

New York Supreme Court
Appellate Division—Third Department

RICHARD ALCANTARA, LESTER CLASSEN,
JACKSON METELLUS, CESAR MOLINA, CARLOS
RIVERA, and DAVID SOTOMAYOR,

Case No.:
531036

Petitioners-Respondents-Cross Appellants,

– against –

ANTHONY J. ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, TINA M. STANFORD,
COMMISSIONER, NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants-Cross Respondents,

and

STEVEN R. BANKS, COMMISSIONER, NEW YORK CITY
HUMAN RESOURCES ADMINISTRATION AND DEPARTMENT
OF SOCIAL SERVICES,

Respondent.

**MOTION FOR LEAVE TO APPEAL
TO THE NEW YORK STATE COURT OF APPEALS**

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Albany County Clerk's Index No. 2534-16

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT**

RICHARD ALCANTARA, LESTER
CLASSEN, JACKSON METELLUS, CESAR
MOLINA, CARLOS RIVERA, and DAVID
SOTOMAYOR,

Respondents-Cross Appellants,

v.

ANTHONY J. ANNUCCI, ACTING
COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, and TINA M.
STANFORD, COMMISSIONER, NEW
YORK STATE BOARD OF PAROLE,

Appellants-Cross Respondents.

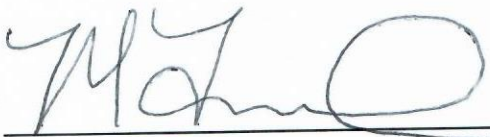
A.D. No. 531036

**NOTICE OF MOTION FOR
LEAVE TO APPEAL**

PLEASE TAKE NOTICE that upon the annexed affirmation of Matthew Freimuth, the undersigned will move this Court, at a term thereof to be held at the Robert Abrams Building for Law and Justice, on June 13, 2022, or as soon thereafter as counsel can be heard, for an order granting Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor leave to appeal the March 31, 2022 Order of the Supreme Court, Appellate Division, Third Department, which granted Appellants-Cross Respondents' motion for summary judgment in its entirety and dismissed the complaint.

PLEASE TAKE NOTICE that the motion will be submitted on the papers
without oral argument.

Dated: May 27, 2022
New York, New York

By: 
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TO (**via ECF**):

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**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT**

RICHARD ALCANTARA, LESTER
CLASSEN, JACKSON METELLUS, CESAR
MOLINA, CARLOS RIVERA, and DAVID
SOTOMAYOR,

Respondents-Cross Appellants,

v.

ANTHONY J. ANNUCCI, ACTING
COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, and TINA M.
STANFORD, COMMISSIONER, NEW
YORK STATE BOARD OF PAROLE,

Appellants-Cross Respondents.

A.D. No. 531036

**AFFIRMATION IN
SUPPORT OF MOTION FOR
LEAVE TO APPEAL**

MATTHEW FREIMUTH, an attorney admitted to practice before the courts of this State, affirms the following under penalty of perjury:

1. I am an attorney admitted to practice before the courts of the State of New York and a partner of the law firm of Willkie Farr & Gallagher LLP, located at 787 Seventh Avenue, New York, New York 10019, counsel to Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor in this appeal.

2. I respectfully submit this Affirmation in support of Respondents-Cross Appellants' motion for leave to appeal to the Court of Appeals (the "Motion") pursuant to CPLR 2221(d)(2) and 5602(b)(1) and 22 NYCRR § 1250.16.

3. In an order entered on March 31, 2022 (the "Order"), this Court issued its decision and judgment granting Defendants' motion for summary judgment in its entirety and dismissing the complaint. (ECF No. 64.)

4. On April 27, 2022 Respondents were served with the Notice of Entry of the Order. (ECF No. 65.) True and correct copies of the Notice of Entry and Decision and Order are attached hereto as Exhibit A.

5. The Motion is timely, as it is being served and filed within 30 days of the Notice of Entry of the Order. CPLR 5513(b).

6. In the Motion, Respondents seek leave to appeal to the Court of Appeals for a determination of the following legal issues:

a. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 2(6).

b. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 73.

c. Whether individuals held at a residential treatment facility under Correction Law § 73(10) can be held at Fishkill without the Department of Corrections and Community Supervision permitting or facilitating access to community-based employment, educational, and training opportunities for those residents.

7. In granting Appellants' motion for summary judgment in its entirety and dismissing the complaint, this Court's Order permits the Department of Corrections and Community Supervision ("DOCCS") to incarcerate Respondents, individuals who are on post-release supervision, in a medium-security correctional facility.

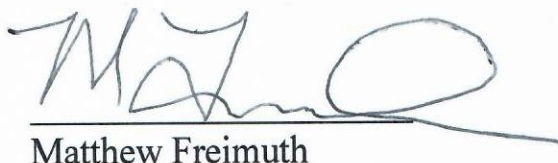
8. This Court's Order did not, however, address whether DOCCS's discretion with respect to residential treatment facilities permits this outcome when the only basis for DOCCS's custody of Respondents is Correction Law § 73(10), which authorizes the use of a residential treatment facility, not a general confinement facility, as a residence. Before Supreme Court and in briefing before this Court, Respondents argued that evidence in the record indicated the Fishkill facility did not satisfy the statutory requirements governing residential treatment facilities.

9. This Court erred in finding that Correction Law § 2(6) establishes only locational, and not programmatic, requirements for residential treatment facilities, and in determining that the conditions at Fishkill fell within the discretion granted

under certain provisions of Correction Law § 73 governing the treatment of incarcerated individuals. This Court did not address the central issue in this matter: whether the conditions of placement at Fishkill are suitable for “persons who are on community supervision,” not incarcerated individuals, who are residents under the authority granted to DOCCS under Correction Law § 73(10).

10. The Court of Appeals specifically left open this question in both *Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018) and *People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d 251 (2020), and because it remains unaddressed in the Order, this case will present the Court of Appeals with an opportunity to address this urgent and important issue.

Dated: May 27, 2022
New York, New York



Matthew Freimuth

EXHIBIT A

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

RICHARD ALCANTARA, et al.,

RESPONDENTS-APPELLANTS,

NOTICE OF ENTRY

v.

A.D. No. 531036

ANTHONY J. ANNUCCI,
Acting Commissioner, New York State Department of Corrections
and Community Supervision, et al.

APPELLANTS-RESPONDENTS.

PLEASE TAKE NOTICE that the within is a true and complete copy of the
MEMORANDUM AND ORDER duly entered in the above-entitled matter in the
Office of the Clerk of the Supreme Court, Appellate Division, Third Department on
March 31, 2022.

Dated: Albany, New York
April 27, 2022

LETITIA JAMES
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State of New York
Attorney for Appellants-Respondents
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BY:


BRIAN D. GINSBERG
Assistant Solicitor General
Telephone (518) 776-2040

TO: All Registered Parties
VIA NYSCEF

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 31, 2022

531036

RICHARD ALCANTARA et al.,
Respondents-
Appellants,

v

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections
and Community Supervision,
et al.,

Appellants-
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 16, 2022

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald
and Ceresia, JJ.

Letitia James, Attorney General, Albany (Brian D. Ginsberg
of counsel), for appellants-respondents.

Willkie Farr & Gallagher LLP, New York City (Kyle Mathews
of counsel), for respondents-appellants.

Aarons, J.

Cross appeals from a judgment of the Supreme Court
(Hartman, J.), entered January 8, 2020 in Albany County, which,
among other things, partially denied defendants' motion for
summary judgment dismissing the complaint.

Plaintiffs are residents at Fishkill Correctional Facility, which is a medium security institution administered by the Department of Corrections and Community Supervision (hereinafter DOCCS) and is designated as, among other things, a "general confinement facility" and a "residential treatment facility" (hereinafter RTF) (7 NYCRR 100.90 [c] [1], [3]). Plaintiffs were housed at Fishkill as RTF residents while they were on postrelease supervision for sex offenses but could not find housing that complied with sex offender residency requirements. Plaintiffs commenced this action raising various claims related to their confinement at Fishkill.¹ Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint. Plaintiffs opposed and requested that Supreme Court grant them summary judgment upon a search of the record. The court partially granted defendants' motion and, upon a search of the record, awarded summary judgment on a claim to plaintiffs. These appeals ensued.

As to the claim that the rehabilitative program for Fishkill RTF residents did not comply with Correction Law § 73, Supreme Court found that the program and opportunities provided within Fishkill complied with the statute and, therefore, summary judgment was granted to defendants to this extent. The court, however, also found that that Fishkill failed to provide sufficient opportunities that were community based and outside of the facility and, accordingly, upon a search of the record, summary judgment was granted to plaintiffs to this extent. Turning first to the latter finding, defendants concede that any opportunities provided by Fishkill outside of the facility were limited in scope. They nonetheless contend that the statutory scheme merely authorizes, and does not mandate, that DOCCS provide opportunities outside of Fishkill.² Plaintiffs counter that Fishkill, as an RTF, was required to secure various

¹ Although originally commenced by plaintiffs as a CPLR article 78 proceeding, Supreme Court converted the proceeding into a declaratory judgment action.

² We disagree with defendants' further contention that plaintiffs' claims are foreclosed by Matter of Gonzalez v Annucci (32 NY3d 461 [2018]).

opportunities in the community where it was situated. We agree with defendants.

A resident in an RTF "may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]" (Correction Law § 72 [6]). To that end, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment" for RTF residents (Correction Law § 73 [2]). Furthermore, "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established" (Correction Law § 73 [3]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill.

It is true that an RTF is defined as "[a] correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released" (Correction Law § 2 [6]). Correction Law § 2 (6), however, speaks to where an RTF must be located. It does not govern DOCCS's obligations in establishing a rehabilitation program or in securing various opportunities for RTF residents. Although it would seem that the purposes behind a rehabilitative program would be served by having such program or employment, training or education take place in the actual community and outside of an RTF, DOCCS is best suited to make this determination given its "leeway to design its RTF programs and facilities" (People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 36 NY3d 187, 207 [2020]).

Of note, an RTF resident "may be allowed to go outside the facility during reasonable and necessary hours to engage in any

activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her" (Correction Law § 73 [1]). Once again, this subsection does not speak to DOCCS's obligations in establishing a rehabilitative program. It merely provides that an RTF resident may leave a facility for the purposes of partaking in a rehabilitative program or opportunity. Moreover, in that situation, DOCCS's statutory obligation merely extends to supervising the RTF resident while he or she is outside the facility (see Correction Law § 73 [1], [2]). Accordingly, Supreme Court erred in granting partial summary judgment in favor of plaintiffs on the claim that DOCCS did not create an appropriate RTF program outside the confines of Fishkill, and summary judgment should have instead been awarded to defendants dismissing this claim.

Turning to plaintiffs' cross appeal, plaintiffs argue that the rehabilitation program provided within Fishkill for RTF residents did not comply with Correction Law § 73. Defendants submitted evidence indicating that the Fishkill RTF program was a 28-day program designed to prepare RTF residents for re-entry into the community and that it had different units covering various topics, including, among other things, sex offender registration procedures, employment and life skills, community resources and relapse prevention. RTF residents could meet with program coordinators for multiple hours in a day. Coordinators engaged with RTF residents and helped them look for apartments, find roommates and create cover letters and budgets. There was a work program for RTF residents that was directed toward the rehabilitation and reintegration into the community of such residents. RTF residents were also paid for their participation in these RTF programs at a higher rate than what general population incarcerated individuals were paid. RTF residents had access to Fishkill's general library, and they could take high school equivalency classes. Viewing the programming as a whole, defendants satisfied their burden of showing that the RTF program complied with Correction Law § 73.

Plaintiffs' complaints about the efficacy of the RTF program or the lack of training or guidance to create one do not suffice to raise an issue of fact. Additionally, even if we

agreed with plaintiffs that Supreme Court erred in assessing Fishkill's program as to whether it was adequate, as opposed to appropriate, our review of the record confirms that the Fishkill RTF program satisfied the dictates of Correction Law § 73. Accordingly, Supreme Court correctly granted summary judgment in defendants' favor to this extent.

Plaintiffs also argue that Fishkill was not fulfilling its obligations as an RTF because RTF residents were treated the same as general population incarcerated individuals. As mentioned, Fishkill functions as a general confinement facility and an RTF, among other things (see 7 NYCRR 100.90 [c] [1], [3]). Subject to certain exceptions, "[t]wo or more correctional facilities may be maintained or established in the same building or on the same premises so long as the incarcerated individuals of each are at all times kept separate and apart from each other" (Correction Law § 70 [4]). As Supreme Court noted, although an RTF is defined as a "correctional facility" (Correction Law § 2 [6]), it may also be an area within a correctional facility in view of the function that it serves (see Correction Law § 70 [6] [b] [ii]). Indeed, the designation and classification of correctional facilities throughout the state are set forth in 7 NYCRR part 100 – of which Fishkill, and not its RTF, is one (see 7 NYCRR 100.90). Accordingly, for purposes of Correction Law § 70 (4), Fishkill's general confinement facility and its RTF are not to be considered as separate correctional facilities.

That said, the record discloses that RTF residents at Fishkill were afforded separate housing and privileges compared to general population incarcerated individuals. The fact that RTF residents and general population incarcerated individuals were subject to the same daily count, wore similar clothes or ate in the same mess hall does not violate the applicable regulatory and statutory scheme. Supreme Court therefore correctly concluded that plaintiffs' claim that they were unlawfully treated as general population incarcerated individuals was without merit.

Egan Jr., J.P., Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as partially denied defendants' motion for summary judgment and granted partial summary judgment to plaintiffs, upon a search of the record; partial summary judgment to plaintiffs denied, defendants' motion granted in its entirety and complaint dismissed; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court