

**Matter of Lowney v New York State Div. of
Human Rights**

2007 NY Slip Op 33237(U)

October 3, 2007

Supreme Court, New York County

Docket Number: 0108754/2007

Judge: Walter Tolub

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

PRESENT: _____
Justice

PART 15

Index Number : 108754/2007

LOWNEY, CYNTHIA

INDEX NO. _____

vs

N.Y.S.D.H.R.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IS DECIDED

FILED

OCT 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/3/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
In the Matter of the Application of
CYNTHIA LOWNEY

Petitioner,

Index No. 108754/07
Mtn Seq. 001,002,003

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS
and NEW YORK STATE DEPARTMENT OF LABOR,
UNEMPLOYMENT INSURANCE APPEAL BOARD.

Respondents.

-----x
WALTER B. TOLUB, J.:

Motion sequence 001, 002 and 003 are consolidated for disposition and disposed of in this memorandum decision. Petitioner brought this Article 78 proceeding (Motion Seq. 001) seeking an appeal of the New York State Division of Human Rights (SDHR) decision dated April 25, 2007. Specifically, Petitioner seeks to include a finding of gender discrimination, an award of back pay, an increase in compensatory damages and an award of the value of certain fringe benefits.

In Motion Sequence 002, Petitioner seeks to consolidate this proceeding with an Albany County matter (New York State Department of Labor (Unemployment Insurance Appeal Board) v. New York State Division of Human Rights and Cynthia T. Lowney, Index No. 4898/2007) ("Albany Proceeding"), and for a change of venue to New York County. Respondents cross-move for an order changing the venue of this proceeding from New York County to Albany

County, and to consolidate this proceeding with the proceeding pending in Albany County.

By Motion Sequence 003, Respondents seek to dismiss the Instant Proceeding for lack of personal jurisdiction, failure to state a cause of action and improper venue. Motion sequence 003 is granted rendering motion sequence 001 and 002 moot.

Facts

Petitioner Cynthia Lowney is a former Department of Labor (DOL) employee, who was terminated on or about April 22, 1992 from her position as an Administrative Law Judge in Bronx County. Petitioner thereafter filed discrimination charges against the DOL. On April 16, 1996, after four years of delay, a "probable cause" determination was rendered in Petitioner's favor and a public hearing was to be scheduled. After further delay, on April 27, 2004, a 37 day public hearing, pursuant to Executive Law §297(a), was finally held in Bronx County. On or about April 25, 2007, the SDHR issued its Final Order (Final Order).

In that decision, the Petitioner won on the merits with regard to retaliation and Respondent was ordered to: (1) refrain from discrimination, (2) pay the Petitioner back pay from April 22, 1992 through December 31, 1993, (3) pay the Petitioner \$50,000 in compensatory damages, and (4) pay the Petitioner for her out of pocket loss.

On June 22, 2007, Petitioner commenced the instant Article

78 proceeding¹ seeking judicial review of the SDHR's Final Order. The appeal was taken with regard to the Order's (1) failure to make a finding on the issue of discrimination that Petitioner claims to have endured, (2) the remedies awarded (i.e. Petitioner seeks reinstatement or front pay, back pay for the entire period from 1992 through 2007, fringe benefits plus interest, compensatory damages in the amount of \$350,000 and attorneys fees and costs).

Service on the DOL was made on Roxanna Diaz, at the Department of Labor's Commissioner's office at 345 Hudson Street. On the very same day, the DOL commenced the Albany Proceeding seeking judicial review of the Final Order pursuant to Executive Law §298. On July 5, 2007 Petitioner brought the instant motion to change the venue of the Albany Proceeding to New York County and to consolidate the two Proceedings. The DOL and SDHR oppose Petitioner's motion to change the venue to New York County. In addition, Respondent Department of Labor (DOL), by cross-motion, seek to transfer the venue of the Instant Proceeding to Albany County and to consolidate it with the Albany Proceeding. Lastly, the DOL seeks to dismiss the action for lack of personal jurisdiction due to improper service.

¹Although the determination is not necessary under the circumstances, the court notes that this proceeding was improperly designated as an Article 78 and this court would have considered this matter under Executive Law §298 because it is susceptible to conversion under CPLR §103[c] and Robinson v. Government of Malaysia, 174 Misc.2d 560 [NY County, 1997].

Discussion

First and foremost, this court must determine whether there was proper service thereby giving this court jurisdiction. CPLR 307(2) provides that service upon a state agency, such as the DOL, shall be made by:

(1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in the manner provided by subdivision one of this section is completed. For the purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. . . The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. . .

The principal office of the DOL is located at the W. Averill Harriman State Office Campus, Building 12, Albany, NY 12240. The Commissioner designated all attorneys in the Counsel's Office of the DOL to receive service on behalf of the DOL, herself or any other official being sued in a representative capacity. This designation has been in effect, and is the only designation, since March 13, 2007.

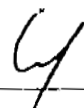
On June 26, 2007 a notice of petition and petition were served to an office secretary, Roxanna Diaz, at a DOL office located at 345 Hudson Street, New York, NY. Ms. Diaz was not authorized to accept service on behalf of the DOL, nor was she authorized to accept service on behalf of M. Patricia Smith, the Commissioner of the DOL. As set forth in Ms. Smith's affidavit, the Commissioner was never personally served with any summons or notice of petition in this proceeding nor did she receive any documents in the mail from Petitioner. There was no service on anyone designated by the Commissioner. The only person served was Ms. Diaz and service of process on an agency employee who is not designated to receive service of process does not constitute process service upon the agency. (Duroseau v. Johnson, 289 AD2d 489, 490 [2d Dept 2001]).

Inasmuch as the DOL is a necessary party and was not properly served, motion sequence 003, DOL's motion to dismiss must be granted and the Petition dismissed in its entirety. (Executive Law §297(2)(b); Jeanty v. New York State Dept. Of Correctional Services et. al., 36 AD2d 811 [2d Dept 2007]; NW Liquidating Corp. v. Industrial Bd. Of Appeals, 213 AD2d 549 [2d Dept 1995]). Furthermore, since the Instant Article 78 proceeding is dismissed, neither a motion for a change of venue nor a motion to consolidate can lie. Accordingly, motion sequence 001 and sequence 002 are denied as moot.

Accordingly, it is
ORDERED that Respondents' motion (seq. 003) to dismiss is
granted and the Petition is dismissed; and it is further
ORDERED that motion sequence 001 and 002 are denied as moot.

This memorandum opinion constitutes the decision and order
of the Court.

Dated:



HON. WALTER B. TOLUB, J.S.C.

FILED
OCT 10 2007
NEW YORK
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