

**Matter of Marte v NYC Civil Serv. Commn.**

2014 NY Slip Op 33575(U)

October 9, 2014

Supreme Court, New York County

Docket Number: 100535/14

Judge: Alice Schlesinger

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10/14/14  
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100535/2014

MARTE, JOHN RAPHAEL

vs

NYC CIVIL SERVICE COMMISSION

Sequence Number : 001

ARTICLE 78

PART **IA** PART 16

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 <sup>Cross-</sup> motion is granted and this Article 78 proceeding is dismissed in accordance with the accompanying memorandum decision.

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

**FILED**  
OCT 21 2014  
COUNTY CLERKS OFFICE  
NEW YORK

RECEIVED  
OCT 14 2014  
**FILED**  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL  
OCT 14 2014

COUNTY CLERK'S OFFICE  
NEW YORK

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

OCT 09 2014

Dated: \_\_\_\_\_

- 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

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

JOHN RAPHAEL MARTE,

Petitioner,

-against-

Index No. 100535/14  
Motion Seq. No. 001

NYC CIVIL SERVICE COMMISSION,

Respondent,

**FILED**

For an Order and Judgment Pursuant to  
Article 78 of the CPLR.

OCT 14 2014

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SCHLESINGER, J.:

COUNTY CLERK'S OFFICE  
NEW YORK

Petitioner John Raphael Marte, representing himself, commenced this Article 78 proceeding on May 16, 2014 to challenge the January 16, 2014 decision of the New York City Civil Service Commission (CSC) dismissing his appeal. The appeal regarded a medical disqualification by the Police Department of the City of New York (NYPD) that precluded Mr. Marte from obtaining employment as a Police Officer. The CSC has moved to dismiss the proceeding in its entirety pursuant to CPLR §§ 217, 306-b, 1001, 1003, 3211(a)(7), 3211(a)(10), and 7804(f), on the grounds that Mr. Marte has failed to join a necessary party, that any attempt to correct the deficiency would be barred by the applicable statute of limitations, and that the petition fails to state a cause of action.

Background Facts and Procedural History

Mr. Marte applied for appointment to the title of Police Officer with the NYPD from Exam No. 8328. He was medically examined by the NYPD on November 2, 2011, on which date he revealed on a questionnaire that he had a "herniated disc in [his]

lumbar spine.” (Questionnaire)<sup>1</sup>. On that same date, the NYPD issued a Notice of Medical Disqualification, citing “herniated discs” as the reason for the disqualification. The Notice included a statement of the procedure for appealing the decision: the appeal could be effectuated by writing the CSC within 30 days of the date of the Notice explaining why the action should be reversed, and the appellant had the right to include documentation or medical evidence.

By letter dated November 29, 2011 sent to the CSC, Mr. Marte appealed from the disqualification. In the appeal letter, Mr. Marte wrote that he “did not have a sufficient understanding of [his] herniated disk and therefore required a physical to be performed and reviewed by an orthopedic surgeon.”<sup>2</sup> Mr. Marte included documentation in the form of a letter on the letterhead of Armin M. Tehrany, M.D., F.A.A.O.S, signed by Stephen D. Bouskila, P.A.-C, and dated November 9, 2011. While noting a history of disk herniation, Bouskila described that condition as “resolved” and added that: “The patient in my medical opinion is fully cleared to begin the police academy and do all the necessary physical activities required by the New York Police Department.”

In response to Mr. Marte’s appeal, the NYPD submitted a letter to the CSC, signed by Eli J. Kleinman, M.D., M.P.H, Supervising Chief Surgeon, dated May 18, 2012. In the letter, Dr. Kleinman wrote that “[d]ue to Mr. Marte’s herniated disk, he cannot physically subdue a violent perpetrator,” and that “applicants presenting with a herniated disk cannot be expected to safely perform the essential duties of police

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<sup>1</sup> All documents cited are attached as Exhibit A to respondent’s cross-motion to dismiss, unless otherwise noted.

<sup>2</sup> It appears that there are two alternative spellings of “herniated disc”, one being “disc” and the other being “disk”.

officer, as the nature of their condition can pose a serious threat to themselves and the public." Dr. Kleinman continued:

[U]niformed members of the NYPD who have herniated disk are considered unfit for full duty by the Article II Disability Board. As such, Mr. Marte's condition would render him unfit for full duty and therefore he could not perform the essential duties of a police officer. The job of a NYPD police officer is highly stressful and can involve mandatory overtime and sleepless nights. Members of the service must be able to defend themselves against a suspect without assistance, use necessary physical force to separate individuals who are fighting, assist removing an injured person from a wrecked vehicle, perform evasive maneuvers while wrestling with a suspect, etc.

Dr. Kleinman's letter cited to an appendix included with it, which listed the "critical essential tasks" of NYPD Police Officers. The letter concluded by requesting that the CSC affirm the NYPD's decision that Mr. Marte was not qualified for the position of police officer.

After receiving the documents, the CSC scheduled a hearing for October 2, 2013, sending Mr. Marte a notice of the hearing date by letter dated August 23, 2013, to his home at 11 Wadsworth Avenue, Apt. 4B, New York, NY 10033. The notice included a warning that "in the event you fail to appear at the stated time and have not been granted an adjournment or postponement, the City Civil Service Commission will dismiss your appeal." The notice also stated that "[a]djournment or postponement will be granted only for good cause shown," and it gave the number that Mr. Marte could call to request an adjournment, if needed.

Pursuant to the hearing notice, Mr. Marte requested an adjournment of the hearing date by fax on September 27, 2013. The CSC granted the adjournment and

sent Mr. Marte an adjournment notice by letter dated December 6, 2013, informing him that a new hearing was scheduled for January 14, 2014. The adjournment notice was sent to the same address where the previous notice was sent. The adjournment notice repeated the statements from the previous notice; to wit, that failure to appear on the scheduled hearing date would result in dismissal and that additional adjournments could be requested.

On January 14, 2014, the CSC called to order a hearing on the matter of Mr. Marte's appeal. (See, CSC Decision). Mr. Marte did not appear at the scheduled hearing, and the NYPD moved to dismiss "based on Appellant's failure to pursue the appeal." The CSC dismissed the appeal, noting that Mr. Marte had provided no documentation explaining his failure to appear at the hearing.

On or about May 16, 2014, Mr. Marte commenced this special proceeding to reverse the CSC's decision which dismissed his appeal, naming the Civil Service Commission as the only respondent. Mr. Marte's papers state only that he has commenced this proceeding "[t]o appeal dismissal by Civil Service Commission for an employment opportunity with NYC's finest as a Police Officer." Mr. Marte gave no further details regarding the circumstances of his failure to appear at the scheduled CSC hearing. On July 16, 2014, the CSC served its cross-motion to dismiss on Mr. Marte. Mr. Marte has not filed any opposition papers.

#### Discussion

Before the Court can reach the merits of whether the NYPD properly found Mr. Marte to be medically disqualified for the position of police officer, it must determine whether there is any basis on which to vacate the CSC decision dismissing the appeal

based on Mr. Marte's default. To vacate a default determination, the defaulting party "must demonstrate a reasonable excuse for his or her default and a meritorious claim or defense, as the case may be." See *60 E. 9th Street Owners Corp. v. Zehinni*, 111 AD3d 511, 512 (1st Dep't 2013), citing *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 (1986). Without any "factual record set[ting] forth the reasons for the nonappearance or any meritorious defenses by the defaulting party, judicial review of the default itself is meaningless." See *Matter of DeCastro v. Wambua*, 43 Misc. 3d 202, 205 (Sup. Ct., N.Y. Co. 2013).

Here, the CSC dismissed petitioner's appeal based on his "failure to pursue the appeal." Both the hearing notice and the adjournment notice that Mr. Marte received warned him that "in the event you fail to appear at the stated time and have not been granted an adjournment or postponement, the City Civil Service Commission will dismiss your appeal." Mr. Marte appears to have understood the meaning of these warnings, as he indeed requested an adjournment and was granted one the first time a hearing was scheduled. Nevertheless, Mr. Marte failed to appear on the second scheduled hearing date.

The CSC noted in its decision that it "received no documentation from Appellant explaining the failure to appear at the hearing." Similarly here in this Article 78 proceeding, Mr. Marte has failed to provide the Court with any reasonable excuse for his failure to appear to the scheduled hearing. Mr. Marte has also failed to show that he made any attempt to provide the CSC with a reasonable excuse for his failure to appear at the scheduled hearing. Additionally, he has not offered any assertions in his Article 78 petition to establish that he has a meritorious claim; he simply stated in his petition

that he sought to "appeal dismissal by Civil Service Commission for an employment opportunity with NYC's finest as a Police Officer."

On this record, the Court is compelled to dismiss this proceeding on the ground that Mr. Marte has failed to state a valid claim that would enable to Court to vacate his default and proceed to determine the merits. In light of this determination, no need exists for this Court to address the remainder of the CSC's arguments.

Accordingly, it is hereby

ORDERED AND ADJUDGED that respondent's cross-motion to dismiss is granted pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, and the Clerk is directed to enter judgment dismissing this proceeding without costs or disbursements.

Dated: October 9, 2014

OCT 09 2014

  
J.S.C.  
ALICE SCHLESINGER

**FILED**

OCT 14 2014

COUNTY CLERK'S OFFICE  
NEW YORK