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Matter of Rossakis v New York State Bd. of Parole
2014 NY Slip Op 31212(U)
May 7, 2014
Supreme Court, New York County
Docket Number: 401072/2012
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

[* 1]

SCANNED ON 5/9/2014

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT — FREED, Justice

PART 5

ROSSAKIS, NIKI

INDEX NO. 401072/12

MOTION DATE

- v -

MOTION SEQ. NO. 002

N.Y.S. BOARD OF PAROLE

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 09 2014
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5-7-14
MAY 07 2014

HON. KATHRYN FREED, JUSTICE OF SUPREME COURT, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5
--X
In the Matter of NIKI ROSSAKIS,

Petitioner,

DECISION/ORDER
Index No.: 401072/2012
Seq. No.: 002

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

FILED
MAY 09 2014
NEW YORK
COUNTY CLERK'S OFFICE

--X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..................	....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.........	1,2(Exs. A-F)
ANSWERING AFFIDAVITS..	....
REPLYING AFFIDAVITS...	..........3..........
EXHIBITS..	..4..(Exs. A-B)
STIPULATIONS...	....
OTHER...	....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

In this Article 78 proceeding, petitioner Niki Rossakis seeks an order adjudging respondent New York State Board of Parole ("the Board") in contempt of an order of this Court dated May 2, 2013. Petitioner also seeks to convert this proceeding into a habeas corpus proceeding and seeks an order directing that she be released on parole. Respondent opposes the application. After oral

argument and a review of the parties' papers and the relevant statutes and case law, this Court **denies** the motion.

Factual and Procedural Background:

Petitioner claims that soon after her 1987 wedding, her husband began physically and emotionally abusing her and that, in 1993, after years of such abuse, she shot her husband in the head with his own licensed gun. She maintains that when she shot him, she was fearful that he was going to force her to have sex, despite the fact that she was still healing from an abortion that she had undergone two weeks earlier as a result of his raping her, and also at his insistence.

Following a three week trial in Queens County, petitioner's battered spouse-justification defense was rejected by the jury and, on May 17, 1996, she was convicted of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree and was sentenced to a term of 23 years to life imprisonment. On appeal, the Appellate Division, Second Department, determined that the sentence imposed by the trial court was "excessive" and reduced it to the minimum possible term of 15 years to life. *See People v. Rossakis*, 256 A.D.3d 366 (2d Dept. 1998). Petitioner remains incarcerated.

Petitioner maintains that, during her incarceration, she has made concerted efforts to improve herself. She asserts that she has successfully completed various programs sponsored by the prison system and has earned two Associates' Degrees. Petitioner has also worked as a teaching assistant, a tutor, a telephone operator, and also as an Inmate Liaison Committee Representative, in which capacity she assists inmates and staff in resolving inmate grievances.

Petitioner alleges that, despite her accomplishments while incarcerated, and the remorse she

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has continuously shown for the shooting, she has been unjustly denied parole on two separate occasions. In 2009, she appeared before the Board for the first time. She asserts that, during that interview, the members of the Board questioned her extensively concerning the circumstances of her crime and also discussed her disciplinary record, after which she was denied parole. In rendering its decision, the Board stated that "[w]hile the panel notes your programmatic accomplishments in prison, the panel finds more compelling the seriousness of the offense as well as your lack of insight into your criminal conduct. The panel concludes that if released at this time, there exists a reasonable probability you would not live and remain at liberty without further violations of the law. Your cold blooded murder of your husband indicates a premeditated act of violence." Transcript of Parole Board Hearing of 7/1/09, at p. 15.[1]

On June 28, 2011, petitioner appeared for a second parole hearing. She claims that, during this hearing, she was again questioned extensively about the circumstances of her crime. The Board ultimately denied her release, stating, in pertinent part, that "release at this time is incompatible with the welfare and safety of the community. This decision is based on the following factors: [t]he serious nature of the instant offense....[which] involved you shooting your husband in the head causing his demise. Your actions clearly displayed a propensity for violence and a callous disregard for the sanctity of human life.....Discretionary release is inappropriate at this time. For the panel to hold otherwise would so deprecate the severity of the crime as to undermine respect for the law" Transcript of Parole Board Hearing of 6/28/11, at p.12.

Petitioner filed an administrative appeal from the June 28, 2011 decision. After the Appeals

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[1]The July 1, 2009 hearing transcript was annexed as an exhibit to petitioner's underlying motion to vacate the Board's determination of June 28, 2011, discussed below. The transcript of the June 28, 2011 hearing was annexed as an exhibit to that motion as well.

Unit affirmed the Board's denial of parole on May 22, 2012, petitioner commenced the instant Article 78 proceeding seeking to vacate the Board's June 28, 2011 decision.

In connection with the Article 78 proceeding, this Court reviewed the transcribed testimony of petitioner's July 1, 2009 and June 28, 2011 parole hearings. This Court found that, in the earlier hearing, while the Board asked extensive questions concerning the shooting, they also asked petitioner about where she intended to live if released and what type of employment she would seek. However, this Court agreed with plaintiff that, during the June 28, 2011 hearing, the Board based its determination solely upon the seriousness of her crime. This Court, relying on *Matter of King v. New York State Division of Parole*, 190 A.D.2d 423, 424 (1st Dept. 1993), *affd* 83 N.Y.2d 788 (1994), *Matter of Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dept. 2009), and *Stanley v. New York State Bd. of Parole*, 31 Misc.3d 911 (Sup Ct, Orange County 2011) found this to be improper, reasoning that the record clearly demonstrated that the Board failed to consider the statutory criteria for parole set forth in Executive Law § 259-i(2)(c) and that, by denying her application for parole solely because of the seriousness of her crime, it evinced irrationality bordering on impropriety. By order dated May 2, 2013, this Court thus granted the petition, vacated the June 28, 2011 determination of the Board, and directed that "a new hearing is to be conducted." Ex. A.[2]

On May 30, 2013, the Board appealed this Court's order of May 2, 2013. Ex. B. This triggered an automatic stay of enforcement of the May 2, 2013 order pursuant to CPLR 5519(a)(1). On August 6, 2013, before the appeal was perfected, petitioner reappeared before the Board for

[2]Unless otherwise noted, all references are to the exhibits annexed to petitioner's order to show cause.

another parole hearing. Ex. E. The proceeding was a "regularly scheduled reappearance hearing before the Board." Board's Aff. In. Opp., at par. 17. Following the 2013 hearing, the Board again denied petitioner parole, stating, inter alia, that:

> The panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. Ex. E, at p. 17.

On September 9, 2013, petitioner moved to vacate the automatic stay and to expedite the appeal. Ex. C. In a September 20, 2013 letter to the Appellate Division, First Department, the Board withdrew its appeal, stating that petitioner's appearance at the August 6, 2013 hearing rendered its appeal moot. *Id.* The Board also requested that the Appellate Division deny petitioner's motion to vacate the stay and to expedite the appeal as academic. *Id.*

Petitioner now moves for an order adjudging the Board in contempt for failing to comply with this Court's order May 2, 2013 order directing that "a new [parole] hearing" be conducted.

Positions of the Parties:

Petitioner asserts that the Board must be adjudged in contempt because it failed to conduct a de novo parole hearing in accordance with this Court's order of May 2, 2013. She asserts that, because the Board withdrew its appeal from this Court's May 2, 2013 order, the automatic stay which was in effect was vacated and the order remains in effect. Further, petitioner insists that her regularly scheduled hearing on August 6, 2013 did not constitute a de novo hearing as ordered by this Court. Alternatively, she asserts that, if the August 6, 2013 hearing did constitute the de novo

hearing directed by this Court, then the Board must still be held in contempt since the 2013 order, like the 2011 order, improperly focused solely on the nature of her crime and therefore the 2013 order should be vacated. She also argues that she was prejudiced by the fact that one of the commissioners who present at her 2011 hearing participated in the 2013 hearing. Petitioner further argues that her Article 78 proceeding should be converted into a habeas corpus proceeding and that this Court should direct her release on parole supervision.

In opposition to petitioner's application, the Board asserts that it should not be adjudged in contempt because it provided petitioner with a new hearing on August 6, 2013, thereby complying with this Court's order of May 2, 2013. Thus, urges the Board, it did not "willfully or intentionally" disobey the May 2, 2013 order. The Board further asserts that it should not be adjudged in contempt because it considered all statutory factors set forth in Executive Law § 259-I (2) (c) (A). The Board asserts that petitioner's challenge to the 2013 order is not properly before this Court and that, if petitioner wishes to challenge the 2013 order, she must commence an Article 78 proceeding to challenge the same after exhausting her administrative remedies. Finally, the Board asserts that this matter cannot be converted into a habeas corpus proceeding since this Court does not have the ability to direct petitioner's release.

In her reply affirmation in further support of the instant application, petitioner argues that her August 6, 2013 hearing was not held for the purpose of complying with the 2013 order but rather was a regularly scheduled hearing. She further asserts that, she does not merely seek to vacate the August 6, 2013 order but to declare the Board in contempt since, in rendering that order, it blatantly disregarded this Court's May 2, 2013 order. She asserts that, if this Court finds that the terms of the May 2, 2011 order were satisfied because she appeared before the Board again in August of

2013, then the Board will "always be able to effectively thwart judicial review by doing precisely what it did here - appeal any court order rendered against the Board, obtain an automatic stay, and then hold a hearing that repeats all the same defects that led to the court order." Petitioner's Reply Aff., at par. 18. Finally, petitioner asserts that, whether or not this Court converts the instant Article 78 proceeding into a habeas corpus proceeding, this Court should order her immediate release on parole as the remedy for the Board's contempt.

Conclusions of Law:

"To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed . . . the party to be held in contempt must have had knowledge of the order [and] . . . prejudice to the rights of a party to the litigation must be demonstrated." *McCain v Dinkins*, 84 NY2d 216, 226 (1994); *see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 (1983). "A motion to punish a party for civil contempt is addressed to the sound discretion of the court." *El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 (2d Dept 2013). A penalty imposed for civil contempt is "designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both." *Matter of Department of Environmental Protection v Department of Environmental Conservation*, 70 NY2d 233, 239 (1987). Civil contempt "must be proven by clear and convincing evidence, and requires a showing that the rights of a party have been prejudiced." *Town of Copake v 13 Lackawanna Props.*, LLC, 73 AD3d 1308, 1309 (3d Dept 2010) (*citations omitted*).

Here, this Court, in its discretion, finds that petitioner has failed to demonstrate the Board's contempt as a matter of law. While the May 2, 2013 order of this Court set forth in detail why

petitioner did not receive a fair parole hearing on June 28, 2011, the only specific mandates set forth in the decretal paragraphs of the order stated that the Board's "recent recommendation denying petitioner's release is struck down, and a new hearing is to be conducted", and that petitioner was to serve the Board and the Trial Support Office of this Court with the order. Ex. A. The order neither set forth a deadline by which the new hearing was to be conducted nor directed that it be conducted before a new panel of commissioners. Thus, the only specific mandate directed at the Board was for it to conduct a new hearing, which it did on August 6, 2013. Ex. E. Therefore, the Board satisfied the specific directive set forth in the order. Contrary to petitioner's contention, the fact that the August 6, 2013 proceeding was a "regular reappearance hearing" (Petitioner's Aff. In Supp., at par. 10), and not a "de novo" hearing, does not preclude a finding that a new hearing was held. Petitioner does not cite, and this Court's research has not revealed, any case law supporting this argument by petitioner.

Since petitioner has reappeared before the Board following this Court's May 2, 2013 order and her request for parole has again been denied, the instant proceeding must be dismissed as moot. *See Matter of Stanley v Dennison*, 20 AD3d 790 (3d Dept 2005). As the Board correctly asserts, if petitioner wishes to challenge its determination of August 6, 2013, she must exhaust her administrative remedies in connection with that decision and, once she does so, she may commence a new Article 78 proceeding challenging it. *See O'Dette v New York State Unified Court System*, 107 AD3d 564 (1st Dept 2013).

That branch of petitioner's motion seeking to convert this proceeding into a habeas corpus proceeding and directing her release to parole are also denied. Even if this Court were to find the Board to be in contempt, it "lack[s] the authority to direct the release of an inmate to parole status

because that remedy invades the discretionary decision-making authority of [the Board]." *Matter of Moore v New York State Board of Parole*, 198 AD2d 836, 837 (4th Dept 1993). Since this Court cannot issue a directive immediately releasing petitioner to parole, this Court cannot grant habeas corpus relief. *See People ex rel. Kaplan v Commissioner of Correction*, 60 NY2d 648 (1983).

In asserting that she is entitled to an order releasing her to parole, petitioner relies on *Matter of Marino v Travis*, 13 AD3d 453 (2d Dept 2004). However, petitioner's reliance is misplaced. In Marino, the Parole Board denied petitioner's request for parole, finding a reasonable probability that he would violate the law and be a threat to the community if released. The trial court found the determination to be irrational, granted petitioner's Article 78 petition, and remanded the matter to the Parole Board for a de novo hearing. The Appellate Division, Second Department affirmed the trial court's finding. *See Matter of Marino v Travis*, 289 AD2d 493 (2d Dept 2001). Petitioner thereafter came up for parole on three separate occasions and was denied release each time, based on essentially the same evidence. The Supreme Court again held that the Parole Board had acted irrationally, and the Appellate Division affirmed once again, this time ordering petitioner's release in lieu of a de novo hearing. See *Matter of Marino v Travis*, 13 AD3d 453, *supra.* Specifically, the Appellate Division held that:

> the Parole Board's determination was irrational bordering on impropriety. Consequently, the Parole Board should not thereafter have denied the petitioner release on parole based on the same reason without specifying new or additional relevant evidence in support of the determination. Rather, by the plain language and mandate of Correction Law § 805, the petitioner should have been released to parole. *Id.*, at 455

At the time petitioner in *Marino* last appeared before the Parole Board, Correction Law § 805 provided, in relevant part, that:

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> an inmate who is serving a sentence with a minimum term of not more than six years and who has been issued a certificate of earned eligibility, *shall be granted parole release at the expiration of his minimum term* . . . unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. *Id.*, at 455 (*emphasis added*).

Here, as noted above, the sentence of the petitioner in this matter was reduced by the Appellate Division to 15 years to life. *See People v. Rossakis, supra.* Therefore, Correction Law § 805, even if it still contained the language regarding a minimum term of six years, which it does not, would not entitle petitioner in this matter to her release on parole.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the application by petitioner Niki Roassakis is denied in all respects; and it is further,

ORDERED that the petition is dismissed as moot; and it is further,

ORDERED that respondent New York State Board of Parole is to serve this order, with notice of entry, on counsel for the petitioner and on the Trial Support Office, 60 Centre Street, Room 158; and it is further,

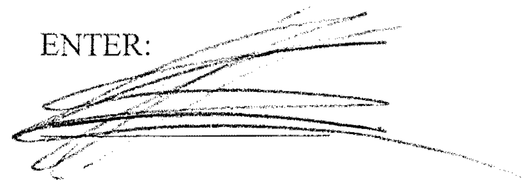
ORDERED that this constitutes the decision and order of the Court.

DATED: May 7, 2014

MAY 07 2014

FILED
MAY 09 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT