

Matter of Volpe v Ricketts

2012 NY Slip Op 32208(U)

August 18, 2012

Supreme Court, New York County

Docket Number: 102744/12

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: YORK
Justice

PART 2

VOLPE, ROBERT

INDEX NO. 102744/12

MOTION DATE 7/19/12

- v -
RHOLDA RICKETTS

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/18/12

[Signature]
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter of the Application of

ROBERT VOLPE

Petitioner,

Index No. 102744/12

-against-

RHOLDA RICKETTS,
As Deputy Superintendent of the
NYS DEPARTMENT OF FINANCIAL SERVICES

Respondent.

-----X

UNFILED JUDGMENT

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YORK, J.:

Petitioner Robert Volpe ("Volpe" or "Petitioner") brought an Article 78 proceeding by an order to show cause against Rholda Rickers, as deputy superintendant of the New York State Department of Financial Services ("Department" or "Respondent") seeking annulment of an administrative determination by the Department denying petitioner's application for a license of a mortgage loan originator ("MLO"). Respondent opposed the petition in its verified answer.

BACKGROUND

In September 2010 petitioner applied to the Department for a MLO license to work at Mortgage Links. MLOs, as defined by Banking Law §599-b(7), are persons who take residential mortgage loan applications and negotiate residential mortgage loan terms. Article 12-E of the

* 3]

Banking Law was amended, effective July 11, 2009, to include Section 599-e. This states that the superintendent of the Banking Department shall not issue a MLO license to an applicant who at any time preceding the date of the application has been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering.

The Legal Division of the Department reviewed petitioner's background and found that his 1994 felony conviction for conspiracy to sell, distribute or dispense cocaine did not involve "an act of fraud, dishonesty, or a breach of trust, or money laundering", but his 2000 conviction for conspiracy to undertake interstate transportation of stolen property, and receive and sell stolen goods, involved an act of dishonesty. By letter dated January 23, 2012, the Department denied petitioner's application and informed him that this was its final determination. In a subsequent letter, dated March 9, 2012, an assistant counsel of the Department, Gene C. Brooks, explained the rationale of the decision and emphasized that the superintendent does not have discretion to vary the requirements for MLO licensing.

In his application for a judgment pursuant to Article 78 of the CPLR, petitioner alleges that the denial of his application for a MLO license was arbitrary and capricious and not supported by the relevant facts and circumstances. He argues that crimes of dishonesty involve some element of fraud or deceit while he simply drove a truck containing stolen goods. In its opposition to the petition, the Department argues that it is charged with the administration and enforcement of the Banking Laws and must be granted discretion to determine which felonies constitute acts of dishonesty. If such determination is rational and reasonable, it should be upheld, and petitioner's order to show cause and verified petition dismissed.

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DISCUSSION

Article 12-E, Section 599-e of the Banking Law closely follows the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act") and provides in relevant part:

§ 599-e. Issuance of a license.

1. Findings. Notwithstanding any other law, the superintendent shall not issue a mortgage loan origination license unless he or she makes, at a minimum, the following findings:

(b) No felony conviction. That the applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court:

(i) During the seven-year period preceding the date of the application for licensing; or

(ii) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering, provided that for purposes of this subdivision, the superintendent may, in his or her discretion, disregard a conviction where the felon has been pardoned ...

The only discretion accorded the superintendent is to disregard a conviction if the felon was pardoned, which is not the case in the present application. In all other instances the superintendent must deny the MLO license if an applicant has a criminal record that includes felonies listed in §599-(e)(b).

Parties dispute the classification of the crime to which plaintiff pleaded guilty on March 10, 2000 in the Southern District of New York – conspiracy to commit interstate transportation of stolen property and receive and sell stolen goods, in violation of 18 U.S.C. Section 371. Respondent cites federal and state law that, in its view, supports the reasonable determination that knowingly transporting stolen goods is an act of dishonesty. Petitioner's

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attorney, in his affirmation, distinguishes these cases on the ground that crimes they refer to involve an element of fraud or false statement, while petitioner's crime "simply consisted of petitioner driving stolen goods from one point to another for a small fee." (Froccaro Aff., para. 8). In addition, all but one case cited by respondent deal with the issue of the admission of defendants' prior criminal conviction at trial, not an interpretation of the NYS Banking Law (id., para.9).

Article 12-E of the Banking Law has a very brief history, and only few cases interpret it. However, there exists extensive federal and state law that classifies theft and associated actions, such as possession and transportation of stolen goods, as crimes of dishonesty. United States v Ortiz, 553 F2d 782, 787-88 [2d Cir 1977] (convictions for grand larceny, automobile thefts, possession of burglary tools and transportation of stolen property involve crime of dishonesty); Melino v Miller, 9:06-CV-1173, 2010 WL 3081439 [NDNY Aug. 5, 2010] (convictions for bank fraud, perjury and transporting stolen property are "in the nature of *crimen falsi*."); People v Young, 178 AD2d 571, 571-72; 577 N.Y.S.2d 657 [2d Dept 1991] (theft, fraud and forgery are crimes involving individual dishonesty); People v Tillman, 122 AD2d 534, 534; 504 N.Y.S.2d 898 [4th Dept 1986] (possession of stolen property is a crime of individual dishonesty and untrustworthiness).

In article 78 proceedings the agency's determination is stricken only if it is "without sound basis in reason and is generally taken without regard to the facts." Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222; 231; 356 N.Y.S.2d 833 [1974]. The Department conducted a thorough review of petitioner's file to make its determination that he does not qualify for a MLO license. It applied the established case law on crimes of dishonesty to interpret the relevant provisions of the

Banking Law. "The construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. "Howard v Wyman, 28 NY2d 434, 438; 322 N.Y.S.2d 683 [1971]. The conclusion that participating in conspiracy to transport stolen goods is an act of dishonesty is a reasonable interpretation of the statute, and the denial of the license was mandated by Banking Law §599-e.

CONCLUSION

For the foregoing reasons, it is

ORDERED and ADJUDGED that the petitioner's application pursuant to CPLR article 78 seeking annulment of respondent's January 23, 2012 determination is denied and the petition is hereby dismissed; and it is further

~~ORDERED that the respondent's application for summary judgment is denied.~~

Dated: 8/18/12

ENTER:

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J.S.C.

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LOUIS B. YORK
J.S.C.