

<b>Matter of Allah v Kiroy</b>
2015 NY Slip Op 31823(U)
August 17, 2015
Supreme Court, Clinton County
Docket Number: 2015-567
Judge: S. Peter Feldstein
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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF CLINTON**

**X**

In the Matter of the Application of  
**WAHEEM ALLAH, #13-A-3263,**  
Petitioner,

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

**DECISION, ORDER AND  
JUDGMENT**

**RJI #09-1-2015-0201.06**

**INDEX #2015-567**

**ORI #NY009013J**

-against-

**L. KIROY, LT. MILLER, D. LUCIA**  
and **REVIEW OFFICER,**

Respondents.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated “AFFIRMATION in Support of Petition Challenging Disciplinary Disposition Pursuant to Article 78 CPLR”) of Waheem Allah, dated February 18, 2014 and filed in the Clinton County Clerk’s office on April 20, 2015. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the results of Tier II Disciplinary Hearing held at the Clinton Correctional Facility on February 7, 2014. The Court issued an Order to Show Cause on April 30, 2015 and has received and reviewed respondents’ Notice of Motion to Dismiss, supported by the Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated July 2, 2015. The Court has also received and reviewed petitioner’s Affirmation in Opposition, dated July 23, 2015 and filed in the Clinton County Clerk’s office on July 29, 2015.

As the result of an incident that occurred at the Clinton Correctional Facility on February 4, 2014 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (direct order), 109.10 (out of place) and 109.12 (inmate movement violation). A Tier II Disciplinary Hearing was held at Clinton on February 7,

2014. At the conclusion of the hearing petitioner was found guilty of all three charges and a disposition was imposed confining him on keeplock status for 15 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing of February 7, 2014 were affirmed, as set forth in an Interdepartmental Communication to petitioner from Correction Captain Lucia dated February 13, 2014. This proceeding ensued.

Respondents' motion is premised upon the assertion that this proceeding was not commenced until April 20, 2015 when the Petition, dated February 18, 2014, was filed in the Clinton County Clerk's office (*see* CPLR §304(a)), which is more than four months after the determination sought to be reviewed became final and binding on petitioner. Accordingly, respondents request that the petition be dismissed as time barred under the four-month statute of limitations set forth in CPLR §217(1).

In opposing the motion to dismiss petitioner asserts that this proceeding should be deemed commenced as of February 28, 2014, when the Petition was initially received in the Court Clerk's office. Petitioner argues that an unidentified representative of the Clinton County Clerk's office unlawfully refused to file his papers and instead returned them with a written memorandum dated February 28, 2014.

Under the relevant provisions of CPLR §304(a) a special proceeding, such as a CPLR Article 78 proceeding (*see* CPLR §7804(a)), “. . . is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter [the CPLR].” CPLR §2102(a) provides in relevant part that “[i]n [a] proceeding in supreme . . . court . . . papers required to be filed shall be filed with the clerk of the county in which the proceeding is brought.” (Emphasis added). “A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts . . .” CPLR §2102(c).

It is clear that petitioner attempted to commence this CPLR Article 78 proceeding in a timely manner during the month of February 2014. By memorandum dated February 28, 2014, however, an unidentified representative of the Clinton County Clerk's office advised petitioner as follows:

“Your recent letter has been received in this office. It appears that you have attempted to start an Article 78 proceeding; however you have been directing your mailings to the Court Clerk's Office. The Court Clerk's Office has in turn re-directed your letter to this office. Since you have never applied to this office for an Index Number, etc. to begin the Article 78 proceeding, your papers have been returned.

If you wish to commence an Article 78 proceeding, please forward your Index Number Application, Request for Judicial Intervention, Poor Person Application (if you are unable to pay fees) and your Petition and/or any other required documents to this office.”

While it is not altogether clear what documents were received in the Clinton County Clerk's office on or about February 28, 2014, it does appear that such documents included the Petition (denominated “AFFIRMATION in Support of Petition Challenging Disciplinary Disposition Pursuant to Article 78 CPLR”), dated February 28, 2014, that was ultimately filed in the Clinton County Clerk's office on April 20, 2015. It also appear that the papers received in the Clinton County Clerk's office on or about February 28, 2014 included petitioner's unsworn “Affirmation of Poverty,” dated February 18, 2014. In that affirmation petitioner stated that he was without cash/assets and requested “. . . that he be allowed to prosecute the foregoing Art. 78 pursuant to CPLR 1101 . . .”

Under the provisions of §202.5(d)(1)(i) of the Uniform Rules for the New York State Trial Courts (adopted by order of the Chief Administrative Judge) a County Clerk shall refuse to accept for filing a paper that does not have an index number. While an index number is ordinarily obtained upon application to the County Clerk accompanied by the requisite fee (currently \$190.00 pursuant to CPLR §8018(a)(1)(i)), an alternative

procedure for inmates, including DOCCS inmates, is set forth in CPLR §1101(f). Under the relevant provisions of that statute “. . . [n]otwithstanding any other provision of law to the contrary, a . . . state . . . inmate under sentence for conviction of a crime may seek to commence his or her . . . proceeding by paying a reduced filing fee as provided in paragraph two of this subdivision. Such inmate shall file the form affidavit referred to in subdivision (d) of this section [CPLR §1101] along with the . . . petition . . .” Under the statutory scheme an index number is then issued despite the fact that no filing fees were paid. The Court, after examining a copy of the inmate petitioner’s DOCCS trust fund account statement, ultimately determines whether or not the inmate petitioner has sufficient means to pay the full filing fee and, if not, establishes a reduced filing fee of not less than \$15.00 nor more than \$50.00. *See* CPLR §1101(f)(1) and (2).

A copy of the “form affidavit” referenced in CPLR §1101(f) and (d) is set forth in Appendix A-1 of Part 140 of the Rules of the Chief Administrator of the Courts. That affidavit, when filled in by the inmate petitioner, not only includes information with respect to such inmate’s income, property and debt, but also includes a separately signed “AUTHORIZATION” section allowing release to the Court of a certified copy of the “correctional facility trust fund account statement,” and setting forth the following specific acknowledgment:

“In the event my application for poor person status in the above-captioned action/proceeding is granted by the Court, I further request and authorize the agency in which I am incarcerated to deduct the amount of any outstanding obligation reported to such agency by the Court pursuant to CPLR 1101(f)(2) from my correctional facility trust fund account (or institutional equivalent) and to disburse such money as instructed by the Court.”

The “AUTHORIZATION” section of the form also includes the following statement just above the space for the inmate petitioner’s signature: “I UNDERSTAND THAT THE FULL

AMOUNT OF THE OUTSTANDING OBLIGATION REFERRED TO HEREIN WILL BE PAID BY AUTOMATIC DEDUCTION FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.”

Nothing resembling the “AUTHORIZATION” portion of the “form agreement” was included in petitioned’s originally-submitted Affirmation of Poverty. The Court therefore finds that petitioned’s February 2014 submission, whatever else its possible shortcomings, did not include an index number fee or an adequate version of the “form affidavit” referenced in CPLR §1101(f) and/or Part 140 of the Rules of the Chief Administrator of the Courts. Accordingly, the Court further finds that this proceeding was not commenced by filing within the meaning of CPLR §304(a) until April 20, 2015 and is therefore time barred.

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

**ORDERED**, that respondents’ motion is granted; and it is further

**ADJUDGED**, that the petition is dismissed as time barred.

**Dated:** August 17, 2015 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice