

Dillon v Town of Reading

2007 NY Slip Op 34160(U)

December 19, 2007

Supreme Court, Schuyler County

Docket Number: 0000276/2007

Judge: Elizabeth A Garry

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At a Special Term of the Supreme Court of the State of New York, held in and for the County of Schuyler at Watkins Glen, New York, on the 17th day of October, 2007.

Present: Hon. Elizabeth A. Garry
Supreme Court Justice
STATE OF NEW YORK : SUPREME COURT
COUNTY OF SCHUYLER

Kenneth F. Dillon,

Petitioner,

-against-

The Town of Reading Town Justice
Honorable Raymond Berry,

Respondent.

MEMORANDUM
DECISION AND
ORDER

Index No. 07-276

Petitioner commenced this special proceeding pursuant to CPLR Article 78 with a *pro se* Notice of Petition and Verified Petition dated August 24, 2007, seeking an Order directing the Respondent to vacate any and all orders of protection issued against Petitioner in a case known as People v. Dillon, Docket Number 01120017, Town of Reading, County of Schuyler, State of New York. The Petition also seeks monetary relief as follows: an award of \$5,000.00 for “costs, fees and expenses incurred by petitioner, incidental to this petition and associated with the researching, writing, assembling, preparing, filing and litigating this action *pro se*”; an award of \$10,000.00 for “the unlawful restrictions imposed on petitioners [sic] right to exercise his freedom of travel, freedom to associate, freedom to participate in the democratic processes and other restrictions on his constitutional and statutory rights as a citizen of the State of New York and the United States of America”; and an award of \$10,000.00 for “emotional suffering, embarrassment and other hardships caused the plaintiff”. Respondent filed an Answer and moved to dismiss the Petition. Petitioner filed a Notice of Response to Answer, Affirmations and Motion to Dismiss.

On October 17, 2007, the parties appeared for oral argument. At the close of oral argument, this court rendered a bench decision that denied Respondent’s motion to dismiss the

Petition, ordered any and all orders of protection issued by Respondent in the disputed action to be vacated, and reserved the issue of monetary damages pending the receipt of memoranda of law from the parties. An Order to that effect was issued on November 13, 2007. Respondent submitted a Memorandum of Law dated October 22, 2007, and Petitioner submitted a Memorandum of Law dated November 9, 2007.

Under CPLR § 7806, any monetary relief awarded to a petitioner in a proceeding under Article 78 must be “incidental to the primary relief sought by the petitioner.” An award is incidental if “the relief that is the primary aim of the article 78 proceeding would make it a ‘statutory duty’ of the respondent to pay the petitioner the sum sought.” (Siegel, NY Prac § 570, at 984 [4th ed], citing Gross v. Perales, 72 NY2d 231 [1988]). In Gross, reimbursements due to a city agency from a state department under a public assistance program were held to be incidental relief in the city agency’s Article 78 proceeding challenging the state department’s failure to pay the reimbursements. Other examples of incidental relief include back pay and benefits in actions for reinstatement by wrongfully discharged public employees (Pauk v. Board of Trustees of CUNY, 68 NY2d 702 [1986]; LaDuke v. Lyons, 250 AD2d 969 [3d Dep’t 1998]; West v. New York State DOT, 229 AD2d 730 [3d Dep’t 1996]) and claims for attorney’s fees under statutes providing for the recovery of such fees (Johnson v. Blum, 58 NY2d 454 [1983]).

“Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case.” (Gross, supra at 236.) The essential nature of Petitioner’s claim in this action was not to recover money, but to obtain the vacatur of the challenged orders of protection. His claims for monetary relief for restrictions allegedly imposed on his constitutional and statutory rights as a citizen as a result of the failure to vacate the orders and for emotional suffering, embarrassment, and “other hardships” involve consequential, rather than incidental damages, and therefore may not be recovered in this proceeding. (See Murphy v. Capone, 191 AD2d 683 [2d Dep’t 1993]; Reape v. Adduci, 151 AD2d 290 [1st Dep’t 1989]; Leisner v. Bahou, 97 AD2d 860 [3d Dep’t 1983], appeal dismissed 61 NY2d 985, cert. den. 469 US 1087, appeal dismissed 62 NY2d 940, appeal dismissed in part, den in part 62 NY2d 605.) Similarly, to the extent that the

Petition seeks “fees and expenses . . . associated with the researching, writing, assembling, preparing, filing and litigating this action pro se,” these are incidents of litigation not compensable without specific statutory authority and for the recovery of which no separate cause of action exists. (Shanholtzer v. Selsky, 291 AD2d 588 [3d Dep’t 2002]). Costs under CPLR Art. 82 are, however, available to the prevailing party in a special proceeding (City of Buffalo v. George Irish Paper Co., 31 AD2d 470 [4th Dep’t 1969]). Petitioner’s claims for money damages in this proceeding are therefore dismissed, but he may, as the prevailing party, submit a bill of costs under CPLR Article 82.

Finally, in the course of review it has come to the attention of the court that the previous Order issued in this action on November 13, 2007, contained an error, previously identified by Petitioner but not addressed prior to execution of the Order. The date of Petitioner’s conviction in the underlying action, stated in the Order as April 30, 2003, was in fact November 23, 2002. The second paragraph of that Order is therefore now amended to provide as follows:

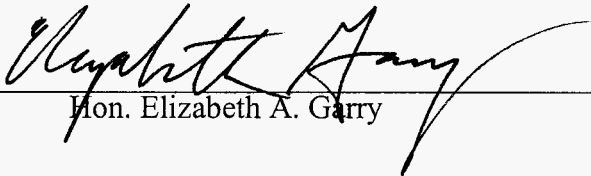
ORDERED that any and all orders of protection issued by Judge Berry against Petitioner, Kenneth F. Dillon, arising out of Mr. Dillon’s conviction in the Town of Reading Justice Court on November 23, 2002, are hereby declared null and void and terminated as a matter of law.

This constitutes the Memorandum Decision and Order of the court.

Dated: December 19, 2007

Norwich, New York

ENTER


 Hon. Elizabeth A. Garry

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Schuyler County Supreme and County Court Chief Clerk, with original Memorandum Decision and Order; Notice of Petition dated August 24, 2007, with attached Verified Petition and Affidavit sworn to by Kenneth F. Dillon on August 24, 2007, and Exhibits A through F; Notice of Motion dated October 3, 2007, with Affirmation of Thomas W. Reed II dated October 3, 2007, Affidavit of Honorable Raymond Berry, sworn to on October 2, 2007, and Exhibit A;

Answer dated October 3, 2007; Response to Answer, Affirmations and Motion to Dismiss sworn to by Kenneth F. Dillon October 14, 2007, with attached Exhibits R1 through R23; Order dated November 13, 2007; Memorandum of Law dated October 22, 2007; and Memorandum of Law dated November 9, 2007.