

**Bellaro v MTA New York City Transit**

2012 NY Slip Op 32316(U)

August 30, 2012

Sup Ct, New York County

Docket Number: 400345/12

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*  
*THOMAS BELLARO,*

INDEX NO. 400345/12

Petitioner,

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

-against-

MOTION SEQ. No. 001

MTA NEW YORK CITY TRANSIT, AN AGENCY  
OF THE METROPOLITAN TRANSIT AUTHORITY,  
STATE OF NEW YORK,

Respondent.

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 2-4

Replying Affidavits \_\_\_\_\_

**UNFILED JUDGMENT**

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

**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 41B).**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8-30-12

*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

-----X

In the Matter of the Application of  
THOMAS BELLARO,

Petitioner,

For a Judgment Under Article 78 of the  
Civil Practice Law and Rules

**UNFILED JUDGMENT**

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-against-

Index No. 400345/12

MTA NEW YORK CITY TRANSIT, AN AGENCY  
OF THE METROPOLITAN TRANSIT AUTHORITY,  
STATE OF NEW YORK,

Respondent.

-----X

Mills, Donna J.:

In this Article 78 proceeding, petitioner Thomas Bellaro (Bellaro) seeks a judgment annulling, vacating and setting aside the determination of The Metropolitan Transit Authority New York City (NYCT) which denied his application for paratransit services (Access-A-Ride); and an order directing the NYCT to immediately re-certify his eligibility for Access-A-Ride.

65-year-old Bellaro suffers from a number of orthopedic and neuromuscular impairments. Though he ambulates with the help of a cane, Bellaro's physical symptoms include chronic pain, weakness, spinal cord damage, fatigue and severe sensitivity to weather conditions. None of the agencies involved with considering Bellaro's Access-A-Ride eligibility refute the existence of his physical disabilities. Bellaro has been seeking Access-A-Ride eligibility so as to enable him to travel to and from his home in Queens County and his medical service providers in Nassau County. Unfortunately, the two responsible agencies empowered to render such accessibility,

though under the same Metropolitan Transit Authority (MTA) umbrella bearing the same commonly recognized, well known MTA logo, issued diametrically opposed decisions. In as much as The MTA Long Island Bus (LIBus) granted eligibility and the NYCT denied eligibility, Mr. Bellaro is left in the untenable position of being able to use Access-A-Ride in Nassau, but not in Queens.

The Americans with Disabilities Act (ADA) requires that, for an individual to be considered paratransit eligible, the applicant must be found to be “unable, as a result of a[n] . . . impairment, and without the assistance of another individual . . . , to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities” (49 CFR § 37.123 [e] [1]). An applicant is ineligible when the applicant’s disabilities do not make the individual “unable” to or “prevent” him from using transportation services available to those without disabilities (*see*, 49 CFR § 37.123 [e] [3] [i]). An eligibility determination is predicated upon whether an applicant is able to travel on the general public fixed-route system (i.e., subways, buses), and not upon whether an individual has a disability.

Pursuant to the ADA, transit agencies devise the specifics of their individual eligibility processes (*see generally*, 49 CFR §§ 27, 37). The ADA regulations set only broad requirements that all agencies must incorporate (*ibid.*).

NYCT, an agency of the MTA, is the public authority responsible for the day-to-day New York City operations of Access-A-Ride. The NYCT has the responsibility of determining which disabled people are eligible for Access-A-Ride. Eligibility may be either unconditional (full unrestricted use), conditional (partial, restricted use) or denied in all respects. The NYCT uses a two-prong criterion to determine one’s eligibility predicated upon establishing an applicant’s

disability and his/her inability to make use of fixed public transportation services. As in this case, the applicant's purported disability is predicated upon an applicant's submitted medical records setting forth the diagnostic tools/tests used to reach a diagnosis, a diagnosis, a treatment plan, a prognosis and statement of patient restrictions and limitations. However, in determining the individual's actual ability to use fixed public transportation, the NYCT considers the functional and/or physical assessment of a tersely trained, licensed practical nurse (Nurse) hired by an outside consultant. This assessment is the result of less than a day of observation of the applicant's ability to perform certain indoor, controlled physical tasks. However, being indoors and controlled, the applicant is neither challenged nor observed performing with different daily symptoms (disability-related physical impairments), weather conditions (temperature and precipitation) access route conditions (sidewalk, crosswalk, road, stairs) and/or passenger-related conditions (crowding, seating). The Nurse makes a determination based on his/her observations that are recorded in a very conclusory manner (yes/no question form). As to Bellaro, the Nurse's conclusion was based upon finding him to have had steady ambulation with the use of a cane, performed well on function evaluations, managed steps and stairs without difficulty, exhibited good range of motion in both knees and no apparent physical limitations preventing him from, or rendering him unable to use generally available public transportation.

At all times relevant, LIBus was the agency of the MTA responsible for the day-to-day operations of Nassau Access-A-Ride. However, the LI Bus decides an Access-A-Ride application using the same underlying criteria, but predicated solely upon review of the applicant's submitted medical records. In-person interviews and functional evaluations are neither conducted nor sought in connection with evaluating eligibility.

In mid-March of 2010, the NYCT granted Bellaro temporary conditional eligibility for Access-A-Ride for a distance of 5 blocks or more in all 5 boroughs. About a year later, the NYCT terminated Bellaro's eligibility for Access-A-Ride as a result of an in-person eligibility reassessment. Meanwhile, at about the same time, LIBus approved an unconditional, **"Full"** eligibility renewal for Access-A-Ride. Furthermore, the LIBus notification of eligibility to Mr. Bellaro states that **"This determination of eligibility also enables you to use similar paratransit services nationwide**, according to the American with Disabilities Act of 1990 (emphasis added)".

In response to the NYCT's termination of eligibility, Mr. Bellaro requested a hearing. Eligibility determinations are subject to a final administrative review before an eligibility appeal board that reviews documentary, as well as at times testimonial, submissions. The ADA, inter alia, provides an applicant "an opportunity to be heard and to present information and arguments" (49 CFR § 37.125 [g] [2]). The medical reports from Bellaro's doctors, the functional evaluation report from the NYCT Nurse, as well as limited testimony from Bellaro and his wife, were submitted for consideration at the hearing. Shortly thereafter, the NYCT upheld the underlying denial of eligibility.

Consequently, Mr. Bellaro commenced this CPLR Article 78 proceeding seeking such relief as would provide him with round-trip Access-A-Ride transportation to and from his home and his various medical providers.

Though it seems unfathomable that two agents (NYCT and LIBus) of the same principal (MTA) would contemporaneously utilize different evaluation methods and render diametrically opposed decisions, that is what has occurred here. However, pursuant to the ADA, each agency

charged with the responsibility of determining eligibility may establish and utilize self determined evaluation processes as long as they are in compliance with the underlying criteria of the applicant being both disabled and unable to travel on the general public fixed route system. Furthermore, neither the MTA's nor the LIBus's conduct, or lack thereof, is presently up for review in this special proceeding. Rather, only the NYCT's conduct, or lack thereof, is subject to review.

This is an Article 78 proceeding, and as such, the purview of the court's authority/power is significantly limited by certain statutorily stated guidelines. Under Article 78, Bellaro's remedies are quite limited in that the court may only act if it determines that the complained of respondent's 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" (CPLR 7803 [3]). It is not for a reviewing court to substitute its judgment for that of the administrative agency. The court has only a review function and not original jurisdiction to second guess the decision of the administrative agency (*Matter of Rocco v Matter of Police Pension Fund, Art. II*, 98 AD2d 609 [1<sup>st</sup> Dept 1983]).

Upon such review, the court is compelled to conclude that the contested determination of the NYCT was not made in violation of lawful procedure, was not affected by error of law and was not arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]).

An action is arbitrary and capricious or an abuse of discretion, when the action is taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Educ. of Union School Free Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). In this case, the NYCT appeals board acted upon a sound

\* 7]

basis in reason and with regard to the facts when it considered the documentary and testimonial record consisting of submissions from Bellaro (application, medical records, and verbal assertions) and the NYCT (Nurse's assessment). The NYCT confirmed Bellaro's disability as indicated by his application, medical record and testimony, and confirmed his ineligibility as indicated by the Nurse's assessment that he performed the tasks necessary for him to utilize the general public fixed route transportation system.

In addition, Mr. Bellaro erroneously claims the the NYCT appeals board committed "error[s] of law" and made its determination without adherence to "lawful procedure." The NYCT appeals board appropriately proceeded in a manner consistent with the relevant ADA directives, as the rightful agency responsible for determining the propriety of the complained of eligibility denial.

As a result, Bellaro's petition must be denied in all respects. However, this decision neither precludes Bellaro from filing a subsequent Access-A-Ride eligibility application with the NYCT nor precludes the NYCT from revisiting, upon recertification, the complained of eligibility denial at issue in this proceeding.

Accordingly, it is

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

Dated: 8-30-12

ENTER

Donna M. Mills

J.S.C.

DONNA M. MILLS, J.S.C.

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