

Matter of Brannon v Goodman
2010 NY Slip Op 30657(U)
March 25, 2010
Supreme Court, New York County
Docket Number: 115662/09
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
SALIANN SCARPULLA

PRESENT: _____

PART 19

Index Number : 115662/2009

BRANNON, RALPH

vs

GOODMAN, NORMAN

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

NOTION DATE _____

NOTION SEQ. NO. _____

NOTION CAL. NO. _____

TI _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Article 78 proceeding is
~~motion and cross-motion~~ are decided in accordance
with accompanying memorandum decision.

**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
1715).**

Dated: March 25, 2010

Saliann Scarpulla
SALIANN SCARPULLA 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 19

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In the Matter of the Application of

RALPH BRANNON,

Petitioner,

Index No.:115662/09

Submission Date: 2/24/10

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules in the Nature of Mandamus

- against-

DECISION AND ORDER

NORMAN GOODMAN,

Respondent.

----- X

For Petitioner:
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Papers considered in review of this article 78 proceeding:

- Petition 1
- Aff in Opp 2
- Reply Aff. 3

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding in the nature of mandamus, petitioner Ralph Brannon (“Brannon”) seeks a judgment compelling respondent Clerk of the Court Norman Goodman (“Goodman”) to accept for filing a hybrid action/proceeding under one index number in New York State Supreme Court.

Brannon attempted to file a complaint/petition, notice of petition, and summons as a hybrid action/proceeding under one index number in New York State Supreme Court. Goodman would not file the pleadings under one index number, informing Brannon that a hybrid action/proceeding could not be filed in New York State Supreme Court. Although Brannon disagreed, he filed the complaint/petition solely as a petition pursuant to Article 78 under Index No. 112004/09 in order to prevent the expiration of the statute of limitations for certain causes of action alleged therein. Brannon then sent a letter dated August 31, 2009 to Goodman and Chief Deputy Clerk James A. Rossetti seeking permission to file the hybrid action/proceeding. He alleges that he received no response to his letter.

Brannon now commences this Article 78 proceeding in the nature of mandamus seeking a judgment directing Goodman to accept for filing Brannon's summons and complaint under Index No. 112004/09, already assigned to his petition, on the ground that New York courts have repeatedly affirmed the ability of a party to commence a hybrid action/proceeding.

In opposition, Goodman argues that CPLR §304 does not allow for the filing of a petition/complaint as a hybrid action/proceeding under one index number, rather, Brannon was required to purchase two separate index numbers, one to commence an action and one to commence a proceeding.

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Discussion

Article 78 relief in the form of mandamus to compel the performance of a ministerial, nondiscretionary act may be granted only where a petitioner establishes a clear legal right to the relief requested. *See Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380 (2006). The act sought to be compelled must be based upon a specific statutory authority mandating performance in a specified manner. *See Savastano v. Prevost*, 66 N.Y.2d 47 (1985); *Matter of Highland Hall Apts., LLC v New York State Division of Housing and Community Renewal*, 66 A.D.3d 678 (2nd Dept. 2009). Here, while Brannon argues that Goodman, as County Clerk, is required by law and court precedent to accept his hybrid action/proceeding for filing under a single index number, he fails to point to any specific statutory authority mandating such performance. Moreover, Brannon fails to establish that he possesses a “clear legal right” to file his pleadings under a single index number as a hybrid proceeding/action.

CPLR §103(b) provides that “all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized” and CPLR §304 states that “an action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter. A special proceeding is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter.” The CPLR plainly explains that judicial proceedings shall be commenced as either an action or a special proceeding and sets forth

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the different method for commencing each. There are no CPLR provisions or any other statutory provisions relating to a hybrid proceeding/action. The CPLR “does not allow civil judicial proceedings to be prosecuted as both an action and a special proceeding.” *Matter of Powell v. City of New York*, 16 Misc. 3d 1113A, *4 (Sup. Ct. N.Y. Co., 2007).

Brannon argues that CPLR §103(c), which states, “a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution,” gives the court discretion to accept for filing a lawsuit in improper form. However, this section of the CPLR addresses the court’s power to accept and/or convert a previously commenced action or proceeding which was not brought in proper form. It does not, however, grant permission to a party to commence suit in an improper form nor does it grant permission to the courts to accept for filing a lawsuit in improper form in the first instance.

Brannon argues that nevertheless, New York courts have repeatedly affirmed the ability of a party to commence a hybrid action/proceeding. In the cases cited by Brannon to support his argument, and in cases discovered through court’s own research, hybrid actions/proceedings have been commenced and maintained only where a party is seeking Article 78 relief along with closely intertwined declaratory judgment relief. *See e.g. Matter of Crown Communication New York, Inc. v. D.O.T.*, 4 N.Y.3d 159 (2005); *Matter of Schwartzfigure v. Hartnett*, 83 N.Y.2d 296 (1994); *Perry Thompson Third Co. v. City of New*

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York, 279 A.D.2d 108 (1st Dept. 2000); *Heimbach v. Mills*, 54 A.D.2d 982 (2nd Dept. 1976);
Matter of Powell v. City of New York, 16 Misc. 3d 1113A (Sup. Ct. N.Y. Co., 2007).

Here, in his proposed complaint/petition, Brannon asserts eight causes of action, including defamation, malicious prosecution, and discrimination. He also seeks a judgment declaring Civ. Service L. §76 unconstitutional and seeks Article 78 relief, alleging that a determination reached by the Civil Service Commission against him should be annulled. Clearly, Brannon's proposed hybrid action/proceeding differs substantially from those previously contemplated by the New York courts, which were only commenced by parties seeking Article 78 and declaratory judgment relief. Brannon's proposed hybrid action/proceeding would require much more extensive discovery and the interests of the parties would be better served if his claims were brought in a separate plenary action and special proceeding under two separate index numbers. As such, this court will not direct Goodman to accept Brannon's hybrid pleadings for filing.

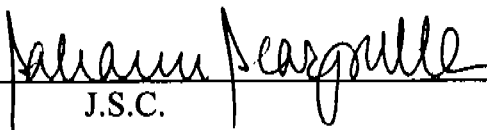
In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Ralph Brannon is denied and the Article 78 proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 24, 2010

ENTER:


J.S.C.

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).