

Bonez v Fischer

2014 NY Slip Op 31820(U)

June 30, 2014

Supreme Court, New York County

Docket Number: 400881/13

Judge: Shlomo S. Hagler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

WILLIAM F. BONEZ,

Petitioner,

INDEX NO.: 400881/13

- against -

BRIAN FISCHER and the NEW YORK STATE
DEPARTMENT OF CORRECTIONS,

FILED

DECISION & ORDER

Respondents JUL 14 2014

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

COUNTY CLERK'S OFFICE
NEW YORK

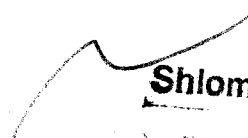
The following papers, numbered 1 to 6, were read on this Article 78 Petition by the pro se Petitioner and Respondent's Cross-Motion to Dismiss or for a Change in Venue Transferring the Petition to Albany County, and Petitioner's purported Motion to Dismiss Respondent's Cross-Motion and for Summary Judgment.

Cross-Motion: No Yes Number of Cross-Motions: 1

	Papers Numbered
Order to Show Cause and Verified Petition with Exhibits "A" through "P-7"	1, 2
Respondents' Affirmation for Extension of Time to Respond to Order to Show Cause and Verified Petition	3
Petitioner's Letter, dated 23 July 2013, with Petitioner's Response Consenting to Respondents' Affirmation for Extension of Time to Respond to the Order to Show Cause and Petition	4
Respondents' Cross-Motion to Dismiss the Petition or, Alternatively, Changing Venue and Transferring the Petition to Albany County with Exhibits "A" through "C" (with Exhibit "C" being Respondents' Demand for a Change of Venue)	5
Petitioner's Motion to Dismiss Respondent's Cross-Motion and for Summary Judgment with Exhibits "A" and "B"	6

After reading and considering all the foregoing papers, Respondent's Cross-Motion is granted to the extent of granting a change of venue and transferring Petitioner's Article 78 proceeding to Albany County as set forth in the attached separate written Decision and Order.

Dated: June 30, 2014
New York, New York


Shlomo Hagler
J.S.C.
Hon. Shlomo S. Hagler, J.S.C.

Check one: Final Disposition Non-Final Disposition

Cross-Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

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

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Hon. Shlomo S. Hagler, J.S.C.:

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FACTUAL AND PROCEDURAL BACKGROUND

Pro se petitioner William F. Bonez ("petitioner") commenced this Article 78 proceeding in New York County by an Order to Show Cause ("OSC"), returnable in the Motion Submission Part on July 18, 2013, with service to be made upon respondent Brian Fischer ("Fischer"), as commissioner of the New York State Department of Corrections and Community Supervision ("DOCCS"),¹ the Office of the Attorney General of the State of New York ("Office of the Attorney General"), and the New York City Law Department/Corporation Counsel ("NYC Law Dept.") by June 26, 2013. The Article 78 petition by the incarcerated petitioner alleges that the DOCCS and Fischer, as "respondeat superior" [sic] (collectively "respondents") are violating petitioner's constitutional rights and the "mandate for the 'care and custody' of the petitioner" through "abuses [of] the administrative process to exact reprisal and retaliation" against the petitioner, among

1. Apparently Brian Fischer retired as commissioner of the DOCCS in April, 2013. This, however, does not affect this proceeding or motion.

others. Specifically, petitioner challenges his disciplinary hearing dispositions of August, September, October, and November 2013 and February, 2013 and his placement in a sexual offenders program and also seeks expungement of these determinations and his "designation" as a sexual offender as well as a mandate for respondents to "cease from any further abusive conduct." At the time of his filing of the Article 78 petition and during the period that the above complained of actions occurred, petitioner was incarcerated at the Wende Correctional Facility in Erie County, New York or the Southport Correctional Facility in Chemung County, New York.

Respondents, by their counsel, the Office of the Attorney General, in a pre-answer cross-motion, moves to dismiss the Article 78 Petition for, *inter alia*, lack of personal jurisdiction upon the ground that petitioner failed to comply with the Court's OSC by failing to serve the Office of the Attorney General with the OSC and Petition as directed in the OSC, or in the alternative, changing venue and transferring the petition to Albany County on the ground of improper venue pursuant to Civil Practice Law and Rules ("CPLR") §§ 506(b), 510, and 511 and extending respondents' time to serve an answer or motion in response to the Petition until at least 30 days after service of notice of entry of any order transferring venue. Petitioner opposes respondents' cross-motion and seeks summary judgment on his Petition.

DISCUSSION

Petitioner's Motion to Dismiss Respondents Cross-Motion and Summary Judgment

Although petitioner denominates his opposition to respondents' cross-motion as a motion, petitioner has not filed this opposition properly as a motion. Furthermore,

petitioner seeks summary judgment pursuant to CPLR § 3211(b), which, however, refers to a motion to dismiss. Nevertheless, as the petitioner is proceeding pro se, and in the interest of judicial economy, this Court will disregard petitioner's error and consider his opposition and arguments herein (CPLR § 2001, *Montgomery v Colorado*, 179 AD2d 401 [1st Dept 1992] [although motion was erroneously mislabeled, court could disregard the mistake as harmless error]).

In his opposition, petitioner challenges respondents' cross-motion on the ground that "County of Kings" is denominated on the caption in their Notice of Cross-Motion and the accompanying Affirmation in Support by Mary Kim, Assistant Attorney General. Petitioner argues that this defect is not curable and deprives this Court from subject matter jurisdiction. Petitioner further argues that "dismissal of respondents' motion is mandated per stare decisis in Robinson v. Oceanic Steam Navig. Co., 112 NY 315 (1889)" and he is, therefore, entitled to judgment in his favor on his petition and the relief requested therein.

Pursuant to CPLR § 2101, which deals with the form of papers, subsection (f) states that:

A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived any objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

In this case petitioner did object to the defect in the caption of respondents' cross-motion and affirmation in support, which were dated August 15, 2013, by his opposition,

dated August 19, 2013, which indicated his specific objections to the defect, and returned copies of the pages of the notice of cross-motion and the affirmation in support which contained the defect, and a copy of which was sent to the Office of the Attorney General. Thus, petitioner has not waived objection to the defect in respondents' papers.

However, the court may disregard the defects in these captions under CPLR § 2101 if a substantial right of petitioner is not prejudiced. Petitioner commenced this proceeding in New York County and has not shown how respondents' typographical error regarding caption's county had prejudiced him, especially since respondents filed their cross-motion and affirmation in the proper county. Courts have even disregarded errors in a caption's named county for filings of a summons and complaint which commences an action (*see, e.g., Russo v Besidine*, 93 AD 2d 790 [1st Dept 1983]; *Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289 [1st Dept 1983]).

The case cited by petitioner to support his position, *Robinson v. Oceanic Steam Nav. Co.*, has nothing to do with errors or defects in a caption but instead deals with a non-resident who attempted to bring an action against a foreign corporation for a tort which did not arise within New York. In that case, the Court of Appeals held that jurisdiction could not be conferred upon the court by any consent or stipulation of the parties and the court may dismiss the action for lack of jurisdiction.

Furthermore, under CPLR § 2001, which deals with mistakes, omissions, defects and irregularities, "if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity **shall be disregarded.**" Since petitioner has not shown how respondents' error prejudiced him and this Court does not find any such prejudice, this

Court will exercise its discretion and disregard respondents' mistake in identifying the County of Kings in the caption of their notice of cross-motion and affidavit in support.

Personal Jurisdiction Based on Service

In their cross-motion, respondents allege that plaintiff failed to obtain personal jurisdiction over respondents because “[U]pon information and belief, plaintiff never served the OSC upon the Office of the Attorney General” and “petitioner **apparently** never served the Office of the Attorney General” (Affirmation of Mary Kim, Assistant Attorney General, in Support of Motion to Dismiss [“Kim Aff.”] at ¶¶ 9, 10). However, plaintiff filed an affidavit of service with the Court, sworn to before a notary on June 14, 2013 and postmarked July 1, 2013, which attests to petitioner’s service by mail as directed in the OSC of the Verified Petition with Exhibits and the Order to Show Cause upon the Office of the Attorney General, as well as upon the respondents and the NYC Law Dept.² Such an affidavit of service is presumptive evidence of proper service (*Reem Contracting v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]), and “service by mail is complete, regardless of its delivery, where the mailing itself is proper” (*European American Bank v Abramoff*, 201 AD2d 611, 612 [2d Dept 1994] citing *14 Second Ave, Realty Corp. v Szalay*, 16 AD2d 919 [1st Dept 1962]). “The bald denial of receipt of receipt of process by mail is insufficient to rebut the inference of proper mailing which may be drawn from a duly executed affidavit of service” (*id.* at 612, citing *Public Adm’r of County of N. Y. v Markowitz*,

2. As petitioner correctly pointed out in his letter to the NYC Law Dept. which contained the Verified Petition with Exhibits and the OSC, service upon the NYC Law Dept should not have been necessary as neither the City of New York nor any of its agencies were parties to this proceeding. Apparently, the OSC signing judge erroneously neglected to cross out the optional direction to serve a copy upon the NYC Law Dept.

163 AD2d 100, 101 [1st Dept 1990]). In this processing, respondents have not even conclusively denied receipt of the service by mail but have merely stated that “petitioner **apparently** never served the Office of the Attorney General” (Kim Aff. at ¶ 10) and that the alleged non-service was “[u]pon information and belief” (*id.* at ¶ 9). As noted in *European American Bank*, “because there was no ‘sworn denial’ [by the presumed recipient of service] of service, nor did the [presumed recipient of service] swear to specific facts in support of any denial of proper service” the issue of proper service is not in question and does not even require a hearing (201 AD2d at 612).

Respondents’ contends that it was also petitioner’s burden to provide proof of mailing in addition to petitioner’s affidavit of service (Kim Aff. n 2). Respondents do not provide any statutory or case law to support this argument. As discussed above, petitioner would only be required to provide additional proof of service after respondents had presented a denial of proper service with specific facts to support such denial, which respondents have failed to do here.

Accordingly, the branch of respondents’ motion to dismiss the petition for lack of personal jurisdiction is denied.

Change of Venue

In their cross-motion, respondents alternatively seek to change venue of this proceeding and transfer it to Albany County pursuant to CPLR §§ 506(b), 510 and 511 on the ground that New York County is an improper venue. Respondents correctly followed the proper procedure for seeking a change of venue as set forth in CPLR § 511 by serving

petitioner with a Demand to Change Venue and moving to change venue within fifteen days after service of its demand.

CPLR § 506(b) which deals with special proceedings (such as an Article 78 petition) against a body or officer (such as the DOCCS and/or its commissioner) provides, in pertinent part, as follows:

A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of . . . or where the material events otherwise took place, or where the principal office of the respondent is located . . .

In this Article 78 proceeding, petitioner complains of material events and determinations or decisions made by respondents, all of which took place either at the prisons located in Erie County and Chemung County or in Albany County where respondents' principal office is located. Other Article 78 proceedings by incarcerated inmates which challenged their prison disciplinary hearing decisions were properly venued in either Albany County or the county in which the prison was located (see, e.g., *Cookhorne v Fischer*, 104 AD3d 1197 [4th Dept 2013] [Erie County]; *Green v Goord*, 24 AD3d 1141 [3d Dept 2005] [Albany County]; *Lamage v Goord*, 21 AD3d 633 [3d Dept 2005] [Albany County]; *Wilson v Goord*, 21 AD3d 637 [3d Dept 2005] [Albany County]; *Stephens v Goord*, 19 AD3d 844 [3d Dept 2005] [Albany County]; *Malik v Coughlin*, 154 AD2d 135 [3d Dept 1990] [Sullivan County]; *Bogle v Coughlin*, 162 AD2d 789 [3d Dept 1990] [Ulster County]; *Littles v Coughlin*, 154 AD2d 135 [3d Dept 1990] [Albany County]; *La Bounty v Coughlin*, 153 AD2d 981 [3d Dept 1989] [Clinton County]). The Article 78 proceedings in these cited cases are more similar to that brought by petitioner in this

proceeding than the cases challenging parole determinations, which were cited by respondents.

The case cited by petitioner in his petition to place jurisdiction and venue in New York County, *McNamara v Coughlin*, 165 Misc 2d 397 (N.Y. Sup. Ct. 1995) is not persuasive. First, as the decision of a Supreme Court trial court of concurrent jurisdiction, it has no precedential authority for this Court. In addition, jurisdiction and venue was found to be proper in New York County, the county in which sentencing of the inmate was imposed, because the Article 78 challenge in the *McNamara* proceeding was that the sentence being carried out, involving the inmates participating in a program at a New York halfway house, was in violation of the sentence imposed by the New York County court. Thus the material event petitioner complained of was taking place in New York County. In the instant proceeding, none of the complained of events and/or determinations took place in New York County and, therefore, New York County is not the proper venue for this Article 78 proceeding.

Since petitioner's Article 78 petition complains of events and/or determinations or decisions made by respondents, all of which took place either at the prisons located in Erie County and Chemung County or in Albany County where respondents' principal office is located, this Court finds those counties are the proper venues for this proceeding and not New York County. This Court further finds that, rather than having petitioner bring separate Article 78 proceedings in Erie County and Chemung County where the events and/or determinations complained of took place, and since respondents' principal office is located in Albany County, in the interests of judicial economy and efficiency, Albany County would be the most appropriate venue for petitioner's Article 78 proceeding.

Respondents' Request to Extend Respondents' Time to Serve an Answer or Motion in Response to the Petition

In its cross-motion, respondents' also request this Court to extend respondents' time to serve an answer or motion in response to the petition until at least thirty (30) days after service of entry of any order of this Court transferring venue. Petitioner has not objected to this request and this Court finds no reason to deny this reasonable request.

CONCLUSION

Accordingly, based upon the foregoing, it is hereby

ORDERED that petitioner's purported motion to dismiss respondents' cross-motion and for summary judgment is denied; and it is further

ORDERED that the branch of the cross-motion by respondents Brian Fischer and the New York State Department of Corrections and Community Supervision seeking to dismiss the Order to Show Cause and Petition for lack of personal jurisdiction for failing to serve the Office of the Attorney General is denied; and it is further

ORDERED that the branch of the cross-motion by respondents Brian Fischer and the New York State Department of Corrections and Community Supervision seeking to transfer venue of this Article 78 petition and proceeding to Albany County is granted; and it is further

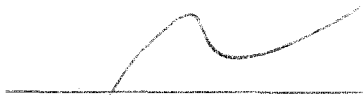
ORDERED that the clerk of the court shall transfer this proceeding to the Supreme Court, Albany County; and it is further

ORDERED that the time for respondents Brian Fischer and the New York State Department of Corrections and Community Supervision, by its counsel the Office of the

Attorney General, to serve an answer or motion in response to the petition until at least thirty (30) days after service of entry of this Decision and Order.

The foregoing constitutes the decision and order of this Court.

Dated: June 30, 2014
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

FILED

JUL 14 2014

COUNTY CLERK'S OFFICE
NEW YORK