

Matter of Platten v Bezio
2012 NY Slip Op 30761(U)
March 8, 2012
Sup Ct, Albany County
Docket Number: 621-11
Judge: George B. Ceresia Jr
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violating prison rules after a Tier III disciplinary hearing held on April 29, 2009. The determination was reviewed and administratively affirmed on June 2, 2009. On June 16, 2009 the disciplinary penalties were modified (including, as relevant here, loss of good time) to reduce the duration thereof from twelve months to nine months. The petitioner thereafter commenced a CPLR Article 78 proceeding, which was transferred to the Third Department Appellate Division. The Appellate Division, on May 27, 2010, issued a decision modifying the disciplinary determination by dismissing one of the charges, and remitting the matter back to the Department of Correctional Services for an administrative redetermination of the penalty with respect to the remaining violations (see Matter of Platten v Bezio, 73 AD3d 1419 [3d Dept., 2010]). Upon remittal, in a decision dated June 15, 2010, the respondent again imposed nine months loss of good time.

The petitioner alleges that in letters dated September 13, 2010 and October 14, 2010 addressed to the Chairman of the Time Allowance Committee, he requested that he be permitted to appear before the Time Allowance Committee to determine the amount of good time, if any, to be restored. This request was denied, apparently on October 15, 2010. By letter dated October 16, 2010 addressed to Commissioner Brian Fischer the petitioner attempted to appeal the decision. In a letter dated October 25, 2010, Lucien J. Leclaire, Jr., Deputy Commissioner of the Department of Correctional Services, indicated that petitioner's good time is not subject to review by the facility Time Allowance Committee since he does not have a maximum expiration date. Leclaire further indicated that the petitioner may be eligible for a Limited Credit Time Allowance (see Correction Law § 803-b), but only after the expiration of five years without any further recommended loss of good time. Lastly,

Leclaire indicated that petitioner could also write to the Office of Special Housing/Inmate Disciplinary Programs to request reconsideration of the disciplinary hearing.

In letters dated November 2, 2010 and December 28, 2010 addressed to the respondent, the petitioner requested reconsideration of the disciplinary hearing. Petitioner's December 28, 2010 letter indicated that if he did not receive a response within ten (10) days (that is, on or before January 7, 2011) he would deem the request denied. By order to show cause and petition filed on February 24, 2011, the commenced the instant CPLR Article 78 proceeding challenging the January 7, 2011 "determination".¹

The respondent made a motion to dismiss the petition on grounds that the applicable statute of limitations had expired before the proceeding was commenced. In a decision dated June 22, 2011 the Court denied the motion, finding that the respondent never provided evidence to establish when the cause of action accrued, and therefore did not establish when the four month statute of limitation (see CPLR 217) commenced to run. The respondent subsequently made a second motion to dismiss on the same grounds. This time, the respondent submitted an affidavit which demonstrated that the June 15, 2010 determination was received by the petitioner on June 21, 2010 (thus establishing that respondent's claim accrued more than four months prior to commencement of the instant proceeding). The petitioner opposed the motion, arguing that the respondent failed to timely move for leave to reargue, in violation of CPLR 2221 (d); and that as a motion to renew, the additional information was readily available at the time that the prior motion was made, and that the respondent failed to present reasonable justification for the failure to present such facts on

¹The significance of the January 7, 2011 date is discussed below.

the prior motion (see CPLR 2221 [e]). In a decision-order dated December 1, 2011 the Court denied the second motion to dismiss. The Court, citing Zito v County of Suffolk (81 AD3d 722 [2d Dept., 2011]), stated that the denial of the second dismissal motion was without prejudice to the right of the respondent to raise the same issue in its answer.

The respondent has served an answer which raises an objection in point of law alleging that petitioner failed to commence the instant proceeding within the applicable statute of limitations. Generally, the statute of limitations begins to run when the party receives oral or written notice, or when the party knows or should have known, of the adverse determination (see Matter of Biondo v New York State Bd. of Parole, 60 NY2d 832, 834 [1983]; Matter of Feldman v New York State Teachers' Retirement Sys., 14 AD3d 769, 770 [2005]). Of great significance here, a request for reconsideration does not automatically toll or revive the statute of limitations (see, Matter of Lubin v Board of Educ. of City of N.Y., 60 NY2d 974, 976; Matter of Gross v State of New York Pub. Serv. Commn., 195 AD2d 866, 867, lv denied 82 NY2d 660). Agency action will be found to renew a lapsed statute of limitations only in cases where the agency has held "a new hearing at which new testimony is taken, new evidence is proffered and new matters are considered" (Matter of Delbello v New York City Tr. Auth., 151 AD2d 479, 480; see, Matter of Chase v Board of Educ. of Roxbury Cent. School Dist., 188 AD2d 192, 197; Matter of Arce v Selsky, 233 AD2d 641 [3d Dept., 1996]).

The respondent has presented evidence, through the affidavit of Joseph Wuest, a Lieutenant for the New York State Department of Corrections and Community Supervision

(“DOCCS”), that the petitioner received the June 15, 2010 administrative determination² on June 21, 2010. Thus, to the extent that petitioner attempts to challenge the June 15, 2010 determination, the Court finds that the respondent demonstrated, prima facie, that the proceeding was not timely commenced within four months of the date of its receipt which, the Court finds, is the date of accrual (see Matter of Harvey v Bradt, 91AD3d 1222 [3d Dept., 2012]; Matter of Abreu v Hogan, 72 AD3d 1143 [3rd Dept., 2010]; Matter of Jackson v Fischer, 78AD3d 1335 [3rd Dept., 2010]; Matter of Watson v Goord, 39 AD3d 1044, 1044 [3rd Dept., 2007]; Matter of Detorres v Goord, 40 AD3d 1306, 1307 [3rd Dept., 2007]).

Apart from the foregoing, petition paragraph 2 recites that “petitioner challenges a determination made by the respondent on January 7, 2011 denying his request to have the recommended loss of good time penalty expunged from his institutional record”. In fact, no determination was made by respondent Bezio, or any State official on January 7, 2011 or any other date, with respect to petitioner’s request for reconsideration. The only significance with respect to that date was that it was a self-created, self-imposed deadline established by the petitioner in his letter dated December 28, 2010 addressed to respondent Bezio in which petitioner indicated that if he did not receive a response within ten days, he would deem his request for reconsideration denied.³ Lastly, as noted above, petitioner’s request for reconsideration would not operate to extend the statute of limitations with respect to the June 15, 2010 determination, since it does not appear that the request was even entertained, let

² Which, as noted, confirmed nine months loss of good time.

³Significantly, there is no evidence in the record that respondent Bezio has made or participated in any administrative decision with respect to the petitioner since the June 2, 2009 determination affirming petitioner’s original disciplinary penalty.

alone a hearing held, involving a “fresh and complete examination of the matter based on newly presented evidence” (Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, 34 AD3d 895, 897 [3rd Dept., 2006]).

Because there was no January 7, 2011 determination, the petition fails to state a cause of action against respondent Bezio. For the foregoing reasons, the Court concludes that the petition must be dismissed.

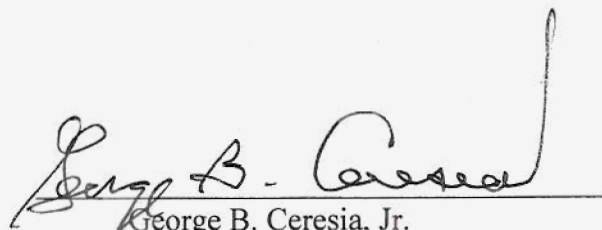
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: March 8, 2012
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 3, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 27, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply dated December 31, 2011 and Exhibits