

Matter of Beissel v New York City Police Dept.

2016 NY Slip Op 32289(U)

November 3, 2016

Supreme Court, Queens County

Docket Number: 6992/16

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART __2__

In the Matter of the Application of

CONSUELO BEISSEL, KIMBERLY BACLIG,
KAYLINE RODRIGUEZ,

Index No.: 6992/16

Motion Date: 7/1/16

Motion Seq. No. 1

Petitioners,

Motion Date: 9/21/16

-against-

Motion Seq. No. 3

NEW YORK CITY POLICE DEPARTMENT,
NYC POLICE COMMISSIONER WILLIAM BRATTON,
NYC POLICE SURGEON DOCTOR PETER GALVIN,
NYC POLICE ACADEMY INSTRUCTOR SERGEANT
PETER WONG, NYC POLICE ACADEMY INSTRUCTOR
SERGEANT MICHAEL ANDERSON, NYC POLICE
ACADEMY INSTRUCTOR POLICE OFFICER WOO HAM,

Respondents.

The following papers read on this Article 78 proceeding by self represented petitioners Consuelo Beissel, Kimberly Baclig and Kayline Rodriguez for a judgment reinstating them to full duty and voiding their termination, with full back pay and benefits, including longevity from the date of appointment; directing a change in a timed run for females; authorizing the substitute service of court papers; reimbursing petitioners for court fees, reproduction costs and research; and award compensatory damages for pain and suffering due to gender and disability discrimination (Motion Seq 1). Respondents separately move for an order restoring the matter to the motion calendar, vacating a default order or judgment, and marking the annexed cross motion to dismiss the petition and the memorandum of law as received in opposition to the order to show cause and petition.

	<u>Papers Numbered</u>
Seq. #1 Order to Show Cause-Emergency Affidavit-Verified Petition- Affidavits-Exhibits-Affidavit of Service.....	1 - 9
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Upon the foregoing papers the petition and motions are consolidated for the purpose of a single decision and are determined as follows:

Self represented petitioners Consuelo Beissel, Kimberly Baclig and Kayline Rodriquez, formerly Probationary Police Officers in the New York City Police Department's Police Academy commenced the within Article 78 proceeding, pursuant to an order to show cause and petition, on June 14, 2016. Petitioners' request for a temporary injunction was denied by the court in the order to show cause dated, June 14, 2016, and the matter was placed on the motion calendar in the Centralized Motion Part for July 6, 2016, at 2:15 p.m. Counsel for respondents did not appear at the calendar call on July 6, 2016, when the matter was called, and the petitioners' papers were marked fully submitted without opposition. No judgment or order was previously issued or entered with respect to the petitioner's order to show cause and petition.

Respondents, in their order to show cause dated July 12, 2016, seek to return petitioners' order to show cause and petition to the court calendar; a determination that respondents are not in default, or in the alternative, vacating a default order or judgment; and marking the annexed notice of cross motion to dismiss and memorandum of law as received in opposition to petitioner's order to show cause and petition.

In order to vacate its default, respondents must demonstrate both a reasonable excuse for its default in opposing the order to show cause and petition, and a potentially meritorious opposition thereto (*see* CPLR 5015 [a] [1]; *Thalle Industries, Inc. v Holubar*, 121 AD3d 671 [2d Dept 2014]; *Starakis v Baker*, 121 AD3d 669 [2d Dept 2014]; *Tatarinova v Boo*, 119 AD3d 771 [2d Dept 2014]). Such a motion is addressed to the sound discretion of the court (*see Tatarinova*, 119 AD3d at 771; *Braynin v Dunleavy*, 109 AD3d 571[2d Dept 2013]).

Respondents' counsel states in her affidavits that on July 6, 2016, she was on the

subway traveling from Corporation Counsel's office in New York County to Queens County, when her train was unexpectedly stopped for approximately 15 minutes due to police activity in her subway car, and that she could not have taken alternative transportation to the courthouse at that time. In addition, she states she was unable to telephone the courthouse or the petitioners as she was underground. She states that upon her arrival at the courthouse, she went to the Centralized Motion Part where she had the clerk re-call the matter in an effort to locate the petitioners, that she searched for and was unable to locate the petitioners within the courthouse, and that she left a voice message on the telephone of Charles Beissel, the father of petitioner Consuelo Beissel, as this was the only contact number given to her by petitioners. Counsel states that she remained at the courthouse until approximately 4:45 p.m. and that Mr. Beissel returned her call at 5:55p.m. As she could not locate or speak with the petitioners prior to the end of the calendar call in the Centralized Motion Part, she was unable to submit the respondents' cross motion in opposition to the order to show cause and petition.

Petitioners, in opposition, assert that their case was called at 2:45 p.m. and that they remained in the courtroom another five minutes and spent an additional 45 minutes in the courthouse and did not see respondent's counsel. Petitioner's further assert that respondents' counsel has failed to submit proof of the police activity in the subway.

That branch of the respondents' motion which seeks to vacate their default in responding to the petition is granted, as under the circumstances presented here respondents have established a reasonable excuse for their default in responding to the order to show cause and petition, as well as the existence of potentially meritorious defenses to the petitioners' claims. However, the rules of Centralized Motion Part do not permit this court to place petitioners' order to show cause and petition back on the motion calendar.

That branch of the respondents' motion which seeks to vacate any order or judgment granted on default, is denied as moot, as no order or judgment has been issued or entered with respect to petitioners' order to show cause and petition.

Petitioners, in their order to show cause, seek an order reinstating them to full duty and voiding their termination; "reimbursing" them with back pay, benefits and longevity from the date of appointment; a "change in the time of run for females"; authorizing substitute service of court papers; reimbursement for court fees, fees for production of court papers and research; and reimbursement for pain and suffering due to discrimination based on gender and disability. Petitioners seek nearly the same relief in their petition.

Petitioners allege in their petition that on February 16, 2016 they were terminated from their employment as probationary police officers with the New York City Police

Department; that all three petitioners are female, and that two are Hispanic and one is Asian; that they were all considered holdovers due to injuries sustained at the Police Academy during strenuous workouts in the gym, and that these injuries made it impossible for them to complete their final timed run until their injuries had healed. Petitioners allege that they completed all other requirements and tests prior to being assigned to a command; that petitioner Rodriguez was already back on full duty and waiting to be tested; that petitioner Baclig's request to return to full duty was denied by respondent Police Surgeon Peter Galvin without any explanation; and that petitioner Bessel was "healed" and expected to return to full duty following an anticipated visit to respondent Galvin.

Petitioners allege that near the end of their tour of duty at the Police Academy they were instructed to sign a termination notice, whereby they were immediately terminated from their employment; that they did not receive prior notice or an interview with the appointing authority pursuant to Civil Service Rule 4.5(b)(5)(iii); that they were made to stand at attention and escorted in front of the other recruits, and that respondents Sergeant Peter Wong and Sergeant Michael Anderson, instructors at the Police Academy, "told other recruits that this is what happens if you scam the system", referring to petitioners "as if they were criminals and committed a crime".

Petitioners allege that "this situation seems to have been generated by" respondent Galvin who oversees all probationary officers; that petitioners were ordered to see Galvin when they were injured; that when they each met with him he never physically examined them, and that he told them they should resign and were not fit to be police officers; that he said the same in the past to other female probationary officers but to their knowledge this was never said to male officers. Petitioners allege that this constitutes discrimination based on gender and disabilities; that petitioners had sustained temporary muscular injuries and not permanent injuries; and that respondent Galvin sent "an order" to the Academy one week prior to their termination.

Petitioners allege that prior to sustaining said injuries, they were held back from training in precincts, as they had not passed the timed 1.5 mile run, with a time of 14 minutes and 21 seconds; that all recruits are required to pass the timed run; that petitioners were given an advanced workout schedule during which time the 2 mile run was increased to 7 miles a day; that their injuries could be due to the increased length of the run, as well as the failure to have a cushioned gym floor, which they allege to be a design flaw; that a "female's muscle structure is 40 percent less than a man's and more inclined to injuries, if pushed at the rate of a male"; that women run marathons slower than men, and that no allowance is made for women by the NYPD in this mandatory test at the Academy; that other police departments have slower times for female recruits; that if petitioners did not have to run the same time as men they would have passed their runs and probably would not have sustained injuries; that

male probationary officers and non-minority females with temporary injuries were not terminated; that petitioners were discriminated against because they are female; that respondent Police Academy instructor Police Officer Woo Ham made statements to recruits that “he would never partner with a female officer and they don’t belong on the job”, and that these statements are proof of systemic discrimination.

Petitioners allege that they feel that they were terminated in “exceptionally bad faith” and request that their names be restored to the eligible list. They also allege that their termination while they had sustained a minor, non-permanent disability, without making a reasonable accommodation due to their known physical limitations violated the Americans with Disabilities Act (ADA) and the State Human Rights Law (SHRL).

Petitioners seek a temporary restraining order due to the fact that their termination eliminated their source of income and are unable to return to their previous employment or find new employment due to their termination. Petitioners also requested that service be made on all respondents at by serving the person designated to receive service at Police Headquarters, 1 Police Plaza. Accompanying the petition, is an affidavit granting Charles Beissel, permission to “speak” on their behalf; an affidavit by the petitioners requesting that the court grant their motion; and copies of certain Civil Service rules; Beissel and Rodriguez’s termination notices; and certain medical information, pertaining to petitioners Baclig, and Rodriguez.

Respondents served petitioners with the order to show cause and supporting papers, including the notice of cross motion and cross motion. Petitioners have served an affidavit in opposition to respondents’ order to show cause in which they respond, in part, to the respondents’ cross motion to dismiss the petition.

Respondents seek to dismiss the petition on the grounds that it fails to state a cause of action. Respondents state that petitioners were recruits at the Police Academy when they sustained injuries due to strenuous exercise, and were placed on light duty; that petitioners were terminated after they failed to pass the Police Academy’s 1.5 mile timed run in the required amount of time, after several attempts. Respondents assert that Charles Beissel is not an attorney and therefore may not represent the petitioners or participate in the within proceeding. Respondents further assert that the petition fails to allege facts sufficient to support a discrimination claim under the SHRL and that petitioners request for an order modifying the NYPD’s time run for female recruits must be denied as they have failed to plead a prima facie claim for gender discrimination; that the petitioners’ disability claims must be dismissed, as they failed to exhaust their administrative remedies with respect to any federal disability discrimination claims, and failed to allege facts demonstrating that their temporary muscular injuries qualify as disabilities within the meaning of the SHRL or ADA.

Respondents also assert that the petition must be dismissed to the extent that petitioners claim that decision to terminate them was made in bad faith, as petitioners were probationary employees and were terminated for a legitimate reason. Finally, respondents assert that petitioners have failed to demonstrate that a temporary restraining order is warranted, as the loss of employment is insufficient to demonstrate irreparable harm.

At the outset, the court notes that the method of service was set forth in petitioners' order to show cause dated June 14, 2016, and therefore petitioners' request in this regard is moot.

It is further noted that as petitioners' request for a temporary restraining order was not granted by the court in the order to show cause dated June 14, 2016, petitioners' request for a temporary restraining order is denied. To the extent that the petition seeks injunctive relief, petitioners do not allege and cannot demonstrate that they have sustained irreparable harm, as all of their alleged injuries are economic in nature (*see Matter of Rice*, 105 AD3d 962, 963 [2d Dept 2013]; *Matter of Armanida Realty Corp. v Town of Oyster Bay*, 126 AD3d 894 [2d Dept 2015]).

“A person not licensed to practice law in the State of New York pursuant to the Judiciary Law may not appear pro se in court on behalf of a litigant as an attorney-in-fact pursuant to a power of attorney” (*Whitehead v Town House Equities, Ltd.*, 8 AD3d 369 [2d Dept 2004]; *see also Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452 [1st Dept 2012]). To the extent that petitioners have appointed Charles Beissel, a non-party who is not an attorney, permission to “speak” on their behalf, pursuant to an affidavit, said appointment is a nullity. Petitioners are self-represented and are not attorneys. Therefore, each petitioner may only represent herself, and act on behalf of herself.

“On a motion pursuant to CPLR 3211(a)(7) and 7804(f), only the petition is considered, all of its allegations are deemed true, and the petitioner is accorded the benefit of every possible inference” (*Matter of Johnson v County of Orange*, 138 AD3d 850, 850-851 [2d Dept 2016], *appeal dismissed* 27 NY3d 1120 [2016], *quoting Matter of Brown v Foster*, 73 AD3d 917, 918 [2d Dept 2010]; *see Matter of Schlemme v Planning Bd. of City of Poughkeepsie*, 118 AD3d 893, 895 [2d Dept 2015]; *Matter of Lobaina v Human Resources Admin., Office of Child Support Enforcement*, 79 AD3d 884, 884 [2d Dept 2010]).

The employment of a probationary employee “may be terminated without a hearing and without a statement of reasons in the absence of a demonstration that the termination was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law” (*Matter of Lane v City of New York*, 92 AD3d 786, 786 [2d Dept 2012]; *see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]; *Matter of Petkewicz v*

Allers, 137 AD3d 1045 [2d Dept 2016]; *Matter of Johnson v County of Orange*, 138 AD3d at 850-851; *Walsh v New York State Thruway Auth.*, 24 AD3d 755, 757 [2d Dept 2005]). Judicial review of the discharge of a probationary employee is limited to whether the determination was made in bad faith or for an improper or impermissible reason (*see Matter of Petkewicz v Allers*, 137 A.D.3d at 1046; *Matter of Lane v City of New York*, 92 AD3d at 786; *Matter of Cooke v County of Suffolk*, 11 AD3d 610, 611 [2d Dept 2004]). The employee has “the burden of raising a material issue as to bad faith or illegal reasons, and conclusory allegations of misconduct or unlawfulness are insufficient to meet this burden” (*Matter of Cooke v County of Suffolk*, 11 AD3d at 611; *see Matter of Petkewicz v Allers*, 137 AD3d at 1046; *Matter of Ward v Metropolitan Transp. Auth.*, 64 AD3d 719, 720 [2d Dept 2009]).

The burden is on the petitioner who seeks reinstatement to a probationary position to demonstrate that the termination was made in bad faith (*see Matter of Cortijo v Ward*, 158 AD2d 345, 345 [1st Dept 1990]). The petitioner must present legal and competent evidence to establish a deprivation of rights, an abuse of discretion or bad faith so as to render the termination arbitrary and capricious (*see Matter of Cooke v County of Suffolk*, 11 AD3d at 611; *see Matter of Ward v Metropolitan Transp. Auth.*, 64 AD3d 719, 720 [2d Dept 2009]) *Haberman v Codd*, 48 AD2d 505 [1st Dept 1975]). A probationary employee has “no right to challenge the termination by way of a hearing or otherwise, absent a showing that [the dismissal was] in bad faith or for an improper or impermissible reason” (*Swinton v Safir*, 93 NY2d at 763).

A bad faith determination is defined as one based on “a constitutionally impermissible purpose or in violation of statutory or decisional law” (*Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). A mere belief of bad faith, without the presentation of evidence, does not satisfy the employee’s burden or warrant a hearing (*Matter of Cortijo*, 158 AD2d at 345-46, *citing D’Aiuto v Dept. of Water Resources*, 51 AD2d 700 [1st Dept 1976]; *Matter of Rehill v New York City Housing Auth.*, 203 AD2d 75, 75 [1st Dept 1994]). Evidence of termination due to, *inter alia*, unsatisfactory performance, absenteeism or lateness, establish good faith on the part of respondent (*see Johnson v Katz*, 68 NY2d 649, 650 [1986]).

Here, the allegations of the petition are insufficient to state a cause of action that the petitioners’ employment was terminated in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law (*see Matter of Johnson v County of Orange*, 138 AD3d at 850-851; *Matter of Lane v City of New York*, 92 AD3d at 786; *Matter of Johnson v New York City Dept. of Educ.*, 73 AD3d 927).

Petitioners may not maintain a claim against the individual respondents based upon discrimination under the ADA, as an individual is not an “employer” under the ADA and, therefore, may not be liable for disability discrimination (*see Craddock v Little Flower*

Children & Family Servs. of N.Y., 2016 U.S. Dist. LEXIS 22958 [EDNY2016]; *Ivanov v N.Y. City Transit Auth.*, 2014 U.S. Dist. LEXIS 79614 [SDNY 2014]; *Corr v MTA Long Island Bus*, 27 F Supp 2d 359, 370 [EDNY 1998], *affirmed*, 199 F3d 1321 [published in full-text format at 1999 U.S. App. LEXIS 25058] [2d Cir. 1999]).

Petitioners' allegations are insufficient to state a claim for disability discrimination in employment under the ADA against respondents NYPD and the Police Academy. As petitioners allege they each sustained a temporary injury, of limited duration, without permanent or long term impact, they cannot demonstrate that they were disabled under the provisions of the ADA. In addition, petitioners do not allege that they failed to pass the 1.5 mile timed-run due to any disability that existed at the time they were tested. (*see Feeley v New York City Police Dept.*, *supra*; *see also Adams v Citizens Advice Bureau*, 187 F3d 315, 317 [2d Cir 1999]); *Williams v Salvation Army*, 108 F Supp 2d 303, 313 [SDNY 2000]).

Where, as here, petitioners are claiming unlawful termination under the SHRL, the pleading must allege that the petitioners suffers from a statutorily defined disability and that the disability caused the behavior for which the employee was terminated (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]; *see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]); *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 147 [1st Dept 2009]). Here, the petition fails to state facts that plausibly allege that the petitioners were disabled within the meaning of the SHRL, and that they suffered adverse employment action because of their disability. Rather, petitioners allege that after they failed the timed-run, they sustained temporary physical injuries, and were thereafter terminated as probationary police officers. Petitioners do not allege that they were unable to perform the timed-run within the allotted time due to their temporary physical injuries, and thus have not alleged a claim based upon disability discrimination under the SHRL.

Applying the liberal pleading standards applicable to employment discrimination claims under the SHRL (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145, [1st Dept 2009]; Executive Law § 296 [1] [a]), petitioners allegations are insufficient to support a claim for unlawful termination based upon sex or gender discrimination. On a claim based on Executive Law § 296, petitioners have the initial burden to prove a prime facie case of discrimination based on the preponderance of evidence. To support a prima facie case, the petitioners must demonstrate: (1) that they are a member of a protected class; (2) that they suffered an adverse employment action; (3) that they were qualified to hold the position they held; and, (4) that the adverse employment action occurred under circumstances giving rise to discrimination (*see Ferrante v Am. Lung Assoc.*, 90 NY2d 623 [1997]).

Here, petitioners were probationary New York City police officers, undergoing training as police recruits at the Police Academy. The Police Department requires that all

recruits meet or exceed established fitness standards in order to qualify for graduation from the Police Academy. These fitness standards includes a job standard test composed of six specific tasks which are performed sequentially and are continuously timed while wearing a fourteen pound weighted vest. The allotted time to successfully pass the job standard test is 3 minutes and thirty two seconds. In addition, all recruits are required to take a cardiovascular endurance test comprised of 1.5 run that must be completed in 14 minutes and 21 seconds, or less.

Petitioners admit that they failed to complete the timed 1.5 mile run within 14 minutes and 21 seconds. Petitioners, however, allege that the Police Academy's 14 minute, 23 second timed run "discriminates against the female gender in its employment practice"; that women are not as fast as men; and that women are more likely to be injured by the timed run requirement as they have "40 percent" less muscle than men. They allege that their timed run should have been approximately 1 minute slower than their male counterparts. They further allege that if they didn't have to run the same time as men, they would have passed the timed run, and probably would not have sustained their injuries.

Petitioners' do not allege and offer no evidence that other female recruits were unable to complete the timed 1.5 mile in the time allocated. Nor do they allege that all of the male recruits completed the timed run in the time allocated.

An appointing authority has wide discretion in determining the fitness of candidates (*see Matter of Rogan v Nassau County Civ. Serv. Commn.*, 91 AD3d 658 [2d Dept 2012]; *Matter of Rodriguez v County of Nassau*, 80 AD3d 702, 703 [2d Dept 2011]; *Matter of Mullen v County of Suffolk*, 43 AD3d 934, 935 [2d Dept 2007]; *Matter of Villone v Nassau County Civ. Serv. Commn.*, 16 AD3d 591, 592 [2d Dept 2005]; *Matter of Verme v Suffolk County Dept. of Civ. Serv.*, 5 AD3d 498 [2d Dept 2004]; *Matter of Ressa v County of Nassau*, 224 AD2d 534 [2d Dept 1996]; *Matter of Havern v Senko*, 210 AD2d 480, 481 [2d Dept 1994]). This discretion is particularly broad in the hiring of law enforcement officers, to whom high standards may be applied (*see Matter of Rogan v Nassau County Civ. Serv. Commn.*, 91 AD3d at 658; *Matter of Mullen v County of Suffolk*, 43 AD3d at 935).

Respondents have submitted documentary evidence which establishes that petitioner Consuelo Beissel failed to keep pace with the timed run on July 20, 2015, and thereafter failed to complete the timed run on August 24, 2015 and September 28, 2015, within the required time of 14 minutes and 21 seconds. It is noted that her times on the last two occasions were more than one minute slower than the required time. Petitioner Beissel also failed the first of the six required tasks which required her to surmount a six foot wall, on July 20, 2015, and thereafter failed the wall test on August 11, 2015, September 16, 2015, September 30, 2015 and November 19, 2015. Petitioner Beissel, therefore, cannot demonstrate that had a different time applied to woman recruits she would have otherwise

passed all of the physical fitness requirements.

With respect to petitioner Kimberly Baclig, respondents have submitted documentary evidence which establishes that she failed to keep pace with the timed run on July 20, 2015, and thereafter failed to complete the timed run on August 24, 2015 and September 28, 2015, within the required time of 14 minutes and 21 seconds. It is noted that her times on the last two occasions were more than one minute slower than the required time. Ms. Baclig passed the wall surmount on her final test which was administered on September 16, 2015.

With respect to petitioner Kayline Rodriguez, respondents have submitted documentary evidence which establishes that she failed to keep pace with the timed run on July 20, 2015, and thereafter failed to complete the timed run on September 2, 2015 and September 23, 2015, within the required time of 14 minutes and 21 seconds. It is noted that her times on the last two occasions were more than one minute slower than the required time. Petitioner Rodriguez passed the wall surmount on her final test which was administered on September 1, 2015.

The respondents' determination that the petitioners failed to meet the cardiovascular endurance standards, as evidenced by the results of repeated testing consisting of a timed run, constitutes an individualized finding that these petitioners were unable to meet the higher standards of physical fitness for police officers. The standards for physical fitness have a rational relationship to the ability of an individual to perform police functions, and their application is neither arbitrary nor capricious and do not constitute unlawful discrimination under the SHRL (*see generally Matter of Burchetta v County of Westchester*, 32 AD3d 513, 514 [2d Dept 2006]; *Matter of Curcio v Nassau County Civ. Serv. Commn.*, 220 AD2d 412 [2d Dept 1995]; *McCarthy v Nassau County*, 208 AD2d 810 [2d Dept 1994]).

Finally, while termination is indisputably an adverse action, petitioners' conclusory claim that their termination was motivated by a gender-related bias is insufficient to establish discrimination (*Fruchtman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015] *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 973 NYS2d 629 [1st Dept 2013]). Nor do stray derogatory remarks, "without more, constitute evidence of discrimination" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 125 [1st Dept 2012]). Thus, even assuming petitioners' allegations concerning respondents Galvin and Ham's statements are true, the complained-of behavior does not rise to the level of "severe and pervasive" for the purposes of a hostile work environment claim under the SHRL resulting in petitioners termination (*see Minckler v United Parcel Serv., Inc.*, 132 AD3d 1186, 1187 [3d Dept 2015]; *Hernandez v Kaisman*, 103 AD3d 106 [1st Dept 2012]; *Barnum v New York City Transit Auth.*, 62 AD3d 736 [2d Dept 2009]; *Beharry v Guzman*, 33 AD3d 742 [2d Dept 2006]).

In view of the foregoing, that branch of respondents' motion for an order vacating

their default in responding to petitioner's order to show cause and petition, is granted.

That branch of respondent's motion which seeks to restore the petitioners' order to show cause to the motion calendar in the Centralized Motion Part and to mark their cross motion to dismiss as received, is denied as motions cannot be returned to the calendar.

That branch of respondents' motion which seeks to have this court consider its cross motion to dismiss in opposition to petitioners' order to show cause and petition, is granted. Petitioners' request for injunctive and other relief is denied, and respondents' cross motion to dismiss the petition on the grounds that it fails to state a cause of action, is granted.

Enter judgment in accordance with this Order.

Dated: November 3, 2016

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J.S.C.