

<b>Matter of Street v City of New York</b>
2020 NY Slip Op 32645(U)
August 12, 2020
Supreme Court, New York County
Docket Number: 158466/2019
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**  
*Justice*

**PART 6**

In the Matter of the Application of

MONROE STREET, individually, and on behalf  
of all others similarly situated,

INDEX NO. 158466/2019

Plaintiff-Petitioner,

MOTION DATE  
MOTION SEQ. NO. 1  
MOTION CAL. NO.

For a Judgment and Order pursuant to Article 78  
of the CPLR,

*-against-*

THE CITY OF NEW YORK, COMMISSIONER  
POLLY TROTTENBERG, in her individual and  
personal capacity, COMMISSIONER JACQUES JIHA,  
in his individual and personal capacity,  
DEPUTY COMMISSIONER JEFFREY SHEAR,  
in his individual and personal capacity,  
JOHN and JANE DOE CITY OF NEW YORK  
EMPLOYEES, in their individual and personal capacities,  
JOHN and JANE DOE NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION  
EMPLOYEES, in their individual and personal capacities,  
JOHN and JANE DOE NEW YORK CITY  
DEPARTMENT OF FINANCE EMPLOYEES,  
in their individual and personal capacities,  
JOHN and JANE DOE NEW YORK CITY  
PARKING VIOLATIONS BUREAU EMPLOYEES,  
in their individual and personal capacities, and  
JOHN and JANE DOE PARKING VIOLATIONS  
BUREAU ADMINISTRATIVE LAW JUDGES,  
in their individual and personal capacities,

Defendants-Respondents.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answer — Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits

PAPERS NUMBERED

■  
■  
■

**Cross-Motion:    Yes    X No**

This case arises out of a Notice of Liability (“NOL”) issued to Plaintiff-Petitioner on March 18, 2019 for violating New York Vehicle and Traffic Law (“NYVTL”) §1111(d). The NOL states that on March 7, 2019, on Classon Avenue and Flushing Avenue in Brooklyn, New York, a Red Light Camera observed Plaintiff-Petitioner’s vehicle enter an intersection upon a red light traffic signal.

Plaintiff-Petitioner contested the NOL by submitting a request for a hearing online. Plaintiff-Petitioner's challenge was based on the grounds that "[t]he technician certificate is not notarized and is therefore invalid" and he has "been deprived of [his] right to face [his] accuser as a camera is unable to stand up to questioning in court." On April 4, 2019, Administrative Law Judge Barbara J. Simmons ("ALJ") found Plaintiff-Petitioner liable for the NOL.

Plaintiff-Petitioner claims on April 4, 2019, the ALJ disregarded Plaintiff-Petitioner's "claims as to the legal insufficiency of his alleged Red Light Camera Violation and entered a guilty verdict against Petitioner." Although Plaintiff-Petitioner appealed the ALJ determination to the Appeals Board, Plaintiff-Petitioner paid the \$50.00 fine for the violation. On April 30, 2019, the Appeals Board upheld the ALJ's determination.

Plaintiff-Petitioner brings this Article 78 proceeding, individually and on behalf of all others similarly situated. Plaintiff-Petitioner seeks an Order:

(a) declaring that all alleged violations of Section 1111(d) of the NYVTL issued pursuant to NYVTL Section 1111-a from August 26, 2013, to the present, and continuing, are legally invalid; (b) declaring that all Technician's Certificates issued from August 26, 2013, to the present, and continuing, for alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a are legally insufficient and do not constitute prima facie evidence of the alleged violations because they are not notarized; (c) declaring that Plaintiff-Petitioner and Class members were deprived of a meaningful opportunity to face their accusers; (d) declaring that New York City administrative law judges have improperly disregarded and ignored Plaintiff-Petitioner's and Class members' valid claims contesting their alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a; (e) declaring that Defendants-Respondents deprived Plaintiff-Petitioner and Class members of their property without due process of law; (f) declaring that Defendants-Respondents made material false representations and/or omissions in connection with all alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a from August 26, 2013, to the present, and continuing; (g) declaring that Defendants-Respondents were unjustly enriched by collecting fines for legally

insufficient alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a without satisfying their burden of establishing Petitioner's and Class members' prima facie guilt; (h) issuing notice to the Class of this action; (i) appointing Plaintiff-Petitioner as the representative of the Class and his counsel as Class counsel; (j) Granting an injunction against Defendants-Respondents prohibiting Defendants Respondents from issuing Technician's Certificates for alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a that are not notarized; (k) vacating all guilty pleas entered by members of the Class from August 26, 2013, to the present, and continuing for alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a; (l) Vacating all guilty verdicts and judgments entered against Petitioner and members of the Class from August 26, 2013, to the present, and continuing for alleged violations of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a; (m) granting damages, including actual, general, special, incidental, statutory, punitive, treble and consequential, in an amount to be determined at trial; and (n) granting pre-judgment and post-judgment.

Defendants-Respondents cross move pursuant to Article 78 of the CPLR for an Order dismissing the Complaint and Verified Petition pursuant to CPLR § 3211(a)(7).

The motion and cross motion were filed before the pandemic but were not fully submitted at the time that the Court paused filings. Once the pause was lifted, Plaintiff-Petitioner was given an opportunity to submit papers in opposition to Defendants-Respondents' cross motion to dismiss and in further support of the Petition. Defendants-Respondents were given an opportunity to submit a reply in further support of their cross motion to dismiss.

### **Discussion**

#### **1. Challenge brought on Plaintiff-Petitioner's behalf**

“Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action.” *Dunne v. Harnett*, 399 NYS 2d 562, 563 (Sup Ct, NY County 1977). Judicial review is limited to questions expressly identified by CPLR § 7803.

*Featherstone v. Franco*, 95 NY2d 550, 554 (2000). One such question is “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” See CPLR § 7803(3). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 (1st Dept 2010). Where “the issues of law in dispute here are limited to whether the challenged determinations were made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, an abuse of discretion, or irrational, they are subject to review only pursuant to CPLR Article 78 ...,” the causes of action for a judgment declaring that the same determinations are illegal is “render[ed] unnecessary.” *Matter of E. Moriches Prop. Owners’ Ass’n, Inc. v Planning Bd. of Town of Brookhaven*, 66 AD3d 895, 897 (2d Dept 2009).

NYVTL § 1111-a(d) provides that “[a] certificate, sworn to or affirmed by a technician employed by the city in which the charged violation occurred ... shall be prima facie evidence of the facts contained therein.”

The Court of Appeals in *Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799, 801 [1981], stated:

Only an attorney, physician, osteopath or dentist authorized to practice within this State can serve and file an affirmation bearing his signature alone in lieu of and with the same force and effect as an affidavit. (CPLR 2106.) Moreover, even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action. (See *Schutzer v. Suss-Kolyer*, 57 A.D.2d 613, 393 N.Y.S.2d 776.) It is also true, of course, that any person who, for religious or other reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective such an affirmation must be made before a notary public or other authorized official. (CPLR 2309.) Otherwise, the affirmation would be of no probative value because the affirmant would not be answerable for the crime of perjury should he make a false statement. (Penal Law, § 210.00, subd. 1.)

In *People v. Eisenstadt*, 48 Misc. 3d 56, 57 (App. Term, 2d Dept, 9th and 10th Judicial Districts 2015), the Court, citing to the *Slavenburg* decision, held that the Technician Certificate that was introduced by the State of New York against the

defendant “was without probative value and should have been disregarded by the court” because “the certificate was not in authorized form since it was neither sworn to nor affirmed before a notary public or other authorized individual (see CPLR 2309[a]).” The Court held that “the People failed to establish a prima facie case against defendant” under NYVTL. *See also People v. Perez-Klein*, 54 Misc. 3d 139(A), at \*1 (App. Term, 2d Dept, 9th and 10th Judicial Districts 2017).

Here, the Technician Certificate issued in connection with Plaintiff-Petitioner’s NOL was neither sworn to nor affirmed before a notary public or other authorized official.

The ALJ’s determination found Plaintiff-Petitioner liable for the NOL and held “respondent’s [Petitioner’s] unsubstantiated, and therefore unpersuasive denial claim that, the violation is invalid, fails to provide a legal basis for dismissal, in this instance, because the evidence submitted at the hearing (an unsupported denial claim) fails to verify respondent’s [Petitioner’s] defense or to prove that respondent’s [Petitioner’s] vehicle was in fact operation in compliance with all relevant regulations at the time and place of the violation issuance.” The ALJ’s determination did not address Plaintiff-Petitioner’s claim that the Technician Certificate issued for his Red Light Camera violation was not notarized and should not be considered prima facie evidence of his guilt, pursuant to NYVTL § 1111-a(d) and the CPLR.

The Technician Certificate issued in connection with Plaintiff-Petitioner’s NOL lacks probative value and should not have been considered by the ALJ. Defendants-Respondents failed to establish a prima case against Plaintiff-Petitioner. (See NYVTL § 1111-a[d]). The NOL issued to Plaintiff-Petitioner on March 18, 2019 is vacated.

## 2. Challenge on behalf of Proposed Class

Plaintiff-Petitioner also brings this action on behalf of Class Members. Plaintiff-Petitioner seeks as part of his relief an Order “issuing notice to the Class of this action” and “appointing Plaintiff-Petitioner as the representative of the Class and his counsel as Class counsel.”

The Class Members are defined as all persons in the United States and New York “who from August 26, 2013, to the present, and continuing, paid a fine and/or associated fee for an alleged violation of NYVTL Section 1111(d) issued pursuant to NYVTL Section 1111-a that was not fully refunded by Respondents with interest.”

“Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court.” *Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 (1st Dept 2010).

“The New York Court of Appeals has held that where the agency action could have been challenged in an Article 78 proceeding, a party will be subject to the four-month statute of limitations notwithstanding that the litigation was brought in the form of a declaratory judgment action.” See § 116:10 Statute of limitations-Declaratory judgment actions, 4E N.Y.Prac., Com. Litig. in New York State Courts § 116:10 (4th ed.). “Whether petitioners’ constitutional claims are subject to the four-month statute of limitations period under CPLR article 78 or the residuary six-year limitations period of CPLR 213(1) turns on whether the parties’ rights could have been resolved in an article 78 proceeding.” *Walton v New York State Dept. of Correctional Services*, 8 NY3d 186, 194 (2007). “A petitioner who seeks article 78 review of a determination must commence the proceeding ‘within four months after the determination to be reviewed becomes final and binding upon the petitioner.’” *Walton v New York State Dept. of Correctional Services*, 8 NY3d 186, 194 (2007).

Here, even assuming that Plaintiff-Petitioner met the prerequisites to certifying the class action, the proposed class would be overly broad because it includes individuals who received fines from August 26, 2013 to the present.

Wherefore, it is hereby

ORDERED that Defendants-Respondents’ cross motion to dismiss the Petition is denied; and it is further

ORDERED that the Petition is granted only to the extent that Notice of Liability No. 5105637495 issued to Plaintiff-Petitioner Monroe Street on March 18, 2019 is vacated; and it is further

ORDERED that the portion of the motion seeking class certification is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated: August 12, 2020**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION