Matter of Victor v Stanford
2015 NY Slip Op 30266(U)
January 27, 2015
Supreme Court, St. Lawrence County
Docket Number: 144392
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
LOUIS VICTOR,#14-R-0438,

Petitioner,

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

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole,

Respondent.

DECISION AND ORDER
R.I. #44-1-2014-0659.30
INDEX #144392
ORI # NY044015J

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated "Affidavit in Support of Order to Show Cause") of Louis Victor, verified on August 27, 2014 and filed in the St. Lawrence County Clerk's office on September 23, 2014. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, is challenging the determination establishing a final delinquency date under the provisions of Executive Law §259-i(3)(d)(iii). The Court issued an Order to Show Cause on September 26, 2014 and has received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Alicia M. Lendon, Esq., Assistant Attorney General, dated November 21, 2014. In opposition thereto, the Court has received and reviewed petitioner's Affidavit of Support to Response of Respondent Affirmation Motion to Dismiss, sworn to on December 12, 2014 and filed in the St. Lawrence County Clerk's office on December 16, 2014. In the meantime, petitioner moved for disclosure. Petitioner's disclosure motion, which was designated as returnable on December 12, 2014, is supported by his Affidavit in Support of an Order Directing Disclosure, sworn to on November 24, 2014.

On December 15, 2010 petitioner was sentenced in Supreme Court, Queens County, as a second drug felony offender, to a determinate term of 2½ years, with 2 years post-release supervision, upon his conviction of the crime of Attempted Criminal Possession of a Controlled Substance 3°. DOCCS officials calculated the initial maximum expiration date of the 2010 determinate term as April 7, 2013.

On July 17, 2012 petitioner was released from DOCCS custody to post-release supervision. Upon such release the running of the 2½-year determinate term was interrupted with 8 months and 20 days still owing to the initial April 7, 2013 maximum expiration date thereof "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's July 17, 2012 release the running of the 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as July 17, 2014.

Petitioner committed a new criminal offense on February 13, 2013 and was apparently arrested and taken into local custody on that date or on February 14, 2013. On February 27, 2013 he was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of release in eight separate respects. Parole Violation Charges #4 through #6 related to the February 13, 2013 incident underlying new criminal charges. Parole Violation Charge #7 alleged, in relevant part, " . . . that on or before 2/26/13 he [petitioner] used an illegal substance, to wit: marijuana as evidence [sic] by a positive toxicology submitted on 2-26-13 . . ." Petitioner waived preliminary hearing and a final parole revocation hearing was conducted on March 13, 2013. At the final hearing petitioner pled guilty to Parole Violation Charge #7 and the remaining charges were withdrawn. His post-release supervision was revoked, with a modified

delinquency date of February 26, 2013, and a delinquent time assessment of time served plus three months was imposed. The delinquency interrupted the running of petitioner's period of post-release supervision (*see* Penal Law §70.45(5)(d)(1)) with 1 year, 4 months and 21 days still owing to the initial July 17, 2014 maximum expiration date of such period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on March 28, 2013 certified as entitled to 29 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the interrupted 2010 determinate term (*see* Penal Law §70.45(5)(d)(iv), reducing the time previously held in abeyance against such term from 8 months and 20 days to 7 months and 21 days. The 7 months and 21 days still held in abeyance against petitioner's 2010 determinate term re-commenced running upon his March 28, 2013 return to DOCCS custody (*see* Penal Law §70.45(5)(a)) and at that time DOCCS officials calculated the adjusted maximum expiration date of the 2010 determinate term as November 19, 2013.

On June 13, 2013, upon expiration of the time served plus three months delinquent time assessment imposed at the March 13, 2013 final parole revocation hearing, petitioner was re-released from DOCCS custody to post-release parole supervision. Upon such re-release the running of the 2010 determinate term was again interrupted with 5 months and 6 days still owing to the November 19, 2013 adjusted maximum expiration date of such term "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's June 13, 2013 release the running of the 1 year, 4 months and 21 days still owed by petitioner against the 2-year period of post-release supervision re-commenced (*see* Penal Law §70.45(5)(a)) with the adjusted maximum expiration date of

that period calculated as November 4, 2014.

On February 7, 2014 petitioner was sentenced in Supreme Court, New York County (in connection with the criminal offense of February 13, 2013), as a second drug felony offender, to a determinate term of 1½ years, with 2½ year post-release supervision. He was received back into DOCCS custody on February 20, 2014 ultimately certified as entitled to 21 days of jail time credit. Upon petitioner's return to DOCCS custody a Notice of Final Deceleration of Delinquency, dated February 20, 2014, was issued by the New York State Board of Parole. The notice provided, in relevant part, as follows: "This is to notify you that, based upon the new [February 7, 2014] conviction and in accordance with Executive Law §259-i(3)(d)(iii), the Board of Parole has issued a final declaration of delinquency with a delinquency date of 2/7/14 [date of conviction]."

DOCCS officials calculated the maximum expiration date of petitioner's multiple [2010/2014] determinate terms by aggregating the 1½-year 2014 determinate term with the 5 months and 6 days still held in abeyance against the 2010 determinate term to produce a total time owed of 1 year, 11 months and 6 days. Running that total time owed from February 20, 2014 (the date petitioner was received back into DOCCS custody following the 2014 sentencing), less 21 days of jail time credit, DOCCS officials calculated the maximum expiration date of petitioner's aggregated multiple sentences as January 4, 2016[1], with the 2½-year period of post-release supervision associated with petitioner's 2014 determinate term controlling.

In this proceeding petitioner challenges the respondent's designation of

[1] After applying possible good time and merit time, DOCCS officials also calculated the conditional release and merit release dates associated with petitioner's multiple determinate sentences as September 24, 2015 and July 6, 2015, respectively.

February 7, 2014 - the date of his 2014 conviction/sentencing - as the delinquency date with respect to the revocation of his post-release parole supervision by operation of law pursuant to Executive Law §259-i(3)(d)(iii). Citing the unreported January 14, 2013 decision of the Supreme Court, Albany County in *Lewis v. Evans* (Index No. 3065-2012), petitioner argues " . . . that regulations and case-law requires the Division of Parole to set the delinquency date as date of arrest [in this case February 13 or 14, 2013] and not the date of conviction." Although petitioner's argument is clear, the Court nevertheless remains uncertain as to the precise nature of the relief he seeks. In this regard it is noted that petitioner's papers set forth no specific proposed sentence calculation methodology if the delinquency date in question was set as February 13/14, 2013 rather than February 7, 2014. There is much uncertainty on this point given all that transpired between those two dates.

Respondent's motion to dismiss follows the assertion set forth in paragraph three of Assistant Attorney Lendon's November 21, 2014 affirmation that "[t]hough not entirely clear, it appears as though Petitioner is challenging both the revocation of his parole on 3/13/13, and the delinquency date provided in his Notice of Final Declaration of Delinquency of 02/20/14." According to respondent's motion papers, any challenge to the results and/or disposition of the March 13, 2013 final parole revocation hearing must be dismissed based upon petitioner's failure to exhaust administrative remedies through the administrative appeals process (9 NYCRR Part 8006). Respondent's motion papers also assert that any challenge to the delinquency date set forth in the February 20, 2014 Notice of Final Declaration of Delinquency is time-barred under the 4-month statute of limitations set forth in CPLR §217(1).

With respect to the exhaustion element of respondent's motion to dismiss, the Court simply finds nothing in the petition constituting a challenge to the results and disposition of the final parole revocation hearing of March 13, 2013. Turning to respondent's statute of limitations argument, it certainly appears that when this proceeding was commenced on September 23, 2014 by the filing of the Petition in the St. Lawrence County Clerk's office (*see* CPLR §304(a)) more than 4 months had elapsed since the respondent's issuance of the Notice of Final Declaration of Delinquency on February 20, 2014. The Court nevertheless finds that where, as here, a final delinquency date is established upon the revocation of parole by operation of law (Executive Law §259-i(3)(d)(iii)) - rather than as the result of a final parole revocation hearing -it is analogous to the continuing ministerial obligation associated with certain sentence calculation functions. *See Flournoy v. Supreme Court Clerk*, 122 AD3d 734, *Goodson v. New York State Department of Correctional Services*, 80 AD3d 1064 and *Colon v. Fischer*, 74 AD3d 1670. In view of such continuing obligation this Court is not persuaded that the four-month statute of limitation should be calculated as commencing to run when the final delinquency date was established on February 20, 2014. *See Bottom v. Goord*, 96 NY2d 870. *Compare Moore v. Evans*, 95 AD3d 579 and *Watson v. Goord*, 39 AD3d 1044. Respondent's motion to dismiss this proceeding as time barred must therefore be denied and the service of answering papers, on the merits, ordered.

With respect to disclosure, the Court initially notes that in a special proceeding such as this CPLR Article 78 proceeding (*see* CPLR §7804(a)), "[l]eave of court shall be required for disclosure except for a notice under [CPLR] section 3123." CPLR §408. Petitioner's motion papers, however, lack specificity. In paragraph three of his Affidavit

in Support of an Order Directing Disclosure petitioner merely " . . . requests any and all evidence respondent intends to use against the petitioner in this Article 78 proceeding." In paragraph four of the affidavit petitioner requests " . . . parole files under petitioner[']s DIN #10-R-4209 to further litigate this Article 78 proceeding and to show respondent[']s inconsistencies with respect to all said delinquency dates under DIN #10-R-4209." In addition, the Court notes that when respondent files her answering papers, on the merits, such papers must include " . . . a certified transcript of the record of the proceeding under consideration, unless such a transcript has already been filed with the clerk of the court." CPLR §7804(e). In view of the foregoing the Court finds that petitioner's motion for an order directing disclosure must be denied, at this juncture, as lacking in specificity and premature. If, after receiving respondent's answering papers on the merits, petitioner perceives that the record before the Court is incomplete he may seek relief at that time[2].

Before concluding the Court must also address petitioner's request that I recuse myself "for not being fair and being impartial [sic] and biased," as set forth in paragraph twelve of his Affidavit of Support to Response of Respondent Affirmation Motion to Dismiss, sworn to on December 12, 2014. As discussed below, the Court takes issue with petitioner's claims of unfairness, partiality and/or bias and, therefore, rejects the recusal request.

To the extent petitioner argues, in effect, that the Court improperly allowed the

[2] Petitioner's Affidavit in Support of an Order Directing Disclosure was sworn to on November 24, 2014 and, according to his affidavit of service, mailed to the Court on that date. By letter to chambers dated November 29, 2014 petitioner states that he did not receive respondent's motion (to dismiss) papers until November 25, 2014. Thus, petitioner's disclosure motion papers pre-date his receipt of the various exhibits annexed to respondent's motion papers. The documents set forth in respondent's exhibits will likely constitute part or all of the record ultimately before the Court and if petitioner later seeks to challenge the adequacy of the record it would be incumbent upon him to demonstrate the nature of any perceived inadequacies.

respondent to submit untimely motion papers, it is noted that the Order to Show Cause of September 26, 2014 directed respondent to serve her answering papers on or before November 21, 2014 (a Friday). On November 26, 2014 chambers received its copy of respondent's motion papers together with the Affidavit of Service by Mail of Sherry Hutter, an employee of the Watertown Regional Office of the New York State Attorney General, sworn to on November 21, 2014. In the relevant portion of paragraph two of Ms. Hutter's affidavit the following was asserted:

> "On November 21, 2014, I served the annexed **NOTICE OF MOTION TO DISMISS WITH SUPPORTING AFFIRMATION AND EXHIBITS** upon the individuals named below, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a depository under the exclusive care and custody of the United States Post Office Department, directed to the said individuals at the address within the State respectively thereto designated by him for that purpose as follows:
>
> Mr Lewis Victor, #14-R-0438
> Ogdensburg Correctional Facility
> 1 Correction Way
> Ogdensburg, NY 13669 [and]
>
> Hon. S. Peter Feldstein
> Acting Justice of the Supreme Court
> Supreme Court Chambers
> Hamilton County Court
> P.O. Box 780
> Indian Lake, NY 12842 [.]" (emphasis in original).

As stated previously, petitioner acknowledged receiving his copy of respondent's motion papers on Tuesday, November 25, 2014 and chambers received its copy of those papers on Wednesday, November 26, 2014. In the meantime, a copy of Assistant Attorney General Lendon's letter of November 24, 2014 was received in chambers via fax on that date (Monday). In her letter Assistant Attorney General Lendon stated, in relevant part, as follows: "A motion to dismiss the proceeding was fully prepared, executed and placed

in the US Postal Service box located within our building on Friday, November 21, 2014 for filing and service. It has come to my attention that the US Postal Service did not pick up those items on Friday due to the inclement weather and building closure. Therefore, they will not be postmarked appropriately. I write to respectfully request that the Court accept the service of the motion as timely, given the circumstances."

Under the provisions of CPLR §2103(b)(2), made applicable to this case pursuant to CPLR §2103(c), service of papers by mail is deemed complete upon mailing rather than receipt. As further set forth in the statute, moreover, " 'Mailing' means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose . . . in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state [.]". CPLR §2103(f)(1). The respondent thus met her statutory service by mail obligation when the envelopes containing her motion papers were placed in the US Postal Service depository box on Friday, November 21, 2014. The Court therefore finds that such motion papers were timely served notwithstanding the fact that representatives of the United States Postal Service were apparently unable to retrieve those envelopes from the depository box, located within the building housing the Watertown Regional Office of the New York State Attorney General, until November 22, 2014.

Even if the service of respondent's motion papers was deemed to be late by one day there still would be no proper basis for the Court to reject such papers as untimely. CPLR §7804(f) provides, in relevant part, as follows: "Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted." In discussing this statutory

discretion to either direct the entry of judgment or that an answer by filed, the Appellate Division, Third Department has noted as follows: "To effectuate deciding such controversies [CPLR Article 78 proceedings] on their merits, default judgments in administrative proceedings are not favored unless it appears that the failure to answer was intentional or that the administrative body or officer has no intention to contest the merits of the proceeding." *Powers v. DeGroodt,* 43 AD3d 509, 511, citing *Castell v. City of Saratoga Springs,* 3 AD3d 774 and *Alvarez v. Coombe*, 239 AD2d 810. Applying this standard, even if respondent's service of motion papers by mail was determined to be one day late the exercise of the Court's discretion to accept such service would be altogether proper and appropriate.

Petitioner also asserts in paragraph 12 of his Affidavit of Support to Response of Respondent Affirmation Motion to Dismiss, sworn to on December 12, 2014, that the Court improperly failed to respond to his disclosure motion. It is simply noted, however, that petitioner specifically designated his motion as being returnable on December 12, 2014. It would have been patently improper for the Court to rule on the motion prior to the return date thereof. The Court has timely issued a ruling with respect to petitioner's disclosure motion as part of this Decision and Order. *See* CPLR §2219(a).

Finally, petitioner asserts in paragraph 12 of his Affidavit of Support to Response of Respondent Affirmation Motion to Dismiss that the Court improperly failed to respond to his November 28, 2014 request for a time extension. As noted previously, chambers received its copy of the respondent's motion papers on November 26, 2014. Inasmuch as counsel failed to designate a return date, the Court, by Letter Order dated November 26, 2014, advised both parties that the return date for the motion " . . . is hereby deemed to

be December 12, 2014." When chambers received petitioner's November 28, 2014 extension request on December 2, 2014 it was apparent that the request crossed in the mail with the Court's Letter Order of November 26, 2014 designating December 12, 2014 as the return date for the motion. While petitioner is correct in his assertion that the Court did not separately respond to his November 28, 2014 extension request, the lack of such response did not flow from any bias on the part of the Court but, rather, from the perception that petitioner's need for additional time to respond to the motion to dismiss had already been addressed by the Letter Order of November 26, 2014.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondent's motion to dismiss is denied; and it is further

ORDERED, that petitioner's motion for an order directing disclosure is denied; and it is further

ORDERED that respondent's request for an order of recusal is denied; and it is further

ORDERED, that respondent serve a copy of her answering papers on the petitioner on or before February 20, 2015 that she simultaneously mail her original answering papers to the Clerk of the Court for filing and mail a further copy of said answering papers to the undersigned; and it is further

ORDERED, that petitioner mail his original Reply to the respondent's answering papers to the Clerk of the Court, St. Lawrence County Courthouse, 48 Court Street, Canton, New York 13617, on or before March 13, 2015.

Dated: January 27, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court