

Matter of Braunstein v Kowalowski

2014 NY Slip Op 31097(U)

April 30, 2014

Supreme Court, Albany County

Docket Number: 6360/13

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
PETER BRAUNSTEIN, # 07-A-3578,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION and ORDER
RJI NO.: 01-14-ST5421
INDEX NO.: 6360-13

J. KOWALOWSKI, Chairperson, Facility Media
Review committee, Clinton Correctional Facility;
LINDA HOLLMEN, Chairperson, Central Office
Media Review Committee, Department of Corrections
and Community Supervision; JEFF MCKOY, Deputy
Commissioner of Program Services, Department of
Corrections and Community Supervision,

Respondents.

Supreme Court Albany County All Purpose Term, April 11, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Petitioner, Pro Se
07-A-3578
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TERESI, J.:

Petitioner, an inmate serving a 15 year to life sentence for Robbery, Burglary, and Sexual Abuse commenced this Article 78 proceeding challenging Respondents' determination denying

Petitioner access to the book “Cellar of Horror, The Story of Gary Heidnik” by Ken Englade and a magazine titled “Burning Angel, 2011 #28.” Respondents barred Petitioner from receiving “Cellar of Horror” upon finding that more than eight pages of that book violate the Media Review guidelines by for example “advocating violence against women as it depicts the act of rape” and depicting “acts of sadomasochism” in a fashion that “appeal[s] to prurient interests and are unacceptable using ... contemporary community standards.” Respondents barred Petitioner from receiving “Burning Angel” on the grounds that more than eight pages of that magazine violate the Media Review guidelines by for example “depicting models as [sic] under age person in sexually alluring position or sexual activities. This material promotes the sexual performance of children by depicting the above referenced models as underage persons.” In addition to appealing those two determinations administratively, Petitioner filed a grievance urging that the determinations involve alleged technical violations of a stipulation made in federal court resolving the Dumont class-action case in 1983.

Petitioner asks the Court to vacate the Respondents’ decisions regarding “Cellar of Horror” and “Burning Angel” as well as 27 other publications that have been barred since 2010 on the ground that those determinations were arbitrary, capricious, and rendered in defiance of the guidelines and therefore invalid. Although Petitioner also asks the Court to direct Respondents to recompose the procedural guidelines to accord with the Dumont stipulation, and to impose sanctions in the event of non-compliance, Petitioner’s grievance regarding the Dumont stipulation has since been accepted in part and Respondent took corrective measures to correct the technical inconsistencies.

Respondents urge that Petitioner lacks standing to challenge the prior determinations regarding the 27 publications that were denied by Respondents. Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991]). Petitioner has the burden of establishing both an injury in fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772–773 [1991]). These requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 773–774 [1991]).

The Court finds that Petitioner has alleged nothing that suggests that he has any injury in fact or other stake in the publications that were denied to other inmates. While Petitioner would have a greater claim to standing regarding the roughly dozen other books and magazines containing bondage, rape and violence against women, and simulated child pornography that Petitioner sought to obtain, Petitioner has failed to explain why he failed to appeal the denial of those books and magazines or why he should be allowed to challenge determinations that he failed to appeal administratively. The Court holds that Petitioner may not include any of those 27 determinations in this proceeding.

Respondents also urge that the petition should be dismissed pursuant to CPLR 3211(a)(7) because Petitioner has failed to state a cause of action regarding the two publications that are at issue in this proceeding. The Court's role is limited to deciding whether the facts as alleged in the petition fit within a cognizable legal theory (Maas v Cornell Univ., 94 NY2d 87,

91 [1999]; Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]). When doing so, the Court must afford the petition a liberal construction, accept as true the allegations contained therein, and accord the proponent of the cause of action the benefit of every favorable inference and cognizable legal theory (Hurrell-Harring v State of New York, 15 NY3d 8, 20 [2010]; EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; SUS, Inc. v St. Paul Travelers Group, 75 AD3d 740, 741-742 [3d Dept 2010]; Shebar v Metropolitan Life Ins. Co., 25 AD3d 858, 859 [3d Dept 2006]; Skibinsky v State Farm Fire & Cas. Co., 6 AD3d 975, 976 [3d Dept 2004]; 1455 Washington Ave. Assoc. v Rose & Kiernan, Inc., 260 AD2d 770, 771 [3d Dept 1999]).

Petitioner has failed to state a cause of action. The Court is not authorized simply to substitute its judgment for that of the agency responsible for making the determination (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]; Awl Indus., Inc. v Triborough Bridge & Tunnel Auth., 41 AD3d 141, 142 [1st Dept 2007]). In order to succeed in this proceeding, Petitioner must demonstrate that it was arbitrary, capricious or an error of law for Respondents to deny Petitioner his book and magazine because of their depicting violence against women, sadomasochism, and simulated child pornography for prurient effect (Matter of Fuentes v Fischer, 89 AD3d 1292, 1293 [3d Dept 2011]; Matter of Davis v Fischer, 85 AD3d 1457, 1458 [3d Dept 2011]; Matter of Raqiya v Goord, 28 AD3d 892, 893 [3d Dept 2006]; Dallio v Goord, 15 AD3d 803, 804 [3d Dept 2005]). Barring at least one of those wrongs, the Court must confirm the determination (Harty v Goord, 3 AD3d 701, 702 [3d Dept 2004]).

Petitioner has failed to provide any support to his conclusory assertion that Respondents' refusal to permit Petitioner to receive the book and magazine in question was arbitrary or capricious. Petitioner does not deny that the book and magazine each contain more than eight pages of material that is of prurient interest, degrades women, and simulates child pornography. Petitioner does not challenge Respondents' authority to review material entering correctional facilities and exclude material such as his book and magazine that contains material of prurient interest that promotes violence against women and underage children.

The Court also rejects Petitioner's mistaken assumption that inconsistency between Respondents' implementation of the applicable administrative regulations and the Dumont stipulation necessitates giving Petitioner his book and magazine. Petitioner has failed to demonstrate that he was entitled to the book or magazine under either the administrative regulations or the Dumont stipulation.

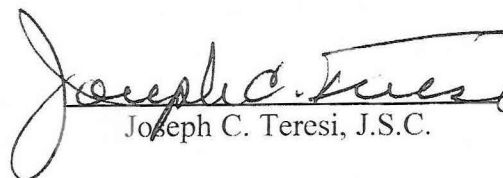
Accordingly, it is hereby

ORDERED, that the petition is denied and the relief requested in this proceeding is in all respects denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall 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.

So Ordered.

Dated: Albany, New York
April 30, 2014


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated December 9, 2013.
2. Petition dated September 7, 2013, with attached exhibits.
3. Answer dated April 4, 2014.
4. Affirmation of Melissa A. Latino, Esq. dated April 4, 2014, with attached exhibits.