

Matter of Rosen v New York City

2014 NY Slip Op 30137(U)

January 14, 2014

Supreme Court, New York County

Docket Number: 104208/12

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
JANE ROSEN,**

Petitioner,

INDEX NO. 104208/12

-against-

MOTION SEQ. NO. 001

**For a Judgment Pursuant to the Provisions of
Article 78 of the New York Civil Practice
Law and Rules,**

**NEW YORK CITY and THE NEW YORK
CITY DEPARTMENT OF FINANCE ADJUDICATION
DIVISION,**

Respondents.

**The following papers were read on this motion by petitioner for an order and judgment pursuant to
Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and
finding of the New York City Department of Finance Adjudication Division.**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this Article 78 proceeding, Jane Rosen (petitioner) seeks an Order pursuant to CPLR 7803(3) and (4) reversing the Decision of the respondent The City of New York Department of Finance Adjudication Division (respondent) on July 18, 2012 upholding a May 29, 2012 Decision and Order finding that a preponderance of the evidence supports that petitioner's automobile was unlawfully parked in a no standing zone for which she was ticketed. Respondents cross-move to dismiss pursuant to CPLR 7804(f) and (d) on the ground that petitioner failed to bring this action by a Verified Petition as required by Article 78. Petitioner is in opposition to respondents' cross-motion.

FILED

JAN 22 2014

BACKGROUND

On May 1, 2012, parking ticket number 7363657002 was issued to petitioner by Traffic Agent Fung on the basis that petitioner's vehicle was in violation of Traffic Rule section 4-08(k)(2) which prohibits any vehicle except a commercial vehicle from parking or standing in an area where there is a sign that reads "no standing except trucks loading and unloading" (Notice of Cross-Motion, exhibit A). Petitioner challenged the ticket and appeared for a hearing before Hearing Officer Edward C. Haag (Hearing Officer Haag) on May 29, 2012, where she and her friend Neal Goodwin testified and petitioner presented photographs and a written statement as evidence. Traffic Agent Fung, who issued petitioner's parking ticket, did not appear at the hearing. In a Decision and Order of the same date, Hearing Officer Haag found petitioner guilty of violating Traffic Rule 4-08(k)(2) and imposed a fine. Specifically, in his decision Hearing Officer Haag noted that "[r]espondent claims that the summons incorrectly describes the sign where vehicle was parked and that summons shows wrong location of where summons [sic] was parked. Pursuant to Traffic Rule 4-08(a)(1)(l), 'one authorized regulatory sign anywhere on a block, which is the area of sidewalk between one intersection and the next, shall be sufficient notice of the restriction(s) in effect on that block.' Respondent's claim is not supported by persuasive evidence" (Notice of Cross-Motion, exhibit C). Petitioner paid the \$95.00 fine. Subsequently, petitioner appealed Hearing Officer Haag's Decision, which was denied by the respondent New York City Department of Finance Adjudication Division on July 18, 2012. Petitioner commenced the herein Article 78 proceeding on November 13, 2012.

STANDARD

The standard of review in this Article 78 proceeding is whether the respondents' determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the

Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

DISCUSSION

In support of their cross-motion to dismiss, respondents allege that the petitioner failed to properly commence an Article 78 proceeding because she did not serve respondents with a Verified Petition, but rather only with a Notice of Petition and an attorney affirmation with exhibits attached. As such, respondents claim this petition should be dismissed. Alternatively, respondents argue that if the Court considers the attorney affirmation a "petition" for purposes of this proceeding, the Parking Violation Bureau's (PVB) determination should be upheld as it was rational and reasonable and not arbitrary or capricious.

In opposition, petitioner maintains that respondents' cross-motion must be denied and this Court should treat the petitioner's papers as a Verified Petition since they contain all the necessary allegations, affidavit and evidence to support the relief requested herein. Moreover, petitioner asserts that respondents' only objection is one of form and not of substance. As to the merits, petitioner contends that the challenged Decision is not supported by sufficient

evidence so as to support a finding that the parking violation was established by a "preponderance of evidence" as required by Administrative Code § 19-206(b)(2).

As a threshold matter, the Court, in reviewing the submitted papers, including petitioner's affidavit which incorporates and references various exhibits, finds that said papers are sufficient to satisfy the requirements of a verified petition (see CPLR 7804[d]; *Lev v Lader*, 115 AD2d 522, 522 [2d Dept 1985] ["Special term did not abuse its discretion in construing petitioner's order to show cause and accompanying papers as a petition... [i]n determining the sufficiency of a petition, the court may consider the affidavits submitted therewith in order to facilitate the swift adjudication intended to be achieved by way of a special proceeding]). A petition in a special proceeding "must notify the opponent of the nature of the claim and frame the issues" (see CPLR 3013 ["Statements in a pleading must be sufficiently particular to give the court and parties notice of the transactions, occurrences. . . intended to be proved and the material elements of each cause of action or defense"]).

Additionally, the application also includes an attorney affirmation, which references and incorporates the same six exhibits as referenced and incorporated in petitioner's affidavit. The Court finds that the petitioner's affidavit, read in conjunction with the exhibits and attorney affirmation, which incorporated the same information as contained in the affidavit, qualifies as a verified petition, in satisfaction of CPLR 403, and to the extent that the affidavit does not bear the title of petition, it does not violate any substantial right of the respondents and the defect may be disregarded as a mere irregularity (see CPLR §§ 2001, 103[c]). Moreover, the notice of petition, attorney affirmation, affidavit of petitioner, and exhibits attached thereto, give respondents adequate notice of the claim and relief requested (see *Lev*, 115 AD2d at 522 ["When read together, the petitioner's order to show cause and the moving papers in support thereof notify [respondents] with sufficient particularity of the transactions petitioner intends to prove, as well as the elements of his claim, as required by CPLR 3013"]). Accordingly, the

respondents' cross-motion to dismiss this proceeding based on petitioner's failure to submit a Verified Petition is denied.

As to the merits of petitioner's claim, upon a review of the record, the Court finds that the petition is granted and the respondents' determination is hereby annulled. According to RCNY 39-08(3), While the summons issued to petitioner charging her with violating Traffic Rule 4-08(a)(1)(l) for parking in a "no standing" zone is sufficient to establish a prima facie case, it does not create a presumption of guilt but rather, it shifts the burden of proof to petitioner, the alleged violator, to go forward with evidence (*see Matter of Gruen v Parking Violations Bur. of City of N. Y.*, 58 AD2d 48, 50 [1st Dept 1977]; *Matter of Heisler v Atlas*, 69 Misc2d 911, 913 [Sup Ct, Special Term, NY County 1972]; *Young v City of New York*, 16 Misc3d 1117[A], 2007 NY Slip Op 51460[U] [Sup Ct, NY County 2007]). Petitioner presented evidence at the hearing including her own testimony that her car was not parked in the "no standing" zone but rather farther south down the block. Her testimony, patently not incredible, at the very least created an issue of fact as to whether she was actually parked in a manner that violated the Traffic Rule. Respondents produced no further evidence, besides the summons, to rebut petitioner's evidence, and as such the respondents failed to sustain their burden of proof (*see Matter of Gruen*, 58 AD2d at 50; *Matter of Heisler v Atlas*, 69 Misc2d at 913; *Young*, 16 Misc3d 1117[A], 2007 NY Slip Op 51460[U] *2). Accordingly, the Decision and Order of the respondent The New York City Department of Finance Adjudication Division dated July 18, 2012, denying petitioner's appeal and upholding the previous determination of Hearing Officer Haag dated May 29, 2012 finding petitioner guilty of violating Traffic Rule 4-08(k)(2) and imposing a \$95.00 fine is arbitrary and capricious and must be vacated.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the cross-motion by respondents to dismiss the proceeding

pursuant to CPLR 7804(d) and (f) is denied; and it is further,

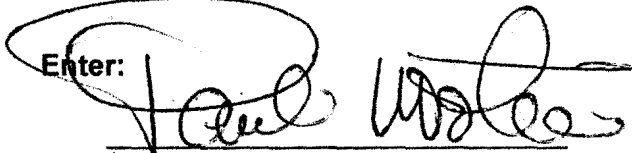
ORDERED that petitioner's Article 78 petition is granted and the Decision and Orders dated May 29, 2012 and July 18, 2012 are hereby vacated; and it is further,

ORDERED that respondents are directed to remit to petitioner the \$95.00 fine plus interest at the statutory rate from May 29, 2012 until the date of entry with this decision; and it is further,

ORDERED that petitioner shall serve a copy of this order, with Notice of Entry, upon the respondents and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/14/14

Enter: 
PAUL WOOTEN J.S.C.

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