

**Matter of Dekom v New York Dept. of Fin. Servs.**

2012 NY Slip Op 32310(U)

August 31, 2012

Sup Ct, New York County

Docket Number: 103072/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*MARTIN DEKOM,*

INDEX NO. 103072/12

Petitioner,  
-against-

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

NEW YORK DEPARTMENT OF FINANCIAL  
SERVICES, et al.,

Respondents.

MOTION CAL NO. \_\_\_\_\_

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2, 3

Replying Affidavits 4

CROSS-MOTION: \_\_\_\_\_ YES  NO

**UNFILED JUDGMENT**

Upon the foregoing papers, it is ordered that this 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).**  
DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8-31-12

Donna M. Mills

**DONNA M. MILLS J.S.C**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58**

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**In the Matter of the Application of MARTIN  
DEKOM,**

**Petitioner,**

**- against -**

**INDEX NO.  
103072/12**

**DECISION/ORDER**

**NEW YORK DEPARTMENT OF FINANCIAL  
SERVICES, et al.,**

**Respondents.**

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

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**DONNA MILLS, J.:**

Martin Dekom ("Petitioner") seeks, by order to show cause a writ of mandamus compelling Rhoda Ricketts, Benjamin Lawsky, and Ruchika Sharma (collectively "State Respondents"), to cease and desist from requiring licensed Mortgage Loan Officer's ("MLOs") to produce credit reports and background checks following their initial application; to produce a list of all individuals who have seen, reviewed, or had access to petitioner's credit report; to terminate the employment of all responsible decision-makers at the New York State Department of Financial Services ("DFS"); and a declaratory judgment that Petitioner is of sufficient fitness, character, and responsibility to possess an MLO license.

**BACKGROUND**

Petitioner is a MLO who specializes in the market of reverse mortgages. Defendant DFS is an agency of the State of New York, which is responsible, inter alia, for approving mortgage loan originator license applications and renewals. In demonstrating financial responsibility, an MLO applicant is required to submit a credit report in accordance with the New York Banking Law. Applicants are also required to submit certain parts of the application electronically through the National Mortgage Licensing System and Registry

("NMLS").

Petitioner was licensed as an MLO on September 30, 2010. He was then required to renew his license by December 31, 2010. Petitioner's licensing document was issued to Petitioner on March 15, 2011. The License indicated that it would expire on December 31, 2011. On December 12, 2011, Petitioner initiated his license renewal request in the NMLS System for the December 31, 2011 MLO license renewal. The Renewal Instructions specified, among other requirements, that Petitioner was to authorize an updated credit report through the NMLS System. It would then be made available to the State Respondents.

On or about March 1, 2012, Petitioner was reported as not having authorized a credit report which was required for the renewal process. Since Petitioner had not provided the credit report, the State Respondents updated the NMLS System on March 2, 2012 to indicate that Petitioner's licensing status was approved but inactive. The change in licensing status meant that Petitioner could no longer work as an MLO in New York State. On March 5, 2012 Petitioner's credit report and credit score were made available to the State Respondents through the NMLS System. The credit report indicated that Petitioner owed mortgage payments to Bank of America that were 120 days past due. On March 22, 2012, Petitioner was asked by the State Respondents to provide documentation supporting any action taken to address the past due mortgage payment owed to Bank of America.

In response to the State Respondents' request for an explanation pertaining to the derogatory credit matter with Bank of America, Petitioner responded by insisting that a credit report update was only required for his initial MLO license and not for a renewal of the license. Petitioner now brings this Article 78 proceeding on the grounds that the State Respondents failed to perform a duty enjoined upon them by law; proceeded in excess of jurisdiction; made a determination in violation of lawful procedure; made a determination

that was arbitrary and capricious; abused discretion as to the measure of penalty imposed; and made a determination without hearing and is on the entire record, unsupported by substantial evidence.

DISCUSSION

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]; 7801, 7804 [h].) Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. (CPLR 7804 [h]; Matter of York v McGuire, 99 AD2d 1023 [1984], affd 63 NY2d 760 [1984]).

The applicable standard of review is whether the administrative decision was: (1) made in violation of lawful procedure; (2) affected by an error of law; or (3) arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR 7803 [3]). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." ( Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974]).

Here, as the State Respondents relied on Article 12-E of the NYBL in determining

that Petitioner's licensing status was approved but inactive, it must be determined whether Petitioner has demonstrated that in doing so, it failed to perform a duty enjoined upon it by law, violated lawful procedure, or was affected by an error of law or was arbitrary and capricious or abused its discretion.

The State Respondents, among other activities, regulates financial services providers such as mortgage brokers, mortgage bankers and MLOs, who are licensed and operate in New York State. The Banking Law, Article 12-E, § 599(a)-(l), governs the state licensing requirements of MLOs. In 2009, it was amended in response to Congress's enactment, on July 30, 2008, of Title V of the Housing and Recovery Act of 2008, also known as the SAFE Act. The SAFE Act sets forth new minimum licensing standards for MLO applicants in order to "increase uniformity, reduce regulatory burden, enhance consumer protection and reduce fraud ..." 12 USCA § 5101).

New York, in enacting the new law, had responded to a warning from the federal government that absent a state's adherence to the Act's minimum licensing standards; the Department of Housing and Urban Development would assume responsibility for state MLO licensing. Section 599-a thus provides as follows:

The legislature deems it necessary, in order to enhance consumer protection, reduce fraud and ensure the public welfare, that mortgage loan originators who originate mortgage loans on residential real property be subject to regulation by the superintendent and that such regulation be consistent with Title V of The Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act, as it may be amended from time to time, and regulations thereunder or interpretations thereof, that may be adopted from time to time by the Secretary of the U.S. Department of Housing and Urban Development.

The act of renewing or denying license renewal, as well as suspending or revoking them, is discretionary. Accordingly, mandamus does not lie to compel a discretionary act, (Town of Riverhead v. New York State Dept. of Environmental Conservation, 50 AD3d 811, 813 [2d Dept 2008], citing Klostermann v. Cuomo, 61 N.Y.2d 525, 539 [1984]. The first claim seeking a writ of mandamus is dismissed.

The law is well established that the courts will not disturb the determination of an administrative agency unless it is arbitrary and capricious, and that a determination will not be so deemed where the record discloses a reasonable basis therefor ( See Matter of Wager v. State Liquor Authority, 4 N.Y.2d 465, 468 [2005]).

Upon examination of the papers submitted in this action, this Court finds ample support for the State Respondent's finding that Petitioner's failure to explain the derogatory information reported in his credit report indicated a lack of financial responsibility, and the determination to designate Petitioner's MLO license as approved-inactive was rational and was neither arbitrary nor capricious or an abuse of discretion.

Accordingly it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 8/31/12

ENTER:

**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).

*Donna M. Mills*

J.S.C.

**DONNA M. MILLS, J.S.C.**