

**Matter of Burrell v City of New York Dept. of
Consumer Affairs**

2011 NY Slip Op 30284(U)

January 19, 2011

Sup Ct, NY County

Docket Number: 109317/2010

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ANIL C. SINGH

PART 14

Index Number : 109317/2010
BURRELL, DERRICK
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 19, 2011



HON. ANIL C. SINGH J.S.C.

SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

-----X
In the Matter of the Application of
DERRICK BURRELL and D&E SERVICES, LLC,

DECISION AND
ORDER

Petitioners,

Index No.
109317/2010

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

CITY OF NEW YORK DEPARTMENT OF
CONSUMER AFFAIRS,

Respondent.

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH, J.:

Papers	Numbered
Notice of Motion.....	1
Cross-Motion.....	2
Answering Affidavit.....	3
Reply.....	4
Memorandum of Law.....	5

In this Article 78 proceeding petitioners Derrick Burrell and D&E Services, LLC, challenge a determination made by the City of New York Department of Consumer Affairs ("DCA") that petitioners had abandoned a job and failed to complete the work in a workmanlike fashion and that assessed treble damages

against petitioners in the amount of \$574,610.10 and suspended petitioners' licenses. Respondent DCA opposes and cross-moves to dismiss the petition on grounds of res judicata. Petitioners oppose the cross-motion.

Petitioner Derrick Burrell was the holder of a home improvement salesperson license. Petitioner D&E Properties and Management Services, LLC was the holder of a home improvement contractor license. In November 2008, DCA issued a Notice of Hearing to petitioners alleging violations of the New York City Administrative Code and Rules of the City of New York regarding standards for integrity, honesty and fair dealing required of licensees.

Following a hearing, Administrative Law Judge James L. Plotnik issued a decision and order dated December 23, 2009, finding petitioners guilty of some of the counts and dismissing others. The decision and order required the payment of \$6,400 in fines and restitution in the amount of \$574,610.10 based on a treble damage provision in the contract between the consumer and petitioners.

On March 23, 2010, DCA denied petitioners' appeal because they "did not pay the fine ordered by the Decision and did not deposit with the Department the restitution awarded to the consumer" (Notice of Cross-Motion to Dismiss, exhibit D).

Subsequently, petitioners commenced an Article 78 proceeding by order to

show cause seeking to compel DCA to consider petitioners' administrative appeal without pre-payment of the fine and restitution; an injunction preventing the enforcement of fines, judgments, and license revocations pending an administrative appeal; and alleging that the manner in which DCA conducted the administrative appeal, and DCA's requirement that petitioners pay the fine and restitution prior to administrative appeal violate the law and petitioners' constitutional rights.

On March 23, 2010, the parties appeared before Justice Lucy Billings and negotiated a settlement and discontinuance of the proceeding. The stipulation was placed on the record. A copy of the transcript is attached to the Notice of Cross-Motion to Dismiss as exhibit F.

The terms of the stipulation provided that the Article 78 proceeding was discontinued with prejudice, and that upon receipt of \$50,000 in cash or bond, DCA's March 23, 2010 decision denying the appeal would be vacated, DCA would hear petitioners' administrative appeal of the December 23, 2009 decision and order, and that petitioners' licenses would be reinstated pending the administrative appeal. Petitioners were given 15 days to provide the cash or bond. The stipulation provided further that if petitioners failed to provide the cash or bond within the time limit, that DCA would not hear petitioners' administrative

appeal and that the proceeding would remain discontinued with prejudice.

Justice Billings issued an order dated March 23, 2010, stating that the proceeding against the City was discontinued pursuant to the stipulation.

Petitioners failed to pay the cash or bond to DCA.

Subsequently, petitioners commenced the instant Article 78 proceeding seeking to vacate the March 23, 2010 denial of their administrative appeal for non-payment of fines and restitution.

Discussion

“A stipulation of discontinuance ‘with prejudice’ is subject to the doctrine of res judicata” (Greenstone/Fontana Corp. v. Neil Feldstein, 72 A.D.3d 890, 893 [2d Dep’t 2010] (citation omitted)). “Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding” (Id.).

In the instant matter, the parties entered into a stipulation in open court in which they agreed to discontinue the proceeding with prejudice (Notice of Cross-Motion to Dismiss, Exhibit F, p. 6, lines 9-10). The stipulation provides further that

the agreement that petitioner may work pending the administrative appeal and that he may prosecute or pursue his administrative appeal are conditioned upon receipt by DCA of the bond and or \$50,000 bond or cash payment, so only upon receipt of that within the 15 days. I'd like to further clarify that if we do not receive that bond or cash within 15 days, that the case continues to be discontinued with prejudice.

(Id., lines 9-19).

As we noted above, petitioners failed to provide the bond or cash payment pursuant to the stipulation.

After careful consideration, the court finds that the instant petition seeks, in large measure, the same relief sought in the prior proceeding. Accordingly, we find further that the instant proceeding is barred by the doctrine of res judicata in light of the unambiguous language in the stipulation that the prior proceeding was discontinued with prejudice.

For the above reasons, the cross-motion to dismiss the instant proceeding is hereby granted, and the petition is dismissed with prejudice.

The foregoing constitutes the decision and order of the court.

Date: January 19, 2011
New York, New York

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE



Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**