

Rodriguez v Kelly

2011 NY Slip Op 30049(U)

January 4, 2011

Supreme Court, New York County

Docket Number: 109088/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 109088/2010
RODRIGUEZ, JEFFERSON
VS.
KELLY, RAYMOND W. ET. AL.
SEQUENCE NUMBER : 001
ARTICLE 78
CAL # 110

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

This motion to/for _____

Notice of ~~Motion~~ / Order to Show Cause — Affidavits — Exhibits ...
Petition
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 11B)

Dated: 1/5/11
JAN 05 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 5

JEFFERSON RODRIGUEZ,

Petitioner,

Index No. 109088/10
Motion Date: 11/16/10
Motion Seq. No.: 001
Calendar No.: 110

-against-

**DECISION, ORDER &
JUDGMENT**

RAYMOND KELLY, as Police Commissioner of the
New York City Police Department, THE NEW YORK
CITY POLICE DEPARTMENT, DETECTIVE LEONARD
MASTROGIACOMO, NEW YORK CITY DEPARTMENT
OF INVESTIGATIONS, ROSE GILL HEARN, as
Commissioner of the New York City Department of
Investigations, CITY OF NEW YORK, DAVID FRANKEL,
as Commissioner of the City of New York Department of
Finance, LINDSAY EASON, As Sheriff of City of New York,
NEW YORK CITY SHERIFF'S DEPARTMENT, PRI CON
INVESTIGATIONS, NOEL BRUEN, NEW YORK CITY
OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS,
and NANCY GOODMAN, Finance Department Advocate,

UNFILED JUDGMENT

Respondents. **his judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
118)**

BARBARA JAFFE, JSC:

For petitioner:
Dominick Revellino, Esq.
1983 Marcus Avenue, Suite C120
Lake Success, NY 11042-1016
516-358-1700

For respondents:
Andre L. Lindsay, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-442-1569

By notice of petition dated July 8, 2010, petitioner moves pursuant to CPLR Article 78
for an order and judgment annulling the determination of respondent New York City Office of
Administrative Trials and Hearings by Kevin F. Casey, Administrative Law Judge, terminating

* 3]

petitioner from his position as deputy sheriff for the City of New York or, in the alternative, finding that the penalty imposed is harsh and excessive or, in the alternative, transferring this matter to the Appellate Division on the ground that it is not supported by substantial evidence. Respondents assert affirmative defenses and request that the matter be transferred to the Appellate Division. Petitioner did not appear for oral argument.

Pursuant to Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. Where the petitioner challenges a determination rendered after a hearing mandated by law on the ground that it was not supported by substantial evidence, the action must be transferred to the Appellate Division. (CPLR 7803, 7804[g]; Siegel, NY Prac § 568 [4th ed]). However, the supreme court may decide legal issues that could terminate the proceeding without reaching the substantial evidence issue. (CPLR 7804; Siegel NY Prac § 568; *In the Matter of Hop-Wah v Coughlin*, 118 AD2d 275 [3d Dept 1986]; *revd on other grounds*, 69 NY2d 791 [1987]; *cf Matter of Walsh v Kelly*, AD3d , 912 NYS2d 406 [1st Dept 2010] [as hearing before Civil Service Commission not mandated by law, proceeding improperly transferred to Appellate Division]).

“An objection in point of law . . . does not include a claim that the penalty imposed is excessive.” (*Donofrio v City of Rochester*, 144 AD2d 1027, 1028 [4th Dept 1988] [supreme court improperly ruled on excessive penalty where substantial evidence question raised]; *cf Hoch v New York State Dept. of Health*, 1 AD3d 994 [4th Dept 2003] [supreme court improperly ruled on whether award was arbitrary and capricious where substantial evidence question raised]; *A & F Gulf Serv., Inc.*, 260 AD2d 474 [2d Dept 1999] [appellate division does not have jurisdiction where excessive penalty, and not substantial evidence question, is raised]).

Here, all but three respondents allege as an affirmative defense that they are not proper parties to the action, and as this defense constitutes an objection based on a point of law and petitioner did not appear at oral argument, the action is dismissed as against them. And, as it is undisputed that petitioner was terminated following a hearing mandated by Civil Service Law § 75, and the remaining respondents are subject to petitioner's challenge to the sufficiency of the evidence supporting the administrative decision terminating him, it is hereby

ADJUDGED, that the petition is dismissed against respondents Raymond Kelly, as Police Commissioner of the New York City Police Department, the New York City Police Department, Detective Leonard Mastrogiacomo, New York City Department of Investigation, Rose Gill Hearn, as Commissioner of the New York City Department of Investigation, Lindsay Eason, as Sheriff of City of New York, New York City Sheriff's Department, Pri Con Investigations, Noel Bruen, New York City Office of Administrative Trial and Hearings, and Nancy Goodman, Finance Department Advocate; it is hereby

ORDERED, that, pursuant to CPLR 7804(g), the application by petitioner seeking to vacate and annul a determination by respondents City of New York, David Frankel, as Commissioner of the City of New York Department of Finance, and New York City Department of Finance is respectfully transferred to the Appellate Division, First Department, for disposition. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is hereby

ORDERED, that petitioner serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First

Department.

This constitutes the decision, order, and judgment of the court.



 Barbara Jaffe, J.S.C.
BARBARA JAFFE
 J.S.C.

DATED: January 4, 2011
 New York, New York
 'JAN 05 2011

UNFILED JUDGMENT
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 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
 11B)