

Matter of Cobb v Drown
2009 NY Slip Op 31867(U)
July 30, 2009
Supreme Court, Albany County
Docket Number: 1658-09
Judge: George B. Ceresia
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The petitioner, an inmate at Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination finding him guilty of violating certain prison rules and imposing concomitant penalties following a Tier III disciplinary hearing. In a pre-answer motion pursuant to CPLR 3211 (a) (8), the respondents seek dismissal of the petition for lack of personal jurisdiction. The petitioner effectively cross-moves pursuant to CPLR 306-b for an extension of time in which to serve respondents.

On March 11, 2009, the Court (Teresi, J.) signed an order to show cause, providing, in part:

Ordered, that service of this Order to Show Cause, the petition, exhibits and any supporting affidavits, by ordinary First Class Mail, upon each named respondent and upon the Attorney General for the State of New York, at the Department of Law, State Capitol, Albany, New York 12224, on or before April 10, 2008, shall be deemed adequate.

Here, the respondents contend that the petitioner did not comply with the dictates of the Order to Show Cause. In support of this contention, the respondents submit an affidavit from an employee with the Office of the Attorney General averring that the Attorney General was never served with a signed copy of the order to show cause and, further, was served with the petition prior to the petitioner obtaining the order to show cause. In addition, the respondents also submit affidavits from employees in the offices of respondents Brian Fischer and Curtis H. Drown averring that neither of these respondents were served with any papers in this matter.

In a letter sent to the Court, the petitioner concedes that he “incurred a minuscule defect” in the service of process (Cobb Letter dated April 20, 2009) but otherwise argues that

in the interests of justice or for good cause shown the Court should consider his constitutional claims. Thereafter, the petitioner, on or about May 28, 2009, served a “Notice of Motion” on the respondents and filed the same with the Court, seeking to extend his time to serve the respondents. However, the petitioner did not submit any accompanying papers, inter alia, to explain why the Court should grant such relief or what efforts he made to serve the respondents.

Dismissal of a petition is warranted where a petitioner fails to comply with the service requirements of an order to show cause (see Matter of Chavis v Goord, 46 AD3d 1029, 1029 [3d Dept 2007]; Matter of Reynoso v Goord, 43 AD3d 1209, 1209 [3d Dept 2007]). Here, the petitioner acknowledges that there were issues with the service of process. Further, nothing in the record establishes that the petitioner ever filed an Affidavit of Service with the Supreme Court Clerk’s Office as directed in the order to show cause nor does the petitioner present such an affidavit in opposition to the respondent’s motion. Moreover, in response to the showing by the respondents that they were not properly served, the petitioner has not demonstrated that “there were any obstacles created by his imprisonment that prevented him from adhering to the order’s directive’s” (Matter of Chavis, 46 AD3d at 1029; see Matter of Cooper v Goord, 55 AD3d 1186, 1186 [3d Dept 2008]).

Rather, in order to avoid dismissal, the petitioner seeks to have an extension of time in which to serve respondents. In relevant part, CPLR 306-b provides: “If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall

dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.” In interpreting this section, the Court of Appeals explained:

The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiff’s request for the extension of time, and prejudice to defendant” (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 [2001]).

Here, except for the notice of motion, the petitioner failed to submit an affidavit or any papers in support of his application to extend the service time and, thus, has failed to offer an explanation as to why he could not perform service as dictated in the order to show cause. Moreover, nothing in the record shows that the petitioner made any attempt at service after receiving the order to show cause. Any papers served on the Office of the Attorney General were served prior to the Court executing the order to show cause. Further, while in an April 20, 2009 letter to the Court he seemingly acknowledges that there are issues with service in this proceeding, the petitioner made no effort at that point to move for an extension of time to serve the respondents. Thus, the petitioner has not established that he diligently attempted service here, warranting denial of his application under the good cause shown standard pursuant to CPLR 306-b (see Matter of Thurston v Annetts, 37 AD3d 726, 727 [2d

Dept 2007]; Matter of Anonymous v New York State Office of Children and Family Servs., 53 AD3d 810, 811 [3d Dept 2008], lv denied 11 NY3d 709).

As to the interest of justice standard, the record shows that the statute of limitations will have expired and the respondents would seemingly not be prejudiced by an extension of service. However, a review of the petition indicates that the petitioner does not have a meritorious cause of action (see Matter of Smith v Goord, 307 AD2d 564, 564-565 [3d Dept 2003]; Matter of Hernandez v Goord, 268 AD2d 727, 727 [3d Dept 2000]). Further, as discussed above, nothing indicates that the petitioner made any attempt to serve the respondents under the dictates of the order to show cause. Therefore, in reviewing the matter as a whole, the Court also concludes that the petitioner has failed to show that an extension of time should be granted in the interest of justice (see Matter of Thurston, 37 AD3d at 727; Maiuri v Pearlstein, 53 AD3d 816, 817 [3d Dept 2008]; see also Matter of Frederic v Goord, 20 AD3d 652, 653 [3d Dept 2005], lv denied 5 NY3d 712).

Accordingly it is

ORDERED that the respondents' motion to dismiss the petition pursuant to CPLR 3211 (a) (8) is granted; and it is further


ORDERED that the petitioner's cross motion pursuant to CPLR 306-b for an extension of time to serve the respondents is denied; and it is further

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 to the County Clerk for filing. The signing of this decision/order/judgment and the 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: July 30, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order to Show Cause signed March 11, 2009;
2. Petition verified February 6, 2009, with accompanying Exhibits;
3. Notice of Motion dated May 19, 2009;
4. Affirmation of Robert M. Blum, Esq., affirmed May 19, 2009, with accompanying Exhibits A-D;
5. Letter of Robert Cobb dated April 20, 2009;
6. Notice of Motion dated May 28, 2009.