Matter of Givens v City of New York
2018 NY Slip Op 30371(U)
February 2, 2018
Supreme Court, New York County
Docket Number: 100016/2016
Judge: Lucy Billings

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

JOHN GIVENS and JOG INVESTIGATIONS, INC.

-v-

CITY OF NEW YORK, et al.

INDEX NO. 100016/2016
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for a preliminary injunction and petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1-2
Answering Affidavits — Exhibits No(s). 3
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court denies petitioners' motion for a preliminary injunction and their amended petition and dismisses this proceeding pursuant to the accompanying decision. C.P.L.R. §§ 6301, 6312(a), 7803(3), 7806.

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).

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

Dated: 2/2/18

Lucy Billings, J.S.C.
LUCY BILLINGS 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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In the Matter of the Application of

JOHN GIVENS and JDG INVESTIGATIONS, INC.,

Index No. 100016/2016

Petitioners

- against -

CITY OF NEW YORK, JULIE MENIN, in her official capacity as a COMMISSIONER of the New York City Department of Consumer Affairs, and NEW YORK CITY COUNCIL,

Respondents,

for Judgment pursuant to Article 78 of the C.P.L.R. and relief under 42 U.S.C. § 1983

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In the Matter of the Application of

JDG INVESTIGATIONS, INC.,

Index No. 100224/2016

Petitioners

- against -

CITY OF NEW YORK, JULIE MENIN, in her official capacity as a COMMISSIONER of the New York City Department of Consumer Affairs, and NEW YORK CITY COUNCIL,

Respondents,

for Judgment pursuant to Article 78 of the C.P.L.R. and relief under 42 U.S.C. § 1983

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Petitioners JDG Investigations, Inc., a process serving business formerly licensed by respondent City of New York, and JDG Investigations' owner John Givens, a formerly licensed process server, seek through separate amended petitions to annul denials by respondent Commissioner of the New York City Department of Consumer Affairs (DCA) of petitioners' applications for licenses to serve process. Petitioners seek to enjoin respondent Commissioner to issue process server licenses to petitioners, to enjoin respondents from enforcing provisions of the New York City Administrative Code and the Rules of the City of New York (R.C.N.Y.) against petitioners, and compensatory damages. The court consolidates the two proceedings for disposition.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner John Givens, the sole owner and president of JDG Investigations, initially was licensed as an individual until his license expired March 31, 2014. Givens submitted an application for a new process server license July 9, 2014, and passed the process server examination shortly afterward, but DCA denied his application December 28, 2015, after a thorough review. DCA determined that his noncompliance with the Administrative Code and R.C.N.Y. in his work for JDG Investigations rendered him unfit for licensing under Administrative Code § 20-101 because he failed to maintain the standards of integrity, honesty, and fair dealing required of licensees.

On February 8, 2016, petitioner JDG Investigations submitted an application to DCA to renew JDG Investigations' process serving license. On February 17, 2016, DCA denied JDG Investigations' application after determining that JDG Investigations also was unfit for licensing under Administrative Code § 20-101 because the business failed to maintain the standards of integrity, honesty, and fair dealing required of licensees.

DCA based its denials of Givens's and JDG Investigations' license applications on specified categories of noncompliance with the Administrative Code and the R.C.N.Y. DCA found that both petitioners assigned process to be served by unlicensed persons on 1,800 occasions from February 1 to August 29, 2014; submitted to DCA an incomplete a list of process servers to whom petitioners assigned process; and failed to notify DCA within five days of assigning process to a new process server. DCA also found that petitioners prepared false affidavits; prepared and notarized affidavits for process servers with expired licenses; assigned process to process servers who failed to record their Global Positioning System (GPS) location; and made false representations on JDG Investigations' website, to clients, and in recommending applicants to DCA for process server licensing. Finally, DCA found that JDG Investigations failed to ensure that their process servers acted with integrity and honesty and complied with all statutes and rules governing process servers.

Petitioners challenge the merits of these findings of

noncompliance and claim that DCA violated petitioners' rights to due process by failing to accord petitioners a pre- or post-deprivation hearing. They also claim that the Administrative Code and R.C.N.Y. provisions underlying DCA's findings violate New York Constitution Article VI, § 30, and New York Municipal Home Rule Law § 11(1)(e).

I. VALIDITY OF THE STATUTES AND RULES REGULATING PROCESS SERVERS

New York Constitution Article VI, § 30, and Municipal Home Rule Law § 11(1)(e) authorize only the New York Legislature and not the New York City Council to alter and regulate procedures in New York State and City courts. Petitioners claim the City Council's enactment of Administrative Code provisions and DCA's promulgation of implementing rules regulating process servers unlawfully supersede C.P.L.R. § 2103(a), which provides that "except where otherwise prescribed by law . . . , papers may be served by any person not a party of the age of eighteen years or over." C.P.L.R. § 2103(a) (emphasis added). The exception in C.P.L.R. § 2103(a) is consistent with New York Constitution Article IX, § 2(o)(1), which grants a local legislature like the New York City Council the "power to adopt . . . local laws not inconsistent with the provisions of this constitution or any general law relating to its . . . affairs or government." See N.Y. Mun. Home Rule Law § 10(1)(i). Thus New York Constitution Article VI, § 30, and Municipal Home Rule Law § 11(1)(e) preempt only local laws that conflict with C.P.L.R. § 2103(a). Berman, P.C. v. City of New York, 25 N.Y.3d 684, 690-91 (2015); DJL Rest.

Corp. v. City of New York, 96 N.Y.2d 91, 95 (2001); Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. City of New York, 142 A.D.3d 53, 61-62 (1st Dep't 2016); New York State Assn. for Affordable Hous. v. Council of the City of N.Y., 141 A.D.3d 208, 214-15 (1st Dep't 2016).

The Administrative Code provisions regulating process servers do not prohibit or even limit court documents being "served by any person not a party of the age of eighteen years or over," C.P.L.R. § 2103(a), but simply require that when a person serves court documents more than five times per year the person must hold a license. N.Y.C. Admin. Code § 20-404(c). In sum, process servers may comply with both C.P.L.R. § 2103(a) and the Administrative Code.

The Administrative Code provisions regulating process servers neither conflict with C.P.L.R. § 2103(a) nor legislate "in a field for which the State Legislature has assumed full regulatory responsibility." DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 95. See Berman, P.C. v. City of New York, 25 N.Y.3d at 692; Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. City of New York, 142 A.D.3d at 60-61; New York State Assn. for Affordable Hous. v. Council of the City of N.Y., 141 A.D.3d at 213-14. The New York Legislature regulates process servers in cities with a population over 1,000,000 pursuant to New York General Business Law (GBL) §§ 89-bb - 89-ll. Section 89-jj specifically addresses preemption, emphatically demonstrating that the State Legislature has left local legislatures free to

afford consumers using process servers greater protections than state law affords. Echoing New York Constitution Article IX, § 2(c)(1), and Municipal Home Rule Law § 11(1)(e), GBL § 89-jj provides that:

> This article does not annul, alter, affect or exempt any person . . . subject to the provisions of this article from complying with any local law, ordinance or regulation with respect to process servers . . . except to the extent that those laws are inconsistent with any provisions of this article . . . . For purposes of this section, a local law, ordinance or regulation is not inconsistent with this article if the protection such law or regulation affords a consumer is greater than the protections afforded by this article.

Both petitioners also claim (1) that DCA denied their applications based on Administrative Code provisions permitting DCA to establish rule violations for which penalties may be imposed and (2) that New York City Charter § 1043(d) required DCA and the City to review all such rules and report the results to the City Council, with which DCA and the City never complied. This claim fails on both grounds.

First, DCA did not deny petitioners' applications based on any statute or rule that establishes a violation for which a penalty, such a fine or imprisonment, may be imposed. DCA simply found that petitioners violated 6 R.C.N.Y. § 2-234, which requires process servers to conform to all laws relating to service of process, but does not impose a fine or other penalty for a violation. Even though DCA's denial of petitioners' applications pursuant to Administrative Code §§ 20-101 and 20-409(a) based on that violation may inflict severe economic consequences on petitioners' livelihood, the denial simply is not

the imposition of a fine or other penalty on petitioners contemplated under applicable law.

Second, DCA and the City did prepare the required report and submitted it to the New York City Council September 13, 2013. V. Answer (Index No. 100016/2016) Ex.V; V. Answer (Index. No. 100224/2016) Ex. T. Even had DCA and the City failed to prepare the report, such a failure "shall not result in the invalidation of any rule" that respondents claim petitioners violated and therefore relied on to deny their applications. N.Y.C. Charter § 1043(d)(3). Finally, petitioners fail to show that 6 R.C.N.Y. § 2-234 is invalid because the standard imposed by the rule is unconstitutionally vague, either on its face or as applied to petitioners. Ulster Home Care Inc. v. Vacco, 96 N. Y. 2d 505, 510 (2001); Pringle v. Wolfe, 88 N.Y.2d 426, 435-36 (1996); Dua v. New York City Dept. of Parks & Recreation, 84 A.D.3d 596, 598 (1st Dep't 2011); Amazon.com, LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 200-201 (1st Dep't 2010).

III. PETITIONERS' ENTITLEMENT TO A PRE-DEPRIVATION HEARING

DCA grants process server licenses for a duration of two years. Thus neither petitioner held a property interest in a license beyond that period. Daxor Corp. v. State of N.Y. Dept. of Health, 90 N.Y.2d 89, 98 (1997); Testwell Inc. v. New York City Dept. of Bldgs., 80 A.D.3d 266, 274 (1st Dep't 2010); Solomon v. Department of Bldgs. of City of N.Y., 46 A.D.3d 370, 371-72 (1st Dep't 2007). Consistent with Administrative Code § 20-409(a), which governs JDG Investigations' renewal application,

the due process guarantees of the United States and New York Constitutions did not entitle JDG Investigations to a hearing before DCA denied JDG Investigations' application. U.S. Const. amend. XIV, § 1; N.Y. Const. art 1, § 6; Daxor Corp. v. State of N.Y. Dept. of Health, 90 N.Y.2d at 98-99; Frohshtein v. Chandler, 150 A.D.3d 552, 553 (1st Dep't 2017); Rasole v. Department of Citywide Admin. Servs., 83 A.D.3d 509, 509 (1st Dep't 2011); Testwell, Inc. v. New York City Dept. of Bldgs.; 80 A.D.3d at 274. Administrative Code § 20-409(b) does not afford either petitioner a hearing, before or after denial of their applications, as this provision requires notice and a hearing only when DCA refuses to issue or renew, suspends, or revokes a license because of the applicant's or licensee's criminal conviction, and DCA did not base its denial of petitioners' applications on any criminal conviction.

Nor does Administrative Code § 20-104 afford petitioners a hearing before or after DCA denied their license applications. Section 20-104(g) specifically provides that: "The commissioner may refuse to issue or renew any license issued in accordance with the provisions of chapter two of this title [§ 20-409] and may suspend or revoke any such license, after due notice and an opportunity to be heard." N.Y.C. Admin. Code § 20-104(g) (emphasis added). See N.Y.C. Admin. Code § 28-401.19.1. Because DCA did not suspend or revoke either petitioner's license, no pre- or post-deprivation hearing was required under the Administrative Code.

This proceeding pursuant to C.P.L.R. Article 78 is petitioners' post-deprivation hearing providing petitioners an opportunity to challenge the denial of their licenses as required by due process. Pinder v. City of New York, 49 A.D.3d 289, 281 (1st Dep't 2008); Sumpter v. New York City Hous. Auth., 260 A.D. 2d 176, 178 (1st Dep't 1999); Victory v. Pataki, 814 F.3d 47, 63 n. 13 (2d Cir. 2016); Anemone v. Metropolitan Transp. Auth., 629 F.3d 97, 121 (2d Cir. 2011). Petitioners complain that DCA's authority to investigate license applicants and gather information from sources other than the applicants themselves denies them the opportunity to confront that information. While respondents may not have charged petitioners previously with the violations of law or other misconduct on which respondents relied to deny licenses to petitioners, they may confront, contest, and show they did not commit those violations or that misconduct either in this proceeding or in any reapplication for a license and recieve a determination of the charges' validity.

IV. PETITIONERS' CHALLENGE TO THE BASES FOR DCA'S DENIAL OF THEIR APPLICATIONS

DCA determined that petitioners failed to comply with 6 R.C.N.Y. §§ 2-234 and 2-234a(a)(1) and (3) and (b) when JDG Investigations assigned process to unlicensed process servers and falsely represented unlicensed servers as licensed in affidavits of service and to clients. Although petitioners admit this conduct, they nonetheless claim that these findings must be annulled because Givens was unaware that the process servers assigned process and represented as licensed actually were

unlicensed. Petitioners rely on Administrative Code § 20-105(d), which only stays enforcement of the DCA Commissioner's orders against an applicant while an applicant's renewal application is pending. This provision does not allow process servers to serve process without a license while their application for a license is pending, nor excuse unlicensed service based on ignorance or a good faith mistake that their pending application does not allow the activity for which a license is required. Nor does any other provision of either the Administrative Code or the R.C.N.Y. excuse petitioners' noncompliance with the licensing laws because Givens believed that the process servers assigned process were licensed and was unaware that they were unlicensed.

In sum, filing an application for a license does not automatically confer the license on the applicant. Petitioners' belief to the contrary is unjustifiable, as such a result would render the determination of the application meaningless. While petitioners have not justified their misapprehension in this proceeding, they still may attempt to do so in any reapplication.

Petitioners also insist that DCA's finding that they violated 6 R.C.N.Y. § 234a(a)(1) and (b) does not support denial of licenses to petitioners because neither they nor their process servers have been charged with or found guilty of violating the rules regulating process servers. While an applicant's conviction of a crime also may support denial, suspension, or revocation of a license under Administrative Code § 20-409(b), § 20-409(a) authorized DCA to deny JDG Investigations' renewal

application based on its noncompliance with any process server rule, regardless whether that noncompliance resulted in conviction of a crime or other adjudication of guilt. N.Y.C Admin. Code § 20-409(a); 6 R.C.N.Y. § 2-234a(a)(3). Administrative Code § 20-406.2(b) also holds JDG Investigations, as a process serving business, legally responsible for its process servers' actions. Therefore no independent finding of guilt is required for DCA to deny JDG Investigations' application based on 6 R.C.N.Y. § 2-234a.

DCA also found both petitioners violated 6 R.C.N.Y. § 2-234, which required them to comply with all statutes and rules regulating process servers, because petitioners falsely represented in two affidavits of service that Givens was a licensed process server. Petitioners similarly insist that this finding must be annulled because DCA did not cite any other statute or rule violated. Both petitioners failed to comply with the applicable statutes or rules, however, since Administrative Code § 20-403(a) barred Givens from serving process without a license, and 6 R.C.N.Y. § 2-234a(a)(1) barred JDG Investigations from assigning service of process to an unlicensed person.

DCA found another statutory violation when petitioners further misrepresented on JDG Investigations' website that Givens was a licensed process server and that petitioners were employed by the New York City Administration for Children's Services. N.Y.C. Admin. Code § 20-700. Administrative Code § 20-700 prohibits deceptive trade practices in the sale of any consumer

goods or services, which Administrative Code § 20-701(c) defines as "goods, services, credit and debts which are primarily for personal, household or family purposes." Even though Givens need not have been licensed to serve process only twice as reflected in the two affidavits of service representing that he was licensed, N.Y.C. Admin. Code § 20-404(c), the affidavits and website still include the false representation that he was licensed.

Petitioners nevertheless claim that DCA's determination must be annulled because serving process is not consumer goods or services under the Administrative Code. Although many customers may not use petitioners' services for personal legal proceedings, petitioners do not deny that many other customers do use petitioners' services for their personal legal proceedings. Nor do petitioners explain why individuals' use of a process server for their personal legal proceedings is not a service for personal purposes, just as legal services are, such that advertisements and other trade practices related to the services fall under the protection of Administrative Code § 20-700. Aponte v. Raychuk, 160 A.D.2d 636, 636 (1st Dep't 1990). Process serving, like legal services, is a service often used by consumers for personal purposes. Petitioners provide no evidence or authority supporting treatment of process serving other than as a consumer service, differently from legal services.

JDG Investigations claims that, in any event, Administrative Code § 20-700 does not support DCA's denial of JDG

Investigations' renewal application. As explained above, Administrative Code § 20-409(a) permits DCA to deny JDG Investigations' renewal application based on its noncompliance with any rule promulgated by the DCA Commissioner. Administrative Code § 20-409 did not take effect until 2010, after JDG Investigations' website was created in 2007, but the provision still applies to the false statements on the website after the effective date and as recently as May 2015. V. Answer (Index No. 100016/2016) Ex. P; V. Answer (Index. No. 100224/2016) Ex. N. Although § 20-409(a) permits DCA to deny a renewal application based on violation of a rule promulgated by the DCA Commissioner, as also set forth above, petitioners' violation of a statute governing process servers further violated 6 R.C.N.Y. § 2-234, which requires compliance with all such statutes. Those violations, moreover, rendered petitioners unfit for licensing under Administrative Code § 20-101 because they failed to maintain the standards of integrity, honesty, and fair dealing required of licensees.

Many of the bases on which respondents denied licenses to petitioners comprised evidence of their dishonesty or simply careless noncompliance with process server statutes and rules that resulted in unfair dealing with customers. These instances of noncompliance reflect either a business' or a business operator's ignorance of the legal standards governing the business, failure to implement business procedures that ensure compliance with the governing standards, and thus failure to

maintain standards of business integrity. Petitioners never show that such instances resulted instead from an aberrational breakdown in their operational systems that petitioners immediately corrected.

JDG Investigations also challenges DCA's determination that JDG Investigations violated 6 R.C.N.Y. §§ 1-01.1 and 2-234a(d) when it omitted from its renewal application three process servers serving process for it, because DCA presented no evidence that one of the three, Zachary Livingston, actually served process for JDG Investigations before its application. Since respondents have not supplied any evidence showing that Livingston served process for JDG Investigations before its application, DCA's finding as to Livingston is unsupported. Nevertheless, respondents did present records showing that the other two process servers not listed on the application did serve process for JDG Investigations before its application, so that DCA's finding of noncompliance with 6 R.C.N.Y. §§ 1-01.1 and 2-234a(d) still is supported by the evidence and thus rational.

Givens independently claims that DCA denied his application based on noncompliance with 6 R.C.N.Y. § 2-234a, which applies only to process serving businesses. DCA denied Givens's application instead because, as an individual process server and as the admitted owner, president, and person in charge of the operation of JDG Investigations, he failed to maintain standards of integrity, honesty, and fair dealing, not because he violated 6 R.C.N.Y. § 2-234a.

Petitioners' final collective challenge is to DCA's determination that, in JDG Investigations' recommendation letters to DCA, petitioners made false or misleading statements that neither Zachary Livingston nor Scott Craig had served process for JDG Investigations, and it had never employed Isaias Alicea. The recommendations do not actually state that JDG Investigations did not use Livingston and Craig as process servers, but merely state that it used Livingston and Craig as messengers and sought to promote them to process servers. V. Answer (Index No. 100016/2016) Ex. O, at 1-2; V. Answer (Index. No. 100224/2016) Ex. L, at 1-2. Similarly, Alicea's recommendation states that JDG Investigations sought to employ Alicea in the future, but not that it had never employed Alicea as a process server in the past. V. Answer (Index No. 100016/2016) Ex. O, at 3; V. Answer (Index. No. 100224/2016) Ex. L, at 3. DCA also determined that petitioners made false statements to a DCA attorney regarding Craig's duties, but respondents again fail to support this finding with any evidence.

Consequently, DCA's finding that petitioners made false and misleading statements to DCA regarding these three employees is unsupported by the evidence, is thus irrational, and must be annulled. Even after annulment of this finding, however, DCA's denial of both petitioners' applications is rational, as DCA supports its determination of Givens's application by detailing seven other categories and JDG Investigations' application by detailing nine other categories of Givens's and JDG

Investigations' repeated instances of noncompliance with the Administrative Code and DCA's rules.

V. CONCLUSION

For the reasons explained above, the court annuls respondent DCA's finding that petitioners John Givens and JDG Investigations made false or misleading statements in their recommendations to DCA, but otherwise denies the amended petitions and dismisses the proceedings. C.P.L.R. §§ 409(b), 7803(3), 7806. Given this disposition, petitioners have failed to show a likelihood of success on their claims to warrant a preliminary injunction. Therefore the court denies petitioners' motions for that relief. C.P.L.R. §§ 6301, 6312(a). This decision constitutes the court's order and judgment of dismissal. C.P.L.R. §§ 411, 7806.

DATED: February 2, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
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).