

**Mann v Banking Dept. of the State of N.Y.**

2011 NY Slip Op 32438(U)

September 8, 2011

Sup Ct, NY County

Docket Number: 102199/2011

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 102199/2011  
**MANN, KENNETH**  
vs.  
**BANKING DEPARTMENT**  
SEQUENCE NUMBER : 001  
ARTICLE 78  
*C.A.C. # 88*

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_  
\_\_\_\_\_ No(s). \_\_\_\_\_  
\_\_\_\_\_ No(s). \_\_\_\_\_  
\_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**  
**FILED**  
SEP 13 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/8/11  
SEP 08 2011

BARBARA JAFFE J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X

KENNETH P. MANN,

Index No. 102199/2011

Petitioner,

Argued: 8/2/11  
Motion Seq. No.: 001

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

**DECISION & JUDGMENT**

-against-

BANKING DEPARTMENT OF THE STATE OF  
NEW YORK, RHOLDA RICKETTS, DEPUTY  
SUPERINTENDENT OF BANKS,

**FILED**

**SEP 13 2011**

Respondents.

**NEW YORK  
COUNTY CLERK'S OFFICE**

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BARBARA JAFFE, J.S.C.:

**For petitioner:**  
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**For respondents:**  
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By notice of petition dated February 4, 2011, petitioner seeks, pursuant to CPLR Article 78, an order annulling the August 24, 2010 determination made by respondents Banking Department of the State of New York (Banking Department) and Rholda Ricketts (Ricketts), Deputy Superintendent of Banks, denying his application to continue working as a mortgage loan originator (MLO). He also seeks an order compelling respondents to review his application for an MLO license under the criteria set forth in Correction Law § 753 (1) and (2).

By notice of cross motion dated April 18, 2011, respondents cross-move for an order

dismissing the petition on the grounds that the proceeding is barred by the four-month statute of limitations, that petitioner has failed to meet the standards for a writ of mandamus, and that he has failed to state a claim under state and federal laws.

### I. FACTS

Petitioner is 58 years old and states that he has “worked most of [his] entire life in the mortgage banking industry.” (Affidavit of Kenneth Mann, dated February 4, 2011 [Mann Affid.], ¶ 7). In 1999, he was charged and convicted in the Eastern District of New York with making a false statement on a mortgage loan application. (Mann Affid., ¶¶ 8, 9). In 2007, petitioner completed his probation and on April 20, 2008, the New York State Division of Parole provided him with permanent Certificate of Relief from Civil Disabilities (certificate of relief). This certificate “provides relief from forfeitures, disabilities or bars to employment and licensing automatically imposed by New York State law as a result of your conviction, except the right to possess weapons and the right to be eligible for public office.” (*Id.*, Exh. B, at 1). Petitioner was then able to obtain employment as an MLO.

In November 2008, after petitioner satisfied all of the educational requirements for an MLO license and passed the written test, he applied to the Banking Department for licensing under the National Mortgage Licensing System. (*Id.*, ¶ 15). By letter dated August 24, 2010, the Banking Department denied petitioner’s application to engage in MLO activities based on petitioner’s prior conviction and in reliance on newly enacted sections of Article 12-E of the Banking Law. (*Id.*, Exh A). The letter states the following, in pertinent part:

Because of your criminal history, both Article 12-E and the SAFE Act bar you from being licensed as a mortgage loan originator because you have 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 your application for an MLO license; or (ii) at any time preceding such date, if such felony involved an act of fraud, dishonesty, or breach of trust, or money laundering. Accordingly the Banking Department is required to deny your application under applicable law.

This constitutes the final determination by this agency in this matter.

Should you have any questions, please contact the undersigned.

*(Id.)*.

On September 20, 2010, petitioner wrote to Ricketts, seeking to appeal the August 24, 2010 determination. Petitioner's counsel also corresponded with Marjorie Gross (Gross), Deputy Superintendent and Counsel of the Banking Department, about appealing the August 24, 2010 determination. By letter dated December 10, 2010, Gross advised petitioner that there is and was no opportunity to file an appeal of the determination, as follows, in pertinent part:

I initially note that the Department's August 24, 2010 letter provided that it constituted "the final determination by this agency in this matter." Hence, there is and was no opportunity to file an appeal with the Department of that determination. Nevertheless, I am prepared as a matter of courtesy to set out again the rationale underlying the Department's actions on Mr. Mann's application.

(Mann Affid., Exh. C, at 1).

Gross then explained that petitioner's application was denied pursuant to Article 12-E of the Banking Law. Since petitioner was convicted of a felony "involving fraud and dishonesty within the meaning of Article 12-E," she wrote, he could never be licensed as an MLO, and that the Superintendent has no discretion to vary the requirements for licensure. (*Id.* at 1-2).

## II. CONTENTIONS

Among other arguments, petitioner claims that the denial of his MLO application is arbitrary and capricious, and asks that the court annul it or remand it to respondents for further

consideration under the criteria set forth in Correction Law § 753, which mandates the consideration of his certificate of relief. He claims that Article 12-E, which respondents relied on in deciding his application, does not implicitly preempt the Correction Law. Rather, as it contains the phrase, “notwithstanding any other law,” petitioner maintains, the Banking Law does not supersede the Correction Law. Petitioner also contends that the Correction Law was amended 90 days after Article 12-E was enacted, and that Correction Law § 701(2), which defines the certificate of relief, also opens with the phrase, “[n]otwithstanding any other provision of law, except subdivision five of section twenty-eight hundred six of the public health law or paragraph (b) of subdivision two of section eleven hundred ninety-three of the vehicle and traffic law.” Petitioner thus argues that the Correction Law does not carve out an exception for the prior Banking Law, and thus enables petitioner to obtain his MLO license.

According to respondents, this Article 78 proceeding is time-barred as it was commenced more than four months after the August 24, 2010 final determination by the Banking Department, and as of July 31, 2010, with limited exceptions that do not apply herein, appeals were no longer permitted. (Affirmation of Gene C. Brooks, Esq., dated Apr. 18, 2011 [Brooks Aff.], ¶ 40). Even so, they argue, their decision to deny petitioner’s MLO application was rationally based as it was made pursuant to the Banking Law, and maintain that they are are charged with enforcing the Banking Laws and that Article 12-E clearly excludes certain individuals from becoming licensed MLOs. Moreover, by failing to incorporate the Correction Law into the new Article 12-E provision, respondents contend that the Legislature intended to preclude certain offenders from being licensed.. (*Id.*, ¶ 58). Respondents also explain that the change in Article 12-E is rationally based and arose from the “imprudent origination of residential mortgage loans,” which caused

the collapse of the housing market. (*Id.*, ¶ 23).

In response to respondents' allegation of an expired statute of limitations, petitioner contends that December 10, 2010 is the date on which he received a final determination, that his September 20, 2010 letter to Ricketts constituted an appeal, and that the December 10 letter was written in response to his appeal.

### III. ANALYSIS

#### A. Article 78

A CPLR Article 78 proceeding against a public body or officer

“must be commenced within four months after the determination to be reviewed becomes final and binding” (CPLR 217 [1]). An agency determination is final—triggering the statute of limitations—when the petitioner is aggrieved by the determination.

(*Matter of Carter v State of New York, Executive Dept., Division of Parole*, 95 NY2d 267, 270 [2000]). “A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted.” (*Id.*)

Here, petitioner was “aggrieved” on August 24, 2010 when he was informed that his application for an MLO license was denied. The letter unambiguously informed petitioner that this was the agency's final determination.

That petitioner received an additional communication from the agency is immaterial as both he and his counsel corresponded with respondents, who informed them that the August 24, 2010 letter constituted a final determination, and “[n]either an application for reconsideration . . . nor a series of inquiries regarding reconsideration . . . will extend or toll the four-month Statute of Limitations [internal quotation marks and citation omitted].” (*Concourse Nursing*

*Home v Perales*, 219 AD2d 451, 453 [1<sup>st</sup> Dept 1995]; see also *Matter of Tivoli Stock LLC v New York City Department of Housing Preservation and Development*, 63 AD3d 543, 544 [1<sup>st</sup> Dept 2009]).

Moreover, “[a]gency action will be found to renew a lapsed Statute of Limitations only in cases where the agency has held a new hearing at which new testimony is taken, new evidence is proffered and new matters are considered [internal quotation marks and citation omitted].”

(*Matter of Arce v Selsky*, 233 AD2d 641, 642 [3d Dept 1996]). Here, respondents reminded petitioner that the previous determination was final, and then informally reiterated, as a matter of courtesy, the reasons for the denial. The December 10, 2010 letter was not a “fresh and new redetermination” (*Concourse Nursing Home v Perales*, 219 AD2d at 454, quoting *Matter of Corbisiero v New York State Tax Commn*, 82 AD2d 990, 990 [1981], *affd* 56 NY2d 680 [1982]), and there was no new hearing or additional evidence.

Accordingly, the petition is dismissed as untimely.

In any event, even if the court were to consider petitioner’s claims, for the reasons set forth in *Rampolla v Banking Department of the State of New York* (31 Misc 3d 161 [Sup Ct, NY County 2010] [Jaffe, J.]), a proceeding almost identical to the instant one, the result would be the same.

#### IV. CONCLUSION


For all of the above-stated reasons, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed; and it is further



ORDERED, that the cross-motion of the respondents Banking Department of the State of New York, and Rholda Ricketts, Deputy of Superintendent of Banks, for an order dismissing the petition is granted in its entirety.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, J.S.C.

Dated: September 8, 2011  
New York, New York

**BARBARA JAFFE**  
J.S.C.

SEP 08 2011

**FILED**

SEP 13 2011

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