

Matter of Murray v New York State Dept. of Parole
2010 NY Slip Op 30540(U)
March 10, 2010
Supreme Court, Rensselaer County
Docket Number: 8781-09
Judge: George B. Ceresia
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administrative remedies, and mootness.

Turning first to the issue of personal jurisdiction, The order to show cause, dated October 23, 2009, 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 November 20, 2009. The respondent has submitted the affidavit of Shane Bouchard, a Clerk in the office of the New York State Attorney General. In the affidavit, Clerk Bouchard indicates that the office of the Attorney General maintains a database to record receipt of pleadings and papers served on the Attorney General. Clerk Bouchard indicates that a search of the database reveals that on November 12, 2009, New York State Attorney General was served with an unsigned, proposed order to show cause, an application for poor person status, and a petition. As of December 28, 2009, the Attorney General had not been served with the executed Order to Show Cause, together with the petition, exhibits, and supporting affidavits.

Respondent has also submitted the affidavit of Robin Filmer, an Administrative Assistant employed by the New York State Division of Parole. Filmer's duties include opening, sorting and logging mail that is received by the Counsel's Office of the Division of Parole. They also include maintaining logs and litigation files which reflect all judicial proceedings in which papers are served upon the Division of Parole at its central office. Filmer avers that legal mail and court papers addressed to the Chairman and Commissioners of the Division of Parole are forwarded to the Counsel's Office. Such papers are included in the litigation logs and litigation files which Filmer maintains. As set forth in the affidavit, the litigation files and litigation logs were personally reviewed by Filmer, who indicates that on November 12, 2009 the Division of Parole received an unsigned, proposed order to show

cause, an application for poor person status, and a petition. As of December 28, 2009, the Division of Parole had not been served with an executed order to show cause, together with the petition, exhibits, and supporting affidavits.

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 Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3rd Dept., 2009]; Matter of Hughes v Dennison, 40 AD3d 1297 [3rd Dept., 2007], citing Matter of Robinson v Goord, 21 AD3d 1150, 1151 [3rd Dept., 2005]; see also Matter of Reynoso v Goord, 43 AD3d 1209 [3rd Dept., 2007]). No such showing has been made. Petitioner did not oppose the motion.

Petitioner filed an affidavit of service with the Court attesting to service of "Article 78" upon the Attorney General and the respondent on November 4, 2009. The Court is mindful of the Lopez decision (Matter of Lopez v Goord, 41 AD3d 992 [3rd Dept., 2007]). Nonetheless, the Court is of the view that petitioner's affidavit of service, containing its vague reference to "Art. 78", is insufficient to meet his prima facie burden of demonstrating that the papers were properly served in accordance with the service requirements of the order to show cause. The Court concludes that the petition must be dismissed by reason of the failure of the petitioner to acquire personal jurisdiction over the respondent.

With regard to the petitioner's alleged failure to exhaust his administrative remedies, the respondent indicates that the petitioner did not raise any objections at his final parole hearing, and that he did not file an administrative appeal of the May 19, 2009 decision revoking his parole. It is well settled that before an issue may be considered in a CPLR

Article 78 proceeding, it is necessary for the petitioner to exhaust all available administrative remedies (see Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Matter of East Lake George House Marina v Lake George Park Commission, ___ AD3d ___, 892 NYS2d 675 [3rd Dept., January 14, 2010]). This includes seeking review of all issues within the context of an administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3rd Dept., 1996]). Neither petitioner nor his counsel raised any objections at the May 19, 2009 hearing in which petitioner pleaded guilty to violating the terms of his parole. In addition, petitioner failed to file a notice of appeal and perfect an administrative appeal of the May 19, 2009 determination. § 8006.1 of the rules of the Division of Parole recites that notice of an administrative appeal must be filed within 30 days of the final determination and failure to do so constitutes a waiver of the right to appeal (see 9 NYCRR § 8006.1 [b]). The affidavit of Robin Filmer states that no notice of appeal was filed by petitioner, nor was any appeal ever perfected. Relief under CPLR Article 78 is not available where the petitioner could have raised his issues in an administrative appeal but failed to do so (see Mtr of Thomas v Executive Department of the Division of Parole of the State of New York, 285 AD2d 688 [3d Dept., 2001]; Mtr of Lee v New York State Department of Parole, 252 AD2d 703 [3d Dept., 1998], *lv denied* 92 NY2d 815 [1998]; Mtr of Boyer v Chairman, New York State Parole Board, 199 AD2d 584 [3d Dept., 1993]). The Court finds that dismissal of the petition must be granted on this ground as well.

The Court need not address the remaining issues. The Court concludes that the petition must be dismissed.

Accordingly it is

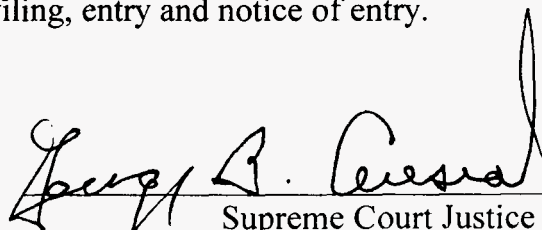
ORDERED, that respondent's motion to dismiss be and hereby is granted; and it is

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: March 10, 2010
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated October 23, 2009 Petition, Supporting Papers and Exhibits, including affidavit of Service dated November 4, 2009.
2. Notice of Motion dated December 29, 2009.
3. Affirmation of, Assistant Attorney General, dated December 29,, 2009, Supporting Papers and Exhibits