Matter of Almonor v New York State Div. of Parole
2007 NY Slip Op 34554(U)
May 4, 2007
Supreme Court, New York County
Docket Number: 405208/2006
Judge: Louis B. York
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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In the matter of the Application of

CHESTER ALMONOR, 93-A-2860,
Petitioner,

Index No.: ***405208/2006***

For a Judgement pursuant to Article 78
Of the Civil Practice Law and Rules,

- against -

NEW YORK STATE DIVISION OF PAROLE,
Respondent.

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Louis B. York, J.:

Currently, Petitioner is incarcerated at the Walkill Correctional Facility, in Ulster County, serving a sentence for criminal use of a firearm in the first degree and for manslaughter one. At his parole hearing, which took place at Walkill on April 18, 2006, the Commissioners discussed Petitioner's application. One of the Commissioners, named Rodriguez, commented that he found it "rather interesting" that the manslaughter charge received a smaller sentence than his weapons charge. (Hearing, at p. 2). The hearing transcript is 12 pages long and the hearing must have lasted approximately 10-15 minutes.

Following deliberation, the Commissioners issued their determination on the record. In full, they stated:

> Parole is again denied due to the serious nature and violent circumstances of the instant offenses, criminal use of a firearm first and manslaughter one, wherein you shot and killed one man and shot and injured a female victim.

All considered, discretionary release cannot be granted at this time.

Guidelines are unspecified.

(Hearing, at p 14).

Petitioner filed an administrative appeal of the parole denial on May 19, 2006. Respondent did not issue a determination within 120 days, or by approximately September 19, 2006. To preserve his statutory rights, petitioner commenced this proceeding around October 24, 2006. As "petitioner's administrative remedy was deemed exhausted when the Appeals Unit failed to render a decision within four months," the court allows the petition to proceed. See Miller v. Board Of Parole, 278 A.D.2d 697, 697, 717 N.Y.S.2d 747, 748 (3rd Dept. 2000).

On January 19, the original return date of the proceeding, Respondent sought a two-month adjournment in the Motion Submissions Part. Respondent mailed petitioner a copy of its application for an adjournment by regular mail, but sent it only one day before making the application to the Court. By way of explanation, Respondent alleged that it could not contact petitioner in advance of that date because petitioner was incarcerated. Respondent did not explain why he lacked the capacity to mail or fax the adjournment request to Petitioner earlier. At any rate, the application was granted, and the Petition was adjourned for two months, until March 17, 2007.

Next, Respondent's attorney served a demand to change venue upon the Court on March 1, 2007. The Attorney General's affidavit of service attests that he served Petitioner with the demand on March 1 as well. However, Respondent now concedes that it did not mail the demand to Petitioner until March 5, 2007. Respondent explains that this was due to confusion in the mail room. Petitioner asserts that he received the demand on March 7, 2007.

The purpose for the original request for an adjournment of the Petition was to afford Respondent time to oppose the Petition or cross-move for affirmative relief. Instead, Respondent separately moved by Order to Show Cause to change venue to either Albany or Ulster County. As part of its interim relief, Respondent sought to stay its obligation to Answer the Petition until the Court decided the Order to Show Cause. The Court granted this interim relief and set a submission date of April 18 for the Order to Show Cause.

The Petition and the Order to Show Cause crossed paths. Unfortunately, Respondent did not file a copy of the signed Order to Show Cause when the Petition was submitted or in any way indicate to the Motion Submissions Office that it had made a separate motion. Therefore, the Petition was marked submitted on default, and forwarded here for determination. Accordingly, on March 29, 2007, this Court issued an order, on default, granting Petitioner's Article 78 proceeding and remanding the matter to respondent for a new hearing. Subsequently, on April 18, 2007, this Order to Show Cause was submitted to the Court, along with Petitioner's opposition papers. At this time, Respondent also requested that the Court vacate the March 29 decision and consider the Order to Show Cause.

Under the circumstances, this Court should not have decided the Article 78 proceeding on default. Indeed, this action conflicted with the Order to Show Cause, which had granted a stay. Accordingly, the Court vacates the earlier Order and considers the Order to Show Cause. However, it advises Respondent that whenever it decides to proceed separately rather than by

cross-motion, he should submit a copy of the signed Order to Show Cause in the Motion Submission Part on the date the Petition is submitted.[1]

Petitioner opposes Respondent's application on the merits. In addition, he raises a threshold challenge to the application. In particular, he notes that Respondent served the notice to change venue on him in an untimely fashion. He argues that the Order to Show Cause should be denied based on Respondent's failure to comply with the statutory mandate. As stated, Respondent admits that the affidavit of service is inaccurate and that it violated the procedural requirements of CPLR 511 by its untimely service. However, it argues that this Court can and should exercise its discretion to overlook the untimeliness of the service.

The Court disagrees. Under CPLR Rule 511, which governs motions to change venue,

> the defendant must serve a demand for a change of venue on the plaintiff with or prior to the answer to the complaint. CPLR § 511(a). If the plaintiff does not consent to the proposed change within five (5) days . . . , the defendant then has fifteen (15) days to move for a change of venue. CPLR § 511(b). Berenguer v. Doyle, 6 Misc.3d 1014(A), 800 N.Y.S.2d 342(Sup. Ct. N.Y. County Nov. 19, 2004) (avail at 2004 WL 3140910, *1)(noting that these rules apply to CPLR § 510 applications as well).

Moreover, "untimeliness deprives a movant of the right to a mandatory change of venue." Castillo v. Metropolitan Laundry Machinery Co., Inc., 299 A.D.2d 247, 248, 750 N.Y.S.2d 52, 52 (1st Dept. 2002). Instead, the Court can overlook the statutory violation if in its discretion the Court determines it is proper to do so. See Berenguer, 6 Misc. 3d 1014(A), 800 N.Y.S.2d 342.

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[1] In addition, while the current Order to Show Cause was still pending, Respondent brought another Order to Show Cause seeking to vacate the prior Court order. In addition, it sought relief duplicative to the relief sought here. Respondent had already informed the Court, on notice, of the problem with the original Court order. Fortunately, by this time the Court was aware of the proceeding and of Respondent's multiple applications and it denied the second application as duplicative.

Based on the facts as a whole, the Court exercises its discretion and denies the Order to Show Cause as untimely. During the short history of this litigation, Respondent has operated in a fashion that has deprived Petitioner of reasonable notice more than once. First, Respondent did not give Petitioner notice that he intended to apply for an adjournment. Instead, he mailed the Petitioner his application one day before the date on which he made the application. As Petitioner is incarcerated in another County and does not have counsel, this made it virtually impossible for him to respond to the application. Second, although Respondent had two months during which to prepare this routine application, it short-served Petitioner with the demand to change venue. On top of this, Respondent submitted an inaccurate affidavit of service suggesting it had been timely.

The Court does not suggest that Respondent or its counsel, the Attorney General of the State of New York, either deliberately misled the Court or contrived to deprive Petitioner of his right to fair notice and an opportunity to respond to its applications. However, Respondent has, at the least, been irresponsible in a way that has prejudiced Petitioner. Moreover, Respondent does not present a single reason why the Court should exercise its discretion and excuse his untimeliness.[2] Therefore, and because of the problems described above, to waive the statutory mandate would be inappropriate.

Respondent relies on D.M.C. Construction Corp. v. A. Leo Nash Steel Corp., 70 A.D.2d 635, 416 N.Y.S.2d 649 (2nd Dept. 1979), a 28-year-old case from another Department, in support of his request. In addition to age of the case and the fact that it is not binding on this Court, the

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[2] It is also noteworthy although not dispositive that, in the underlying parole appeal, Respondent did not issue a decision on Petitioner's appeal within the requisite 120 day time frame. See supra, at p. 2. There, too, Respondent was negligent with respect to Petitioner's rights.

facts of that case are readily distinguishable. Unlike this proceeding, in which a government agency with a large legal staff served the Notice upon an incarcerated party who is proceeding without counsel,[3] D.M.C. involved two business corporations represented by counsel. In addition, in D.M.C., which involved a challenge to an arbitration proceeding, the arbitrator and all of the prospective witnesses lived in the county. The Second Department noted that all of the potential witnesses resided in other parts of the State, and if there were a hearing these individuals would be greatly inconvenienced. Id. at 637, 416 N.Y.S.2d at 653. Here, on the other hand, Respondent has an office in this County so the inconvenience is minimal; and, moreover, the matter almost certainly will be resolved based on the papers. Petitioner, on the other hand, points to Howard v. New York State Bd. of Parole, 5 A.D.3d 271, 272, 773 N.Y.S.2d 300, 300 (1st Dept. 2004), which denied an application by the same Respondent litigating the instant proceeding, where Respondent did not follow the proper procedure. See also Phillips v. Travis, 6 Misc.3d 1041(A), 800 N.Y.S.2d 354 (Sup. Ct. N.Y. County)(avail at 2005 WL 701116, at *5)(application to change venue denied where Respondent did not follow demand procedure set forth in CPLR § 511(a) and (b)), reversed on other grounds, 21 A.D.3d 335, 300 N.Y.S.2d 397 (1st Dept. 2005).

Accordingly, it is

ORDERED that the decision dated March 29, 2007, resolving Motion Sequence Number 1 in this matter, is hereby vacated, and the Petition is restored to active status; and it is further

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[3] The Court notes that Petitioner, although incarcerated and litigating without counsel – and although deprived of timely notice on two occasions – has risen above these limitations and problems, submitting excellent papers throughout.

ORDERED that the Order to Show Cause to change venue is denied, and it is further

ORDERED that Respondent shall have thirty (30) days from the date of entry of this order to serve and file an answer; and it is further

ORDERED that, upon the filing and service of its Answer, Respondent shall file a copy of this Order with the County Clerk, which shall then send the complete file for this proceeding back to Part 2 for resolution.

ORDERED:

Dated: May 4, 2007

LOUIS B. YORK
Louis B. York J.S.C.

FILED
MAY 14 2007
NEW YORK
COUNTY CLERK'S OFFICE