Matter of Johnson v Uhler
2018 NY Slip Op 31115(U)
March 23, 2018
Supreme Court, Franklin County
Docket Number: 2017-558
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
JOHNATHAN JOHNSON, #89-A-1042,
Petitioner,

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

DECISION, ORDER & JUDGMENT
RJI #16-1-2017-0262.39
INDEX #2017-558

-against-

DONALD UHLER, SUPERINTENDENT, ANTHONY J. ANNUCCI, CENTRAL OFFICE REVIEW COMMITTEE, T. NELSON, FOIL OFFICER,
Respondents.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Johnathan Johnson, verified and supported by the Petitioner's Affidavit in Support of Order to Show Cause, both sworn to on August 16, 2017. Both of these documents were filed in the Franklin County Clerk's Office on August 21, 2017, in addition to a Summons. Petitioner, who is an inmate at the Upstate Correctional Facility, appears to be challenging the Central Office Review Committee's determination of Inmate Grievance UST-61657-17, as well as arguing that the Respondents are violating the 8th and 14th Amendments of the U.S. Constitution by allowing "cadre-inmates" to have clotheslines but not allowing Special Housing Unit (SHU) inmates to have clotheslines.

The Court issued an Order to Show Cause on August 30, 2017. On October 2, 2017, the Petitioner filed a motion seeking a subpoena duces tecum for videotapes. By Affirmation dated October 13, 2017, Christopher J. Fleury, Esq., Assistant Attorney General, on behalf of the Respondents, opposed the issuance of the subpoena duces tecum. Thereafter, on October 20, 2017, the Petitioner filed a Notice to Admit, to which the

Respondents opposed by Affirmation of Attorney Fleury dated October 26, 2017. In addition, the Respondents moved to dismiss the petition for failure to state a cause of action, which was supported by an Affirmation of Attorney Fleury dated October 26, 2017. On November 3, 2017, the Petitioner filed a "Motion to Convert/ Reply Affidavit in Opposition", wherein the Petitioner opposes the Respondents' motion to dismiss based upon the failure to include a copy of the Petitioner's pleading with the motion papers, as well as, the Petitioner seeks the Court to convert his Article 78 proceeding to be one for declaratory judgment pursuant to CPLR §3001. In response to same, the Respondents filed an Affirmation in Opposition to the Cross-Motion dated November 14, 2017. On November 21, 2017, Petitioner filed a Reply dated November 16, 2017.

> In the Petition, the stated challenge is as follows:
>
> "Denial of equal treatment between Upstate Correctional Facility Special Housing Unit inmates and Petitioner with the treatment respondents allows the cadre-inmates non-special housing unit inmate at Upstate. By denying SHU-inmates to hang drying clothing state issues etc. with in they recreations (*sic*) pens as permitted to do so by cadre inmates." Petition, ¶3.
>
> The Petition also prays for relief, in relevant part:
>
> "1. Reversing the decision of the Respondent CORC which affirmed a *Parole/Tier III/Grievance* decision and declaring it null and void;
>
> 2. Ordering the Respondent(s) or whoever else shall have care and custody of the Petitioner's records to:
>
> c. to reverse the decision of the CORC." Petition, p.6.

However, in the Petitioner's Affidavit in Support of Request for an Order to Show Cause, in the Wherefore Clause, the Petitioner seeks a declaratory judgment that the Respondents are denying equal treatment to the SHU inmates.

On September 29, 2016, Petitioner filed an Inmate Grievance, UST-59269-16, which complained that the cadre-inmates were allowed to hang clotheslines to dry their clothing but the SHU inmates were not allowed to do the same. On October 4, 2016, the Inmate Grievance Resolution Committee (hereinafter referred to as "IGRC") denied the grievance. The Petitioner appealed and on October 19, 2016, the Superintendent affirmed the IGRC. Following a further appeal, the Central Office Review Committee (hereinafter referred to as the "CORC") affirmed the Superintendent with the following response on June 14, 2017:

> "Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby accepted only to the extent that CORC upholds the determination of the Superintendent for the reasons stated.
>
> CORC notes that both SHU and Cadre inmates are prohibited from hanging clothes or other articles outside of their cell, including in the exercise pens, and upholds the discretion of the facility administration to promulgate local policy and procedures.
>
> In regard to the grievant's appeal, CORC finds no compelling reason to revise the facility policy regarding clotheslines and notes no malfeasance by staff. CORC advises him to address his concerns to an area supervisor at the time of the incident for the most expeditious means of resolution." Res. Ex. C.

On August 3, 2017, the Petitioner filed an Inmate Grievance, UST-61657-17, dated July 28, 2017, wherein he challenged that the cadre inmates were allowed to hang their drying clothes in the recreation pen and their cells. On August 8, 2017, the IGRC denied the grievance based upon the previous grievance, UST-59269-16, and again stated that no inmate is allowed to use clotheslines. Following administrative appeal, on August 17, 2017, the Superintendent affirmed. On August 21, 2017, the CORC received the appeal, however,

that was the same date the petition was filed and accordingly, the CORC had not decided the administrative appeal.

Preliminarily, the Court references hereto and incorporates herein the Decision, Order and Judgment captioned *Johnson v. Annucci, et al*, Franklin County Index No. 2017-603, decided February 26, 2018, wherein the petition was dismissed as moot. Therein, Petitioner sought the production of video tapes of: "[1] twelve-building-A-gallery fourteen cell thru twenty five cell on August 13, 2017, from 7:00 a.m. thru 8:00 a.m. outside area [sergeant and prison guards cell-inspections]; [2] twelve-building B-gallery one cell thru thirteen cells on August 13, 2017 from 7:00 a.m. thru 8:00 a.m. outside area [sergeant/prison guard cell inspection." Decision, p. 2. FOIL Officer Tracy Nelson denied the Petitioner's FOIL request with the caveat that if the Petitioner could provide a sufficient reason for production, such request may be reconsidered. The Petitioner failed to avail himself of further explanation and instead, filed an administrative appeal. By letter-decision dated August 28, 2017, Cathy K. Sheehan, Deputy Counsel, denied the appeal and, as per protocol, the videos were not preserved.

On October 2, 2017, the Petitioner filed a motion for subpoena duces tecum seeking: "Video tapes footages (*sic*) [outside] at: [Upstate Corr. Facility 12-Building-Gallery "A" and "B"] for August-October 2017." Petitioner alleged that he needed the video footage to support his argument that the cadre inmates are treated more favorably than the SHU inmates. Respondents oppose the motion insofar as there is no discovery as a right in matters brought under Article 78 of the CPLR and leave may only be granted where "it is demonstrated that there is need for such relief." Aff. 10/13/17, ¶3. Respondents further argue that the Petitioner has sought the production of two months of video tapes, which will

be laborious to produce, that may show inmates violate the no clotheslines rule. In addition, Respondents assert that there is a serious security risk in providing video that discloses the identities and cell locations of other inmates which is not overcome by the Petitioner's alleged need for such evidence.

> "In order for a court to issue a subpoena duces tecum, the party seeking the subpoena must make a preliminary showing that the record requested actually contains the information that he or she seeks to obtain. A mere showing that the record may potentially uncover relevant evidence is insufficient; rather, it is necessary for the proponent to offer 'some factual predicate' as to the likelihood that the record sought will contain the information that he or she seeks. A subpoena duces tecum may not be used as part of a fishing expedition or to ascertain the existence of evidence." *Bostic v. State*, 232 AD2d 837, 839.

In this instance, the Petitioner was advised that some of the requested videotape does not exist insofar as the holding time has passed. The Petitioner is aware[1] that if video is not requested within fourteen (14) days, pursuant to Directive #4942, such request is untimely and the requested footage would not have been preserved. Inasmuch as the requested two-month span of time would not have been preserved at the time the Petitioner filed his motion seeking a subpoena, even if the motion were successful, same would have been a hollow victory as the majority of the material Petitioner sought would not be available. Notwithstanding same, the Petitioner has not provided a sufficient reason to be provided such a broad and vague request. While the Petitioner is trying to obtain evidence to support that some cadre inmates are hanging clothes in the recreation pen or in their

[1] Petitioner would be aware of the 14 day policy as same is written on the FOIL denial letter he received on August 14, 2017 for FOIL Request #UST-1364-17.

cells, such video footage, if it exists, is not relevant as the Respondents have clearly stated that no inmate is allowed to hang a clothesline and evidence of rule violations does not support the Petitioner's premise of unequal treatment. As such, the motion for a subpoena duces tecum is denied.

On October 20, 2017, Petitioner filed a copy of the Notice to Admit that was served upon the Respondents. The Notice to Admit contained the following questions:

> "[1] Does Petitioner/Johnson/confinement in Upstate Correctional Facility [Upstate] consist of outside recreation?
> [2] Whether Johnson Recreation Pen in Ten (10-Building) is directly across the Upstate yard in view of twelfth (12-Building cadre-Recreation Pens?
> [3] Does Upstate Yard has video tapes for surveillance purposes to which the prison guards could monitor from the building console activities within (12-Building) Recreation Pens twenty-four (24-hours) a day?
> [4] Was the Respondents "ALL" named within the Article 78 petition served upon them on September 13, 2017, informed that the video-tapes was to be preserved And does Directive 4942 [videotapes] required the Respondents to preserve the requested videotapes?
> [5] Did any cadre-inmates from 12-Building received (*sic*) any misbehavior reports for hanging clothing within they recreation pens in 2017?"

Respondents oppose the Petitioner's Notice to Admit as improper. The Petitioner posed five questions and the Respondents argue that the questions are either irrelevant to the proceeding or are material to the central issues. In addition, the Respondents assert that what the Petitioner really proposed were Interrogatories which are a separate discovery tool from a Notice to Admit and should not be allowed in this instance. *See*, *Berg v. Flower Fifth Ave. Hospital*, 102 AD2d 760.

> "[T]he purpose of a notice to admit is 'to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices.' Clearly, the underlying purpose of such a notice 'is to eliminate from contention factual matters which are easily provable and about which there can be no controversy * * * to expedite the trial by eliminating as issues that as to which there should be no dispute.' Thus, a notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts, which can only be resolved after a full trial. As stated, it may not be employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories (*internal citations omitted*)." *Taylor v. Blair*, 116 AD2d 204, 205–06.

In the Notice to Admit, the Petitioner was not stating facts that could be agreed upon and eliminated from dispute. Indeed, the Petitioner sought answers to questions, some of which would require the Respondents to divulge confidential and/or security issues. On its face, the Notice to Admit is improper and is vacated in its entirety. *See, Kimmel v. Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453.

In opposition to the petition, the Respondents move to dismiss and argue that the Petitioner has failed to state a claim under the Equal Protection Clause of the 14th Amendment. Citing the Court of Appeals in *Doe v. Coughlin*,71 NY2d 48, 56-57, Respondents assert that the matter herein is "not an instance 'of a classification affecting fundamental rights or creating suspect classifications.' " Aff. 10/26/17, ¶¶27-28. Respondents argue that there is no fundamental right to hang clothes on a clothesline. Furthermore, there is no evidence that Respondents have a policy to allow cadre inmates to hang clotheslines in their recreation pens while also having a policy prohibiting the SHU inmates from hanging clotheslines in their recreation pens. Indeed, the Respondents aver that the Upstate Correctional Facility clearly has a policy prohibiting either classification

of inmate to hang a clothesline.[2] The Respondents further state that even if there was video evidence of cadre inmates hanging clothes on a clothesline in their recreation pens, such activity would be in violation of the rules and not evidence of unequal treatment.

Respondents also argue that the Petitioner has failed to state a claim under the Cruel and Unusual Punishment Clause of the 8th Amendment. Respondents assert that the United States Supreme Court has outlined four (4) ways in which an inmate may be found to be subjected to cruel and unusual punishment pursuant to *Rhodes v. Chapman*, 452 U.S. 337, and the Petitioner herein has not stated a claim that falls into any of the four enumerated categories.[3]

> "On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a claim, we must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." *McFadden v. Amodio*, 149 AD3d 1282, 1283.

The Petitioner did not specifically challenge the rule that prohibits clothing items from being hung inside or outside the cell, including the recreation pens. Indeed, the Petitioner argues that there is unequal treatment of the SHU inmates as the rules are being

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[2] The Cadre Inmate Rules and Regulations state, in relevant part:
"A) Nothing is to be hung in the cell as to obstruct visibility into any part of the cell.
B) Nothing is to be hung covering the window or the rec pen door.
C) No clotheslines permitted. Clothing is to be hung from the hooks provided.
F) Nothing is to be hung from the bunks.
H) There will be no hanging of clothes or other articles outside the cell. Nothing will be hung on the front of the cell." Res. Ex. C.

[3] Attorney Fleury paraphrased the four categories enumerated by *Rhodes v. Chapman* as follows: "1) if it involves ;the wanton and unnecessary infliction of pain', 2) if the punishment is 'grossly disproportionate to the severity of the crime warranting imprisonment'; 3) if it 'resulted in unquestioned and serious deprivation of basic human needs'; and 4) if it 'may deprive inmates of the minimal civilized measure of life's necessities.' " 10/26/17 Aff. ¶35.

enforced against them and not against the cadre inmates. Petitioner further argues that the cadre inmates often hang clothing in their cells and recreation pens without punishment which he finds to be unfair.

There is no fundamental right to hang a clothesline or drying clothes in an inmate's cell other than on the designated hooks provided for hanging clothing. Similarly, insofar as the cadre inmates are also prohibited from hanging clothing except on the designated hooks, the Petitioner's argument that there is a classification that allows for unequal treatment is without merit. It is clear that the policy of the facility is that no clothing is to be hung in the cell or rec area, other than on the designated hooks, insofar as hanging clothes may interfere with the safety and security of the facility by obscuring the line of sight. While the Respondents deny that there is any difference in the clothesline policy between the classifications of cadre and SHU inmates, even if there was a distinction, same may be without violating the equal protection clause of the 14th Amendment if the Respondents determined that the SHU inmates were at a higher security risk due to their placement therein. Nonetheless, while the Petitioner avers that if he could provide video tape of the cadre inmates located in Building 12, it would show that the inmates are allowed to hang clotheslines to dry their clothing. In actuality, if such videotape existed, it may show that the cadre inmates were violating the rules but not that there is a different policy for cadre inmates. As such, the Petitioner has failed to state a claim under the Equal Protection Clause of the 14th Amendment.

Similarly, Petitioner claims cruel and unusual punishment by the Respondents allowing the cadre inmates to hang clotheslines while the SHU inmates are denied. Cruel and unusual punishment may be applied to deprivations suffered during imprisonment,

however, such allegations by an inmate must allege "deliberate indifference" to establish the requisite culpable state of mind. *See, Wilson v. Seiter*, 501 U.S. 294, 297.

> "'After incarceration, only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety.... It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.'" *Wilson v. Seiter*, 501 U.S. 294, 298–99 (1991) *citing Whitley v. Albers*, 475 U.S. 312 (1986).

Clearly, the deprivation of the ability to hang a clothesline in an inmate's cell does not rise to the level of cruel and unusual punishment as contemplated by the U.S. Supreme Court. As such, the Petitioner has failed to state a viable claim pursuant under the Cruel and Unusual Punishment Clause of the 14th Amendment.

The Petitioner has moved to convert the instant proceeding to an action seeking declaratory judgment pursuant to CPLR 103. In addition, in response to the Respondents' motion to dismiss, the Petitioner argues that the equal protection claims are based upon race insofar as there are more black inmates housed in SHU than white inmates in SHU and the Correction Officers choose not to enforce the rules against the cadre inmates. Further, the Petitioner alleges that this Court "mislabeled" the proceeding to be solely a petition for Article 78 despite the Petitioner also filing a Summons seeking declaratory judgment. Petitioner argues that he filed the motion to convert in an effort to correct the Court's mistake.

A review of the original file indicates that the Request for Judicial Intervention indicates that the matter was a Special Proceeding pursuant to CPLR Art. 78 as well as declaratory relief. However, the Petitioner filed a bare Summons, as opposed to a Summons with Notice, and did not file a Complaint. Furthermore, in the Affidavit in Support of Request for an Order to Show Cause, the Petitioner only referred to the Petition for Mandamus and did not seek alternate service of the Summons upon Respondents. The Court issued an Order to Show Cause allowing for substituted service of the Petition, supporting affidavits, exhibits and memoranda, but did not provide for substituted service of the bare Summons as same was not requested and therefore, not granted. It was unclear from the papers if the Petitioner actually intended to file a hybrid action also seeking declaratory judgment. Notwithstanding same, for the same reasons outlined by the Respondents in their opposition to the original Petition, the Respondents argue that the motion to convert should be denied and the Court agrees. While the Petitioner seeks to add new arguments to support the motion to convert to a declaratory judgment action, the Petitioner still fails to allege a viable claim under either the Equal Protection Clause of the 14th Amendment or the Cruel and Unusual Punishment Clause of the 8th Amendment.

At the essence of the matter, the Petitioner believes that cadre inmates are being allowed to hang clotheslines in their cells or recreation areas inasmuch as the Petitioner does not believe those inmates are being punished for hanging clothes. Petitioner is not asserting that the cadre inmates have a different set of rules for their cells. Instead, Petitioner asserts that the correction officers are choosing not to enforce the current rules against the cadre inmates. The Court must allow latitude to the Respondents to maintain security and safety within the correctional facilities and it is not within the province of this

Court to dictate the manner in which rules should be enforced. Should the Petitioner be personally aggrieved by the enforcement of the rules, the Court is certain that the Petitioner would bring forth a petition challenging such administrative act. As such, the Petitioner has an available mechanism to seek judicial review and a declaratory judgment action herein is unnecessary. *See, Greystone Mgt. Corp. v. Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763. Notwithstanding the additional information the Petitioner has alleged in his motion to convert, the motion must still be denied. *See*, *Rivera v. Coughlin*, 188 AD2d 725.

It is of note that Attorney Fleury has not formally moved for sanctions against the Petitioner for filing of a frivolous matter. Yet, Attorney Fleury has provided decisions from other Courts, both Federal and State, wherein the Petitioner has been warned or limited in his ability to file future actions. In this instance, as formal sanctions have not been requested, the Court will not impose same. However, it is noted that in this matter, the Petitioner filed two separate discovery devices, which the Petitioner should be aware are rarely utilized in special proceedings, as well as a further motion to convert the proceeding. There was no statute of limitations issue that would warrant the Petitioner to rush a petition or seek to convert the motion while preserving the filing date, yet the premise of the case was wholly without merit which may have been discerned upon some legal research.

In light of the foregoing, the Petitioner is hereby warned that the continued filing of baseless or frivolous petitions and motions, such as evidenced herein, may be subject to the imposition of sanctions pursuant to 22 NYCRR §130-1.1, and the requirement that he must seek judicial approval before filing a claim, petition or motion. Similarly, the Attorney

General's Office should not hesitate to make a motion for sanctions should same be warranted in the future.

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

ORDERED, that the Petitioner's motion seeks a subpoena duces tecum is DENIED; and it is further

ORDERED, that the Respondents' motion to strike and vacate the Petitioner's Notice to Admit is GRANTED; and it is further

ORDERED, that the Petitioner's motion to convert the proceeding is DENIED; and it is further

ORDERED, that the Respondents' motion to dismiss is GRANTED; and it is further

ADJUDGED, that the petition is dismissed.

Dated: March 23, 2018 at
Lake Pleasant, New York.

S. Peter Feldstein
Acting Supreme Court Justice