

Matter of Hutzenlaub v Fischer

2007 NY Slip Op 32020(U)

June 19, 2007

Supreme Court, Franklin County

Docket Number: 0000169/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
FRED HUTZENLAUB, #97-A-3919,

Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

-against-

**DECISION AND ORDER
RJI #16-1-2007-0065.022
INDEX # 2007-0169
ORI #NY016015J**

BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Fred Hutzenlaub, verified on January 10, 2007, and stamped as filed in the Franklin County Clerk's office on January 29, 2007. Petitioner, who is an inmate at the Five Points Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility on July 31, 2006. The Court issued an Order to Show Cause on January 31, 2007, and has received and reviewed respondents' Notice of Motion to Dismiss, supported by the Affirmation of Robert C. Glennon, Esq., Assistant Attorney General, dated March 16, 2007. The Court has also received reviewed petitioner's opposing papers, filed in the Franklin County Clerk's office on April 5, 2007.

The petitioner was found guilty of violating three rules of inmate behavior and a disposition was imposed confining him to the special housing unit for 90 days, denying him various privileges for a like period of time and recommending the loss of 90 days of good time. Upon administrative appeal the results and disposition of the Tier III

Superintendent's Hearing were affirmed. There is no dispute that on September 13, 2006, the petitioner received his copy of the aforementioned administrative appeal determination. The respondents' motion to dismiss is premised upon their assertion that this proceeding was not commenced by filing (CPLR §304) until January 29, 2007, which is more than four months after the determination sought to be reviewed became final and binding on the petitioner. Accordingly, the respondents request that the petition be dismissed as time barred pursuant to the four-month statute of limitations set forth in CPLR §217(1).

Ordinarily, the petitioner would have had until January 13, 2007, to timely commence this proceeding by filing his petition in the Franklin county Clerk's office. However, since January 13 and 14, 2007, fell on a Saturday and Sunday, and since Monday, January 15, 2007, was the Dr. Martin Luther King holiday, the filing deadline was extended by statute to January 16, 2007. See Judiciary Law §282-a.

The petitioner maintains that on January 10, 2007, he placed an envelope addressed to the Supreme Court, Franklin County, containing his original "Article 78 Petition with all the supporting Motions" in the Five Points Correctional Facility mailbox. According to the petitioner, "[w]hen a Pro-se Petitioner (Prisoner) swears to, by placing in a Correctional Facility's mail-box, the date the Petitioner places that Petition in that facility's mail-box it is deemed filed, not when the Clerk of the Court receives it or stamps it." This Court disagrees. In *Grant v. Senkowski*, 95 NY2d 605, the New York Court of Appeals declined to adopt a "mailbox rule" to govern the filing of papers by *pro se* inmate petitioners. Instead, the *Grant* Court held that a *pro se* inmate's papers are to be deemed filed upon actual receipt by the Clerk of the Court. See *Id.* Although the record is not

clear with respect to the issue of when petitioner's original mailing was received in the Court Clerk's office, the petitioner corresponded with the Franklin County Clerk by letter dated January 21, 2007, wherein he indicates that on January 18, 2007, he received his entire original mailing back from the County Clerk's office. It thus appears that the County Clerk must have received the original mailing on or before January 17, 2007. In view of the contents of petitioner's affidavit of service, and in view of the fact that the burden of proving the applicability of the affirmative defense of statute of limitations rests on the party asserting it (*see Brush v. Olivo*, 81 AD2d 852 and *Rowe v. City of New York*, 162 Misc2d 683), the Court presumes that petitioner's original mailing was actually received in the Court Clerk's office no later than January 16, 2007. This finding, however, is not necessarily dispositive of the pending motion since the Court must also consider the facts and circumstances underlying the Court Clerk's apparent rejection of petitioner's original mailing. Unfortunately, the record sheds little direct light on those facts and circumstances.

In petitioner's aforementioned January 21, 2007, letter to the Franklin County Clerk, after acknowledging the return of his "entire petition for my article 78, along with all the attached papers that were within," the petitioner notes that the County Clerk included with the returned documents an RJI form to be filled out and returned in triplicate. The petitioner then states as follows: "In my original application I submitted a RJI form, however, for this Courts purposes you have instructed me to fill out the RJI form this Court evidently prefers." Thus, as Assistant Attorney General Glennon speculates in paragraph 15 of his affirmation, "[i]t appears from Petitioner's letter that the Clerk rejected his papers as not in compliance with 22 NYCRR 202.6(a) (perhaps

because his ‘homemade’ RJI was not ‘in duplicate, on a form authorized by the Chief Administrator of the Courts’) and returned them to him with the requisite official RJI form.”

In *Soto v. Freda*, 196 Misc. 2d 623, the Supreme Court, New York County, authorized the one business day late filing of a summons and complaint where a timely attempt to file on the last day allowed under the applicable statute of limitations was rejected by the County Clerk because an index number purchase cover sheet form did not accompany the attempted filing. The *Soto* Court noted that the index number purchase cover sheet form is not mandated by any provision of the CPLR, other statute or written court rule, but, rather, was a local administrative requirement of the County Clerk’s office. The *Soto* Court ultimately found “. . . that cases should be decided on the merits and not whether someone has completed a nonjurisdictional form.” *Id* at 629.

Unlike the index number purchase cover sheet form in *Soto*, use of the RJI form is mandated by the Uniform Rules for the New York State Trial Courts. 22 NYCRR §202.6(a) provides, in relevant part, that “. . . the court shall not accept for filing . . . [an] application for *ex parte* order . . . unless such . . . application is accompanied by a request for judicial intervention . . . A request for judicial intervention must be submitted, in duplicate, on a form authorized by the Chief of the Courts . . .” The Appellate Division, Third Department, moreover, has held that a County Clerk’s office properly rejected the attempted filing of a notice of petition and petition unaccompanied by either a RJI form or an application for an index number. *Saferstein v. Lawyers’ Fund For Client Protection*, 298 AD2d 726, *lv den* 99 NY2d 505, *recon den* 99 NY2d 637.

If the petitioner had simply failed to include an RJI form with the papers that were deemed received for filing in the Franklin County Clerk's office prior to the expiration of the applicable statute of limitations, the Court would have no difficulty in dismissing his petition. The record before the Court demonstrates, however, that the papers originally mailed by the petitioner to the Franklin County Clerk, which were deemed to have been received by the County Clerk no later than January 16, 2007, included a signed RJI. That RJI, however, was not a form RJI but, rather, a typewritten, individualized document. This Court has compared the petitioner's original RJI "form" with the revised form he ultimately filed on January 29, 2007. Other than layout, the primary difference in the two documents is that the later form expands the list of specific causes of action that can be checked off by the filer. It is noted, however, that both documents include an Article 78 proceeding in their respective checklists. Despite other minor differences, this Court is unwilling to conclude that petitioner's use of an individually typed RJI should serve as the basis to deny him adjudication of his case on the merits. Accordingly, the Court finds that the papers filed by the petitioner on January 29, 2007, should be deemed filed *nunc pro tunc* as of January 16, 2007. *See Soto v. Freda*, 196 Misc 2d 623.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that the respondent's motion to dismiss is denied; and it is further

ORDERED, that respondent serve a copy of his answering papers on the petitioner on or before July 13, 2007, and that he simultaneously mail his original

answering papers to the Clerk of the Court for filing, and mail a further copy of said answering papers to the undersigned; and it is further

ORDERED, that the petitioner mail his original Reply to the respondent's answering papers to the Court Clerk's office, Franklin County Courthouse, 355 West Main Street, Suite 3223, Malone, New York, 12953, on or before August 3, 2007.

Dated: June 19 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice