

Matter of Peterson v Fischer

2013 NY Slip Op 32635(U)

September 13, 2013

Supreme Court, Albany County

Docket Number: 2459-13

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of LEROY PETERSON,
Petitioner,

-against-
 BRIAN FISCHER, COMMISSIONER OF
 DOCCS,

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 # 01-13-ST4720 Index No. 2459-13

Appearances: Leroy Peterson
 Inmate No. 12-A-3493
 Petitioner, Pro Se
 Franklin Correctional Facility
 62 Bare Hill Road
 PO Box 10
 Malone, NY 12953-0010

Eric T. Schneiderman
 Attorney General
 State of New York
 Attorney For Respondent
 The Capitol
 Albany, New York 12224
 (Keith A. Muse,
 Assistant Attorney General
 of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate housed at Franklin Correctional Facility, has commenced

the instant CPLR Article 78 proceeding to review a determination with respect to the calculation of his sentence.

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, petition and supporting papers 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 caused a search to be made 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 as of July 18, 2013, no papers had been 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]).

The petitioner has submitted two letters, each dated July 22, 2013. In his letters he claims that he properly served a copy of his papers upon the Attorney General. The Court finds that the letters may not be considered for two reasons. First, the petitioner has not submitted an affidavit of service to demonstrate that a copy of either letter was served upon the Attorney General. Secondly, answering papers are required to be in the form of affidavits (see CPLR 2214). That is to say, they must be sworn to before a notary public. Because neither such letter is notarized, they may not be considered.

The petitioner has also submitted two affidavits of service. Again, there is no showing that copies of these documents were served upon the Attorney General. The affidavit of service for service upon Brian Fischer indicates that Commissioner Fischer was served with unspecified papers on June 2, 2013. However it is notarized on May 31, 2013, two days before. The Court finds that the affidavit of service is flawed in three respects. First, it appears to be a photocopy of an affidavit of service, not an original. Second, because the affidavit of service does not indicate what papers were served, it fails to demonstrate that the petitioner complied with the service requirements set forth in the order to show cause.

Third, the fact that the affidavit of service was notarized prior to service renders it defective and of no probative value (see Matter of Barnes v Prack, 108 AD3d 894, 895 [3d Dept., 2013]). Turning to the separate affidavit of service for service upon Eric T. Schneiderman, Attorney General, it indicates that unspecified papers were served on an unspecified date. This fails to establish what papers were served and when.

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

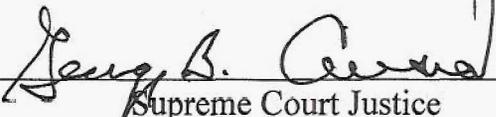
ORDERED, that respondent's motion to dismiss be and hereby is granted; and it is **ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

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 13, 2013
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated May 20, 2013, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated July 19, 2013, Supporting Papers and Exhibits

Not Considered:

1. Two Letters of Petitioner dated July 22, 2013
2. Petitioner's Affidavits of Service sworn to May 31, 2013