December 2019

Decision in Art. 78 proceeding - Congelosi, Brian (2013-12-18)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
BRIAN CONGELOSI, 97-B-0099,

Plaintiff

-against-

DECISION AND ORDER

DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, STATE BOARD OF PAROLE,

Index No. 2746-13
RJI No. 01-13-110253

Defendant(s)

For a declaratory judgment pursuant to Article 30 of the Civil Practice Law and Rules

(Supreme Court, Albany County, Special Term)

APPEARANCES:

Brian Congelosi (97-B-0099)
Southport Correctional Facility
P.O. Box 2000
Pine City, New York 14871-2000

Hon. Eric T. Schneiderman
Attorney General of New York State
Attorney for Defendant
(Keith A. Muse, Assistant Attorney General,
of Counsel)
Department of Law
The Capitol
Albany, New York 12224

Connolly, J.:

Plaintiff has brought a declaratory judgment action challenging the Board of Parole's ("Board") January 31, 2012 determination denying his release to parole. While denominated as an action for a declaratory judgment, the relief plaintiff is seeking appears to also be that of an Article 78 special proceeding challenging the underlying determination. Plaintiff moved to amend his complaint on July 11, 2013. Defendants, thereafter, moved for an order, pursuant to CPLR §3212, granting summary judgment dismissing the plaintiff's original complaint. Plaintiff opposes the

motion for summary judgment and has subsequently moved to further amend his complaint as he re-appeared before the Board of Parole ("Board") on October 8, 2013.

The Court, by letter dated November 13, 2013, noted that it was in receipt of plaintiff's motion to amend the complaint, returnable July 29, 2013, and defendants' motion for summary judgment which was returnable on August 30, 2013 which did not address plaintiff's pending motion to amend, nor included a copy of or identified which complaint defendants were seeking to dismiss. Further, the Court noted it was in receipt of plaintiff's motion to further "supplement" his complaint, which motion was returnable on November 11, 2013, as it appears plaintiff has re-appeared before defendant Board of Parole on October 8, 2013. The Court required defendants to, *inter alia*, address plaintiff's motion to amend returnable July 29, 2013 (and adjourned to August 30, 2013).

In response, defendants assert, via attorney affidavit, that they were not in receipt of plaintiff's motion to amend returnable July 29, 2013 and were not aware of such application or that it was considered pending. Accordingly, they request that the Court deny such application on such basis. In response, plaintiff asserts that such motion was properly served upon defendants. The Court is in receipt of an Affidavit of Service dated July 11, 2013 which provides that such motion and accompanying papers was served upon defendants via their counsel.

The Court turns first to plaintiffs' motion for leave to amend. CPLR §3025(b) declares that:

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Leave to amend is freely given provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, palpably improper, or insufficient as a matter of law

(*Duquette v. Oliver*, 75 AD3d 727, 727-728 [3rd Dept., 2010]; *Leclaire v. Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 1102 [3rd Dept., 2008]; *Harrell v. Champlain Enterprises, Inc.*, 222 AD2d 876 [3rd Dept., 1995]).

Plaintiff asserts that his motion to amend is based upon his receipt of the decision denying his administrative appeal. Plaintiff submitted an administrative appeal which was received by the Division of Parole Appeals Unit on July 20, 2012. The Appeals Unit, however, failed to file a determination within four months. As a result, pursuant to 9 NYCRR § 8006.4(c), the plaintiff may deem his administrative remedy to be exhausted and may seek judicial review of the underlying determination (*see Graham v New York State Division of Parole*, 269 AD2d 628 [3d Dept 2000], *lv denied* 95 NY2d 753 [2000]). Accordingly, as plaintiff deemed his administrative remedy to be exhausted and sought judicial review of the underlying determination, there is no need to amend the complaint to address the determination by the Division of Parole Appeals Unit. Further, as noted by plaintiff, he re-appeared before the Board on October 8, 2013 and accordingly, any determination by the Division of Parole Appeals Unit has been rendered moot and therefore, the Court need not permit defendant to amend his complaint to reference such determination.

Further, plaintiff's motion to supplement the complaint is denied. To the extent plaintiff seeks to challenge the October 8, 2013 administrative determination denying him parole, he must exhaust his administrative remedies and thereafter commence a special proceeding. To the extent, however, that he is concerned that the pending action will be moot based upon such re-appearance before the Board, while the portion of such action seeking relief pursuant to Article 78 challenging the determination has been rendered moot by the subsequent determination by the Board in October, the declaratory judgment portion of the action is not moot and the Court will consider the pending

motion for summary judgment of the defendant with respect to such requested declaratory relief (*see Lebron v. Travis*, 47 AD3d 1142, 849 [3d Dept., 2008]).

Plaintiff seeks the following declarations related to such action and concerning the recent revisions to Executive Law 259: (i) the "actions or inactions of the defendants are unconstitutional", (ii) "[t]here are no written procedures filed with the Secretary of State as required by the Executive Law and Constitution", (iii) "the procedures promulgated in 9 NYCRR 8001.3 and 9 NYCRR 8002.3 are null and void", (iv) the October 5, 2011 memorandum by Adnrea [sic] Evans is null and void", and (v) "[t]he written procedures mandated to be established by Executive Law §§259-c(4) and 259-i(2)(c)(A) are required to be promulgated according to the Administrative Procedure Act, the Executive Law, and the State Constitution".

Plaintiff was convicted of the crimes of two counts of Murder in the Second Degree, two counts of Assault in the First Degree, Assault in the Third Degree, three counts of Driving While Intoxicated, and two counts of Aggravated Unlicensed Operator and received an aggregate indeterminate term of 16 years to Life. The circumstances of the instant offenses involve plaintiff driving while intoxicated and hitting another vehicle killing the female driver and a 10 year old boy. Plaintiff was awaiting re-sentencing due to a violation of probation for a previous DWI offense at the time of the instant offense.

In support of its motion for summary judgment, defendants have submitted, *inter alia*, the affirmation of Terrence X. Tracy, an employee of defendant New York State Department of Corrections and Community Supervision and counsel to defendant New York State Board of Parole. Defendants argue that plaintiff is not entitled to any of the relief he is seeking. Defendants have also submitted, *inter alia*, a copy of the transcript of plaintiff's January 31, 2012 parole board hearing as

well as plaintiff's Compas Risk Assessment, his inmate status report, the pre-sentence investigation report, the parole release decision notice and the administrative appeal decision notice.

With respect to plaintiff's requested declaratory judgment relief, defendants assert that the Board has complied with Executive Law §259-c(4). Defendants assert that Executive Law §259-c (4) was amended and requires the Board to establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision. In addition, Executive Law §259-i (2)(c) was amended to list all of the factors the Board is required to consider in making parole release determinations in the same provision. Such amendment did not add new factors for consideration but list all factors in the same paragraph.

In a memorandum dated October 5, 2011, respondent addressed the amendments to the Executive Law (Respondents Exhibit L). Such memo provides, *inter alia*, that the

> members of the Board have been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ("TAP"). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. ...Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. ... .

Additionally, such memo provides that

> ... the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. ... therefore, in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

Defendants assert that such memorandum serves as the written procedures of the Board pursuant to Executive Law §259-c(4). Defendants further argue that the written procedures do not constitute the kind of rule-making that triggers the filing requirement with the Secretary of State as such requirements are only triggered when an agency's policies dictated a particular outcome. Defendants assert that as the written procedures at issue are merely explanatory, they are not rules or regulations for purposes of the State Administrative Procedures Act.

As noted above, the 2011 amendment of Executive Law §259-c(4) mandated the establishment of written procedures which incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board and the likelihood of success of such person upon release. Defendants have represented that the memorandum of October 5, 2011 of Chairwoman Evans constitutes the written procedures of the Board pursuant to Executive Law § 259-c(4).

As discussed in *Partee v Evans*, 40 Misc3d 896 [Sup. Ct., Albany County, June 28, 2013], "there is no indication that the change in the statute required respondent to adopt a fixed guideline or policy which will determine the outcome of cases before the Parole Board without regard to other facts and circumstances relevant to the underlying regulatory scheme". Accordingly, as consideration of the factors in Executive Law §259-i(2)(c) does not mandate that a particular action be taken regardless of individual circumstances, defendants have demonstrated that such procedures are not rules that must be formally promulgated under the State Administrative Procedure Act and filed with the Secretary of State (*see id.*). Moreover, Plaintiff's due process argument is without merit. Plaintiff has no due process right to parole (*see Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1988]). Further, the record demonstrates that Plaintiff was given notice and an opportunity to be heard, and a decision that

was adequately detailed to inform Plaintiff of the reasons for the denial of parole (*see Whitehead v Russi*, 201 AD2d 825, 825-26 [3d Dept 1994]). Based upon the record, defendant has demonstrated its entitlement to summary judgment dismissing the amended complaint.

In opposition, Plaintiff has failed to raise a triable issue of fact concerning such allegations. While Plaintiff asserts that the written memorandum of Chairwoman Evans fails to constitute the statutorily required written procedures, such assertion is insufficient to raise a triable issue of fact as it is based upon his contention that such procedures must be adopted as a rule or regulation, which contention is without merit, as discussed above.[1]

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Based upon the record, defendant is entitled to summary judgment dismissing the amended complaint as plaintiff is not entitled to the declaratory judgment relief he is seeking.

The Court observes that certain records of a confidential nature relating to the Plaintiff were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Therefore, it is hereby

ORDERED, that plaintiff's motion to amend is denied; and it is further

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[1]The Court notes that such issue has not been specifically addressed by the Appellate Division at this juncture, however the Court does not subscribe to the determination in *Matter of Morris v New York State Dept. of Corr. and Community Supervision*, 40 Misc. 3d 226 (Sup. Ct., Columbia Cty, 2013) but, rather the reasoning as set forth in *Matter of Partee v Evans*, 40 Misc. 3d 896 (Sup. Ct., Albany Cty, 2013).

ORDERED, that the defendants' motion for summary judgment dismissing the complaint is granted as plaintiff is not entitled to the declaration judgment relief he is seeking; and it is further

ORDERED, that plaintiff's motion to supplement the complaint is denied; and it is further

ORDERED, that the confidential records submitted to the Court for *in camera* review are sealed.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order and confidential records are being returned to the attorney for the defendants. The below referenced original papers are being mailed to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry the Albany County Clerk.

SO ORDERED.
ENTER.

Dated: December 13, 2013
Albany, New York

Albany County Clerk
Document Number 11542529
Revd 01/10/2014 9:38:50 AM

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Summons dated May 13, 2013; Complaint dated May 13, 2013 with accompanying papers; Memorandum of Law dated May 13, 2013; Amendment Pursuant to CPLR §3025(a) dated July 2, 2013 with accompanying exhibits A-F;
2. Notice of Motion to Supplement/Amend Complaint pursuant to CPLR 3025(b) dated July 11, 2013; Affidavit in Support of Motion to Supplement/Amend. of B. Congelosi dated July 11, 2013; Addendum to

Memorandum of Law of July 11, 2013; Amended Complaint dated July 11, 2013 with accompanying Exhibits A-L; Affidavit of Service dated July 11, 2013;

3. Notice of Motion for Summary Judgment dated August 29, 2013; Answer dated August 28, 2013; Affirmation of K. Muse, Esq. dated August 28, 2013; Affirmation of T. Tracy dated August 8, 2013 with accompanying exhibits A-R;
4. Reply to Motion for Summary Judgement and Answer of B. Congelosi dated September 5, 2013 with accompanying exhibits A-C;
5. Notice of Motion to Supplement Complaint pursuant to CPLR §3025(b) dated October 16, 2013; Affidavit in Support of Motion to Supplement Complaint of B. Congelosi dated October 16, 2013 with accompanying exhibits A-F;
6. Letter of the Court dated November 13, 2013;
7. Affirmation of K. Muse, Esq. dated November 18, 2013; accompanying exhibits 1-6;
8. Affidavit in Response to Affirmation/Opposition dated November 18, 2013 and in Further Support of the Declaratory Action dated November 25, 2013 with accompanying exhibits A-K.