

**Matter of Dombrof v Fisher**

2012 NY Slip Op 32189(U)

August 2, 2012

Supreme Court, New York County

Docket Number: 400658/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*RICHARD LAWRENCE DOMBROF,*

INDEX NO. 400658/12

Petitioner,  
-against-

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

BRIAN FISHER, Commissioner NYSDOCCS, et al.,  
Respondents.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

**UNFILED JUDGMENT**

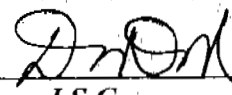
CROSS-MOTION:  YES  NO

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).

Upon the foregoing papers, it is ordered that this motion be

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8/2/12

  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**UNFILED JUDGMENT**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of RICHARD  
LAWRENCE DOMBROFF,  
Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 400658/12

BRIAN FISCHER, Commissioner NYSDOCCS and  
PRISCILLA LEDBETTER, Director Temporary Release  
Program NYSDOCCS,  
Respondents.  
-----X

**DONNA M. MILLS, J.:**

In this special proceeding pursuant to C.P.L.R. Article 78, petitioner Richard Lawrence Dombroff ("Petitioner") seeks to nullify Respondents Brian Fischer, Commissioner of the New York State Department of Corrections and Community Supervision ("DOCCS"), and Priscilla Ledbetter's DOCCS' Director of Temporary Release Programs denial of his work release removal, and seeks to compel Respondents to reinstate Petitioner into the temporary release program at the Lincoln Correctional Facility. Respondents cross move to dismiss the petition in this Article 78 proceeding pursuant to CPLR §§ 217(1), 306-b, 3211(a)(1), (2), (5), (7), and (8), and 7804(f) upon the grounds that (1) the proceeding is barred by the statute of limitations; (2) the Court lacks personal jurisdiction over respondents; and (3) petitioner's claims are unpreserved for the Court's review.

Petitioner is an inmate in the care and custody of DOCCS, and is currently incarcerated at the Watertown Correctional Facility. Petitioner was convicted in 2003 for a non-violent corporate financial offense and sentenced to an indeterminate sentence

of five to fifteen years. Petitioner was granted work release in 2007 and was a participant in the temporary release program at Lincoln Correctional Facility in Manhattan from 2007 to 2011 until his removal by the respondents on July 19, 2011.

Petitioner claims that on the afternoon of Friday, July 15, 2011, while working at the offices of Kaye Associates, Inc. on Long Island, he was summoned without explanation from his furlough by his parole officer, Ms. Simmons, and instructed to return immediately to the Lincoln Correctional Facility. Petitioner complied immediately with the aforementioned directive, and on July 19, 2011 appeared before the Temporary Release Committee ("TRC") for a hearing.

Following the hearing, the TRC made the following recommendation:

After review, TRC recommends removal as inmate committed fraud in that he presented himself on the Internet as Dr. Richard Lawrence for unknown purposes. Current behavior is unsuitable & contradictory to temp[orary] re[lease] rules and reg[ulation]s.

Petitioner signed the TRC's decision on July 19, 2011, the same day it was rendered. He thereafter properly appealed the TRC's determination to the central office of Temporary Release Programs . In his appeal, dated July 25, 2011, petitioner denied engaging in fraud and claimed that at the July 19<sup>th</sup> hearing, he "was not afforded a fair hearing," "was intimidated and berated," and "was constantly interrupted by a certain member of the TRC who made it impossible for [petitioner] to present information that would clarify the situation."

In a letter dated August 29, 2011 from Theresa A. Knapp-David, DOCCS Associate Commissioner, in response to a letter petitioner wrote to respondent Brian

Fischer, petitioner was advised that his administrative appeal was received on August 2, 2011 and that he would receive a decision within 60 days of that date. On September 30, 2011, the TRP Office purportedly affirmed the TRC's determination concluding that termination from the work release program was warranted. Moreover, in a letter dated January 25, 2012 in response to petitioner's correspondence regarding his temporary release status, respondent Ledbetter advised petitioner that his Work Release Removal appeal was denied and that further review was not provided for in the Temporary Release Program Rules and Regulations.

Petitioner brought this Article 78 proceeding challenging the TRC's July 19, 2011 determination on February 28, 2012. In challenging the TRC's determination, petitioner asserts that he was denied procedural due process and that respondents failed to determine his administrative appeal within 60 days pursuant to 7 NYCRR § 1904.4.

As mentioned earlier, the TRP Office contends that it issued its final determination on September 30, 2011, which affirmed the TRC's July 19, 2011 determination to remove petitioner from work release. Respondents claim to have sent petitioner a copy of this final determination. Petitioner contends that he did not receive actual notice of the determination until around the time he was preparing this action, without specifying when he actually received the final determination.

An Article 78 proceeding must be commenced "within four months after the determination to be reviewed becomes final and binding on the petitioner" (CPLR 217 1]). An agency determination becomes final and binding when the aggrieved party received actual notice of the determination. (Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello, 20 AD3d 28 [1<sup>st</sup> Dept 2005]).

The burden rests on the party seeking to assert the Statute of Limitations as a defense to establish that its decision provided notice more than four months before the proceeding was commenced ( see, Matter of Vil. of Westbury v. Department of Transp., 75 NY2d 62, 73, 550 N.Y.S.2d 604, 549 N.E.2d 1175; Matter of Castaways Motel v. Schuyler, 24 N.Y.2d 120, 126–127, 299 N.Y.S.2d 148, 247 N.E.2d 124; Matter of Chaban v. Board of Educ. of City of N.Y., 201 A.D.2d 646, 608 N.Y.S.2d 229).

Here, we find respondents' assertion that the statute of limitations began to run on the date the determination was issued, without more, to be insufficient to shift the burden of persuasion to petitioner to establish that his petition was timely. No evidence exists that the final order was mailed on September 30, 2011, to petitioner, and he has denied receipt of the final order until sometime in 2012 when he was preparing the subject Article 78 petition. The affirmation from respondents' attorney regarding a copy of the final determination being sent to petitioner is insufficient.

Respondents have, therefore, failed to establish that petitioner was served with the final order dated September 30, 2011. The statute of limitations, accordingly, had not expired prior to the commencement of this Article 78 proceeding.

In light of this Court's finding that the statute of limitations had not expired, that branch of respondents' motion to dismiss for lack of personal jurisdiction for failure to serve the Office of the Attorney General and respondents, is similarly denied.

Respondents also seek to dismiss the petitioner's procedural due process claims on the grounds that petitioner failed to raise them in his administrative appeal. In his administrative appeal, dated July 25, 2011, petitioner generally denied engaging in fraud and claimed that at the July 19<sup>th</sup> hearing, he "was not afforded a fair hearing." In

this Article 78 proceeding, petitioner alleges that he was not (1) provided 24 hours notice of the specific reasons for his referral to the TRC; (2) provided with an inmate assistant; (3) given the opportunity to call witnesses or confront adverse witnesses; (4) provided the opportunity to present documentary evidence or challenge evidence proffered against him; or (5) afforded a neutral body at his hearing.

The law is clear that a claim cannot be raised for the first time on judicial review of the administrative determination. It must first be made at the administrative level ( see, Matter of Hennekens v. State Tax Commn. of State of N.Y., 114 A.D.2d 599, 600, 494 N.Y.S.2d 208; see also, Matter of Valvano v. Jones, 122 A.D.2d 336, 504 N.Y.S.2d 306).

Upon review of the petitioner's administrative appeal, this Court finds that the lack of a fair hearing claim, although not expounded upon in his appeal, does cover the allegations complained of in this petition during the hearing. The petitioner's administrative appeal does not, however, raise issues pertaining to the first two claims raised in the instant petition, which are now raised for the first time.

Accordingly it is

ORDERED that respondents' cross motion to dismiss the petition on the grounds of statute of limitations and lack of personal jurisdiction is denied; and it is further

ORDERED and ADJUDGED that respondents' cross motion to dismiss the procedural due process claims is granted only to the extent of dismissing the petitioner's claims of not being provided with 24 hours notice of the specific reasons for his referral to the TRC; and not being provided with an inmate assistant; and it is further

ORDERED that respondents are directed to serve their answer, along with all

[\* 7]

supporting papers within thirty days of the date of this Order. Petitioner thereafter shall have 15 days to serve any reply papers. This action will be placed on this Court's motion calendar for papers only, on October 1, 2012.

Dated: 8/2/12

ENTER:

  
\_\_\_\_\_  
J.S.C.

**DONNA M. MILLS, J.S.C.**

**UNFILED JUDGMENT**

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