

Richards v Office of the New York State Comptroller
2010 NY Slip Op 33190(U)
November 16, 2010
Sup Ct, Albany County
Docket Number: 6376-10
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

JAMES A. RICHARDS,

Petitioner,

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

DECISION and ORDER
INDEX NO. 6376-10
RJI NO. 01-10-ST1830

-against-

OFFICE OF THE NEW YORK STATE COMPTROLLER,
NEW YORK STATE AND LOCAL POLICE AND FIRE
RETIREMENT SYSTEM, and NEW YORK STATE AND
LOCAL RETIREMENT SYSTEMS,

Respondents.

Supreme Court Albany County All Purpose Term, October 22, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioner commenced this CPLR Article 78 proceeding, by Notice of Petition and

Petition both dated September 16, 2010, seeking to overturn the Deputy Comptroller of the New York State and Local Employees' Retirement System's May 26, 2010 determination. Prior to answering, Respondents move to dismiss the petition pursuant to CPLR §§7804(f) and 3211(8), claiming Petitioner failed to obtain personal jurisdiction over them. Petitioners oppose the motion and cross move for an extension of time to re-serve the Respondents pursuant to CPLR §306-b's "interest of justice" provision. Because Petitioner neither obtained personal jurisdiction over Respondents nor demonstrates his entitlement to re-serve the petition, this proceeding is dismissed.

It is uncontested that Petitioner failed to personally serve Respondents in accord with CPLR §307(2). Respondents' counsel alleges that his office maintains a record of all process served upon Respondents, and that his office has conducted a "diligent search" of such records for the petition and notice of petition herein. Upon such search, he states that "respondents were not served." Petitioner does not deny such failure of service, but rather readily admits that "[t]hrough a mistake in counsel for Petitioner's office the notice of petition and petition was only served on the Attorney General's office and not the individually named agencies." As such, this proceeding is "jurisdictionally defective" and Respondents demonstrated their entitlement to dismissal. (Finnan v. Ryan, 50 AD3d 1306 [3d Dept. 2008]; Maddox v. State University of New York at Albany, 32 AD3d 599 [3d Dept. 2006]; Rosenberg v. New York State Bd. of Regents, 2 AD3d 1003 [3d Dept. 2003]).

In opposition, Petitioner's cross motion for an extension of time to re-serve Respondents, Petitioner failed to demonstrate his entitlement to a CPLR §306-b "interest of justice" extension. It is now well established that CPLR §306-b's "interest of justice [extension] requires a careful

judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.” (Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]). The interest of justice factors to consider “includ[e] the meritorious nature of the action, the expiration of the statute of limitations, the length of delay in service, plaintiff’s diligence, promptness of plaintiff’s request for an extension of time and prejudice to defendant.” (Mead v. Singleman, 24 AD3d 1142, 1144 [3d Dept. 2005], citing Leader v. Maroney, Ponzini & Spencer, supra).

First, Petitioner failed to demonstrate this proceeding’s “meritorious nature.” Petitioner’s claim is wholly dependent upon his interpretation of 2 NYCRR §344.2(b)’s good cause for failure to timely file his Retirement and Social Security Law §363-c(e) claim. While Petitioner’s proposed interpretation of 2 NYCRR §344.2(b) is plausible, he failed to demonstrate that Respondent’s contrary interpretation of such regulation was unreasonable, “irrational, arbitrary or capricious.” (Natoli v. Regan, 196 AD2d 945 [3d Dept. 1993]), Moreover, “courts must defer to an administrative agency’s rational interpretation of its own regulations in its area of expertise.” (Meyers v. New York State Div. of Housing and Community Renewal, 68 AD3d 1518, 1519 [3d Dept. 2009], quoting Matter of Peckham v. Calogero, 12 NY3d 424 [2009]). Further undermining the “meritorious nature” of this proceeding, it appears that Petitioner failed to file his petition and notice of petition with the “clerk of the county in which the proceeding is brought” in accord with CPLR §2102. Such nonfiling is “a nonwaivable, jurisdictional defect.” (Miller v. Waters, 51 AD3d 113 [3d Dept. 2008] quoting Sangiaco v. County of Albany, 302 AD2d 769, 772 [3d Dept. 2003]).

Similarly, Petitioner failed to demonstrate his diligence or the promptness of his request

for an extension. (Anonymous v. New York State Office of Children and Family Services, 53 AD3d 810 [3d Dept. 2008]). Petitioner's attorney, as set forth above, made no attempt to serve Respondents prior to receiving their motion to dismiss. Nor does Petitioner allege that he has since served Respondents; proffering only law office failure as his excuse. Moreover, Petitioner did not promptly move for an extension, as he did not move for such relief until after Respondents moved to dismiss this proceeding. (Hine v. Julie Ann Bambara, 66 AD3d 1192 [3d Dept. 2009]; City of Albany v Wise, 298 AD2d 783 [3d Dept. 2002]).

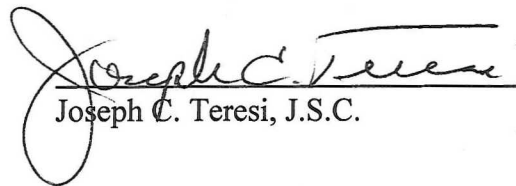
Although the statute of limitations has expired, a factor which "weighs in petitioner's favor" (Palmateer v. Greene County Indus. Development Agency, 38 AD3d 1087 [3d Dept. 2007]), and Petitioner alleges that Respondents have not been prejudiced, in considering the record as a whole, the petitioner has failed to demonstrate that an extension of time should be granted in the interest of justice. (Leader v. Maroney, Ponzini & Spencer, supra).

Accordingly, in an exercise of discretion, Petitioner's motion pursuant to CPLR §306-b is denied; whereas, Respondent's motion to dismiss is granted.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
November 16, 2010


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated September 16, 2010; Verified Petition, dated May 15, 2010; Affidavit of John Newman, dated September 16, 2010; Affidavit of James Richards, dated September 16, 2010, with attached Exhibits A-B.
2. Notice of Motion, dated October 14, 2010; Affirmation of Robert Coughlin, dated October 12, 2010.
3. Notice of Cross-Motion, dated October 20, 2010; Affirmation of Ryan Miosek, undated.