Matter of McCurry v New York State Off. for People with Dev. Disabilities

2013 NY Slip Op 30727(U)

January 17, 2013

Supreme Court, Albany County

Docket Number: 663-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
FREDERICK McCURRY,

Petitioner,

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

-against-

THE NEW YORK STATE OFFICE FOR PEOPLE WITH
DEVELOPMENTAL DISABILITIES,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-12-ST3359 Index No. 663-12

Appearances: Scoppetta Seiff Kretz & Abercrombie
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner, Frederick McCurry, is the former executive director of Tanglewood Acres Adult Home, Inc. ("Tanglewood"), a non-profit group home providing housing and services in a family-like setting to around a dozen mostly elderly people with developmental

disabilities. Respondent is the state agency responsible for ensuring that people with developmental disabilities receive adequate, skilled, and safe care and supervision. The Hudson Valley Developmental Disabilities Services Office ("Hudson Valley DDSO") is one of 14 regional offices operated by respondent and is the regional office responsible for coordination and delivery of services to people at Tanglewood.

GM, a 47 year-old man who lived at Tanglewood for nearly thirty years, was diagnosed with Moderate Mental Retardation, Mood Disorder (Not Otherwise Specified), Intermittent Explosive Disorder and various medical conditions. It is undisputed that during much of this time he engaged in a pattern of intermittent violent behavior, but that for the most part the behavior was successfully managed by petitioner and Tanglewood's staff. Upon loss of full-time employment at an outside company in 2008, GM became increasingly violent. This includes incidents where GM attacked several other elderly Tanglewood consumers and staff, where he hurt himself, destroyed property, pulled fire-alarms, made repeated false accusations of sexual abuse against almost all of the male staff members, and made sexual attacks on female staff.

There is evidence that GM's violent misbehavior had a negative impact on the dozen other consumers at Tanglewood, some of whom desired to leave Tanglewood due to GM's attacks on themselves and/or other Tanglewood consumers. There is evidence that GM's allegations of sexual abuse caused disruptions in management of the Tanglewood facility. Staff members who were accused of sexual abuse could not interact with GM until after the complaint was investigated. New staff would need to be hired and assigned, to assure that there was no interaction between GM and the staff that GM had previously accused.

The petitioner concluded that GM should be removed from Tanglewood to another facility which could better control petitioner's behavior. GM's family, who wanted GM to remain at Tanglewood, opposed petitioner's efforts to remove GM to another facility. On June 10, 2010 a hearing was conducted by respondent's hearing officer Kevin E. O'Dell ("O'Dell") pursuant to 14 NYCRR § 633.12. O'Dell acknowledged in his June 15, 2012 Report that GM had attacked at least three other Tanglewood consumers during the months before the hearing. O'Dell acknowledged that the psychiatrist concluded that GM was "targeting vulnerable consumers" and should "be placed in an intensive setting to unlearn his dangerous maladaptive behaviors." O'Dell did not find that GM's abuse was prompted by other consumers or staff at Tanglewood. O'Dell determined that GM should get another chance to stay at Tanglewood and denied Tanglewood's application to have GM moved. O'Dell decided that more effort needed to be made to implement a behavior modification plan authored by Hudson Valley DDSO Deputy Director Joan Higgins, and approved by Dr. Rupp-Goolnick in March 2010. O'Dell ordered Tanglewood to make further efforts to modify GM's maladaptive behavior.

O'Dell also recognized that petitioner's interest in protecting Tanglewood's other consumers and GM's sister's interest in protecting GM from leaving his home of nearly 30 years had devolved into a "competition" between petitioner and GM's sister. O'Dell urged both petitioner and GM's sister to repair their relationship or recuse themselves from managing GM's program plan.

Subsequent to this, GM's brother complained to the New York State Commission of Quality Care that GM was being mistreated by unknown Tanglewood staff. The brother's

abuse complaint required that Hudson Valley DDSO remove GM from Tanglewood for his own protection. GM was placed at Camp Hill, a group home operated by Hudson Valley DDSO.

The charge of abuse prompted the commencement of an investigation. Respondent's employee Barbara L. Huff ("Huff") was assigned to conduct the investigation. She was assisted by one Elaine Zoldan ("Zoldan"). Together, they reviewed 64 documents and 59 statements (given by residence counselors, other staff members, family members and others). They conducted 12 interviews, and ultimately issued a 30 page Incident Investigation Report (the "Huff-Zoldan Report" or "Report") dated October 12, 2010 (revised November 24, 2010). The Report found that "[t]he allegation of psychological abuse of [GM] by staff at Tanglewood Acres is substantiated." It mentioned that GM "has been subjected to humiliation and scorn since he was chastised in front of his family by Mr. McCurry and was provoked to exhibit negative and aggressive behaviors resulting in hospitalization." The Report described alleged incidents during which GM would commence exhibiting aggressive behaviors, where the petitioner would not be physically present on-premises to immediately address the problem. In such situations, the petitioner would be contacted, and GM would be restrained in a SCIP[1] hold until such time as the petitioner could arrive at the Tanglewood facility "to lecture [GM]". The Report indicates that there is circumstantial evidence that GM may have been provoked during some incidents, causing an escalation in violence which resulted in the need to call 911 for assistance. The Report mentions that there existed an

[1]An acronym for Strategies in Crisis Intervention & Prevention.

"overwhelming negativity and lack of empathy for [GM, which] created an atmosphere of psychological abuse"; and that GM "did not comprehend why he was being provoked and why he was to be expelled from Tanglewood Acres, but he felt the pressure of being forced out." Notably however, the Report failed, to a great extent, to present detailed factual information to support the investigators' conclusions.

As relevant here, the Report recommended that the investigation, and the conclusion that GM had been psychologically abused, be shared with the Board of Directors of Tanglewood. It also recommended that the petitioner and his staff be re-trained in the definitions of abuse and how to appropriately handle individuals with behavioral issues. Notwithstanding the finding of abuse, the Report made no recommendation that any member of the Tanglewood staff be punished. The Report was subsequently adopted by Hudson Valley DDSO's Quality Improvement Coordinator Larry Kravitz ("Kravitz").

GM died on February 9, 2011, while a resident of Hudson Valley DDSO's Camp Hill facility. On February 10, 2011 Kravitz mailed the Report to Tanglewood's Board. Kravitz advised that the abuse investigation was closed, that the Report was privileged and confidential and intended for the Board's eyes only and that further dissemination was prohibited. Kravitz requested that Tanglewood's Board take the necessary actions to resolve outstanding issues raised in the Report and complete all recommendations and provide its written response to the Report on or before March 18, 2011. Tanglewood's Board did not agree with the finding that petitioner had abused GM and did not comply with Kravitz's request for a written response to the report's conclusions and recommendations.

As a result of the Tanglewood Board's failure to respond, on August 24, 2011 respondent's Acting Deputy Commissioner, James F. Moran ("Moran"), wrote a letter to both petitioner and Tanglewood's Board President informing them that respondent was issuing Tanglewood a 45-day letter based on its non-compliance. Tanglewood's Board did not agree with respondent's findings and did not comply with respondent's recommendations.

Moran and eight other agency employees followed up by meeting with Tanglewood's Board and staff, including petitioner, on September 28, 2011. Following the meeting, on September 30, 2011, Moran sent a letter to the Tanglewood board which recited that Tanglewood

> "has an obligation to follow its own policies and to take appropriate action against your Executive Director with regard to the substantiated abuse. You have failed to do so and this is unacceptable. Your Board must immediately address, in a meaningful and substantial way, the allegations substantiated in these reports."

Five days later on October 5, 2011, Moran imposed a $3,000 fine on Tanglewood for among other things, its failure to

> "address the substantiated allegation of abuse against your Executive Director as evidenced in the SOD dated August 8, 2011 for the July 27, 2011 visit."

On October 6, 2011, Tanglewood's Board complied with Moran's demand for "meaningful and substantial" action against petitioner by informing petitioner that he was terminated.

On October 24, 2011, Travis T. Proulx ("Proulx") respondent's Director of Communications issued a press release in which respondent announced various areas of reform including holding nonprofit providers accountable for various deficiencies. In

response to a The Journal News reporter's requests for further details regarding any affected facilities in that newspaper's region, Proulx e-mailed a copy of both Moran's October 5, 2011 letter to Tanglewood which includes the reference to "the substantiated allegation of abuse against your Executive Director" and a copy of Moran's August 24, 2011 letter which identifies petitioner as Tanglewood's "Executive Director." The Journal News published an article on October 25, 2011 reporting that Tanglewood had been fined $3,000 for among other things its failure to "address the substantiated allegation of abuse against [its] Executive Director," and that "[t]he executive director has resigned over the psychological abuse case that involved someone in the group's care."

The petitioner commenced the above-captioned CPLR Article 78 proceeding to review the finding set forth in the Report that petitioner psychologically abused GM, and subsequent demands that Tanglewood take action against petitioner on the grounds that respondent's determination was made in violation of lawful procedure, was arbitrary and capricious and violated petitioner's due process rights and liberty interests. Petitioner seeks an order vacating respondent's determination and expunging it from all of respondent's records or, in the alternative, for a name-clearing hearing. In support of the application, the petitioner indicates that GM resided at Tanglewood for 29 years and has had behavioral problems from the very first day of his admission. The petitioner indicates that for the last 15 years he accompanied GM on annual vacations with GM's family to Myrtle Beach or the Jersey Shore; and that he "practically raised GM at Tanglewood for 29 of the 47 years of his life. According to the petitioner, GM's behavioral problems escalated in 2008 after GM lost his job. The petitioner avers that the job-loss adversely effected GM because he functioned

best in a structured vocational environment. The petitioner also mentions that GM enjoyed making money so he could accompany the petitioner on vacations "all over the United States, from California to Florida, Mexico to Canada and numerous states in between." The petitioner indicates that after the loss of his job, GM became much more disruptive, assaulting other house residents, assaulting staff, accusing male staff of sex abuse, yelling, screaming, biting himself (and staff), and pulling fire alarms. The petitioner maintains that during his 30 years at Tanglewood he (the petitioner) had an exemplary record on annual surveys of the respondent, and was never the subject of disciplinary action. He indicates that he received excellent reviews from the Tanglewood Board, as well as from staff and family members of consumers. Lastly, the petitioner states that since termination from his position with Tanglewood, he has been unable to secure other employment, by reason that prospective employers request information with regard to why he was discharged.

The Respondent has served an answer which raises a number of affirmative defenses and objections in point of law. Among them, that the petition fails to state a cause of action, that the proceeding is time-barred, that the petitioner does not have standing, and failure to join a necessary party.

The Court is of the view that the petition fundamentally sets forth two causes of action: (1) a CPLR Article 78 challenge seeking annulment of the Huff-Zoldan Report insofar as it finds that the petitioner psychologically abused GM; and (2) a request for a name clearing hearing.

CPLR Article 78 Challenge To Huff-Zoldan Report

Among the defenses raised by the respondent is one predicated on petitioner's alleged lack of standing. The Court notes that this is a threshold issue and a litigant must establish standing in order to seek judicial review (see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991]). Standing involves a two part test. "First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (NY State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 207, at 211 [2002], citing Society of Plastics Indus. v County of Suffolk, supra, and Matter of Colella v Board of Assessors, 95 NY2d 401, 409-410 [2000]; see also Graziano v County of Albany, 3 NY3d 475, at 479 [2004]). With regard to the second requirement, the aggrieved party must demonstrate "special damage", different in kind and degree from the community generally (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 413).

In this instance, the Court is of the view that issuance of the Report itself did not cause the petitioner injury in any tangible sense, and did not implicate the Due Process rights discussed below. Aside from containing a recommendation that the Tanglewood staff be retrained, it did not impose any form of punishment upon the petitioner. Retraining is not a penalty. Standing alone, the Report caused the petitioner no injury, since it did not direct (or even recommend) that any adverse action be taken against him. Apart from the foregoing, the injury which the petitioner claims to have sustained does not fall within the

zone of interests or concerns sought to be promoted or protected by the Mental Hygiene Law, the statute under which the respondent acted (see Mental Hygiene Law §§ 13.01, 13.07 [c], 13.09 [b], 13.21 [b], 13.33, 16.01, 16.13, 16.17, 16.19, 29.29, 33.03, 41.41, and 45.19, all of which deal with the care, treatment and protection of persons with developmental disabilities). In the Court's view, the petitioner did not establish standing under either prong of the two-part test. For this reason the petition, to the extent that it seeks to annul the Huff-Zoldan Report under CPLR 7801 and 7803, must be dismissed.

Petitioner's Request For A Name Clearing Hearing

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the similar provision contained in our State Constitution prohibit the government from depriving a person of "life, liberty or property without due process of law" (US Const 14th Amend; NY Const, art I, § 6). Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests (Mathews v Eldridge, 424 US 319, 332 [1976]). The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner (Armstrong v Manzo, 380 US 545, 552 [1965]). Whether the constitutional guarantee applies depends on whether the government's actions impair a protected liberty or property interest (Matter of Lee TT. v Dowling, 87 NY2d 699, 707 [1996]).

A name clearing hearing "is a remedy for the deprivation of a person's due process right when an employee is terminated along with a contemporaneous public announcement of stigmatizing factors, including illegality, dishonesty, immorality, or a serious denigration

of the employee's competence" (Aquilone v City of New York, 262 AD2d 13 [1st Dept., 1999], at 13). The Second Circuit Court of Appeals, in Donato v Plainview-Old Bethpage Cent. Sch. Dist. (96 F3d 623 [2d Cir., 1996]), provided a cogent explanation with regard to relevant due process considerations:

> "[A]s understood by the Fourteenth Amendment, a decision not to reemploy, standing alone, does not deprive an employee of liberty, Board of Regents v Roth, 497 US 564, at 575. Special aggravating circumstances are needed to implicate a liberty interest. For instance, when the state fires an employee and publicly charges that she acted dishonestly or immorally, due process guarantees the employee an opportunity to defend her 'good name, reputation, honor or integrity.' Id. at 573 (quoting Wisconsin v. Constantineau, 400 US 433, 437, 27 L. Ed. 2d 515, 91 S. Ct. 507 [1971]). A free-standing defamatory statement made by a state official about an employee is not a constitutional deprivation. Instead, it is properly viewed as a state tort of defamation. But a defamatory statement about an employee implicates a liberty interest when it is made during the course of that employee's termination from employment. See Paul v Davis, 424 US 693, 709-10, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976); Martz [v Incorporated Village of Valley Stream], 22 F3d [26] at 32 ('concurrent temporal link between the defamation and the dismissal is necessary' to claim a deprivation of liberty); Easton v. Sundram, 947 F.2d 1011, 1016 (2d Cir. 1991) (requiring 'stigma plus'), cert. denied, 504 U.S. 911, 118 L. Ed. 2d 548, 112 S. Ct. 1943 [1992])" (Donato v Plainview-Old Bethpage Cent. Sch. Dist., supra, at 630)

There are three elements to a cause of action for a name clearing hearing: a statement which is alleged to be false and defamatory, which stigmatizes the individual in the constitutional sense in a manner which forecloses future employment opportunities; loss of employment; and dissemination of the defamatory information (see Swinton v Safir, 93

NY2d 758, 763-766 [1999]). Where the foregoing elements are present, the Court may order a name clearing hearing.

Turning first to respondent's argument that Tanglewood is a necessary party and the proceeding should be dismissed by reason that the petitioner failed to join Tanglewood, the Court notes that CPLR § 1001 contemplates joinder of all persons who ought to be parties if complete relief is to be accorded between the parties to the action or who might be adversely or inequitably affected by a judgment in the action (Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761, 763 [3d Dept., 2000]; Matter of Martin v Ronan, 47 NY2d 486, 490 [1979]). A party whose interest may be inequitably or adversely affected by a potential judgment must be made a party in a CPLR Article 78 proceeding (CPLR § 1001[a]; Windy Ridge Farm v Assessor of Town of Shandaken, 45 AD3d 1099, 1099 [3d Dept., 2007]; Haddad v City of Hudson, 6 AD3d 1018, 1019 [3d Dept., 2004]; Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761, 763 [3d Dept., 2000]). Compulsory joinder of parties avoids multiplicity of actions and protects nonparties whose rights should not be jeopardized if they have a material interest in the subject matter of litigation (Joanne S. v Carey, 115 AD2d 4, 7 [1st Dept., 1986]). In the Court's view, inasmuch as the petitioner does not seek reinstatement to his position or back pay, there is no need to join Tanglewood to the instant proceeding. Nor does the Court discern how or in what respect Tanglewood would be prejudiced by nonjoinder. The Court finds that the defense has no merit.

With regard to the statute of limitations, as discussed in greater detail below, the Court finds that the cause of action accrued when there was a public dissemination of the

underlying reason for petitioner's discharge from employment, which occurred on October 25, 2011. On that date, all of the elements to the cause of action were present. This being so, even if the Court were required to apply the four month statute of limitations under CPLR 217, the Court would find that the proceeding was timely commenced on February 2, 2012.

In contrast to the Court's discussion with respect to a CPLR Article 78 challenge to the Huff-Zoldan Report (supra), the Court finds that the petitioner has alleged facts supporting his claim that he has been suffered injury through his discharge from employment, coupled with dissemination of the alleged defamatory statement (which he claims is untrue). In addition, he would appear to be within the zone of interest sought to be protected under the Due Process clause by reason of the stigmatizing nature of the charge (see Swinton v Safir, 93 NY2d 759, supra, at 763). Specifically, the petitioner has alleged that the Huff-Zoldan Report is false and defamatory with regard to allegations of his psychological abuse of GM. It is undisputed that the petitioner was discharged from his employment at Tanglewood. He has presented evidence that the defamatory information was published in a local newspaper, and alleges that the charge of psychological abuse effectively precludes his ability to obtain future employment in his chosen field (see Swinton v Safir, 93 NY2d 758, supra). In a case having similarities to the one at bar, it was held that a charge of patient abuse against a care-giver was "of a stigmatizing nature" (Wright v Guarinello, 165 Misc2d 720 [Sup. Ct., Kings Co., 1995], in which the Court directed that a name clearing hearing be conducted by OMRDD, where the petitioner, an employee of a not-for-profit social service agency serving people with developmental disabilities, had been accused of patient abuse).

The respondent argues that the name clearing proceeding is not applicable here, by reason that the petitioner was not a government employee. The Court understands the argument, but does not agree. In this particular instance, the petitioner asserts that the respondent's employees pressured the Tanglewood Board of Directors to discharge him. Indeed, as noted, it appears that James F. Moran, respondent's Acting Executive Deputy Commission, sent three letters to the Tanglewood Board of Directors (dated August 24, 2011, September 30, 2011 and October 5, 2011). The first letter placed Tanglewood on "Early Alert Status", which apparently imposed an additional layer of supervision on the agency by reason of "substantial regulatory noncompliance". The latter two letters criticized the Tanglewood Board for their lack of a response to "substantiated allegations of abuse", and the failure to take appropriate action against their Executive Director. In this respect it is arguable that governmental action, through use of an allegedly defamatory statement, caused the petitioner to be discharged. Moreover, as noted, the situation at bar is almost identical to the one in Wright v Guarinello (supra), in that the plaintiff in Wright was not a government employee, but rather was an employee of a not-for-profit corporation comparable to Tanglewood. The Court further finds that there was public dissemination of information sufficient to identify the petitioner, through the newspaper article published in The Journal News on October 25, 2011, which indicated that Tanglewood had been fined $3,000 by reason of its failure to address the substantiated allegation of abuse against its Executive Director.

The Court finds that the petitioner demonstrated, prima facie, entitlement to a name clearing hearing. The Court concludes that the instant matter must be remanded to the respondent for the conduct of a name clearing hearing and, if the findings warrant,

expungement of Huff-Zoldan Report and conclusions, and all references thereto (see Budd v Kelly, 14 AD3d 437 [1st Dept., 2005], Held: Order denying petition brought pursuant to CPLR Article 78 seeking to annul termination of petitioner's employment without a hearing, but remanding the matter to respondent for a name-clearing hearing, unanimously affirmed).

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly it is

ORDERED and ADJUDGED, that the petition is granted to the limited extent that the matter be remanded to the respondent for the conduct of a name clearing hearing in keeping with this decision/order/judgment, but is otherwise denied and dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the petitioner. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: January 17, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Petition dated January 31, 2012, with exhibits annexed;
2. Affidavit of Frederick McCurry dated January 31, 2012;
3. Memorandum of Law dated January 31, 2012;
4. Answer dated April 27, 2012, with exhibits annexed;
5. Affidavit of Travis T. Proulx dated April 18, 2012;
6. Affidavit of Ann B. Sartoris dated April 13, 2012;
7. Affidavit of Shari R. Bakst dated April 16, 2012;
8. Affidavit of Mary K. Newhard dated April 17, 2012;
9. Affidavit of Michael P. Kirchmer dated April 16, 2012;
10. Affidavit of Maureen A. Stone dated April 16, 2012;
11. Memorandum of Law dated April 27, 2012;
12. Affidavit of Kathleen R. Cardinale dated May 29, 2012;
13. Affidavit of Yoshihiro Yamazaki dated May 29, 2012;
14. Memorandum of Law dated May 29, 2012.

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit C, Hearing Officer's Report Dated June 15, 2010, and respondent's Exhibit E, Undated Incident Investigation Report,

For good cause shown it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: January 17, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice