to apply to these disabled veteran food vendors notwithstanding this Court's March 2013 Decisions. Rossi v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100562/2013; Rivera v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100563/2013; Belkebir v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100564/2013; Rossi v. N.Y. City Dep't of Health and Mental Hygiene, Index. No. 100565/2013 (collectively the "Merrill Interpretation Decisions"). In August, following the DOH's answer in those actions, this Court in final dispositions declared that the Merrill Interpretation was ultra vires, and that the protections continued to apply.

In its Answer to the petition now before this Court, the DOH opposes Mr. Diaz's petition on two grounds. Notwithstanding this Court's disposition denying the motion to dismiss in the Merrill Interpretation Decisions, which had been rendered over a month before the DOH submitted its Answer, the DOH claims that Mr. Diaz has failed to establish his right to the relief sought. While conceding that this Court has rejected its legal position regarding the applicability of General Business Law Section 35-a, Respondent reasserts that position. Lastly it claims that any priority on any waiting list is not available as a matter of law.

This Court finds for other reasons that Petitioner Diaz has not established his right to compel the DOH to reconsider his application for a restricted area mobile food vending permit. In an Article 78 proceeding, the judiciary reviews an administrative action to determine whether that

action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). The record does not show that the DOH has made any determination on Mr. Diaz's application. At most, Mr. Diaz references an email from the DOH's Director of Licensing addressed to another applicant, Barbara Morris, denying her application. Mr. Diaz is not referenced in that email. Nor is he copied on that correspondence. Absent any proof of a final determination in which this Petitioner is aggrieved, see Section 7801(1) of the Civil Practice Law and Rules, this Court will not review any agency action.

Next this Court finds that Petitioner Diaz has not established his right to compel placement of his name on any waiting list for the same reasons that Petitioner has not established his right to compel reconsideration of his permit application. Mr. Diaz avows that he sought priority placement on the waiting list as recently as 2012. That reference, however, fails to show when that request was denied. At most this Court notes that, in his Reply papers, the Petitioner has attached recent correspondence in which the DOH denies that it has authority to grant him priority on any waiting list. But that correspondence, made in the context of settlement negotiations over this case and sent after the filing of this petition, cannot serve as any final determination upon which to base this petition. Accordingly, it is

ADJUDGED that the petition is denied, and the proceedings are dismissed.

Dated: September 25, 2013

UNFILED JUDGMENT

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JBL
JOAN B. LOBIS, J.S.C.
JOAN B. LOBI.