

<b>Matter of Barnes v Venettozzi</b>
2013 NY Slip Op 32638(U)
September 10, 2013
Supreme Court, Albany County
Docket Number: 4944-12
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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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.

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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  
                         PO Box 2001  
                         309 Bare Hill Road  
                         Malone, NY 12953

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Gregory J. Rodriguez,  
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. By notice of motion dated November 15, 2012, respondent 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 required the petitioner to serve the papers on or before October 5, 2012. The petitioner opposed the motion, providing an account of a series of circumstances which he claimed prevented him from timely serving his papers. He indicated that on September 6, 2012 he was transferred out of his institutional residence, Upstate Correctional Facility, to the Ontario County Jail for a re-trial of a criminal action. On September 21, 2012 he was returned to Upstate Correctional Facility, 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 claimed that he was forced to pack up all his legal papers on September 28, 2012 in connection with a temporary transfer to Five Points Correctional Facility. He indicated that he did not receive his legal papers back until October 3, 2012, but that a notary public was not available. In a corrected decision-order dated February 19, 2013, the Court denied the motion to dismiss and granted the petitioner an extension of time, to March 11, 2013, to serve his papers<sup>1</sup>. The Court subsequently received a letter from the petitioner dated March 6, 2013 in which he indicated that he had been returned to Upstate

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<sup>1</sup>Which papers were to include the February 19, 2013 order, the petition, exhibits and supporting affidavits.

Correctional Facility from the Ontario County Jail on March 5, 2013. He indicated that as of March 6, 2013 he had not yet received possession of his legal papers. He requested a fourteen day extension of time. By letter-order dated April 1, 2013 the Court granted him an extension until April 15, 2013<sup>2</sup>.

At the time the Court signed the April 1, 2013 order, the Court was unaware that in the meantime, both the petitioner and the respondent had made motions returnable on April 1, 2013. The petitioner, in his motion, sought a further extension of time to serve his papers. The respondent requested that the Court dismiss the action by reason that the petitioner failed to timely serve his papers on or before the March 11, 2013 deadline.

By decision-order dated July 5, 2013, the Court denied the petitioner's motion for an extension by reason that the application had been rendered moot by the grant of an extension in the letter-order dated April 1, 2013.

With regard to respondent's motion to dismiss, although as noted the motion was returnable on April 1, 2013, the respondent made an additional submission in June 2013. The submission included the affidavit of Donald Venettozzi, Assistant Director of the Office of Special Housing/Inmate Disciplinary Program of the Department of Corrections and Community Supervision ("DOCCS"). Mr. Venettozzi indicated in his affidavit that as of June 17, 2013, the respondent had not received any further legal papers in this matter since March 25, 2013. Because however, the petitioner had not been afforded an opportunity to respond to the affidavit of Donald Venettozzi, and in an effort to bring the matter to

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<sup>2</sup>The Court granted the petitioner far more time than he had requested, in order to provide him ample opportunity to serve the papers.

conclusion the Court, by order dated July 5, 2013, granted the petitioner an extension until July 31, 2013 to serve a response to respondent's submission. The petitioner did so by letter dated July 23, 2013. The Court will now proceed to address respondent's motion to dismiss.

The June 14, 2013 submission of the respondent contains a copy of petitioner's affidavit of service dated April 9, 2013. The affidavit of service indicates that on April 9, 2013 the petitioner served "court directives dated 2/1/13 and 4/1/13, verified petition and supporting papers upon Gregory J. Rodriguez, Assistant Attorney General, The Capitol, Albany, N.Y. 12224". No mention is made with regard to service of such papers upon the respondent.

Failure of an inmate to satisfy the service requirements set forth in a court order 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]).

Notably, if the petitioner had the ability to serve the Attorney General with a copy of the papers before the April 15, 2013 deadline, then he certainly had the ability to serve the respondent, as well. The petitioner was granted ample time to serve the respondent, but failed to do so. The petitioner has not demonstrated that imprisonment prevented him from serving the respondent with a copy of the papers by court-ordered deadline. For this reason, the Court finds that the respondent's motion must be granted, and the petition dismissed (see

Matter of Barnes v Prack, 108 AD3d 894 [3d Dept., 2013]).

Accordingly, it is

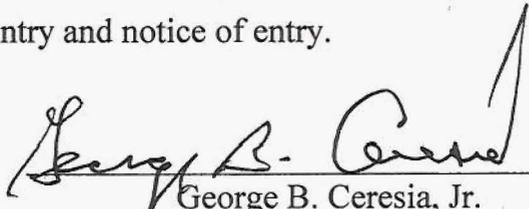
**ORDERED**, that the respondent's motion to dismiss is granted; and it is

**ORDERED and ADJUDGED**, that the petition 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 10, 2013  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Petitioner's Amended Notice of Motion Dated March 27, 2013, Supporting Papers and Exhibits
2. Respondent's Notice of Motion To Dismiss dated March 25, 2013, Supporting Papers and Exhibits
3. Petitioner's Reply sworn to April 2, 2013
4. Petitioner's Letter Dated June 12, 2013
5. Letter Dated June 14, 2013 of Gregory J. Rodriguez, Assistant Attorney General, Affidavit of Donald Venettozzi sworn to June 17, 2013, and Exhibits
6. Petitioner's Letter dated June 12, 2013
7. Petitioner's Letter dated July 23, 2013