Matter of Liao v Fonda
2013 NY Slip Op 33353(U)
December 27, 2013
Sup Ct, St. Lawrence County
Docket Number: 141624
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
SHIH-SIANG SHAWN LIAO,#10-R-0674,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND ORDER
RJI #44-1-2013-0455.27
INDEX #141624
ORI # NY044015J

-against-

VERNON J. FONDA, Inspector General,
NYS Department of Corrections and
Community Supervision,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Shih-Siang Shawn Liao, verified on July 1, 2013 and filed in the St. Lawrence County Clerk's office on July 9, 2013. Petitioner, who is an inmate at the Riverview Correctional Facility, seeks relief in the nature of mandamus to compel the removal of alleged erroneous information from his institutional parole records. The Court issued an Order to Show Cause on July 25, 2013 and has received and reviewed respondent's Answer/Return, including Confidential Exhibits B, E, and F, verified on September 26, 2013, as well as petitioner's Reply thereto, sworn to on October 18, 2013 and filed in the St. Lawrence County Clerk's office on October 22, 2013.

At this juncture it is noted that in a proceeding of this nature - mandamus to compel the removal of alleged erroneous information from a DOCCS inmate's parole records - the Court does not find it appropriate to address the issue of how such information may have been utilized in the context of previous parole board appearances or may properly be utilized in the context of future Parole Board appearances. Rather, the Court will limit its inquiry in the case at bar to the issue of whether or not the information

in question is in fact erroneous, as alleged by petitioner. If so, the Court will direct removal of such information from petitioner's records. If not, the petition will be dismissed.

On March 1, 2010 petitioner was sentenced in Supreme Court, Queens County, to an indeterminate sentence of 3 to 9 years upon his conviction of the crime of Grand Larceny 2°. The criminal act underlying this conviction/sentencing involved the petitioner fraudulently receiving a $360,000.00 loan in the name of his mother-in-law, secured by a mortgage on a condominium owned by the mother-in-law, all without her authorization or knowledge.

At his March 1, 2010 sentencing petitioner signed an Affidavit of Confession of Judgment in the amount of $438,892.00 in favor of Chase Home Finance LLC and a separate Affidavit of Confession of Judgment in the amount $6,000.00 in favor of his mother-in-law. After being advised by petitioner's attorney that these affidavits had been executed, the sentencing judge placed the following history on the record:

> "Mr. Liao, when you took this plea on December 16th of the year 2008, the promise of the Court was that if you made restitution of $450,000 on the date of sentencing and you came back [to] the Court and you commit no new crimes, the plea to the felony would be vacated and on the misdemeanor you'll be sentenced to a conditional discharge.
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> If on the other hand, you made restitution of $2,000 [sic] on the date of sentencing and you came back [to] the Court and committed no new crimes and then on the felony, I would be sentencing you to probation with the additional condition you make restitution of the additional $200,000.
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> If on the other hand you fail to make any restitution, but you came back to court and you committed no new crimes, then on the felony, you'd be sentenced to an indeterminate sentence having a minimum of one year in jail with the maximum of three years in jail with the further understanding [that if] you fail to come back to court or you were to commit a new crime, then you would face a maximum sentence allowable by law which is 15 years in jail.

> The case was then adjourned for June 30th of 2009 for sentencing, some seven months after you took the plea. On June 30th of 2009, you didn't come back to court and a bench warrant was stayed for one week to see whether or not you would actually come back. You failed to come back to court.
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> On January 18th of 2010 you were returned only because the People extradited you and you came involuntarily. The case was then put on for January 26th for your attorney to be here. On January 26th your attorney couldn't make it on that date, at which point the case was put on for January 28th. At that point, the case was then adjourned for February 10th for you to make restitution.
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> At that point, you told the Court you would be able to make restitution of $448,892; at which point you would be sentenced to an indeterminate sentence having the minimum of one year in jail, the maximum of three years in jail.
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> On February 10th, it was a snow day, court was closed, the case was then adjourned to February 17th. On that date, your counsel was unavailable. The case was adjourned to today. At this point no restitution has been made. You've violated the conditions of the plea; in light of that you're sentenced to an indeterminate sentence having the minimum of three years in jail with the maximum of nine years in jail. There is a mandatory surcharge of $270 plus a $50 DNA fee which will be taken from inmate funds."

Notwithstanding the foregoing, the sentencing court did not order restitution pursuant to Penal Law §60.27.

In this proceeding a Court order is sought directing the " . . . removal of erroneous information from petitioner's institutional records with respect to inferences or references made about restitution or court-ordered restitution . . ." The Court notes that in the Inmate Status Report prepared in anticipation of petitioner's June, 2012 merit board appearance the following statement is included under the heading "SUPERVISION NEEDS": "Note is made of the nature and circumstances of this present offense and the indication that there is restitution ordered in this case. Note is made that this subject [petitioner] has viable employment . . . upon release which will allow the subject to

support himself and pay court ordered restitution . . .” In addition, under the “SPECIAL CONDITIONS RECOMMENDED” heading the following is proposed: “ 20. Comply with all court orders including those ordering fines, surcharges and/or restitution.”

Respondent, although asserting that petitioner has continuously and consistently acknowledged that he owes restitution, nevertheless “ . . . concedes the Sentence and Commitment order does not explicitly order restitution . . . Thus, Respondent has agreed to amend the ISR [Inmate Status Report] to remove references to ‘court-ordered’ restitution. Those documents will now simply acknowledged restitution is owed in this matter.” (Citations to exhibits omitted). Notwithstanding the foregoing, the respondent did not set forth in his answering papers the precise language to be included in the amended Inmate Status Report.

In his Reply, petitioner purports to decline what he characterizes as respondent’s “offer” to amend the Inmate Status Report. According to petitioner, “[t]he purpose of the ISR is for the Parole Board to ascertain whether certain conditions as required by law should be placed upon a parolee as condition(s) of his parole release, including any fine, restitution, or reparation that must be collected as part of the conviction.” In the absence of a formal restitution order, petitioner therefore urges that “ . . . there is no base [sic] for the Parole Board to make inferences and/or references about any type of restitution in the ISR.”

Petitioner’s assertion to the contrary notwithstanding, the Court finds that the purpose of the Inmate Status Report is broader than simply ascertaining “ . . . whether certain conditions as required by law should be placed upon a parolee as condition(s) of his parole release . . .” Even after the 2011 merger of the New York State Division of Parole with the New York State Department of Correctional Services into the New York State Department of Corrections and Community Supervision, the New York State Board

of Parole has independently maintained " . . . the power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole . . . and when and under what conditions . . ." Executive Law §259-c(1). DOCCS, in turn, is now statutorily charged with the " . . . responsibility for the preparation of reports and other data required by the state board of parole in the exercise of its independent decision making functions." Correction Law §201(1). In view of the foregoing, the Court finds that an Inmate Status Report, prepared by DOCCS employees in anticipation of an inmate's appearance before a Parole Board for discretionary release consideration, may properly include information potentially relevant to the issue of whether or not the inmate in question should be released to parole supervision as well as information potentially relevant to the issue of what condition(s) should be imposed if such inmate is to be released. Obviously, however, any such information must be accurate.

In the case at bar the Court has serious concerns with respect to respondent's proposed Amendment to the Inmate Status Report, which would apparently remove all references to "court-ordered" restitution but retain language to the effect that "restitution is owed" by petitioner. In this regard the Court finds that any use of the word "restitution" in the Inmate Status Report (even without the reference to "court-ordered") is susceptible to misinterpretation since the word "restitution", while having an ordinary dictionary meaning, is also a term of legal art under the provisions of Penal Law §60.27. The Court is thus concerned that any reference to "restitution" in the Inmate Status Report might easily be misinterpreted as a reference to court-ordered restitution. In addition, even if the Court were not concerned with the potential misinterpretation of a simple "restitution is owed" reference, such statement appears to go beyond the reporting of potentially relevant facts and into an area bordering on, although perhaps not quite

reaching, moral judgment (i.e. the respondent should do the right thing and make restitution). The Court therefore finds that this type of conclusory statement goes beyond the proper role of DOCCS in the " . . . preparation of reports and other data required by the state board of parole in the exercise of its independent decision making functions." Correction Law §201(1). Notwithstanding the foregoing, the Court finds it proper and appropriate that the Inmate Status Report include reference to potentially relevant facts, including that petitioner executed the confessions of judgment at sentencing, that petitioner acknowledged his intent to pay back the fraudulently obtained funds and otherwise make his victims whole and that petitioner has not paid back any monies to date.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that DOCCS officials forthwith amend the Inmate Status Report, as is deemed appropriate but not inconsistent with the provisions of this Decision and Order; and it is further

ORDERED, that DOCCS officials file a copy of the Amended Inmate Status Report, on notice to petitioner, on or before January 17, 2014; and it is further

ORDERED, that petitioner submit any objections with respect to the Amended Inmate Status Report on or before January 31, 2014.

Dated: December 27, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court