| **Alale v MTA N.Y. City Tr.** |
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| 2020 NY Slip Op 33720(U) |
| November 9, 2020 |
| Supreme Court, New York County |
| Docket Number: 155222/2020 |
| Judge: Carol R. Edmead |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

*Justice*

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OLUSEGUN ALALE

Plaintiff,

- v -

MTA NEW YORK CITY TRANSIT,

Defendant.

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**INDEX NO.** 155222/2020

**MOTION DATE** 10/14/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the petition, pursuant to CPLR Article 75, by petitioner Olusegun Alale (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this special proceeding, petitioner *pro se* Olusegun Alale (Alale) seeks an order to overturn an arbitration award that sustained job-related disciplinary charges against him and recommended his employment be terminated (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

BACKGROUND

Alale was employed as a bus driver by the respondent New York City Transit Authority (NYCTA; i/s/h/a MTA New York City Transit) from May 5, 2017 until March 5, 2020. *See* verified petition, ¶¶ 7, 29. On that latter date, NYCTA served Alale with a "Disciplinary Action Notification" that terminated his employment on the grounds of "Gross Misconduct and Conduct Unbecoming" which arose during an incident on February 29, 2020. *Id.*, ¶ 29; verified answer, exhibit B. On that date, Alale left his bus to pursue a passenger with whom he had had a fare altercation and spat on her in front of her two minor children. *Id.*, ¶¶ 10-28; verified answer, exhibit B. On March 6, 2020, Alale filed a grievance appealing his dismissal pursuant to the procedures set forth in the collective bargaining agreement (CBA) between NYCTA and Alale's union, non-party Transport Workers Union, Local 100 (TWU). *Id.*, ¶ 30; exhibit C. Under those procedures, his grievance was submitted to a neutral arbitrator. *Id.*, exhibit C; verified answer, ¶¶ 25-27. On April 27, 2020, the arbitrator issued a decision that upheld NYCTA's termination decision and dismissed Alale's grievance. *Id.*, verified petition, ¶ 32; exhibit A. Alale thereafter commenced this Article 78 proceeding on July 10, 2020. *Id.*, verified petition. NYCTA filed an answer on September 10, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). However, it would be improper to simply perform that analysis in this case. Alale's petition requests that the court overturn the decision that the arbitrator issued on April 27, 2020 pursuant to the grievance procedure set forth in his union's CBA. As such, it plainly requests relief pursuant to CPLR Article 75, even though it is improperly designated as an application under CPLR Article 78. The court, therefore, elects to treat this as an Article 75 proceeding.

Unlike Article 78 proceedings, which are governed by the four-month statute of limitations set forth in CPLR 217 (1), Article 75 proceedings are subject to the 90-day limitations period specified in CPLR 7511 (a). As a result, Article 75 petitions that are mis-designated as Article 78 petitions are frequently dismissed on timeliness grounds. *See e.g.*, *Matter of Green v Manhattan Community Bd. 10*, 129 AD3d 588, 588 (1st Dept 2015), citing *Matter of Rosa v City Univ. of N.Y.*, 13 AD3d 162 (1st Dept 2004).

Here, Alale states that he received the arbitrator's decision on the day it was issued, April 27, 2020. *See* verified petition, ¶ 32. The affidavit of service accompanying the petition shows that he filed it and obtained an index number on July 8, 2020, 72 days later. *See* aff of service. This is plainly within the statute's 90-day limitations period. However, the affidavit of service also shows that Alale did not complete service of the petition until August 5, 2020 when

his process server sent a copy of the petition to NYCTA via certified mail. *Id.* That date falls 100 days after April 27, 2020, and is clearly outside the statute's 90-day limitations period.

Appellate precedent indicates that the 15-day service completion period that is specified in CPLR § 306-b applies to Article 75 petitions. *See e.g., Matter of Travelers Indem. Co./Aetna Cas. & Sur. Co. v Roth*, 258 AD2d 341, 341 (1st Dept 1999); *Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 (2d Dept 2009). Here, the service of Alale's petition on August 5, 2020 took place 28 days after he filed it on July 8, 2020, in violation of CPLR § 306-b. Further, as noted earlier, the completion of service on August 5, 2020 means that this proceeding was not commenced until 100 days after Alale's Article 75 claim accrued on April 27, 2020, in violation of CPLR 7511 (a). Thus, it is clear that Alale's petition is not timely.

The court is aware that CPLR § 306-b permits it to extend a petitioner's time to effect service "upon good cause shown or in the interest of justice." However, the court believes that it would be improvident to grant such an extension in this case on either ground. Firstly, neither Alale's petition, his accompanying affidavit nor his memorandum of law discusses the issue of "good cause" for the delay in serving the petition. The court cannot simply presume that "good cause" exists.

Secondly, CPLR 7511 provides only four grounds for disturbing an arbitrator's award:

> "(i) corruption, fraud or misconduct in procuring the award; or
> "(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
> "(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
> "(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

CPLR 7511 (b) (1). Appellate case law consistently holds that a petitioner may only challenge an arbitrator's award on these statutory grounds, and routinely upholds dismissals of petitions which do not contain such challenges. *See e.g.*, *Bortman v Lucander*, 150 AD3d 417, 417 (1st Dept 2017), citing *Ingham v Thompson*, 113 AD3d 534 (1st Dept 2014). Here, Alale's petition does not mention any of the foregoing permissible grounds, but only alleges that "the arbitrator's decision upholding his termination for a single, alleged transgression as grossly excessive, shocking to the Court's sense of fairness, and disproportionate to the misconduct alleged." *See* verified petition, ¶ 36. Alale's failure to abide by the statute's requirements renders his petition meritless under CPLR Article 75. Therefore, there is no justification for the court to extend his time to serve that petition "in the interest of justice." Accordingly, the court declines to grant any extension pursuant to CPLR 306-b, and instead finds that Alale's petition should be dismissed.

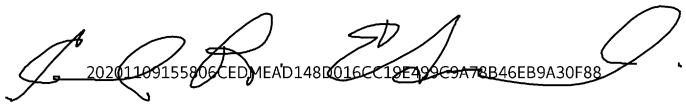
DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the petition, pursuant to CPLR Article 75, by petitioner Olusegun Alale (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.




11/9/2020
DATE

CAROL R. EDMEAD, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | x | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | | GRANTED | x | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |