

<b>Matter of Martinez v State Commn. of Jud. Conduct</b>
2010 NY Slip Op 31276(U)
May 17, 2010
Sup Ct, NY County
Docket Number: 114000-09
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) 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: Hon. Jose A. Madala  
Justice

PART 4

Index Number : 114000/2009  
**MARTINEZ, MANUEL**  
VS.  
**STATE COMMISSION**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for Article 78 relief

NOTICE OF MOTION/ Order to Show Cause \_\_\_\_\_ Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this <sup>pititor</sup> motion and its cross motion are decided in accordance with the enclosed Memorandum, Decree, order + 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: May 17, 2010

[Signature]  
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: IAS PART 11

Decision, Order and Judgment

-----X  
In the Matter of the Application of  
MANUEL MARTINEZ,

Index No. 114000-09

Petitioner,

-against-

STATE COMMISSION OF JUDICIAL CONDUCT  
and A.D.A. JOEL J. SEIDMANN,

Respondent.

**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).

-----X  
JOAN MADDEN, J.:

In this Article 78 proceeding, petitioner, Manuel Martinez, who is appearing pro se and is incarcerated, challenges the dismissal by the respondent State Commission of Judicial Conduct (“the Commission”) of his complaint against a judge without conducting an investigation and seeks to enjoin A.D.A. Joel Seidmann (“Seidmann”) from acting beyond his legal authority and to require him to inform the New York State Inspector General to restore petitioner’s ability to communicate with 49 individuals. The Commission opposes the petition and cross moves to dismiss it on statute of limitations grounds, and Seidmann opposes the petition. For the reasons below, the petition is denied and dismissed.

Background

Petitioner, who is an inmate at a State correctional facility and a former attorney, was convicted in April 2008, after a jury trial, of second degree murder for hiring a hit man to kill George H. Kogan at the behest of Kogan’s estranged wife, who petitioner was representing in the couple’s divorce proceeding. Seidmann, an Assistant District Attorney in Manhattan, prosecuted the case. Justice Michael J. Obus presided over the trial and sentenced petitioner to 25 years to life. Petitioner’s appeal of the verdict is pending.

On May 6, 2008, petitioner filed a complaint against Judge Obus with the Commission, which is the sole state agency responsible for receiving, initiating and investigating complaints against the judges and justices in the New York State Unified Court System. After his complaint was filed, petitioner sent various materials to the Commission in support of the complaint, including a copy of his pro se motion to set aside the verdict which he sent on October 31, 2008. On January 20, 2009, the Commission wrote petitioner that it had read his letter of complaint dated October 31, 2008, and that his complaint had been dismissed. By letter dated January 26, 2009, petitioner responded that the October 31, 2008 letter was a follow up to his May 6, 2008 complaint and noted that he had made four other filings containing additional information in support of the complaint including the trial transcript. The record also contains a July 23, 2009 letter from the Commission acknowledging the receipt of additional documents from petitioner which the Commission stated it would file with petitioner's previous complaints.

On August 14, 2009, Seidmann wrote to Mr. Sean Duncan of the Office of the Inspector General at the New York State Department of Corrections ("DOCS") to inform him that he received a telephone call from one of the witnesses who testified against petitioner at trial informing Seidmann that petitioner had mailed a copy of a letter to her place of business. The witness asked Seidmann to take all steps necessary to ensure that petitioner did not write any further letters. Seidmann enclosed a list of 49 witnesses who testified at petitioner's trial and wrote that he "would greatly appreciate it if you could take all legal and proper steps to prevent [petitioner] from harassing any of the People's witnesses."

On August 17, 2009, the Superintendent of Auburn Correctional Facility where

petitioner is incarcerated informed petitioner that 49 names had been placed on his "Negative Correspondence/Telephone List," meaning that he would not be permitted to communicate with these individuals. DOCS Directive #4422 entitled "Inmate Correspondence Program" allows DOCS to place on an inmate's Negative Correspondence/ Telephone List "the name of any person or business that has indicated, in any manner, that further correspondence from the inmate is not desired."

On October 6, 2009, petitioner filed this Article 78 proceeding against the Commission and Seidmann.

Petitioner's Request for Article 78 relief Against the Commission

This proceeding challenges the Commission's dismissal of petitioner's complaint against Judge Obus and its failure to conduct an investigation in connection with the complaint.

The Commission cross moves to dismiss the proceeding as untimely, asserting that the petition was filed more than four months after its January 20, 2009 determination dismissing the petitioner's complaint against Judge Obus. The Commission also argues that as its decision to dismiss the complaint against Judge Obus and not to further investigate the matter are discretionary, a writ of mandamus is unavailable to compel the Commission to reinstate and investigate the complaint.

In reply, petitioner contends that his May 6, 2008 complaint was incomplete and that the Commission dismissed the complaint before receiving petitioner's legal support for its allegations.

Under CPLR 217(1), an Article 78 proceeding "must be commenced within four months

after the determination to be reviewed becomes final and binding upon the petitioner.” The Commission’s January 20, 2009 decision to dismiss the petitioner’s complaint became “final and binding upon the petitioner,” so as to trigger the running of the statute of limitations period on the date that petitioner’s received notice of the decision. Shell v. McCray, 261 AD2d 664 (3d Dept 1999), lv dismissed, 97 NY2d 700 (2002). Here, the record reveals that petitioner received the January 20, 2009 decision by January 26, 2009, at the latest, since that is the date he wrote to the Commission regarding the decision. Thus, statute of limitations expired on May 26, 2009, or four months after petitioner’s receipt of the decision.

However, this Article 78 proceeding was not commenced until it was filed on October 6, 2009 (See Grant v. Senkowski, 95 N.Y.2d 605 (2001); Fry v. Village of Tarrytown, 89 N.Y.2d 714, 719 (1997)), which is more than four months after the limitations period expired. Accordingly, the petition against the Commission should be dismissed as untimely.

In any event, even if the court were to consider the merits of the petition, there is no basis for granting petitioner relief against the Commission as the Commission’s decision to dismiss the complaint without further investigation is within its broad grant of authority. Judiciary Law § 44(1) provides that: “Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that on its face lacks merit.” Notably, this statute gives the Commission the authority to dismiss a complaint on its face without further investigation or consideration of subsequently submitted materials. Mantel v. New York State Commission on Judicial Conduct, 181 Misc2d 1027, 1029 (Sup Ct NY Co. 1999), aff’d, 277 AD2d 96 (2000), lv denied, 96 NY2d 706 (2001); see also,

Harley v. Perkinson, 187 AD2d 765 (3d Dept 1992). Accordingly, petitioner's application for Article 78 relief against the Commission is denied.

Petitioner's Request for Article 78 relief against Seidmann

Petitioner seeks to enjoin A.D.A. Joel Seidmann ("Seidmann") from acting beyond his legal authority and to require him to inform the New York State Inspector General to restore petitioner's ability to communicate with 49 individuals placed on the Negative Correspondence List. Petitioner argues that Seidmann acted beyond his legal authority when he sought to prevent his communication with the 49 individuals and asserts that the DOCS directive at issue only bars communication with a person that indicates that he or she does not wish to communicate with an inmate and does not give the prosecutor the authority to make a request on behalf of such individuals.

In response, Seidmann argues that the relief sought in the petition is premature as petitioner has failed to exhaust his administrative remedies. In addition, Seidmann argues that petitioner has not shown that he is entitled to a writ of prohibition since Seidmann was not acting in his capacity as a judicial or quasi-judicial officer when he wrote to the Inspector General and did not direct the Inspector General to implement the directive preventing petitioner from communicating with witnesses but, instead, made a request. In addition, Seidmann contends that to the extent petitioner argues that DOCS acted beyond its authority in placing the witnesses on the Negative Correspondence List, relief is more properly directed against that agency.

In reply, petitioner argues that he is not required to exhaust his administrative remedies as the pursuit of such remedies would be futile. In support of his argument, he submits a November

12, 2009 appeal of a determination afer hearing in which he was disciplined for, inter alia, attempting to communicate with one of the witnesses at his trial. He also argues that Seidmann does not have the authority and acted beyond his duties in seeking to have the witnesses placed on the Negative Correspondence List, and that exhaustion of administrative remedies is not required under such circumstances.

Here, it appears that petitioner did not exhaust his administrative remedies as he failed to administratively challenge the Negative Correspondence List, so that this matter is not ripe for determination. Lee v. New York State Dept. Of Parole, 252 A.D.2d 703 (3d Dept 1998), lv denied, 92 N.Y.2d 815 (1998). Moreover, evidence that petitioner was punished for communicating with an individual on the list does not mean that his challenge to the placement of individuals on the Negative Correspondence List would be futile.

Additionally, even if the court were to reach the merits of the petition against Seidmann, petitioner would not be entitled to relief. "Prohibition is an extraordinary remedy which is available only when a clear legal right to relief exists." Hirschfeld v. Friedman, 307 AD2d 856, 858 (1<sup>st</sup> Dept 2003). Thus, the writ of prohibition may not be used where a petitioner has an adequate remedy at law to review any alleged errors. La Rocca v. Lane, 37 NY2d 575, 578 (1975), cert. denied, 424 US 968 (1976). I

In this case, petitioner has not provided any legal basis for relief against Seidmann whose only action consisted of requesting that DOCS place the witnesses who testified against petitioner at trial on the Negative Correspondence List. Moreover, petitioner has an adequate remedy to challenge the Negative Correspondence List by the administrative procedure provided

for under the Correction Law and its accompanying regulations and, if such challenge proves unsuccessful or futile, petitioner can appeal via an Article 78 proceeding against DOCS, which is the agency responsible for placing the individuals on the Negative Correspondence List.

Accordingly, the petition for Article 78 relief against Seidmann is denied.

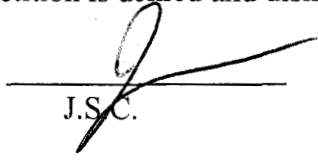
Conclusion

In view of the above, it is

ORDERED that the Commission's cross motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed.

DATED: May 17, 2009

  
\_\_\_\_\_  
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).