

Matter of Joseph v Fischer

2011 NY Slip Op 33227(U)

September 21, 2011

Supreme Court, Franklin County

Docket Number: 2011-600

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
NIGEL JOSEPH, #97-A-3826,
Petitioner,

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

**DECISION AND ORDER/
SUPPLEMENTAL
ORDER TO SHOW CAUSE
RJI #16-1-2011-0273.57
INDEX # 2011-600
ORI #NY016015J**

-against-

BRIAN FISCHER, Commissioner, NYS
Department of Corrections and Community
Supervision, and **DARWIN LaCLAIR**,
Superintendent, Franklin Correctional Facility,
Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that appears to have been commenced on January 6, 2011, when the Petition, dated December 13, 2010, was filed in the Wyoming County Clerk's office. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the recommendation/requirement that he participate in the DOCCS Alcohol and Substance Abuse Treatment (ASAT) program, as set forth in the August 18, 2010 final decision of the Inmate Grievance Program Central Office Review Committee (CORC) in grievance FKN-9178-10.

By order dated January 5, 2011, Supreme Court, Wyoming County, granted petitioner's application for poor person status, imposed a reduced filing fee of fifteen dollars and appointed Wyoming County-Attica Legal Aid Bureau, Inc. (hereinafter, Legal Aid) to represent petitioner in this proceeding. The Supreme Court, Wyoming County,

issued an Order to Show Cause on January 21, 2011¹ and as a part thereof petitioner was directed to effectuate service of process by mail or fax on or before January 24, 2011. Respondent Fischer subsequently moved for transfer of venue to Franklin County. By order dated June 13, 2011 the motion was granted and venue was transferred to this Court. As part of the order of June 13, 2011, Legal Aid was relieved of its assignment to represent petitioner. The papers originally filed in Wyoming County were received in the Franklin County Clerk's office on June 17, 2011 and in chambers on June 22, 2011.

By Letter Order dated June 22, 2011 respondents were directed to serve answering papers on or before July 29, 2011. The Court has since received and reviewed respondents' Notice of Motion to Dismiss, dated July 29, 2011, supported by the Affirmation of Justin C. Levin, Esq., Assistant Attorney General, also dated July 29, 2011. By Letter Order dated August 3, 2011 the motion was deemed returnable on August 19, 2011, rather than July 29, 2011 as designated by respondents. The Court has since received and reviewed petitioner's "Affidavit in Support of Petitioner's Reply to Respondent's Notice of Motion," dated August 16, 2011 and received directly in chambers on August 19, 2011.

Respondents' motion papers first assert that this proceeding is barred by the four-month statute of limitations set forth in CPLR §217(1). In this regard respondents note that the final decision of the CORC was issued on August 18, 2010 - a fact conceded in paragraph 20 of the petition - and that petitioner made "... no claim that his receipt of CORC's decision was delayed in any way." Respondents go on to assert that the statute

¹ Notwithstanding the fact that Brian Fischer, DOCCS Commissioner, and Darwin LaClair, Superintendent, Franklin Correctional Facility, were both named as respondents in the Petition, the Order to Show Cause of January 21, 2011 only listed Commissioner Fischer as a respondent.

of limitations therefore commenced running on August 18, 2010 and that this proceeding was not timely commenced within four months thereof (on or before December 18, 2010). In paragraph four of his opposing papers, however, petitioner alleges that he did not receive a copy of the final CORC decision until October 10, 2010. In paragraph five of his opposing papers, moreover, petitioner asserts that he originally filed his petition in the Wyoming County Clerk's office on December 13, 2010.

“It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof.” *Warburton v. Department of Correctional Services*, 251 AD2d 831, 832, citing *Biondo v. New York State Board of Parole*, 60 NY2d 832, 834. See *Jackson v. Fischer*, 67 AD3d 1207. In the case at bar the respondents failed to submit any affidavit(s) and/or documentary evidence addressing the issue of when petitioner received a copy of the final CORC decision. In view of petitioner's assertion that he did not receive a copy of such decision until October 10, 2010, the Court finds that respondents have failed to carry their burden of demonstrating the applicability of the statute of limitations defense. Accordingly the Court finds no reason to address petitioner's contention that he originally filed his papers in the Wyoming County Clerk's office on December 13, 2010.

The second branch of respondents' motion, seeking dismissal on personal jurisdiction grounds, is premised upon the assertion that petitioner failed to comply with the relaxed service requirements set forth in the January 21, 2011 Order to Show Cause issued out of Supreme Court, Wyoming County. Although respondents concede that the Buffalo regional office of the New York State Attorney General was timely served, they assert that the respondent Fischer was not served with any papers. This assertion is

supported by the Affidavit of Patricia E. Dallmann-Weaver, a DOCCS employee assigned to counsel's office in Albany, sworn to on July 6, 2011.

The Court finds that petitioner has failed to effectively rebut the allegation of non-service. No affidavit of service was included with petitioner's opposing papers and in paragraph seven of such papers he merely states, in relevant part, as follows:

“Even if the respondent [Fischer] was not serve at the time the respondent was to be serve the petitioner was represent by Wyoming county-Attica legal aid bureau, Inc and was advise that all parties was served, and further the respondent's Attorney was served in a timely manner, therefore I ask that the court overlook any and all technical errors, faults or defects contained herein.”

It is clear that petitioner has failed to demonstrate compliance with the relaxed service requirements set forth in the Order to Show Cause of January 21, 2011. In view of the circumstances of this case, however, the Court finds it appropriate to afford petitioner an additional opportunity to acquire personal jurisdiction over the respondents herein.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondents' motion is denied; and it is further

ORDERED, that respondents serve a copy of their answering papers on the petitioner on or before November 11, 2011, and that they simultaneously mail their original answering papers to the Clerk of the Court for filing, and mail a further copy of said answering papers to the undersigned; and it is further

ORDERED, that petitioner mail his original Reply to the respondents' answering papers to the Court Clerk's office, Franklin County Courthouse, 355 West Main Street, Suite 3223, Malone, New York, 12953, on or before December 2, 2011; and it is further

ORDERED, that petitioner serve a true copy of this Decision and Order/Supplemental Order to Show Cause, together with petition and any supporting affidavits, exhibits and/or memoranda by ordinary first class mail to each of the respondents and to the Attorney General of the State of New York, The Capitol, Albany, New York 12224, on or before October 14, 2011, and such shall be deemed sufficient service; and it is further

ORDERED, that petitioner mail an original Affidavit of Service, evidencing compliance with the service requirements set forth in this Decision and Order/Supplemental Order to Show Cause, to the Court Clerk's Office, Franklin County Courthouse, 355 West Main Street, Suite 3223, Malone, New York, 12953, on or before October 21, 2011.

Dated: September 21, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice