

**Matter of Baez v Brown**

2010 NY Slip Op 33020(U)

October 27, 2010

Supreme Court, Queens County

Docket Number: 24221/2009

Judge: Allan B. Weiss

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## Short Form Order and Judgment

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS  
Justice

IA Part 2

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In the Matter of the Application of  
CANDIDO BAEZ, #90-A-3203,

Petitioner,

FOR A JUDGMENT PURSUANT TO  
ARTICLE 78 OF THE CIVIL PRACTICE  
LAW AND RULES,

-against-

RICHARD A. BROWN, Queens County  
District Attorney; RAYMOND W. KELLY,  
Chief of Police, New York City  
Police Department,

Respondents.

x

Index

Number 24221 2009

Motion

Date July 21, 2010

Motion

Cal. Number 3

Motion Seq. No. 3

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x

The following papers numbered 1 to 10 read on this motion by petitioner Candido Baez, pro se, for leave to reargue this court's order and judgment of April 12, 2010, and upon reargument, determining that his Article 78 petition was timely filed on November 17, 2008, and reinstating said petition against the respondents and directing respondents to comply with his request for documents pursuant to Public Officers Law § 84.

	<u>Papers Numbered</u>
Notice of Motion - Affidavit - Exhibits (A - E, Appendix A - S)	
Affidavit of Service .....	1-4
Opposing Affirmation .....	5-6
Reply Affidavit .....	7
Opposing Affirmation - Exhibit (1 - 5).....	8-10

Upon the foregoing papers this motion is determined as follows:

A motion for reargument is one “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” (CPLR 2221[d][2].) It is well settled that “[i]ts purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1979].) Nor does a motion for reargument “offer an unsuccessful party successive opportunities to present arguments not previously advanced.” (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2005].)

This court in its order of April 12, 2010, determined that the petitioner Candido Baez’s Article 78 proceeding against Richard A. Brown, District Attorney of Queens County, was time barred. The court also granted the cross motion of Commissioner Raymond W., Kelly, to dismiss the petition on the ground that the letter of January 26, 2010 rendered this proceeding moot.

Petitioner now seeks reargument with respect to his claims against the District Attorney on the grounds that his Article 78 proceeding should be deemed timely as of November 17, 2008, nunc pro tunc, based upon his mailing of the petition and supporting papers to the court. With respect to respondent Kelly, petitioner seeks reargument based upon his assertion that the police department reneged on their promises concerning the production of color photographs and other documents.

Under the commencement by filing system, a special proceeding is “commenced by filing a petition” (CPLR 304). Filing means the delivery of the petition to the clerk of the court in the county where the proceeding is brought along with payment of the requisite fee (*see* CPLR 304). Upon the filing of a petition, “an index number shall be assigned” (CPLR 306-a). The relevant date for commencement purposes is the date that the papers to

be filed are received by the county clerk, not the date that the papers are mailed (*see Matter of Ambramov v Board of Assessors, Town of Hurley*, 257 AD2d 958, 960 [1999], *lv denied* 93 NY2d 813 [1999]; *Enos v City of Rochester*, 206 AD2d 159, 161 [1994]).

An inmate may seek to commence an action by paying a reduced filing fee. In order to commence such an action, an inmate must file the required form affidavit (see CPLR 1101[d]) and the summons or complaint or other appropriate documents, such as the summons with notice, third-party summons and complaint, petition, notice of petition or order to show cause. (CPLR 1101 [f][1].) The application must include the name and address of the inmate's current facility, as well as any other facility wherein the inmate was confined within the preceding six months. The case will be assigned an index number or a filing number and the application will be submitted to a judge. Upon receipt of the application, the court shall obtain from the appropriate official of the facility at which the inmate is confined a certified copy of the inmate's trust fund account statement, or institutional equivalent, for the six-month period preceding the filing of the inmate's application. If the court determines that the inmate has insufficient means to pay the full filing fee, the court may permit the inmate to pay a reduced filing fee, of which the minimum shall not be less than \$15 and the maximum not more than \$50. The court shall require the payment of the initial reduced filing fee as the inmate can reasonably afford, unless exceptional circumstances exist which permit the court to authorize no initial payment of the fee. (CPLR 1101[f][2].)

Here, petitioner Candido Baez, an inmate then at Sing Sing Correctional Facility, sought to commence his Article 78 proceeding by paying a reduced filing fee. He mailed his Article 78 petition, an unsigned Order to Show Cause, verification, an affidavit in support of his poor person application, an authorization permitting the correctional facility to send to the Clerk of the Court copies of the facility's trust fund account statement and to calculate the amount to be deducted and disbursed as instructed by the court, an index number form and a RJI form, to "Clerk of the Court, Supreme Court of New York, County of Queens, 125-01 Queens Boulevard- Special Term Part, Kew Gardens, New York 11415." The petition and supporting papers are all dated, or were notarized on November 17, 2008, and were mailed on or after that date, as his requests for funds to be disbursed from his account were approved on November 19, 2008 and November 24, 2008.

The clerk of Supreme Court is the County Clerk (*see* NY Const, art VI, § 6 [e]; County Law § 525 [1]). The offices of the County Clerk are located within the Supreme Court, Queens County, at 88-11 Sutphin Boulevard, Jamaica, New York 11435. Although petitioner's Article 78 petition and supporting papers were sent to the County Clerk at an incorrect address, they were apparently sent by inter-office mail re-routed to the Supreme

Court building in Jamaica. These papers were thereafter returned to petitioner at the Sing Sing Correctional Facility in an envelope bearing the return address of New York State Supreme Court, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York 11435, and post marked February 17, 2009. Petitioner had been transferred to Lakeview Correctional Facility and these papers were forwarded to him. Included in the returned papers was a memo directing petitioner to “prepare order and re-submit” a blank form “Order Determining Application For Poor Person for an Inmate.”

Petitioner filled out the caption, the NYSID Number, DIN number and the first line of said order form and returned it along with the Article 78 petition, Order to Show Cause and supporting papers, and a letter to the Clerk of the Court notarized February 23, 2009. These papers were sent by certified mail, return receipt requested, to the “Supreme Court of the State of New York, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York 11435.” The copy of the return receipt establishes that papers were mailed to the court on February 26, 2009, and that they were received in the personnel office of the Queens Supreme Court in Jamaica, New York. The actual date the court’s personnel office accepted delivery of these papers cannot be determined from these receipts.

Petitioner’s papers did not contain an affidavit in the form required by CPLR 1101, although he submitted an affidavit to proceed as a poor person and an authorization regarding his trust fund account statement. Petitioner’s papers, however, were processed by the court, in that his application to proceed as a poor person was presented to Justice Cullen, the emergency judge. The County Clerk did not assign an index number Article 78 proceeding prior to submitting the poor person application to a judge. Justice Cullen granted petitioner’s application on June 19, 2009, and he was directed to pay the reduced filing fee of \$15.00. A copy of the order was sent to petitioner along with a notice from the Self Represented Information Office directing petitioner to pay the initial fee of \$15.00 by a money order payable to the Queens County Clerk as soon as possible. The notice stated that once payment was received, an index number would be issued by the County Clerk, and the processing of the petition would be completed.

On July 15, 2009 Baez’ friend Ronald Mason mailed a Western Union money order to the Self Represented Information Office. Thereafter Mason contacted said office and was informed that the money order was not processed as the court only accepts a United States Postal Service money order. On August 25, 2009, Mason purchased a \$15.00 money order from the United States Postal Service and mailed it to the court. The money order was received and processed, and index number was assigned to this proceeding on September 8, 2009. On October 6, 2009, the clerk in the Self Represented Information Office mailed a copy of the Article 78 petition and a signed Order to Show Cause to Ronald

Mason, and directed him to make copies and serve the respondents, and provide proof of service. Baez, in a letter dated October 15, 2009, informed the clerk in the Self Represented Information Office that the papers should had gone to him, rather than Mason, and that he would not be able to serve the respondents by October 20, 2009 as directed by the court. The court mailed the Order to Show Cause and other papers to Baez on October 20, 2009, and he received them on October 22, 2009 at the Auburn Correctional Facility.

Ronald Mason, however, had apparently served the Order to Show Cause, petition and supporting papers on the respondents on October 9, 2009, in accordance with the court's directives. The respondents served their respective answer, opposing papers and cross motion, and petitioner served his reply, and the matter was fully submitted to the court on January 27, 2010. Petitioner was informed that an the index number had been assigned and that the matter was on the November 12, 2009, calendar in this part.

A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (CPLR 217 [1]). Under this State's commencement-by-filing system, an article 78 proceeding is "commenced by filing a notice of petition or order to show cause and a petition" (CPLR 304). Claims asserted in such proceedings are deemed "interposed" for Statute of Limitations purposes at the time of filing (*see* CPLR 203 [c]). The term "filing" is statutorily defined as "the delivery of the . . . notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose together with any fee required . . . for filing" (CPLR 304). Although CPLR 1101 permits an inmate to commence a proceeding by paying a reduced filing fee, petitioner's mailing of the Article 78 petition, Order to Show Cause and supporting papers in November 2008 and again in February 2009, was insufficient to commence the action for statute of limitations purpose (*Grant v Senkowski*, 95 NY2d 605, 608 [2001]).

Further, petitioner has failed to establish that the delay in processing his papers and poor person application was either intentional or negligent. Petitioner initially addressed the envelope containing his papers to the wrong address, and then failed to address the February mailing to the Court of the Clerk and merely sent it to the court house in Jamaica. Petitioner's own errors thus contributed to the delay in processing his petition, poor person application, and supporting papers.

Finally, even if the court could consider June 19, 2009, the date the poor person application was granted as the date the Article 78 proceeding was commenced, the statute of limitation had already run with respect to his Article 78 proceeding against the Queens

County District Attorney. The court cannot extend the statute of limitations. Petitioner thus has not established that his Article 78 proceeding was timely commenced. Therefore, petitioner's request for leave to reargue his Article 78 proceeding with respect to Richard A. Brown, Queens County District Attorney is denied.

With respect to respondent Kelly, this court dismissed petitioner's claims as moot, in light of the New York City Police Department's (NYPD) letter of January 26, 2010, which granted petitioner's FOIL request with respect to 36 pages of records, including crime scene photographs. Said records were to be sent to Baez upon the remittance of the copying fee. Petitioner's claim that the Police Department "reneged" on its promise to provide the subject records is without merit. A complete set of records were mailed to petitioner on March 1, 2010 and he acknowledged receipt of these records on March 10, 2010. The NYPD, in its letter of January 26, 2010, did not promise to provide petitioner with color photographs and did not grant all of the items he requested. To the extent that petitioner is dissatisfied with the NYPD's FOIL response of January 26, 2010, he was required to file a timely administrative appeal of that determination, as previously stated by the court in its order of April 12, 2010.

In view of the foregoing, petitioner's motion for leave to reargue is denied in its entirety.

Dated: October 27, 2010

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J.S.C.