

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of ROBERTA REARDON,
Commissioner of the New York State Department of Labor,

Petitioner,

DECISION and ORDER
Index No.: 2643-17
RJI No.: 01-17-ST8693

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

-against-

GLOBAL CASH CARD, INC. and NEW YORK STATE
INDUSTRIAL BOARD OF APPEALS,

Respondent(s).

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:

Barbara D. Underwood, Attorney General of the State of New York
Kevin M. Lynch, Assistant Attorney General, of Counsel
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Gleason, Dunn, Walsh & O'Shea
Thomas F. Gleason, Esq.
Attorney for Respondent
NYS Industrial Board of Appeals
40 Beaver Street
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HON. W. BROOKS DeBOW, Acting Justice:

Respondent Global Cash Card, Inc. moves for leave to renew and/or reargue its opposition to the petition in this matter. Petitioner opposes the motion. Respondent NYS Industrial Board of Appeals (IBA) takes no position on the motion.¹

¹ Oral argument on the motion was heard on September 25, 2018.

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The Decision, Order and Judgment of this Court, dated May 23, 2018 granted the instant petition pursuant to Article 78 of the CPLR and annulled a determination and decision by the IBA invalidating certain regulations promulgated by petitioner which established rules for payment of employees by payroll debit cards. The successful administrative challenge to the regulations had been brought by respondent Global Cash Card. Two preliminary issues were presented on the petition – petitioner’s challenge to Global Cash Card’s standing to bring the administrative challenge, and Global Cash Card’s motion to correct the record and strike documents that were submitted by petitioner in support of its petition that were not part of the administrative record.

Global Cash Card’s motion was brought on by Order to Show Cause, which established a briefing schedule for the motion, adjourned the return date of the petition pending a determination of the motion, and set forth a schedule for submission of papers on the petition (see Morgen Affidavit, Exhibit D). Upon review of the record upon consideration of the motion to correct the record and strike certain material, it was apparent that whether Global Cash Card had standing to challenge petitioner’s promulgated regulations was a predicate issue, for if it was not a proper party to the administrative and judicial proceedings, its motion to strike documents from the record would be moot. By order dated October 26, 2018, the Court held in abeyance decision on Global Cash Card’s motion to strike, and provided the parties periods within which to submit memoranda on the issue of Global Cash Card’s standing, and directed “that respondents Global Cash Card, Inc. and the New York State Industrial Board of Appeals may, within 35 days of the date of filing of this Order, file and serve their verified answers to the petition.” The order did not address respondents’ submission of memoranda responsive to the remainder of the petition, and respondents’ answers were filed, unaccompanied by memoranda of law. This Court thereafter rendered judgment granting

the petition.

A motion for leave to reargue is addressed to the discretion of the Court, and such a motion “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221 [d] [2]; see Peak v Northway Travel Trailers, 260 AD2d 840, 842 [3d Dept 1999]; Schneider v Solowey, 141 AD2d 813 [2d Dept 1988]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). In support of that part of the motion that seeks to reargue its opposition to the petition, Global Cash Card asserts that the combined effect of this Court’s order directing briefing on the standing issue along with the prior Order to Show Cause set a briefing schedule that did not permit Global Cash Card the opportunity to brief its opposition to the substance of the petition. Global Cash Card specifically refers to that part of its answer that references its “forthcoming memorandum of law” (Morgen Affidavit, Exhibit F [Verified Answer, sworn to December 7, 2017, ¶ Seventh). Regardless of whether the Court overlooked Global Cash Card’s intention to submit a memorandum of law at some future point in time, the Court acknowledges that respondent Global Cash Card was not expressly directed to file a memorandum of law and that its scheduling order could fairly be interpreted as requiring submission only on the issue of standing, and notions of fairness guide the Court to exercise its discretion to grant the motion to reargue the merits of the petition. Petitioner’s arguments in opposition to the motion to reargue – that reargument would be futile and that judicial resources would be best served by allowing the direct appeal of the matter to proceed – do not persuade the Court otherwise.

Turning to that part of the motion seeking renewal, such a request must be based on “new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e]

[2]; see Alexy v Stein, 16 AD3d 989, 990 [3d Dept 2005], lv dismissed in part, denied in part 5 NY3d 755 [2005]; Matter of Weinberg, 132 AD2d 190 [1st Dept 1987], lv dismissed 71 NY2d 994 [1988]), and the party seeking permission to renew must present a “reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]; see Bansbach v Zinn, 20 AD3d 629, 630 [3d Dept 2005]). This branch of Global Cash Card’s motion is addressed to that part of the Court’s Decision, Order and Judgment that found that petitioner’s revocation of the entirety of Part 192 of 12 NYCRR was arbitrary and capricious because the Part addresses multiple “Methods of Payment of Wages,” not just the payroll debit card provisions that were challenged in the administrative proceeding. Global Cash Card seeks to make part of the record in this proceeding a notification of decision that was posted on respondent IBA’s website that summarized the Board’s challenged decision as “[p]ayroll card regulations revoked because Commissioner of Labor exceeded scope of Labor Law Article 6 by regulating financial services products” (Morgen Affidavit, Exhibit I [February 2017]). Permission to renew will not be granted, for the reasons that follow.

Assuming without deciding that the summary that is posted on respondent IBA’s public website clarifies the breadth of the Board’s decision, Global Cash Card offers no support for its implicit and necessary suggestion that the website summary has the legal effect of correcting or modifying the plain language of a decision of the IBA after the completion of administrative review, and thus, respondent has not demonstrated that the website summary would change the prior decision, which interpreted the scope of the plain language of the IBA’s decision. Further, respondent has offered no reasonable justification for not offering the website summary at an earlier time. In particular, the Court is unpersuaded that the orders permitted Global Cash Card to submit “additional evidence” (Morgen Affidavit, ¶ 29) in this Article 78 proceeding.

Accordingly, it is

ORDERED, that respondent Global Cash Card's motion is GRANTED IN PART to the extent that permission is granted to reargue the prior order of this Court, dated May 23, 2018, and it is further

ORDERED, that the Memorandum of Law of respondent Global Cash Card in Support of its Motion for Leave to Renew and/or to Reargue Its Opposition to the Petition, filed July 12, 2018, shall be considered upon reargument, and it is further

ORDERED, that petitioner Reardon may file and serve a reply memorandum of law not later than seven (7) days after the date of filing of this Decision and Order, and it is further

ORDERED, that respondent Global Cash Card's motion is DENIED in all other respects.

Dated: Saratoga Springs, New York
October 15, 2018



W. Brooks DeBow, Acting Supreme Court Justice

Papers considered:

- (1) Notice of Motion for Leave to Renew and/or Reargue, dated July 12, 2018;
- (2) Affidavit of David B. Morgen, Esq. In Support of Motion for Leave to Renew and/or Reargue Opposition to the Petition, sworn to July 12, 2018, with Exhibits A-J;
- (3) Respondent Global Cash Card, Inc.'s Memorandum of Law in Support of its Motion for Leave to Renew and/or to Reargue Its Opposition to the Petition, dated July 12, 2018;
- (4) Affirmation of Kevin M. Lynch, AAG, in Opposition to Motion for Leave to Renew and/or Reargue, dated August 20, 2018, with Exhibits 1-4 with sub-exhibits;
- (5) Reply Affirmation of David B. Morgen, Esq., dated August 29, 2018.

Oral argument on Motion for Leave to Renew and/or Reargue Opposition to the Petition heard on September 25, 2018


D.B. 10/20/18
AB

