

Matter of Johnson v Fischer

2013 NY Slip Op 30031(U)

January 8, 2013

Sup Ct, NY County

Docket Number: 401488/12

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

IN THE MATTER OF THE APPLICATION OF
DAVID JOHNSON,

Petitioner,

INDEX NO. 401488/12

MOTION SEQ. NO. 001

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

-against-

BRIAN FISCHER, Commissioner, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, CYRUS VANCE, JR.,
District Attorney, NEW YORK CITY DISTRICT
ATTORNEY'S OFFICE,

Respondent.

FILED

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The following papers, numbered 1-4 were considered on this Article 78 and cross-motion to dismiss:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>3, 4</u>

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

Petitioner David Johnson seeks an order, pursuant to Article 78 of the CPLR, removing allegedly improper information contained in papers allegedly in his file maintained by respondent New York State Department of Corrections and Community Supervision (Dept of Corrections).

Respondent Dept of Corrections cross-moves to dismiss this proceeding pursuant to CPLR §§ 3211(a)(7) and 7804(f) on the grounds that petitioner failed to state a cause of action. For the reasons stated below, the petition is denied and the cross-motion to dismiss is granted.

BACKGROUND

Petitioner is currently an inmate of Eastern New York Correctional Facility. In October 1999, petitioner pled guilty to several criminal offenses and received several sentences to run concurrently, resulting in a total sentence of 12 ½ years to life. Petitioner alleges that his file, maintained by respondent Dept of Corrections (Petitioner's File), contains "papers about crimes that petitioner was never charge [sic] for, or even convicted for, that...[respondent Dept of Corrections]...got from NY County District Attorneys Office." Verified Petition, ¶ 3. Petitioner further alleges that the Assistant District Attorney used false statements at petitioner's sentencing hearing, memorialized in the sentencing transcript which is in Petitioner's File. *Id.*

In October and November of 2011, petitioner filed two Freedom of Information Law (FOIL) requests, seeking his "folder papers that shows front cover picture of [him] with a dress suit" and the "folder which was open with front cover when [petitioner] went in front of work release interview," respectively. Verified Petition, Exh. C, FOIL appeal denial letter, dated March 2, 2012. Both FOIL requests were denied. Petitioner filed a FOIL appeal on February 8, 2012, which was also denied, by letter dated March 2, 2012, for the reason that "[n]o folder with a front cover photo of [petitioner] in a dress suit or similar photos was found." *Id.* Thereafter, petitioner filed the instant Article 78 proceeding, by order to show cause, seeking to remove the inappropriate papers from Petitioner's File.

In seeking dismissal of this proceeding, respondent Dept of Corrections maintains that petitioner has failed to state a cause of action, as respondent Dept of Corrections is without authority to correct, amend, or expunge information that was provided by another governmental agency. Further, respondent Dept of Corrections argues that petitioner is not entitled to a mandamus to compel. Petitioner has failed to oppose respondent Dept of Corrections' cross-motion to dismiss.

DISCUSSION

At the outset, this court notes that petitioner failed to properly serve respondents Cyrus Vance, Jr. (Vance) and the New York City District Attorney's Office, as per the order to show cause. Petitioner's order to show cause specifically states that service shall be made by "personal service or service by ordinary first class mail of a copy of this order and the papers upon which this order is granted upon the respondent (and the Attorney General) (and the Corporation Counsel) on or before the 30th day of July, 2012". Order to Show Cause, p. 1. Petitioner's affidavit of service shows that the Attorney General, the Corporation Counsel, respondent Brian Fisher, and respondent New York City District Attorney's Office were not served with the instant order to show cause. In fact, such affidavit of service lists service to only respondents Vance and the Dept of Corrections. Further, it is well-settled that service in an action or proceeding must be made by a non-party. *See* CLPR 2103(a). The Appellate Division, First Department has held that service in violation of CPLR 2103(a) is defective. *See Matter of Bloomberg v Niebauer*, 286 AD2d 267 (1st Dep't 2001). *See also Miller v Bank of New York*, 226 AD2d 507, 507-508 (2d Dep't 1996); *Matter of Beverly E. v William H.*, 53 AD2d 891, 892 (2d Dep't 1976). Here, petitioner himself served the instant petition on respondent Vance and respondent Dept of Corrections on July 31, 2012, and thus, this petition was served improperly and untimely as against both such respondents. As such, the petition must be denied as against all respondents, as petitioner failed to properly serve the instant order to show cause.

As the court has already determined that service is improper, it need not address respondent Dept of Correction's unopposed cross-motion to dismiss at length. It is settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss the

complaint for failure to state a cause of action “will generally depend upon whether or not there was substantial compliance with CPLR 3013.” *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep’t 1972). If the allegations are not “sufficiently particular to give the court and parties notice of the transactions intended to be proved and the material element of each cause of action”, the cause of action will be dismissed. *See Catli*, 40 AD2d at 715. CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

Here, petitioner brings this Article 78 proceeding to compel respondent Dept of Corrections to remove allegedly improper information contained in Petitioner’s File. New York Courts have held that a “[m]andamus [to compel] is available...only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.” *New York Civil Liberties Union v. State of New York*, 4 NY3d 175, 184 (2005). Here, petitioner has failed to even allege that respondent Dept of Corrections failed to perform a duty enjoined by law, and cites to no authority to support his propositions. Moreover, respondent Dept of Corrections is correct in arguing that a copy of the sentencing minutes must be delivered by the court to the institution where the defendant is incarcerated. *See Criminal Procedure Law* § 380.70. Further, the New York Code’s Rules and Regulations states that “[i]f the record in dispute [by an inmate] is one which has been received from another governmental agency, then the custodian shall direct the inmate to make his challenge to such governmental agency.” 7 NYCRR § 5.51(a). It is undisputed that petitioner’s sentencing transcript was provided to respondent Dept of Corrections, pursuant to statute, by the court. Thus, having received such transcript from another governmental agency, respondent Dept of Corrections does not have the authority to remove any such information from Petitioner’s File. For the reasons stated above, respondent Dept of Corrections’ cross-

motion to dismiss is granted.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent's cross-motion to dismiss is granted; and it is further

ORDERED that within 30 days of entry, respondent shall serve a copy of this order upon petitioner with notice of entry.

This constitutes the decision of this Court.

Dated: _____ 1/8/13



DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if Appropriate: DO NOT POST

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