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Decision in Art. 78 proceeding - Wallman, Jay A. (2004-03-08)

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Matter of Wallman v Travis

2004 NY Slip Op 30021(U)

March 8, 2004

Supreme Court, New York County

Docket Number: 0_30012/1582

Judge: Joan A. Madden

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INTERIM ORDER

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

PRESENT:HON. JOAN A. MADDEN
Justice

PART 11

In the Matter of the Application of
JAY A. WALLMAN,
Petitioner,

INDEX NO. : 121582/03

MOTION DATE: 2/5/04

- v -

MOTION SEQ. NO.: 001
MOTION CAL. NO.:

BRION TRAVIS, Chairman, New York State
Division of Parole,
Respondent.

C1

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

NUMBERED

PAPERS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

1

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

1

Cross-Motion: [x] Yes [] No

Petitioner brings this Article 78 proceeding
challenging the denial of his **application for parole.**

Respondents cross **move** to dismiss the petition pursuant to

CFLR § 506(b) on the grounds that the venue of this proceeding is improper. Respondent's cross motion is denied.

Respondent asserts that under CPLR § 506(b), this proceeding should have been commenced in Albany County, which is the principal office of the New York **State** Board of Parole and the Appeals Unit, or in Ulster County, which is where **the parole** hearing took place and where petitioner currently resides. After this proceeding was brought, respondent served a demand to change venue on December 19, 2003 **and** cross moved to change venue eighteen **days later** on January 6, 2004.

Petitioner counters that New **York** County is an appropriate venue as material events took place here including the commission of petitioner's crimes and all of the underlying proceedings from the indictment to sentencing occurred.

CPLR § 506(b) provides that, "an article 78 proceeding shall be commenced in any county within the judicial district where the challenged determination was made, where proceedings in the matter or material events took place or where the principal office of respondent is located." See Matter of Nolan v. Lungen 61 N.Y.2d 788, 790 (1984) (emphasis supplied). Here, although the crimes which resulted in

petitioner's sentence were committed in New York County and the underlying criminal proceedings occurred here, it appears to this court that these events **are** not "so closely interwoven with [the **parole**] determination as to constitute 'material facts' which 'otherwise took place' within this county." Matter of Brown v. New York Bd. of Parole, 10 NY2d 116, 120 (1961); see Matter of Gibson v. Travis, 6/21/02, NYLJ, at 20, col. 4 (Sup Ct. Bronx Co.) (granting motion to change venue from **Supreme** Court Bronx County in Article 78 proceeding challenging denial of parole where Bronx County was the site of petitioner's guilty plea and sentencing which **led** to petitioner's incarceration but where parole determination and other facts related to the underlying proceeding **Occurred** elsewhere).

In any event, this court need not determine whether venue is appropriate here **as** respondent has failed to follow the proper procedure for changing venue as a matter of right. Although **respondent** properly served the demand prior to its answer, it failed to move to change venue within 15 days of service of the demand. See CPLR 511(a) & (b). Under these circumstances, respondent has waived its objection to venue in this county. See Banks v. New York State and Local Employees' Retirement System, 271 AD2d 252 (1st Dept 2000) (court improvidently changed venue of **special**

proceeding even if action not commenced in proper county when defendant failed to observe the statutory requirements for changing venue as a matter of right); Dean v. New York State Board of Parole, 2002 NY Misc. Lexis 1485 (Sup Ct. Queens Co. 2002) (venue should not be changed where respondent fails to follow the procedure for changing venue provided under CPLR 511(a) & (b)).

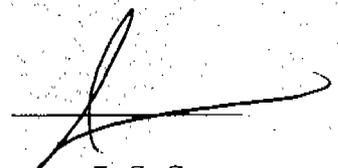
Accordingly, it is

ORDERED that the **cross** motion to dismiss the petition pursuant to CPLR § 506(b) is denied; and it is further

ORDERED that respondent shall serve and file¹ an answer within twenty days of date of this order; and, it is further

ORDERED that the parties shall appear in Part 11, room 351, 60 Centre Street, New York, New York ^{April 8, 2004} on ~~March 25,~~ 2004 at 11:00 am for argument on the petition.

March 8, 2004
 DATED: ~~February~~, 2004


 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

¹The answer should be filed with Part 11, room 351.