Matter of Franco v New York State Cent. Register of the N.Y. State Office of Children & Family Servs.
2016 NY Slip Op 32561(U)
December 9, 2016
Supreme Court, Suffolk County
Docket Number: 06506/2016
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 06506/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
SUPREME COURT JUSTICE

Motion Date: 08/05/16
Submit Date: 09/08/16
Motion Seq #: 001 MD; CASE DISP

x

In the Matter of the Application of

MATTHEW FRANCO,

Petitioner,

For a Judgment Under Article 78 of the CPLR

-against-

NEW YORK STATE CENTRAL REGISTER OF THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES & SHEILA J. POOLE, in her Official capacity as COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES,

Respondents.

x

PETITIONER'S ATTORNEY:
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RESPONDENTS' ATTORNEY:
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In consideration of the following papers in connection with the following application currently pending before the Court:

1. Notice of Petition, Verified Petition of Matthew Franco, dated June 29, 2016, Exhibits A – J;
2. Verified Answer with Objections in Point of Law dated August 8, 2016; Administrative Return with Exhibits A – S;
3. Verified Reply to Verified Answer of Matthew Franco, dated September 7, 2016; it is

ORDERED that the this special proceeding brought on by petitioner's Verified Petition pursuant to CPLR Article 78 seeking a determination vacating, annulling or otherwise setting aside a determination made by respondents New York State Office of Children & Family Services, New York State Central Register, and Sheila J. Poole in her

official capacity as Commissioner, New York State Office of Children & Family Services is hereby denied with prejudice as thoroughly discussed below.

Factual Background & Procedural Posture

Petitioner Matthew Franco ("petitioner" or "Franco") is a divorced father of three children, "John", "Matthew", and Gabriella who for the relevant period of time to this petition, are minors.1 He and his ex-wife Deneen Franco share 50% custody of their children, although petitioner alleges that his eldest daughter, aged 17, is alienated from him and has not visited with him for some time. Franco is currently employed as a pediatric occupational therapist for Nassau County BOCES and regularly and routinely interacts with children.

This proceeding arises out of Franco's attempt to challenge, vacate, annul or otherwise set aside a determination of the New York State Office of Children & Family Services ("respondents" or "OCFS") as regards a "founded" report of child maltreatment to the New York Statewide Central Register for child abuse, neglect or maltreatment.

As plead in the verified petition, Franco claims that sometime between October 10 and October 17, 2014, he was accused of maltreating his son "John", aged 10 at the time of the incident. More specifically, Franco states the report to SCR was that he permitted his minor son to operate his motor vehicle on the way home from the Port Jefferson Country Club after golfing together. The allegations were founded, determining that Franco exhibited poor judgment as a guardian placing "John's" mental, physical and/or emotional wellbeing at imminent risk of harm in a report dated February 2, 2015. Thereafter Franco disputed the finding and sought pursuant to his due process rights a fair hearing which was held before Administrative Law Judge Eugene S. Ginsberg, Esq. on January 27, 2016.

Petitioner argues at that hearing that respondents produced no live witnesses and rather relied upon the submission of documentary evidence including the SCR report. In defense of the allegations, Franco through his counsel produced evidence including copies of a judgment of divorce obtained from Supreme Court, a separation settlement transcript, a demonstrative summary of the salient points of those documents, and a transcribed stenographic transcript of a recorded telephone conversation between and OCFS caseworker and Franco as related to his then upcoming fair hearing.

In a decision rendered after fair hearing authored by ALJ John Franklin Udoji, Esq., OCFS determined to a fair preponderance of the evidence that Franco committed the alleged maltreatment and sustained the SCR Report. This occurred after the ALJ did not find the divorce documents relevant to the proceedings. Additionally, OCFS by its ALJ found that the founded maltreatment was reasonably related to Franco's employment.

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1 As per 22 NYCRR § 500.5(d) the names of these minor children have been redacted to protect their identities as required by court rule and statute.

Franco now comes before this Court seeking to vacate, annul, set aside or otherwise modify OCFS maltreatment finding. Moreover, petitioner also seeks to seal the SCR Report record, since by operation of law, such findings remain a matter of record for 10 years until the subject minor child reaches the age of 18. Here, "John" is now approximately 14 years of age, having been born in 2002. Thus according to petitioner, the determination under review would remain a matter of record for nearly 14 years or until the year 2030. Franco also argues that the maltreatment finding will negatively impact his employment in the childcare field, as such employers are mandated to check for such findings registered with the SCR.

Summary of the Parties' Respective Positions

Petitioner bases his request to overturn OCFS' findings arguing that the determination is not supported by substantial evidence pursuant to CPLR 7804. Principally, Franco argues that since OCFS could not pin down with sufficient specificity beyond a one week period in October 2014, the allegations of maltreatment lack sufficient detail. To controvert any inference, Franco sought to admit his divorce documents which he argued would have shown that he only has 50% custody of his children and would have allowed him to rebut any inference that John was in his care, custody or control on a date certain. Further, he argues that the documents would have been relevant for the proposition that John, being a minor and of tender years, would have been easily manipulated by his mother who currently has an application pending before the Supreme Court seeking to modify the child custody arrangements for him and his brother. Lastly, Franco argues that the recorded phone call between him and caseworker Stamler evidences that even though OCFS agreed that a thorough, capable or competent investigation would have borne out a specific date, time or place of the alleged maltreatment, OCFS did not supply such evidence at the fair hearing, thus casting the credibility of the SCR Report into doubt or question.

In response and opposition to the petition, OCFS has submitted a verified answer with objections in point of law. Chiefly, OCFS challenges the petition on jurisdictional grounds arguing that petitioner failed to properly effectuate service of process pursuant to CPLR 307 in two separate ways. First, OCFS argues that Franco's counsel served OCFS and Commissioner Poole in Rennselaer by Federal Express overnight delivery, where the CPLR explicitly requires that under Article 7803 where a state officer is sued in a special proceeding in an official capacity, that service be made either personally or by certified mail, return receipt requested. CPLR 307(2). OCFS also argues that petitioner failed to comply with the service of process requirements set forth in CPLR 307(1) calling for service on the New York State Attorney General's Office for any special proceeding as prospective counsel for state officers. Lastly, in the alternative, OCFS argues that since the gravamen of petitioner's entire petition argues substantial evidence, pursuant to CPLR 7804(g) the entire matter must be transferred for review and disposition by the Appellate Division, Second Department.

Legal Standard of Review

Where the petition raises a question of whether the challenged determination is supported by substantial evidence, and the remaining points raised by the petitioner that were disposed of by the Supreme Court were not objections that could have terminated the proceeding within the meaning of CPLR 7804(g), the matter is properly transferred to the Appellate Division (*see* ***Matter of Sureway Towing, Inc. v. Martinez***, 8 AD3d 490, 779 NYS2d 109; ***Matter of Stein v. County of Rockland***, 259 AD2d 552, 553, 686 NYS2d 460; ***Matter of Duso v. Kralik***, 216 AD2d 297, 627 NYS2d 749).

This Court finds that respondents are correct and that while ordinarily a proceeding raising questions of substantial evidence belong in the Second Department, because jurisdictional defenses are raised concerning service and implicating lack of personal jurisdiction, this Court is equipped, and indeed, must resolve those questions first as they may well moot consideration of the adjudicatory hearing below and substantial evidence *ab intio*.

Based upon this Court's research, this Court finds and determines that respondents are correct as regards service and Supreme Court lacks personal jurisdiction as to the respondents premised upon petitioner's failure to comply with statutory mandated service requirements. It is well settled that where petitioner failed to effect personal service of the notice of petition on the respondents and the New York State Attorney–General (CPLR 403[c]; 307[1]) and similarly failed to move for leave to effect a substituted method of service (CPLR 308[5]; 7804[c]), such a failure constitutes a fatal defect in the proceeding due to a failure to acquire requisite personal jurisdiction over the respondents is a fatal defect precluding further action by this court (***Jenkins v. Artuz***, 159 AD2d 625, 553 NYS2d 1001 [2d Dept 1990]; ***Matter of Gingher v. Chan*, 2014 N.Y. Misc. LEXIS 4385 [Sup. Ct., Suffolk Co. Sept. 29, 2014]**[trial court dismissed Article 78 petition for lack of personal jurisdiction finding that petitioners were required to personally serve a copy on the Attorney General's Office pursuant to CPLR §7804[c] and that the failure to comply and so serve is jurisdictional and curable by mail service]).

Put somewhat differently, the Second Department has affirmed lower courts' dismissal of special proceedings where petitioners failed to serve the respondents with their notice of petition and petition (*see* CPLR 307[2], 7804[c]), even where petitioners served those papers only on an Assistant Attorney–General of the State of New York, who while not a party to the proceeding, was found still to be the prospective attorney for the respondents (***Conciatori v. Office of Sec'y of State***, 15 AD3d 397, 398, 790 NYS2d 47, 48 [2d Dept 2005]).

Applying this standard to the facts presented by Franco, the affidavit of service included in his papers at best shows that on July 1, 2016, the pleadings were deposited for overnight mail service via Federal Express for respondents SCR and Poole. Franco's papers show no effort to apprise the Attorney General of his proceeding and thus evidence noncompliance with both CPLR 307(1) & (2).

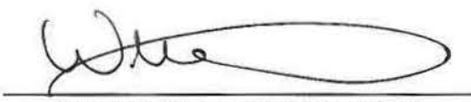
In his reply to respondents'' answer, Franco argues that the jurisdictional arguments centering on service are waived or did not prejudice respondents as they answered the petition, provided substantive argument and documents in support of their position. Here the Court remains unpersuaded as the jurisdictional bases and defenses were not waived, but rather appear as substantive objections in point of law in respondents' answer. Thus, petitioner's argument that by participating in discovery respondents have waived this defense is rejected as unsupported in law (*see* ***Williams v. Uptown Collision, Inc.***, 243 AD2d 467, 467, 663 NYS2d 88, 88 ([2d Dept 1997][court erred in holding that the defendants waived the defense of lack of personal jurisdiction asserted in their answer through participation in discovery]).

Accordingly, petitioner's verified petition pursuant to CPLR Article 78 is hereby **DENIED** on the merits with prejudice for lack of personal jurisdiction over the respondents, and it is

ORDERED that a copy of this decision shall be served with notice of entry on or before January 10, 2017.

The foregoing constitutes the decision and order of this Court.

Dated: December 9, 2016
Riverhead, New York



WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**