Matter of Prussick v New York State Dept. of Motor Vehs.
2019 NY Slip Op 30256(U)
January 29, 2019
Supreme Court, Suffolk County
Docket Number: 4404/2017
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 4404/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

x

In the Matter of the Application of

CURTIS L. PRUSSICK,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondent.

x

Motions Submit Date: 04/12/18
Mot SCH: 03/26/18
Mot Seq 001 MD
Mot Seq 002 MG; CASE DISP

PETITIONER'S *Pro Se*:
CURTIS L. PRUSSICK
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Ridge, New York 11961

RESPONDENT'S COUNSEL:
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New York Attorney General
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On petitioner's special proceeding commenced under CPLR Article 78, the Court considered the following:

1. Notice of Petition, Petition and supporting papers
2. Notice of Motion, Affirmation in Support, Memorandum of Law in Support and other supporting papers; and upon due deliberation and full consideration; it is

ORDERED that this special proceeding commenced by petitioner's Notice of Petition & Petition pursuant to CPLR Article 78 seeking to vacate, annul or otherwise set aside a determination made by respondent New York State Department of Motor Vehicles denying petitioner's application for relicensure is **denied** for the following reasons; and it is further

ORDERED that respondent's counsel is hereby directed to serve a copy of this decision and order with notice of entry on petitioner *pro se* personally forthwith.

BACKGROUND

Petitioner Curtis L. Prussick commenced this special proceeding filing his notice of petition and petition *pro se* on August 23, 2017. As best as can be gleaned from petitioner's petition, petitioner seeks to challenge a final administrative determination of respondent the New York State Department of Motor Vehicles concerning his revoked driver's license. To best address petitioner's proceeding, some background is necessary.

Although the petition is not a model of clarity, Prussick explains that on January 7, 2008 he was arrested by the Suffolk County Police Department for suspicion of DUI. At the time of his arrest the arresting officer did not perform a field sobriety test to avoid further escalating the situation and further provoking a then irate an unruly Prussick. Prussick further explains that the incident arose from a verbal altercation between himself and his then girlfriend at the Longwood Public Library in Middle Island, New York. Library staff had called police to intervene and during the course of his interview with the arresting officer on scene, the officer observed petitioner as "unsteady on his feet" with white foam around his lips and/or mouth, unable to focus, lethargic and slurring in his speech with bloodshot eyes. Police ordered Prussick to quit the premises, which he did, crossing over Route 25/Middle County Road to do some shopping at the Shell gas station. In fact, police ordered the petitioner to walk home. Thereafter, police observed Prussick walk back across Route 25 into the library parking lot and enter his vehicle. At this time, police boxed in his vehicle and Prussick was taken into custody on suspicion of driving under the influence of drugs.

While being processed after his arrest at Suffolk County Police Department Sixth Precinct, petitioner was alleged to have made voluntary admission or confirmation of an earlier admission that he had taken prescription medication for pain and anxiety. Police attempted to obtain consent from Prussick on three separate occasions for his submission to a chemical test, which he refused, consented to, and after speaking with counsel and on his advice, refused. Thus, Prussick was charged with a violation of Vehicle & Traffic Law § 1192(4).

Prussick was prosecuted on that charge in the Suffolk County First District Court and that court held a *inter alia* chemical test refusal hearing in 2009. The parties record is unclear as to the outcome of those proceedings. Annexed to the petition appears minutes for a probable cause, chemical test refusal and *Huntley* hearing. However, missing from the record is the decision after hearing referenced by the court.

At any rate, after those proceedings, on September 11, 2008, an administrative chemical test refusal hearing was noticed by respondent for November 7, 2008. It is further undisputed that petitioner did not appear for his hearing on that date, nor did he request an adjournment. As a result, the hearing proceeding without his appearance and respondent deemed his failure to appear to constitute a waiver. Thus, petitioner's license and privilege to drive, which previously was suspended on his failure to submit to a chemical test, was revoked.

This proceeding followed. Most of petitioner's arguments appear to be that the underlying arrest lacked probable cause and thus the determination that he failed to submit to a chemical test and all of the consequences that followed were improper. Thus, petitioner argues that the chemical test refusal determination appearing on his driver's license abstract was an arbitrary and capricious determination that should now be overturned by this Court.

In lieu of answering the petition, respondent has moved to dismiss arguing that the petition on its face fails to state a claim under CPLR 3211(a)(7). Respondent further argues that this Court lacks jurisdiction over its person disputing that petitioner has properly served it with process. Lastly, respondent argues that the petition itself is untimely as seeking to challenge administrative determinations beyond the 4-month limitations period set forth in CPLR 217.

STANDARDS OF REVIEW

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Nonnon v. City of New York***, 9 NY3d 825, 827; ***Leon v. Martinez***, 84 NY2d 83, 87–88; ***Paolicelli v. Fieldbridge Assoc., LLC***, 120 AD3d 643, 644; ***Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.***, 131 AD3d 601, 603 [2d Dept 2015]). Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (***Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.***, 132 AD3d 811, 812 [2d Dept 2015]).

In moving to dismiss a cause of action as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period. To make a *prima facie* showing, the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued (***Loiodice v BMW of N. Am., LLC***, 125 AD3d 723, 724–25, 4 NYS3d 102, 103–04 [2d Dept 2015]). "In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (***Cataldo v Herrmann***, 154 AD3d 641, 642, 62 NYS3d 130, 131 [2d Dept 2017]).

DISCUSSION

A. Jurisdictional Defense

As a threshold consideration, the Court does not find merit with respondent's jurisdictional argument. In support of the contention that the Court lacks jurisdiction, respondent contends via affirmation that petitioner has failed to demonstrate proper service of process pursuant to CPLR 7804(c), arguing that while petitioner has demonstrated good service over the Attorney General's Office as counsel for respondent, he failed to serve the DMV. On this point, having reviewed the petition and its supporting documentation to include petitioner's affidavit of service, the Court notes that the affidavit reflects an undated attempt of service on the DMV at its Albany address. Petitioner did not attempt to indicate diligent efforts of service, nor does he indicate by his affidavit what methods were relied upon. However, on the other hand, respondent relies upon a conclusory denial of service appearing in counsel's affirmation. Respondent does not corroborate its denial with any proffer of mail log in procedures or anyone with direct, firsthand or personal knowledge of receipt of service by the DMV. Thus, this Court determines that the jurisdictional defense and issue is not ripe for hearing as respondent's denial is insufficient on its face to warrant an evidentiary hearing. This is even more the case where respondent has mounted a full-throated merits defense to the petition, and thus suffers no prejudice.

B. Timeliness of the Proceeding

In order to commence a timely proceeding pursuant to CPLR article 78, a petitioner must seek review of a determination within four months after the determination to be reviewed

becomes final and binding upon the petitioner, or after the respondents' refusal, upon the demand of the petitioner, to perform its duty (*see* CPLR 217[1]; ***Walton v. New York State Dept. of Correctional Servs.***, 8 NY3d 186, 194–196, 831 NYS2d 749[2007]; ***Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.***, 5 NY3d 30, 34, 799 NYS2d 182, [2005]; ***Barresi v. Cty. of Suffolk***, 72 AD3d 1076, 1076, 900 NYS2d 343, 344 [2d Dept. 2010].

A strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by potential litigation (*see* ***Solnick v. Whalen***, 49 NY2d 224, 232, 425 NYS2d 68 [1980]); ***Best Payphones, Inc. v. Dep't of Info. Tech. & Telecommunications of City of New York***, 5 NY3d 30, 34 [2005]. An administrative determination becomes "final and binding" when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party" (***Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.***, 5 NY3d 30, 34, 799 NYS2d 182 [2005]; *see also* ***Matter of City of New York [Grand Lafayette Props. LLC]***, 6 NY3d 540, 548, 814 NYS2d 592 [2006]; ***Matter of Comptroller of City of N.Y. v. Mayor of City of N.Y.***, 7 NY3d 256, 262, 819 NYS2d 672 [2006]; ***Matter of Eadie v. Town Bd. of Town of N. Greenbush***, 7 NY3d 306, 316, 821 NYS2d 142 [2006]; ***Walton v. New York State Dep't of Corr. Servs.***, 8 NY3d 186, 194-95[2007]).

Here, petitioner commenced the proceeding on August 23, 2017. The parties differ as to the appropriate measurement of accrual of petitioner's claim. As noted above, the petition read broadly seeks to collaterally attack the validity of petitioner's underlying DUI arrest and prosecution in 2008, as well as the administrative DMV chemical test refusal hearing and license suspension and revocation that naturally flowed from that incident. Obviously to the extent this proceeding seeks to undo those adverse determinations, petitioner is time barred from review by this procedural vehicle and remedy as those determinations and consequences clearly fall way outside the 4month look back period.

However, as noted and argued by respondent, petitioner brought this proceeding after petitioner applied for relicensure on December 21, 2016. That application was denied on February 24, 2017, with requests for reconsideration denied on April 25, 2017. The record is unclear precisely how petitioner was apprised of these determinations but assuming service by mail and adding 5 days, that aspect of his petition seeking review of respondent's appeals board denial of relicensure is timely under the 4month statute of limitations (*see e.g.* ***Kamarad v Fiala***, 149 AD3d 740, 741, 50 NYS3d 556, 558 [2d Dept 2017][ruling that a determination of the DMV Appeals Board constitutes the final agency action for purposes of accrual of a claim prosecuted by CPLR Article 78 review]).

C. Merits of the Petition

Thus, reviewing the merits of the petition and reading them to argue that respondent's denial of petitioner's application for relicensure was arbitrary and capricious administrative action, petitioner still is unsuccessful. Respondent argues, and petitioner has not disputed that his application for relicensure constituted that of a recidivist motorist with multiple alcohol/drug incidents considered within the prerogative and authority conferred to the DMV Commissioner

under 15 NYCRR § 136.5 regulatory amendments adopted in 2012. The courts recognized that the Commissioner's regulations indicate preference for a policy of denying relicensing a recidivistic operator with prior alcohol or drug involvement, only providing for exception where the Commissioner in his/her discretion may consider unusual, extenuating and compelling circumstances as a valid basis to deviate from the general policy." Under those circumstances, the court's review on an CPLR Article 78 proceeding challenging such a determination "is limited to whether such a determination was arbitrary and capricious, irrational, affected by an error of law or an abuse of discretion" (***Nicholson v Appeals Bd. of Admin. Adjudication Bur.***, 135 AD3d 1224, 1225, 23 NYS3d 709, 710 [3d Dept 2016][interpreting 15 NYCRR 136.5[b][1]] & 15 NYCRR 136.5[d]).

CONCLUSION

Viewed in this context, the Court determines that petitioner's proceeding must be unsuccessful on its merits. This result is dictated when viewed against the backdrop where our courts acknowledge that the license and privilege of operating a motor vehicle within this State "is not generally viewed as a vested right, but merely a personal privilege subject to reasonable restrictions and revocation" by the DMV Commissioner within his/her discretionary authority powers (***Scism v Fiala***, 122 AD3d 1197, 1198, 997 NYS2d 798, 800 [3d Dept 2014]). The petition with all of its focus on the validity or appropriateness of petitioner's original and underlying criminality gives this Court no substantive argument addressing whether respondent's denial of his appeal for relicensure constituted arbitrary administrative action. Having independently reviewed the motion record, this Court finds no basis on which to disturb that determination. Thus, respondent's motion to dismiss the petition is **granted** to the extent that the petition on its face fails to sustain petitioner's burden.

The foregoing constitutes the decision and order of this Court.

Dated: January 29, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**