

Matter of Bellezza v Swarts

2011 NY Slip Op 31828(U)

June 13, 2011

Sup Ct, Albany County

Docket Number: 625-11

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of FRANK BELLEZZA a/k/a
 FRANK LEONARD BELLEZZA, JR.,

Petitioner,

-against-

DAVID J. SWARTS, COMMISSIONER OF THE
 NEW YORK STATE DEPARTMENT OF MOTOR
 VEHICLES,

Respondents,

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
 RJ# 01-10-ST2472 Index No. 625-11

Appearances: Frank Bellezza a/k/a Frank Leonard Bellezza, Jr.
 Inmate No. 97-A-4585
 Petitioner, Pro Se
 Orleans Correctional Facility
 35-31 Gaines Basin Road
 Albion, NY 14411

Eric T. Schneiderman
 Attorney General
 State of New York
 Attorney For Respondent
 The Capitol
 Albany, New York 12224
 (Justin C. Levin,
 Assistant Attorney General
 of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Orleans Correctional Facility, has commenced the above-

captioned CPLR Article 78 proceeding to compel the respondent to expunge certain entries in his driver's record. The 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 order to show cause, dated February 3, 2011, required the petitioner to serve the respondent and the Attorney General with a copy of the order to show cause and petition on or before March 4, 2011. In support of the motion the respondent has submitted the affidavit of Dinah M. Crossway, Assistant Counsel in the Counsel's Office of the New York State Department of Motor Vehicles ("DMV"). Ms. Crossway indicates that the first time that the respondent received any papers in this matter was on March 30, 2011, when a copy of the order to show cause and petition were received via facsimile from the Office of the Attorney General. She further indicates that on March 31, 2011 the Counsel's Office of DMV received a copy of the order to show cause via first class mail. The envelope was post-marked March 28, 2011.

The respondent has also 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, in the regular course of business, 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 the Attorney General's Office received a copy of the order to show cause, verified petition and supporting papers in this proceeding on March 30, 2011. They were enclosed in an envelope

postmarked March 28, 2011.

The petitioner has submitted an affidavit of service which appears valid on its face.¹ The petitioner's affidavit of service indicates that he timely served the order to show cause and petition on March 4, 2011, the last day for service set forth in the order to show cause.

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 Pettus v New York State Dept. of Corr. Serv., 76 AD3d 1152 [3rd Dept., 2010]; Matter of Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3rd Dept., 2009]; People ex rel. Holman v Cunningham, 73 AD3d 1298, 1299 [3rd Dept., 2010]; 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]).

The Court is thus confronted with a situation where the petitioner has tendered what appears to be a valid affidavit of service establishing timely service, but where the respondent has presented compelling evidence that this is not true. In Matter of Lopez v Goord (41 AD3d 992 [3rd Dept., 2007]) the Court identified three options with respect to how to handle such a situation: to conduct a traverse hearing, to solicit an admission of service from the respondent, or to extend the time for service to afford the petitioner an opportunity to re-

¹The Court is mindful of respondent's argument that the address utilized by the petitioner did not conform exactly to that specified in the New York Register for service of legal papers upon the Department of Motor Vehicles. The New York Register requires that such papers be addressed as follows: "Department of Motor Vehicles, Counsel's Office, 6 Empire State Plaza, Swan St. Bldg., Albany, NY 12228". The Court finds that the address utilized by the petitioner ("N.Y.S. Commissioner of Motor Vehicles, 6 Empire State Plaza, Albany, NY 12228") substantially complied with the requirements of the New York Register.

serve the papers (see Matter of Lopez v Goord, supra). The Court, on May 19, 2011, directed the respondent to state its position with regard to the foregoing alternatives. The respondent has indicated that he would consent to an order directing that the papers be re-served. The Court has received no response from the petitioner. Under the circumstances, the Court will direct that petitioner re-serve the papers.

Accordingly,

ORDERED, the respondent's motion is denied; and it is

ORDERED, that the petitioner, **on or before July 16, 2011**, serve a copy of the order to show cause, petition, supporting papers and exhibits by ordinary first class mail upon the respondent and the attorney for the respondent at the following addresses:

David J. Swarts, Commissioner
Department of Motor Vehicles
Counsel's Office
6 Empire State Plaza, Room 526
Albany, NY 12228

Eric T. Schneiderman
Attorney General
State of New York
The Capitol
Albany, New York 12224

Attn.: Justin C. Levin, Esq.
Assistant Attorney General

and it is further

ORDERED, that the petitioner file a copy of an affidavit of service demonstrating full compliance with this order within ten (10) days of the date of such service upon the respondent and the Attorney General; and it is

ORDERED, that respondent be and hereby is directed to serve and file an answer within twenty (20) days of the date of receipt of said papers, and it is further

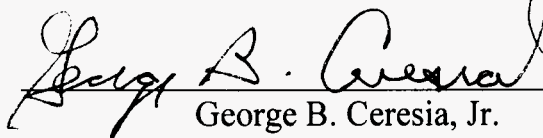
ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding be referred to the undersigned for disposition.

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

ENTER

Dated: June 13, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 3, 2011, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated April 7, 2011, Supporting Papers and Exhibits
3. Letter of Justin C. Levin, Esq., dated May 24, 2011

cc.:

Albany County Supreme Court Clerk
Albany County Courthouse
Albany, NY 12207

Attn.: Diane Hook