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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 400030/2009

WESLEY, MICHAEL DONNEL

VS.

TWEED COURT HOUSE

SEQUENCE NUMBER : 003

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
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

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

THE ANNEXED DECISION, ORDER AND JUDGMENT.

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: 2/16/2011

_____ 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: CIVIL TERM: PART 12
----------X

In the Matter of the Application of
MICHAEL DONNEL WESLEY,

Index No. 400030/2009

Mot. Seq. No. 003

Petitioner,

DECISION ,ORDER, and AMENDED JUDGMENT

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION, TWEED COURT HOUSE 52 CHAMBERS STREET, NEW YORK, NY 10007
CHANCELLOR JOEL KLEIN,
THE NEW YORK CITY DEPARTMENT OF EDUCATION, REGIONS 9 AND 10 OPERATIONS CENTER, 333 SEVENTH AVENUE, 8TH FLOOR, NEW YORK, NEW YORK 10001
DIRECTOR ROBERT WILSON,

Respondents.
----------X

For Petitioner:
Michael Donnel Wesley, pro se
545 West 126th Street, Apt. 11-B
New York, New York 10027
(347) 767-7825

For Respondents:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
By: Kimberly Conway, Esq.
100 Church Street
New York, New York 10007

Papers considered in review of this motion:

Papers	Number
Petitioner's Notice of Motion & Supporting Affidavit with Exhibits	1
Respondents' Notice of Cross-Motion	2
Opposition to Respondents' Cross-Motion	3

PAUL G. FEINMAN, J.:

This article 78 proceeding, in which petitioner seeks to compel respondent, the New York City Department of Education, to provide him an official record confirming his graduation from

Park West Evening High School in 1996, and to compel respondent to verify the authenticity of a document claimed to be his high official diploma (CPLR 7803[1]), has twice before been before this court. Petitioner now moves for sanctions against respondent for failing to comply with the court's August 4, 2010, decision, order and judgment, which was granted upon the respondent's default. By that August 4th order, the court amended the original judgment, and granted petitioner various relief, including a direction to the respondent to update its records and issue petitioner a certified copy of his diploma. Respondent now seeks to vacate its default on the motion which resulted in the August 4th decision and to vacate the amended order and judgment. Petitioner opposes the cross motion.

Background

In 2006, petitioner was incarcerated for matters unrelated to this proceeding. While in prison petitioner sought to take advantage of the post-secondary school education programs offered by the Department of Corrections, which required petitioner to provide proof that he had graduated from high school. Petitioner claims that he attended high school for four years at Automotive High School in Brooklyn, but was graduated. Instead, he later enrolled in evening classes at Park West Evening High School (PWEHS), eventually graduating in 1996. Petitioner even claims that after high school, he took several classes for credit at the New York City College of Technology. Petitioner requested and received a copy of his transcript from the college and provided it to the Department of Corrections, but he claims that was told, unless he provided an official transcript from his high school confirming his graduation, he would only be allowed to enroll in classes where a high school degree is not required. Thereafter, the record indicates that between January 2006 and the time this proceeding was commenced, petitioner sent numerous

requests to various Department of Education officials and departments, providing all of the pertinent information and including the required money order for copying charges (*see* Resp.'s Cross-Motion Affirm., Ex. A).

The following is a condensed version of petitioner's efforts to obtain his official academic records. According to the correspondence attached in support of this motion, the officials and departments that received his request include, at least, the Office of Legal Services, Park West (day) High School, PWEHS and the Regions 9 and 10 Operations Center (Resp.'s Cross-Motion Affirm., Ex. A.) Petitioner was told that his records would likely still be located at PWEHS, but it appears as though no one from that school ever responded to petitioner's requests. Furthermore, it appears that PWEHS closed at some point between March 15, 2006 and June 14, 2007, and another school opened in its former location (Resp.'s Cross-Motion Affirm., Ex. A, 3/15/2006 Letter; 6/14/2007 Letter).

After another round of requests by petitioner, he received a letter, dated June 14, 2007, from Special Assistant Mary Frizzel from the New York City Department of Education, Regions 9 and 10 Operations Center, stating that she had tried to locate his official record using the information he provided without any success (Resp.'s Cross-Motion Affirm., Ex. A, 6/2007 Letter). Although this letter did not provide any details as to where or how she performed her search for his records, it did confirm that PWEHS was closed, but other schools were still at that location (*id.*). At some point around this time petitioner received an undated letter from Mr. John Cosenza, Assistant Principal of Park West High School, stating that he had contacted "someone at the Board of Education and he advised that you contact Automotive High School to get [his] final records and proof of your graduation" (Resp.'s Cross-Motion Affirm., Ex. A, Undated Letter).

Petitioner's final request found in the record is contained in a letter to respondent, dated October 16, 2008 (Resp.'s Cross-Motion Affirm., Ex. A, 10/16/2008 Letter). In this letter, petitioner again provides his detailed personal information and the specific documents which he seeks. He provides an overview of his efforts to obtain his records up to that point and a detailed history of his education background. After expressing his frustration resulting from his perception that it seems to take four or five months for respondent to reply to his requests, petitioner tells respondent that they have five (5) working days to locate his official high school transcript or else he would commence the instant legal proceedings. (Resp.'s Cross-Motion Affirm., Ex. A, 10/16/2008 Letter). The only response from respondent in the record is a letter from Ms. Frizzel, dated November 7, 2008, informing the education supervisor at the Adirondack Correction Facility that she had not been able to find any information connected with petitioner's name and the date of birth he provided (Resp.'s Cross-Motion Affirm., Ex. A, 11/7/2008 Letter).

Thereafter, petitioner commenced this Article 78 proceeding seeking an order compelling respondent to provide petitioner with an official copy of his transcript from Park West Evening High School (Resp.'s Cross-Motion, Ex. A, Order to Show Cause). Respondent initially opposed, but only to the extent that it sought an extension of time to respond to the petition by providing the transcript, if possible, or an answer (4/3/2009 Interim Dec. & Order at 2). The affirmation of respondent's attorney submitted in support of extending respondent's time claimed that respondent's employee with the most knowledge concerning petitioner's requests was on vacation (*id*). The court, expressly relying on respondent's attorney's representation "that a certain amount of time is needed to conduct a full search and to provide either the transcript or an answer to the petition," held the petition in abeyance pending respondent's supplying proof of mailing of the

transcript to petitioner or else filing its answer (*id.*).

Respondent eventually opposed petitioner's application on the ground that it was moot because, based on respondent's search of its computer records, it determined that petitioner only attended Automotive High School, but he was not graduated (Resp.'s Cross-Motion Affirm. ¶ 8). Furthermore, respondent did not find records indicating petitioner graduated from PWEHS in 1996. In support of this position, respondent attached an affidavit of Mary Frizzel, dated April 30, 2009, which stated that she had conducted a "search for petitioner's education records and official high school transcripts within the NYCDOE...[and she] forwarded all petitioners' [*sic*] education records in the possession of NYCDOE to respondents' counsel on April 23, 2009" (Resp.'s Cross-Motion Affirm., Ex. C, Frizzel Affid.). Ms. Frizzel did not explain how her search was conducted or what files were searched, including, whether any attempts were made to search the records of Park West Evening High School. She further did not explain what differed about her search technique or scope this time that allowed her to find records for petitioner from Automotive High School, whereas she had apparently been unable to locate this same information in her prior searches in 2007 and 2008. Notwithstanding these omissions, the court, relying on the statements made in Ms. Frizzel's affidavit, denied the petition and dismissed the proceedings as having been rendered academic insomuch as respondent had provided transcripts for petitioner for Automotive High School (6/3/09 Decision/Order/Judgment).

On or about July 3, 2010, petitioner filed a motion seeking to reinstate his Article 78 proceeding on the basis of proof previously not made available to the court - a copy of his original high school diploma from 1996 from Park West Evening High School (mot. seq. 002) (Resp.'s Cross-Motion, Ex. F, Notice of Motion dated 7/3/2010). On August 4, 2010, the court granted petitioner's motion upon default and, upon renewal, granted the branch of the Article 78 proceeding which sought to compel respondent to enter petitioner's information into respondent's

computerized records and issue a certified copy of his diploma and transcript from PWEHS (Resp.'s Cross-Motion, Ex. D, 8/4/2010 Decision/Order/Judgment).

The August 4, 2010 order was filed with the County Clerk by August 12, 2010. Respondent's attorney confirms receipt of a copy the decision, order and judgment on or about August 17, 2010, which petitioner attached to a letter demanding the relief granted to him. Although it appears that there was some communication between respondent's counsel and petitioner after this point, no resolution was reached. Therefore, on or about September 21, 2010, petitioner filed the instant motion seeking sanctions against respondent for not complying with the court's August 4, 2010, decision, order and judgment and seeking and order compelling respondent to authenticate what he claims to be his original high school diploma from Park West Evening High School (Petitioner's Notice of Motion). Respondent has opposed the motion and cross-moved seeking tp vacate its default that resulted in the August 4, 2010 decision, order and judgment (Resp. Notice of Cross-Motion).

Analysis

1. Cross Motion to Vacate

Under CPLR 5015 (a), a court is empowered to vacate its own default judgment for several reasons, including where the default was a result of excusable neglect (*Woodson v Mendon Leasing*, 100 NY2d 62, 68 [2003]). A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015 (a) (1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of its cause of action or defense (*Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). Law office failure may constitute a "reasonable excuse" (*id.*). Where it is not entirely clear whether the parties were required to appear on a motion, and the defaulting party takes immediate steps to cure its default, thereby demonstrating its intent to defend the motion, vacatur under CPLR 5015 (a) (1) may be appropriate (*Cantarelli S.P.A. v L.*

Della Cella Co., Inc., 40 AD2d 445 [1st Dept 2007]). In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice (*id.*).

Respondent argues that its default was excusable because respondent's attorney had no notice of the August 4, 2010, court appearance (Resp.'s Affirm. ¶ ¶ 20 - 22). According to respondent's attorney, "[n]o return date was set by the Court regarding Petitioner's motion [to reargue or reconsider,] dated July 3, 2010 to grant Respondent an opportunity to respond to Petitioner's application" (Resp.'s Affirm. ¶ 20). She claims that her first notice was an electronic alert sent to her e-mail on August 2, 2010, indicating that a return date had been set in the submission part for the following day. However, because she was out of the office without access to e-mail the afternoon of August 2, 2010, until the next day, after the morning calendar call, she was not aware that she missed the appearance until it was too late.

Respondent ignores the fact that petitioner's notice of motion to reargue and reconsider unambiguously made the motion returnable for 9:30 a.m. on August 3, 2010, in the Motion Support office at Room 130 (Resp.'s Affirm, Ex. F, Petitioner's Motion to Reargue papers). In fact, petitioner was required to include this information, among other things, in its notice of motion or else it would be defective under CPLR 2214 (a) and 22 NYCRR 202.7. Respondent's attorney does not deny being served with the notice of motion and even includes a copy of the document as an exhibit to the affirmation submitted in support of the instant cross motion. Thus, respondent must be deemed to have notice of the August 3, 2010, return date. Furthermore, respondent cannot claim that it was not provided with sufficient opportunity to respond to the motion because the notice of motion included notice, pursuant to CPLR 2214 (b), that all answering papers were to be served no later than seven days prior to the date set above for submission of the motion. In these circumstances, respondent has failed to provide a reasonable

excuse. Thus, there is no need to determine at this point whether a meritorious cause of action or defense has been stated.

Nonetheless, the court will exercise its discretion to grant respondent the relief it seeks to the extent that the August 4, 2010, judgment and order is vacated in the interests of substantial justice. The factors supporting this outcome include the nature of the relief granted by default, respondent's subsequent appearance and intent to contest the action, and the absence of demonstrated prejudice to petitioner, considering the underlying motion was one for reargument or reconsideration of a judgment and order dismissing the petition. Having vacated the August 4, 2010, decision, order and judgment, the court now turns to motion to reargue or reconsider, which had been determined therein as motion sequence number 002.

2. Motion to Reargue or Reconsider

Although characterized by petitioner as a motion to reargue or reconsider, the court will deem it as one seeking renewal, because it is based upon new evidence not submitted to the court in support of the prior motion. A motion to renew must be based upon new facts not offered on the prior motion that would change the prior determination (CPLR 2221 [e] [2]), and shall provide reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e] [3]).

Here, petitioner submits additional evidence in the form of copies of documents he claims to be his high school diploma and transcript from PWEHS. He argues that this information would change the outcome of the court's prior judgment and order because it relied on the Frizzel affidavit's claim that no record of petitioner's graduation from PWEHS existed. Furthermore, petitioner argues that he has a reasonable excuse for not submitting these documents earlier because, at the time of the prior judgment and order, he was incarcerated and had limited ability to retrieve these documents himself. The court finds these arguments to be sufficient.

Accordingly, petitioners motion to reargue or reconsider, bearing motion sequence number 002, herein deemed as one seeking renewal, is granted.

Upon renewal, the court now turns to merits of petitioner's Article 78 claims.

3. Article 78 Petition

Where a party seeks to test the action or inaction of a public officer, the sole available remedy lies in a CPLR Article 78 proceeding seeking mandamus to compel. Mandamus is available, however, only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law (*see* CPLR 7803 [1]; *N.Y. Civ. Liberties Union v State*, 4 NY3d 175, 184-185 [2005] [*internal citations omitted*]). Mandamus to compel does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial (*N.Y. Civ. Liberties Union v State*, 4 NY3d at 185). A discretionary act "involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

In Article 78 proceedings, "[i]t is a well settled principle of administrative law that one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (*Matter of DiBlasio v Novello*, 28 AD3d 339, 341 [1st Dept 2006]). This exhaustion requirement is applicable to petitions seeking relief in the nature of mandamus to compel (*id.* at 342), but is subject to several exceptions including when resort to an administrative review would be futile (*see Martinez 2001 v New York City Campaign Finance Bd.*, 36 AD3d 544, 548 [1st Dept 2007]).

Chancellor's Regulation, No. A-820 provides the applicable legal standards concerning a current or former student's rights to inspect, review, or obtain a copy of his or her own education records within the New York City public school system. Regulation A-820 (IV) (B) (1) states that a

student seeking to inspect or review his or her own education records, "shall be provided an expeditious opportunity to do so ... Access to the records shall be provided within a reasonable period of time but not more than 45 days from receipt of the request" (Chancellor's Regulations, No. A-820 [IV] [B] [2]). Former students are instructed to write to the last school attended (Chancellor's Regulations, No. A-820 [IX]). However, "[i]f the school has since closed or is no longer in existence, the request for records should be made to the appropriate ISC/CFN office. The requester may also contact the Office of Student Enrollment Planning and Operations ("OSEPO")" (*id.*).

Destruction of academic records "must be carried out in accordance with the State Education Department's *Records Retention and Disposition Schedule ED-1*" (Chancellor's Regulations, No. A-820[IV] [B] [7]). Section 1.[275] (a) of Schedule ED-1 requires permanent retention of a student's cumulative achievement record equivalent by all secondary schools which must include information on school entry, withdrawal and graduation, and subjects taken and grades received from examinations (*see* 8 NYCRR, Appx. I). In addition, Section 4.[276] requires permanent retention of all certificates of regents high school and college entrance diplomas issued, unless it has already been posted to the student's cumulative achievement record described in Section 1.[275].

In opposition to the petition, respondent does not argue that petitioner did not graduate and thus the record sought does not exist. Instead, it argues that its inability to locate petitioner's academic records was due to an administrative error - rather than any arbitrary or capricious act against Petitioner" (Resp.'s Cross-Motion Affirm ¶ 37). The administrative error, respondent explains, was that upon receiving petitioner's request, petitioner conducted a search of its computer records. However, these computer records did not contain the files of evening high school students who graduated prior to 2000, as a result of respondent's "policy and practice to purge records from

[its] computer system every 10 years - rather than any arbitrary and capricious act against Petitioner" (Resp.'s Cross-Motion Affirm. ¶ 31).

In arguing that its actions were not arbitrary and capricious, respondent applies the wrong Article 78 standard of review. The "arbitrary and capricious" standard is applicable where petitioner seeks review of an administrative agency determination made without a formal hearing (*see* CPLR 7803 [3]; *Peckham v Calogero*, 12 NY3d 424, 431 [2009]). However, mandamus to compel, pursuant to CPLR 7803 (1), is the appropriate standard where, as here, petitioner seeks to compel an administrative agency to perform a ministerial act, premised upon specific statutory authority mandating performance in a specified manner.

Petitioner has a "clear legal right" under the applicable regulations to access any of his academic records in the respondent's possession or control. Although Park West Evening High School is now apparently closed, the records sought by petitioner could not have been destroyed without violating the retention standards set forth in Schedule ED-1. The record indicates that proper requests were made, at the very least, to the Department of Education, Office of Legal Services in early 2006, to Park West High School which forwarded the request to Park West Evening High School in March of 2006 and the Department of Education's Regions 9 and 10 Operations Center in early 2007. Because petitioner complied with the procedure set forth in the Chancellor's Regulations and the requirements provided to him by respondent, respondent was bound by a legal duty to provide petitioner access to his documents which they were legally required to retain. Moreover, the duties imposed by the relevant Chancellor's Regulations involve ministerial, not discretionary acts. The rules envision direct adherence to a compulsory result - if a student requests access to his or her academic record, respondent must make it available within 45 days.

Therefore, because respondent has admitted that it has never performed a full search of all

of the documents most likely to contain petitioner's records, the relief sought by petitioner is granted to the extent that respondent must promptly turn over all of petitioner's academic records within its possession or control. In light of respondent's claim that the records are not found on its computer system, when locating petitioner's documents, respondent's search for the records must specifically include the physical paper or microfiche files for Park West Evening High School, whether they are kept at the school's former location or elsewhere. If after a diligent search respondent does not locate the documents requested, then it must submit an affidavit by the person most knowledgeable of the facts contained therein, describing (1) where the records were likely to be kept; (2) what efforts, if any, were made to preserve them; (3) whether such records were routinely destroyed; and (4) whether a search had been conducted in every location where the records were likely to be found (*see Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). In addition, the affidavit should specifically indicate whether any student files from Park West Evening High School from 1994-1996 could be found.

In the event that respondent fails to locate petitioner's documents, any subsequent decision on the issue of petitioner's graduation must first be decided by the Department of Education in accordance with its procedures. It is solely within that agency's discretion to determine what weight, if any, should be given to the documents offered as evidence of his graduation.

Accordingly, upon renewal, the petition is granted to the extent that respondent is directed to conduct a prompt search of all of its files and turn over to petitioner its findings. In the event that no records are found, respondent must submit an affidavit outlining its compliance with the court's directives. All other relief requested by the petition is denied in its entirety.

4. Petitioner's Application for Sanctions

Petitioner's application for sanctions pursuant to22 NYCRR § 130-1.1 is denied.

Accordingly, it is

ORDERED that the cross motion by respondent to vacate its default on motion sequence number 002 and this court's decision and amended order and judgment dated August 4, 2010, is granted;

ORDERED that upon de novo consideration of the petitioner's motion to reargue filed under motion sequence number 002, which was deemed a motion to renew, and upon consideration of all papers filed under motion sequence number 003, the motion to renew is granted and it is

ORDERED and ADJUDGED that the motion of petition is granted to the extent of directing the New York City Department of Education to conduct a full search for petitioner's official academic records from Park West Evening School in all of the relevant computer, microfiche, and physical paper records in its possession and control, and requiring it to provide the results to petitioner within thirty (30) days of entry of this decision, order and judgment; and it is further

ORDERED that in the event no records are found, respondent shall provide petitioner an an affidavit of compliance with the search directed in accordance with the court's decision.

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

ENTER,

Paul G. Feinman
J.S.C.

Dated: February16, 2011
New York, New York

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).