

Matter of Finkelstein v Horn

2008 NY Slip Op 32652(U)

September 30, 2008

Supreme Court, New York County

Docket Number: 405691/07

Judge: Lottie E. Wilkins

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

PRESENT: LOTTIE E. WILKINS
Justice

PART 18

In the Matter of the Application of
STEVEN FINKELSTEIN,

INDEX NO.

405691/07
406515/07

Petitioner,

MOTION DATE

- v -

MOTION SEQ. NO.

001

MARTIN HORN et al.,

Respondent.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for art. 78

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Petition pursuant to CPLR article 78 is granted, on default, in accordance with attached decision and judgment.

Dated: September 30, 2008

Lottie E. Wilkins
Lottie E. Wilkins

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

PART 18

-----X

In the Matter of the Application of

Index No. 405691/07

STEVEN FINKELSTEIN,

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

DECISION and JUDGMENT

- against -

MARTIN HORN, Commissioner, NYC Department of
Correction and GEORGE OKADA, Warden, Manhattan
Detention Complex,

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).
Respondent

Lottie E. Wilkins, J.:

Pro se petitioner, who at all relevant times was an inmate at the
Manhattan Detention Complex, brings this proceeding pursuant to CPLR article 78 to
annul a determination of respondent, affirmed on administrative appeal, which found
petitioner guilty of violating sections 109.10 and 120.20 of the Department of Correction
Inmate Rule Book. Those sections of the Rule Book deal with physically resisting a
DOC staff member and refusing to be strip searched, respectively. Petitioner argues,
inter alia, that the determination was arbitrary and capricious, an abuse of discretion,
and a violation of his state and federal due process rights.

The proceeding was brought on by order to show cause which was signed

by an “ex parte” Justice of this Court, but was made returnable in the Motion Submissions Part (Rm. 130) on September 5, 2007. In an affidavit provided to the Court, the reason given by petitioner for commencing this proceeding by order to show cause, as opposed to commencement by notice of petition, was that he was seeking a stay of enforcement of the penalty imposed by respondent, which was 40 days in punitive segregation, which required the review of an ex parte justice. However, the ex parte Justice who signed the order to show cause denied petitioner’s request for a stay.¹ On September 5, 2007, the Motion Submissions Part marked the matter “submitted without opposition” and assigned it here to IAS Part 18 for decision. This is where the procedural confusion begins.

In a letter dated September 6, 2007, respondent’s counsel requested “an extension of time to file a response due to the delay in procuring all relative paperwork and recorded tapes...” As a practical matter, the Court was not technically in a position to grant an extension of time to serve an answer on September 6th because the entire matter had been marked “submitted without opposition” in the Submission Part the day before. At best, the Court could have accepted respondents’ submission of a late answer, but since no answer to the petition was forthcoming on September 6th, no such relief was called for or given.

¹ It is possible, or even likely at this point, that petitioner has already served his 40 days in punitive segregation which would make most of the issues presented here largely moot.

A verified answer to the petition dated September 18, 2007 was eventually received by this Court, however, it was not accompanied by any proof of service on petitioner. It should also be noted that the verification annexed to the answer was neither dated nor notarized and appears to have been signed by the Department of Correction staff attorney assigned to defend this matter which raises some question concerning its adequacy (see, CPLR 3020 & 3021).

Another letter from respondents' counsel was received on or about October 5, 2007. On the topic of submission of an answer, that letter indicated that counsel was confused as to exactly when and where responsive papers were returnable and that the need to obtain records from the jail facility also contributed to missing the September 5, 2007 deadline in the Submissions Part. Counsel further contended that petitioner had not been prejudiced by respondents' late answer because he was in twenty-four hour lock-up and had been placed in punitive segregation. The same letter also stated, albeit unsworn, that petitioner was served with respondent's answer on September 18, 2007.

The Court next heard from petitioner in a letter dated October 30, 2007. Petitioner claimed that he received respondent's answer only the day before, on October 29, 2007 along with a copy of DOC counsel's letter to the Court of October 5, 2007. Petitioner requested that he be "afforded an opportunity to oppose respondents'

application for leave to serve and file a late answer” and also pointed out the inappropriateness of respondents’ request for an “extension” of time to answer after September 5, 2007. Petitioner further indicated that he was prepared to show that the assertions made in the October 5th letter from respondents’ counsel were either untrue or did not constitute good cause for late submission of the answer. Finally, petitioner requested that he be provided with a copy of the September 6, 2007 letter from respondents’ counsel, which he claimed never to have received, as well as a copy of the affidavit of service of the answer.

On or about November 30, 2007 petitioner sent through the mail a notice of motion for an order striking respondents’ answer or, in the alternative, for an order directing respondents’ to provide a certified transcript of the record of his disciplinary proceedings. The grounds alleged for striking the answer were that it was untimely. Respondents did not respond to those papers.

Analysis

In many respects, the pro se petitioner has “outlawyered” opposing counsel in the litigation of this proceeding. From his jail cell, petitioner properly commenced an article 78 proceeding to annul the subject disciplinary determination. Because he understood that he was seeking temporary injunctive relief pending hearing

of the matter, he correctly presented his papers to an “ex parte” Justice who, although denying the temporary relief, fixed a return date and made the matter returnable in the Motion Submissions Part. When presented with an answer well after the return date, petitioner promptly advised the Court of his position that acceptance of a late answer was not justified and, not having received a reply to that communication, attempted to move to have respondents’ answer stricken from the record.

In contrast respondents missed the return date to submit an answer which was clearly and unambiguously specified in the original order to show cause, communicated with the Court on important matters concerning the proceeding without giving notice to petitioner, and neglected to provide essential documents such as affidavits of service. The Court is very much aware that respondents’ office must deal with a great many cases at any given time, nevertheless, a certain minimum adherence to the rules of practice and procedure is necessary if the Court is to discharge its responsibilities in a just and equitable manner. In terms of judicial economy, it behooves all concerned when the Court can directly address the merits of the underlying dispute, but that is nearly impossible to do when one party repeatedly fails to comply with fundamental rules of procedure which are there to ensure that each party before the Court receives due process of law.

Respondents did not submit a timely answer to the petition as required in

[*7]

the original order to show cause signed by the ex-parte justice. Compounding that error, they requested an extension of time to answer in the form of a letter without even giving notice of that request to petitioner. When an answer was finally served, some two weeks later, respondents did not supply proof of service on petitioner. And indeed, petitioner alleges that he did not receive the answer until approximately two weeks after its purported date of service.

Turning to the excuse provided for the delay, respondents' counsel claims in the October 5, 2007 letter to the Court (which does not appear to have been sent to petitioner) that she believed that this matter would have been transferred to the Bronx County Supreme Court and then subsequently heard on Riker's Island by a visiting Supreme Court Justice. Exactly why respondents' counsel would think the proceeding would be automatically transferred to another county or venued at another location is beyond the understanding of this Court given that the order to show cause signed by the ex-parte justice very clearly required the submission of responsive papers at particular location in the New York County Supreme Court on a particular date. In the final analysis, the excuse provided in the October 5, 2007 letter from respondents' counsel does provide an excuse for the delay. The excuse lacks merit in that it describes a misunderstanding created entirely by counsel's own subjective and misguided conviction that order to show cause did not actually mean what it said. Moreover, to

[* 8]

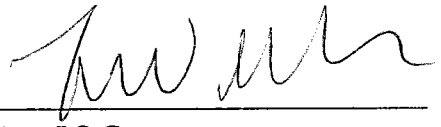
the extent that counsel represents she made efforts to clarify exactly when and where her papers were returnable prior to defaulting, the six weeks given by the ex-parte justice to submit responsive papers – from when the order to show cause was signed on July 24th to the return date on September 5th – should have provided ample time to clarify the situation before the default. For these reasons the Court finds that the excuse for the delay lacks merit.

This Court is keenly mindful of the general policy preference for adjudication of disputes on their merits and, as already mentioned, of the many burdens on respondents' office. The default by respondents in this case, however, appears to be the product of little more than counsel's inadvertence and a general disregard for petitioner's claim. Given that the pro se petitioner hewed so carefully to the procedural requirements of the CPLR from his jail cell, it should not be asking to much for respondents' counsel to adhere to the same rules. It would certainly be unfair to petitioner to excuse respondents' actions under these circumstances. Accordingly, it is

ORDERED that the petition is granted, on default, and the subject determination by respondents is annulled.

This constitutes the decision and judgment of the Court.

Dated:



Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

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