

Matter of Barnes v Venettozzi
2013 NY Slip Op 30730(U)
February 15, 2013
Supreme Court, Albany County
Docket Number: 4944-12
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JESSIE J. BARNES,
Petitioner,

-against-
DON VENETTOZZI, Acting Director
Special Housing Unit State of New
York Department of Corrections and
Community Service,

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
RJI # 01-12-ST4062 Index No. 4944-12

Appearances: Jessie J. Barnes
Inmate No. 09-B-2707
Petitioner, Pro Se
Upstate Correctional Facility

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State of New York
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The Capitol
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Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Upstate Correctional Facility, commenced the above-captioned CPLR Article 78 proceeding to review a disciplinary determination in which he was found guilty of violating prison rules. Respondent has made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that the petitioner failed to timely serve the order to show cause and petition. The order to show cause, dated September 10, 2012,

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 October 5, 2012.

The respondent has submitted the affidavit of Jessica Norton, a keyboard specialist employed in the Office of Special Housing/Inmate Disciplinary Program of the Department of Corrections and Community Supervision (“DOCCS”). Ms. Norton indicates that the Office of Special Housing maintains records concerning receipt of all legal papers served upon its employees. Ms. Norton, who is fully familiar with the office procedure and practice concerning such records had the records reviewed for the time period between October 1, 2012 to November 15, 2012.¹ She found that during that period, the Office of Special Housing was not served with an order to show cause, petition or any other legal papers in this matter.

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. Petitioner did not oppose the motion, and thus has not controverted the respondent’s denial of service (see Davis v Evans, 97 AD3d 857, 858 [3d Dept., 2012]). No affidavits of service have been submitted.

The petitioner opposes the motion, arguing that his confinement prevented him from

¹No mention is made of a search for the time period between September 10, 2012 to September 30, 2012.

complying with the service requirements of the order to show cause. Specifically, he indicates that on September 6, 2012 he was transferred out of Upstate Correctional Facility to the Ontario County Jail for a re-trial of a criminal action. He was returned to Upstate Correctional Facility on September 21, 2012, but did not receive the signed order to show cause until Monday, September 24, 2012. On September 25, 2012 he sent the papers to the Upstate Correctional Facility law library to make photocopies. He received the papers back on September 28, 2012, however one of the correction officers refused to notarize his papers so that he could mail them out. He claims that he was forced to pack up all his legal papers on September 28, 2012 to go to Five Points Correctional Facility. He indicates that he did not receive his legal papers back until October 3, 2012, but that a notary public was not available. He maintains that on October 3, 2012 he sent a letter to the Court indicating that he was unable to serve his papers before the October 5, 2012 deadline.² He requests that the Court grant an extension of time to serve his papers upon the respondent.

Mindful that CPLR 2004 authorizes the Court to extend the time for doing any act,

²The petitioner actually submitted two affidavits in opposition to the motion containing similar, but not duplicate language, both sworn to on November 24, 2012. In one affidavit, paragraph 8 recites:

“The petitioner was forced to pack up papers in his property on September 28, 2012 at Upstate Corr. Fac. and did not receive his property at Five Pts. Corr. Fac. til Oct. 3, 2012 and no notary services were available.”

In the other affidavit paragraph 8 recites:

“The petitioner was forced to pack up papers in his property on September 28, 2012 at Upstate Corr. Fac. and did not receive his property at Five Points Corr. Fac. til [sic] October 3, 2012 and the bag containing the documents for this petition was misplaced in Downstate draft area , that did not arrive there at Five Pts. Corr. Fac. until Oct. 11, 2012 when the petitioner was in the drafted area awaiting return to Upstate.”

whether the application is made before or after the expiration of the deadline, the Court finds that the petitioner has demonstrated sufficient cause to authorize the grant of an extension of time. Under the circumstances, the Court will deny the motion, and grant petitioner an extension of time to serve his papers upon the respondent.

Accordingly, it is

ORDERED, that respondent's motion is denied; and it is

ORDERED, that petitioner is granted an extension of time to serve his papers; and it is further

ORDERED, that the petitioner shall serve a copy of this order, the petition, exhibits and supporting affidavits, by ordinary first class mail, upon the respondent and upon the Attorney General of the State of New York, at the Department of Law, State Capitol, Albany, New York, on or before March 11, 2013; and it is further

ORDERED, that petitioner shall, within ten (10) days of such service, submit an affidavit of service of said papers to the Court and the Attorney General; and it is

ORDERED, that respondent shall serve and file an answer to the petition within twenty (20) days of the date of service of petitioner's papers, as set forth above; and it is further

ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding be referred to the undersigned for disposition.

This will constitute the decision and order of the Court. The Court will retain all papers until final disposition of the instant proceeding.

ENTER

Dated: February 15, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 10, 2012, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated November 15, 2021, Supporting Papers and Exhibits.
3. Petitioner's Affidavit In Opposition, sworn to November 24, 2012 (two copies - not identical)