| **Romanow v New York State Dept. of Motor Vehs.** |
| --- |
| 2020 NY Slip Op 32095(U) |
| May 27, 2020 |
| Supreme Court, Suffolk County |
| Docket Number: 890/19 |
| Judge: Carmen Victoria St. George |
|  |
|  |

**SUPREME COURT – STATE OF NEW YORK**
**TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

***Hon. Carmen Victoria St. George***
**Justice of the Supreme Court**

**ORIGINAL**

---

**MYLES ROMANOW,**

**Petitioner,**

**-against-**

**NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,**

**Respondent.**

---

**Index No. 890/19**

**Motion Seq:**
**001 MD 002 MD**
**003 MG 004 MD**
**005 MD 006 MD**

**Decision/Order**

The following papers were read upon this motion:

Notice of Motion/Order to Show Cause……XXXXX
Answering Papers……...XXX
Reply……...XX
Briefs: Plaintiff's/Petitioner's……
Defendant's/Respondent's……X

This Decision and Order determines six motion sequences (001through 006) filed in connection with this action brought by the petitioner, appearing *pro se*, to "reverse the determination and decision by New York State Department of Motor Vehicle, vacate the traffic ticket and removing demerit points from petitioners (sic) driving license record."

The motion sequences and the relief sought are as follows: 001) petitioner's application for relief pursuant to Article 78; 002) petitioner's amended petition requesting the same relief; 003) respondent's motion to dismiss; 004) petitioner's motion for a default judgment; 005) petitioner's cross-motion for a default judgment and in opposition to respondent's motion; 006) petitioner's "notice of opposition to motion and reply to opposition of cross-motion and resubmission of notice of cross-motion for default judgment."

The Court will first address Motion Sequences 001, 002 and 003.

The Petitions and Motion to Dismiss (Motion Sequences 001, 002 and 003)

Petitioner brings this action by Notice of Petition filed on February 15, 2019 (Sequence 001). Subsequently, on March 15, 2019, petitioner filed an Amended Notice of Petition for the same relief (Sequence 002). The original petition and the subsequent petition are substantially the same in content and seek the same relief.

The return date of the original petition was denominated by petitioner as March 8, 2019; however, the parties apparently agreed to a return date of April 25, 2019.[1] On April 4, 2019, respondent New York State Department of Motor Vehicles (the DMV) filed its motion to dismiss (Sequence 003). It was during the interim between the filing of the original petition and the agreed-upon adjournment of its return date to April 25, 2019 that the petitioner filed the amended petition on March 15, 2019. The amended petition was filed thirty days after the original petition was filed, and without leave of the Court.

In his amended filing, petitioner checked paragraph 8 therein indicating that a prior application has not been made for the relief requested previously, although a comparison of the two applications reveals that the amended application requests the same relief as the original petition. The Court surmises from the amended filing that petitioner was attempting to correct service of the petition by serving the DMV at its office in Hauppauge and to submit the transcript of the DMV hearing that was held before the Administrative Law Judge on July 16, 2018. The original petition does not include the transcript and the accompanying affidavit of service indicates that the petition was mailed to the DMV in Albany, New York.

Respondent moves for dismissal of the petition and the amended pursuant to CPLR § 3211 (a) (7), (8) and CPLR § 307 (2). In its papers, respondent addresses the original petition and the amended petition that was filed after the adjournment of the return date of the original petition was granted by the Court.[2] Respondent asserts that, pursuant to CPLR § 3211 (a)(7), this Court plaintiff/petitioner fails to state a cause of action because this Court cannot review the substance of Romanow's arguments due to this failure to submit a copy of the hearing transcript to the Appeals Board of the DMV. Pursuant to CPLR §3211 (a) (8), respondent maintains that this Court lacks personal jurisdiction over respondent due to Romanow's failure to properly serve the DMV in accordance with CPLR § 307 (2).

---

[1] This matter was originally assigned to the Hon. William G. Ford, J.S.C., Supreme Court, Suffolk County. It was transferred to this Court by Administrative Order 87-19 on or about November 20, 2019. Among the papers in this Court's possession is respondent's February 28, 2019 letter to Judge Ford memorializing the conversation with Chambers concerning the adjournment of the original petition's return date.

[2] The respondent's papers for motion sequence 003 (Notice of Motion, Affirmation of Alex J. Freundlich, Esq., the affirmation of Renee L. Behrens, Esq. with accompanying exhibits and the Memorandum of Law in Support are each complete and each is date-stamped as received by the Supreme Court on April 4, 2019.

CPLR § 3211 (a)(8)

Based upon the affidavits of service accompanying the petition and the amended petition, the DMV was served by certified mail, return receipt requested; however, more is required by the applicable statute. In relevant part, CPLR § 307 reads as follows:

1. Personal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state. 2. Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in the manner provided by subdivision one of this section is completed. For purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. Service by certified mail shall not be effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters.

In this case, there is no indication that petitioner ever served the petition or amended petition upon any person designated by the statute, which is required in addition to certified, return receipt requested mailing. Accordingly, on that basis alone, the petition and amended petition should be dismissed pursuant to CPLR § 3211 (a)(8) for failure to obtain jurisdiction over the respondent (***CPLR § 7804 [c]***; ***Matter of Wittie v. State of New York Office of Children & Family Services***, 55 AD3d 842 [2d Dept 2008]; ***Duroseau v. Johnson***, 289 AD2d 489, 490 [2d Dept 2001]; ***Matter of Russo v. New York State Department of Motor Vehicles***, 181 AD2d 774, 775 [2d Dept 1992]).

CPLR § 3211(a)(7)

In addition, this Court cannot review the substance of plaintiff/petitioner's claim that the determination of the DMV should be vacated, the traffic ticket vacated, and the points removed from his driver's license record. Accordingly, petitioner has failed to state a cause of action.

The Court recognizes that when deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see* ***Marcantonio v Picozzi III***, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275 [1977]; *see* ***Leon v Martinez***, 84 NY2d 83, 87-88, [1994]; ***Sokol v Leader***, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; ***Gershon v Goldberg***, 30 AD3d 372, 373 [2d Dept 2006]). "Whether a plaintiff can

ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]).

Nonetheless, as a matter of law, when a petitioner fails to submit a transcript of the administrative hearing whose result petitioner claims was improper to the DMV Appeals Board, a court is thereafter precluded from addressing whether substantial evidence supported the administrative determination (***Brady v. DMV***, 98 NY2d 625, 626 [2002]; ***Matter of Watson v. Fiala***, 101AD3d 1649 [4th Dept 2012]; ***Matter of Cipry Automotive, Inc. v. New York State Dept. of Motor Vehicles***, 72 AD3d 816, 817 [2d Dept 2010]; ***Matter of Herskovic v New York State Dept. of Motor Vehs.***, 57 AD3d 995 [2d Dept 2008]; ***Matter of Richmond Hill Serv. Sta. v New York State Dept. of Motor Vehs.***, 92 AD2d 688, 688-689 [3d Dept 1983]; ***Matter of Gouranga v. New York State Department of Vehicle Traffic Violation Bureau***, 2009 NY Slip Op 30788 [U] [Sup Ct New York County 2009]).

Furthermore, absent a transcript submitted to the Appeals Board, the only aspect that the Board is able to review is the penalty imposed; however, pursuant to VTL § 228 [2][c] and 15 NYCRR 126.3, this determination of the Appeals Board on a "penalty-only" basis is not judicially reviewable (***Brady***, ***supra***; ***Matter of Gouranga***, ***supra***). If the appellant claims to have been aggrieved by a determination of the hearing officer and wishes to appeal that determination in addition to the penalty imposed, and have that determination judicially reviewed, the appellant is required to submit the transcript of the hearing (***VTL §§ 228 [2] [b], [d], [9]***).

It is undisputed in this case that the petitioner never submitted the transcript of the July 16, 2018 to the Appeals Board of the DMV; accordingly, the adverse determination of guilt that he seeks to have vacated cannot be reviewed by this Court and his petition and amended petition should be dismissed pursuant to CPLR § 3211, for failure to state a claim. The petition and amended petition are also dismissible because this Court does not have subject matter jurisdiction of the causes of action alleged by plaintiff/petitioner (***CPLR § 3211 [a][2]***; ***Herskovic***, ***supra***).

To the extent that the penalty imposed upon plaintiff/petitioner can be reviewed by this Court (*see* ***Brady***, ***supra*** at 626), it was the minimum mandatory fine ($50.00, plus mandatory surcharge). "[T]he sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (***Featherstone v. Franco***, 95 NY2d 550, 554 [2000]). "This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general" (***Kelly v. Safir***, 96 NY2d 32, 38 [2001]). Thus, the minimum penalty imposed in this case was not so disproportionate to the offense so as to be shocking to one's sense of fairness (***Cipry***, ***supra*** at 817).

Petitioner's claim that he did not receive notification from the DMV concerning the requirements necessary to file an appeal of the guilty determination is unavailing. Generally, proof of proper mailing gives rise to a presumption that the item was received by the addressee

(***Residential Holding Corp. v. Scottsdale Insurance Company***, 286 AD2d 679, 680 [2d Dept 2001]).

15 NYCRR 126.2 (f) provides as follows:

(f) Presumption of mailing and delivery. All necessary notices may be mailed from the Appeals Board via first class mail to appellant's address as shown on his appeals form, or--if notice of change of address be delivered via certified mail to the Appeals Board, at the address given in section 126.1 of this Part--to the address specified in such notice. Mailing via first class mail in the regular course of business shall be presumed to have occurred on the date shown in the records of the Appeals Board as the date of any notice, bill or other correspondence addressed to appellant or his representative. All such mail and all notices contained therein shall be deemed delivered on the fourth day following the date of such notice, bill or other correspondence.

The affirmation of Renee L. Behrens, Assistant Counsel in Counsel's Office of the New York State DMV, together with the annexed exhibits, establishes that all the appropriate written notifications concerning an appeal of the guilty determination were sent to the address specified by petitioner by describing the DMV's mailing procedures in detail (***Residential Holding Corp., supra***). Furthermore, Ms. Behrens affirms that neither the August 16, 2018 letter advising Romanow that he had to purchase the transcript in order for the Appeals Board to review the hearing officer's adverse determination, nor the October 18, 2018 letter advising Romanow that his appeal was rejected for failure to pay for and submit the transcript were returned to the DMV by the United States Postal Service.

Petitioner's bare denial of receipt is insufficient to overcome the presumption, especially when he provided the address to which the DMV attests it sent the notifications concerning his appeal (***Rodriguez v. Wing***, 251 AD2d 335 [2d Dept 1998]; ***Rosa v. Board of Examiners of the City of New York***, 143 AD2d 351 [2d Dept 1988]).

The Default Motions/Cross-Motions (Sequences 004, 005 and 006)

Petitioner has failed to submit any proof that the respondent in this action defaulted in responding to the petition and/or amended petition. The Court again notes that the return date for the original petition was adjourned to April 25, 2019; therefore, plaintiff/petitioner's claim that respondent failed to respond by the return date of the amended petition (April 15, 2019) is spurious. In any event, out of an abundance of caution, and despite the affidavits of service establishing that the respondent served its motion to dismiss upon petitioner on April 3, 2019, respondent re-mailed to petitioner its motion to dismiss on May 1, 2019. Service of the motion papers was complete once they were properly addressed to Romanow at the address designated by him (***CPLR § 2103***; ***Watt v. New York City Transit Authority***, 97 AD2d 466 [2d Dept 1983]).

In view of the determination of this Court with respect to the respondent's motion to dismiss, the petitioner's motions and cross-motions are denied as moot, since this Court lacks jurisdiction over the respondent due to petitioner's failure to properly serve respondent, and since this Court is precluded as a matter of law from reviewing the adverse determination of the DMV due to petitioner's failure to submit a hearing transcript to the Appeals Board of the DMV.

It is unknown to this Court to what additional party petitioner refers in his Memorandum of Law (Motion Sequence 005) when he claims that this Court should "order joinder" pursuant to CPLR § 3211 (a)(10). There is no evidence that there are any parties to this action other than Mr. Romanow and the respondent.

Despite having respondent's motion to dismiss, which petitioner references in his cross-motions (Sequences 005 and 005), he persists in requesting a default judgment while failing to substantially address the merit of respondent's motion. Petitioner states that the dismissal motion was incorrectly mailed to the incorrect address and he states that, "[his] suspicion is malicious intent, and it is clearly an attempt to prevent Petitioner from continuing his case and receiving fair and just treatment under the law." Aside from his "suspicion," petitioner nevertheless acknowledges the merit of respondent's motion to dismiss when he states, *"[w]hile there may be merit to respondents (sic) claims*, the fact that they willfully chose to mail response to a seemingly random address both bewilders and confuses the petitioner, and in no way shape or form meets the minimum requirements for service specified by the courts in CPLR 308" (emphasis added) (Motion Sequence 006, Reply, page 3). CPLR §308, service on a natural person, is inapplicable with regard to respondent in this matter, and respondent's motion to dismiss is not required to be personally served upon plaintiff/petitioner (***CPLR § 2103 [c]***).

Petitioner also repeatedly emphasizes that he is a layperson, apologizing for his "oversight" of certain matters, including properly serving the respondent. Mr. Romanow's *pro se* status does not afford him greater rights than those afforded to any other litigant (***Matter of Correnti v. Suffolk County District Attorney's Office***, 34 AD3d 578 [2d Dept 2006]).

Based upon the foregoing, Motion Sequences 004, 005 and 006 are denied as moot.

Motion Sequence003 is granted and the petition (Sequence 001) and the amended petition (Sequence 002) are dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 27, 2020
Riverhead, NY

/S**HON. CARMEN VICTORIA ST. GEORGE**

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ X ] NON-FINAL DISPOSITION [ ]