October 2020

Decision in Art. 78 proceeding - Bolarinwa, Senora (2020-05-15)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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SENORA BOLARINWA,

Petitioner,

- v -

NEW YORK STATE DEPARTMENT OF CORRECTIONS and COMMUNITY SUPERVISION,

Respondent.

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INDEX NO. 451231/2020

MOTION DATE 05/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) were read on this motion to SPECIAL PROCEEDING.

ORDER

Upon the foregoing documents, it is

ORDERED that the cross-motion of respondent to transfer venue of this special proceeding to Westchester County is DENIED; and it is further

ORDERED that the cross motion of respondent to dismiss this special proceeding as moot is DENIED; and it is further

ORDERED that the court determines that an answer pursuant to CPLR § 404(a) is unnecessary and that this decision can be rendered on the record before the court on the herein cross motion to dismiss; and it is further

ADJUDGED that the petition is granted, and this matter is remanded to respondent New York State Department of Corrections

and Community Supervision Commissioners Anthony J. Annucci and Tina M. Ford for further proceedings not inconsistent with this decision; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DECISION

With respect to respondent's motion to change the place of trial from New York to Westchester County on the grounds of improper venue pursuant to CPLR § 506(b), this court agrees with petitioner that New York County is a proper venue for this special proceeding. As the First Department stated unequivocally, in Matter of Phillips v Dennison, 41 AD2d 17 (2007),

> Finally, we note that the Board correctly asserts that venue for a proceeding such as this is properly placed in the county where the parole hearing was held and the challenged determination made, or where the Board's principal office is located (see Matter of Ramirez v Dennison, 39 AD3d 310 [2007, decided herewith]; Matter of Vigilante v Dennison, 36 AD3d 620 [2007]; cf. Matter of Howard v New York State Bd. of Parole, 5 AD3d 271 [2004]). Under CPLR 506 (b), the "material events" leading to the subject parole determination were not the crime and sentence, but "the decision-making process leading to the determination under review" (Vigilante, supra at 622).

Since there is no dispute that the county where the subject parole hearing was held is New York County, petitioner chose the proper venue. Nor has respondent set forth any ground for transfer to Westchester County under CPLR § 510(3), as it does

not identify the proposed witnesses, the manner in which such witnesses would be inconvenienced by trial in New York County, let alone that such witnesses have been contacted and are willing and available to testify. See Heinenmann v Grunfeld, 224 AD2d 204 (1st Dept. 1996).[1]

The statute implicated in this proceeding is Correction Law § 803-b [1][b][i],[ii][A]), entitled "Limited time credit allowance for inmates serving indeterminate or determinant sentences for specified offenses" (LTCA). As stated in Ciaprazi v Fisher, 95 AD3d 1567, n. 1 (3rd Dept. 2012)

> "The effect of earning LTCAs rendered those inmates eligible for conditional release or parole consideration six months earlier than they would have been otherwise (see Correction Law § 803-b[1][b][i], [ii] [A])."

Respondent moves to dismiss the case based upon an objection of law pursuant to CPLR § 7804(f), asserting that this proceeding fails to state a meritorious cause of action as it is moot. See

[1] Both sides argue alternatively that this court should exercise its discretion to set venue on the basis of the "interest of justice" under CPLR § 510(3), and weigh the "interest" of petitioner, and interest of the county where petitioner is imprisoned, respectively, in petitioner's health status in the midst of the current public health emergency. Each side references Administrative Order (AO) 78/20 of the Chief Administrative Judge. However, such AO has nothing to do with venue, but is a statewide mandate authorizing the court to determine whether a particular filing is essential under the circumstances of the COVID19 pandemic.

Organization of Staff Analysts v. City of New York, 277 AD2d 23 (1st Dept. 2000).

Specifically, respondent argues that petitioner's subsequent parole release interview, which took place on March 3, 2020, and resulted in a grant of her release on parole on July 20, 2020, rendered moot any challenge to the LTCA parole interview afforded to her on September 19, 2019 that denied her release, which if granted would have advanced such date to January 20, 2020. Petitioner counters that the matter is not academic, as the March 3, 2020 determination granting her parole did not address the September 19, 2019 determination that denied her the six-month advance of her parole release date.

In support of its position, respondent cites, the opinions in Matter of Pratt v Van Zandt, 236 AD2d 763 (3d Dept. 1997) and Schwartz v Dennison, 40 AD3d 218 (1st Dept. 2007), inter alia. In Pratt, the appeals court held that petitioner's appearance at a second hearing of the Parole Board, "at which time he was again denied parole" rendered his challenge to the denial of parole release at the first hearing moot. The First Department, Schwartz, on the same facts, dismissed the Article 78 petition to review the earlier denial, as academic.

This court agrees with petitioner that the instant petition is distinguishable on its facts from those of Pratt and Schwartz. In both Pratt and Schwartz, the Parole Board, in

denying the parole release application after the second hearing, by implication, found that petitioners therein would not be granted an LTCA, i.e. a release date six months earlier than otherwise. There is no such implication here with the subsequent grant of the parole release, herein. Taken to its logical conclusion, respondent's assertion is that a petitioner would never be entitled to judicial review of the discretion exercised by a Parole Board in denying the LCTA, unless such petitioner irrationally forbore on his or right to pursue parole upon "completion of the controlling minimum period of imprisonment" Correction Law § 803-b(1)(b)(i), (ii)(A).

There is no precedent for respondent's position that LCTA determinations by Parole Boards are insulated from judicial review. See, e.g., Matter of Ciaprazi v Fischer, 95 AD3d 1537 (3d Dept. 2005). Moreover, the court disagrees with respondent that there is no longer any controversy, since petitioner does not challenge the decision granting her release upon completion of the controlling minimum period of her sentence, but seeks judicial review of the Parole Board decision to deny such release six months in advance of such period.

Thus, the question of whether the LTCA determination of the Parole Board was irrational or arbitrary and capricious has not been rendered moot by its subsequent determination granting

petitioner release upon her completion of the minimum period of her sentence.

Though it denies respondent's motion to dismiss, this court declines to cause the petition to be re-noticed for a further hearing to allow respondent to file an answer pursuant to CPLR § 7804(3), as the papers now before the court "clearly establish" the absence of triable issues of fact. See Kusyk v New York City Department of Buildings, 130 AD3d 509, 510 (1st Dept. 2015). On that basis, the court finds that an answer is unnecessary and that the issue can be decided on the papers submitted on the respondent's cross motion to dismiss. See McKinney's CPLR § 404, Practice Commentaries,

> "It should be noted that the court is not required to permit the service of an answer. The court might determine that an answer would be unnecessary and that a decision can be made on the basis of the record developed in connection with the motion to dismiss. See, e.g., In re Dodge's Trust, 1969, 25 N.Y.2d 273, 286, 303 N.Y.S.2d 847, 858, 250 N.E.2d 849, 857. Cf. CPLR 409(b)."

In Karimzada v New York State Board of Parole, 176 AD3d 1555, 1556 (3d Dept. 2019), the court stated:

> "Petitioner also argues, and respondent concedes, that the administrative appeals unit relied on inaccurate information in affirming respondent's denial. Specifically, the appeals unit erroneously stated, in its statement of its findings and recommendation, that petitioner was assessed "high" on his COMPAS Risk and Needs Assessment instrument for the risk factors related to a history of violence and risk of absconding, when, in fact, he was assessed 'medium'

> for both factors. 'Because of the likelihood that such error may have affected the decision to affirm [respondent's] denial of petitioner's request for parole release, proper administrative review is required' (Matter of Torres v. Stanford, 173 A.D.3d 1537, 1538, 102 N.Y.S.3d 794 [2019] [internal quotation marks and citations omitted]; see Matter of Clark v. New York State Bd. of Parole, 166 A.D.3d 531, 532, 89 N.Y.S.3d 134 [2018]). Accordingly, the judgment must be reversed and the matter remitted to respondent for a new administrative appeal proceeding."

As in Karimzada, the respondent at bar, in making its determination that denied release (here, early release), relied on inaccurate information, which, with respect to the July 2019 COMPAS Needs and Risks Report, respondent concedes. Likewise, as argued by petitioner there is "the likelihood that such error may have affected the decision" to deny petitioner's request for early parole release.

05/15/2020
DATE

DEBRA A. JAMES, J.S.C.

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