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| Matter of Freeman v Williams |
| 2007 NY Slip Op 31820(U) |
| June 25, 2007 |
| Supreme Court, Albany County |
| Docket Number: 0905506/2007 |
| Judge: George B. Ceresia |
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of the Application of
FREDERICK FREEMAN,

Petitioner,

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

-against-

M. WILLIAMS, Superintendant Willard
Drug Treatment Campus; R. Dennison,
Chairman; THOMAS M. POOLE,
Superintendent Five Points CF,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7438 Index No. 9055-06

Appearances: Frederick Freeman
Inmate No. 00-A-6178
Petitioner, Pro Se
Downstate Correctional Facility
P.O. Box F
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Fishkill, NY 12524-0445

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State of New York
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner is currently serving an indeterminate term of imprisonment of six to twelve years on a conviction of criminal sale of a controlled substance 3rd degree. He was released on parole on March 3, 2005. At some point parole was revoked. Thereafter, on August 11, 2006, the petitioner was restored to parole, subject to a requirement that he successfully complete the Willard Drug Treatment Campus Program (“Willard Program”). On December 19, 2006 the petitioner was removed from the Willard Program. As a consequence of the removal, he was served with a notice of violation of parole. He was then transferred to Five Points Correctional Facility.

The petitioner has commenced the instant proceeding to annul the determination revoking his parole by reason of his failure to complete the Willard Program. He also alleges that in August and September 2006 the respondent delayed his entry into the Willard Program by 31 days.

With respect to the latter issue, he indicates that he commenced a habeas corpus proceeding in Seneca County in which he alleged that he was not transferred to the Willard Program in a timely manner. Acting Supreme Court Justice Dennis F. Bender dismissed the petition on October 6, 2007. A copy of Judge Bender’s decision-order is annexed to the petition. The petitioner requests that this Court reverse the determination of Judge Bender.

Respondent has made a motion to dismiss the petition alleging that the petitioner

failed to exhaust his administrative remedies with regard to the parole revocation proceeding, and that the petition, as it relates to the issue concerning the timeliness of the petitioner's transfer to the Willard Program, is barred under principles of res judicata and collateral estoppel.

Turning first to that portion of the petition in which the petitioner seeks to annul the determination revoking his parole, the respondent has submitted evidence that the petitioner has not exhausted his administrative remedies. An administrative appeal was filed by the petitioner on March 26, 2007, after commencement of the instant proceeding. The appeal had not been perfected as of March 30, 2007.

It is well settled that before an issue may be considered in a CPLR Article 78 proceeding, it is necessary for the petitioner to exhaust all available administrative remedies (see Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375). This includes seeking review of all issues within the context of an administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [Third Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3rd Dept., 1996]). Moreover, the fact that an administrative appeal is perfected, or even decided, after commencement of the CPLR Article 78 proceeding does not operate to retroactively validate the petition and/or excuse the petitioner from first exhausting his administrative remedies (see Matter of Boddie v New York State Division of Parole, 293

AD2d 884, 884 [Third Dept., 2002]; Matter of Robinson v Bennett, 300 AD2d 715, 716 [3rd Dept., 2002]; People ex rel. Howe v Travis, 18 AD3d 1052, 1052 [3rd Dept., 2005]; Matter of West v McGinnis, 4 AD3d 654, at 655 [3rd Dept., 2004]). Under the circumstances, the Court finds that the petitioner has not exhausted his administrative remedies with regard to revocation of his parole, and that that portion of the petition must be dismissed.

Turning to the issue concerning the timeliness of petitioner's transfer to the Willard Program, the doctrine of res judicata "is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (Gramatan Home Investors Corp. v Lopez, 46 NY2d 481, 485). It gives "binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently re-litigating any questions that were necessarily decided therein" (Comi v Breslin & Breslin, 257 AD2d 754, 757 [Third Dept., 1999], quoting Watts v Swiss Bank Corp., 27 NY2d 270, 277, quoting Matter of Shea, 309 NY 605, 616). The doctrine operates to bar future litigation between the same parties of a cause of action based on the same transaction where the cause of action was raised or could have been raised in a prior proceeding (see, O'Brien v City of Syracuse, 54 NY2d 353, 357; Evergreen Bank v Dashnaw, 246 AD2d 814, 815 [3rd Dept., 1998]).

In a similar fashion, collateral estoppel or issue preclusion bars re-litigation of issues that have necessarily been determined in a prior proceeding (Gramatan Home v Lopez, 46

NY2d 481, 485 [1979]; McNeary v Senecal, 197 AD2d 835, 836 [Third Dept., 1993]; Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985] ; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Lake George Park Commission v Salvador, 245 AD2d 605, 607 [Third Dept., 1997], lv dismissed and lv denied 91 NY2d 939). As to parties in litigation and those in privity with them, a judgment on the merits is conclusive with regard to the issues decided (see, Gramatan Home v Lopez, supra; Ryan v New York Tel. Co., 62 NY2d 494 [1984], at p. 500). There are two general requirements for the doctrine of collateral estoppel to apply. The first is that the party seeking to benefit from the doctrine must demonstrate that the identical issue was necessarily decided in the prior action and is decisive in the present one (see, D'Arata v NY Cent Fire Ins., supra, at p. 664; Matter of Juan C. v Cortines, 89 NY2d 659 [1997], at p. 667). The second is that the party to be precluded must have had a full and fair opportunity to litigate the issue (see, Kaufman v Lilly & Co., supra, at p. 455; Matter of Juan C. v Cortines, supra; D'Arata v NY Cent. Fire Ins., supra).

The Court finds that the decision and judgment of Acting Supreme Court Justice Dennis F. Bender is binding upon the petitioner, under the doctrine of either *res judicata* or collateral estoppel, in that it contains a specific finding that he was transferred to the Willard Program in a timely manner. In addition, the Court notes that the proper method of review of Justice Bender's decision and judgment would be by direct appeal to the Appellate Division (see CPLR 5701). Petitioner's request in this proceeding, that this Court reverse the determination of Justice Bender, is nothing more than an improper attempt to collaterally

attack Justice Bender's decision and judgment (see Bell v Town Board of Town of Pawling, 146 AD2d 729 [2nd Dept., 1989]). Under the circumstances, the Court finds that petitioner's claim concerning the timeliness of his transfer to the Willard Program must be dismissed.

The Court concludes that the petition must be dismissed.

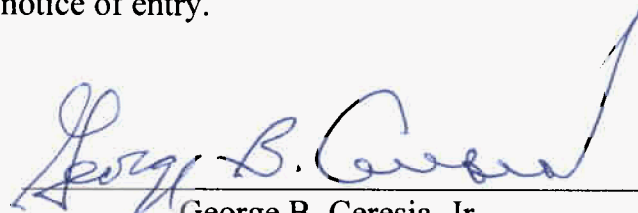
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: June 25, 2007
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated January 9, 2007, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated April 4, 2007, Supporting Papers and Exhibits