

Rivera v City of N.Y. Off. of Admin. Trials & Hrgs

2017 NY Slip Op 32450(U)

November 15, 2017

Supreme Court, New York County

Docket Number: 153114/17

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

EDWIN A. RIVERA

INDEX NO. 153114/17

MOT. DATE

MOT. SEQ. NO. 001

- v -

CITY OF NEW YORK OFFICE OF ADMIN. TRIALS AND HRGS et al.

The following papers were read on this motion to/for ARTICLE 78 and X-MOT TO DISMISS

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This is an Article 78 proceedings whereby petitioner seeks to challenge the determination of Respondents City of New York Office of Administrative Trials and Hearings ("OATH") and Environmental Control Board ("ECB") which denied petitioner's application to vacate a judgment against petitioner regarding a civil summons he received for a violation of Admin Code § 19-190. Respondents cross-move to dismiss, on the grounds that the petition is untimely and pursuant to CPLR § 3211[a][7]. Petitioner opposes the cross-motion.

An Article 78 proceeding is governed by a four-year statute of limitations (CPLR § 217) and begins to run after the determination becomes final and binding upon the petitioner (Walton v. New York State Department of Correctional Services, 8 NY3d 186 [2007]). On November 17, 2016, petitioner made a payment at the OATH Hearing Center, thereby admitting liability to the charge of Admin Code § 19-190. 48 RCNY § 6-09(a) provides:

Where the summons states that a penalty for the cited violation may be paid by mail prior to the scheduled hearing or other applicable date provided, a Respondent may admit to the violation charged and pay the penalty in the manner and by the time directed by the summons. Payment in full is deemed an admission of liability and no further hearing or appeal will be allowed. (Emphasis added.)

Further, 48 RCNY § 6-19(a) further provides that: "[a] party may not appeal a decision rendered on default, a denial of a motion to vacate a default decision, or a plea admitting the violations charged.

Therefore, petitioner waived his right to an administrative hearing or appeal by paying the penalty on November 17, 2016. By letter dated December 22, 2016 from Grace Samuel on behalf of OATH, petitioner was advised that his request for appeal was denied because his case was not eligible for appeal since petitioner "admitted the violation by paying the penalty in full prior to the hearing date."

Dated: 11/15/17

HON. LYNN R. KOTLER, 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

The court finds that a final determination of petitioner's guilt occurred on November 17, 2016 and therefore the petition, which was filed on April 3, 2017, is untimely, to the extent that petitioner seeks to challenge his underlying conviction. An agency action is final when the agency has reached a definitive position on an issue which inflicts an actual, concrete injury (*Stop-The-Barge ex re. Gilrain v. Cahill*, 1 NY3d 218 [2003]). Here, petitioner's payment and admission of guilt was a final determination of his guilt and constitutes an actual, concrete injury. Therefore, the statute of limitations on petitioner's challenge to his conviction and/or guilty plea began to run on November 17, 2016, and a challenge to the OATH's determination of petitioner's guilt is untimely.

It is of no moment that petitioner filed a meritless appeal or that respondent to the OATH proceeding, the NYPD, filed an affirmation in opposition to petitioner's meritless appeal. There was no ambiguity regarding whether OATH's determination, and ignorance of the law is not a defense to a failure to timely bring an Article 78 petition within the statute of limitations.

Further, that petitioner couches the relief he seeks in terms of challenging the December 22, 2016 denial of an appeal, that portion of the petition is unavailing. The denial of an appeal was based upon applicable law by which petitioner waived his right to a hearing and an appeal because he admitted the charge and paid the penalty. Indeed, the underlying summons clearly advised petitioner that he essentially had two options, either admit or deny the charge. Petitioner chose to admit the charge, and based upon 48 RCNY §§ 6-09(a) and 6-19(a), an appeal does not lie. There are no facts alleged by petitioner which could possibly support a claim that the denial of an appeal "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." (CPLR § 7803). The court is not persuaded by petitioner's arguments that he wasn't properly advised about 48 RCNY §§ 6-09(a) and 6-19(a) since again, ignorance of the law is not a basis for vacating an agency's otherwise lawful determination. Therefore, respondents' cross-motion to dismiss the petition must be granted and the petition, to the extent that petitioner seeks Article 78 relief, must be dismissed.

Finally, petitioner alternatively requests that if the court finds the petition time-barred, that the court sever the declaratory relief requested, to wit, a declaration that Admin Code § 19-190(b) is unconstitutional on its face and as applied to petitioner, and convert same to a plenary action. CPLR § 103[c] provides that:

If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs.

Petitioner alleges that Admin Code § 19-190(b) is unconstitutionally vague and that OATH did not afford petitioner due process protections. According to the summons, petitioner was charged with violating "Admin Code § 19-190 Right of way – failure to yield physical injury". The summons further states:

Motorist driving E/B on Madison Ave & E. 125 87 to make left turn onto Madison Ave. did fail to exercise due care while entering crosswalk causing injury to said victim. Pedestrian had the walk signal thus having the right of way.

Admin Code § 19-190, entitled "Right of way", provides in pertinent part as follows

(a) Except as provided in subdivision b of this section, any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way shall be guilty of a traffic infraction, which shall be punishable by a fine of not more than fifty dollars or imprisonment for not more than fifteen days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall be subject to a civil penalty of not more than one hundred dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, "motor vehicle"

shall have the same meaning as in section one hundred twenty-five of the vehicle and traffic law.

(b)... [A]ny driver of a motor vehicle who violates subdivision a of this section and whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, *shall be guilty of a misdemeanor*, which shall be punishable by a fine of not more than two hundred fifty dollars, or imprisonment for not more than thirty days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall also be subject to a civil penalty of not more than two hundred fifty dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, "physical injury" shall have the same meaning as in section 10.00 of the penal law. (Emphasis added.)

Petitioner essentially claims that it was unconstitutional for him to be charged with a violation of Admin Code § 19-190(b), a misdemeanor, through the use of a civil summons which was then processed by ECB (where petitioner could admit the charge and send a check by mail to) or OATH (where petitioner could appear in person and either admit or deny the charge). Petitioner claims that he was not advised that he was pleading guilty to a misdemeanor or that he had waived his rights to appeal by admitting the charge and paying the penalty in person. Petitioner was not represented by a lawyer at the time that he admitted the charge and paid the penalty. Petitioner argues that since he was charged with a misdemeanor, he should have been given a Criminal Court Appearance Ticket "thereby starting the Criminal Court process and thus assuring that the Petitioner would be informed of his rights and protections..."

Petitioner contends that Admin Code § 19-190(b) is unconstitutional on its face "based on vagueness and failure to set minimal guidelines for law enforcement." Petitioner argues that the statute is unconstitutional as applied to him because it did not give him "fair notice" of the prohibited conduct since the summons states that petitioner failed to use "due care". Petitioner further argues that the statute is unconstitutional as applied to him since the statute can be enforced either through the criminal courts or in a proceeding before ECB and/or OATH and is thus arbitrary and/or discriminatory. In opposition to the cross-motion, petitioner argues for the first time that OATH does not have jurisdiction to determine Admin Code § 19-190 charges based upon the New York City Charter provisions which confers OATH such jurisdiction.

In turn, respondents argue that Admin Code § 19-190(b) is not unconstitutionally vague because it can be enforced civilly or criminally and otherwise distinguishes the cases which have found the statute unconstitutional. Respondents further argue that petitioner's argument that OATH lacks jurisdiction was advanced improperly for the first time in opposition to the cross-motion.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

A facial challenge to the constitutionality of a statute requires a showing that a statute is impermissibly vague in all of its applications whereas an as-applied challenge requires a determination as to whether a statute was constitutionally applied to the petitioner under the facts of the case (*People v. Stuart*, 100 NY2d 412 [2003]).

At this stage, petitioner has alleged sufficient facts to survive a motion to dismiss his request for a declaration that Admin Code § 19-190(b) is unconstitutional as applied. Respondents argue that petitioner was "only charged civilly" and that he wasn't charged with a misdemeanor offense. This argument, however, flies in the face of the plain language of Admin Code § 19-190(b), which provides that a

violation of it is a misdemeanor, punishable either criminally or civilly. The court finds that petitioner has, at this point, presented a colorable argument that the subject statute is unconstitutional as applied to him since respondents claim that petitioner was not in fact charged with a misdemeanor. Further, by being charged with a misdemeanor, which is a crime, petitioner was not afforded constitutionally guaranteed due process protections given those who choose to plead guilty to a crime. Whether petitioner's guilty plea was knowing, voluntary and intelligent has not been established. Petitioner's burden to survive the motion is relatively light. All petitioner need do is allege sufficient facts to support his claims, which he has done here.

Otherwise, petitioner's claim that Admin Code § 19-190(b) is unconstitutional on its face must be dismissed, since petitioner has not alleged any facts which would support a determination that the statute is unconstitutional as applied to all defendants.

Therefore, the court will convert petitioner's claim for a declaration that Admin Code § 19-190(b) is unconstitutional as applied, only, to a plenary action pursuant to CPLR § 103[c].

Conclusion

In accordance herewith, it is hereby:

ORDERED that the cross-motion to dismiss is granted to the following extent:

[1] petitioner's claims for relief pursuant to Article 78, challenging ether OATH's determination of petitioner's guilt or the December 22, 2016 denial of an appeal, are dismissed as untimely; and

[2] petitioner's claim for a declaration that Admin Code § 19-190(b) is unconstitutional on its face is dismissed; and it is further

ORDERED that the balance of the petition, which seeks a declaration that Admin Code § 19-190(b) is unconstitutional as applied to petitioner, is severed and shall continue as a plenary action; and it is further

ORDERED that the petition pursuant to Article 78 is denied; and it is further

ORDERED that the cross-motion is otherwise denied; and it is further

ORDERED that respondents shall serve and file an answer within 30 days from the date of service of this decision/order with notice of entry; and it is further

ORDERED that since the City is a party to this plenary action and is represented by Corporation Counsel, the Clerk is directed to reassign this case to a City IAS part.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

11/15/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.