

Matter of Michaellessi v Banking Dept. of State of N.Y.
2012 NY Slip Op 30064(U)
January 17, 2012
Supreme Court, New York County
Docket Number: 106022/2011
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
CAROL E. HUFF

PRESENT: _____

PART 32

Justice

Index Number : 106022/2011

MICHAELSSI, LAWRENCE

VS.

NYS BANKING DEPARTMENT

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

NOTICE OF MOTION/ ORDER TO SHOW CAUSE — AFFIDAVITS — EXHIBITS ...

ANSWERING AFFIDAVITS — EXHIBITS _____

REPLYING AFFIDAVITS _____

CROSS-MOTION: YES NO

UPON THE FOREGOING PAPERS, IT IS ORDERED THAT THIS _____

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: JAN 12 2012

J.S.C.

CAROLE E. HUFF

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: PART 32

-----x

In the Matter of the Application of : Index No. 106022/11
LAWRENCE MICHAELLESSI,

Petitioner, :
For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against -

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

UNFILED JUDGMENT
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141B).

Respondents. :
-----x

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent Banking Department of the State of New York (BDNY), dated February 3, 2011, which denied his application for a license to be a mortgage loan originator. BDNY cross moves to dismiss the petition.

BDNY's determination will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). "[I]t is incumbent upon the court to defer to the agency's construction of the statutes and regulations that it administers as long as that construction is not irrational or unreasonable." Kenton Assoc. v Division of Hous.

and Community Renewal, 225 AD2d 349 (1st Dept 1996).

The ground for the denial of petitioner's application was a provision of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. § 1501 *et seq.*) (the Federal SAFE Act) that was incorporated verbatim in New York Banking Law, Article 12-E. Banking Law § 599-e, identical to 12 U.S.C. § 1505, provides:

(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 the 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.

It is undisputed that petitioner was convicted under New York law of felony bank fraud and felony conspiracy to commit bank fraud in 2000. He was not pardoned. However, on December 16, 2003, he was provided a Permanent Certificate of Relief from Civil Disabilities, pursuant to Correction Law § 701. Petitioner contends that there is a conflict between Banking Law § 599-e and Correction Law § 701(2), and that the Correction Law provision should prevail in his case.

In relevant part, Correction Law § 701 provides:

(2) Notwithstanding any other provision of law . . . a conviction of a crime or an offense specified in a certificate of relief from disabilities shall not cause automatic forfeiture of any license. . . . Nor shall such conviction be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, . . . a disability to apply for or to receive any license. . . .

Both statutes have the clause, "Notwithstanding any other . . . law." Petitioner contends

that these mutually exclusive clauses require upholding his Certificate of Relief, in the absence of any evidence of specific intent in the legislative history of Banking Law § 599-e to supercede Correction Law § 701(2). Petitioner cites Hodes v Axelrod, 70 NY2d 364 (1987) in support. In Hodes, there was a similar conflict between Correction Law § 701 and a later amendment of the Public Health Law revoking licenses of nursing home industry-related felons. The Court of Appeals found the Certificate of Relief to be effective:

[W]e reversed the Appellate Division judgment, concluding that the Public Health Law as it existed at the time of our decision – which is the applicable law – was impermissibly at odds with Correction Law § 701, barring automatic revocation of petitioners' operating certificate. We recognized that an “unfortunate result” was produced by the interrelationship of Public Health Law § 2806 (5) and Correction Law § 701, but that amelioration was properly for the Legislature.

Id. at 368 (citations omitted).

In Hodes, however, the Public Health statute at issue did not contain the key phrase, “notwithstanding any other law.” That phrase on its face indicates the Legislature’s intent with respect to prior enacted statutes. The Legislature is presumed to have been aware of Correction Law § 701 when it later enacted Banking Law § 599-e (the relevant provisions of § 701 long predicated the Banking Law amendment). With respect to the “notwithstanding any other law” language of § 599-e, the omission of an exception regarding § 701 certificates of relief must be deemed intentional. See Patrolman’s Benev. Assn. of City of New York v City of New York, 41 NY2d 205, 208-09 (1976) (“where . . . the statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded) (citations omitted). Accord, Rampolla v Banking Dept. of State, 31 Misc.3d 161 (Sup Ct, NY County 2010, Jaffe, J.) Notably, even if the amended Banking Law were found not applicable, Correction Law § 701(3) provides that the Certificate

of Relief does not prevent the licensing authority from using its discretionary power to rely on a conviction as the basis for refusing to issue a license.

In this Article 78 proceeding, BDNY's interpretation of the Banking Law cannot be said to be arbitrary or capricious.

Petitioner's contracts clause argument is unavailing as well. The State has a "significant and public purpose" for denying mortgage loan originating licenses to felons convicted of fraud, even if the amended Banking Law were found to constitute a substantial impairment of petitioner's contract rights with his prior employer. See Energy Reserve Group, Inc. v Kansas Power and Light Co., 459 U.S. 400, 411 (1983).

Accordingly, it is

ADJUDGED that petition is denied, the cross motion is granted, and the proceeding is dismissed.

Dated: **JAN 12 2012**

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CAROLE E. HUFF
J.S.C.