

Matter of Bolofsky v City of New York

2020 NY Slip Op 34249(U)

December 9, 2020

Supreme Court, New York County

Docket Number: 100028/2017

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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In the Matter of the Application of

GLEN BOLOFSKY, individually and as
President of Alternate Side of the
Street Suspended Parking Calendar
Corporation d/b/a parkingticket.com
d/b/a Parking Survival Experts, on
their own behalf and on behalf of all
clients for whom they have filed
transcript requests with the New York
City Parking Violations Bureau;
ATLANTIC COOLING TECHNOLOGIES AND
SERVICES; CONCEPT NATIONAL, LLC; KING
FREEZE; UB DISTRIBUTORS, LLC; ROYAL
ROSE BURTON KITCHEN SUPPLY, LLC; and
SYSCO METRO NY, LLC,

Index No. 100028/2017

Petitioners

- against -

DECISION AND ORDER

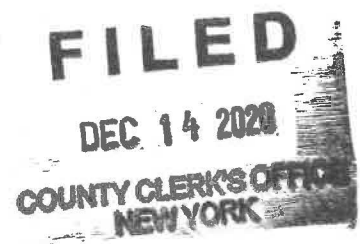
CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF FINANCE; JEFFREY SHEAR,
Deputy Commissioner of Department of
Finance; DIANA BEINART, Deputy
Commissioner and General Counsel of
Department of Finance; NEW YORK CITY
PARKING VIOLATIONS BUREAU OF NEW YORK
CITY DEPARTMENT OF FINANCE; and
JACQUES JIHA, Commissioner of New York
City Department of Finance,

Respondents

For an Order and Judgment Pursuant to
Article 78 of the Civil Practice Law
and Rules and for Injunctive and
Equitable Relief and a Declaratory
Judgment as a Plenary Action

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LUCY BILLINGS, J.S.C.:

Petitioners challenge respondents' procedures for appealing a finding of guilty after issuance of a notice of violation (NOV) of parking laws and their failure to respond to inquiries concerning NOV's. Petitioners move to file a Third Amended Petition joining additional claims, C.P.L.R. § 3025(b), and petitioners. C.P.L.R. § 1002(a). Respondents cross-move to vacate a preliminary injunction staying administrative appeals and enforcement of petitioners' NOV's entered on the parties' consent at the commencement of this proceeding. C.P.L.R. § 6314. Petitioners separately move to stay the administrative hearings and enforcement of petitioners' NOV's about which petitioners have made inquiries regarding alteration or reloading of the NOV, which respondents have not answered within 45 days or within a reasonable period. C.P.L.R. §§ 6301, 6312(a).

I. THE ADDITIONAL CLAIMS

Leave to amend a complaint is freely granted unless the amendment would surprise or otherwise prejudice the opposing

parties, Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411 (2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017), or the amendment lacks merit. C.P.L.R. § 3025(b); Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d 476, 477 (1st Dep't 2020); Brook v. Peconic Bay Med. Ctr., 172 A.D.3d 468, 469 (1st Dep't 2019); Jean-Baptiste v. 153 Manhattan Ave. Hous. Dev. Fund Corp., 124 A.D.3d 476, 477 (1st Dep't 2015); Onetti v. Gatsby Condominium, 111 A.D.3d 496, 497 (1st Dep't 2013). The court already dismissed several claims in the proposed Third Amended Petition when the court partially granted respondents' motion to dismiss the Second Amended Petition. Petitioners have provided no further facts or legal theories to support those dismissed claims that warrant reinstating them. Therefore the court addresses only those claims that petitioners have added to their Second Amended Petition in their proposed Third Amended Petition.

Respondents claim that petitioners' proposed second and fourth claims in their Third Amended Petition duplicate the eighth claim in the Second Amended Petition, which alleges that respondents have failed to answer petitioners' requests for information regarding their NOV's timely, in violation of New York Vehicle and Traffic Law (VTL) § 237(8), and requiring the NOV's

dismissal. Petitioners' proposed second claim, however, encompasses additional requests for information regarding NOV's by petitioners in the Second Amended Petition. Petitioners maintain that the second claim also encompasses requests for information regarding NOV's by the proposed additional petitioners in the Third Amended Petition, addressed below. Petitioners' proposed fourth claim encompasses requests for information regarding NOV's that respondents answered inadequately or meaninglessly according to petitioners, not just requests for information to which respondents provided no timely answer. Petitioners claim respondents' inadequate or meaningless answers also violate VTL § 237(8) and require dismissal of the NOV's to which the inquiries pertained.

Thus these proposed second and fourth claims simply expand on the facts supporting the eighth claim in the Second Amended Petition. The court therefore grants petitioners' motion to amend the Second Amended Petition to add the proposed fourth claim and the proposed second claim to the extent that it encompasses additional requests for information regarding NOV's by petitioners in the Second Amended Petition. C.P.L.R. § 3025(b); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d at 413-14; Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d at 500; LDIR, LLC v. DB Structured Prods., Inc., 172 A.D.3d 1, 4 (1st Dep't 2019); CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec. LLC, 146 A.D.3d 60, 65-66 (1st

Dep't 2016). The court denies petitioners' motion to amend the Second Amended Petition to add the proposed second claim to the extent that the Third Amended Petition claims that its proposed additional petitioners made requests for information regarding NOVs that respondents did not timely, adequately, or meaningfully answer, for the reasons discussed in section II below.

Petitioners' proposed eleventh claim in their Third Amended Petition alleges that respondents' rescission of their \$2.00 fee to obtain the cost of an administrative hearing transcript violated lawful procedure, after the Second Amended Petition sought that rescission, and the court dismissed that claim as moot because respondents had provided the relief requested. Therefore petitioners do not plausibly allege any injury from respondents' rescission of the fee. Rudder v. Pataki, 93 N.Y.2d 273, 281 (1999); Bloomfield v. Cannavo, 123 A.D.3d 603, 605 (1st Dep't 2014); Roberts v. Health & Hosps. Corp., 87 A.D.3d 311, 319 (1st Dep't 2011). Nor do petitioners seek a refund of fees previously paid. See Ryan, Inc. v. New York State Dept. of Taxation & Fin., 83 A.D.3d 482, 483 (1st Dep't 2011).

Petitioners' proposed thirteenth claim in their Third Amended Petition seeks dismissal of NOVs that petitioners challenged at an administrative hearing, after which petitioners requested the cost of the hearing transcript, were charged the \$2.00, and moved to stay their administrative appeals while

petitioners challenged the fee, to which respondents consented. The claimed basis for dismissal is that, due to the stay of the appeals that petitioners requested, their representatives who appeared at the hearings are no longer employed to prosecute the appeals and determine whether the hearing transcripts are accurate and complete. Again, petitioners may not plausibly complain about the consequences of the relief, the stays, that petitioners themselves sought. The representatives' departures from their employment by petitioners are also circumstances of petitioners' own making or, at minimum, not of respondents' making. Finally, petitioners do not allege that their former employees are unavailable to be temporarily retained to review transcripts and do not explain why another representative cannot otherwise prosecute the appeals.

Petitioners' proposed twelfth and fourteenth claims in their Third Amended Petition seek disclosure. Petitioners do not need a separate claim to entitle them to disclosure material and necessary to this proceeding. They may seek that relief at any time pursuant to C.P.L.R. § 408. Consequently, the court denies petitioners' motion to amend the Second Amended Petition to the extent that the motion seeks to add the eleventh through fourteenth claims in their proposed Third Amended Petition, because they lack merit. C.P.L.R. § 3025(b); Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 581; Avail 1 LLC v.

Acquafredda Enters. LLC, 184 A.D.3d at 477; Brook v. Peconic Bay Med. Ctr., 172 A.D.3d at 469; Y.A. v. Conair Corp., 154 A.D.3d at 612.

II. THE ADDITIONAL PETITIONERS

Petitioners' motion also seeks to add petitioners that raise the remaining claims in the Second Amended Petition and the fourth claim in the proposed Third Amended Petition. C.P.L.R. § 1002(a). Respondents' only opposition is that the Third Amended Petition fails to show that any of the 20 added petitioners raises one of the claims sustained in this proceeding. Thus the inquiry boils down to which, if any, proposed petitioners (1) received a hearing decision that did not articulate in intelligible terms its basis or rationale, as the sustained seventh claim alleges, or (2) sought information regarding the petitioner's NOV to which respondents did not respond timely, as the sustained eighth claim and proposed fourth claim allege.

Petitioners fail to demonstrate either category of injury incurred by any proposed petitioner. Exhibit GG to the proposed Third Amended Petition presents two lists of petitioners and their NOVs in controversy. Comparison of the NOVs issued to the 20 proposed petitioners with the requests for information regarding the NOVs in Exhibit G to the proposed Third Amended Petition fails to indicate that any of the proposed petitioners made these information requests. No NOV in controversy at all

was associated with proposed petitioner Metro Furniture Delivery, Ltd., even related to a dismissed or denied claim. While Exhibit DD to the proposed Third Amended Petition includes affidavits by representatives who appeared for administrative hearings to dispute NOVs and received hearing decisions that did not articulate any rationale, the few NOV numbers specified in the affidavits were not associated with any proposed petitioners.

Thus petitioners' proposed joinder of the additional petitioners is palpably insufficient. C.P.L.R. §§ 1002(a); 3025(b); Varsity Bus Co. v. New York City Dept. of Educ., 95 A.D.3d 623, 624 (1st Dep't 2012); Shelter Is. Assn. v. Zoning Bd. of Appeals of Town of Shelter Is., 57 A.D.3d 907, 908-909 (3d Dep't 2008). The court therefore denies petitioners' motion to amend the Second Amended Petition to the extent that the motion seeks to join additional petitioners. C.P.L.R. §§ 1002(a), 3025(b).

III. RESPONDENTS' CROSS-MOTION TO VACATE THE PRELIMINARY INJUNCTION CURRENTLY IN EFFECT

Respondents cross-move to vacate the stay on the administrative appeals and enforcement of NOVs for which petitioners sought the cost of hearing transcripts and were charged \$2.00, because respondents no longer charge the \$2.00 fee. These changed circumstances warrant lifting the stay. C.P.L.R. § 6314; Wynkoop v. 622A President St. Owners Corp., 169 A.D.3d 1103, 1105 (1st Dep't 2019); Morris v. 702 Fifth St. HDFC,

8 A.D.3d 27, 29-30 (1st Dep't 2004); Wellbilt Equip. Corp. v. Red Eye Grill, 308 A.D.2d 411, 411 (1st Dep't 2003).

IV. PETITIONERS' SEPARATE MOTION FOR A NEW PRELIMINARY INJUNCTION

Petitioners separately move to stay the administrative hearings and enforcement of petitioners' NOVS about which petitioners have made inquiries regarding alteration or reloading of the NOV, which respondents have not timely answered. C.P.L.R. §§ 6301, 6312(a). To be entitled to this preliminary injunction, petitioners must show that they will be irreparably harmed if the injunction is not granted. Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 181 A.D.3d 488, 489 (1st Dep't 2020); Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d 530, 531 (1st Dep't 2017); IME Watchdog Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C., 145 A.D.3d 464, 466 (1st Dep't 2016); LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d 529, 530 (1st Dep't 2014).

Petitioners insist that, if the administrative hearings and enforcement of petitioners' NOVS about which petitioners have made inquiries are not stayed, their vehicles to which the NOVS were issued will be towed or immobilized. Petitioners may avoid this injury, however, by timely pursuing administrative appeals of the NOVs or simply paying the fines. If petitioners pursue an appeal, they may be able to show that the NOV was altered by comparing the version of the NOV that they received on their

vehicle or via delivery to their vehicle operator with respondents' version at the administrative hearing, or they may present another defense, and succeed with a dismissal of the NOV. VTL § 238(2-a)(2). See VTL § 238(2); Sysco Metro NY, LLC v. City of New York, 62 Misc. 3d 997, 1003-1004 (Sup. Ct. N.Y. Co. 2018). If petitioners do not succeed or do not pursue and appeal because they did not receive a timely, adequate answer to their inquiry, and they pay the fine, they will be entitled to a refund of that fine if they succeed on their eighth claim in the Second Amended Petition.

Thus the harm that petitioners claim if the administrative hearings and enforcement of petitioners' NOVS about which petitioners have made inquiries are not stayed is both avoidable and fully compensable by monetary relief. CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 168 A.D.3d 567, 568 (1st Dep't 2019); Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d at 531; LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d at 530; Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d 101, 105-106 (1st Dep't 2013). The court therefore denies petitioners' motion for a preliminary injunction staying the administrative hearings and enforcement of petitioners' NOVS about which petitioners have made inquiries regarding alteration or reloading of the NOV, which respondents have not timely answered. C.P.L.R. §§ 6301, 6312(a).

V. CONCLUSION

For the reasons explained above, the court grants petitioners' motion to amend the Second Amended Petition to add the proposed Third Amended Petition's second claim, to the extent that the second claim encompasses additional requests for information regarding NOV's of petitioners in the Second Amended Petition, and the proposed Third Amended Petition's fourth claim. C.P.L.R. § 3025(b). The court otherwise denies petitioners' motion to amend the Second Amended Petition and to join additional petitioners. C.P.L.R. §§ 1002(a), 3025(b). Within 20 days after service of this order with notice of entry, petitioners shall serve a Third Amended Petition that includes only the seventh and eighth claims in the Second Amended Petition, the second and fourth claims in the proposed Third Amended Petition, and the petitioners in the Second Amended Petition.

The court also grants respondents' cross-motion to vacate the stay on the administrative appeals and enforcement of NOV's for which petitioners sought the cost of hearing transcripts and were charged \$2.00. C.P.L.R. § 6314. Regarding the stayed NOV's, within 30 days after service of this order with notice of entry, respondents shall provide the cost of those transcripts for which petitioners have requested the cost. Within the same time, for any stayed NOV's for which petitioners have not requested the

transcript cost, petitioners shall (1) request the cost or (2) confirm that they do not seek the transcript and, in either instance, proceed with their administrative appeals according to the governing regulations. E.g., 19 R.C.N.Y. § 39-12. Upon receipt of the transcript cost, petitioners shall request any transcripts sought, respondents shall prepare the requested transcripts, and petitioners shall pay for the transcripts and proceed with their administrative appeals, all according to the governing regulations. E.g., id.

The court denies petitioners' motion for a preliminary injunction staying the administrative hearings and enforcement of petitioners' NOVS about which petitioners have made inquiries regarding alteration or reloading of the NOV, which respondents have not timely answered. C.P.L.R. §§ 6301, 6312(a).

DATED: December 9, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

FILED
DEC 14 2020
COUNTY CLERK'S OFFICE
NEW YORK

LUCY BILLINGS
J.S.C.