Milcarek v NYS Dept. of Motor Vehicles
2013 NY Slip Op 32572(U)
October 18, 2013
Sup Ct, New York County
Docket Number: 100984/13
Judge: Carol E. Huff

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

PRESENT: CAROL E. HUFF Justice PART 32

BONNIE MILCAREK

- v -

NY STATE DEPT MOTOR VEHICLES

INDEX NO. 100884/13

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 [redacted]

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).

[redacted]

Dated: OCT 18 2013

CAROL E. HUFF

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

APPLICATION OF BONNIE MILCAREK, : Index No. 100984/13

Petitioner, :

For a Judgment Pursuant to CPLR Article 78 :

- against - :

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES and BARBARA J. FIALA, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents. :

----------x

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the determination of respondent New York Department of Motor Vehicles (DMV) dated February 26, 2013, which affirmed the denial of her application to reinstate her driver's license. Petitioner contends that the determination was arbitrary and capricious, and that the implementation of DMV's new regulations is unconstitutional on numerous grounds.

Petitioner pled guilty to three alcohol-related driving violations between 1994 and 2006. She incurred twenty-two points for driving offenses within a twenty-five year period. Her driver's license was revoked on April 30, 2007, following her October 15, 2006 alcohol-related conviction. Following completion of a "relapse prevention program" and discharge from probation supervision, petitioner submitted an application to reinstate her license in May 2012. At that time all such applications were held in abeyance by the DMV pending promulgation of

new state regulations setting forth new standards for relicensing.

The new regulations, contained in 15 NYCRR § 136 and effective September 25, 2012, provide that if the applicant "has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the commissioner shall deny the application." § 136.5(b)(2). A "serious driving offense" includes incurring "20 or more points from any violations." § 136.5(a)(2)(iv). The person whose license has been permanently revoked may apply for waiver of the revocation after five years, but only if the provisions of § 136.5 no longer apply.

Petitioner's driving history plainly falls within these provisions mandating the denial of her application. She argues, however, that she pled guilty to her last alcohol-related driving charge only because the provisions of the pre-amendment regulations would have allowed her to be relicensed within a shorter period of time. She contends that the application of the new provisions is wrongful, alleging that they conflict with statutory law; they violate the separation of powers doctrine; they violate the ex post facto and due process clauses; the new regulations themselves are arbitrary and capricious; and the withholding determination of petitioner's original application pending passage of the new regulations was unlawful.

None of these contentions has merit. Pursuant to VTL §§ 510(6) the DMV Commissioner has discretion to establish conditions for relicensing. The ex post facto clause of the United States Constitution is not implicated because it applies to criminal acts and punishments, not civil remedies that seek to protect the public, as here. See People v Parilla, 109 AD3d 20 (1st Dept 2013). The Due Process Clause is not implicated because possession of a

license is a privilege, not a right, and is subject to reasonable regulation. See Papaioannou v Kelly, 14 AD3d 459 (1st Dept 2005). Finally, petitioner's remedy with respect to the holding off of the determination was a proceeding in mandamus to compel the DMV to render a decision, which petitioner did not initiate. See Gianelli v New York State Div. of Hous. & Com. Renewal, 142 Misc2d 285 (Sup Ct NY County 1985).

Consequently, the determination to deny the application for relicensing 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). An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008).

Petitioner has failed to demonstrate that the determination was affected by these factors.

Accordingly, it is

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

Dated: OCT 18 2013

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).

CAROL E. HUFF
J.S.C.