

**Cycle Stone, Inc. v New York City Dept. of Consumer
Affairs**

2019 NY Slip Op 31537(U)

May 31, 2019

Supreme Court, New York County

Docket Number: 150806/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Cycle Stone, Inc., and Irfan Karakus,

Index No.
150806/2019

Petitioners,

**DECISION
and ORDER**

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules,

- against -

New York City Department of Consumer Affairs and the
City of New York,

Motion Seq. 1, 2

Respondents.
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HON. EILEEN A. RAKOWER, J.S.C.

Petitioners Cycle Stone, Inc. (“Cycle Stone”) and Cycle Stone’s Officer Irfan Karakus (collectively, “Petitioners”) have filed an Amended Verified Petition and an Order to Show Cause seeking the following relief: (1) a stay on the enforcement of the New York City Department of Consumer Affairs (“DCA”) December 13, 2018 determination wherein DCA denied Petitioners’ request to renew pedicab registration plate number “1547”(“Subject Plate”)¹; (2) an Order and Judgment annulling DCA’s December 13, 2018 determination; and (3) an Order declaring that DCA’s review process was “contrary to law, unconstitutional, arbitrary and capricious; and issuing “a writ of mandamus directing [DCA] to perform its statutorily assigned duty to conduct an inspection and renew the [Subject Plate] ... and awarding just compensation” to Petitioners.

The Order to Show Cause also sought a temporary stay of proceedings by DCA and the City of New York (“the City”) (collectively, “Respondents”) to void the Subject Plate and/or place the Subject Plate into an upcoming public lottery. On

¹ Petitioners refer to the plate number at issue as pedicab registration plate number “1547”. DCA states that the plate number at issue is pedicab registration plate number “1541”, not “1547”, and that the discrepancy is a result of unclear handwriting on the transfer application. The plate that is at issue will be referred to as the “Subject Plate” in this decision.

January 25, 2019, this Court granted the application for a temporary stay. The Order to Show Cause was marked fully submitted on May 6, 2019 upon the receipt of the transcript from the oral argument that took place before the Court.

Background

Cycle Stone operates as a New York City licensed pedicab business under Pedicab Business License No. 1336845. Cycle Stone operates pedicabs under its pedicab business license. (Amended Ver. Petition, 7, 17).

On October 4, 2018, a representative from Cycle Stone appeared at DCA and signed an application to transfer the Subject Plate to a third party, Ivan Ivanov (“Mr. Ivanov”). (Amended Petition, 20; Answer, 92). DCA states that at that time, DCA informed Cycle Stone’s representative that Cycle Stone should not remove the Subject Plate from its pedicab roster on its business license or from its insurance until DCA approves the requested pedicab transfer. (Ver. Answer, 93).

On October 4, 2018, DCA also received Cycle Stone’s application to renew its pedicab business license and registration for Plate 1534. This application did not seek to renew registration for the Subject Plate. (Ver. Answer, 94; Exhibit C).

By letter dated October 16, 2018, DCA’s Staff Counsel Robert DeLay (“Mr. DeLay”) notified Ahmet Karakus, of Cycle Stone, that Mr. Ivanov had outstanding fines that needed to be paid within 14 days (by October 30, 2018) or the transfer application would be denied. (Ver. Answer, 95; Exhibit D).

By letter dated November 1, 2018, Mr. DeLay informed Ahmet Karakus that because Mr. Ivanov had failed to pay his outstanding fines within 14 days, Cycle Stone’s October 4, 2018 transfer application was denied. (Ver. Answer, 96; Exhibit E).

On November 30, 2018, Irfan Karakus and Ahmet Karakus sent DCA an email acknowledging receipt of DCA’s November 1, 2018 letter which denied Cycle Stone’s application to transfer the Subject Plate. They requested that DCA “add pedicab back (sic) onto Cycle Stone Inc.” (Ver. Answer, 98; Exhibit F).

On December 13, 2018, Mr. DeLay responded to Irfan Karakus and Ahmet Karakus’s November 30, 2018 email. Mr. DeLay wrote that DCA had previously informed Cycle Stone not to cancel the pedicab insurance for the Subject Plate and

not to drop the Subject Plate from Cycle Stone's business license until the transfer application was approved by DCA. Mr. DeLay wrote that Cycle Stone "renewed [its] pedicab business license [on November 2, 2018] and did not list DCA pedicab plate no. 1547 and [Cycle Stone's] 2018-2019 pedicab insurance did not include pedicab plate 1547." (Ver. Answer, 99; Exhibit G).

On December 26, 2018, Cycle Stone's attorney Moria Brennan, Esq. ("Ms. Brennan"), e-mailed DCA and requested that DCA renew the pedicab registration for the Subject Plate by December 31, 2018. (Ver. Answer, 99; Exhibit H).

On December 28, 2018, Ahmet Karakus appeared at DCA and asked if he could renew the Subject Plate. At that time, DCA informed him that he could not renew the Subject Plate because it was not included on Cycle Stone's renewal application or insurance policy. (Ver. Answer, 100).

On January 23, 2019, Mr. DeLay emailed Ms. Brennan. Mr. DeLay notified Ms. Brennan that DCA had determined that Cycle Stone could not reclaim the pedicab registration for the Subject Plate. (Ver. Answer, 102; Exhibit I). Petitioners thereafter filed a Petition and Order to Show Cause commencing the instant proceeding.

Discussion

A. Article 78 Relief

In the Amended Verified Petition, Petitioners seek a writ of mandamus to compel DCA "to perform its statutorily required duty to renew pedicab registration plates and conduct inspections of pedicabs, and process pedicab registration plate renewal applications." Petitioners argue that DCA's refusal to conduct an inspection of the Subject Plate "is contrary to law, arbitrary, and capricious and constitutes an unconstitutional taking." Petitioners further argue that the determination by Mr. DeLay "is infected with bad faith, bias, vindictiveness, and vendetta." Respondents contend that Petitioners do not have a "clear legal right" to renew the registration for the Subject Plate.

Since an Article 78 proceeding is a special proceeding, it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised. CPLR § 409 (b); CPLR §§ 7801, 7804 (h). Therefore, the

Court will decide the issues raised on the papers and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 (h).

Under Article 78 of the CPLR, a party may challenge the determination of administrative agencies where “a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR §7803(3). The “Court’s role in reviewing an agency action is not to determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable.” *Chem. Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 396 (1995).

“[A]rticle 78 relief in the form of a mandamus to compel may be granted only where a petitioner establishes a ‘clear legal right’ to the relief requested.” *See Matter of Council of City of New York v. Bloomberg*, 6 N.Y.3d 380 (2006). A petitioner seeking mandamus to compel “must have a clear legal right to the relief demanded and there must exist a corresponding non-discretionary duty on the part of the administrative agency to grant that relief.” *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Ed. Serv.*, 77 N.Y.2d 753, 757 (1991). “The availability under Article 78 of mandamus to compel performance of a duty of an administrative agency depends not on the applicant’s substantive entitlement to prevail, but on the nature of the duty sought to be commanded - i.e. mandatory, non-discretionary action.” *Hamptons Hospital and Medical Center, Inc. v. Moore*, 52 N.Y.2d 88 (1981). Irrespective of whether the party had discretion to act, the standard of review requires a showing by the moving party that the determination was “arbitrary and capricious.” *Matter of Anonymous v. Commissioner of Health*, 21 A.D.3d 841, 843 (2005).

“The burden of presenting legal and competent evidence to show a deprivation of petitioner’s rights or bad faith or other arbitrary action constituting an abuse of [an agency’s] discretion must be borne by petitioner.” *York v. McGuire*, 99 A.D.2d 1023, 1024, *aff’d*, 63 N.Y.2d 760 (1984)

Title 20, Subchapter 9 of the New York City Administrative Code (“Administrative Code”), Section 20-248 et seq., regulates pedicab businesses. DCA is the agency that enforces these provisions. A pedicab business license issued by DCA is needed in order to conduct a pedicab business in the City. See Administrative Code §§ 20-250; 20-252. Any pedicab being operated in the City must have registration plates issued by DCA. See Administrative Code §§ 20-251; 20-255(a)(2). DCA may not issue more than 850 active pedicab registration plates at any time. See Administrative Code § 20-251(a).

“In order to obtain, amend, or renew a pedicab business license,” the pedicab owner must provide DCA with, *inter alia*, “[a] list of all pedicabs owned, leased or controlled by such pedicab owner for which such owner seeks registration” with “[e]ach such pedicab ... uniquely identified on such list,” and “[p]roof that there is in force for the full license term a policy of public liability and property damage insurance that meets the requirements of section 20-253 of this subchapter for each pedicab listed.” See Administrative Code § 20-250(b).

A pedicab business license is valid for a term of one year. See Administrative Code § 20-250(c). Pedicab registration plates are “valid for a period no longer than one year.” See Administrative Code § 20-255(b). Under 6 RCNY § 2-426, “[r]egistration plates for pedicabs shall expire annually on November 1.” Under 6 RCNY § 2-421(b), “[w]henver a pedicab registration is not renewed within fifty-nine days after it has expired, such registration shall be void, and such registration shall not be reinstated.”

Here, Petitioners have failed to demonstrate they had a “clear legal right” to renewal of the pedicab registration for the Subject Plate to warrant the issuance of a writ of mandamus. The business renewal application that Cycle Stone completed and which DCA received on October 4, 2018 did not include the Subject Plate for renewal, even though DCA had notified Cycle Stone that it should keep the Subject Plate on its pedicab roster on its business license and insurance policy unless and until its transfer to Mr. Ivanov was approved. Petitioners claim that they sought to renew registration for the Subject Plate by emails on November 30, 2018 and December 26, 2018 and in person on December 28, 2018. However, registration for the Subject Plate had already expired on November 1, 2018 and became void.

Petitioners rely on 6 RCNY § 2-421(b), which provides that “[w]henver a pedicab registration is not renewed within fifty-nine days after it has expired, such registration shall be void, and such registration shall not be reinstated.” Petitioners argue that based on this provision, DCA was required to renew the Subject Plate because it did not become void until fifty-nine days after November 1, 2018, the date it expired. However, as the DCA points out, here, “the only purpose of [6 RCNY §2-421(b)] is to provide a grace period for delinquent licensees who have not yet renewed their licenses to renew their expired registrations, thereby making them valid again.” As DCA further points out, “Here, by contrast, Petitioners had already renewed their business license and the associated pedicab registration plates within the grace period, but chose not to include the subject plate in their renewal as

required under Administrative Code § 20-250(b). Thus, the registration expired and the subject plate became void on November 1, 2018.”

Since Petitioners have failed to establish a “clear legal right” for renewal of the registration for the Subject Plate, the request for a writ of mandamus is denied. Furthermore, Petitioners have failed to demonstrate that DCA’s December 13, 2018 determination was arbitrary, capricious and in bad faith.

B. Other Relief Sought – Declaratory Relief

In addition to seeking Article 78 relief in the form of a writ of mandamus, the initial Petition included a “Declaratory Judgment Action Complaint” which was comprised of two causes of action. The first cause of action was for “unlawful seizure of property.” The second cause of action was for “unlawful taking of property and deprivation of due process.” The Amended Petition omits the “Declaratory Judgment Action Complaint” and its two causes of action. However, the Amended Verified Petition seeks as part of its relief “a declaratory judgment and injunction prohibiting [Respondents] from unconstitutional taking of property for redistribution without any legal or factual justification which is ongoing or continuing, as well as attorneys’ fees.”

A party who claims that government action “has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt.” *de St. Aubin v. Flacke*, 68 N.Y.2d 66, 76 (1986). “A physical taking is found only where there is a permanent physical occupation of the owner’s property by the property by the government, a stranger or a third party.” *Sobel v. Higgins*, 188 A.D.2d 286, 287 (1st Dept 1992). A “regulatory taking” “occurs when the government regulates property in a manner that unfairly imposes on a property owner a burden that should be born by the public as a whole, by alleging facts sufficient to show that the challenged regulations either deny her an economically viable use of her property, by making it ‘impossible’ or ‘commercially impracticable’ for her to profitably engage in business, or fail to substantially advance a legitimate state interest.” *Id.* at 287.

In *Scherr v. City of New York*, 55 Misc. 2d 176, 177 (Sup. Ct. 1967), Petitioners challenged a regulation on the taxi-cab industry as “an improper deprivation of the taxi owner’s property, and an unwarranted interference with such owner’s right to use his property in the manner he sees fit.” The Court wrote, “One

who chooses to engage in a publicly regulated business, such as the taxicab business, by so doing surrenders his right to unfettered discretion as to how to conduct same.” *Id.* at 177.

Here, Petitioners do not sufficiently allege a “taking” to justify the relief being sought. The Subject Plate became void pursuant to 6 RCNY § 2-421(b) because Petitioners did not renew it with Cycle Stone’s business license. Petitioners request for declaratory judgment and injunction is dismissed.

Furthermore, to the extent that Petitioners allege that DCA’s actions “violate both procedural due process and substantive due process guaranteed by the Due Process Clauses of the United States Constitution and the New York State Constitution” (Am. Ver. Petition, 34), these claims also fail as matter of law.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v Eldridge*, 424 U.S. 319, 333 (1976). “The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’” *Id.* at 348-349. Here, Petitioners have been given the opportunity to challenge DCA’s determination.

“Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.” *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999). Here, Petitioners have failed to allege such conduct on DCA’s behalf to substantiate such a claim.

Wherefore, it is hereby

ORDERED and ADJUDGED that the Petition is denied and this special proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: MAY 31, 2019



EILEEN A. RAKOWER