

Matter of Lomas v Egan
2017 NY Slip Op 33138(U)
February 21, 2017
Supreme Court, Putnam County
Docket Number: 1507/2016
Judge: Paul I. Marx
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
In the Matter of
BRENDAN G. LOMAS,

Petitioner,

ORDER AND JUDGMENT

-against-

Index No: 1507/2016

THERESA L. EGAN, as Executive Deputy
Commissioner of the New York State Department of
Motor Vehicles,

Return Date: November 23, 2016

Respondent.
-----X

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The following papers numbered 1 through 4 and the attached exhibits were read in this Article 78 proceeding, brought by Order to Show Cause, seeking an order and judgment “enjoining and prohibiting the Respondent from revoking Petitioner’s Driver License”.

Order to Show Cause/Verified Petition/Exhibits 1-9	1-2
Verified Answer/Exhibits A-R	3
Reply Affirmation	4

Upon reading the foregoing papers, it is ORDERED that the Petition is disposed as follows:

BACKGROUND

On October 20, 2016, Petitioner brought this Article 78 proceeding by Order to Show Cause against Respondent Theresa L. Egan, Executive Deputy Commissioner of the NYS Department of Motor Vehicles (“DMV”). The Order to Show Cause provided for service of the Order and supporting papers upon “Respondent, THERESA L. EGAN, or her authorized representative, namely: Hon. Eric T. Schneiderman, Attorney General for the State of New York”. Order to Show Cause dated October 20, 2016 (emphasis added). Petitioner seeks to enjoin Respondent from revoking his driver license.

This proceeding arises out of Petitioner’s involvement in a car accident and subsequent arrest on November 5, 2014 for violating certain provisions of NYS Vehicle and Traffic Laws (“VTL”), including § 1192.3, Driving While Intoxicated. At the scene, Petitioner refused to submit to a chemical test.

Petitioner was arraigned on November 13, 2014, at which time he was also served with a Report of Refusal to Submit to Chemical Test, which was prepared by NY State Trooper Richard St. Preux, who had arrested him. Petitioner's license was suspended pending the outcome of a chemical test refusal hearing, which was scheduled for December 7, 2014.

The State Trooper did not appear for the scheduled hearing. Therefore, the DMV Administrative Law Judge, Donna Marinacci, adjourned the hearing and reinstated Petitioner's license pursuant to VTL § 1194(c), because the hearing could not be held within the required time frame.

On February 19, 2015, Petitioner was convicted of Driving While Intoxicated and his license was revoked as of March 11, 2015. Petitioner's driving privileges were later restored on September 11, 2015.

On March 9, 2016, ALJ Marinacci conducted the rescheduled chemical test refusal hearing. The State Trooper again failed to appear at the hearing, notwithstanding service of a witness subpoena by Petitioner's counsel. Petitioner's counsel moved to close the case. The ALJ found service of the subpoena to be defective and denied the application. The ALJ also denied Petitioner's request for an adjournment to re-serve the subpoena, citing the length of time between the initial hearing on December 17, 2014 and the rescheduled hearing on March 9, 2016. The ALJ then proceeded with the hearing, at which Petitioner testified, and admitted the Trooper's report into evidence. The ALJ found that Petitioner had refused to submit to a chemical test. The ALJ revoked Petitioner's license for a one-year period, pursuant to VTL § 1194, effective March 9, 2016. Order to Show Cause, Exhibit 4, Findings & Disposition - Chemical Test Refusal.

Petitioner appealed the ALJ's decision to the DMV Administrative Appeals Board. The Appeals Board affirmed the ALJ's decision, finding that the ALJ properly based her determination on the Report of Refusal without an appearance by the State Trooper. Citing *Gray v Adduci*, 73 NY2d 741 [1988] and *Matter of Whelan v Adduci*, 133 AD2d 273 [2nd Dept 1987], the Appeals Board held that "the Report of Refusal, together with the negative inference, which can be drawn from appellant's failure to testify in this administrative proceeding, was sufficient to support the findings." Order to Show Cause, Exhibit 8, NYS Department of Motor Vehicles Administrative Appeals Board Decision of Appeal dated August 30, 2016.

Petitioner seeks judicial review of the Appeals Board's decision pursuant to Article 78, by Order to Show Cause. Respondent's answer asserts lack of personal jurisdiction and requests dismissal or transfer of the proceeding to the Appellate Division pursuant to CPLR §7804(g).

DISCUSSION

Personal Jurisdiction

The Order to Show Cause signed by this Court provided for service of the Order and accompanying papers upon Respondent or the Attorney General. Order to Show Cause dated October 20, 2016.

Respondent contends that service of the Petition only upon the Attorney General does not confer personal jurisdiction over Respondent.

Petitioner's counsel concedes that it erred in providing for service on Respondent or the Attorney General in the Order to Show Cause it presented to the Court for signature. Petitioner also concedes that service was not properly made, notwithstanding compliance with the directive in the Order to Show Cause. Petitioner contends that the mistaken service may be corrected in the interest of justice, relying upon *Taylor v Poole*, 285 AD2d 769 [3rd Dept 2001] and *Matter of Standifer v Goord*, 285 AD2d 912 [3rd Dept 2001]. Petitioner provides proof of curative service upon Respondent on or about November 25, 2017, within the statute of limitations period.

The Court takes responsibility for the oversight, although the Order to Show Cause was prepared by Petitioner's counsel and presented to the Court for signature. The proceeding was timely commenced and the Order to Show Cause should have been modified to provide for service upon both Respondent and the Attorney General. The "Court's mistake and petitioner's faithful compliance does not require ... dismissal (see, *Matter of Grassia v Tracy*, 232 AD2d 930, 931); rather, the facts mandate ... correction (see, CPLR 2001) by the exercise of [the Court's] interest of justice jurisdiction." *Matter of Taylor, supra* at 770. Petitioner has served the Order to Show Cause within the four month limitations period.

Accordingly, the Court has personal jurisdiction over Respondent and will proceed to address the Petition on the merits.

Substantial Evidence

Respondent argues that the Petition raises a substantial evidence question which requires its transfer to the Appellate Division.

Petitioner contends that transfer is not warranted because the Petition does not raise a question of substantial evidence. Instead, the Petition falls within CPLR §7803(3) because it alleges that the Appeals Board's decision to affirm the ALJ "was made in violation of lawful procedure; or was affected by an error of law, or was arbitrary and capricious, or an abuse of discretion." Reply Affirmation at ¶ 27. Petitioner claims that the revocation of his driver's license was made in violation of his due process right to confront and cross-examine the State Trooper. Petitioner further contends that the refusal hearing scheduled for March 9, 2016 should have been closed after the State Trooper failed to appear in response to a witness subpoena and tender of the appropriate travel fee.

This Court finds that the Petition does not present a substantial evidence question. Petitioner seeks review of the ALJ's determination to proceed with the refusal hearing in the absence of the State Trooper, notwithstanding substitute service upon him of a subpoena.

Petitioner's Due Process Claim

Petitioner relies on *Gray v Adduci*, 73 NY2d 741 [1988], also cited by the Appeals Board in support of its decision, to establish his due process right to call the State Trooper as a witness. Petitioner relies more directly upon *Matter of Thomas A. Deyhle*, Case No. D95-33398, Docket No. 18657 (Aug. 1, 1977), an Appeals Board decision, an excerpted copy of which is attached to the Petition, wherein the Appeals Board reversed the ALJ's decision to rely on the officer's prior testimony, conducted without the opportunity for cross-examination, and refusal report after the officer did not appear for the rescheduled hearing. The Appeals Board reversed the ALJ's decision.¹

Deyhle is inapposite because it did not involve a defective subpoena. In this case, the ALJ denied Petitioner's request to close the case when the State Trooper failed to appear because service of the subpoena was defective. The ALJ found that there was no evidence that substitute service of the subpoena upon another officer was followed with a subsequent mailing. Indeed, the affidavit of

¹ Petitioner did not provide a complete copy of the Appeals Board's decision. The excerpt appears to set out the respondent Deyhle's argument for reversal rather than the Appeals Board's rationale for its reversal.

service shows that there was no follow up mailing of the subpoena after it was served by substitute service. Order to Show Cause, Exhibit 5. The ALJ also found that there was short service of the subpoena. Substitute service was effectuated on March 4, 2016. The hearing was scheduled for March 9, 2016.

CPLR §2303(a) requires service of a subpoena to be made in the same manner as a summons. If service is made “pursuant to subdivision two ... of section three hundred eight ... service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter.” *Id.*

The subpoena was served upon State Trooper Preux by substitute service pursuant to CPLR §308(2); however, service was not completed by mailing the subpoena. Therefore, the ALJ properly found that the subpoena was defective. Petitioner had ample opportunity to properly serve the officer with a subpoena but failed to do so.

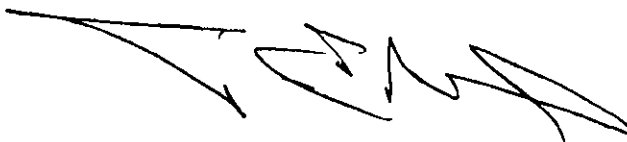
Petitioner does not contend that the ALJ abused her discretion in denying his adjournment request to permit him to re-serve the subpoena.

The Court of Appeals held in *Gray, supra* that “[h]earsay evidence can be the basis of an administrative determination ... [and that] the arresting officer’s written report of petitioner’s refusal is sufficiently relevant and probative to support the findings of the [ALJ] that petitioner refused to submit to the chemical test after being warned of the consequences of such refusal.” 73 NY2d at 742 (citations omitted). Thus, the ALJ did not err in proceeding with the refusal hearing in the absence of the State Trooper.

Accordingly, the Petition is denied.

ENTER,

Dated: Carmel, New York
February 21, 2017



HON. PAUL I. MARX, J.S.C.

To: Dennis W. Light, Esq.
Raneri, Light & O'Dell, PLLC
Attorneys for Petitioner
150 Grand Street, Suite 502
White Plains, NY 10601

Terrance K. DeRosa, Esq.
Assistant Attorney General
Attorneys for Respondent
44 South Broadway, 5th Floor
White Plains, NY 10601