

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

898

CA 19-00388

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND TROUTMAN, JJ.

MARTIN S. AUER, PLAINTIFF,
AND LAWRENCE SLOANE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOHN S. DYSON, GEORGE L. INGALLS, RICHARD M.
FLYNN, FREDERICK R. CLARK, ROBERT I. MILLONZI,
CONSTITUTING POWER AUTHORITY OF THE STATE OF
NEW YORK, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

AARON M. ZIMMERMAN, SYRACUSE, AND GARY LAVINE, FOR
PLAINTIFF-APPELLANT.

HOLLAND & KNIGHT, LLP, NEW YORK CITY (KATHERINE A. SKEELE OF COUNSEL),
PUGH, JONES & JOHNSON, P.C., AND MICHAEL MCCARTHY, ASSISTANT GENERAL
COUNSEL, NEW YORK POWER AUTHORITY, WHITE PLAINS, FOR DEFENDANTS-
RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 7, 2018. The order, inter alia, granted the motion of defendant Power Authority of the State of New York for a change of venue to Albany County.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Using an index number assigned to a declaratory judgment action that settled in the 1980s, Lawrence Sloane (plaintiff) moved by order to show cause in 2018 to, inter alia, "enforce" the various determinations made in the prior action. Plaintiff now appeals from an order that, inter alia, granted the motion of defendant Power Authority of the State of New York to change venue.

We dismiss the appeal because plaintiff charted an improper procedural course under these circumstances. Although a party is not generally required to commence a separate action to enforce a prior declaratory judgment, plaintiff's current motion raises issues "wholly separate and distinct" from those raised in the prior action and thus cannot be treated as a proper application to enforce the determinations rendered in such prior action (*Matter of Korn v Gulotta*, 186 AD2d 195, 197-198 [2d Dept 1992], *lv dismissed* 81 NY2d 759 [1992], *rearg denied* 81 NY2d 835 [1993]). In other words, plaintiff "should [have] proceed[ed] by a new plenary action" rather

than by "motion in an action which has been terminated" (*County of Erie v Axelrod*, 80 AD2d 701, 702 [3d Dept 1981], *lv dismissed* 53 NY2d 604, 797 [1981]), and it is undisputed that plaintiff did not commence a new plenary action. "Without an underlying action the order putatively on appeal does not constitute an appealable paper," and the appeal must therefore be dismissed (*Matter of Town of Cicero v Lakeshore Estates, LLC*, 152 AD3d 1168, 1169 [4th Dept 2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court