

Matter of St. Louis v Fischer

2009 NY Slip Op 31350(U)

May 14, 2009

Supreme Court, New York County

Docket Number: 1345-09

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of PHILLIP ST. LOUIS,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Petitioners,

-against-

BRIAN FISCHER, COMMISSIONER, NEW
YORK STATE DEPARTMENT OF CORREC-
TIONAL SERVICES,

Respondents,

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-09-ST9948 Index No. 1345-09

Appearances: John T. Casey, Jr., Esq.
Attorney For the Petitioner
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State of New York
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The Capitol
Albany, New York 12224
(Justin C. Levin,
Assistant Attorney General
of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

In the early portion of 2008, the petitioner, an inmate in the custody of the New York Department of Correctional Services, submitted an application for presumptive work release, as a part of the Comprehensive Alcohol and Substance Abuse (“CASAT”) program

(see 7 NYCRR Part 1950). While the Temporary Release Committee and the Superintendent of Eastern Correctional Facility approved the application, the Central Office did not. The petitioner was informed that he could not re-apply until April 2010. The Director of the Temporary Release Program affirmed the decision of the Central Office Reviewer on June 24, 2008. The petitioner thereafter commenced a CPLR Article 78 proceeding to review the denial of his application for presumptive work release. During the pendency of the CPLR Article 78 proceeding, the petitioner, without a prior request on his part, was brought before the Franklin Correctional Facility Temporary Release Committee. The appearance took place on November 7, 2008. In a determination received by the petitioner on November 14, 2008, temporary release was again denied, but this time the petitioner was directed not to re-apply until November 2010, seven months beyond the April 2010 re-application date previously imposed. The Central Office Reviewer affirmed the determination on January 7, 2009. The petitioner has commenced the above-captioned CPLR Article 78 proceeding to review the November 2008 determination.

The respondent made a motion to dismiss the petition on grounds that the petitioner failed to serve the respondent or the Attorney General at least twenty days before the petition was noticed to be heard, as required under CPLR 7804 (c). The petitioner has made a cross-motion for an order allowing an enlargement of the time to bring the petition. As a part of his application he has enclosed an amended notice of petition which includes a new return date of March 27, 2009.

The respondent acknowledges that the respondent and the Attorney General received the notice of petition and petition on February 20, 2009. In this regard the Court finds, with

respect to the method of service, that the notice of petition and petition were properly served, and that the petitioner acquired personal jurisdiction over the respondent. While it is undisputed that the respondent and the Attorney General were served fourteen days before the return date rather than the twenty days required under CPLR 7804 (c), this is not a jurisdictional defect. It has been held that the failure to strictly comply with the time constraints set forth in CPLR 7804 (c) is a mere irregularity, which does not require dismissal of the petition (see Matter of Lavin v Lawrence, 54 AD3d 412 [2d Dept., 2008]). This is particularly so where, as here, the respondent has not demonstrated substantial prejudice (see Matter of Trobiano v State of New York Division of Parole, 285 AD2d 812 [3d Dept., 2001]; see also Matter of Griswald v Village of Penn Yan, 244 AD2d 950 [4th Dept., 1997]). In addition, the Court notes that once the problem was called to the petitioner's attention, he made a prompt motion to re-set the return date to a date which would be in full compliance with CPLR 7804 (c). The Court concludes that the motion to dismiss the petition must be denied.

With respect to the cross-motion, the Court notes that the petitioner annexed an amended notice of petition and an amended petition to his motion papers. The respondent has voiced no specific objection to the proposed amendment of the petition. Under such circumstances, the Court finds that the petitioner should be permitted to serve and file an amended petition in the form annexed to the cross-motion (see Matter of McIntosh v State of New York, 7 AD3d 890 [3d Dept., 2004]).

Notably, the return date set forth in the amended notice of petition (March 27, 2009) has long since passed. No answer has yet been served, due no doubt to the pendency of

the instant motion and cross-motion. The Court cannot proceed to the merits of the proceeding until issue is joined. The Court will therefore direct the petitioner to serve the Attorney General with an amended notice of petition and amended petition within twenty (20) days of the date hereof. The amended notice of petition should fix a new return date for the proceeding which should be at least thirty (30) days in advance of service of the amended notice of petition and amended petition upon the Attorney General. The Court will retain the proceeding for disposition.

Accordingly it is

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

ORDERED, that the cross-motion is granted to the extent set forth herein; and it is

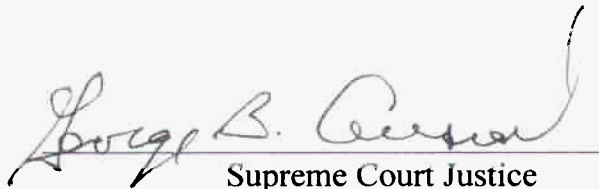
ORDERED, that within twenty (20) days of the date hereof the petitioner serve and file an amended notice of petition and amended petition in keeping with the instant decision-order; and it is further

ORDERED, that on the new return date the instant proceeding be referred to the undersigned for disposition.

This shall constitute the decision and order of the Court. The Court will retain all papers until final disposition of the proceeding.

ENTER

Dated: May 14, 2009
Troy, New York


Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition February 19, 2009, Petition, Supporting Papers and

Exhibits

2. Respondent's Notice of Motion dated February 26, 2009, Supporting Papers and Exhibits
3. Petitioner's Notice of Cross-Motion filed March 4, 2009, Amended Notice of Petition and Supporting Papers
4. Affirmation dated March 10, 2009 of Justice C. Levin, Assistant Attorney General in Opposition to Cross-Motion
3. Reply Affirmation of John T. Casey, Jr. dated March 20, 2009 and Exhibits