

Matter of Smith v Fischer

2010 NY Slip Op 33454(U)

November 30, 2010

Supreme Court, Albany County

Docket Number: 2560-10

Judge: George B. Ceresia

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CPLR Article 78 proceeding to review a Tier 3 disciplinary determination dated November 3, 2009 which found him guilty of violating prison rules.

The respondents have made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that petitioner failed to timely serve the order to show cause and petition. The order to show cause dated May 24, 2010 required the petitioner to serve the respondents and the Attorney General with a copy of the order to show cause and petition on or before June 18, 2010.

Respondents have submitted the affidavit of Danny McDonald, a clerk in the Office of the Attorney General. In his affidavit, Mr. McDonald indicates that the office of the Attorney General maintains a database to record receipt of pleadings and papers served upon the Attorney General. Mr. McDonald's responsibilities include making entries into the database and searching the database for information on litigation matters. Mr. McDonald further indicates that he searched the database maintained in the office of the Attorney General for information concerning the above-captioned matter, and found that the Attorney General's Office received a copy of the order to show cause, verified petition and supporting papers in this proceeding on July 9, 2010. They were enclosed in an envelope postmarked July 7, 2010.

The respondents have also submitted the affidavit of Patricia E. Dallmann-Weaver, employed by the New York State Department of Correctional Services in the Counsel's Office as an Administrative Assistant. Ms. Dallmann-Weaver indicates that whenever legal

papers are served upon Commissioner Brian Fisher's office or the Department of Correctional Services, the papers are forwarded to her. It is her responsibility to forward such papers, together with a letter requesting legal representation in that matter, to the Office of the Attorney General. A copy of letters requesting legal representation is maintained in Counsel's Office files. Ms. Dallmann-Weaver caused a search of Counsel's Office files to determine if any legal papers in the above matter had been received. An order to show cause and petitioner were received from the petitioner in this matter on July 6, 2010.

Lastly, the respondents have submitted the affidavit of Amy Perl, employed by the New York State Department of Correctional Services as a Clerk at Attica Correctional Facility. Ms. Perl indicates that one of her responsibilities is to maintain records of legal papers in CPLR Article 78 proceedings served upon the Superintendent or other employees of Attica Correctional Facility. She indicates that she recently reviewed the records in her office and found that on July 16, 2010 her office received an order to show cause and verified petition in this matter addressed to Superintendent James Conway. The envelope was post marked July 13, 2010.

Failure of an inmate to satisfy the service requirements set forth in an order to show cause requires dismissal for lack of jurisdiction absent a showing that imprisonment prevented compliance (see Matter of Pettus v New York State Dept. of Corr. Serv., 76 AD3d 1152 [3rd Dept., 2010]; Matter of Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3rd Dept., 2009]; People ex rel. Holman v Cunningham, 73 AD3d 1298, 1299

[3rd Dept., 2010]; Matter of Hughes v Dennison, 40 AD3d 1297 [3rd Dept., 2007], citing Matter of Robinson v Goord, 21 AD3d 1150, 1151 [3rd Dept., 2005]; see also Matter of Reynoso v Goord, 43 AD3d 1209 [3rd Dept., 2007]). No such showing has been made. Petitioner's affidavit of service indicates that he served the order to show cause and petition upon the Commissioner of the Department of Correctional Services and the Attorney General on August 28, 2010, well after the deadline set forth in the order to show cause.¹ Petitioner did not oppose the motion, and has not demonstrated how his confinement prevented him from complying with the service requirements set forth in the order to show cause.

The Court is mindful of the decision in Matter of Lopez v Goord, 41 AD3d 992 [3rd Dept., 2007]). In this instance, as noted, the petitioner has failed to submit either an affidavit of service demonstrating, prima facie, that proper service was made, or an affidavit in opposition to the motion. Under such circumstances, the Court discerns no evidentiary basis upon which to grant further relief, as set forth in Lopez (supra).

In view of the foregoing, the Court finds that the order to show cause, the petition and supporting papers were not served upon respondent as required in the order to show cause. The Court concludes that the petition must be dismissed by reason of the failure of petitioner to comply with the service requirements contained in the order to show cause (see, Matter of Pettus v New York State Dept. of Corr. Serv., supra; Matter of Ciochenda v Department

¹Another affidavit of service indicates that such papers were mailed on April 13 2010, prior to the date of the order to show cause. It also fails to indicate to whom the papers were addressed.

of Correctional Services, supra; People ex rel. Holman v Cunningham, supra; Matter of Hughes v Dennison, supra; see also Matter of Reynoso v Goord, supra).

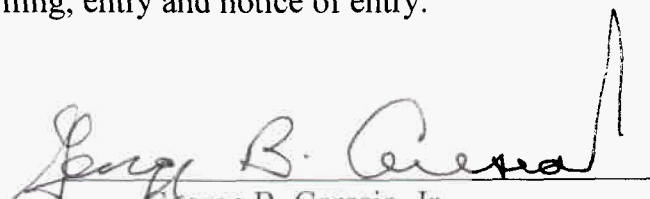
Accordingly, it is

ORDERED, that respondent's motion to dismiss be and hereby is granted; and it is **ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 30, 2010
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 24, 2010, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated July 20, 2010, Supporting Papers and Exhibits
3. Petitioner's Letter dated August 19, 2010 with Attachments