Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of

HON. ELLEN GESMER, HON. DAVID FRIEDMAN, HON. SHERI S. ROMAN, HON. JOHN M. LEVENTHAL and DANIEL J. TAMBASCO,

Petitioners/Plaintiffs,

For a Judgment under Article 78 of the CPLR

-against-

THE ADMINISTRATIVE BOARD OF THE NEW YORK STATE UNIFIED COURT SYSTEM, JANET DIFIORE, as Chief Judge of the New York State Unified Court System and LAWRENCE K. MARKS, as Chief Administrative Judge of the New York State Unified Court System,

Respondents/Defendants.

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INDEX NO.: 616980/2020
MOTION RETURN DATE: 12/7/20
MOTION SEQ. NO.: 002 MD
MOTION SEQ. NO.: 004 MD

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ORDERED that the branch of the respondents' cross-motion (Mot. Seq. 002) for an order pursuant to CPLR 511 to change the venue of this proceeding is denied; and it is further

ORDERED that the branch of the respondents' cross-motion (Mot. Seq. 002) for an order pursuant to CPLR 3211 dismissing this proceeding for failure to state a claim upon which relief may be granted is denied; and it is further

ORDERED that the branch of the respondents' motion (Mot. Seq. 002) for "reconsideration" pursuant to CPLR 2221(d) and (e) of this Court's Order to Show Cause dated November 5, 2020, and for a protective order pursuant to CPLR 3103(a) is denied; and it is further

ORDERED that the respondents' "Supplemental Motion" (Mot. Seq. 004) pursuant to CPLR 3211(a)(8) dismissing the proceeding for failure to obtain personal jurisdiction over the respondents is denied.

This matter was instituted by petitioners-plaintiffs (hereinafter"Petitioners") filing of a verified petition and complaint (hereinafter "Petition") on November 5, 2020, asserting that the respondents-defendants (hereinafter "Respondents") action in denying certification to Justices Gesmer, Friedman, Roman, and Leventhal was violative of lawful procedure, arbitrary and capricious, unconstitutional, and discriminatory. Petitioners allege seven causes of action seeking the review and nullification of Respondents denials of certification. The Administrative Board denied certification to 46 of the 49 justices who had attained the age of 70 as set forth in a memorandum issued by Chief Administrative Judge Lawrence Marks dated September 29, 2020. Specifically, the Appellate Division, Second Department will lose the services of two justices and Suffolk County will lose the services of three trial judges. Respondents contend that due to the COVID-19 pandemic that New York has experienced and is expected to continue experiencing multi-million dollar budget gaps over the next several years, and in response, the Governor has acted to reduce present spending on state operations by ten percent. Respondents further contend that the judiciary is expected to make budgetary adjustments to reduce its spending by the same ten percent amount as is required of all agencies in the executive branch of government.

Instead of serving an answer to the Petition together with a certified transcript of the record of the proceedings under consideration pursuant to CPLR 7804(d), the Respondents filed a motion (Mot. Seq. 002) for an order (1) changing venue, (2) dismissing the Petition pursuant to CPLR 3211 for failure to state a cause of action, and (3) granting "reconsideration" of this Court's order to show cause dated November 5, 2020, and for a protective order. The Petitioners oppose the motion.

Initially, the Petitioner's letter application dated December 7, 2020, to strike the Affirmation in Further Support of Respondents' Motion to Transfer, Dismiss and for a Protective Order filed by the Respondents on December 6, 2020, is denied. CPLR 2214(b) permits reply affidavits to be served at least one day before the time at which the motion is noticed to be heard. The Respondents' noticed the motion to be heard on December 7, 2020. Therefore, the Respondents' reply papers were properly filed.

Respondents move for an order pursuant to CPLR 506, 510, and 511 for a change of venue to Albany County, contending, *inter alia*, that the determination at issue was not made in Suffolk County and that there is potential for the appearance of impropriety, bias, or favoritism if this proceeding remains in Suffolk County. Specifically, Respondents maintain that the Administrative Board's decision to disapprove Petitioners' applications for certification occurred on September 22, 2020, at Court of Appeals Hall located in Albany County. Petitioners argue that venue in a special proceeding may properly lie in more than one county, and that venue of this proceeding is properly placed in Suffolk County as a county where material events took place.

CPLR 506(b) provides that a proceeding against a body or officer:

> shall be commenced in any county within the judicial district where the respondent made the determination complained of *or* refused to perform the duty specifically enjoined upon him by law, *or* where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, *or* where the material events otherwise took place, *or* where the principal office of the respondent is located (emphasis added).

Four potential bases for venue under CPLR 506(b) are "alternate options" and, accordingly, venue may lie in more than one county as a result. (*Matter of Hughes Hubbard & Reed, LLP v Civilian Complaint Review Bd.*, 53 Misc 3d 947[Sup Ct, Kings County 2016], *aff'd on the merits,* 171 AD3d 1064 [2d Dept 2019]). In this case, the third basis for venue, "where the material events otherwise took place," enables the Petitioners to properly place venue in Suffolk County. The Respondents' reading of CPLR 506(b) as mandating venue only in the judicial district where the determination complained of was made ignores the plain meaning of the word "or" in CPLR 506(b), which undeniably provides alternate options for venue of special proceedings (*see Hecht v New York State Teachers' Ret. Sys.*, 138 Misc2d 198 [Sup Ct, Suffolk County 1987]). It is clear that in this time of crisis due to the Covid-19 pandemic that the termination of trial judges in Suffolk County and Appellate Division Justices from the Second Department will significantly delay the resolution of cases, thereby greatly prejudicing litigants and their counsel in Suffolk County. Additionally, three Suffolk County Supreme Court Justices submitted applications for certification to the Administrative Board in order to continue serving as judges in Suffolk County. "Material events" occurred in Suffolk County, the county where the judges were not certificated, and where the consequences will be felt (*Riccelli Enters., Inc. v New York State Dept. of Envtl. Conservation*, 30 Misc 3d 573 [Sup Ct, Onondoga County 2010]; *Matter of Lacqua v O'Connell*, 280 AD 31 [1st Dept 1952]).

The Respondents assert that venue should be transferred to avoid the possible appearance of impropriety, bias or favoritism. Specifically, Respondents assert that the issue is, "whether the petitioner judges should be considered eligible to continue serving on that same court alongside the very judges who would hear any appeal in this matter." Further, Respondents emphasize that Suffolk County Supreme Court decisions are appealed to the Second Department, where two of the Petitioners and the Presiding Judge of the Second Department, a member of the Administrative Board, sit. Respondents contend that there could be "speculation about the professional, personal, or political motivations for any decision." Petitioners contend that transferring the matter to Albany County would create an even greater appearance of bias or favoritism as Albany County is where Chief Judge DiFiore presides. Petitioners further contend that the fact alone that two of the petitioners preside on the Appellate Division, Second Department is insufficient to justify a transfer of venue. Petitioners further argue that the risk of

a "close personal connection existing between a litigant and the judge presiding over this case is much greater in Albany than in Suffolk County," given the close geographic proximity of Supreme Court, Albany County to the Appellate Division, Third Department, and the Court of Appeals. This Court agrees. "The decision of whether to grant a change of venue is committed to the providently exercised discretion of the trial court" (*Xhika v Rocky Point Union Free School Dist.*, 125 AD3d 646 [2d Dept 2015]; see also *Milazzo v Long Is. Light Co.*, 106 AD2d 495 [2d Dept 1984]). Moreover, Respondents' argument is moot since the appeals filed in this action to date in the Appellate Division, Second Department have been transferred by the Second Department *sua sponte* to the Appellate Division, Third Department. Accordingly, Respondents' motion to change venue from Suffolk County to Albany County is denied.

"An article 78 proceeding is a special proceeding (CPLR 7804, subd.[a]), intended to be summarily decided 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' (CPLR 409 subd.[b]), and to be tried forthwith if a triable issue is raised (CPLR 7804 subd.[h])" (*Matter of Levien v Bd. of Zoning and Appeals of the Inc. Vill. of Russell Gardens*, 64 Misc2d 40, 41 [Sup Ct, Nassau County 1970, Meyer, J.). CPLR 7804(f) permits a respondent in an Article 78 proceeding to "raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for an answer." "An objection in point of law is not any legal issue raised in the proceeding, but is limited to threshold objections of the kind listed in CPLR 3211(a) which are capable of disposing of the case *without reaching the merits*" (*Matter of Hull-Hazard, Inc. v Roberts*, 129 AD2d 348 [3rd Dept 1987][emphasis added]).

Here, the Respondents' motion seeks dismissal of the petition under CPLR 3211. However, their motion should have been brought under CPLR 7804(f) which, as stated above, provides for motions upon objection in point of law to an Article 78 petition. "Such a motion is tantamount to a demurrer, assumes the truth of the allegations of the petition, and permits no consideration of facts alleged in support of the motion" (*Hondzinski v County of Erie*, 64 AD2d 864, 864 [4th Dept 1978]; *see Matter of Tipton v Suffolk County Civ. Serv. Comm.*, 43 AD2d 841 [2d Dept 1974]). Although the Respondents frame their argument as seeking dismissal of the petition because it fails to state a cause of action, they exclusively address the merits of the petition by arguing that they are entitled to judgment as a matter of law on each of the causes of action set forth in the petition. They fail to undertake any analysis of the pleading requirements for the claims asserted in the petition and fail to make any argument that the allegations do not sufficiently set forth the required elements of the various causes of action. Rather, Respondents submit what purports to be admissible evidence, including the affidavit of Chief Administrative Judge Marks and excerpts of New York State's FY 2021 Enacted Financial Budget Plan, in support of their motion and argue that such evidence demonstrates that the petition should be dismissed as a matter of law because the Respondents complied with their statutory and Constitutional obligations related to the certification process. Clearly such arguments go directly

to the merits of the various causes of action set forth in the petition and, therefore, are not procedurally appropriate for a pre-answer motion to dismiss the petition for failure to state a cause of action.

At this juncture, the Respondents' reliance on *Matter of Loehr v Administrative Bd. of the Cts. of the State of New York* (29 NY3d 374 [2017]) and *Matter of Marro v Bartlett* (46 NY2d 674 [1979]) is misplaced. Procedurally, neither *Loehr* nor *Marro* were decided on the merits in the context of a pre-answer motion to dismiss. Here, by contrast, the Respondents have not yet filed an answer nor have they filed a certified transcript of the record of the proceedings under consideration as required by CPLR 7804(e). Moreover, the "facts are not so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County* (63 NY2d 100, 102 [1984]). Therefore, it would be improper to reach the merits of this proceeding in deciding the Respondents' pre-answer motion to dismiss. Since the Respondents have failed to demonstrate that any of the causes of action contained in the petition fail to state a cause of action, that branch of the Respondents' motion is denied.

With regard to that branch of the Respondents' motion seeking "reconsideration" pursuant to CPLR 2221(d) and (e) of this Court's order to show cause dated November 5, 2020, and for a protective order, the Court notes that neither CPLR 2221(d) nor CPLR 2221(e) permit a motion for "reconsideration." Rather, CPLR 2221(d) allows a motion for leave to reargue and CPLR 2221(e) allows a motion for leave to renew. Therefore, the Court will treat this branch of Respondents' motion as seeking leave to reargue and renew.

In granting the Petitioners expedited discovery in the order to show cause dated November 5, 2020, this Court neither overlooked nor misapprehended any matters of fact or law (CPLR 2221[d][2]). Additionally, the Respondents have failed to set forth new facts not offered on the prior motion that would change the prior determination nor have they demonstrated that there has been a change in the law that would change the prior determination (CPLR 2221[e][3]). Therefore, the branch of the Respondents' motion pursuant to CPLR 2221(d) and (e) of this Court's Order to Show Cause dated November 5, 2020, and for a protective order is denied.

Despite receiving sufficient advance notice that the Petitioners were going to present an order to show cause to this Court on November 5, 2020, seeking, among other things, expedited discovery, no one on behalf of the Respondents appeared before this Court on November 5, 2020, in opposition to the order to show cause, nor did this Court receive any communication whatsoever from anyone on behalf of the Respondents before the order to show cause was signed. In fact, it was not until November 13, 2020, more than one week later, that the Respondents first raised an objection to this Court regarding the expedited discovery by filing the

instant motion, which was made returnable on December 7, 2020, nearly 20 days after the expedited discovery was directed to be completed. At this juncture, there is no procedural or factual basis for this Court to "reconsider" its prior order to show cause. Inasmuch as the temporary injunction imposed by the Appellate Division, Third Department on expedited discovery pending determination of the instant motions expires on its terms with the issuance of this order, the expedited discovery previously ordered by this Court shall proceed expeditiously.

On November 24, 2020, Respondents filed a "supplemental motion" (Mot. Seq. 004) to dismiss the proceeding for failure to obtain personal jurisdiction over the Respondents. Specifically, Respondents allege that the order to show cause by which Petitioners commenced this proceeding required personal service of the order and petition upon the Respondents on or before November 6, 2020. Respondents argue that they were never personally served with the order to show cause or petition, and that the only manner of service consisted of receiving an e-mailed copy of the order to show cause and supporting papers. Respondents further argue that Petitioners failure to serve the Attorney General is also a jurisdictional defect pursuant to CPLR 2214(d). Petitioners assert that personal service was attempted on the Respondents at the Office of Court Administration located at 25 Beaver Street, but the process server was informed by building security that the building was empty as all employees were working remotely. Petitioners further contend that the motion is untimely as it was filed eleven days after the deadline imposed by the court's order dated November 5, 2020.

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the court lacks personal jurisdiction (CPLR 3211[a][8]). However, a defense based on inadequate service or lack of personal jurisdiction is waived when a respondent fails to raise it in its first pleading (*Matter of Ballard v HSBC Bank USA*, 6 NY3d 658, 84 NE2d 1292, 815 NYS2d 915[2006]; *Addesso v Shemtob*, 70 NY2d 689, 512 NE2d 314, 518 NYS2d 793[1987]) .

Respondents' "supplemental motion to dismiss" was made on November 24, 2020, 19 days after the action was commenced. Moreover, counsel for the Respondents admitted on the record on November 18, 2020 that they had been "served on the 6th" and concede they were also served by e-mail. The affidavit of Petitioners' process server reveals that attempts were made at personal service on November 6, 2020, at 4:00 p.m. and November 10, 2020, at 11:25 a.m and the process server was advised that no one was in the building to accept service of legal documents.

Shortly after this proceeding was commenced, Respondents' counsel began participating in the litigation by filing a demand for a change of venue, filing a motion to dismiss, appearing before this Court on November 18, 2020, and November 19, 2020, for oral argument in opposition to Petitioners' proposed order to show cause to hold the Respondents in contempt of

court for failing to comply with this Court's directives regarding expedited discovery, conferencing with Petitioners' counsel and this Court and stipulating to limited discovery. At no time during the aforementioned proceedings did Respondents' counsel ever raise the issue of improper service. This issue was not raised until the filing of the "supplemental motion to dismiss" on November 24, 2020. As Respondents admit to having been aware of the proceedings in this action at all relevant times, and having actively participated in the litigation prior to raising the issue of lack of personal jurisdiction for the first time on November 24, 2020, and having argued for dismissal of the petition on the merits as a matter of law, the Court finds that Respondents have waived this defense (*see JP Morgan Chase Bank, Natl. Assoc. v Lee*, 186 AD3d 685, 686 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1010 [2d Dept 2020]). Therefore, the Respondents' "supplemental" motion is denied.

The remaining contentions of the parties either need not be addressed or are without merit.

Dated: December 10, 2020

J.S.C.

HON. PAUL J. BAISLEY, JR.