Matter of Taffet v Wexler
2016 NY Slip Op 32131(U)
August 2, 2016
Supreme Court, Suffolk County
Docket Number: 15462/15
Judge: Paul J. Baisley, Jr.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of
JORDAN TAFFET,

Petitioner,

-against-

HON. WILLIAM DOUGLAS WEXLER and PEOPLE OF THE STATE OF NEW YORK and ROBERT T. FUCHS,

Respondents.

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INDEX NO.: 15462/15
MOTION DATE: 1/28/16
MOTION NO.: 001 CASEDISP
002 MD; 003 MD

RESPONDENTS' ATTORNEY:
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HON. WILLIAM DOUGLAS WEXLER
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Upon the following papers numbered 1 to 56 read on this Article 78 petition, motion for oral argument and a preference and motion for return of bail ; Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-22; 23-27 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 28-29; 30-33; 34-36; 37-38; 39-40;41-44; 45-56 ; Replying Affidavits and supporting papers___; Other___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED and ADJUDGED that the petition (motion sequence no. 001) of Jordan Taffet, *pro se*, brought on by order to show cause (ILIOU, J.) dated September 2, 2015, pursuant to CPLR Article 78 for a writ of prohibition and an order, judgment and decree that respondents never obtained jurisdiction over petitioner with regard to 29 charges under Village Justice Court of Ocean Beach Index No. WDW 14050002, vacating the bail order and returning petitioner's bail, and enjoining respondents from taking action without, and in excess of, their jurisdiction is denied and the proceeding is dismissed; and it is further

ORDERED that the motion (motion sequence no. 002) of petitioner for oral arguments and a "preference," and for an order disqualifying respondent Hon. William D. Wexler from presiding over the proceedings pending against petitioner in the Village Justice Court of Ocean Beach is denied as moot; and it is further

ORDERED that the motion (motion sequence no. 003) of petitioner, brought on by order to show cause (MOLIA, J.) dated January 6, 2016, for an order vacating any improper application of bail money and ordering that bail be returned to the person who posted it pursuant to CPL §520.15, and enjoining respondents from taking action regarding bail posted in the within matter without, and in excess of, their jurisdiction and/or authority is denied as moot.

Petitioner Jordan Taffet, appearing herein *pro se*, commenced the instant Article 78 proceeding by order to show cause (ILIOU, J.) dated September 2, 2015 against respondents William Douglas Wexler, Esq., Village Justice for the Incorporated Village of Ocean Beach; People of the State of New York by Hon. Thomas Spota, District Attorney of Suffolk County; and Robert T. Fuchs, Esq., Village Prosecutor for the Incorporated Village of Ocean Beach. The affidavits of service annexed to the petition reflect that on September 3, 2015 the order to show cause and supporting papers were served upon Justice Wexler, Robert Fuchs and the Office of the Suffolk County District Attorney by personal service as directed in the order to show cause.

In support of his petition, verified September 1, 2015, petitioner has annexed his own "affidavit and petition" sworn to September 1, 2015; several affirmations that bear the caption of a criminal proceeding entitled *People of the State of New York v. Jordan Taffet*, under Index No. CC#030314-01, in the Supreme Court of the State of New York, Appellate Term, Second Judicial Department, 9th & 10th Judicial Districts; copies of various emails; and copies of transcripts, certified by the court reporter, of appearances in the Village Justice Court for the Incorporated Village of Ocean Beach on June 14, 2014 and August 30, 2014 in the matter of *The People of the State of New York v. Jordan Taffet*.

A verified answer with objections in point of law dated September 16, 2015 was timely filed and served on behalf of respondent Thomas J. Spota, District Attorney of Suffolk County, together with a memorandum of law and copies of the transcripts, certified by the court reporter, of petitioner's Village Justice Court appearances on June 14, 2014, August 16, 2014, August 30, 2014, March 21, 2015, April 18, 2015, and August 29, 2015 (as well as that of a post-petition appearance on September 15, 2015). Village Prosecutor Robert T. Fuchs, *pro se*, filed and served a verified answer and affirmation dated September 9, 2015 in opposition to the petition.[1] Respondent Hon. William Douglas Wexler has not appeared in this proceeding.[2]

After issue was joined herein, the *pro se* petitioner interposed a notice of motion (motion sequence no. 002) dated November 9, 2015 for oral argument on the Article 78 petition and for an unspecified "preference." Thereafter, petitioner moved by order to show cause (MOLIA, J.) dated January 6, 2016 for an order vacating any improper application of bail money, and ordering that

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[1] The Court notes that the two answering respondents have not filed a certified transcript of the record of the proceedings under consideration together with their verified answers as required by CPLR §7804(e). In light of the long delay that transpired after the initial filing of the instant proceeding as the result of a series of recusals by the justices to whom the matter was previously randomly assigned, the absence of an objection by petitioner to the lack of a certified record, and the Court's ability to render a determination on the record as it presently exists, the Court has not ordered the respondents to supplement the record, as authorized by CPLR §7804(e).

[2] The Court's records do not reflect that respondent Justice Wexler gave notice of his intent not to appear herein pursuant to CPLR §7804(i) ("Unless ordered by the court upon application of a party the respondent justice, judge, referee or judicial hearing officer need not appear in the proceeding in which case the allegations of the petition shall not be deemed admitted or denied by him. Upon election of the justice, judge, referee, or judicial hearing officer not to appear, any ruling, order or judgment of the court in such proceeding shall bind said respondent. If such respondent does appear he shall respond to the petition and shall be entitled to be represented by the attorney general. If such respondent does not elect to appear all other parties shall be given notice thereof.").

bail be returned to the person who posted it pursuant to Criminal Procedure Law §520.15, and "enjoying [*sic*] Respondents from taking action regarding bail posted in the within matter without, and in excess of, their jurisdiction and/or authority." The order to show cause granted a temporary restraining order staying "all proceedings on any matter on part of the Respondents, or any person acting on their behalf including the attorney(s) or agent(s) of the Respondents" pending the hearing and determination of the motion and entry of an order thereon. Affirmations in opposition to petitioner's motions were filed by respondent Thomas J. Spota and an affirmation in opposition to motion sequence no. 003 was filed by respondent Fuchs.

All of the foregoing submissions are hereby consolidated for purposes of the instant decision, order and judgment and are determined as set forth hereinafter.

Petitioner alleges in his verified petition that he was improperly arraigned "in absentia" on May 29, 2014 by Village Justice William Douglas Wexler on six criminal misdemeanors and 23 non-criminal violations of the Code of the Village of Ocean Beach ("Village Code"), and that his attorney, Arnold Wolsky, Esq., who appeared on his behalf on that date was not authorized to represent petitioner in connection with any criminal charges. Petitioner alleges that the purported arraignment was unlawful pursuant to Criminal Procedure Law ("CPL") §170.10, that there is no record of any such purported arraignment as there is no transcript of the proceedings, and that Justice Wexler had no jurisdiction to fix bail of $6,000.00 for the six misdemeanors when he appeared before him – without counsel – on June 14, 2014. Respondent further alleges that if the Court finds that Justice Wexler did have jurisdiction to fix bail, such respondent violated constitutional standards prohibiting excessive bail and abused statutory discretion.

Petitioner further alleges in his petition that his purported re-arraignment on August 30, 2014 was also defective, allegedly predicated on a violation of his right to counsel pursuant to CPL §170.10. Petitioner acknowledges that he appeared without his newly retained attorney, David Grossman, on that date, although he had several weeks' notice of the court date. Petitioner, who stated on the record his intention to proceed *pro se*,[3] further acknowledges that the charges were read publicly and that he was handed copies of the same accusatory instruments that were part of the purported May 29, 2014 arraignment "in absentia" (specifically, violations of Village Code §§127-3(A), 127-4(A), 127-4(B) and violations of Penal Law §§170-30 and 175-30 arising out of his activities as a real estate rental agent for short-term summer rentals in Ocean Beach on Fire Island). Petitioner alleges, however, that Justice Wexler failed to inform petitioner of his rights under CPLR §170.10, specifically the right to aid of counsel at the arraignment, right to counsel at every subsequent stage of the action, right to an adjournment for the purpose of obtaining counsel, and right to have counsel assigned by the court if petitioner were financially unable to obtain counsel.

The Court notes that it is undisputed that there is no stenographic or audiographic record of the Village Court proceedings on May 29, 2014.

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[3] Justice Wexler read into the record a faxed letter from Mr. Grossman who had written to advise the court that he was "changing my status to advisor to pro se defendant" and that "Mr. Taffet will consult with me from time to time and in his sole discretion, he may ask me to attend proceedings or not." Upon inquiry by the court, Mr. Taffet confirmed on the record that he was proceeding pro se.

The Court further notes that although petitioner's allegations in support of his demand for a writ of prohibition are limited to events occurring through August 30, 2014, the record reflects that petitioner, intermittently purporting to be *pro se*, appeared and participated in Village Court proceedings on numerous occasions thereafter but took no legal action with respect to his jurisdictional and constitutional claims until after the August 29, 2015 appearance. On August 29, 2015, petitioner, whose attorney Mr. Grossman had been formally relieved as attorney of record in the meantime, was arraigned on approximately 21 superseding informations with respect to the previously filed violations of the Village Code and four superseding misdemeanor informations. A not-guilty plea was entered, and Justice Wexler set the matter down for jury selection and trial on September 16, 2015.

Petitioner commenced the instant proceeding on September 2, 2015.

It is well established that prohibition is an extraordinary remedy, and is available "only where there is a clear legal right, and then only when a court – in cases where judicial authority is challenged – acts or threatens to act either without jurisdiction or in excess of its authorized powers" *(Matter of Holzman v Goldman*, 71 NY2d 564, 569 [1988]). The remedy may be invoked only in the most extreme cases of judicial action, such that the legality of the entire proceeding is implicated as opposed to the commission of a legal error in a proceeding that is in itself proper (*Matter of State of New York v King*, 36 NY2d 59, 62-64). The remedy of prohibition does not lie where the petitioner seeks review of a determination already made and not the restraint of a continuing exercise of authority (*Matter of Vargason v Brunetti*, 241 AD2d 941 [4th Dept 1997]). Prohibition will not lie for an error in a proceeding where jurisdiction over the subject matter exists and where the petitioner's issues or grievances are subject to review on appeal (*Hirschfeld v Friedman*, 307 AD2d 856 [1st Dept 2003]). Prohibition is not intended to be resorted to as a method of premature appeal (*Matter of Hogan v Court of General Sessions of the County of New York*, 296 NY 1 [1946]). "[T]he remedy does not lie to review the exercise of discretion in criminal cases... nor is it available to review claimed errors of substantive or procedual law even where constitutional issues are involved (*Matter of Bloom v Clyne*, 69 AD2d 956 [3rd Dept 1979]). Even if prohibition does lie, the remedy is not mandatory, but is subject to the sound discretion of the reviewing court (*Holzman v Goldman*, 71 NY2d 564, 569 [1988]).

As a general rule, and particularly relevant here, the "jurisdiction" that is contemplated in the context of prohibition is subject matter jurisdiction (*Hirschfeld v Friedman*, 307 AD2d 856 [1st Dept 2003]; *Matter of Abrahams v DiBlasi*, 293 AD2d 530 [2d Dept 2002]; *Matter of Herskowitz v Tompkins*, 184 AD2d 402 [1st Dept 1992]). Article 78 relief by way of prohibition has thus been found to be unavailable where the petitioner claimed that the lower court lacked personal jurisdiction over him (*id.*).

In *Matter of Abrahams v DiBlasi*, 293 AD2d 530 [2d Dept 2002]), the Appellate Division, Second Department denied the petition of Solomon Abrahams for a writ of prohibition to prohibit Supreme Court Justice John P. DiBlasi from continuing the Court's *sua sponte* contempt proceeding against him in the action entitled *Caiola v Allcity Insurance Co.* (then pending in Supreme Court, Westchester County under Index No. 1333/96) on the ground that he had not been served personally with notice of the contempt proceeding. The Appellate Division, citing *Matter of Holzman v Goldman*, 71 NY2d 564, 569 [1988]), denied the writ on the ground that the petitioner had "failed to demonstrate a clear legal right to the relief sought." Supreme Court

thereafter conducted a contempt hearing, at the conclusion of which it adjudicated Abrahams in criminal contempt. Abrahams appealed the order and judgment and, upon the appeal, the Appellate Division, Second Department, dismissed the contempt proceeding (without prejudice), holding that "the failure to personally serve the alleged contemnor with notice of the proceeding is a jurisdictional defect." The Court noted that "the appellant [was] not collaterally estopped from contesting the issue of personal jurisdiction by virtue of the Court's finding in the Article 78 proceeding that the Supreme Court possessed subject matter jurisdiction" (*Caiola v Allcity Ins. Co.*, 305 AD2d 350 [2d Dept 2003], citing *Matter of Herskowitz v Tompkins*, *supra*, 184 AD2d 402, 403 [1st Dept 1992]).

Petitioner here does not argue that respondents lack subject matter jurisdiction to adjudicate the Village Code violations and misdemeanor charges pending against him. Indeed, his petition concedes that a court has "jurisdiction over the subject matter once a criminal action is filed" (Taffet Petition & Affidavit, ¶15. His petition is predicated on the argument that a court does not acquire jurisdiction over the person until arraignment pursuant to law, which in this case never occurred" (*id.*). Arraignment is "the occasion upon which a defendant against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending for the purpose of having such court acquire and exercise control over his person with respect to such accusatory instrument and of setting the course of further proceedings in the action" (CPL §1.20(9)). Accordingly, as argued by petitioner, arraignment has jurisdictional significance. Furthermore, in light of the conceded unavailability of a record of the Village Court proceedings on May 29, 2014,[4] the Court is constrained to agree that petitioner was not properly arraigned on May 29, 2014 on the Village Code violations and/or the misdemeanor charges.

However, respondents argue that even if petitioner is correct and he was not properly arraigned on May 29, 2014, or on August 30, 2014, the error was corrected by the subsequent proceedings, and in any event was rendered moot by petitioner's arraignment on superseding accusatory instruments on August 29, 2015. Moreover, even if petitioner was never properly arraigned, and even if petitioner did not waive the alleged jurisdictional defect by participating in the continuing proceedings, and even if bail was improperly fixed and/or petitioner was not properly advised of his right to counsel, the Court is constrained to conclude that petitioner's submissions fail to establish a "clear legal right" to the relief sought in his petition (*Matter of Holzman v Goldman*, *supra*, 71 NY2d at 569). Petitioner's jurisdictional and constitutional claims are manifestly addressable on direct appeal if petitioner is aggrieved by any final verdict and judgment. Accordingly, the petition is denied and the proceeding is dismissed.

In light of the foregoing, petitioner's motions for oral argument and a preference (motion sequence no. 002) and for a return of bail (motion sequence no. 003) are denied as moot, and the temporary restraining order granted in the order to show cause (MOLIA, J.) dated January 6, 2016 is vacated.[5]

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[4] It appears that a court reporter was not available on that date and the court's computer recording equipment malfunctioned.

[5] The Court notes that petitioner's motion includes claims and allegations arising out of events that occurred after the commencement of this proceeding and that accordingly are not properly before the Court. However, the Court is constrained to note that the record reflects that on September 16, 2015, petitioner agreed to plead guilty to a violation of Village Code §112-5F

The foregoing constitutes the decision, order and judgment of this Court.

Respondents are directed to submit a formal judgment on notice to petitioner.

Dated: August 2, 2016

HON. PAUL J. BAISLEY, JR.
J.S.C.

(unreasonable noise) and pay a fine of $1,000.00 in full satisfaction of all four of the misdemeanor charges currently pending against petitioner (two violations of Penal Law §175.05, falsifying business records; and two violations of Penal Law §170.30, offering a false instrument for filing). Petitioner agreed to the application of a portion of the bail money to the payment of his fines, and upon entry of the plea, the misdemeanors were dismissed.