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### Decision in Art. 78 proceeding - Combs, Andre (2008-05-16)

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[\*1]

<b>Matter of Combs v New York State Bd. of Parole</b>
2008 NY Slip Op 50994(U) [19 Misc 3d 1133(A)]
Decided on May 16, 2008
Supreme Court, New York County
Braun, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 16, 2008

**Supreme Court, New York County**

<p><b>In the Matter of the Application of Andre Combs, Petitioner,</b></p> <p><b>against</b></p> <p><b>New York State Board of Parole, Respondent.</b></p>
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116283/07

Petitioner's attorneys are Franzblau Dratch, P.C. by Brian Dratch, Esq., 233 Broadway, Suite 2701, New York, New York 10279, (212) 571-1808.

Respondent's attorney is Andrew M. Cuomo, Attorney General, by Julinda Dawkins, Assistant Attorney General, 120 Broadway, 24th Floor, New York, New York 10271, (212) 416-8118.

Richard F. Braun, J.

This is an article 78 proceeding brought by petitioner-prisoner to reverse respondent's determination denying petitioner's release on parole and direct petitioner's release from prison under parole supervision, or in the alternative order a de novo parole board hearing. Petitioner was convicted of murder and manslaughter in the second degree, and sentenced to fifteen years to life. The parole board hearing was held and the determination to deny petitioner parole was made at the Marcy Correctional Facility in Oneida County. Respondent's principal office is located in Albany County.

Respondent moved to dismiss the petition, or change venue; stay the proceeding, pending change of venue; and extend respondent's time to serve an answer or move in response to the petition. By stipulation, respondent withdrew the branch of the motion seeking dismissal.

On January 10, 2008, the attorney for respondent served a written demand on the attorney for petitioner that the place of trial in this proceeding be changed from New York County to either Albany County or Oneida County, pursuant to CPLR 511 (a) and (b). Pursuant to CPLR 511 (a), such a demand has to be made either with the answer to the petition, or before an answer is served. [\*2]No answer by respondent has been served yet in this proceeding.

Pursuant to CPLR 511 (b), unless the petitioner consents in writing within five days after service of the demand to the change sought by the respondent, within 15 days after service of the demand the respondent may make a motion to change the place of trial. Petitioner's only opposition to the motion is that respondent's motion was not timely.

Respondent submitted an order to show cause to commence the motion (CPLR 2214 [d]) on Friday, January 25, 2008. The court cashier stamped the order to show cause that it was received on that date at 1:59 P.M. Because this Justice was out on that date having

shoulder surgery and then recuperating at home for the next two weeks, the order to show cause was assigned to another Justice for signature review.

Respondent's attorney submitted with the order to show cause an affirmation of urgency, which set forth the pertinent facts including that respondent had to move to change venue by January 25, 2008 and requested that the order to show cause be signed by the court on that date so that compliance with CPLR 511 (b) could be effectuated. The Justice signed the order to show cause on Monday, January 28, 2008, with a temporary stay of all proceedings in this proceeding. The record does not show when he received the order to show cause for his review. He gave respondent until January 29, 2008 to serve the motion, which is when it was served.

Although, pursuant to CPLR 511 (b), the motion had to have been made by January 25, 2008, respondent should not be penalized under the circumstances by denial of the motion (*see Daley v Daley*, 257 AD2d 593, 594 [2nd Dept 1999]; *cf. Matter of Howard v New York State Bd. of Parole*, 5 AD3d 271, 272 [1st Dept 2004] [where the respondent did not follow the required procedures under both CPLR 511 (a) and (b), the respondent was not entitled to have venue changed as of right]). Respondent should not have its motion denied where respondent submitted its order to show cause with an affirmation specifying the exigent need for the order to be signed on the date of submission and where respondent served the moving papers within the time period set by the court. Pursuant to CPLR 2001, in the interest of justice this court will disregard the defect of respondent's not complying with CPLR 511 (b), where no substantial right of petitioner was prejudiced by the slight delay in service of the order to show cause beyond the statutory time limit, especially where the delay may have been caused at least in part by the court. This court will allow the change of venue, where petitioner improperly venued this proceeding in New York County, and the proceeding should have been venued in Albany County, the place of respondent's principal office, or Oneida County, the location in which the parole board hearing was held and the determination was made (CPLR 506 [b]; *Matter of Phillips v Dennison*, 41 AD3d 17, 23 [1st Dept 2007]).

CPLR 511 (c) provides for a stay of all proceedings in an action or proceeding for the purpose of changing the place of trial. As venue has been changed here, such a stay has been awarded.

Therefore, the motion was granted by this court's separate decision and order to the extent of changing venue in this proceeding to Albany County, all proceedings in this article 78 proceeding have been stayed until the change of venue has occurred, and respondent has been ordered to answer the petition within 30 days after receiving a written notice, which petitioner may serve, that the change has been effectuated. Furthermore, a separate order has been promulgated that the file in this proceeding shall be transferred to Albany County. [\*3]

Dated: New York, New York

May 16, 2008 RICHARD F. BRAUN, J.S.C.

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