Russo v Locus Valley Library

2012 NY Slip Op 32461(U)

August 6, 2012

Sup Ct, Nassau County

Docket Number: 03253/2012

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL RUSSO,

Petitioner,

-against-

LOCUS VALLEY LIBRARY, JANIS SCHOEN, Executive Director, and ELLEN M. HANES, GERALD KIRBY, PETER DeBUONA, CATHY CHERNOFF, AMY DRISCOLL, CHARLESS SCOLARO, CHARLES RUHL, ANDREA VOLPE, Constituting the current and former members of the BOARD OF TRUSTEES OF TE LOCUST VALLEY LIBRARY,

Respondents.

---x

Michele M. Woodard
J.S.C
TRIAL/IAS Part 8
Index No. 03253/2012
Motion Seq. No.: 01

DECISION AND ORDER

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Petitioner Michael Russo (hereinafter "Russo") moves by Notice of Petition, pursuant to CPLR Article 78, for a judgment annulling and vacating the Respondents' determination to revoke Russo's Locust Valley Library (hereinafter "Library") privileges and ban him from the Library premises for a year. Respondents oppose the petition.

Facts

Petitioner Russo resides in Oyster Bay, NY and had Library use privileges prior to their revocation on March 16, 2011. On March 8, 2011, Russo, with his wife, Alice Russo (hereinafter "Alice"), approached the Library desk to rent a DVD and became annoyed when Library employee Carolyn Oglesby (hereinafter "Oglesby") informed him that he owed a sixty-

cent fine for an overdue book, *The Negro President*. An argument ensued. Russo refused to pay the fine and lost interest in renting the DVD. Oglesby left for the backroom, and Sue Ostrowski (hereinafter "Ostrowski"), another Library employee, "took over the desk." Russo complained to Ostrowski about the fine and Oglesby's rudeness, allegedly characterizing Oglesby, who was still away from the desk, with a racial epithet. Russo alleges that he first learned of the Library employees' racial-epithet accusation, which he denies, in June 2011, after the Board rendered its initial March 16, 2011 decision. The Russos soon left the Library. Alice returned to explain her husband's behavior to the desk employees. Oglesby and Ostrowski later filled out "Incident/Accident/Problem Reports" (hereinafter "Reports") that were submitted to the Board for its March 16, 2011 decision. Russo did not see the Reports until November 16, 2011, the day of his appeal. Interestingly, although both parties and the transcript note that Ostrowski and Oglesby each authored her own Report, both Reports refer to Oglesby in the third person.

Several days later, Russo received a letter, dated March 9, 2011, in the mail from Respondent Janis Schoen (hereinafter "Schoen"), Executive Director of the Library. The letter alleged that Russo violated the Library's Maintenance of Public Order Policy (hereinafter "Policy") on March 8, 2011 but did not point to or use language from any Policy provision to indicate which provision Russo allegedly violated. The letter generally condemned Russo's conduct without specifying his acts or words and added, "[s]hould this ever happen again the Library administration will take all necessary steps to stop such behavior." Schoen did not solicit Russo's response, inform him of impending action, or offer him an opportunity to be heard.

Russo contacted his attorney, but before Russo could respond to the letter, he received another letter, dated March 17, 2011, from Ellen Hanes (hereinafter "Hanes"), President of the Board of Trustees (hereinafter "Board"), advising him of the Board's March 16, 2011 decision to

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revoke his privileges to enter the Library property for a year, effective immediately. At that meeting, Schoen provided the Reports to and discussed the incident with the Board. Hanes did not mention the Board's grounds: that Russo's behavior constituted threatening behavior under Policy § III(C)(1). If the Board did write an opinion, it was not submitted to the Court. The letter informed Russo that he could appeal within thirty days, pursuant to Policy § V. The "unapproved minutes" of the Board's March 16, 2011 meeting provide no more substance on the decision than Hanes's letter. Russo timely appealed the decision to the Board by mailed letter, dated March 29, 2011, from his counsel, alleging procedural and substantive grounds for reversing the Board's decision addressed below. After receiving a copy of the Policy and March 16, 2011 meeting minutes, Russo supplemented his appeal by another letter of counsel, dated March 24, 2011, addressed to Hanes. The letter restated prior assignments of error and alleged more procedural errors according to the Policy, also addressed below.

At Russo's appeal before the Board, Russo's counsel noted, in addition to the contentions addressed in his letters, the strangeness of appealing to a body whose past decision is the subject of the appeal, thus rendering the Board as both an appellee and the decider of the appeal. The Russos each had an opportunity to speak and enter evidence, including the Reports, which Russo argues are unreliable for being unsigned, unsworn, and inconsistent with each other. The Reports' authors were not present for cross-examination. On November 16, 2011, the Board reaffirmed its March 16, 2011 decision to revoke Russo's library privileges.

Russo instituted this proceeding on March 14, 2012 for a judgment annulling Respondents' determination as arbitrary, capricious, unreasonable, unsupported by substantial evidence, contrary to law, and violative of Petitioner's due process rights. Respondents filed an Affirmation in Opposition denying that the Board's decision was arbitrary and capricious, but

failed to file an Answer in accordance with Article 78 procedure. Respondents concede that Schoen was not working on the day of the incident but argue, without providing evidentiary support, that she conducted "an extensive investigation when she returned the next day." Respondents' other arguments are addressed below. In his Reply Affirmation, Russo objects to, *inter alia*, Respondent's failure to file an Answer and verify their asserted facts with someone who had personal knowledge of the incident as required by CPLR §§ 402, 7804(d). Therefore, Russo argues that Respondents failed to controvert his verified allegations.

Analysis

Russo exhausted available administrative remedies after appealing to the Board, which rendered a final decision. Respondents do not allege the existence of a statute that precludes judicial review. The Library is a public entity with a Board of officers and thus an agency at law. Therefore, Article 78 applies to this case.

Respondents correctly contend that this matter is in the nature of mandamus and not certiorari because it involves an agency's exercise of judgment or discretion without a required trial-type hearing. *See Irving v. Finger Lakes State Parks Comm'n*, 12 Misc.2d 1087 (1958). However, an error in nomenclature will not be fatal if the petitioner alleges a cognizable right to relief under Article 78. *Id*; *accord Newbrand v. City of Yonkers*, 285 NY 164, 174 (1941). Russo adequately asserts a right to relief under CPLR § 7803(3)-(4), so the court ignores this defect.

Russo correctly and timely objected to Respondents' failure to file an Answer and verify its alleged facts. *See* NY CPLR §§ 402, 3021, 7804(d); *Giambra v. Commissioner of Motor Vehicles*, 46 NY2d 743, 745 (1978). The Court, in its discretion, may enter default judgment, *see* NY CPLR § 7804(e); *see also, e.g.*, *Marseilles Leasing Co. v. New York State Div. of Housing and Community Renewal*, 140 AD2d 345 (2d Dept 1988). However, Respondents clearly

intended to respond to the allegations via their Affirmation in Opposition, so the Court disregards this procedural defect.

An administrative hearing is judicial or quasi-judicial if it was held pursuant to direction by law and in a manner substantially similar to that used in a court of law, such as a trial-like hearing preserved in a fully developed record with the entering of evidence. *See Fuller v. Urstadt*, 28 NY2d 315, 318 (1971); *Ryan v. New York Telephone Co.*, 62 NY2d 494, 499 (1984). The Board's initial proceeding was certainly not judicial or quasi-judicial. First, no law or rule requires the Board to hold hearings. Second, the proceeding involved little if any fact-finding. Respondents assert that Schoen investigated the incident as required by Policy § IV(A) but have not proffered any evidentiary support. Additionally, the Reports that were submitted were unsigned, unsworn, and did not identify its authors, unlike court-admissible evidence. Fourth, Russo was not heard on the matter before the Board made its initial determination. Lastly, Russo did not receive notice of the proceeding against him. Since the Board's initial proceeding was far from judicial or quasi-judicial, Respondents correctly argue that the Court cannot review the agency action based on the substantiality of the evidence. Thus, judicial review of the Board's determination is limited to whether it was: "[1] violati[ve] of lawful procedure; [2] affected by an error of law; or [3] arbitrary and capricious or an abuse of discretion . . . ." NY CPLR § 7803(3).

The reasons why the administrative proceeding at issue was neither judicial nor quasi-judicial are also why this Court must nullify the Board's decision. The Supreme "Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*,

424 US 319, 333 (1976); *see also McBarnette v. Sobol*, 83 NY2d 333, 339 (1994) (At administrative proceedings, "no essential element of a fair trial can be dispensed with unless waived."). Even when a quasi-judicial or judicial hearing is not required, the petitioner must still have an opportunity to be heard and submit evidence. *See Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Services*, 77 NY2d 753, 757 (1991). "It is well established that State action in connection with the [] withholding of services or interests, even if normally extended by private enterprises not subject to regulation, may not be exercised arbitrarily. *Fuller*, 28 NY2d at 318.

Library privileges are a property interest. *See Mathews*, 424 US at 333; *see also, e.g.*, *Bykofsky v. Hess*, 107 AD2d 779, 781 (2d Dept 1985) (citing *Board of Regents v. Roth,* 408 US 564, 577 (1972)). The Library is a public entity that withheld services or interests from Russo. *See Fuller*, 28 NY2d at 318. Russo had no opportunity, let a lone a "meaningful" one, to be heard or submit evidence before the Board made its initial decision. *Mathews*, 424 US at 333. These errors violated Russo's due process rights, *see Mathews*, 424 US at 333, and the "essential element[s] of a fair trial" required of administrative hearings, *see McBarnette*, 83 NY2d at 339.

Respondents argue that they are not required to provide a full-fledged adversarial hearing. This is true, which is why their failure to provide Russo with an opportunity to cross-examine witnesses was not in error. *See Jacobs v. Board of Ed. of City of New York*, 73 AD2d 623 (2d Dept 1979). However, this lesser standard does not permit agencies to dispense with essential elements of a fair trial unless waived. *McBarnette*, 83 NY2d at 339. Petitioner did not waive these elements because he contested them in his letters to and appellate hearing before the Board and in his moving papers before this court.

Respondents also argue that they satisfied due process requirements by granting Russo an opportunity to be heard at his appeal. The Court disagrees. First, "at an administrative hearing --

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where strict procedure and the rules of evidence do not control, and where the findings of fact have such binding effect upon an attempted judicial review -- there [must] be afforded a full and complete opportunity to be heard *prior to the closing of the case and the making of the determination*." *Hauch v. McGoldrick*, 200 Misc. 628, 630-31 (Sup. Ct., Special Term, Bronx Co. 1951) (emphasis added). This is also sound public policy. To allow for no due process in initial proceedings but require it for appeals would allow agencies to construct a biased record to which the reviewing body would be limited, thereby prejudicing the petitioner. Respondents therefore violated lawful procedure and committed legal errors.

Russo's due process rights were also violated when Respondents failed to notify him of the initial proceeding, constituting an error of law. "[N]otice of the charges made . . . equally applies to an administrative proceeding for . . . no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged." *Tartaglione v. Bd. of Com'rs. of Police Dept. of Vill. of Briarcliff Manor*, 301 AD2d 655, 657 (2d Dept 2003). Schoen should have notified Russo of the impending, or possibility of the, proceeding in her letter to him but did not. If anything, Schoen represented that no disciplinary action would be taken unless Russo continued his alleged behavior. Furthermore, the generality of Schoen's letter did not provide Russo with adequate information to know what exactly he did or said that violated the Policy and which part of the Policy. Russo alleges that he was not informed of the racial-epithet allegation until months after the incident and initial determination by the Board. Schoen did not cite to or even use language from any Policy provision that might indicate to Russo which provision he was charged of violating. Furthermore, Russo was not given the Incident Reports until the day of his hearing, so Russo "was deprived of the opportunity to adequately prepare a defense . . . ." *Tartaglione*, 301 AD2d at 657. These errors deprived Russo of fair or meaningful notice.

The Board committed another legal error by hearing and deciding an appeal from its own decision. "Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made . . . ." *People ex rel. Finnegan v. McBride*, 226 NY 252, 259 (1919). Appealing to a different body from the one that rendered the initial decision is essential to a fair trial. *See McBarnette*, 83 NY2d at 339.

The Board's revocation of Russo's license violated Respondents' own lawful procedure under the Policy. The Board is not empowered to revoke a patron's library privileges under Policy § IV(E)(2), which expressly states that "the Library Director may [], in his/her *sole* discretion . . . revo[ke the] privileges to enter upon Library property for a minimum period of one year" (emphasis added). Respondents first argue that this provision does not limit this power to only the Library Director, but this is exactly the opposite of what "sole" means. "Although [an] agency's interpretation of regulation is entitled to deference, its interpretation is not entitled to unquestioning judicial deference, since ultimate responsibility of interpreting law is with court." *Nilsson v. Department of Environmental Protection of City of New York*, 28 AD3d 773, (2d Dept 2006). Respondents' contention deprives the word of its sole meaning in its context, and by "sole," the Court means "only," or "no other." *See* Merriam-Webster Dictionary (2012) (defining "sole," *inter alia*, as "having no sharer"; "being the only one"; and "functioning independently and without assistance or interference"). Respondents' contention lacks a "sound basis in reason or [] the facts," so the Board's action was "arbitrary and capricious," *Peckham v. Calogero*, 12 NY3d 424, 431 (2009), and violated its own lawful procedure.

Respondents next argue that Policy § III(C)(2) grants the Board revocation power. ("[T]he Library administration shall take all *appropriate* steps necessary to prevent or stop such

threatening or violent behavior . . . .") (emphasis added). Read as a congruous document, the "appropriate steps" are those permitted by the Policy. *Id.* Respondents failed to act according to the Policy, however, when the Board, instead of Schoen, decided to revoke Russo's Library privileges. If the Library could take any "steps necessary," as Respondents seem to suggest, as opposed to "appropriate" ones, *id.*, there would be no need for the other provisions. Therefore, the Board's determination violated lawful procedure and was arbitrary and capricious.

Respondents violated their own lawful procedure again for the Director's failure to investigate the facts and circumstances as required by Policy § IV(A). Respondents proffered no evidence to support that any investigation took place, despite the fact that Policy § IV(C) requires a written report of the facts and circumstances. In addition, even if Schoen did investigate, she never asked Russo for his position on the matter despite her opportunity to do so in her letter to him, and a one-sided investigation, if that was even conducted, is nominal at best.

The Board also erred at law in not writing an opinion in its determination to revoke Russo's privileges. "[T]he proceedings of administrative board should disclose basis for administrative denial in order that the court may determine whether the decision was reasonable or arbitrary." *Meschino v. Lowery*, 34 AD2d 255 (1st Dept 1970); *see also Gittens v. Sullivan*, 151 AD2d 481 (2d Dept 1989) (holding that if no transcript existed, the agency's determination had to be annulled and that a new hearing may be conducted). Such a "record is critical when the court is reviewing an agency's determination"; however, the Board's transcript is devoid of substance to allow for adequate judicial review. *See* NY CPLR § 7804(e); *see also Lydon v. New York State Div. of Housing and Community Renewal*, 158 AD2d 291 (1st Dept 1990).

The Court cannot substitute its judgment for the agency's if there is a rational basis, *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester*

County, 34 NY2d 222, 232 (1974), even though the violent or threatening nature of Russo's conduct is dubious. However, this is an issue of procedural, not substantive, justice. Despite the allegedly hateful and disgusting language used, there must be procedural justice to ensure substantive justice. Accordingly, it is hereby,

ORDERED, that the Board's March 16, 2011 and November 16, 2011 decisions are hereby ***VACATED***. It is further

ORDERED, that Respondents are directed to reinstate Petitioner Michael Russo's Library privileges immediately.

This constitutes the Decision and Order of the Court.

DATED: August 6, 2012
Mineola, N.Y. 11501

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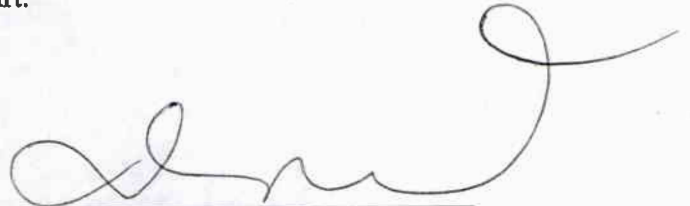

HON. MICHELE M. WOODARD
J.S.C.

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