

Matter of Ciferri v Dinapoli

2011 NY Slip Op 30235(U)

February 3, 2011

Sup Ct, Albany County

Docket Number: 7679-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

RODERICK W. CIFERRI III,

Petitioner,

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

DECISION and ORDER
INDEX NO. 7679-10
RJI NO. 01-10-ST2009

-against-

THOMAS P. DINAPOLI, COMPTROLLER,
FOR THE STATE OF NEW YORK,

Respondent.

Supreme Court Albany County All Purpose Term, January 14, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner’s notice of petition and petition, both dated November 8, 2010, seek to compel Respondent to “enroll and/or reinstate [Petitioner] to Tier I in the New York State Retirement System.” Prior to answering, Respondent moves to dismiss the petition pursuant to CPLR

§§7804(f) and 3211(8), claiming Petitioner failed to obtain personal jurisdiction over him.

Petitioner opposes the motion and cross move for an extension of time to serve the Respondent in the “interest of justice.” Because Petitioner failed to either serve Respondent in accord with CPLR §306-b or demonstrate his entitlement to an extension of time to serve the petition, this proceeding is dismissed.

CPLR §306-b mandates, in part, that service of a “petition with a notice of petition... be made not later than fifteen days after the date on which the applicable statute of limitations expires.” Here, as conceded by the parties, the determination Petitioner challenges was rendered and mailed to him on June 13, 2010. As such, the statute of limitations expired on or about November 13, 2010 (CPLR §217) and Petitioner was required to serve the Respondent on or about November 28, 2010 (CPLR §306-b). On this record it is uncontested that Petitioner failed to properly serve Respondent prior to November 28, 2010.

A state officer (the Respondent herein) must be served in accord with CPLR §307. “While CPLR 307 permits service upon a state officer sued in an official capacity by ‘mailing the summons by certified mail, return receipt requested, to such officer,’ personal service upon the state is also mandated (CPLR 307[2]; see CPLR 7804[c]). To complete such service, petitioner was required to deliver his notice of petition and other papers to an Assistant Attorney General (see CPLR 307[1]; 403[b], [c]).” (Finnan v. Ryan, 50 AD3d 1306 [3d Dept. 2008]).

Petitioner’s first service attempt occurred on November 12, 2010; he mailed the notice of petition and petition to Respondent and to the Attorney General’s Office. Such service was defective because the Respondent’s copy was not sent certified return receipt requested, and the Attorney General’s copy was sent to the wrong address. Moreover, Petitioner does not allege

that the petition was personally delivered to an Assistant Attorney General. As such, Petitioner's November 12, 2010 service attempt was entirely ineffective.

Although Petitioner made later service attempts, no additional service attempts occurred on or before November 28, 2010. As such, this proceeding is subject to dismissal because Petitioner failed to properly serve his notice of petition and petition within CPLR §306-b's time frame. (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]).

Despite Petitioner's non-compliance with CPLR §306-b's time frame, Petitioner may avoid dismissal by demonstrating his entitlement to an "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 factors to consider include "the [petitioner's] diligence, whether the statute of limitations has expired, the meritorious nature of the action, the length of delay in service, the promptness of the [petitioner's] request for the extension of time and prejudice to the [respondent]." (Dujany v. Gould, 63 AD3d 1496, 1498 [3d Dept. 2009]; Mead v. Singleman, 24 AD3d 1142 [3d Dept. 2005]; Leader v. Maroney, Ponzini & Spencer, supra).

First, Petitioner failed to demonstrate this proceeding's "meritorious nature." Reviewing the petition, it appears that the Petitioner presents a question of pure statutory interpretation. "Where, as here, interpretation of the statutes does not depend on any specialized knowledge or competence of the agency, no deference is accorded to the agency's interpretation." (Albany Law

School v. New York State Office of Mental Retardation and Developmental Disabilities, __AD3d__ [3d Dept. 2011]). However, Petitioner still failed to demonstrate the propriety of his proposed construction.

At issue, as framed by the petition, are sections 803 and 806 of New York's Retirement and Social Security Law. Petitioner claims that he is eligible for the retirement benefits he seeks pursuant to Retirement and Social Security Law §803. However, Retirement and Social Security Law §806 specifically provides that "[a] person who was not a member of a public retirement system as of March thirty-first, nineteen hundred ninety-three shall be ineligible for the benefits provided by [Retirement and Social Security Law §803]." On this record it is uncontested that Petitioner was not a member of the retirement system as of March 31, 1993. As such, the plain language of this statute renders Petitioner ineligible to receive the benefits he seeks and Petitioner failed to demonstrate the "meritorious nature" of his claim.

Petitioner also failed to demonstrate the promptness of his request for an extension, as he did not move for such relief until after Respondent 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]; Anonymous v. New York State Office of Children and Family Services, 53 AD3d 810 [3d Dept. 2008]).

Although Petitioner demonstrated his diligence, the statute of limitations has expired, and no prejudice was shown, each of which "weighs in petitioner's favor" (Palmateer v. Greene County Indus. Development Agency, 38 AD3d 1087 [3d Dept. 2007]); considering the record as a whole, especially the petition's merit, Petitioner failed to establish his entitlement to an "interest of justice" extension. (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
February 3, 2011


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated November 8, 2010; Petition, dated November 7, 2010, with attached Exhibits 1-7.
2. Notice of Motion, dated December 7, 2010; Affirmation of Kelly Munkwitz, dated December 7, 2010; Affidavit of Danny McDonald, dated December 5, 2010; Affidavit of Robert Coughlin, dated December 7, 2010.
3. Notice of Cross-Motion, undated; Affirmation of Alexander Behr, dated December 28, 2010, with attached Exhibits 1-3.
4. Affirmation of Megan Brown, dated January 5, 2011, with attached Exhibit A; Affirmation of Kelly Munkwitz, dated January 5, 2011.
5. Reply of Alexander Behr, dated January 12, 2010.