

Aspiroz v New York City Dept. of Health

2009 NY Slip Op 32628(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 109198/2009

Judge: Paul G. Feinman

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: PAUL G. FEINMAN
J.S.C.

PART 12

Index Number : 109198/2009
ASPIROZ, FERNANDO
VS.
NYC DEPT OF HEALTH
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 109198/09
MOTION DATE 9/4/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 9

this motion to/for _____

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

PAPERS NUMBERED
<u>1</u>
<u>2</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**NOTICE IS HEREBY GIVEN IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

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: 11/6/09

Paul G. Feinman
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: CIVIL TERM: PART 12

-----X

FERNANDO ASPIROZ,
Petitioner,

against

NEW YORK CITY DEPARTMENT OF HEALTH,
ALBERTA TORRES, and OSCAR ASPIROZ, an
infant, by his parent, ALBERTA TORRES,
Respondents.

-----X

Index Number: 109198/2009
Submission Date 9/4/2009
Mot. Seq. No. 001
Cal. No. 9

**DECISION, ORDER and
JUDGMENT**

For the Petitioner:
Wilens & Baker, P.C.
By: Jill M. Goffer, Esq
450 Seventh Avenue, 12 Floor
New York, NY 10012

For Respondent NYC Department of Health:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
By: Teresita V. Magsino, Esq.
100 Church Street, 5-175
New York, NY 10007

For Respondents Torres and Aspiroz:
Alberta Torres, *pro se*
1681 Linden St., Apt. 2
Ridgewood NY 11385

Papers considered in review of this petition to compel a change in birth certificate and vacate an acknowledgment of paternity :

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Answer to Petition	2

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or representative must appear in person at the County Clerk's Office (100 Nassau St., New York, NY 10038) and vacate an acknowledgment of paternity.

PAUL G. FEINMAN, J.:

Petitioner moves pursuant to CPLR Article 78 for an order directing the New York City Department of Health and Mental Hygiene (DOH) to amend the birth certificate of the infant respondent Oscar Aspiroz to remove petitioner as the named father, and to vacate an acknowledgment of paternity signed by the petitioner. The child's mother, respondent Torres, does not oppose. The City's DOH has not opposed or otherwise appeared. Nonetheless, for the reasons which follow, the petition is denied in its entirety.

Petitioner married Respondent Alberta Torres in 1987. (Pet. Aspiroz Aff. ¶ 2). On June

22, 2005, Ms. Torres gave birth to Oscar Aspiroz. (Pet. Aspiroz Aff. ¶ 2). At that time, petitioner believed that he was Oscar's father and signed an acknowledgment of paternity. (Pet. Aspiroz Aff. ¶ 2). Oscar's birth certificate lists petitioner as Oscar's father. (Pet. Ex. D). Alberta Torres later notified petitioner that he was not, in fact, Oscar's father. (Pet. Aspiroz Aff. ¶ 4). A subsequent DNA test excluded petitioner from potentially being Oscar's father. (Pet. Aspiroz Aff. ¶ 4; Ex. A). On February 16, 2006, petitioner was granted a judgment of divorce from Torres. (Pet. Aspiroz Aff. ¶ 5, Ex. B). The judgment of divorce makes no findings that there was any issue from the marriage. (Pet. Ex. B).¹

On March 31, 2009, the Commissioner of Social Services filed a petition for child support against petitioner. (Pet. Aspiroz Aff. ¶ 6). However, that petition was dismissed due to the fact that Oscar was not petitioner's son. (Pet. Aspiroz Aff. ¶ 6, Pet. Ex. C).

Petitioner served the instant notice of petition and petition on June 29, 2009 on respondents by mailing a copy of the papers to the New York City Department of Health and Mental Hygiene and a copy to Torres at her home. (Aff. of Service). Torres served and file an answer to the petition in which she does not oppose petitioner's requests in the instant petition, but objects to any possible motion by petitioner in the future to amend the child's surname, which is that of petitioner's (Ans. to Pet. ¶¶ 1-6). DOH has not responded.

At the outset it should be noted that this court does not have personal jurisdiction over two of the respondents because petitioner did not properly serve them. As concerns the City's DOH, it is required under CPLR 311 (2) that for a party to properly serve a New York City

¹Although petitioner states that Torres executed an affidavit consenting to entry of judgment of divorce and acknowledging that there was no issue from the marriage (Pet. Aspiroz Aff. ¶ 5), there is no affidavit from Torres included in the petition's exhibits.

agency, he or she must personally serve “the corporation counsel or [] any person designated to receive process in a writing filed in the office of the clerk of New York County.” Here, petitioner simply mailed the petition to the New York City Department of Health and Mental Hygiene, and not the Corporation Counsel of the City of New York. Failure to serve corporation counsel deprives the court of jurisdiction.

This court also lacks jurisdiction over respondent Oscar Aspiroz since he was never served. Such notice should have been personally served on his parent or guardian pursuant to CPLR 309 (a). Accordingly, the petition is denied as against both the DOH and Oscar Aspiroz.

As for respondent Alberta Torres, she was also improperly served, because service of a petition by mail is not authorized (CPLR 308). However, Torres appeared in this proceeding by filing an answer to the petition, and her answer did not include any objections to the court’s personal jurisdiction over her. Therefore, she waived any personal jurisdiction objections. (CPLR 320 [b]).

Because the court lacks personal jurisdiction over the City’s DOH, the branch of the petition seeking amendment of Oscar’s birth certificate must be denied for that reason alone. However, even if the court it did have personal jurisdiction over DOH, the petition would still be denied. CPLR Article 78 provides that upon motion from a petitioner, a court may compel a state body or officer to perform a non-discretionary duty. Implicit in Article 78’s framework, however, is the tenet that a party must first exhaust all his administrative remedies. (*Community Sch. Bd. Nine v Crew*, 224 AD2d 8, 12 [1st Dept 1996]). In this case, petitioner makes no allegations that he sought to amend the birth certificate by first asking the Department of Health and Mental Hygiene to do so. The DOH has established procedures concerning how to change a birth certificate. According to the provisions of the Rules of the City of New York pertaining to

the DOH, a new birth certificate may be filed if the department receives notice "from the clerk of a court of competent jurisdiction, or proof is submitted of a judgment, order or decree" respecting the parentage of the child. (24 RCNY § 207.05[a][2]). Petitioner could have simply had submitted to DOH the order of the Family Court magistrate dismissing the child support action. If DOH had then refused to change the birth certificate, this Article 78 action would have been proper. Without any evidence that petitioner sought and was denied relief by DOH, it is premature to compel DOH to take any action.

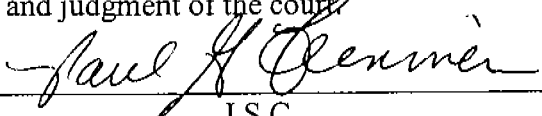
As for the branch of the petition requesting vacatur of petitioner's signed acknowledgment of paternity, this court lacks subject matter jurisdiction over such a request. Family Court Act § 511 provides that the Family Court has exclusive original jurisdiction over actions to establish paternity. Petitioner's request to vacate the signed acknowledgment of paternity must be brought there.

As concerns respondent Torres' opposition to any change of her son's last name, there is no application before the court regarding a name change, and therefore her opposition is academic. Accordingly, it is

ORDERED and ADJUDGED that the petition is denied in all respects and is dismissed in its entirety .

This constitutes the decision, order, and judgment of the court.

Dated: November 6, 2009
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

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).