

**Matter of New York Racing Assoc., Inc. v State of
New York Div. of the Budget**

2009 NY Slip Op 31605(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 102611/09

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 102611/2009
NEW YORK RACING
VS.
FRANCHISE OVERSIGHT BOARD
SEQUENCE NUMBER : 002
CHANGE VENUE

INDEX NO. _____
MOTION DATE 04/30/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
PAPER NUMBERED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

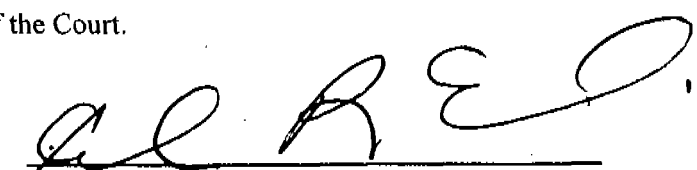
ORDERED that the motion of respondents State of New York Division of the Budget, State of New York Franchise Oversight Board, and Laura Anglin, in her capacities as Director of State of New York Division of the Budget and Chairperson of State of New York Franchise Oversight Board for an order, pursuant to CPLR §§506(b), 510(1) and 511, changing the venue of this action by petitioner New York Racing Association, Inc. from New York County to Albany County is granted; and it is further

ORDERED that the venue of this action 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; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of the Court.

Dated: 7/9/09


HON. CAROL EDMEAD 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 35

_____ x
In the Matter of the Application of

NEW YORK RACING ASSOCIATION, INC.

Index No. 102611/09

Petitioner,

DECISION/ORDER

For judgment under Article 78 of the
Civil Practice Law & Rules

-against-

STATE OF NEW YORK DIVISION OF THE
BUDGET, STATE OF NEW YORK
FRANCHISE OVERSIGHT BOARD, and LAURA
ANGLIN, in her capacities as Director of STATE
OF NEW YORK DIVISION OF THE BUDGET and
Chairperson of STATE OF NEW YORK
FRANCHISE OVERSIGHT BOARD,

Respondents.

_____ x
EDMEAD, J.S.C.

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, petitioner, the New York Racing Association, Inc. ("NYRA"), seeks a judgment and order, pursuant to CPLR Article 78 and Public Officers Law §87(2)(d), vacating a February 13, 2009 Determination (the "Determination") of respondents State of New York Division of the Budget ("DOB"), State of New York Franchise Oversight Board ("FOB"), and Laura Anglin ("Ms. Anglin"), in her capacities as Director of State of New York Division of the Budget and Chairperson of State of New York Franchise Oversight Board ("respondents"), which grants Freedom of Information Law ("FOIL") disclosure of NYRA's 2009 Operating Budget.

Respondents now move for an order, pursuant to CPLR §§506(b), 510(1) and 511,

changing venue from New York County to Albany County.

Respondents' Motion

Respondents argue that venue should be changed to Albany County as of right. This Article 78 proceeding was placed in New York County contrary to the express provisions of CPLR §506(b), which provides in relevant part that 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 where the material events otherwise took place, or where the principal office of the respondent is located” (*emphasis added*). None of these three venue criteria is satisfied here, respondents argue.

First, New York County, which constitutes the First Judicial District, is not “the judicial district where the respondent made the determination complained of,” respondents argue. The series of FOIL determinations challenged by NYRA were made in Albany County, in the Third Judicial District, respondents contend.

Second, the “material events,” or the decision-making process in which the determination was made, took place at DOB’s office in the State Capitol building in Albany, respondents contend.

Third, respondents contend that the “principal office” of DOB, within the meaning of CPLR §506(b), is in the State Capitol building in Albany, and NYRA’s assertion that DOB “maintains a primary office in New York County at 633 Third Avenue” is flatly wrong. According to respondents, they do not maintain offices in New York City; the Governor maintains an office at 633 Third Avenue; DOB does not. Further, with the exception of one employee who works in the District of Columbia, the official location for all employees of DOB

is Albany.

Furthermore, NYRA correctly asserts that FOB has no public official office or address. However, the object of the FOIL request – the disclosure to the *Times Union* newspaper in Albany of NYRA’s 2009 Operating Budget and “all materials received by respondent Anglin” as Chair of the FOB – “are kept, held and physically possessed in the office of the [DOB] in the State Capitol building in Albany” respondents argue. When interpreting the definition of the term “record” under Public Officers Law § 86(2), the Court of Appeals has made clear that “physical possession” is determinative, respondents contend. It is undisputed that the FOIL request, dated December 22, 2008, was made by reporter James M. Odatto (“Mr. Odatto”) of the *Times Union* to DOB in the State Capitol building in Albany (“FOIL Request”). DOB has physical possession of the record in the State Capitol building in Albany, and not at any other location. Accordingly, venue does not properly lie in New York County, but rather in Albany County, where the principal office of the respondent is located.

NYRA’s Opposition

First, NYRA argues that, notwithstanding respondents’ claims to the contrary, respondents made the Determination in New York County. Certain FOB members who attended the December 22, 2008 meeting wherein NYRA’s 2009 Operating Budget was addressed and wherein it was initially decided to provide Mr. Odatto with the Budget were physically present in New York County during the meeting, which was partially conducted *via* teleconference, NYRA contends. Further, both DOB and Ms. Anglin maintain a principal office in New York County. FOB maintains no principal public office. As such, FOB and its Chairperson can be sued in New York County, the situs for certain FOB public meetings (*i.e.*, 633 Third Avenue, New York, NY).

Respondents would like this Court to believe that FOB, the agency that received NYRA's 2009 Operating Budget from NYRA and whose Chairperson personally denied NYRA's administrative appeal herein, is not a proper party in order to argue that NYRA has no basis to sue respondents in New York County.

Second, NYRA argues that the absence of a principal FOB office in any county does not mean that FOB does not have any records and that all of the FOB's records are automatically records of DOB solely. The relevant caselaw sets forth that the possession of a record is a dispositive fact in certain instances, NYRA argues. In any event, DOB, too, has a duty under FOIL to withhold records from dissemination pursuant to NYRA's request, and DOB has admitted to possessing NYRA's letter of request, NYRA contends.

NYRA further argues that the relevant caselaw speaks to instances where information has been distributed by one agency to another. Respondents admit that no such communication has taken place herein. Here, respondents deem the records of FOB to be the records of the DOB, as though FOB's status as a state agency is of no concern or weight whatsoever. This position is inaccurate at best, NYRA argues. Respondents cannot have it both ways: Either Ms. Anglin's duties as Chairperson of FOB and as Director of the DOB are inseparably intertwined, or they are not. Respondents cannot simply pick and choose when the separation of Ms. Anglin's responsibilities suits them and is correct and when it does not.

Third, NYRA argues that there is no practical reason herein necessitating a change in venue. The Supreme Court, New York County, has jurisdiction throughout the State of New York. New York County is the proper county under CPLR §506(b). Impartiality is, naturally, assured in New York County. Convenience of the witnesses, pursuant to CPLR §510, is not an

issue. The Attorney General's Office, counsel for respondents, is located only a few blocks away from this Court's 60 Centre Street address. Respondents can and will be afforded an appropriate defense herein by the New York State Attorney General in the Supreme Court, New York County, NYRA argues.

Fourth, NYRA argues that FOB and Ms. Anglin are proper parties to this action. NYRA was required to file its 2009 Operating Budget with FOB. There has been no showing that FOB transferred these records to DOB. Respondents insist that the records of the FOB are records of the DOB because DOB's employees are associated with FOB and because FOB maintains no principal office. DOB cannot deem the 2009 Operating Budget to be a record of DOB solely on the basis that the Director of the DOB and the Chairperson of the FOB happen to be the same person, NYRA argues.

Fifth, NYRA argues that DOB regularly utilizes employees of the New York State Racing and Wagering Board (the "Racing and Wagering Board"), the predecessor in interest to FOB, to assist in addressing the racing business issues that are now the responsibility of FOB. In fact, upon information and belief, attorneys of the Racing and Wagering Board typically represent and/or provide advice to both of the agencies regarding horse-racing issues. FOB is the successor in interest – with respect to FOB's statutory rights and duties – to the Racing and Wagering Board, an agency also maintaining a primary office in New York County, and which NYRA has regularly sued in New York County, NYRA argues.

Finally, NYRA argues that forum shopping should not be permitted. "Respondents are blatantly forum shopping because of NYRA's longtime success in New York County with respect to FOIL cases against the [FOB's] immediate predecessor in interest," the Racing and

Wagering Board, NYRA contends.

Respondents' Reply

Respondents maintain that the principal office of DOB is in the State Capitol building in Albany. DOB does not have an office in New York County, and no employees of DOB are assigned to work in New York County.

Respondents also dispute NYRA's contention that the controversy herein originated from a meeting of FOB conducted in New York County. The December 22, 2008 meeting of FOB was conducted in Albany by Ms. Anglin, with videoconferencing available in New York City, respondents argue, citing the "Agenda" and the "Meeting Minutes," which list the location of the meeting as "Room 143" in the State Capitol building in Albany. Room 143 is a conference room within the premises of DOB. Upon information and belief, Mr. Odatto also was present at the December 22, 2008 meeting in the State Capitol building in Albany, respondents contend.

Respondents also dispute NYRA's contention that during the December 22, 2008 meeting it was initially decided to provide Mr. Odatto with NYRA's 2009 Operating Budget. The FOIL Request from the *Times Union* was not in any way a subject of the December 22, 2008 meeting, respondents argue, citing the Meeting Minutes. Rather, the FOIL request was initiated after the meeting ended, when Mr. Odatto personally delivered the request to a DOB employee at the DOB office in the State Capitol building in Albany. With the FOIL Request having been addressed and delivered to DOB – and not to FOB or any other agency – all subsequent actions with respect to the FOIL Request were taken by DOB, in the State Capitol building in Albany, respondents argue.

Respondents further argue that NYRA's statements and allegations about the origins of

FOB and the Racing and Wagering Board are irrelevant. “The FOIL request at issue in this proceeding was expressly addressed to, filed with, and responded to by DOB alone,” respondents argue.

As alleged by petitioner, FOB maintains no offices. However, as can be seen from the Meeting Notification, the mailing address of the FOB is the State Capitol building in Albany, respondents contend. Further, Ms. Anglin maintains the files related to her role as FOB’s Chairperson in her office at DOB in the State Capitol building in Albany, respondents contend. Again, the Court of Appeals has held that the “physical possession” of a document by an agency is the determinative factor in assessing whether a document is a “record” subject to disclosure under FOIL, and NYRA has cited no caselaw to the contrary, respondents argue.

Petitioner suggests that it is relevant that the Attorney General has a New York City office. “Upon information and belief, the Attorney General maintains offices in a number of locations throughout New York State, including, of course, in the State Capitol building in Albany,” respondents contend. However, the locations of the Attorney General’s offices do not provide a ground for venue under CPLR §506(b), respondents argue.

Finally, respondents dispute NYRA’s assertion that they are “forum shopping.” In enacting CPLR §506(b), the Legislature explicitly precluded choice of forum by restricting venue in special proceedings to the location where the government entity is located or where the material events and determination being challenged took place, which, in this case, is in the State Capitol building of Albany, respondents argue. In fact, as respondents have set forth, no aspect of DOB’s determination relating to the *Times Union* FOIL Request took place in any county other than Albany County, respondents argue.

Analysis

According to CPLR §510(1), a court, upon motion, may change venue where “the county designated for that purpose is not a proper county.” Venue can be changed “as of right to a proper county” where the movant serves the demand with an answer or before an answer in a timely manner (CPLR §511). With regard to the venue of special proceedings against a body or an officer, such as an Article 78 proceeding, CPLR §506(b) provides the following:

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.

For example, in *Howard v New York State Bd. of Parole* (5 AD3d 271, 2004 NY Slip Op 02123 [1st Dept 2004]), which dealt with an Article 78 proceeding, the Court held:

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 Albany County, which is also the location of respondent's principal office. Thus, Albany County is the proper venue. (*Howard* at 272) (*emphasis added*)

Finally, it is well settled that upon a motion by defendant to change venue, defendant bears the burden to establish that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v Pahlavi*, 62 NY2d 474, 479, *cert denied* 469 US 1108 [1984]; *Castro ex rel. Gonzalez v New York Hosp. Medical Center of Queens*, 52 AD3d 251, 252 [1st Dept 2008]; *Clarke v Michael Ahern Production Services, Inc.*, 181 AD2d 514, 515 [1st Dept 1992]).

Here, respondents have demonstrated that New York County, plaintiff's choice of forum,

is not appropriate.

First, the documentary evidence in the record shows that respondents made all of their determinations regarding the FOIL Request in Albany County. Further, NYRA's argument that respondents made the initial Determination approving the FOIL request on or about December 22, 2008 at a meeting in New York County lacks merit. Documentary evidence shows that the initial Determination was made after the December 22 meeting in Albany County.

The Meeting Agenda and Minutes show that the December 22 meeting took place in Room 143 of the New York State Capitol building in Albany. NYRA argues that because certain FOB members who attended the December 22, 2008 meeting were physically present in New York County during the meeting, which was partially conducted via teleconference, the meeting was actually conducted in New York County. While the Minutes note that two members of the FOB were participating via teleconference, the Minutes also make clear that Ms. Anglin, as FOB's Chairperson, was present along with another member in Room 143 of the Capitol Building in Albany when she called the meeting to order at 11:07 a.m.

Regardless of where the December 22 meeting took place, documentary evidence also shows that the Determination was not made at that meeting. The Minutes show that while FOB reviewed NYRA's 2009 Operating Budget in detail, there was no discussion of a FOIL Request. Respondents allege that Mr. Odatto of the *Times Union* was present at the December 22 meeting, and *afterward* he "personally delivered" the FOIL request to a DOB employee at the DOB office in the State Capitol building in Albany (reply, ¶ 9). Included with respondents' motion is a handwritten note to DOB signed by a "James M. Odatto" and dated "Dec. 22, '08." On or about December 24, 2008, DOB advised NYRA via e-mail that it had received a FOIL request for its

2009 Budget and that Ms. Anglin “has decided to honor that request” (see the December 24, 2008 e-mail; see also Petition, ¶ 9).

According to NYRA’s Petition, after receiving the December 24 e-mail, NYRA advised respondents that it would oppose the FOIL Request (Petition, ¶ 9). In a letter dated January 12, 2009, DOB asked NYRA to justify its request that the FOIL trade secret exception be applied to its 2009 Operating Budget. NYRA opposed the FOIL application by a letter dated January 25, 2009. By a letter dated January 28, 2009, DOB informed NYRA of its intention to grant access to all but three small sections of NYRA’s 2009 Operating Budget. In a letter dated February 5, 2009, NYRA appealed DOB’s decision. By a letter dated February 13, 2009, DOB denied in part NYRA’s appeal, resulting in the Petition from NYRA herein. Although it is not clear *exactly when* the initial Determination was made to approve the FOIL request, it is clear from documentary evidence that the initial Determination, and all subsequent determinations, were made by respondents in Albany County.

Second, the record shows that the “material events” took place in Albany County. According to caselaw, in an Article 78 proceeding, the “‘material events’ forming a proper basis of venue include all such underlying facts and events which give rise to the official action challenged by petitioner” (*Hecht v New York State Teachers' Retirement System*, 138 Misc 2d 198, 200 [NY Sup 1987]); *see also New York Republican State Committee v New York State Com'n on Government Integrity*, 138 AD2d 884, 885 [3d Dept 1988], *quoting Ward v Sise*, 127 Misc 2d 32, 33 [1984] [“ The ‘material event’ here is ‘the decision-making process in which the [determination] was established’”]; *Brothers of Mercy Nursing and Rehabilitation Center v De Buono*, 237 AD2d 907, 908 [4d Dept 1997], *quoting Matter of Daley v Board of Estimate*, 258

AD 165, 166 [2d Dept 1939] [the “location of the material events is ‘the county wherein occurred the underlying events which gave rise to the official action complained of’”]; *Spano v New York State Racing and Wagering Bd* (2009 WL 982177, *2 [NY Sup 2009] [“Although the Board may have an office in New York City, there is no indication that any proceedings were brought or that any material events took place in this county. Rather, the initial events took place at the racetrack in Tioga County and the hearing took place in Schenectady County, as did the ultimate decision of the Board”]).

Here, the record shows that all of the underlying material events that gave rise to NYRA’s Petition herein took place in Albany County. NYRA’s Petition challenges respondents’ determination approving the FOIL Request. As discussed above, respondents have demonstrated that the FOIL Request was made by Mr. Odatto, who attended the December 22, 2008 meeting at the Capitol Building in Albany. At that meeting, Mr. Odatto learned about NYRA’s 2009 Operating Budget. After the meeting, Mr. Odatto submitted a handwritten FOIL Request to employees at the DOB in Albany, seeking a copy of the Budget. After learning of the FOIL Request, NYRA wrote several letters to officials in Albany seeking to prevent the disclosure of its 2009 Budget and appealing the Determination approving the FOIL Request. NYRA’s actions in response to the December 22, 2008 FOIL Request in Albany have culminated in the Petition before this Court. Therefore, respondents have demonstrated a second ground for changing venue.

Third, it is undisputed that the principal office of DOB is in Albany County, and FOB has no principal office (even though it has an official address in Albany). Further, as DOB is the agency that made all of the determinations regarding the FOIL Request herein, NYRA’s

arguments regarding the origins of FOB and the Racing and Wagering Board, and the location of various records lack merit.

Accordingly, respondents have demonstrated that Albany County is the proper venue for this action.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of respondents State of New York Division of the Budget, State of New York Franchise Oversight Board, and Laura Anglin, in her capacities as Director of State of New York Division of the Budget and Chairperson of State of New York Franchise Oversight Board for an order, pursuant to CPLR §§506(b), 510(1) and 511, changing the venue of this action by petitioner New York Racing Association, Inc. from New York County to Albany County is granted; and it is further

ORDERED that the venue of this action 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; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: July 9, 2009

FILED
JUL 13 2009
-12-
COUNTY CLERK'S OFFICE
NEW YORK



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD