

Matter of Blackwell v Fischer
2012 NY Slip Op 31349(U)
May 8, 2012
Supreme Court, St. Lawrence County
Docket Number: 138178
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
JAMES BLACKWELL, #10-B-1866,

Petitioner,

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

**DECISION AND ORDER/
ORDER OF TRANSFER**

RJI #44-1-2012-0100.04

INDEX #138178

ORI # NY044015J

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision, and **NUNZIO
DOLDO**, Acting Superintendent, Gouverneur
Correctional Facility,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was commenced in Dutchess County by the Petition of James Blackwell, verified on January 19, 2012. Petitioner, who is an inmate at the Fishkill Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Gouverneur Correctional Facility and concluded on December 19, 2011. Petitioner is also challenging the results of two separate Tier II Disciplinary Hearings held at the Gouverneur Correctional Facility and concluded on October 14, 2011 and January 3, 2012, respectively. The petition originally filed in Dutchess County named William Connolly, Superintendent, Fishkill Correctional Facility, as sole respondent. By Decision and Order dated February 6, 2012 Supreme Court, Dutchess County (Hon. Joan S. Posner) directed that venue be transferred to St. Lawrence County. The papers originally filed in Dutchess County were received in the St. Lawrence County Clerk's office on February 15, 2012.

This Court issued an Order to Show Cause on February 28, 2012. In view of the challenges advanced by petitioner herein, the Court, as part of said Order to Show Cause,

directed that Brian Fischer, Commissioner, NYS Department of Corrections and Community Supervision, and Nunzio Doldo, Acting Superintendent, Gouverneur Correctional Facility, be substituted for Superintendent Connolly as respondents.

The petitioner has moved, purportedly pursuant to CPLR §3025(a), to substitute Albert Prack, DOCCS Director of Special Housing/Inmate Disciplinary Program, for respondent Acting Superintendent Doldo “ . . . on the grounds that Albert Prack . . . affirmed the Superintendent’s Hearing upon petitioner’s [administrative] appeal, on February 14, 2012; in Albany County.” In his motion papers petitioner also seeks “[t]o transfer this proceeding pursuant to CPLR §506(b) on the grounds that the determination of Albert Prack was made in Albany County, and both respondent’s offices are located in Albany County . . .” In addition, petitioner seeks a order vacating the \$15.00 reduced filing fee imposed as part of the Order to Show Cause of February 28, 2012. Petitioner’s motion papers were filed in the St. Lawrence County Clerk’s office on March 23, 2012. The Court has since received and reviewed respondent’s Answer/Return, verified on April 13, 2012, as well as petitioner’s Reply thereto, filed in the St. Lawrence County Clerk’s office on April 26, 2012.

Under the relevant provisions of CPLR §1003 “[p]arties may be added at any stage of the action by leave of court . . . or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of the pleading responding to it.” Where a new party is to be joined pursuant to CPLR §1003, “ . . . a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party.” CPLR §305(a). Although the language set forth in CPLR §§1003 and 305(a), as quoted above, is geared towards an action, the statutory provisions are applicable to this special proceeding pursuant to CPLR §103(b).

Thus, for petitioner to “substitute”/add a new respondent it is incumbent upon him to serve the prospective new respondent with either a Notice of Petition or an Amended Order to Show Cause. Since it is apparent that no Notice of Petition has been served, petitioner’s “motion” will be considered as an application for the issuance an Amended Order to Show Cause. For the reasons set forth below, however, the Court declines to issue such an order.

The results and disposition of the Tier III Superintendent’s Hearing concluded on December 19, 2011 were affirmed on administrative appeal by Albert Prack, DOCCS Director, Special Housing/Inmate Disciplinary Program, acting as designee of the respondent DOCCS Commissioner Fischer. *See* 7 NYCRR §254.8. Since Commissioner Fischer, who is already a named respondent herein, is ultimately responsible for the disposition on administrative appeal, the Court finds that no purpose would be served by the addition of Director Prack as a respondent. As far as the two Tier II Disciplinary Hearings are concerned, petitioner’s administrative appeals from the results and dispositions of those hearings were decided by the designee of the facility superintendent pursuant to 7 NYCRR §253.8. The respondent Acting Superintendent Doldo is, therefore a proper respondent with respect to judicial review of the results and dispositions of the Tier II Disciplinary Hearings. Inasmuch as proper respondents are currently named, the Court finds no reason to issue an Amended Order to Show Cause directing the substitution/addition of Director Prack.

Since the respondent Fischer maintains a principal office in Albany County and the material events underlying all three hearings took place at the Gouverneur Correctional Facility in St. Lawrence County, it appears that this proceeding could properly be venued in St. Lawrence County (in the 4th Judicial District) or Albany County (in the 3rd Judicial District) or, for that matter, in any county within the 4th or 3rd Judicial Districts. *See*

CPLR §506(b). In the absence of any assertion that this proceeding is improperly venued in St. Lawrence County, the Court finds no basis to order a change of venue to Albany County. In any event, as discussed below, this proceeding must be transferred to the Appellate Division, Third Department, for disposition regardless of venue.

Although petitioner advances a variety of arguments in support of his contentions that the results and dispositions of all three hearings must be overturned, he alleges that all three underlying inmate misbehavior reports were false and written in retaliation for his exercise of constitutionally protected rights. The Court finds that such allegations call into question the sufficiency of evidence upon which the determinations of guilt were based and thereby implicate the substantial evidence question as specified in CPLR §7803(4). Although the *pro se* inmate petitioner does not specifically raise the “substantial evidence” issue by name, the Court’s examination of the petition leads it to conclude that such issue has sufficiently, although inartfully, been raised. *See Abreu v. Coughlin*, 157 AD2d 1028 and *Segrue v. City of Schenectady*, 132 AD2d 207. Since respondents’ Answer interposes no objection constituting his objection as could terminate the proceeding within the meaning of CPLR §7804(g), this matter must be transferred to the Appellate Division, Third Department, for disposition.

Finally, to the extent petitioner asserts in his motion papers that the Supreme Court, Dutchess County (Hon. Joan S. Posner), “waived any and all filing fees” on or about February 6, 2012, this Court notes that petitioner’s application for poor person status, originally filed in Dutchess County, was forwarded to this Court along with the February 6, 2012 Dutchess County transfer order. Nothing in the Dutchess County papers, however, indicates that a disposition had been made in that court with respect to petitioner’s application for poor person status and/or reduced filing fees.

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

ORDERED, that petitioner's applications are denied; and it is further

ORDERED, that this proceeding, in its entirety, is transferred for disposition to the Appellate Division, Third Department.

Dated: May 8, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court