

**Matter of Sabba v New York State Dept. of Labor**

2011 NY Slip Op 30201(U)

January 26, 2011

Sup Ct, New York County

Docket Number: 108091/10

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.  
*Justice*

PART 5

Index Number : 106662/2010  
**SABBA, STEVE H.**  
VS.  
**NYS DEPARTMENT OF LABOR**  
SEQUENCE NUMBER : 001  
ARTICLE 78  
*CAL # 112*

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

this motion to/for motion to dismiss

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

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

**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 141B).

Dated: 1/26/11  
*JAN 26 2011*

*[Signature]* J.S.C.  
**BARBARA JAFFE**

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

-----X  
In the Matter of the Petition of  
STEVE H. SABBA and  
TAXPRO FINANCIAL NETWORK INC.

Index No. 108091/10  
Motion Date: 8/24/10  
Motion Seq. No.: 001  
Calendar No.: 112

Petitioner,

-against-

**DECISION & JUDGMENT**

NEW YORK STATE DEPARTMENT OF LABOR and  
COLLEEN C. GARDNER, in her official capacity as  
COMMISSIONER of LABOR, STATE OF NEW YORK

Respondents.

-----X  
BARBARA JAFFE, JSC:

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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

**For petitioner:**  
Christian D. LoFaro, Esq.  
350 East 65<sup>th</sup> Street #7  
New York, NY 10065  
973-479-3826

**For respondents:**  
Karen Kithan Yau, AAG  
Andrew M. Cuomo  
Atty Gen, State of New York  
120 Broadway  
New York, NY 10271  
212-416-6136

By notice of petition dated May 19, 2010, petitioners seek a judgment pursuant to CPLR Article 78 vacating a Resolution of Decision issued on March 24, 2010 by the Industrial Board of Appeals of the State of New York (IBA). By notice of cross-motion dated July 23, 2010, respondents oppose the petition and seek its dismissal.

I. FACTS

In a unanimous decision dated March 24, 2010, the five-member IBA affirmed the determination of the Commissioner of the Department of Labor (DOL) that petitioners had violated the Labor Law by failing to pay \$1,908.50 in wages to Tamika L. McLemore. (Affidavit of Steve H. Sabba, dated May 19, 2010 [Sabba Affid.], annexed exhibit). On April 5 and 20, 2010, the decision, along with a copy of Labor Law § 102, was served on petitioners

(Affirmation of Sandra M. Nathan, Esq., dated July 22, 2010 [Nathan Aff.], Exh. 2), thus starting the running of the 60-day statute of limitations for commencing a proceeding against IBA (Labor Law § 102).

On or about May 21, 2010, petitioners sent IBA by regular mail papers purporting to constitute the instant petition. (*Id.*, Exh. 5). On June 4, 2010, petitioner served a copy of the notice of petition and petition upon the New York State Department of Labor by personal service.

## II. CONTENTIONS

Petitioner contends that IBA's decision is arbitrary and capricious in that it failed to consider evidence of McLemore's lack of credibility. (Sabba Affid.). In opposition, and in support of their cross-motion, respondents allege that as petitioners failed to serve the Attorney General personally and to name and serve IBA, which they contend is a necessary party to the proceeding, the proceeding must be dismissed with prejudice, the statute of limitations having expired. (Nathan Aff.).

In opposition to the cross-motion, petitioner Sabba alleges that having been self-represented, he was unfamiliar with the service requirements and that IBA was a necessary party to the proceeding, and that as he relied to his detriment on advice given him by DOL investigator Robert Smith as to the filing of the petition and necessary parties, he contends that it would be inequitable for the proceeding to be dismissed. He also asserts that his process server should be held accountable for the service failure, not him. (Affirmation of Christian D. LoFaro, Esq., dated Oct. 6, 2010, Exh. A).

In reply, respondents maintain that Sabba unreasonably relied on Smith's advice and that

a public agency cannot be equitably estopped from discharging their statutory duties, and according to Smith, while he has no independent recollection of his conversation with Sabba, he usually identifies himself to the public as an investigator for the DOL, records his conversations upon completion, and sometimes takes contemporaneous notes. In his records, Smith wrote that Sabba called stating that he had “served a[n] Article 78 proceeding against the IBA,” “served the Commissioner at Varick Street and wanted to know if he should serve in Albany as well.” Smith noted that in response, he told Sabba that “if it was signed for not necessary especially since it was against the IBA,” and also noted that when Sabba asked if he “should serve the AG as well,” he “advised to contact the AG directly.” Upon reviewing his notes, Smith now believes that Sabba did not ask him about necessary parties as it was apparent that he had already served the petition and had only asked about the need to serve the Commissioner in Albany. (Affidavit of Robert W. Smith, dated Nov. 3, 2010, Exh. 1).

### III. ANALYSIS

Pursuant to CPLR 307(a) and 7804(c), in an article 78 proceeding against the Commissioner of Labor, the notice of petition commencing the proceeding must be served upon the Attorney General. Absent service on the Attorney General, the petition must be dismissed. (*Matter of Rosenberg v New York State Bd. of Regents*, 2 AD3d 1993 [3d Dept 2003]; *Matter of Kelly v Scully*, 152 AD2d 698 [2d Dept 1989]).

It is undisputed that petitioners did not serve the instant notice of petition upon the Attorney General, and as petitioner does not explain his failure to serve the Attorney General, nor does he allege that he relied on any information given to him by respondents as to whether or not he should serve the Attorney General, the petition is dismissed. Given this result, there is no

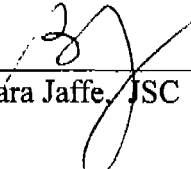
need to address the parties' other contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: January 26, 2011  
New York, New York

JAN 26 2011

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