At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 18th day of August, 2014

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

REGINALD McFADDEN,

Plaintiff

v. Index No. 46345

ERIC T.SCHNEIDERMAN, ATTORNEY GENERAL, MARCUS MASTROCCO, DEPUTY SOLICITOR GENERAL, and ANTHONY J. ANNUCCI, ACTING COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Defendants.

DECISION and ORDER

The plaintiff commenced this action pursuant to CPLR §3001 by filing with the Court the summons and complaint on January 14, 2014. By notice of motion dated April 8, 2014, the plaintiff, pro se, moves for a default judgment on the grounds that the defendants have failed to serve a timely answer or to bring a motion to dismiss. The defendants, by notice of cross-motion dated June 13, 2014, move to dismiss the complaint pursuant to CPLR §3211 for failure to state a cause of action, for untimeliness, and for

lack of subject matter jurisdiction. Both the motion and the cross-motion have been submitted for determination by the Court.

NOW, on reading the plaintiff's summons and complaint, and on reading and filing the notice of motion and notice of cross-motion, the affidavit in support of the motion submitted by the plaintiff, sworn to on April 8, 2014, together with the annexed exhibits, the affirmation in opposition to the motion and in support of the cross-motion submitted by Assistant Attorney General Darren Longo, attorney for the defendants, dated June 13, 2014, together with the accompanying memorandum of law, and the reply affirmation of the plaintiff, dated June 17, 2014, due deliberation having been had, the following decision is rendered.

The plaintiff's motion for a default judgment must be denied because he has not shown that the defendants are in default. The time within which the defendant must answer or otherwise appear commences to run on the date that service is completed. In this case, it is evident that the method that the defendant attempted to use to effect service upon the defendants was the method of "personal service by mail" provided for in CPLR §312-a. His motion papers demonstrate that he did send his summons and complaint in late February or early March by certified mail to the defendants (the Court notes that he did not use "first class" mail as required by §312-a[a]). It is not clear from the plaintiff's submissions whether he

complied with the requirement that he send to the defendants with the summons and complaint two copies of "a statement of service by mail and acknowledgment of receipt" in the form prescribed by the statute (CPLR §312-a[a] and [d]). In any event, he has not submitted the executed acknowledgment forms with his motion, and therefore he has not shown that he actually effected personal service by mail upon the defendants in late March as he claims. Service under §312-a is not complete until the person served returns to the sender the acknowledgment of receipt form, and it is the signed and returned acknowledgment of receipt form which "shall constitute proof of service." Without it, attempted service pursuant §312-a is ineffective (Ananda Capital Partners v. Stav Elec. Sys., 301 A.D.2d 430 [1st Dept., 2003]).

Contrary to the plaintiff's contention, certified mail receipts are insufficient to establish completed service under §312-a (Miron Lumber Co., Inc. v. Phylco Realty Development Co., Inc.,151 Misc.2d 139 [N.Y.City Civ.Ct. 1991]). Furthermore, the plaintiff is incorrect in arguing that the statute permits the Court to deem service constructively complete after 30 days when no acknowledgment form has been returned. In fact, the statute specifically directs that when the party to be served fails to return the acknowledgment form within 30 days of receipt, the party attempting service must resort to service by "another manner permitted by law" in order to

complete personal service upon the party (CPLR §312-a[e]). Thus, the plaintiff's motion papers fail to establish that he completed personal service upon the defendants prior to the date of the motion. Therefore, the plaintiff has not shown that the defendants' time to answer began to run prior to June 13, 2014 – the date when the defendants' attorney acknowledged personal service upon the defendants in his affirmation in opposition to the motion and in support of the cross-motion, .

Addressing the defendants' cross-motion, the Court has determined that the complaint must be dismissed. The allegations in the complaint are excessively vague and conclusory, and are insufficient to make out a valid cause of action for a declaratory judgment.

In the first paragraph of his complaint, the plaintiff, a prison inmate, identifies the source of his claim as a "fraudulent" inmate disciplinary hearing to which he was subjected. The hearing concluded on November 30, 2012, at which time the plaintiff was evidently subjected to discipline. He has attached a copy of the appeal decision of Albert Prack, Director, Special Housing/Inmate Disciplinary Program, which shows that the hearing officer's decision following the November 30, 2012, hearing was affirmed upon the plaintiff's administrative appeal on January 25, 2013. The plaintiff alleges that "over 21 separate violations occurred" during the hearing. He names Anthony Annucci, Acting Commissioner of the Department of Corrections and

Community Supervision [DOCCS] as a defendant upon the assertion that the hearing officer conducted the "fraudulent" hearing "in conspiracy with" the Acting Commissioner. He names Eric T. Schneidermann, Attorney General, and Marcus Mastrocco, Deputy Solicitor General, as defendants because they allegedly engaged in "official obstruction to judicial review." According to the complaint, the Attorney General somehow prevented the plaintiff from using the prison law library and typing service on an unspecified occasion, and Deputy Solicitor Mastrocco – presumably in the course of representing DOCCS as the respondent or defendant in a proceeding brought by the plaintiff relating to the disciplinary hearing – provided to the plaintiff as part of the hearing record a copy of a page from the prison contraband log which the plaintiff contends is "fraudulent."

Thus, the complaint alleges that the defendants committed certain acts or omissions relating to the disciplinary hearing, the plaintiff's administrative appeal following the hearing, and/or the subsequent, unspecified Court proceeding relating to the hearing. The mere fact that the plaintiff feels aggrieved by these acts or omissions does not entitle him to declaratory relief, however. Furthermore, the plaintiff's particular aggrievements are not made into justiciable controversies suitable for the granting of declaratory relief simply because the plaintiff has labeled them as such in his complaint (Rosenzweig v. New York State Surrogate's Court, 44

Misc.2d 1013, 1014 [Sup. Ct., Kings Co., 1965]). Nor has the plaintiff remedied the deficiency in his pleading through his conclusory assertions that the acts or omissions alleged constitute a pattern of "official obstruction" and/or are indicative of a general policy on the part of the defendants to deprive inmates of their Constitutional rights . "A declaratory judgment action is appropriate only when there is a substantial legal controversy between the parties that may be resolved by a declaration of the parties' legal rights" (Rice v. Cayuga-Onondaga Healthcare Plan, 190 A.D.2d 330 [4th Dept., 1993]; CPLR §3001). Moreover, that controversy must be one that is ripe for judicial determination in that it has arisen in an adversary context with a set of concrete facts rendering it capable of definitive and complete resolution. Upon review, the Court finds that the plaintiff has failed to allege the existence of an actual, justiciable controversy in his complaint. In addition, the Court finds that the complaint fails to state any other valid claim upon which the Court might grant the plaintiff the items of relief that he requests. Accordingly, the Court will dismiss the complaint for failure to state a cause of action. Having concluded that the complaint must be dismissed for this reason, it is unnecessary for the Court to examine the other bases for dismissal raised by the defendants in their cross-motion.

NOW, THEREFORE, it is hereby

ORDERED that the plaintiff's motion is denied; and it is further

ORDERED that the defendants' cross-motion is granted and the complaint is dismissed.

DATED: August 18, 2014
Warsaw, New York

MICHAEL M. MOHUN
Acting Supreme Court Justice

GRANTED
AUG 18 2014
CHIEF CLERK
WYOMING COUNTY SUPREME COURT