

Mashack v Alexander
2009 NY Slip Op 31148(U)
May 20, 2009
Supreme Court, New York County
Docket Number: 400117/09
Judge: Marilyn Shafer
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHAFFER
Justice

PART 8

MASHACK, LESTER

INDEX NO. 400117/09

- v -
GEORGE ALEXANDER

MOTION DATE _____

MOTION SEQ. NO. 601

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is granted~~ motion is

decided in accord with the annexed memorandum.

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 141B).

Dated: 5/20/2009

MARILYN SHAFER

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 8

----- X
In the Matter of the Application of

LESTER MASHACK,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

Index:
400117/09

-against-

GEORGE ALEXANDER, CHAIRMAN OF THE
DIVISION OF PAROLE, and the NEW YORK
STATE DIVISION OF PAROLE,

Respondents.

UNFILED JUDGMENT
*This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).*

----- X
Marilyn Shafer, J.

In response to Petitioner Lester Mashak's (Petitioner)
Article 78 Petition to vacate Respondent George Alexander,
Chairman of the New York State Division of Parole and Respondent
New York State Division of Parole's (Respondents) decision to
deny parole, pursuant to CPLR 511 (a) and (b), respondents
request that venue be changed from New York County to either
Albany or Chemung County, as provided in CPLR 506 (b).
Petitioner objects to the venue change. In addition, respondents
seek an additional 30 days from the date of this decision to
serve and file an answer to the Article 78 petition, if change of
venue is denied.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is currently a prisoner incarcerated at Riverview

Correctional Facility. On June 3, 2008, the New York State Board of Parole (Parole Board) held a hearing and then denied petitioner's discretionary release on parole. At the time of this decision, and up until March 26, 2009, petitioner was incarcerated at Elmira Correctional Facility, which is located in Chemung County. On July 10, 2008, Petitioner appealed this decision to the Appeals Unit, located in Albany County. On or around February 5, 2009, after not receiving a response, petitioner served his Article 78 petition challenging the June 3, 2008 determination on George Alexander, the Chair of the Division of Parole. Petitioner designated New York County as the venue for this proceeding.

Respondents then served petitioner, pursuant to CPLR 511 (a) (b), with a written demand for a change of venue to either Albany or Chemung County, consistent with CPLR 506 (b). On or around April 14, 2009, respondents filed a cross motion to change venue. Petitioner responded via a letter to the court, challenging this cross motion.

In his letter, petitioner writes that his hearing was done via teleconferencing from New York City, and as such, his Article 78 was appropriately filed in New York County.

Respondents contend that New York County is an improper venue and venue should be designated as either Chemung county, where the decision to deny parole took place, or Albany county,

where respondents' principal office is located.

DISCUSSION

CPLR 506 (b) governs venue in Article 78 proceedings, and states, in pertinent part:

[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

As such, respondents contend that since the Parole Board made its decision to deny petitioner's parole at Elmira Correctional Facility, Chemung county would be a proper venue.

To further substantiate their argument, respondents cite to *Matter of Vigilante v Dennison* (36 AD3d 620, 622 [2nd Dept 2007]), which says that the material event leading up to the subject parole determination is not the crime and sentencing, but is the "decision-making process leading to the determination under review." In *Vigilante*, the court found that venue was proper in Albany county, because the subject determination was affirmed on administrative appeal in Albany County and Albany County was also the principal office location of the respondent. In the present case, although the petitioner never received an answer to his administrative appeal, the decision making process was allegedly conducted at Elmira Correctional Facility.

Respondents contend that, additionally, Albany County would

also be a proper venue, since the principle office of the Division of Parole is located in Albany, and so is the office of George Alexander, the Chair of the Division of Parole. They cite to *Matter of Howard v NY State Bd. of Parole* (5 AD3d 271 [1st Dept 2004]), in which petitioner brought an Article 78 proceeding to vacate a Division of Parole decision. Although, due to the respondent's failure to comply with proper procedure, venue was ultimately not changed from New York County, the Appellate Division, First Department, concluded:

According to CPLR 506 (b), venue in a case such as this should have been placed in the judicial district where the determination complained of took place or where respondent's principal office is located. The determination here was made at the Woodbourne Correctional Facility, located in Sullivan County. Respondent's principal office is located in Albany County. Thus, Albany county is a proper venue.

Id. at 272.

Petitioner cites to *South v New York State Div. of Parole*, (Sup Ct, New York County, April 8, 2008, Goodman, J., Index No. 113811/07), in support of New York County as the proper venue. In his letter, although petitioner does not provide any details about his own teleconferenced hearing, he reiterates that in *South*, "the Article 78 was appropriately filed in New York County because the hearing was done via teleconferencing with the Board in New York City and the Petitioner in Elmira." Petitioner, Letter dated April 17, 2009.

In *South supra*, the court indicated that, "[t]he sixth

hearing, the subject of this proceeding, took place in New York County, as designated by the Parole Board, and was summarily conducted by members of the board in person, while the inmate was electronically conferenced into the premises of the New York State Division of Parole on the westside of Manhattan" In *South*, venue was not an issue, as none of the parties objected to the venue being in New York County. However, the court upheld venue in New York County because the commissioners and the court reporter were present in New York County during the hearing "[a]lthough Petitioner inmate was in an upstate facility ... hearing was held in New York County, facilitated by modern technology". Hence, this was where the determination complained of took place.¹

The transcript from the June 3, 2008 hearing includes a sentence that petitioner's parole hearing was done via teleconferencing. It is undisputed that the petitioner was located in Elmira Correctional Facility during this hearing. Petitioner did not provide the court with any information as to the location of the commissioners conducting the hearing, or where these commissioners made their final determination. Respondents state in their cross motion that the determination to deny parole was made at Elmira Correctional Facility but do not

¹The court in *South, supra*, duly noted petitioner's concerns that respondents were "forum shopping" by attempting to move him to a different prison and having the parole board meet there. In response, the court instructed the parole board, in good faith, to meet again, via teleconference in New York County.

reveal where they were situated when the decision was made. Presumably, the Board would not conduct a teleconference with petitioner in Chemung County if they were sitting in Chemung County. Moreover, the court reporter present during petitioner's hearing was the same one who was present during the hearing in *South, supra*. As such, the Court is inclined to believe that the commissioners were also present in New York County during this hearing, and made their determination there. In any event, respondents, in seeking a change of venue, have an obligation to advise the court where the Board was sitting when the hearing was held.

Accordingly, venue is proper in New York County and respondents' motion to transfer the proceeding to either Chemung or Albany county is denied.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED AND ADJUDGED that the venue of this action is to remain in New York County and respondents have been ordered to answer the petition within 30 days after receipt of this decision.

Dated: 5/20/09

MARILYN SHAFER

J.S.C.

J.S.C.

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 141B).