

Royer v New York State Div. of Human Rights
2017 NY Slip Op 31979(U)
September 19, 2017
Supreme Court, Tompkins County
Docket Number: 2017-0219
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the Tompkins County Courthouse, Ithaca,
New York, on the 21st day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

MICHAEL ROYER,

Petitioner,

For a judgment pursuant to Article 78 of the
Civil Practice Law and Rules and
Section 298 of the New York Executive Law

-vs-

New York State Division of Human Rights, and
CAYUGA MEDICAL CENTER OF ITHACA, INC.,

Respondents.

DECISION AND ORDER

Index No. 2017-0219
RJI No. 2017-0155-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter involves an Article 78 Petition filed by Michael Royer (“Petitioner”) on April 6, 2017 to appeal of a Determination and Order of the Division of Human Rights (“DOHR”), dated February 23, 2017, which found no probable cause for his complaint with DOHR. The underlying complaint at DOHR alleged that Petitioner was subjected to sexual discrimination in the course of his employment with Respondent, Cayuga Medical Center of Ithaca, Inc. (“Cayuga Medical Center” or “Respondent”), and consisted of 69 numbered paragraphs. The Article 78 action was given a return date of May 5, 2017, but both sides requested an adjournment. Respondent’s adjournment request was based upon not being timely served with the Article 78 papers. The matter was therefore adjourned to May 19, 2017. Petitioner requested an adjournment of that date, and the matter was re-scheduled to June 20, 2017, and Petitioner was granted additional time to respond to motions that had been made by Cayuga Medical Center. Subsequently, Petitioner filed a Cross Motion, seeking leave to amend the Petition. The parties then appeared for oral argument on July 21, 2017.

RESPONDENT’S FIRST MOTION TO DISMISS

Cayuga Medical Center filed a Motion to Dismiss on May 12, 2017. on the grounds that Petitioner failed to name a necessary party, and failed to state a cause of action under CPLR 7803. Specifically, Respondent contends that the Petitioner failed to join the DOHR in the action and therefore, the Petition must be dismissed. Respondent also argued that the Petition fails to state a cause of action, in that it fails to provide requisite particularity concerning the factual or legal basis for bringing the Petition.

PETITIONER’S AMENDED NOTICE OF PETITION AND AMENDED PETITION

On May 31, 2017, Petitioner filed an Amended Notice of Petition seeking to add DOHR as a Respondent. Besides adding DOHR as a named Respondent, the Amended Petition

primarily added numbered paragraphs 70-90, describing the events at the DOHR hearing, the conclusions and determination reached by the DOHR, and Petitioner's allegations concerning alleged shortcomings of the determination.

RESPONDENT'S SECOND MOTION TO DISMISS

In response to the Amended Notice of Petition and Amended Petition, Respondent filed another Motion to Dismiss on June 8, 2017. Respondent argued that the Amended Petition should be dismissed for: 1) failure to include a return date on the Amended Notice of Petition, 2) for failure to bring the claim against DOHR within the applicable statute of limitations, 3) failure to state a claim under CPLR 7803, and 4) failure to name a necessary party (assuming that the Amended Notice of Petition was a nullity, and that the original Petition, without DOHR, is all the Court should consider). Respondent asserts that the failure to include a return date on the Petition is jurisdictional, requiring dismissal. Next, Respondent contends that the Amended Notice of Petition, which first named DOHR, was untimely since it was filed more than 60 days after the determination, as required under New York Executive Law §298¹, and that the Petition is not saved by the "relation back" doctrine. As a result, the Amended Petition is untimely and should be considered a nullity, and therefore, all that remains is the original Petition, which should be dismissed (as argued in Respondent's first motion).

PETITIONER'S CROSS MOTION

At the return date on June 20, 2017, it was noted that Petitioner's Amended Notice of Petition and Amended Petition were simply filed in the Clerk's office, and that was done without leave of the Court. "After a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." CPLR

¹New York Executive Law §298 provides that "[a] proceeding under this section when instituted by any complainant, respondent, or other person aggrieved must be instituted within sixty days after the service of such order."

§401. A petition in a special proceeding amended without leave of the Court is a nullity. *See Matter of Czajka v. Dellehunt*, 125 AD3d 1177, 1181 (3rd Dept. 2015); *see also Matter of Barrett v. Dutchess County Legislature*, 38 AD3d 651 (2nd Dept. 2007); *Bd. of Educ. v. DePace*, 301 AD2d 521 (2nd Dept. 2003).

After the issue of obtaining leave of Court was raised, Petitioner filed a Cross Motion on June 29, 2017 seeking leave to serve an Amended Petition adding DOHR as a party, and an attorney affirmation of Nino Lama, Esq. Respondent submitted a reply Memorandum, dated July 12, 2017 objecting to the Cross Motion, arguing that it should be denied because Petitioner initially failed to obtain leave of Court to join DOHR pursuant to CPLR 401. Further, Respondent again argued in opposition to the Cross Motion that the 60 days time limitation imposed by Executive Law §298 had expired against DOHR, and it would be too late to add DOHR now.

ANALYSIS

The Court will first address Petitioner's Cross Motion. The original return date on the Article 78 proceeding was May 5, 2017. Although it is true that both sides requested, and were granted, an adjournment, it bears noting that Respondent's request was due to the fact that the Petition was served late, thereby depriving Respondent of the minimum time to respond.

The case was thereafter scheduled to be heard on May 19, 2017 and again adjourned at Petitioner's request. Petitioner also sought an adjournment of the June 20, 2017 return date, but the Court denied that request. Accordingly, the matter was returnable and, in fact, heard on June 20, 2017. Despite the fact that Petitioner had obtained two previous adjournments, Petitioner had yet to reply to Respondent's two motions to dismiss. The Court, in its discretion, permitted Petitioner a further opportunity to respond to the two Motions to Dismiss; but that did not extend so far as to permit Petitioner to make any Cross Motions, which would have necessarily been due before the return date-especially a twice adjourned return date. The Court deems the Cross Motion untimely.

Even if the Court were to excuse the late Cross Motion, the Court would still agree with Respondent that Petitioner has not set forth any grounds for granting that relief. The affirmation

in support simply lists various documents which have been filed in this proceeding, but does not provide any factual or legal basis to grant the Cross Motion. Therefore, even if the Court were to consider the Cross Motion, the Cross Motion would be denied for failing to set forth the grounds for the relief. *See*, CPLR 2214(a). Further, and in addition, for reasons which will be discussed below, the Amended Petition cannot add DOHR because of the statute of limitations.

A. RESPONDENT'S FIRST MOTION TO DISMISS

Respondent, in its first motion, argued that the Petition was defective and should be dismissed because DOHR was not named as a party. The Petition seeks review, under Article 78, of the determination by DOHR of no probable cause. Under CPLR 7803, the only issues that can be brought before the Court involve determinations of a body or officer. Since DOHR made the determination of no probable cause, it is not only a necessary party, but the most essential party. Where a Petition fails to join the agency that made the determination, the Petition must be dismissed. *Matter of McNeil v. Town Bd. Of Town of Ithaca*, 260 AD2d 829 (3rd Dept. 1999) (“It is well settled that a court may not adjudicate a dispute raised in a CPLR article 78 proceeding unless the governmental agency which performed the challenged action is a party thereto. [citations omitted]” *McNeill* at 830 (citations omitted); *Matter of Solid Waste Servs., Inc. v. New York City Dept. of Env'tl. Protection*, 29 AD3d 318 (1st Dept. 2006) (governmental agency that performed the challenged action is a necessary party, and failure to join resulted in dismissal). Thus, the original Petition was defective, and the Court need not consider Respondent's additional arguments on the merits.

B. RESPONDENT'S SECOND MOTION TO DISMISS

Petitioner, apparently taking heed of the arguments made in Respondent's First Motion to Dismiss, filed an Amended Petition on May 31, 2017, naming DOHR as a party.² Respondent

²As noted previously, the Amended Petition was filed without leave of the Court, but the Court will continue its analysis of the Amended Petition.

then filed its Second Motion to Dismiss, setting forth four arguments for dismissal, which the Court will now address.

1. Failure to include a return date on the Notice of Petition

Respondent argues that Petitioner's failure to include a return date on the Amended Notice of Petition requires dismissal on that basis alone, and Respondent provides case law on point supporting that proposition. However, subsequent to the Respondent's filing of its Second Motion to Dismiss, the Third Department handed down a decision overruling the line of cases relied upon by Respondent. In *Matter of Oneida Pub. Lib. Dist. v. Town Bd. of The Town of Verona*, 153 AD3d 127 (3rd Dept., July 13, 2017), the Third Department held that "[i]n view of the amendment of CPLR 2001 [in 2007], the rule articulated in our prior decisions-a notice of petition lacking a return date is jurisdictionally defective and, therefore, prohibits a court from exercising its authority under CPLR 2001-is no longer tenable. We now hold that the omission of a return date in a notice of petition does not constitute a jurisdictional defect so as to deprive the court from assessing whether such omission may be excused under CPLR 2001, and our prior decisions stating to the contrary should no longer be followed for such proposition." *Id.* at ____.

Thus, the failure to include a return date on the Notice of Petition does not require dismissal of the Petition. Instead, the Court can consider whether that omission may be excused. In this case, the parties have not been able to address that particular question, in light of the timing of the *Oneida* decision. However, the Court need not make a specific determination on that issue, as Respondent has proffered additional arguments for dismissal, which the Court finds to be dispositive of the matter at hand.

2. The Amended Petition adding DOHR was not filed within 60 days as required by Executive Law §298

The Agency determination sought to be appealed was made on February 23, 2017 by

DOHR. Adding 5 days for mailing, and then commencing the 60 day statute of limitations under Executive Law §298, means any claim needed to be filed by April 29, 2017. Here, the original Petition was filed on April 6, 2017 and would have been timely. However, DOHR was not added until the Amended Notice of Petition filed on May 31, 2017, which was beyond the 60 days. The only way the Petition could be saved is if the Amended Notice of Petition related back to the earlier filed Petition, and

The relation back doctrine permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her.

Matter of Sullivan v. Planning Bd. of the Town of Mamakating, 151 AD3d 1518, 1519-1520 (3rd Dept. 2017) (citing *Matter of Emmett v. Town of Edmeston*, 2 NY3d 817, 818 (2004); *Buran v. Coupal*, 87 NY2d 173, 178 ([1995]; *Matter of Ayuda Re Funding, LLC v. Town of Liberty*, 121 AD3d 1474, 1475 (3rd Dept. 2014)).

The Court finds that the second and third prongs of that test have not been met. DOHR and Cayuga Medical Center are not united in interest. Cayuga Medical Center has an interest in defending the claim of discrimination. DOHR is charged with handling and processing the claim brought to it, but has no legal interest in whether the complaint against any Respondent is found to have probable cause, or no probable cause. Furthermore, the Petitioner has failed to present any evidence that would tend to show that DOHR knew, or should have known, that the proceeding would have also been brought against DOHR. Respondent and DOHR are not connected entities, and there is no evidence that DOHR had any reason to know that a claim had been made against Cayuga Medical Center; or that the claim should have actually been made against DOHR.

Thus, the Court concludes that DOHR was not named in the original Petition, and cannot now be added by way of an Amended Petition, because it would be barred by Executive Law §298, and because the relation back doctrine would not apply to save the untimely claim.

3. Failure to state a cause of action

Respondent argues that the Amended Notice of Petition is a nullity, and should not be considered. However, even if it is considered, the Respondent argues that the Petition and Amended Petition both suffer from the infirmity of failing to set forth any factual or legal basis for the pleading. This is the same argument that Respondent advanced to oppose Petitioner's Cross Motion. Specifically, that both pleadings just set forth allegations regarding the DOHR proceeding, and Petitioner's termination. While the Court agreed that Petitioner failed to provide specific detail to support his Cross Motion, it does not necessarily follow that the Petition fails to state a cause of action.

The Court's determination with respect to the Cross Motion was based on CPLR 2214. In contrast, "[a] motion to dismiss a CPLR article 78 proceeding for failure to state a cause of action requires the reviewing court to assume the truth of the allegations in the petition, consider them in their most favorable light and not consider the allegations in support of the motion." *Federation. of Mental Health Ctrs. v. DeBuono*, 275 AD2d 557, 561 (3rd Dept. 2000) (citations omitted); *see also Manupella v. Troy City Zoning Bd. of Appeals*, 272 AD2d 761 (3rd Dept. 2000). Since Respondent has not submitted an answer prior to moving for dismissal, the motion is similar to a CPLR 3211 motion. *See, Northway 11 Cmty., Inc. v. Town Bd.* 399 AD2d 786 (3rd Dept. 2002); *Cahill v. Public Service Com.*, 113 AD2d 603 (3rd Dept. 1986). The "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 NY2d 83, 88 (1994) *quoting Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977).

In light of the Court's findings on the statute of limitations and failure to name a necessary party, the Court need not resolve the question of failure to state a cause of action.

4. Failure to name a necessary party

This branch of the Respondent's Second Motion to Dismiss is based on the premise that DOHR needed to be a party to this proceeding, and has not been included, and cannot be

included now. The original Petition failed to name DOHR, and the Amended Notice of Petition and Petition cannot cure this defect for the reasons stated above. Accordingly, the Court agrees that the Petition must be dismissed because Petitioner failed to join DOHR, a necessary party.

See McNeill, supra.

CONCLUSION

Based upon all the foregoing, the Court finds that: the original Petition failed to join a necessary party; the Petitioner's Amended Notice of Petition and Amended Petition were filed without leave of the Court in violation of CPLR 401, and are therefore a nullity; the Amended Petition seeking to add DOHR would be impermissible because of the statute of limitations, and the "relation back" doctrine does not operate to allow DOHR to be added; that Petitioner's Cross Motion is untimely, and even if it were to be considered, the Cross Motion would be denied for failure to specify the grounds for relief. As a result, the Petition failed to include the DOHR, the agency that made the underlying determination, and the Petition must be dismissed.

Therefore, Respondent's First Motion to Dismiss and Second Motion to Dismiss are GRANTED. Petitioner's Cross Motion is DENIED, as untimely and also on the merits. The Court directs that the Petition and Amended Petition are hereby DISMISSED.

This constitutes the **DECISION AND ORDER** of this Court. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).³

Dated: September 19, 2017
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

³The papers submitted in support of the Petition, and in opposition thereto, have already been filed in the County Clerk's office, and have been discussed in the body of this Decision and Order.