

Matter of Brown v Goord
2007 NY Slip Op 30523(U)
March 30, 2007
Supreme Court, Albany County
Docket Number: 0384606/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of DAVID BROWN,

Petitioner,

-against-

GLENN S. GOORD, Commissioner, of
D.O.C.S.,

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 No. 01-06-ST7287 Index No.3846-06

Appearances: David Brown
Inmate No. 01-A-2661
Petitioner, Pro Se
Southport Correctional Facility
236 Institution Road
P.O. Box 2000
Pine City, NY 14871

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(David L. Cochran,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated November 29, 2005 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 petitioner failed to timely serve the order to show cause and petition. The amended order to show cause, dated November 13, 2006, 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 December 8, 2006. Respondents have submitted the affidavit of June E. Burt, a secretary employed in the Counsel's Office of the State Department of Correctional Services. Ms. Burt indicates that whenever legal papers are served upon Acting Commissioner Brian Fischer's office or the Department of Correctional Services, that the papers are forwarded to her; and that it is her responsibility to forward such papers to the Office of the Attorney General. She indicates that she personally caused a search to be made of her files to determine whether any legal papers relating to the above-captioned action have been served upon either the Commissioner or the Department. She further indicates that as of January 8, 2007 neither the Commissioner nor the Department of Correctional Services had received any legal papers in the above-captioned matter.

Respondent has submitted the affidavit of Shane Bouchard, a clerk in the Office of the Attorney General. In his affidavit, Mr. Bouchard indicates that the office of the Attorney

General maintains a database to record receipt of pleadings and papers served on the Attorney General. His responsibilities include making entries into the database and searching the database for information on litigation matters. Mr. Bouchard further indicates that he searched the database maintained in the office of the Attorney General for information concerning the above-captioned matter, and found that as of January 10, 2007 the Attorney General has not been served with the order to show cause or any supporting papers.

As stated in Matter of Gittens v. Selsky (193 AD2d 986 [3rd Dept. 1993]), 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 also, Matter of McRae v. New York State Division of Parole, 221 AD2d 827, 828 [3rd Dept., 1995]; Matter of Marsalona v Coombe, 234 AD2d 841, 841 [3rd Dept., 1996]; Matter of Wilder v New York State Division of Parole, 249 AD2d 606 [3rd Dept., 1998]). No such showing has been made. Petitioner did not oppose the motion; and no affidavits of service have been submitted.

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 Gittens v Selsky, supra; Matter of McRae v. New York State Division of Parole, supra; Matter of Marsalona v Coombe, supra; Matter of Wilder v New York State Division of

Parole, supra).

Accordingly, it is

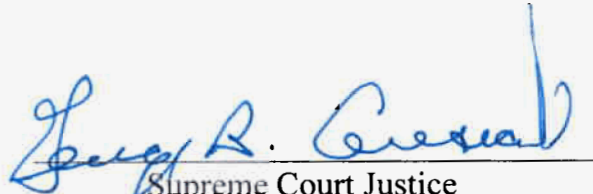
ORDERED, that respondent's motion to dismiss be and hereby is granted; and it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: March 30, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Amended Order To Show Cause dated November 13, 2006, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated January 11, 2007, Supporting Papers and Exhibits
3. Affirmation of, Assistant Attorney General, dated Supporting Papers and Exhibits