

**Matter of Pettigrew v Fischer**

2013 NY Slip Op 32632(U)

September 13, 2013

Supreme Court, Albany County

Docket Number: 1239-13

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.



7, 2012 and August 8, 2012. The respondent has made a motion dated July 17, 2013, 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 amended order to show cause, dated May 20, 2013, 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 14, 2013.

The respondent has submitted the affidavit of Patricia E. Dallmann-Weaver, employed by the New York State Department of Corrections and Community Supervision (“DOCCS”) in the Counsel’s Office as an Administrative Assistant. Ms. Dallmann-Weaver indicates that whenever papers are served upon Commissioner Brian Fischer’s Office or DOCCS the papers are forwarded to designated staff after review by her supervisor, Deputy Counsel Nancy J. Heywood. It is the responsibility of appropriate staff to forward these documents to the Office of the Attorney General, along with a letter requesting representation on behalf of the respondents. Ms. Dallmann-Weaver indicates that she made a search of the files in the Counsel’s Office to determine whether any legal papers relating to the above-captioned action had been served upon the respondents. She indicates that her office received the following documents: on May 2, 2013 an affidavit of service, an order to show cause, an affidavit in support, an order regarding poor person status, a request for judicial intervention, a verified petition and supporting papers; and on June 11, 2013 an amended order to show cause.

Respondents have also submitted the affidavit of Evan Schanz, employed in the Office

of the New York State Attorney General in the Albany Litigation Bureau as a Clerk. His responsibilities include making entries in the database maintained in the office of the Attorney General and searching the database. He searched the computerized database of the Attorney General for information concerning the above-captioned action. He found that the Attorney General was not served with a copy of the verified petition and supporting documentation on or before June 14, 2013 as ordered in the amended order to show cause dated May 20, 2013. On June 11, 2013 the Office of the Attorney General received a copy of the amended order to show cause dated May 20, 2013.

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 [3<sup>rd</sup> Dept., 2010]; Matter of Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3<sup>rd</sup> Dept., 2009]; People ex rel. Holman v Cunningham, 73 AD3d 1298, 1299 [3<sup>rd</sup> Dept., 2010]). The petitioner has submitted an affidavit of service. While the affidavit of service indicates that service of the Article 78 petition and amended order to show cause was made on June 6, 2013, it is notarized on June 5, 2013, the day before he swears he served them. This renders the affidavit of service defective and of no probative value (see Matter of Barnes v Prack, 108 AD3d 894, 895 [3d Dept., 2013]).



The Court observes that the service requirements of the order to show cause could not be satisfied through service of papers in a piecemeal fashion. When the amended order to show cause was served, it was necessary to also serve with it the petition and all supporting papers.

In view of the foregoing, the Court finds that the amended order to show cause, the petition and supporting papers were not served upon respondent as required in the amended 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 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*).

Lastly, the Court observes that the respondent had made a motion to dismiss (dated May 21, 2013) in response to the original order to show cause dated March 15, 2013. That motion was served on May 23, 2013. As noted, the petitioner applied for and obtained an amended order to show cause on May 20, 2013 to extend the deadline for service to June 14, 2013. The Court finds that respondent's initial motion to dismiss dated May 21, 2013 has been abandoned through service of respondent's subsequent motion.

Accordingly, it is

**ORDERED**, that respondent's motion to dismiss dated May 21, 2013 is denied as abandoned; and it is

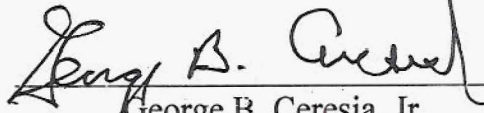
**ORDERED**, that respondent's motion to dismiss dated July 17, 2013 be and hereby is granted; and it is

**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: September 13, 2013  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated , Petition, Supporting Papers and Exhibits
2. Amended Order To Show Cause Dated May 20, 2013
3. Notice of Motion dated May 21, 2013, Supporting Papers and Exhibits
4. Notice of Motion Dated July 17, 2013, Supporting Papers and Exhibits