

<b>Matter of Hutchinson v Fischer</b>
2013 NY Slip Op 32634(U)
September 16, 2013
Supreme Court, Albany County
Docket Number: 2359-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

In The Matter of EDDIE HUTCHINSON,  
Petitioner,  
-against-  
BRIAN FISCHER, COMMISSIONER,  
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 # 01-13-ST4724 Index No. 2359-13

Appearances: Eddie Hutchinson  
Inmate No. 89-T-2984  
Petitioner, Pro Se  
Marcy Correctional Facility  
9000 Old River Road  
P.O. Box 3600  
Marcy, New York 13403  
  
Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Laura A. Sprague,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Marcy Correctional Facility, has commenced the instant  
CPLR Article 78 proceeding to review a disciplinary determination. The respondent has

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 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 sworn to July 10, 2013 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 the respondent's office received an unsigned order to show cause, a verified petition and supporting papers in connection with this proceeding on June 10, 2013. However as of July 10, 2013 no signed order to show cause had been received.

Respondents have also submitted the affidavit sworn to July 11, 2013 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 on June 5, 2013 the Attorney General was served with a copy of an unsigned order to show cause and petition. However as of July 11, 2013 the Office of the Attorney General had not received a signed order to show cause in the instant proceeding.

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]).

Petitioner's affidavit of service recites:

“Subject to perjury indentures in civil procedure law rules section 2106, certifications pursuant title 22 NYCRR section 130.1.1 A(B) petitioner attested sub-declaration veracious: on 4<sup>th</sup> day of June ‘13 petitioner ceded to respondent commissioner Brian Fischer, state attorney general Eric T. Schneiderman state capitol, Albany, NY 12224 an article 78 petition, accompanying documents, show cause injunction and equivalent to Albany County Supreme Court including judicial intervention request 1101 (a) (f) related injunction via U.S. mail service pertinent USCA section 101 title 39 by depositing envelope containing documents in mail receptacle.”

Petitioner's opposing affidavit recites:

“Asst. Attorney General Motion soliciting court to dismiss suppliant article 78 petition pursuant Article 32 section 11 subd. A (8) court deficient jurisdiction of defendant; purporting inadequate service process entailing show cause injunction require repudiation.

“(1) Acknowledging petition, show cause injunction receipt July 5<sup>th</sup> ’13 instructing documents consignment to respondent, Attorney General Office Department of Law, Capital Albany, NY 12224 via first class mail on or prior June 14<sup>th</sup> ’13; Asst. Attorney Laura Sprague confirm injunction consummation refuting jurisdictional defect claim; suppliant reproducing documents pursuant to section 4539 (A) CPLR transcriptionally unable to manufacture photographic copies doesn’t vitiate attestable injunction service requirement semanticizing a copy be served as authorized in CPLR Article 2101 (E) opposed to original. Asst. Attorney General admit authenticity procuring endorsed duplicate from court clerk; in retrospect demeritizing defiance.

“(2) Hypothetically, qualifying as a document defect not service failure to notify in two days subsequent receipt consigning party waiver correction opportunity (CPLR 2101 F) the [word unintelligible] supra state motion merit denial. Unimplementing perfunctory corrective process at presumption of defect discovered nine days prior service date July 14<sup>th</sup> ’13.”

The Court finds that the affidavit of service is insufficient to establish that the signed order to show cause, petition, and all supporting papers were served in full compliance with the service requirements set forth in the order to show cause. Petitioner’s affidavit in opposition fails to either demonstrate that proper service was made or present facts to support an argument that imprisonment prevented him from doing so. An inmate’s inability to make photocopies is not, ordinarily, a proper excuse (see Matter of Hickey v Goord, 3 AD3d 802, 802-803 [3d Dept., 2004]; Matter of Vargas v Unger, 29 AD3d 1258, 1258 [3<sup>rd</sup> Dept., 2006];

Matter of Thomas v Selsky, 34 AD3d 904, 904-905[3<sup>rd</sup> Dept., 2006]).

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 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

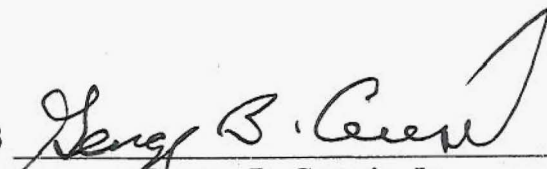
**ORDERED**, that respondent's motion to dismiss be and hereby is granted; and it is

**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: September 16, 2013  
Troy, New York

  
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George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 20, 2013, Petition, Supporting Papers and Exhibits and Affidavit of Service
2. Notice of Motion dated July 16, 2013, Supporting Papers and Exhibits
3. Petitioner's Response To Dismissal Motion Pursuant to Section 3211 (a) (8) CPLR