Art. 78 Motion to Reargue/Opposition - FUSL000119 (2018-06-27)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of [redacted] **Petitioner,** For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules **- against -** **NEW YORK STATE BOARD OF PAROLE,** **Respondent.**	**Index No. [redacted]** **(Watson, D., A.J.S.C.)** **AFFIRMATION IN OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO REARGUE AND FOR A STAY AND IN SUPPORT OF PETITIONER'S CROSS-MOTION TO PRECLUDE AND FOR EXPEDITED CONSIDERATION**

Orlee Goldfeld, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am counsel to Petitioner [redacted]. I submit this affirmation (a) in opposition to Respondent New York State Board of Parole's (the "Board") motion to reargue pursuant to CPLR 2221 and for a stay pursuant to CPLR 7805 (the "Motion") and (b) in support of Mr. [redacted]'s cross-motion to preclude the Board from utilizing any purported "community opposition" not previously provided to the Court, or alternatively to provide the community opposition to Mr. [redacted]'s for review, and for expedited consideration.

2. The statements herein are true to my knowledge and based on my review of the files, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.

The Board's Motion to Reargue Should Be Denied

3. In its Motion, the Board contends that it complied with the Court's March 29, 2018 Decision and Order and "submitted 240 pages of bate [SIC] stamped documents to the

Court" and that a copy of its April 19, 2018 cover letter was sent to me as counsel for Mr. [redacted] (Exhibit A, NYSCEF Doc. No. 43 ¶ 3).

4. The Court apparently never received the Board's purported April 19, 2018 cover letter and enclosures (Exhibit B, NYSCEF Doc. No. 41 at 3).

5. The Board submitted no proof of mailing to, or proof of receipt by, the Court of its purported April 19, 2018 cover letter and enclosures.

6. I never received a copy of the Board's purported April 19, 2018 cover letter.

7. The Board submitted no proof of mailing of its purported April 19, 2018 cover letter to me.

8. If the Board did in fact submit the cover letter and enclosures by hard copy or by fax to the Court, the Board violated the Court's Rules of Mandatory E-Filing cases by not e-filing the cover letter or providing notice of that filing to me as Mr. [redacted]'s counsel (22 N.Y.C.R.R. 202.5-b(d)(1) and 202.5-bb(c)).

9. The purported April 19, 2018 cover letter indicates that it was sent by fax (Exhibit C, NYSCEF Doc. No. 44). It is simply unreasonable to believe that the Board faxed 240 pages of documents and that those faxed pages were not received by the Court. In any event, a fax of that length would have violated the Court's Individual Rules on faxed communications, which are not to exceed 3 pages (Exhibit D at Communications with the Court, Section (c)).

10. By submitting the April 19, 2018 cover letter by either hard copy or fax, the Board would have also violated this Court's Individual Rules on E-Filing, which provide that "All submissions to the Court, including proposed orders, proposed judgments, *and letters*, must be electronically filed." (Exhibit D at E-Filing, Subsection (b) (emphasis added)).

11. The Board also did not follow this Court's Individual Rules by making the Motion returnable on a Tuesday, rather than a Monday (Exhibit D at Motions, Subsection (b)).

12. Moreover, the Board lacks credibility in this case about service. The Board previously filed a patently false Affidavit of Service, wrongfully stating that it e-filed its Answer and Return on December 4, when those documents were clearly e-filed on December 5, 2017 (Exhibits E and F, NYSCEF Doc. Nos. 28 and 31). The Board further falsely stated that it served a hard copy of the Answer and Return by overnight mail on December 4, when there is no indication that overnight mail was utilized, and which did not comply with CPLR 2103 in any event (Exhibit G, NYSCEF Doc. No. 34).

13. The Board simply did not comply with this Court's March 29, 2018 Decision and Order, and it is now seeking another chance. Thus, the Board does not come within a ground for reargument pursuant to CPLR 2221. "A motion for leave to reargue is directed to the trial court's discretion and, to warrant reargument, the moving party must demonstrate that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law (*see* CPLR 2221(d))." *Robinson v. Viani*, 140 A.D.3d 845, 847 (2d Dep't 2016).

14. Here, the Court did not overlook or misapprehend anything. The Court ordered production by the Board of the purported "community opposition" for *in camera* review. The Court did not receive it. There was nothing that was therefore "overlooked or misapprehended" by the Court in determining the Petition because the Board failed to provide it, and reargument is inappropriate.

15. To the extent that the Board is seeking renewal, the Board does meet the standards of CPLR 2221(e), which require the Board to demonstrate a reasonable justification for its failure to present facts on a previous motion.

16. Thus, the Board's request for permission to reargue should be denied.

17. Likewise, the Board's request for a stay pursuant to CPLR 7805 is inappropriate. CPLR 7805 provides, in part, that "the court may stay further proceedings, or the enforcement of any determination under review, under terms including notice, security and payment of costs …"

18. As used in that statute, "further proceedings" and "determination under review" refer to the administrative decision that is under consideration in the Article 78 proceeding, not the Decision and Order of the case:

> The "determination under review" refers to the administrative determination under review in the judicial proceeding pursuant to C.P.L.R. Article 78. While the provision is somewhat ambiguous whether, like "enforcement," the "further proceedings," also refers to the administrative determination, all the authority applying C.P.L.R. 7805 consistently interprets "further proceedings" as referring to further administrative proceedings regarding the determination under review…. Therefore C.P.L.R. § 7805 does not provide a basis to stay a judicial proceeding.

Smith v. Proud, 2013 NY Slip Op 33509[U], *9 (Sup. Ct., N.Y. County 2013) (citing *Lucas v. Village of Mamaroneck*, 93 A.D.3d 844, 848, 941 N.Y.S.2d 204 (2d Dep't 2012); *Murphy v. County of Nassau*, 203 A.D.2d 339, 340, 609 N.Y.S.2d 940 (2d Dep't 1994); *Town of East Hampton v. Jorling*, 181 A.D.2d 781, 782, 581 N.Y.S.2d 95 (2d Dep't 1992)).

19. In addition, there are no terms to support staying execution of the Decision and Order, because it means that Mr. [redacted] remains incarcerated without a lawful parole hearing that he has been due to him statutorily since November 2016. *See* NY Executive Law § 259-i(2)(a)(i).

20. The only case cited by the Board is inapposite. In *Matter of DiBenedetto v. Evans*, 36 Misc.3d 1224(A) (Supreme Court, Dutchess County 2012), the Court denied the request for a stay as moot where the Court dismissed the underlying Article 78 Petition. Thus, the only case cited by the Board in support of its Motion says nothing about staying an action where a Respondent has been ordered to provide a *de novo* hearing within 30 days.

21. Accordingly, the Board's Motion for a Stay should be denied.

Cross-Motion to Preclude and for Expedited Review

22. Mr. [redacted] moves pursuant to CPLR 3216 to preclude the Board from utilizing any of the purported "community opposition" that was not identified by the Court as having been provided for *in camera* review with the Board's Answer and Return, *i.e.*, the Pre-Sentence Investigatory Report and confidential parties of the Parole Board Report and COMPAS (Exhibit B, NYSCEF Doc. No. 41 at 3).

23. The Board was ordered to produce that purported "community opposition" for *in camera* review and did not.

24. The Board, having failed to comply with the March 29, 2018 Decision and Order, should be precluded from considering that "community opposition" at the *de novo* hearing.

25. In any event, Mr. [redacted] should have access to that purported community opposition, as there is no basis to keep it confidential (beyond any identifying information) if it is not a victim impact statement. *See* NY Executive Law § 259-i(2)(c)(B).

26. To the extent that the "community opposition" is a petition that was submitted by the District Attorney's office to the Appellate Division, Third Department, more than 25 years ago to consider a purported spontaneous statement by Mr. [redacted], that petition was part of the record in the appeal of Mr. [redacted] conviction, and Mr. [redacted] should have access to it.

27. By now seeking a stay of the Court's Decision and Order, the Board, once again, is seeking to delay providing Mr. [redacted] with a lawful hearing to determine whether he should be released to parole supervision.

28. Mr. [redacted] has been denied that lawful hearing since November 2016, and the Board should be required to comply with the Court's Order for a *de novo* hearing as soon as possible. At issue here is Mr. [redacted]'s liberty interest, and staying these proceedings will cause him significant prejudice and continued irreparable harm. It is hard to imagine a fundamental

right greater than liberty. In this case, Mr. [redacted], who has served 37 years on a 25 year – life sentence, remains incarcerated even though the Board does not find him likely to reoffend if at liberty (Exhibit H, NYSCEF Doc. No. 3).

29. In its Motion papers, the Board identifies no prejudice or harm that would come to it by having to comply with the Court's Order to conduct a *de novo* interview within 30 days. Upon information and belief, the Board is present at Mr. [redacted]'s correctional facility monthly for parole hearings, and can conduct interviews remotely via video conference, if necessary.

30. Balancing the harms, it is clear that Mr. [redacted]'s harm of continued incarceration greatly outweighs the harm of the Board having to simply do its job.

CONCLUSION

31. Accordingly, Mr. [redacted] respectfully requests that, for the reasons set forth herein, the Court should deny the Board's motion for leave to reargue and for a stay, so that Mr. [redacted] may finally have a hearing conducted promptly in accordance with the law and held before a panel of Commissioners that have not seen Mr. [redacted] before. Mr. [redacted] further respectfully requests that the Court grant its cross-motion to preclude the Board from considering any "community opposition" not provided to the Court as ordered in the March 29, 2018 Decision and Order, consider these cross-motions on as expedited basis, and for such other and further relief as may be just and proper.

Dated: New York, New York
June 27, 2018

Respectfully Submitted,

*/s/ Orlee Goldfeld*_____
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