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### Decision in Art. 78 proceeding - Copeland, Phillip (2021-11-26)

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SUPREME COURT  
STATE OF NEW YORK

COUNTY OF ALBANY

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In the Matter of the Application of

PHILLIP COPELAND

Petitioner,

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

-against-

TINA M. STANFORD, CHAIRWOMAN, NEW  
YORK STATE BOARD OF PAROLE,

Respondent.

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DECISION  
And ORDER  
Index No. 908604-21  
RJI No. 01-21-ST1972  
(Hon. Lynch, J.)

**INTRODUCTION**

On November 10, 2020, Respondent denied Petitioner’s application for parole release. Petitioner perfected his administrative appeal, which was denied on June 10, 2021. Petitioner claims that the decision was unlawful and seeks a de novo review by the Parole Board.

This is a proceeding pursuant to CPLR Article 78. The proceeding was timely commenced upon the filing of the Petition on October 4, 2021(see CPLR § 217 (1) and 304 (a)).<sup>1</sup>

At this juncture, the Court will address the technical issues raised in the motion to dismiss the Petition.

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<sup>1</sup> NYSEF Doc. No. 1.

### PERSONAL JURISDICTION

The affidavit of service demonstrates that the service was properly made upon Respondent by service upon both the New York State Attorney General and upon Respondent's authorized agent on October 7, 2021 (see CPLR §§ 306-b, 307 (2), and 7804 (c)).<sup>2</sup> Personal jurisdiction was established.

### MOTION TO DISMISS

On October 29, 2021, Respondent moved to dismiss the Petition pursuant to CPLR R 3211 (a) (8). Respondent asserts that the Court lacks personal jurisdiction, under a claim that the Petition failed to comport with the pleading requirements of CPLR 3014 and is jurisdictionally defective.<sup>3</sup>

### STATEMENT OF LAW

The CPLR R 3211 review standard requires that a Court “must give the pleadings a liberal construction, accept the allegations as true and accord the Petitioners every possible favorable inference” (Chanko v. Am. Broad Companies, Inc., 27 N.Y. 3d 46, 52 [2016]; see also, Conklin v Laxen, 180 A.D.3d 1358, 1362 [4<sup>th</sup> Dept. 2020]; Piller v Tribeca Dev. Group LLC, 156 A.D.3d 1257, 1261 [3d Dept. 2017]).

Here, for some inexplicable reason, Petitioner failed to comply with the simple pleading directive of CPLR 3014, i.e., “that pleadings shall consist of plain and concise statements in consecutively numbered paragraphs.” Rather than comply, Petitioner chose to draft the Petition

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<sup>2</sup> NYSEF doc. Nos. 26 and 27.

<sup>3</sup> NYSEF Doc. No. 28.

in the form of a Memorandum of Law. The threshold question is whether that failure results in a corresponding failure to obtain personal jurisdiction. I think not.

Respondents rely on Lebow v. Lansing Planning Bd., 151 A.D.2d 865 [3d Dept. 1989] to support their lack of personal jurisdiction claim. Such reliance is wholly misplaced. In Lebow, Petitioner served a document entitled "Notice of Petition" and "Notice Pursuant to C.P.L.R. 304 and 305(b)", but did not serve any Petition. Finding "A verified petition is required to establish a jurisdictional predicate for the proceeding" [and]... "petitioners' papers are jurisdictionally deficient," the Court dismissed the proceeding as time barred. (id at 866) In fine, the court found that the proceeding had not commenced, and the time to file had expired.

In Archer-Vail v LHV Precast Inc., 168 A.D.3d 1257 [3d Dept. 2019], defendant moved to dismiss under a claim that the 98-page, 426 paragraph complaint failed to comply with CPLR 3013 and 3014. Rejecting that claim, the Court held,

"Pursuant to CPLR 3013, a pleading must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action". Additionally, pursuant to CPLR 3014, "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs" and "[e]ach paragraph shall contain, as far as practicable, a single allegation." "These [pleading] requirements must be read in light of CPLR 3026[,] which provides for the liberal construction of pleadings and states that '[d]efects shall be ignored if a substantial right of a party is not prejudiced'. Affording a liberal construction to the pleading here, we agree with Supreme Court that **the complaint—although unnecessarily long and inartfully drafted—sets forth legally cognizable claims, including causes of action sounding in negligence and wrongful death, with sufficient particularity so as to provide defendants with notice of the claims asserted against them and the transactions and/or occurrences sought to be proven**" (id at 1258) (emphasis added)



In Matter of Levine v Suffolk County Dept. of Social Servs., 164 A.D.3d 1446 [2d Dept. 2018], Petitioner filed a Notice of Petition, her Affidavit and her attorney's affirmation, but no document denominated a Petition. Respondent claimed that absent service of a Petition, no personal jurisdiction had been established. Finding jurisdiction, the appellate court rejected Respondent's argument, holding,

"A verified petition is required to establish a jurisdictional predicate for a special proceeding (*see* CPLR 304 [a]; 7804 [c], [d]; Matter of Lebow v Village of Lansing Planning Bd., 151 AD2d 865, 542 NYS2d 840 [1989]). CPLR 304 (a) provides that "[a] special proceeding is commenced by filing a petition." CPLR 7804(c) provides that "a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard." **However, a document that is not denominated a verified petition may satisfy CPLR 304 and 7804 if it is the functional equivalent of a verified petition** (*see* Matter of Shumsky v New York City Loft Bd., 192 AD2d 350, 351, 596 NYS2d 21 [1993]).

Here, none of the papers filed and served by the petitioner was denominated a verified petition. However, the **petitioner's papers, particularly her affidavit and the affirmation of her attorney, gave notice as to what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought** (*see id.* at 351; Matter of Marmo v Department of Env'tl. Conservation, 134 AD2d 260, 260-261, 520 NYS2d 442 [1987]; *cf.* Matter of Long Is. Citizens Campaign v County of Nassau, 165 AD2d 52, 57, 565 NYS2d 852 [1991]). Therefore, the papers fulfilled the purposes of a verified petition and were the **functional equivalent** of a verified petition" (emphasis added)

Clearly, the substance of the pleading must be considered, distinct from the procedural requirements.

Petitioner served a document denominated a Verified Petition, albeit it did not contain plain and concise statements in consecutively numbered paragraphs. The Petition did, however, identify the administrative decision that was being challenged, the underlying parole proceedings

that the decision was based upon, the basis for the challenge, and the relief sought. In fine, while not precise, the Petition was the functional equivalent of a pleading otherwise in conformance with CPLR R 3014. The motion to dismiss for lack of personal jurisdiction is **denied**.

That does not end the inquiry. In the absence of consecutively numbered paragraphs in the Petition, Respondent has raised a legitimate concern as to how to file a responsive pleading in accord with CPLR § 3018 and R 3024 (a). In this Court's view, the irregularity should not be disregarded but rather corrected, so that the proceeding may continue in the ordinary course.

CPLR §2001 provides,

**“At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.**

To implement the Court's authority under CPLR §2001, the Court directs the parties to comply with the following schedule:

1. Petitioner shall file and serve an amended verified Petition that comports with the pleading requirements of CPLR R 3014 and CPLR § 3017 on or before December 14, 2021; and
2. Respondent shall file and serve its Answer with a certified transcript of the proceedings under consideration in accord with CPLR § 7804 (e) as well as any other responsive pleadings on or before January 14, 2022; and
3. Petitioner's Reply in accord with CPLR § 7804 (d), if any, shall be filed and served on or before January 19, 2022; and



4. The return date of this proceeding is adjourned to January 21, 2022.

In the event either party fails to comply with this directive, each party reserves the right to move to strike the pleadings.

### CONCLUSION

For the reasons more fully stated above, the motion to dismiss the Petition is Denied. It is further,

ORDERED, that

1. Petitioner shall file and serve an amended verified Petition that comports with the pleading requirements of CPLR R 3014 and CPLR § 3017 on or before December 14, 2021; and
2. Respondent shall file and serve its Answer with a certified transcript of the proceedings under consideration in accord with CPLR § 7804 (e) as well as any other responsive pleadings on or before January 14, 2022; and
3. Petitioner's Reply in accord with CPLR § 7804 (d), if any, shall be filed and served on or before January 19, 2022; and
4. The return date of this proceeding is adjourned to January 21, 2022.

This memorandum constitutes both the decision and order of the Court.<sup>4</sup>

Dated: Albany, New York  
November 26, 2021

  
PETER A. LYNCH, J.S.C.



<sup>4</sup> Notice of Entry and service in accord with CPLR R 2220 is required.

11/26/2021

**PAPERS CONSIDERED:**

All e-filed pleadings and exhibits.

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