

Matter of Word v New York State Bd. of Parole

2014 NY Slip Op 30969(U)

April 7, 2014

Sup Ct, Albany County

Docket Number: 6716-12

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of DIANE WORD,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4302 Index No 6716-12

Appearances:

Diane Word
Inmate No. 96-G-0380
Petitioner, Pro Se
Bedford Hills Correctional Facility
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Bedford Hills, NY 10507

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The Capitol
Albany, New York 12224
(Laura A. Sprague, Assistant Attorney General,
Of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Bedford Hills Correctional Facility, commenced the above-captioned CPLR Article 78 proceeding to review a determination issued in 2011 in which she was denied release on parole. The respondent made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that petitioner failed to timely serve the order

to show cause and petition. By decision/order/judgment dated May 7, 2013 the Court granted the motion and dismissed the petition. The Court found that while it appeared that the Attorney General had been properly served, the petitioner had failed to timely serve the order to show cause, petition and supporting papers upon the respondent, as directed in the order to show cause.

In a motion dated June 11, 2013, the petitioner sought to “reopen” respondent’s prior motion. In support of the motion to reopen she maintained that she had a right to immediately appear before a completely new panel of Parole Board members, before whom she has not appeared previously. She also cited Executive Law § 259-c (4), but did not present facts to establish how or in what manner it was applicable and/or had been violated. In addition, her supporting papers were not notarized. The Court denied the motion in a decision-order dated August 30, 2013.

The petitioner thereafter made a second motion, this time for a new order to show cause “on the grounds that Judge George B. Ceresia finds that the order to show cause were timely served to the respondents attorney, and were not timely served to the respondent”. The Court denied the motion by decision-order dated November 13, 2013. The Court pointed out that petitioner’s motion was based upon unsworn papers; and otherwise found that the application had no merit.

The petitioner has now made two additional motions: (1) a motion to renew; and (2) a motion “to modify order on service of petition, and for respondent to disclose public record under Freedom of Information Law”

Petitioner's Motion To Renew

The affidavit submitted by the petitioner in support of the motion to renew recites as

follows:

“I, the petitioner pro se submit herein affidavit in support of motion to renew on new or additional facts that would change the prior determination. The new or additional facts are (1) that the court has subject-matter jurisdiction to issue mandamus to compel in January 2014 or soon thereafter to Respondent to immediately issue new Administrative Appeal Decision Notice to the petitioner who does have right to immediately receive the respondent's new Administrative Appeal Decision notice also on the grounds that the petitioner pro se did timely serve respondent State Attorney who also did timely notify respondent with Notice of Petition for Mandamus to Compel including number 5 whereby the respondent Administrative Appeals Decision Notice control # 12-301-11 is challenged in this present case; (2) that the respondent on the law concedes that respondent Administrative Appeal Decision notice control # 12-301-11 violates Executive law §§§§ 259; 259-c; 259-c (4); 259-i when respondent omitted applicable statutory factors relevant to the petitioner being currently eligible for release to parole supervision on the respondent's record of low risk assessment and needs assessment of the petitioner who has jury trial verdict conviction on the instant offense charge; that whenever the petitioner appears at parole hearing, the petitioner maintains statements of petitioner's actual innocence, not guilty also on the trial record; that the petitioner has adequate release plan of New York State licensed service program for support of petitioner's likelihood of success upon release, and for respect of the petitioner's rights, welfare and safety in the community and respects the rights welfare and safety of the community and of others; that are facts sufficient that the petitioner has right in court for relief of mandamus to compel the respondent to immediately issue new Administrative Appeal Decision Notice for the petitioner.

“Wherefore upon the foregoing the petitioner's pro se motion to renew should be granted; and such other and further relief as to the court shall deem just and proper.”

The respondent opposes the motion arguing that petitioner's motion does not involve newly discovered evidence, and is essentially a motion to reargue. The respondent points out that the petitioner appeared again before the Parole Board, on December 3, 2013, and she was denied release. The respondent argues that a reappearance before the Parole renders a challenge to a prior parole board determination moot.

A motion to renew must be based upon new facts not offered on the prior motion which existed at the time the prior motion was made, but were unknown to the party seeking renewal, along with a justifiable excuse as to why the new information was not previously submitted (see CPLR 2221 [e] [2], [3]; Hurrell-Harring v State of New York, 112 AD3d 1217, 1218 [3d Dept., 2013]; Tibbits v Verizon New York, Inc., 40 AD3d 1300, 1302-1303 [3rd Dept., 2007]; M & R Ginsburg, LLC v Orange Canyon Development Company, LLC, 84 AD3d 1470, 1472 [3d Dept., 2011]; 2 North Street Corporation v Getty Saugerties Corporation, 68 AD3d 1392, 1396-1397 [3rd Dept., 2009]).

To the extent that petitioner's motion may be construed as being predicated upon her December 3, 2013 re-appearance before the Parole Board, this fact would not constitute newly discovered evidence within the meaning of CPLR 2221(e). The reason for this is that this evidence did not exist at the time she initially filed her petition in 2012 (see Trump On The Ocean, LLC v State of New York, 79 AD3d 1325, 1326-1327 [3rd Dept., 2010]; Town of Kirkwood v Ritter, 80 AD3d 944, 948 [3d Dept., 2011]). Nor has the petitioner otherwise identified newly discovered evidence. Thus as a motion to renew, the motion has no merit.

To the extent that her motion may be construed as one to reargue, the petitioner has failed to demonstrate that the Court overlooked, misapplied or misapprehended the relevant

facts or law (see, CPLR 2221 [d] [2]; Loris v S & W Realty Corp., 16 AD3d 729, 730 [3rd Dept., 2005]; Matter of Smith v Town of Plattekill, 274 AD2d 900, 901-902 [3d Dept., 2000]).

In addition, as noted by the respondent, the petitioner's reappearance before the Parole Board in December 2013 renders petitioner's challenge to the 2011 Parole Board determination moot (see Matter of Bonez v State of New York, 100 AD3d 1235 [3d Dept., 2012]; Matter of Russo v New York State Division of Parole, 89 AD3d 1305 [3d Dept., 2011]; Matter of Davidson v Evans, 84 AD3d 1599 [3d Dept., 2011]).

For the foregoing reasons, the Court finds that the motion must be denied.

Petitioner's only remedy at this point would be to commence a new CPLR Article 78 proceeding through the filing of a new petition under a new index number, to seek timely review of the December 3, 2013 Parole Board determination.

Petitioner's Motion To Modify Order On Service of Petition; And For Respondent to Disclose Public Record Under Freedom of Information Law

The affidavit submitted by the petitioner in support of this motion recites as follows:

"I, the petitioner pro se submit herein affidavit in support of motions to modify order on service of petition; and for respondent to disclose public record under Freedom of Information Law on the ground

(1) that this court's record shows that the petitioner pro se did timely serve the respondent's state attorney who did timely notify respondent with notice of petition for mandamus to compel including number 5 whereby the respondent's Administrative Appeals Decision Notice control number # 12-301-11 is challenged in this present case. The respondent is a

New York State Agency or officials that are this court's jurisdiction.

(2) The respondent must also perform duty required by law to indicate how and in what manner Executive Law 259-c (4) is applicable to respondent's Administrative Appeal Decision Notice Control Number #12-301-11 on or before return date March 21, 2004.

(3) The respondent has issued new Administrative Parole Appeal # 12-178-13 effective December 17, 2013 to the petitioner whereby the respondent must also disclose public record of respondent's administrative appeal decisions notice control number # 12-178-13 on or before April 17, 2014 under Public Officer's law sections 84-89 Freedom of Information Law upon the respondent's record of Board of Parole report of petitioner's low risk assessment and of verdict conviction whereby the petitioner maintains statements of petitioner's actual innocence not guilty also on the trial record.

"Wherefore upon the foregoing the motions to modify order on service of petition should be granted; and for respondent to disclose public record under Freedom of Information Law should be granted; and such other and further relief as the court shall deem just and proper."

With regard to the Court's original decision/order/judgment dated May 7, 2013 which dismissed the petition, again, as a motion to reargue, the petitioner has failed to demonstrate that the Court overlooked, misapplied or misapprehended the relevant facts or law (see CPLR 2221 [d] [2]; Loris v S & W Realty Corp., supra; Matter of Smith v Town of Plattekill, supra). In addition, as noted above, the entire matter is now moot by reason of petitioner's re-appearance before the Parole Board.

The petitioner for the first time, seeks relief under the Freedom of Information Law (see Public Officers Law Article 6 [hereinafter FOIL]). Such relief may not be granted by motion. Relief may only be granted through commencement of an entirely new CPLR

Article 78 proceeding (see Public Officers Law § 89 [4] [d]), which would require the filing of a new petition under a new index number (see CPLR 7804; CPLR 304). The foregoing has not been done. In addition, the petitioner has failed to present facts establishing that she had submitted a request for agency records pursuant to FOIL, that her request was denied, whether it was appealed, and the outcome of any such appeal. Under all of the circumstances, the Court has no authority to grant any relief under FOIL.

For all of the foregoing reasons, petitioner’s motion must be denied.

Accordingly, it is

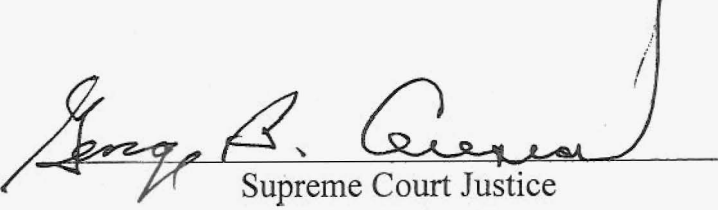
ORDERED, that petitioner’s motion to renew be and here is denied; and it is

ORDERED, that petitioner’s motion to modify order on service of petition and for respondent to disclose public record under Freedom of Information Law be and hereby is denied.

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 and delivery 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: April 7, 2014
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Petitioner's Notice of Motion to Renew Dated December 18, 2013 and Supporting Affidavit
2. Respondent's Letter Dated February 7, 2014 and Exhibits
3. Petitioner's Reply Letter dated February 11, 2014
4. Petitioner's Notice of Motion Dated March 4, 2014 to Modify Order On Service of Petition and For Respondent to Disclose Public Record Under the Freedom of Information Law and Supporting Affidavit