Greenberg v New York City Dept. of Consumer Affairs
2019 NY Slip Op 33662(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 150033/2019
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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BRENT GREENBERG,

Petitioner,

For a judgment and a writ of prohibition pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, JOHN W. BURNS, AS DEPUTY COMMISSIONER FOR THE OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, JOHN B. SPOONER, AS HEARING OFFICER FOR THE OFFICE OF ADMINSTRATIVE TRIALS AND HEARINGS, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION AND THE CITY OF NEW YORK,

Respondents.

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DECISION AND ORDER

Index No. 150033/2019

MELISSA A. CRANE, J.:

Petitioner Brent Greenberg brings this hybrid action/proceeding for a writ of prohibition, a judgment annulling a determination made by respondent Office of Administrative Trials and Hearings (OATH), declaratory and injunctive relief, and damages for alleged violations of 42 USC § 1983. In lieu of answering, respondents New York City Department of Consumer Affairs (DCA), John W. Burns, as Deputy Commissioner for OATH (Deputy Commissioner Burns), John B. Spooner, as Hearing Officer for OATH (ALJ Spooner), New York City Department of Parks and Recreation (Parks), and the City of New York (City) (collectively, respondents) move, pursuant to CPLR 3211 (a) (2) and (a) (7), for dismissal of the petition and this proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner holds a pedicab driver license and a pedicab business license that DCA issued (New York St Cts Elec Filing [NYSCEF] Doc No. 3, amended petition ¶ 7). On May 9, 2018,

petitioner was involved in an incident with Parks Enforcement Officers Tatiana Moye (Moye) and Washington Cardenas (Cardenas) in the parking lot at Tavern on the Green in Central Park. Allegedly, Moye and Cardenas observed petitioner soliciting passengers in a prohibited area. The officers approached petitioner to ask for his identification, but petitioner fled instead of speaking to them (NYSCEF Doc No. 13, affirmation of petitioner's counsel, exhibit G at 3-5). Moye's mobile radio unit or pen holder became caught in the wheel of petitioner's pedicab, causing petitioner to drag Moye approximately 40 feet as he fled away on his pedicab (*id.*). Subsequently, another Parks Enforcement Officer arrested petitioner and charged him with resisting arrest under Penal Law § 205.30 (*id.* at 5). He was also charged with reckless endangerment in the second degree under Penal Law § 120.20[1] (*id.*).

Following the May 9, 2018 incident, DCA informed petitioner by letter, dated May 11, 2018, that it had elected to suspend his pedicab driver license with immediate effect under Administrative Code of the City of New York § 20-261 (d). That provision reads, in pertinent part, that "if the commissioner determines that continued possession by a pedicab driver of a pedicab driver license would pose an exigent danger to the public, the commissioner may suspend such pedicab driver license, subject to a prompt post-suspension hearing." The letter cited a violation of Administrative Code § 20-259 (a) as a predicate for the suspension,[2] and further advised petitioner that "[a] post-suspension hearing on this matter will be scheduled shortly" (NYSCEF Doc No. 7, affirmation of petitioner's counsel, exhibit A at 1-2). Following the issuance

[1] Petitioner asserts that the misdemeanor charges brought in New York City Criminal Court were dismissed on November 19, 2018 and the records sealed (NYSCEF Doc No. 38, affirmation in opposition of petitioner's counsel, ¶ 38).

[2] Administrative Code § 20-259 (a) provides that a pedicab driver is subject to state and local laws governing the operation of a bicycle, including the Administrative Code and the Rules of the City of New York promulgated by Parks.

of the May 11, 2018 letter, DCA and Parks pursued simultaneous enforcement and revocation proceedings against petitioner related to the May 9, 2018 incident.

On May 18, 2018, DCA issued summons no. 180099HR to petitioner for four violations of Administrative Code § 20-259, each of which carried a maximum monetary penalty of $375, and for a violation of Administrative Code § 20-261 (d), for which the penalty was the continued suspension of his pedicab driver license (NYSCEF Doc No. 8, affirmation of petitioner's counsel, exhibit B at 1). The summons was returnable in OATH's Hearings Division on May 24, 2018 (*id.*). OATH granted petitioner's request for an adjournment of the hearing to July 9, 2018 (NYSCEF Doc No. 10, affirmation of petitioner's counsel, exhibit D at 1).

On June 28, 2018, DCA issued summons no. 180120HR to petitioner alleging that his business, Brent Pedicab Business, committed a violation of Administrative Code § 2-259 (d) by failing to report the May 9, 2018 incident to DCA (NYSCEF Doc No. 34, affirmation of respondents' counsel, exhibit E, ¶ 15). Petitioner alleges that a hearing on this summons was held on January 7, 2019 (NYSCEF Doc No. 3, ¶ 2).

On July 2, 2018, DCA filed a notice withdrawing summons no. 180099HR and issued new summons no. 180121HR to petitioner returnable in OATH's Hearings Division on July 9, 2018 (NYSCEF Doc No. 3, ¶¶ 23-24). This new summons removed any reference to the Administrative Code § 20-259 (a) violations set forth in summons no. 180099HR (NYSCEF Doc No. 9, affirmation of petitioner's counsel, exhibit 9 at 1). The only charge alleged was a violation of Administrative Code § 20-261 (d) and whether DCA's decision to suspend petitioner's pedicab driver license should continue (*id.*). At the July 9, 2018 appearance on summons no. 180121HR, Hearing Officer Steven Laduzinski (Hearing Officer Laduzinski) adjourned the hearing to a "final" date of July 27, 2018, and allegedly informed DCA that "[Administrative Code] section 20-261

(d) had requirements that needed to be satisfied prior to suspension" (NYSCEF Doc No. 3, ¶¶ 25 and 27).

On July 18, 2018, Parks issued five summonses to petitioner – summons no. 0197 595 732,[3] summons no. 0197 595 750 (violation of Administrative Code § 19-176.2), summons no. 0197 598 491 (violation of 56 RCNY 1-04 [l] [9]), summons no. 0197 498 500 (violation of 56 RCNY 1-05 [i] [3]), and summons no. 0197 595 741 (violation of 56 RCNY 1-03 [c] [1]) (NYSCEF Doc No. 3, ¶¶ 2, 90, 93, 95 and 103). Petitioner claims that Deputy Commissioner Burns rescheduled the hearing from September 11, 2018 to December 28, 2018 (*id.*, ¶ 29).

Contemporaneous with these enforcement proceedings, DCA filed petition no. 190018 (the Revocation Petition) on July 6, 2018 to revoke permanently petitioner's pedicab driver license and to recover monetary penalties for numerous violations of Title 20 of the Administrative Code (NYSCEF Doc No. 13 at 3). The Revocation Petition stated that DCA had suspended petitioner's license and had "scheduled a post-suspension hearing by way of" summons no. 180099HR[4] (*id.* at 5-6). The Revocation Petition alleged that petitioner committed several violations of Administrative Code § 20-259 (a) as follows: (1) soliciting passengers in an area Parks had not designated for pedicab operations in violation of the Rules of City of New York Department of Parks and Recreation (56 RCNY) § 1-05 (i) (8); (2) failing to comply with a lawful order of a Parks Enforcement Officer; (3) committing an act that endangered the safety of others in violation of Administrative Code § 18-146 (c) (1); (3) committing an act that endangered the safety of others in violation of 56 RCNY 1-04 (l) (8); and (4) operating a pedicab in a manner that endangered the safety of others in violation of 56 RCNY 1-04 (l) (9). The Revocation Petition was returnable in

[3] The petition does not describe the relief sought on this summons.
[4] By the time DCA served the notice of conference on July 6, 2018, it had already withdrawn summons no. 180099HR.

OATH's Trials Division, and a conference was held on July 24, 2018 (NYSCEF Doc No. 3, ¶ 30). Petitioner alleges that the violations cited in the five Parks summonses duplicate those alleged in DCA's Revocation Petition (*id.*, ¶ 28).

In an email dated July 26, 2018, Kelly Corso, an assistant commissioner at OATH, informed petitioner that "[t]he hearings for 180121HR and 180120HR have been stayed at the Hearings Division pending the outcome of the cases at the Trials Division" (NYSCEF Doc No. 11, affirmation of petitioner's counsel, exhibit E at 1). Petitioner alleges that Deputy Commissioner Burns made the decision to adjourn the two matters (NYSCEF Doc No. 3, ¶ 27).

On August 29, 2018, ALJ Spooner, an administrative law judge in OATH's Trials Division, commenced a hearing on the Revocation Petition. Ostensibly, the only matter before him involved the revocation of petitioner's pedicab driver license, but the hearing transcript reveals that ALJ Spooner presided over the post-suspension hearing, that had been originally scheduled before Hearing Officer Laduzinski (NYSCEF Doc No. 14, affirmation of petitioner's counsel, exhibit H [hearing tr] at 4). After a three-day hearing, during which ALJ Spooner heard testimony from Moye and Cardenas, he issued a memorandum decision dated October 19, 2018 upholding DCA's initial decision to suspend petitioner's pedicab driver license (the October Decision). ALJ Spooner reasoned that the suspension "was and is appropriate in that the incident with the parks enforcement officers establishes good cause for the Commissioner to believe that respondent is an exigent danger to the public" (NYSCEF Doc No. 15, affirmation of petitioner's counsel, exhibit I at 1). DCA withdrew summons no. 180121HR after ALJ Spooner issued the October Decision (NYSCEF Doc No. 16, affirmation of petitioner's counsel, exhibit J at 1; NYSCEF Doc No. 33, affirmation of respondents' counsel, exhibit D at 1). Petitioner maintains that OATH has not held a hearing on the balance of the allegations in the Revocation Petition, although it has scheduled a

conference for February 20, 2019 on new revocation petition no. 191309 (NYSCEF Doc No. 3, ¶¶ 2 and 46; NYSCEF Doc No. 38, ¶ 3).

As for summons no. 180120HR concerning petitioner's pedicab business license, a hearing was held before Hearing Officer Clive Morrick (Hearing Officer Morrick) in OATH's Hearings Division, during which DCA introduced a copy of the October Decision (NYSCEF Doc No. 3, ¶ 44). Petitioner asserts that the record on summons no. 180120HR was deemed fully submitted on January 7, 2019 (*id.*).

Four of the five Parks summonses were scheduled to be heard on January 18, 2019 in OATH's Hearings Division, and petitioner claims that a hearing on summons no. 0197 595 741 will be scheduled once an amended summons is filed (NYSCEF Doc No. 3, ¶ 45). Petitioner alleges that DCA has denied his request to lift the suspension placed on his pedicab driver license, and that DCA informed him "we will determine if we want to seek revocation once these underlying [Parks] summonses are resolved" (NYSCEF Doc No. 21, affirmation of petitioner's counsel, exhibit O at 1).

Petitioner commenced this hybrid action/proceeding for (1) a writ of prohibition under CPLR 7803 (2) on the ground that OATH exceeded its jurisdiction; (2) a judgment pursuant to CPLR 7803 (3) annulling the October Decision; and (3) a writ of prohibition under CPLR 7803 (2) barring OATH from exercising subject matter jurisdiction over the Revocation Petition. The petition also pleads four causes of action under CPLR 3001 and 42 USC § 1983. The first, denominated the fourth cause of action, seeks a judgment declaring and enjoining Parks from introducing false accusatory instruments at a hearing scheduled for January 18, 2019 before Hearing Officer Morrick.[5] The second, denominated the "sixth" cause of action, seeks a judgment

[5] Petitioner states that Parks has submitted a notice withdrawing summons no. 0197 595 741 (NYSCEF Doc No. 3, ¶ 92).

declaring that violations of 56 RCNY 1-03 (c) (1) and 1-04 (l) (9) constitute misdemeanors, and that instruments charging misdemeanors are properly returnable in New York City Criminal Court. Petitioner seeks injunctive relief because the OATH proceeding involves a misdemeanor in violation of his civil rights. The third, denominated the "seventh" cause of action, seeks a judgment declaring that four of the Parks summonses contain false statements and enjoining DCA from continuing the suspension of petitioner's pedicab driver license based on those purportedly false statements. Additionally, the petition seeks a "judgment declaring Administrative Code § 20-261 (d), as applied, unconstitutional" (NYSCEF Doc No. 3, ¶ 118). The fourth, erroneously denominated a second "sixth" cause of action, seeks a judgment declaring and enjoining DCA from introducing allegedly false accusatory instruments before Hearing Officer Morrick on February 20, 2019. The petition seeks punitive damages and the recovery of petitioner's attorneys' fees. Respondents now move for dismissal.

DISCUSSION

On a motion to dismiss brought under 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"" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). The court must deny the motion "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, the court need not "accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it

has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

At the outset, the court rejects petitioner's contention that respondents cannot rely on DCA's May 18, 2018 letter suspending petitioner's pedicab driver license or the Revocation Petition on this motion. He has offered these same documents as exhibits in support of the petition. Additionally, the court rejects petitioner's assertion that respondents' memorandum of law is defective because it is not verified. CPLR 402 states that a petition "shall comply with the requirements for a complaint in an action", and CPLR 3020 (a) states, in part, that "[a] verification is a statement under oath that the pleading is true to the knowledge of the deponent." A memorandum of law, though, is not a pleading but a statement that sets forth relevant law and legal arguments (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Law of NY, CPLR C2214:21; *Tripp & Co., Inc. v. Bank of N.Y. (Del), Inc.*, 28 Misc 3d 1211[A], 2010 NY Slip Op 51274[U], *6 [Sup Ct, NY County 2010]). As such, a memorandum of law need not be verified.

Petitioner's assertion that the court cannot deny or dismiss the petition without respondents having first served an answer is equally unconvincing. CPLR 404 (a) allows a respondent to move for dismissal before answering the petition, and a motion to dismiss brought under CPLR 3211 (a) (7) may be supported entirely by a memorandum of law, as respondents have done (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Law of NY, CPLR C2214:22). Further, CPLR 404 (a) states that "[i]f the motion [to dismiss] is denied, the court may permit the respondent to answer." Thus, where a respondent moves for pre-answer dismissal of a special proceeding, it may serve an answer if the dismissal motion is denied.

It is well settled that judicial review of administrative determinations is limited to the questions of law described in CPLR 7803 (*see Matter of Featherstone v Franco*, 95 NY2d 550,

554 [2000]). The allegations in the petition here implicate CPLR 7803 (2), (3) and (4). However, notwithstanding that the petition raises a substantial evidence question, (*see* CPLR 7803 [4]), discussed further *infra)*, before the matter may be transferred to the Appellate Division, First Department, the court must determine whether it may terminate the proceeding on some other basis, such as the lack of jurisdiction, the statute of limitations or res judicata (*see* CPLR 7804 [g]; *Matter of O'Donnell v Rozzi*, 99 AD2d 494, 494 [2d Dept 1984]). Further, inasmuch as the petition seeks declaratory relief, the court may determine the merits of the motion to dismiss before transferring the matter (*see Matter of Huntington Hills Assoc., LLC v Town of Huntington*, 49 AD3d 647, 648 [2d Dept 2008] [stating that any issues pertaining to relief other than that sought under CPLR Article 78 "must be determined by the Supreme Court … in the first instance"]).

A. The First Cause of Action

The first cause of action seeks a writ prohibiting respondents from: (1) imposing a stay on DCA summons no. 180121HR; (2) proceeding on a hearing on only a portion of the Revocation Petition without proving a violation of Administrative Code § 20-261 (d); and (3) issuing or complying with the October Decision because they were "actions in excess of jurisdiction and without statutory authorization" (NYSCEF Doc No. 3, ¶ 48). Respondents argue this cause of action should be dismissed because DCA withdrew prosecution of summons no. 180121HR, thereby rendering the request for a writ of prohibition moot. In addition, respondents contend that there is no merit to the assertion that Deputy Commissioner Burns and ALJ Spooner were without statutory or jurisdictional authority to hold proceedings on only a portion of the Revocation Petition. Petitioner, in turn, rejects respondents' contention that the cause of action is moot because issuing a writ prohibiting the complained of actions would restore the status quo before Deputy Commissioner Burns stayed the post-suspension hearing on summons no. 180121HR in the

Hearings Division (NYSCEF Doc No. 38, ¶ 64). He also argues that OATH failed to conduct the hearing, as requires, by statute prior to the suspension of his pedicab driver license (*id.*, ¶ 66).

CPLR 7803 (2) allows for judicial review where "the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." A writ of prohibition effectively restrains an "inferior court from exceeding its authorized powers in a proceeding over which it has jurisdiction" (*Matter of Lee v County Ct. of Erie County*, 27 NY2d 432, 437 [1971], *cert denied* 404 US 823 [1971] [internal quotation marks and citations omitted]). "Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" (*Matter of Vance v Roberts*, 176 AD3d 492, 493-494 [1st Dept 2019] [internal quotation marks and citation omitted]). Prohibition is meant to "prevent an arrogation of power in violation of a person's rights, particularly constitutional rights" (*Matter of Nicholson v State Commn. on Jud. Conduct*, 50 NY2d 597, 606 [1980]). As such, courts grant this "extraordinary" relief only in limited circumstances (*Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 361 [2008]). Therefore, "a petitioner seeking a writ of prohibition must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity, (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction and (3) petitioner has a clear legal right to the relief requested" (*id.* at 361-362, citing *Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786 [1993]).

Even if a petitioner successfully establishes each element, an award of relief is discretionary. In exercising its discretion, the court must weigh the following:

> "[T]he gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish 'a more complete and

> efficacious remedy ... even though other methods of redress are technically available'"

(*Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986] [internal quotation marks and citations omitted]).

Insofar as the first cause of action seeks prohibition related to summons no. 180121HR, respondents have demonstrated that petitioner's request for relief is moot. "[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729 [2004] [internal quotation marks and citation omitted]). An exception to the mootness doctrine exists where there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Here, the relief sought on summons no. 180121HR is moot because DCA withdrew the summons, and petitioner concedes that DCA withdrew it (NYSCEF Doc No. 3, ¶ 23). Further, none of the exceptions described in *Matter of Hearst Corp.* apply because ALJ Spooner upheld DCA's decision to suspend petitioner's pedicab driver license. It is unlikely that respondents will seek to hold a second, post-suspension hearing.

As for petitioner's claim that OATH exceeded its jurisdiction, the argument is unpersuasive. Under New York City Charter § 1048 (1), OATH is charged with "conduct[ing] adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements." As of 2016, OATH hears all matters that DCA's own administrative tribunal previously adjudicated (NYSCEF Doc No. 17, affirmation

of petitioner's counsel, exhibit K [NY City Executive Order (de Blasio) No. 18] at 1). 48 RCNY 1-02, titled "Jurisdiction," also states that "[p]ursuant to Charter § 1049 (3), OATH's jurisdiction includes the authority to render any ruling or order necessary and appropriate under applicable law or agency rule for the just and efficient adjudication of cases." Thus, OATH was empowered to adjudicate and dispose of the post-suspension hearing.

Moreover, respondents have shown that prohibition is not the appropriate remedy in this instance. Petitioner's complaints primarily concern whether it was procedurally improper for OATH to transfer the post-suspension hearing from the Hearings Division to the Trials Division, but "constitutional issues involving errors of substantive or procedural law are not cognizable by way of prohibition" (*La Rocca v Lane*, 37 NY2d 575, 580 [1975], *cert denied* 424 US 968 [1976]; *Matter of Nicholson*, 50 NY2d at 606). Indeed, prohibition lies where the excess of power involves "an unlawful use or abuse of the entire action or proceeding" as opposed to "an unlawful procedure or error in the action or proceeding itself related to the proper purpose of the action or proceeding" (*Matter of State of New York v King*, 36 NY2d 59, 64 [1975]). Petitioner's allegation that the post-suspension hearing was not properly noticed for the Trials Division implicates a violation of a lawful procedure for which relief is available under CPLR 7803 (3) (*see California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 152 [1st Dept 2012]). The language in the October Decision also appears to foreclose the possibility of an administrative review or appeal, and petitioner admits that the Revocation Petition has been adjudicated to a final determination (NYSCEF Doc No. 38, ¶ 7). Therefore, petitioner has an adequate remedy at law.[6]

Further, contrary to petitioner's assertion, Administrative Code § 20-261 (d) does not require OATH to hold a post-suspension hearing before DCA may suspend a pedicab driver

[6] Petitioner also argues that the first, second and third causes of action should not be dismissed based on his failure to exhaust his administrative remedies, but respondents did not move on this ground.

license. The Administrative Code "has the force of a statute in the City of New York" (*Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 899 n [1991]). To that end, the court's primary focus on statutory interpretation is to give effect to legislative intent based on the text of the statute (*see Matter of Avella v City of New York*, 29 NY3d 425, 434 [2017]). The court must construe clear and unambiguous statutory language according to its plain meaning (*Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336, 348 [2019], *rearg denied* 33 NY3d 1130 [2019]). A plain reading of Administrative Code § 20-261 (d) indicates that a post-suspension hearing shall occur after DCA initially suspends a license. Accordingly, that part of respondents' motion to dismiss the first cause of action is granted, and the first cause of action is dismissed.

B. The Second Cause of Action

The second cause of action seeks an order annulling the October Decision "on the grounds that the order is a violation of statutory law, unconstitutional, arbitrary and capricious, and an abuse of discretion" (NYSCEF Doc No. 3, ¶ 62). Respondents posit that the decision was reasonable, rational, neither arbitrary nor capricious or an abuse of discretion, or should be transferred to the Appellate Division, First Department because of a substantial evidence issue. Petitioner contends that ALJ Spooner made findings of fact in violation of New York City Charter § 1046 (c) (3), and challenges the basis for the determination.

CPLR 7803 (3) provides for judicial review where "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline impose." The standard of review is "an extremely deferential one" (*Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]), as the "courts must defer to an administrative agency's rational

interpretation of its own regulations in its area of expertise" (*Matter of Peckham, v Calogero*, 12 NY3d 424, 431 [2009]). An administrative determination is arbitrary or capricious when it is taken "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Where a "determination [was] made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law," judicial review of an administrative determination is made under the substantial evidence standard (CPLR 7803 [4]). Under this standard of analysis, "a determination is … supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179 [1978] [internal quotation marks and citation omitted]). As such, a substantial evidence question is implicated where the challenged agency determination is the result of a trial-type hearing (*see Matter of Rubenstein v Metropolitan Transp. Auth.*, 145 AD3d 453, 454 [1st Dept 2016] [declining to transfer a proceeding because the hearing underlying the respondents' determination was not transcribed or recorded and was not held before a hearing officer]; *Matter of Street Vendor Project v City of New York*, 43 AD3d 345, 346 [1st Dept 2007], *appeal dismissed* 9 NY3d 1001 [2007], *lv denied* 10 NY3d 709 [2008] [finding that the substantial evidence issue was not raised because the determination did not result from a trial-type, quasi-judicial hearing]). Where a substantial evidence question is implicated, CPLR 7804 (g) prescribes that the matter must be transferred to the appropriate appellate division.

The second cause of action raises a question of substantial evidence within the meaning of CPLR 7803 (4). First, the hearing before ALJ Spooner was quasi-judicial in nature. ALJ Spooner heard sworn testimony from Moye and Cardenas, Sergeant Rene Reid of Parks Enforcement, pedicab driver Koudaogo Eric Zoundi, and petitioner's expert, George Bliss (NYSCEF Doc No. 14 at 56, 189, 386, 418 and 434), and permitted cross-examination of those witnesses (NYSCEF Doc No. 14 at 96, 246, 393, 427 and 505). Second, the hearing was recorded and transcribed. Next, the hearing was mandated under Administrative Code § 20-261 (d). Lastly, the petition specifically challenges the merits of ALJ Spooner's determination based on the evidence from at the hearing.

ALJ Spooner's determination also did not contravene the New York City Charter § 1046 (3), as petitioner suggests. That section states, in part, that "[t]he hearing shall be transcribed or recorded and a copy of the transcript or record, or any part thereof, shall be made available to any party to the hearing upon request therefor." The three-day hearing before ALJ Spooner was recorded and transcribed, as evidenced by the 590-page transcript annexed to the petitioner's papers.

To the extent petitioner contends that he was precluded from offering constitutional defenses at the hearing, the transcript is replete with instances where he raised them[7] (NYSCEF Doc No. 14 at 5-6, 43, 50-52, 222-225, 340-346, 351-373). ALJ Spooner also allowed the parties submit post-hearing briefs at petitioner's request (*id.* at 343). Petitioner subsequently withdrew his untimely post-hearing submission (NYSCEF Doc No. 15 at 4). Thus, it appears that petitioner no longer wished to pursue these defenses before OATH.

[7] Petitioner challenged the burden of proof applied at the hearing, the adequacy of the hearing notice, and the standard to be applied for the post-suspension hearing under Administrative Code § 20-261 (d).

Petitioner has not set forth any other ground that would bar a transfer of this proceeding. Because the second cause of action raises a substantial evidence question within the meaning of CPLR 7803 (4), this part of the petition must be severed and transferred to the Appellate Division, First Department.

C. The Third Cause of Action

The third cause of action seeks a writ prohibiting Deputy Commissioner Burns and ALJ Spooner from exercising jurisdiction over the Revocation Petition because it charges petitioner with misdemeanor violations of 56 RCNY 1-05 (i) (8), 1-04 (l) (8) and (l) (9) and Administrative Code § 18-146 (c) (1). Respondents urge the court to dismiss this cause of action because petitioner was charged civilly, not criminally.

The third cause of action fails to plead a claim for prohibition because petitioner was not charged with a criminal misdemeanor.

56 RCNY 1-05 states, in relevant part, that a "[v]iolation of any paragraph or subparagraph of this section shall subject the violator to a civil penalty as specified in the Department's penalty schedule," although a violation may also be classified as a misdemeanor under the Administrative Code. 56 RCNY 1-05 (i) (8), which regulates the use of bicycles and pedicabs within City parks, does not specify that a breach of that section constitutes a misdemeanor. Therefore, petitioner's contention that a violation of 56 RCNY 1-05 (i) (8) is a misdemeanor is unsupported.

56 RCNY 1-04 contains similar language, and states that a violation is subject to a civil penalty unless the Administrative Code classifies a specific paragraph as a misdemeanor. The provisions of 56 RCNY 1-04 relevant to this proceeding state:

> "(l) Disorderly behavior. No person shall engage in disorderly behavior in a park. Disorderly behavior includes violating the following rules:
>
> ...

> (8) No person shall engage in a course of conduct or commit acts that endanger the safety of others.
>
> (9) No person shall operate a bicycle, motor vehicle, or similar vehicle in a manner that endangers any other person or property. Violation of this paragraph constitutes a misdemeanor."

According to Park's penalty schedule, a violation of 56 RCNY 1-04 (l) (8) will result in a default civil penalty of $250 or $375 recoverable in a proceeding before OATH (*see* 56 RCNY 1-07 [a] and [c]). A violation of 56 RCNY 1-04 (l) (9) will result in a default civil penalty of $500 or $750 (*see* 56 RCNY 1-07 [c]). The schedule also states, in pertinent part, that "[v]iolations marked with an asterisk are also misdemeanors prohibited by § 18-146 or § 18-147 of the New York City Administrative Code and are subject to additional penalties" (56 RCNY 1-07 [b]). Importantly, 56 RCNY 1-04 (l) (8) is not marked with an asterisk. Thus, counter to petitioner's contention, a violation of 56 RCNY 1-04 (l) (8) is not a misdemeanor. However, 56 RCNY 1-04 (l) (9) is marked with an asterisk (*see* 56 RCNY 1-04 [c]), making a breach of this section a misdemeanor under Administrative Code § 18-146 (a).[8]

Petitioner, though, ignores the balance of 56 RCNY 1-07 (b) stating that a "violation of the rules of this chapter shall also constitute an offense (classified as a 'violation' under the Penal Law), which may be punished in a separate court proceeding." That language is followed immediately by the sentence, "[v]iolations marked with an asterisk are also misdemeanors." The reference to a separate court proceeding clearly implies that the prosecution of a Penal Law violation or misdemeanor shall take place in a court outside of OATH. In that regard, had respondents charged petitioner with a misdemeanor in a proceeding before OATH, they would have exceeded their jurisdiction in doing so (*see* NY Const, article VI, § 15 [c]; NY City Crim Ct

[8] Administrative Code § 18-147 pertains to the destruction of trees and public property and is inapplicable.

Act § 31), but that is not the case here. The summonses seek only civil monetary penalties in accordance with Parks' penalty schedule. The same rationale applies to the alleged violation of Administrative Code § 18-146 (c) (1), for which a breach subjects the violator to a default civil penalty of $250 or $375 recoverable in OATH (*see* 56 RCNY 1-07 [c]). If an offender is charged with a misdemeanor (*see* Administrative Code § 18-146 [a]), then prosecution shall take place in a separate court proceeding. Moreover, to prosecute this section as a criminal violation or misdemeanor would require proof beyond a reasonable doubt.

Further, regarding DCA's license enforcement powers, "[t]he Administrative Code and [New York City] Charter provide for multiple avenues of enforcement of the provisions of Title 20" (*New York Professional Process Servers Assn. v City of New York*, 2014 WL 4160127, *6, 2014 US Dist LEXIS 115137, *14 [SD NY, Aug. 18, 2014, No. 14 Civ 1266, Cote, J.], *affd sub nom. Clarke v de Blasio*, 604 Fed Appx 31 [2d Cir 2015] [discussing process server licenses]). Significantly, Administrative Code § 20-106 (a) authorizes the imposition of criminal penalties against a licensee for a violation of a rule or regulation regulating that license, but the section "does not require ... violations to be adjudicated in criminal court" (*id.*). As noted above, OATH is charged with adjudicating all matters previously heard before DCA's administrative tribunal (*see* NY City Charter § 1048 [1]; NY City Executive Order [de Blasio] No. 18). Therefore, respondents did not act in excess of jurisdiction. Accordingly, that part of respondents' motion to dismiss the third cause of action is granted, and the third cause of action is dismissed.

D. The Fourth Cause of Action

The fourth cause of action seeks a judgment declaring that Parks summonses nos. 0197 595 741, 0197 595 750, 0197 598 491, and 0197 598 500 contain false information and an order enjoining respondents from introducing them before Hearing Officer Morrick in upcoming

proceedings pertaining to his pedicab driver license and pedicab business license. Respondents posit that the petition fails to plead a claim for redress under 42 USC § 1983 because it does not identify a violation of a specific constitutional right. They claim this cause of action is premature because petitioner has not exhausted his administrative remedies. Petitioner, in response, argues that he seeks a declaratory judgment, not Article 78 relief. He also admits he has exhausted his administrative remedies because a hearing on the four Parks summonses was held January 18, 2019 (NYSCEF Doc No. 38, ¶ 72).

CPLR 7801 (1) partially states that a "proceeding [brought] under this article shall not be used to challenge a determination … which is not final or can be adequately reviewed by appeal to a court or some other body or officer." Hence, an agency's determination must be final and binding upon the petitioner before the petitioner may bring an Article 78 proceeding (*see Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938, 939 [2017]). While the failure to exhaust the available administrative remedies ordinarily precludes a party from seeking judicial review under Article 78, the fourth cause of action seeks a declaratory judgment and injunctive relief, neither of which are remedies generally available in an Article 78 proceeding.

Nevertheless, respondents have demonstrated that the petition fails to state a claim for declaratory relief. "[A] declaratory judgment is a discretionary remedy" (*Bower & Gardner v Evans*, 60 NY2d 781, 782 [1983]). An award of declaratory relief requires a justiciable controversy (*see* CPLR 3001). The party seeking a declaratory judgment must also "have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to" that party (*American Ins. Assoc. v Chu*, 64 NY2d 379, 383 [1985], *cert denied* 474 US 803 [1985]; *Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Vehs.*, 127 AD3d 1049, 1049 [2d Dept 2015] [stating

that a declaratory relief cannot be based on a hypothetical injury]). Here, petitioner has admitted that Parks withdrew summons no. 0197 595 741 on December 31, 2018, and petitioner and respondents admit that OATH dismissed four of the Parks summonses on January 18, 2019 for improper service (NYSCEF Doc No. 38, ¶ 73; NYSCEF Doc No. 34, ¶ 33). Thus, there is no justiciable controversy on which the court may render a declaration. While petitioner states that Parks issued new summonses on January 25, 2019 (NYSCEF Doc No. 38, ¶ 75), those new summonses are not the subject of the present proceeding. Thus, that part of the motion to dismiss the fourth cause of action is granted, and the fourth cause of action is dismissed.

E. The Fifth Cause of Action

The fifth cause of action, denominated the sixth cause of action, seeks a judgment declaring that misdemeanor violations of 56 RCNY 1-03 (c) (1) and 1-04 (l) (9) and any other instrument charging a misdemeanor must be brought in New York City Criminal Court, and that the failure to do so constitutes a violation of petitioner's constitutional rights. As with the fourth cause of action, respondents argue that petitioner has not properly pled a claim under 42 USC § 1983. Petitioner does not address the dismissal of this cause of action in his opposition.

42 USC § 1983 partially states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

It is well settled that 42 USC § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States

Constitution and federal statutes that it describes" (*Baker v McCollan*, 443 US 137, 145 n3 [1979]). Therefore, to prevail on section 1983 claim, a party must demonstrate that an individual, acting under color of law, violated that party's constitutional or statutory rights (see *Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011]).

There is no dispute that respondents were "persons" acting under color of law (*see Monell v New York City Dept. of Social Servs.*, 436 US 658, 700-701 [1978]). However, the fifth cause of action fails to state a claim because respondents have not charged petitioner with a criminal misdemeanor, as discussed *supra*.[9] Consequently, petitioner has not adequately pled a deprivation of his constitutional rights. Additionally, because respondents are not pursuing criminal misdemeanor sanctions, there is no justiciable controversy on which the court may issue declaratory relief, and the court declines to issue what would amount to an advisory opinion (*see Combustion Eng'g, Inc. v Travelers Indem. Co.*, 75 AD2d 777, 778-779 [1st Dept 1980], *affd* 53 NY2d 875 [1981]). Accordingly, that part of the motion to dismiss the fifth cause of action is granted, and the fifth cause of action is dismissed.

F. The Sixth and Seventh Causes of Action

The sixth cause of action, denominated the seventh cause of action, seeks a judgment declaring that DCA cannot rely on Parks summonses nos. 0197 595 741, 0197 595 750, 0197 598 491, and 0197 598 500 as grounds for the continued suspension of petitioner's pedicab driver license because they purportedly contain false sworn statements. Petitioner alleges that Administrative Code § 20-261 (d), as applied, is an unconstitutional violation of the due process

[9] 56 RCNY 1-03 (c) (1) discusses the failure, neglect or refusal to comply with the lawful direction or command of a Parks Enforcement Patrol Division employee. A violation subjects the offender to a civil penalty of $250 or $375 or prosecution for a misdemeanor in a separate court proceeding (*see* 56 RCNY 1-07 [b], [c]).

clauses in the US Constitution, New York State Constitution, and New York City Charter. The seventh cause of action, denominated a second "sixth" cause of action, seeks a judgment and injunction prohibiting respondents from introducing DCA summonses nos. 180120HR and 180121HR and the Revocation Petition before Hearing Officer Morrick at future appearances because the documents contain false sworn statements. The petition alleges that such conduct "was wanton, outrageous, and malicious, was intended to injure Plaintiff and was done with reckless indifference to Plaintiff's protected civil rights" (NYSCEF Doc No. 3, ¶¶ 120 and 124).

Respondents argue that petitioner failed to plead a 42 USC § 1983 claim, and in any event, the immediate and continued suspension of petitioner's pedicab driver license comports with constitutional due process. In response, petitioner appears to challenge DCA's procedure in suspending petitioner's pedicab driver license and asserts that respondents' reliance on these allegedly false statements is a violation of his constitutional rights.

The sixth and seventh causes of action fail to state a claim under § 1983. The US Constitution, 5th Amendment reads, in part, that no person shall be "deprived of life, liberty, or property, without due process of law" (*see also* NY Const, art I, § 6 [stating that "[n]o person shall be deprived of life, liberty or property without due process of law"). The US Constitution, 14th Amendment, § 1 also provides that no state shall "deprive any person of life, liberty, or property, without due process of law." While "the deferential standard of review accorded administrative determinations in article 78 proceedings presupposes administrative procedures that conform with due process requirements" (*People v David W.*, 95 NY2d 130, 139-140 [2000]), the allegations herein implicate a violation of procedural, as opposed to substantive, due process. Thus, the court must determine whether the procedures in place for the post-suspension hearing comports with procedural due process.

It is well settled that "'[o]nce licenses are issued ... their continued possession may become essential in the pursuit of a livelihood ... In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment'" (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 273-274 [1st Dept 2010], quoting *Bell v Burson*, 402 US 535, 539 [1971]). "[D]ue process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand" (*LaRossa, Axenfeld & Mitchell v Abrams*, 62 NY2d 583, 588 [1984]). In assessing issues of procedural due process, the court must consider the following three factors enunciated in *Mathews v Eldridge* (424 US 319, 333 [1976]) (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 105 [2013]). They are "(1) the private interest of the litigant; (2) the risk of erroneous deprivation in the absence of substitute procedures; and (3) the State's interest in avoiding additional procedures" (*id.* at 105). As applied herein, petitioner has not adequately pled how the procedures in place for holding a prompt post-suspension hearing failed to satisfy the factors set forth in *Mathews*, and the court fails to perceive a constitutional deficiency with respect to the process afforded to him.

"The gravamen of the cause of action pursuant to 42 USC § 1983 is deprivation of property without due process of law" (*Bower Assoc. v Town of Pleasant Val.*, 304 AD2d 259, 262 [2d Dept 2003], *affd* 2 NY3d 617 [2004]). Petitioner has a valuable property interest in his pedicab driver license. Therefore, as to the first *Mathews* factor, the private interest of suspending petitioner's license is high (*see Matter of Donmez v New York City Dept. of Consumer Affairs*, 2014 NY Slip Op 30577[U], *5 [Sup Ct, NY County 2014], *appeal dismissed* 139 AD3d 595 [1st Dept 2016], *appeal dismissed* 28 NY3d 1049 [2016], *cert denied* 138 S Ct 467 [2017]). The second and third factors, though, weigh in respondents' favor.

The second *Mathews* factor focuses on the risk to petitioner's private interest from respondent's procedures. Petitioner essentially complains that he should have been given formal notice that the post-suspension hearing would be held in OATH's Trials Division instead of the Hearings Division. This argument cannot is baseless. The consequences from an administrative proceeding are not as grave as those in a criminal proceeding (*see Matter of Block v Ambach*, 73 NY2d 323, 332-333 [1989]). Thus, the charges in an administrative proceeding need only be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him and to allow for the preparation of an adequate defense" (*id.* at 333 [internal citation omitted]; *Matter of New York Apple Tours v Hoffman*, 278 AD2d 70, 72 [1st Dept 2000], *appeals dismissed and lv denied* 96 NY2d 729 [2001] [stating that the notice must particularize the alleged misconduct and must be given in advance of a proceeding so as to allow a party sufficient time to prepare]; *Matter of Steiner v DeBuono*, 239 AD2d 708, 710 [3d Dept 1997], *appeal denied* 90 NY2d 808 [1997] [declining to import criminal law requirements into administrative proceedings because "the potential loss of license does not rise to the risk of loss of life or liberty ever present in criminal proceedings"]).

Respondents notified petitioner that he was to appear at OATH for a post-suspension hearing on summons no. 180121HR, and the summons and the letter conveying DCA's decision to suspend his license informed him of the basis for the hearing. The hearing transcript reveals that petitioner learned at a conference, held one month earlier, that the post-suspension hearing would be before ALJ Spooner (NYSCEF Doc No. 14 at 4). Although petitioner describes the hearing as an "inquisition" (NYSCEF Doc No. 38, ¶ 23), he ably cross-examined respondents' witnesses and produced three witnesses of his own (*see Matter of Ammar v Olatoye*, 136 AD3d 585, 586 [1st Dept 2016] [concluding that there was no violation of the petitioner's due process

rights because the petitioner "was able to testify and to present evidence, which meets the requirements of due process and substantial fairness"]).

Further, Administrative Code § 20-261 (d) mandates a prompt post-suspension hearing. It has been held that a 30-day delay of a hearing and a 90-day delay of a decision is not unconstitutional (*see Federal Deposit Ins. Corp. v Mallen*, 486 US 230, 242 [1988]). Here, the summons scheduled the post-suspension hearing for May 24, 2018, less than two weeks after DCA's letter informed petitioner that his license had been suspended. ALJ Spooner commenced the hearing on August 29, 2018. While petitioner complains that OATH unnecessarily delayed holding the hearing, the delays are attributed, in part, to petitioner's requests, as noted in the October Decision (NYSCEF Doc No. 15 at 5).

Petitioner's complaint that the post-suspension hearing was improperly held as part of the license revocation proceeding in OATH's Trials Division is unpersuasive. While the hearing had been scheduled originally in the Hearings Division, petitioner's objection to the transfer of the hearing to the Trials Division seemingly elevates form over substance. Petitioner was aware that the suspension of his license was an allegation in the Revocation Petition, and he was able to contest the matter by examining and cross-examining witnesses (*see Matter of New York Apple Tours*, 278 AD2d at 72 [concluding that proper notice was given to the petitioner of a suspension hearing even though "the notice was given in the context of a license revocation hearing that was already in progress"]). Petitioner has not suggested what other alternative process, apart from holding a prompt post-suspension hearing, as was the case here, should have been instituted. Accordingly, there was no erroneous risk of a deprivation of life, liberty or property in the absence of a substitute process.

As to the third *Mathews* factor, respondents' interest in ensuring public safety is significant and compelling (*see Matter of New York Apple Tours*, 278 AD2d at 74 [upholding respondent DCA's decision to suspend the petitioner's tour bus license because of numerous violations that implicated public safety]). Language in Administrative Code § 20-261 (d) referring to the commissioner's authority to suspend a pedicab driver license if the continued possession of the license "would pose an exigent danger to the public" bolsters this factor. As explained earlier, petitioner received notice and an opportunity to be heard on whether the suspension should continue. Lastly, constitutional due process was satisfied "[b]ecause New York provides a meaningful post-deprivation remedy" (*Harris v Mills*, 572 F3d 66, 75 [2d Cir 2009] [internal quotation marks and citation omitted]), and petitioner has availed himself of that remedy by instituting this Article 78 special proceeding (*see Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F3d 877, 881 [2d Cir 1996], *cert dismissed* 521 US 1140 [1997]).

The court also notes that the sixth and seventh causes of action fail to allege the existence of an official municipal policy or widespread practice or custom that deprived petitioner of his constitutional rights (*see De Lourdes Torres v Jones*, 26 NY3d 742, 768 [2016]). To the extent he seeks punitive damages, such damages cannot be assessed against a municipality (*see Sharapata v Town of Islip*, 56 NY2d 332, 339 [1982]). Thus, the sixth and seventh causes of action fail to plead a claim under 42 USC § 1983 and fail to plead allegations sufficient to infer that Administrative Code § 20-261 (d), as applied, is unconstitutional.

The sixth and seventh causes of action also fail to state a claim for declaratory relief. "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action" (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). Petitioner has an available remedy, namely an Article 78

proceeding, to challenge Hearing Officer Morrick's decision to consider respondents' submissions once he renders a determination. Moreover, petitioner's request precluding DCA from potentially introducing documents at a future hearing pleads a purely hypothetical injury (*see Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1022, 1024 [2d Dept 2018] [declining to issue a declaratory judgment based on hearsay as to possible future events]). Accordingly, the motion to dismiss the sixth and seventh causes of action is granted, and the sixth and seventh causes of action are dismissed.

G. Injunctive Relief

The petition requests a temporary and a permanent injunction and a stay. This court has already denied petitioner's request for temporary injunctive relief (NYSCEF Doc No. 39).

A cause of action for a preliminary injunction requires a party to show that it has "no adequate legal remedy, will suffer irreparable injury if the injunction is not granted, have a clear right to the ultimate relief, and that a balancing of the equities favors their position" (*Bashein v Landau*, 96 AD2d 479, 479 [1st Dept 1983]). The allegations in the petition are insufficient to warrant the extraordinary relief of a preliminary injunction because an Article 78 proceeding is available as a legal remedy. Therefore, the court denies petitioner's request for a preliminary injunction and stay.

H. Leave to Replead

The court also denies petitioner's request for leave to replead the 42 USC § 1983 claims (*see Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]; *Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405, 407 [1st Dept 2007]). The standard governing a request for leave to replead is the same standard applied to a motion for leave to amend a complaint (*see Chaikin v Karipas*, 162 AD3d 842, 844 [2d Dept 2018]). Not only did

petitioner fails to submit a proposed pleading, he also fails to set forth any new factual allegations sufficient to cure the pleading deficiencies.

Accordingly, it is

ORDERED that respondents' motion to dismiss the petition is granted to the extent of dismissing the first, third, fourth, fifth, sixth and seventh causes of action, and the first, third, fourth, fifth, sixth and seventh causes of action are dismissed; and it is further

ORDERED that, pursuant to CPLR 7804 (g), the second cause of action by petitioner seeking to vacate and annul a determination by respondents is severed, and respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. This cause of action involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERD that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: 12-17-2019

ENTER:

J.S.C.
HON. MELISSA A. CRANE
J.S.C.