

**Ford v New York State Racing & Wagering Bd.**

2010 NY Slip Op 30303(U)

February 4, 2010

Supreme Court, New York County

Docket Number: 100162/10

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER Justice

PART 15

Index Number : 100162/2010  
**FORD, MARK**  
 vs.  
**NYS RACING AND WAGERING**  
 SEQUENCE NUMBER : 003  
 REARGUE

INDEX NO. 10016210  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 003  
 MOTION CAL. NO. \_\_\_\_\_  
 motion to/for \_\_\_\_\_

The

PAPERS NUMBERED

1, 2  
3

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED  
 FEB 19 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 2/4/10

  
**HON. EILEEN A. RAKOWER**

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: PART 15

-----X  
MARK FORD, RICHARD BANCA, JOHN BRENNAN,  
GEORGE CASALE, and STANDARDBRED OWNERS  
ASSOCIATION, INC.,

Index. No.  
100162/10

Petitioners,

- against -

DECISION  
and ORDER

THE NEW YORK STATE RACING AND WAGERING  
BOARD,

Mot. Seq.  
003

Respondent.

-----X  
EILEEN A. RAKOWER, J.S.C.

Petitioners bring this proceeding pursuant to CPLR Article 78 and CPLR §3001, against respondent the New York State Racing and Wagering Board (“the Board”), seeking an Order declaring that certain rules newly promulgated by the Board are, among other things, arbitrary, capricious, over broad and exceed the Board’s jurisdiction. Individual petitioners are “harness” race horse owners and/or trainers. Petitioner, Standardbred Owners Associations, Inc. (“SOA”), is incorporated in New York State, with its principal offices in Yonkers.

Petitioners are challenging 9 NYCRR §4120.17 and 9 NYCRR §4120(g), also known as the “Out of Competition Testing Rules.” The new rules expand the Board’s power to test for illegal medications in race horses who are stabled in private barns off track. The new rules may also require out-of-state owners or trainers to bring their horses to the track for testing when they are stabled at a site located within a radius not greater than 100 miles from a New York State race track. Violation of the new rules would subject violators to, among other penalties, fines, suspension or exclusion from New York race tracks.

On January 7, 2010 this Court held oral argument on petitioners’ Order to Show Cause, seeking a Temporary Restraining Order (“TRO”). At that hearing, respondent raised the issue of transferring venue, claiming that the proceeding should be transferred to Schenectady County pursuant to CPLR §506(b). As a result of the January 7, 2010 hearing, this Court temporarily stayed enforcement of the new rules. The Board subsequently moved to change venue from New York County to

Schenectady County. That motion, along with petitioners' opposition, is presently before this Court.

The Board, in support of its motion, argues that Schenectady County is the proper county for this action to be venued pursuant to CPLR §506(b). The Board submits evidence that its principal offices are located in Schenectady County and that the development and promulgation of the new rules took place there.

Petitioners, in opposition, claim that, since they are seeking a declaratory judgment, §506(b) does not apply. Petitioners argue that their petition is clearly one for declaratory relief because it is challenging the constitutionality of the new rules. Thus, petitioners argue, the Court should look to the general residency provisions of CPLR 503(a).

Pursuant to CPLR §510(1), which permits change of venue based on assertion that the county designated is improper, the court must first determine what venue provision applies and what constitutes proper venue. Thereafter, it is respondent's burden to "establish that, given the type of action, the venue chosen was improper." (*Tarpey v. Port Authority of New York and New Jersey*, 7 Misc.3d 1006(A)[Sup. Ct. Bronx Cnty. 2005]).

Initially, the Court rejects the contention that it should treat the instant petition as one for declaratory relief. While it is well settled that a challenge to the validity of legislation may not be brought by way of an Article 78 proceeding, the same principle does not apply to the "quasi-legislative acts and decisions of administrative agencies." (*Walton v. New York State Dept. of Corr. Servs.*, 8 NY3d 186,194[2007]). Thus, "where a quasi-legislative act by an administrative agency . . . is challenged on the ground that it was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion, a proceeding in the form prescribed by Article 78 can be maintained . . ." (*New York City Health & Hosp. Corp. v. McBarnette*, 84 NY2d 194,204 [1994]) (where the court found that a claim commenced as a declaratory judgment action, challenging the reimbursement rates for Medicaid, should have been brought in the form of an Article 78 proceeding). Merely asserting a challenge in terms of a "constitutional objection, does not serve to make unavailable an Article 78 proceeding the customary procedural vehicle for review of administrative determinations." (*Solnick v. Whalen*, 49 NY2d 224,231[1980]).

Venue in an Article 78 proceeding is governed by CPLR §506(b), which states, in relevant part:

(b) Proceeding against body or officer. 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 . . .

Here, the Board has met its burden of showing that the instant proceeding is improperly venued in New York County. The Board submits a printout from its website which lists its office locations. The printout shows that the Board's Executive Office, Licensing Unit, and Charitable Game Unit are located at 1 Broadway Center, Suite 600, in the County of Schenectady. Further, the Board submits notices announcing three public hearings to be held at its Schenectady office. Finally, a letter announcing the adoption of the Out of Competition Testing Rules was issued from the Board's Schenectady office, evidencing that the determination was made in Schenectady County.

Petitioners maintain their position that CPLR §506(b) is inapplicable to the instant action. Thus, they fail to submit evidence in opposition to the Board's assertion that venue is proper pursuant to CPLR §506(b). Even if the Court were to agree that the nature of the relief sought was one for declaratory judgment, petitioners fail to show why New York County is the proper venue. CPLR §503(c) states that a corporation "shall be deemed a resident of the county in which its principal office is located." According to the petition, SOA is a domestic corporation with its principal place of business in Yonkers, which is in Westchester County.

Nor can the Court place venue in New York County pursuant to CPLR §503(a). A general venue provision, CPLR §503(a) directs that venue shall be proper "in the county in which one of the parties resided when it was commenced . . ." There is nothing in the record before the Court evidencing that any of the individual petitioners resided in New York County when the instant action was commenced.

Wherefore, it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that venue of this action is changed from this Court to the Supreme Court, County of Schenectady, 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 Schenectady,

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 the Temporary Restraining Order, granted by this Court on January 7, 2010, shall remain in effect pending the resolution of the underlying petition.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: February 4, 2010



EILEEN A. RAKOWER, J.S.C.

**FILED**  
FEB 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE