

Matter of Donmez v Department of Consumer Affairs
2014 NY Slip Op 31726(U)
February 5, 2014
Sup Ct, New York County
Docket Number: 401875/2013
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 57 (formerly 40 B)

FILED

FEB 14 2014

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In the Matter of Ibrahim Donmez,

COUNTY CLERK'S OFFICE
NEW YORK

Petitioner,

Index No. 401875/2013

- against -

Department of Consumer Affairs, Department
of Parks and Recreation

Respondents.

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PETER H. MOULTON, J.S.C.:

Petitioner, a pedicab driver and pedicab owner, moves by verified petition dated October 25, 2013 (motion sequence 001) for a judgment annulling respondents' decisions to issue two violations to petitioner pursuant to the Administrative Code of the City of New York and their decisions to uphold the fines assessed by the administrative law judge of \$500.00 per violation.¹ In determining the amount of the fine, which may be imposed within a statutory range of \$200.00 to \$500.00 per offense, the hearing officer, without explanation, imposed the highest fine.² Petitioner also argues that the hearing officer's rejection of petitioner's constitutional arguments, including one based on unreasonable search and seizure, was arbitrary, capricious and in error of law.

Respondents maintain, among other things, that this matter must be transferred to the First Department because a hearing was held and any determination is based on the substantial evidence. Petitioner appears to consent to a transfer because he previously moved to have the matter transferred

¹Petitioner's appeal was denied by Bruce M. Dennis Director of Adjudication by Decision and Order dated June 28, 2013.

²Petitioner also argues that the fines are improper because he cannot afford to pay them.

to the Appellate Division. The court declined to sign petitioner's Order to Show Cause as premature and unnecessary (*see* Decision and Order, dated November 27, 2013).

Petitioner also moves under a second verified petition, dated November 1, 2013 (motion sequence 002). He seeks an order granting him conditional pedicab driver's and business licenses, and for a determination that respondents violated his constitutional rights by failing to provide him with a hearing on the revocation/refusal to renew his licenses.³ Respondents maintain that due process does not require a hearing because petitioner does not have a property interest in a license. DCA notes that it mailed petitioner a letter, dated September 19, 2013, which advised him that if the fines were not paid by September 30, 2013 "your license(s) will be suspended."⁴ By email dated September 25, 2013, petitioner was cautioned that failure to pay the fines could result in suspension of his licenses under Administrative Code § 20-104 (e) (3), which permits suspension of the "license of any person pending payment of such fine." No action was taken regarding the business license until petitioner attempted to renew that license upon its November 1, 2013 expiration.⁵ Petitioner's October 31, 2013 renewal application was denied by letter dated November 6, 2013. The letter explained that the application was denied under Administrative Code § 20-104 (e) (3), based on petitioner's refusal to pay the fines, and, under Administrative Code § 20-101, because petitioner "lacked the honesty and integrity required of all persons who hold a license issued by the Department."

³Petitioner questions why a hearing was provided to him regarding the violations, but not regarding the licenses.

⁴By order dated March 13, 2013 the appeals judge stayed enforcement of the decision of the administrative law judge until the determination of the appeal.

⁵Petitioner asserts that his driver's license was suspended October 1, 2013.

Petitioner further moves under motion seq 004 for this court to restore his licenses, upon the payment of the \$1,000 fine. By email dated January 9, 2014, respondents conditioned restoration of petitioner's licenses-not only upon payment of the \$1,000 fine-but upon petitioner's withdrawal of his Article 78 proceeding before this court and another judge. No legal basis is asserted for the condition that petitioner's licenses may be restored only upon his waiver of his day in court. However, opposition papers in response to the most recent motion are not due until the return date of the motion on February 10, 2014.⁶

Discussion

The verified petition dated October 25, 2013 and all papers under motion sequence 001 must be transferred to the Appellate Division, First Department (*see Matter of Spano v New York State Racing & Wagering Bd.*, 72 AD3d 404, 405 [1st Dept 2010] [court erred in entertaining petitioner's argument regarding an illegal search before transferring the proceeding to the appellate division because that argument did not constitute such other objection as could terminate the proceeding under CPLR 7804 [g]).

However, the verified petition dated November 1, 2013 and all papers under motion sequence 002 and 004, regarding petitioner's licenses, stand on a different footing. No hearing was held on these issues and therefore, the issue is not based on substantial evidence which would require a transfer to the Appellate Division. Accordingly, it is hereby

ORDERED that verified petition dated November 1, 2013 and all papers filed under motion

⁶Respondents' own memorandum of law at page 25 states "petitioner is free at this time to satisfy the fine assessed against him and DCA would then renew his pedicab business license." Other than payment, no condition is attached to restoration of the license.

sequence 002 and sequence 004 are severed from this proceeding and shall be assigned a separate index number without payment of any fees; and it is further

ORDERED that petitioner file an RJI after assignment of a separate index number, and shall indicate on the RJI that the proceeding should be referred to this court; and it is further

ORDERED that the verified petition dated November 1, 2013 is held in abeyance pending respondent's submission of opposition papers on February 10, 2014 and any other papers which the court may request; and it is further

ORDERED that after the Clerk of the Court severs the matter as described above and assigns a separate index number for the proceeding retained by this court, the verified petition dated October 25, 2013 and all papers under motion sequence 001 and motion sequence 003 shall be respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g)⁷; and it is

ORDERED that respondents file a copy of this Decision and Order with the Clerk of the Court within 10 days from the date hereof, who is directed to transfer the file as specified above to the Appellate Division, First Department.

This Constitutes the Decision and Order of the Court.

Dated: February 5, 2014

ENTER:



J.S.C.

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NEW YORK

⁷By Decision and Order dated November 27, 2013, the court declined to sign an Order to Show Cause (motion sequence 003).