

Matter of Young v Prack
2012 NY Slip Op 31693(U)
June 5, 2012
Sup Ct, Albany County
Docket Number: 7025-11
Judge: George B. Ceresia Jr
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of CARL YOUNG,

Petitioner,

-against-

ALBERT PRACK, DIRECTOR OF SPECIAL
 HOUSING UNIT / INMATE DISCIPLINARY
 PROGRAM FOR THE NYS DEPARTMENT
 OF CORRECTIONS AND COMMUNITY SUPER-
 VISION,

Respondent,

For A Judgment Pursuant to Article 78
 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
 RJ1 # 01-12-ST3293 Index No. 7025-11

Appearances: Carl Young
 Inmate No. 97-A-2691
 Petitioner, Pro Se
 Wende Correctional Facility
 Wende Road
 P.O. Box 1187
 Alden, NY 14004-1187

Eric T. Schneiderman
 Attorney General
 State of New York
 Attorney For Respondent
 The Capitol
 Albany, New York 12224
 (Brian J. O'Donnell,
 Assistant Attorney General
 of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wende Correctional Facility, has commenced the instant

CPLR Article 78 proceeding to review a disciplinary determination in which he was found guilty of violating prison rules. The respondent has made a motion pursuant to CPLR 7804 (c) 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 December 12, 2011, required the petitioner to serve the respondent and the Attorney General with a copy of the order to show cause and petition on or before January 6, 2012.

In an affidavit submitted in support of the motion, respondent Albert Prack indicates that the Office of Special Housing and Inmate Disciplinary Programs maintains a computerized database to record the receipt of all papers served upon that office, and its employees, in legal proceedings. He indicates that he caused a review to be made of records of the Office of Special Housing and Inmate Disciplinary Programs to determine whether the petitioner effected service of the order to show cause and supporting papers on or before the January 6, 2012 deadline set forth in the order to show cause. As a result of the foregoing review, he determined that his office was served with the following documents: an incomplete affidavit of service notarized on January 4, 2012, a memorandum of law, a verified petition, an affidavit in support of order to show cause, a document entitled reconsideration request for an appeal, respondent Prack's letter dated September 26, 2011, and an affidavit of service dated October 27, 2011. Notably, he was not served with a copy of the order to show cause dated December 12, 2011.

The respondent has also submitted the affidavit of Shane Bouchard, a clerk in the Office of the Attorney General. In his affidavit, Mr. Bouchard indicates that the office of the Attorney General, in the regular course of business, maintains a database to record receipt

of pleadings and papers served upon the Attorney General. Mr. Bouchard's responsibilities include making entries into the database and searching the database for information on litigation matters. Mr. Bouchard indicates that he searched the database of the Attorney General for information concerning the above-captioned matter, and found that on January 9, 2012 the Attorney General's Office received the following documents: an incomplete affidavit of service notarized on January 4, 2012, a memorandum of law, a verified petition, an affidavit in support of order to show cause, a reconsideration request for an appeal, a copy of Albert Prack's letter of September 26, 2011, an August 25, 2011 appeal with exhibits, and an affidavit of service dated October 27, 2011. Mr Bouchard further indicates that as of February 8, 2012, the office of the Attorney General had not been served with a copy of the order to show cause.

The petitioner argues that his confinement in the special housing unit hampered his ability to timely serve the papers. Notwithstanding this argument, he has also submitted an affidavit of service, notarized on January 4, 2012, which indicates that the petition, affidavit and supporting papers were served.

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 Gibson v Fischer, 87 AD3d 1190 [3d Dept., 2011]; Matter of DeFilippo v Fischer, 85 AD3d 1421, 1421 [3d Dept., 2011]; 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]). No such showing has been

made.

It is well settled that confinement in a special housing unit does not qualify as a hardship with regard to the timely service of papers (see Matter of Short v Goord, 37 AD3d 925, 925-926 [3rd Dept., 2007]). The fact that the petition and supporting papers were timely served undercuts petitioner's argument that he was unable to timely serve the order to show cause.

In view of the foregoing, the Court finds that the order to show cause was not served upon respondent or the Attorney General as required in the order to show cause. The Court concludes that the petition must be dismissed, by reason of the failure of the petitioner to comply with the service requirements contained in the order to show cause (see, Matter of Gibson v Fischer, supra; Matter of DeFilippo v Fischer, supra; Matter of Pettus v New York State Dept. of Corr. Serv., supra; Matter of Ciochenda v Department of Correctional Services, supra; People ex rel. Holman v Cunningham, supra).

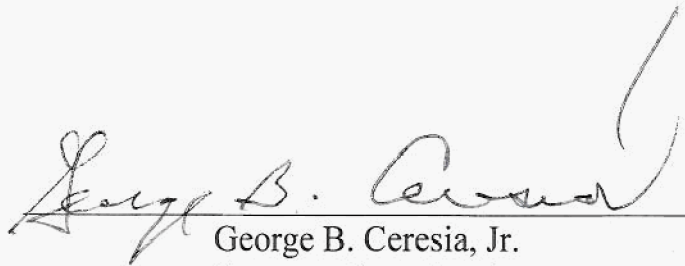
Accordingly, it is

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: June 5, 2012
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 12, 2011, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated February 10, 2012, Supporting Papers and Exhibits
3. Petitioner's Letter Dated February 17, 2012

Not Considered:

1. Petitioner's Letter Dated April 6, 2012