

Matter of Baxter v Alexander

2009 NY Slip Op 31300(U)

June 12, 2009

Supreme Court, New York County

Docket Number: 400285/09

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER
Justice

PART 3

BAXTER

INDEX NO. 400285/09

- v -

ALEXANDER

MOTION DATE _____

MOTION SEQ. NO. 001

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 decided in accord*
with the annexed memorandum.

FILED

JUN 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/9/09

[Signature]
MARILYN SHAFER
J.S.C.

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

JAMES BAXTER,

Petitioner,

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

Index:
400285/09

-against-

GEORGE ALEXANDER, CHAIRMAN,
NEW YORK STATE BOARD OF PAROLE,

Respondent.

----- X

Marilyn Shafer, J.

In response to Petitioner James Baxter's (petitioner) Article 78 Petition to vacate the decision by Respondent George Alexander, Chairman of the New York State Board of Parole (respondent), pursuant to CPLR 510 and 511, respondent requests that venue be changed from New York County to either Erie or Albany County, as provided in CPLR 506 (b). Petitioner objects to the venue change.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is currently a prisoner incarcerated at Wende Correctional Facility (Wende), which is located in Erie County. On April 30, 2008, the New York State Board of Parole (Parole Board) held a hearing and then, on May 1, 2008, denied petitioner's discretionary release on parole. At the time of this decision, petitioner was incarcerated at Wende. On July 31,

2008, Petitioner appealed this decision to the Appeals Unit, located in Albany County. On or around March 4, 2009, after not receiving a response, petitioner served his Article 78 petition challenging the May 1, 2008 determination on George Alexander, the Chair of the Division of Parole. Petitioner designated New York County as the venue for this proceeding.

Respondent then served petitioner, pursuant to CPLR 511 (a) (b), with a written demand for a change of venue to either Erie or Albany County, consistent with CPLR 506 (b).¹ Petitioner opposed this change of venue. On or around May 7, 2009, respondent filed a cross motion to change venue.

In his opposition papers, petitioner writes that under CPLR 506 (b), venue is proper where the county of material events such as the crime, conviction and sentencing, took place. Petitioner committed his crime in New York County and was also sentenced there. As such, he contends his Article 78 was appropriately filed in New York County.

Respondent asserts that New York County is an improper venue and venue should be designated as either Erie county, where the decision to deny parole took place, or Albany county, where respondent's principal office is located.

DISCUSSION

¹It appears that the first written demand was "returned to sender" and then respondent served an amended demand on petitioner, to which he replied.

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 Wende Correctional Facility, located in Erie county, this would be a proper venue. It also asserts that Albany county would also be proper, since this is the county where the respondent's office is located.

To further substantiate its argument, respondent cites to *Matter of Phillips v Dennison* (41 AD3d 17, 23 [1st Dept 2007]), which says venue for an Article 78 proceeding to challenging a decision by the Division of Parole is "[p]roperly placed in the county where the parole hearing was held and the challenged determination made, or where the Board's principal office is located."

The Appellate Division, First Department, has consistently held that pursuant to CPLR 506 (b), venue is proper in the judicial district where the "complained-of parole determination was rendered, or where the respondent's principal office is located." *Ramirez v Dennison*, 39 AD3d 310, 310 (1st Dept 2007).

Although some of the parole board hearings are conducted via teleconferencing, from the transcript of the April 30, 2008 hearing, it appears that not only the petitioner, but also the commissioners and the court reporter were located at Wende.² Respondent has also stated that their determination to deny parole was made at Wende. Accordingly, Erie county would be a proper venue for the Article 78 proceeding.

Additionally, Albany County would also be a proper venue, since the principle office of George Alexander, the Chair of the Division of Parole, is located in Albany. In *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, Albany county was considered a proper venue. 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.

²The court is aware, that as of late, many parole board determinations are held via tele-conferencing, in which the inmate is located at the prison, but the commissioners and court reporter are located in New York County. As such, in those circumstances, the parole board made its determination in New York County, and New York County is a possible venue for a subsequent Article 78 proceeding. See *Mashack v Alexander* (Sup Ct, NY County, May 20, 2009, Shafer, J., Index No. 400117/09).

Id., at 272.

Although petitioner does not cite to any cases, he relies on the language of CPLR 506 (b), in which it specifically states, venue is possibly proper where the "material events otherwise took place." He states that the "material events" should be considered his crime, sentencing and conviction, which all took place in New York County. Inasmuch as his instant offense took place in New York County, and respondent relied upon "the nature of the instant offense when denying Petitioners [sic] application for Parole [sic]," petitioner contends that New York County is a proper venue. Petitioner Opposition, at 1.

However, petitioner's argument that the "material events" are considered to be the ones that pertain to his instant offense, is misplaced. In *Matter of Vigilante v Dennison* (36 AD3d 620, 622 [2nd Dept 2007]), the petitioner similarly contended that his chosen venue of Kings County was proper, "because his Kings County crime and sentence were 'material events' leading to the subject parole determination, within the meaning of CPLR 506 (b). To the contrary, the relevant material event was the decision-making process leading to the determination under review." *Id.* at 622. Petitioner's case is no different from any other parole board determination, in which the board reviews the crime, record and other factors before them, and then "decides on such facts which constitute the

'material facts' relevant to the decision." *Wechsler v Dennison*,
(Sup Ct, NY County, December 19, 2005, Stone, J., Index No.
110443/05).

Accordingly, venue is improper in New York County and
respondent's cross motion to transfer the proceeding to either
Erie or Albany county is granted. This court concludes that the
proceeding should be transferred to Albany County.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the venue of this proceeding is changed from
this Court to the Supreme Court, County of Albany, and the Clerk
of this Court is directed to transfer the papers on file in this
action to the Clerk of the Supreme Court, County of Albany, upon
service of a copy of this order with notice of entry and payment
of appropriate fees, if any.

Dated: 6/12/09

ENTER:
MARILYN SHAFER
J.S.C.

J.S.C.

FILED
JUN 16 2009
NEW YORK
COUNTY CLERK'S OFFICE