Matter of Morris v New York City Dept. of Health & Mental Hygiene
2013 NY Slip Op 32359(U)
September 25, 2013
Supreme Court, New York County
Docket Number: 100845/13
Judge: Joan B. Lobis
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[* 1]

SCANNED ON 10/4/2013

SUPREME COURT OF THE STATE OF NEW YORK

JOAN B. LOBIS — NEW YORK COUNTY

Index Number : 100845/2013
MORRIS, BARBARA
vs
NYC DEPARTMENT OF HEALTH
Sequence Number : 001
ARTICLE 78

PART 6

INDEX NO. ______

MOTION DATE 8/29/13

MOTION SEQ. NO. ______

The following papers, numbered 1 to 37, were read on this motion to/for Art. 78 Petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1-11

Answering Affidavits — Exhibits — No(s). 12-19

Replying Affidavits — No(s). 20-37

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER & Judgment

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).

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

Dated: 9/25/13 ______, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of

BARBARA MORRIS,

Petitioner,

Index No. 100845/13

-against-

Decision, Order, and Judgment

NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondent.

For an Order and Judgment Pursuant to Article 78 of the *Civil Practice Law and Rules.*

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JOAN B. LOBIS, J.S.C.:

Barbara Morris, acting pro se, brings this petition under Article 78 of the New York Civil Practice Law and Rules. She challenges the denial of her application for a restricted area mobile food vending permit and seeks priority for a citywide mobile food vending permit based on transference rights as the widow of a disabled veteran. Respondent New York City Department of Health and Mental Hygiene (DOH) opposes the petition. For the reasons set forth below, the petition is granted in part and denied in part.

Petitioner Barbara Morris is the widow of John K. Morris, a veteran with service-related disabilities. Ms. Morris avows that Mr. Morris served in the Navy. At the time of his death in 2009, he was 45th on the disabled veterans' waiting list to receive a mobile food vending permit.

Since 2009, Ms. Morris has had a mobile food vendor license issued by the DOH and sells hot dogs, pretzels, and beverages from pushcarts of disabled veterans who already have mobile food vending permits. She has also applied for a citywide mobile food vending permit. On March

22, 2013, Ms. Morris applied for her own restricted area mobile food vending permit.

That same month this Court issued a series of decisions, including Rossi v. New York City Department of Parks and Recreation, Index No. 103794/2012, 2013 N.Y. Misc. LEXIS 1092 (N.Y. County Sup. Ct., Mar. 20, 2013)[1] (collectively the "March 2013 Decisions"). In the March 2013 Decisions, food-vending veterans with service-related disabilities challenged notices of violation that they had received in operating hot dog pushcarts. The violations generally cited the New York City Department of Parks and Recreation regulation, Section 1-03(c)(1) of Title 56 of the Rules of the City of New York, which prohibits a person from failing "to comply with the lawful direction or command" of an officer. The legal authority upon which the directive to move was based was New York General Business Law Section 35-a. That state statute, among other things, limits the amount of space that a specialized vending licensee can take up at a given location and limits the number of specialized vending licensees in particular areas. Under Section 35-a, the New York City Department of Consumer Affairs (DCA) issues specialized vending licenses that restrict by location, size of vending area, and number of vendors per area, among others, veterans with service-related disabilities who are general vendors. This Court, construing the face of the statute, found that Section 35-a distinguishes general vendors, who are regulated by the DCA, from certain other types of vendors, including food vendors, who are regulated by the DOH. It held that Section

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[1]Related proceedings appear at Belkebir v. New York City Department of Parks and Recreation, Index No. 103796/2012, 2013 N.Y. Misc. LEXIS 1097 (N.Y. County Sup. Ct., Mar. 20, 2013); Diaz v. New York City Department of Parks and Recreation, Index No. 103795/2012, 2013 N.Y. Misc. LEXIS 1098 (N.Y. County Sup. Ct., Mar. 20, 2013); and Rossi v. New York City Department of Parks and Recreation, Index No. 103792/2012, 2013 N.Y. Misc. LEXIS 1117 (N.Y. County Sup. Ct., Mar. 20, 2013).

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35-a, which was enacted as a narrow exception restricting certain veteran protections provided under New York General Business Law Sections 32 and 35, did not extend to food vendors.[2]

In response to the March 2013 Decisions, holding that the veterans' restrictions enacted under General Business Law Section 35-a did not extend to food vendors, the DOH issued a letter dated April 1, 2013, signed by its General Counsel, Thomas Merrill, addressed to "To Whom It May Concern" (the "Merrill Interpretation"). General Counsel Merrill interpreted this Court's decision as requiring that since the veterans' restrictions under Section 35-a did not extend to food vendors, the general protections for veterans under General Business Law Sections 32 and 35 did not apply to them either.[3] General Counsel Merrill threatened "appropriate enforcements [sic] proceedings" against these disabled veteran food vendors for any failure to comply with all local laws regulating food vending regardless of any previous exemptions.

On April 15, 2013, the DOH denied Ms. Morris's application for a restricted area mobile food vending permit. Steven Linden, Director of Licensing for the DOH, wrote to Ms. Morris that "due to ongoing litigation, you may submit an application for a 'restricted area' mobile food vending permit only if you have a contract from the Department of Parks and Recreation authorizing you to vend on Parks property."

[2]No motion to reargue or renew was submitted following the March 2013 Decisions. The Respondent in those proceedings has filed notices of appeal.

[3]The DOH was not a party to the proceedings in the March 2013 Decisions.

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As a result of the April 15 denial of her application, Ms. Morris brought this Article 78 petition in June, challenging that determination as arbitrary and capricious. As relief she seeks an order compelling the DOH to issue her a restricted area mobile food vending permit without requiring that she contract with the Parks Department to be eligible for that permit. Additionally she claims that she is entitled to priority on the waiting list for a citywide full-term mobile food vending permit because the DOH impermissibly refused to transfer her husband's position on the waiting list to her.

Later, on June 27, 2013, in separate proceedings, this Court denied cross-motions by the DOH to dismiss petitions by similarly-situated food vendors seeking a declaration that the Merrill Interpretation was ultra vires, and that the state legislature's protections for veterans continued to apply to these disabled veteran food vendors notwithstanding this Court's March 2013 Decisions. Rossi v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100562/2013; Rivera v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100563/2013; Belkebir v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100564/2013; Rossi v. N.Y. City Dep't of Health and Mental Hygiene, Index. No. 100565/2013 (collectively the "Merrill Interpretation Decisions"). On August 26, 2013, following the DOH's answer in those actions, this Court in final dispositions declared that the Merrill Interpretation was ultra vires, and that the protections continued to apply.

In its Answer to the petition now before this Court, the DOH opposed Ms. Morris's petition on three grounds. Notwithstanding this Court's disposition denying the motion to dismiss in the Merrill Interpretation Decisions at the time that the DOH submitted its Answer, the DOH

claims that Ms. Morris has failed to establish her right to the relief sought. While conceding that this Court has rejected its legal position regarding the applicability of General Business Law Section 35-a, the DOH reasserts its position. In its second affirmative defense, citing doctrines of collateral estoppel and res judicata, the DOH claims that Petitioner's claim for priority on the city-wide mobile vending waiting list is barred by the disposition of Petitioner's 2012 petition arising out of a prior application that was dismissed as untimely. Lastly, in a third affirmative defense, the DOH claims that any priority on any waiting list held by Ms. Morris's deceased husband is not transferable to Ms. Morris as a matter of law.

In reply, Ms. Morris argues that her 2013 application should not have been denied even though the respondent in this Court's March 2013 Decisions has appealed those determinations.[4] Ms. Morris contends that this Court's prohibition against enforcing restrictions that apply to general vendors under General Business Law Section 35-a on food vendors as well is not stayed. She further argues that the 2012 petition was not adjudicated on the merits and accordingly cannot bar any consideration of the merits of her claim for priority on the citywide mobile food vending waiting list raised in the petition presently before this Court. Lastly, Petitioner argues that she is entitled to priority on the waiting list through her spousal relationship to her deceased husband.

In an Article 78 proceeding, the judiciary reviews an administrative action to determine whether that action violates lawful procedures, is arbitrary or capricious, or is affected

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[4]While the pro se petitioners in the March 2013 Decisions captioned their papers naming the Department of Parks and Recreation as respondent, the body which issued the final determination for review was the Environmental Control Board, within the Office of Administrative Trials and Hearings, see New York City Charter Section 1049-a, and that body defended the action.

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by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2012); see also Lynch v. City of N.Y., 965 N.Y.S.2d 441, 445 (1st Dep't 2013) (statute must be read and given effect as written by legislature). Agencies may not "create whatever rule they deem necessary" that conflicts with the statutes that they interpret. N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, 2013 WL 3880139 (1st Dep't July 30, 1013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes); Edenwald Contracting Co. v. City of N.Y., 86 Misc.2d 711, 720 (N.Y. County Sup. Ct. 1974) (agency cannot step beyond powers conferred upon it by statute); aff'd, 47 A.D.2d 610 (1st Dep't 1975).

This Court finds that Petitioner has established her right to compel the DOH to consider her application for a restricted area mobile food vending permit without any "contract from the Department of Parks and Recreation authorizing you to vend on Parks property." As this Court determined in the March 2013 Decisions, the restrictions in General Business Law Section 35-a, which created a narrow exception to the general protections for veterans under General Business Law Sections 32 and 35, do not extend to food vendors. Since 1896, Subsection 1 of Section 32 of the New York State General Business Law, in pertinent part, has expressly extended the protections of disabled war veterans to their widows: "Every honorably discharged member of the armed forces . . . and the surviving spouse of any such veteran . . . shall have the right to hawk, peddle, vend and

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sell goods, wares or merchandise or solicit trade." Those protections extend further to exempt veterans who are disabled as a result of service-related injuries from restrictions on "hawking or peddling, without the use of any but a hand driven vehicle, in any street, avenue alley, lane or park of a municipal corporation . . . ." Gen. Bus. Law § 35.

This record shows that Ms. Morris has a food vending license but needs a permit to operate her own cart. NYC Admin. Code § 17-306(d). It is uncontroverted that Ms. Morris may obtain a restricted area mobile food vending permit without a waiting list. As the DOH explained to Ms. Morris, those "permits are exempt from the statutory limits which apply to street vending . . . . They do, however, authorize vending on . . . property under the jurisdiction of the New York City Department of Parks and Recreation."

The DOH's claim that this Court's rulings in the March 2013 Decisions have been statutorily stayed based on the Environmental Control Board's appeal as respondent in those cases does not impact this determination. See, e.g., All Am. Crane Serv. Inc. v. Omran, 58 A.D.3d 467, 467 (1st Dep't 2009); Pokoik v. Dep't of Health Servs., 220 A.D.2d 13, 15-16 (2d Dep't 1996) (governmental party's appeal does not "restore the case to the status which existed before it was issued . . . an order does not become undecided and the declaratory provisions are not undeclared" when that party serves notice of appeal). In its own Answer in this action, the DOH has attached its answer in a prior petition filed by Ms. Morris. As recently as last year when it filed that answer, the DOH acknowledged in those papers that the Department of Consumer Affairs only regulates "non-food goods and services." Those powers to regulate, it admitted, include issuing "specialized vending licenses." General Business Law Section 35-a, it further admitted, "sets forth the provisions

for specialized vending licenses." See also 6 RCNY § 2-315 (DCA regulation setting forth application procedures for honorably discharged veterans eligible for specialized vending licenses under Section 35-a). These prior admissions by the DOH and regulatory scheme reinforce this Court's ruling that any automatic stay does not affect this Court's determinations prohibiting impermissibly extending General Business Law Section 35-a to restrict food vendors.[5]

This Court next addresses the DOH's contention that Ms. Morris is collaterally estopped or barred by the doctrine of res judicata from litigating her claim for priority on the citywide mobile food vending waiting list. Dismissals for untimeliness are not dismissals on the merits. See, e.g., Omansky v. Lapidus & Smith, LLP, 273 A.D.2d 110, 111 (1st Dep't 2000) (complaint should not have been dismissed on grounds of collateral estoppel and res judicata since prior dismissal was not on merits). In denying Ms. Morris's earlier petition, Justice Mendez specifically dismissed the proceeding "as untimely and barred by the statute of limitations." In raising this claim, the DOH simply misstates the relevant procedural history: "Justice Manual [sic] J. Mendez of the New York Supreme Court denied the petition and dismissed the proceeding on the merits as barred by the statute of limitations."

[5]This Court notes that the parties include settlement correspondence offering Ms. Morris a disabled veteran's mobile food unit vending permit. See 24 RCNY § 6-13. Ms. Morris rejected that offer based on the regulation's specific incorporation by reference to General Business Law Section 35-a, which in multiple decisions now this Court has held does not apply to food vending. As this Court noted in Ms. Rossi's determination in the March 2013 Decisions, the DOH may continue to regulate food vendors but Section 35-a references must be read as severed from any such regulations. Rossi v. N.Y. City Dep't of Health and Mental Hygiene, Index No. 100562/2013, slip op. at 7; see, e.g., Ricketts v. City of N.Y., 281 A.D.2d 245, 245 (1st Dep't 2001).

Lastly this Court considers Ms. Morris's request for priority on the citywide mobile food vending waiting list. In this case, the record shows that a prior request for preference on the waiting list was already dismissed as untimely by Justice Mendez. There is nothing in the record before this Court to show that Ms. Morris has made any additional request for priority on the citywide mobile vending waiting list. At this time, therefore, there is no final administrative action before this Court to review. See CPLR § 7801(1). Accordingly, it is

ADJUDGED that the petition is granted in part to the extent that the DOH's denial of Ms. Morris's application for a restricted area mobile food vending permit for lack of a contract to vend on Parks property is vacated and remanded for further consideration without that condition, and it is further

ADJUDGED that the petition is denied to the extent that Ms. Morris seeks priority on any waiting list for a citywide full-term mobile food vending permit.

Dated: September 25, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

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).