

**Liden v Devane**

2009 NY Slip Op 32105(U)

September 9, 2009

Supreme Court, New York County

Docket Number: 400532/09

Judge: Marilyn Shafer

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

PRESENT: **MARILYN SHAFER** PART 8

Index Number : 400532/2009

LIDEN, SCOTT

vs

DEVANE, ELIZABETH

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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 *petition is denied in*  
*accord with the annexed memorandum -*

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

**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 1/143).

Dated: 9/9/09

*MARILYN SHAFER*  
**MARILYN SHAFER**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

----- X  
SCOTT LIDEN,

Petitioner,

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

Index No.:  
400532/09

-against-

ELIZABETH DEVANE, Chairperson,  
NEW YORK STATE BOARD OF  
EXAMINERS OF SEX OFFENDERS,

DENISE O'DONNELL, Commissioner,  
NEW YORK STATE DIVISION OF  
CRIMINAL JUSTICE SERVICES,

Respondents.

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Marilyn Shafer, J.:

Respondents Elizabeth Devane, Chairperson, New York State Board of Examiners of Sex Offenders (Board) and Denise O'Donnell, Commissioner, New York State Division of Criminal Justice Services, filed a cross motion to dismiss petitioner Scott Liden's Article 78 petition. Petitioner filed an Article 78 petition to vacate the determination by respondents that he is a "sex offender," as defined by Correction Law § 168-a (2) and directing that petitioner be removed from the sex offender registry. Respondents argue that the petition should be dismissed, pursuant to CPLR § § 217 (1), 306-b, 3211 (a) (8) and 7804 (f), on the grounds that the proceeding is barred by the statute of limitations and that the court lacks personal jurisdiction over respondents. Petitioner argues that the

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petition should be deemed timely, that the cross motion be denied, and that respondents should be required to answer.

#### BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is currently a prisoner incarcerated at Five Points Correctional Facility, which is located in Seneca County. He is serving a five-year sentence based on his conviction by his January 24, 2007 plea of guilty to robbery. In September 1995, petitioner was arrested in the State of Washington and charged with the crimes of rape and kidnaping in the first degree. The arrest report designates the ages of the victims as 16 and 17. On May 10, 1996, petitioner entered into an "Alford" plea to two counts of unlawful imprisonment. Petitioner was sentenced to eight months of prison time for each count, plus a year of community supervision. Petitioner was not required to register as a sex offender due to the language of his plea, and due to changes in the Washington statutes at the time he was released.

After petitioner was sentenced for the crime committed in New York, on or around July 17, 2007, he received a notification from respondents that he was required to register and be "risk assessed" as a sex offender. In New York, a person is required to register as a sex offender in New York, even if he did not have to register in another state, provided that he was convicted of certain crimes. See Correction Law § 168-a (2) (d) (i). Under New York law, someone convicted of unlawful imprisonment

must register as a sex offender, regardless of the victims' ages. Petitioner was informed that, although he would be entitled to a Sex Offender Registration hearing (SORA) to officially determine his level notification, the Board recommended to the Court and to the District Attorney that petitioner be classified as a level three sex offender, based on his prior criminal history and his activity after being released from prison. The letter specifically stated as follows:

Pursuant to the New York State Sex Offender Registration Act, the Board of Examiners of Sex Offenders has reviewed your conviction in another jurisdiction and has determined that you are required to register with the New York State Sex Offender Registry. You will receive a registration form for completion and signature from the New York State Division of Criminal Justice Services Sex Offender Registry . . . . This is the final decision of the Board of Examiners of Sex Offenders. If you are aggrieved by this final decision, you may commence a proceeding for judicial review in accordance with Article 78 of the Civil Practice Law and Rules.

Respondents' Notice of Cross Motion, Exhibit A. Therefore, petitioner, at this time, was informed that he was required to register and only the level of his status as a sex offender was left to officially determine at the SORA hearing.

Before the SORA hearing, on April 9, 2008, petitioner's attorney wrote a letter to the State of New York Division of Criminal Justice Services requesting that petitioner be de-classified as a sex offender. In response, he received a letter,

dated April 14, 2008, which stated, "[p]lease be advised that it was, and continues to be, the position of the Board of Examiners of Sex Offenders that Mr. Liden must register as a sex offender." Respondents' Reply Affirmation, Exhibit A.

Petitioner's attorney also wrote letters to the judge who would be assigned to petitioner's case to determine solely petitioner's classification level. On December 11, 2008, a hearing was held to determine petitioner's level of notification. Petitioner was classified as a level three sex offender.<sup>1</sup>

Petitioner filed this Article 78 proceeding on or around March 4, 2009.

#### DISCUSSION

A CPLR Article 78 proceeding against a public body or officer

"must be commenced within four months after the determination to be reviewed becomes final and binding (CPLR 217 [1])." An agency determination is final-triggering the statute of limitations-when the petitioner is aggrieved by the determination.

*Matter of Carter v State of New York, Executive Dept., Division of Parole*, 95 NY2d 267, 270 (2000).

Petitioner received a letter from the Board dated July 17, 2007, which notified him that he was required to register with

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<sup>1</sup>Petitioner notes that this decision is currently on appeal, and that if this current petition is granted, that appeal would be moot.

the New York State Sex Offender Registry. The letter also stated, "[t]his is the final decision of the Board of Examiners of Sex Offenders. If you are aggrieved by this final decision, you may commence a proceeding for judicial review in accordance with Article 78 of the Civil Practice Law and Rules."

According to Correction Law § 168-k (2), the Board is the agency which determines whether a person convicted of a sex offense in a foreign jurisdiction is required to register in New York. *People v Geier*, 56 AD3d 539, 540 (2d Dept 2008). The county or supreme court in the county of residence decides the notification level and length of registration. *People v McGarghan*, 18 Misc 3d 811, 813 (Sup Ct, NY County 2007). Therefore, the appropriate way to challenge the Board's classification of petitioner as a sex offender is through an Article 78 proceeding. *People v Geier*, 56 AD3d, at 540. In *People v McGarghan* (18 Misc 3d 811, *supra*), which is a recent New York County case, the petitioner was required to register as a sex offender in Vermont and the Board determined that, after he established residency in New York, he was also required to register there. Petitioner brought a motion to dismiss under the SORA. The court held that it lacked the jurisdiction to review the Board's determination that petitioner was a sex offender, that the Board is empowered to make the initial determination and that at petitioner's SORA's hearing, the court is not evaluating

whether the Vermont statute is equivalent to the New York statute. The court also concluded that an Article 78 proceeding was the only appropriate means to review the Board's decision, and since petitioner did not file one, his petition was dismissed.

In the present case, similar to *People v McGarghan*, 18 Misc 3d 811, *supra*, petitioner did not file an Article 78 proceeding challenging the Board's initial determination until nearly two years after its initial determination. Accordingly, petitioner has exceeded the statute of limitations, and his petition must be dismissed.

As previously mentioned, petitioner also wrote a letter to the State of New York Division of Criminal Justice Services and received a response refusing to de-classify petitioner as a sex offender. As respondents argue, even if the court were to find that this proceeding is one in the nature of mandamus, an Article 78 proceeding should have been filed by August 14, 2008, four months after respondents' refusal. Therefore, in all respects, petitioner's motion is denied and respondents' cross motion is granted.

Although respondents argue that the court lacks jurisdiction over respondents because the petition was not timely served on the Office of the Attorney General, this issue is moot for the same reasons set forth in this decision.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the respondents' cross motion is granted; and  
it is further

ADJUDGED that the petition is denied, and the proceeding is  
dismissed.

Dated: 9/9/09

ENTER:

MARILYN SHAFER

**UNFILED JUDGMENT**

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