

**Matter of Sanchez v State Director and
Superintendent**

2011 NY Slip Op 33104(U)

November 16, 2011

Sup Ct, Albany County

Docket Number: 4918-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of Luis Sanchez,

Petitioner,

-against-

STATE DIRECTOR AND SUPERINTENDENT,

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 # 01-11-ST2987 Index No. 4918-11

Appearances: Luis Sanchez
 Inmate No. 98-A-6905
 Petitioner, Pro Se
 Great Meadow Correctional Facility
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(Brian J. O'Donnell,
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Great Meadow Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a Tier III disciplinary determination dated January 12, 2011. The respondent has made a motion pursuant to CPLR 7804 (c), CPLR

2214 (d), and 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 August 11, 2011, 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 September 9, 2011.

The respondent has submitted the affidavit of Danny McDonald, a clerk in the Office of the Attorney General. In his affidavit, Mr. McDonald 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 upon the Attorney General. His responsibilities include making entries into the database and searching the database for information on litigation matters. Mr. McDonald further indicates that he searched the database of the Attorney General for information concerning the above-captioned matter, and found that the Attorney General's Office was not served with a copy of the executed order to show cause, the petition, exhibits or any supporting affidavits on or before September 9, 2011. Notably, it has been repeatedly held that failure to serve the papers upon the Attorney General as directed in the order to show cause is a jurisdictional defect which requires the proceeding to be dismissed (see Matter of Pettus v Wetmore, 81 AD3d 1019, 1020 [3d Dept., 2011]; Matter of Gantt v Lape, 83 AD3d 1349, [3d Dept., 2011]).

Respondents have submitted the affidavit of Sandra Prusak, employed by the Department of Corrections and Community Service ("DCCS") at Attica Correctional Facility. In the course of his employment he is responsible for maintaining records of all legal papers served upon employees of Attica Correctional Facility in CPLR Article 78 proceedings. At the request of the Attorney General's Office she caused a search of the records maintained in her office to determine whether the respondent, Mark Bradt, Superintendent of Attica

Correctional Facility was served with any papers in the instant matter. As of October 20, 2011 there was no record that Mr. Bradt had been served with a petition, order to show cause or any other papers.

The respondents also submitted the affidavit of Carla Baldwin, employed by DOCCS as a clerk in the Inmate Records Office at Great Meadow Correctional Facility. The Inmate Records Office is responsible for maintaining records of all legal papers served upon DOCCS employees at Great Meadow Correctional Facility in CPLR Article 78 proceedings. At the request of the Attorney General's Office, Clerk Baldwin caused a search to be made of the records maintained in the Inmate Records Office to determine whether Charles F. Kelly, Jr., Deputy Superintendent of Security of Great Meadow Correctional Facility was served with any papers in this matter. Upon performing the search, she found that as of October 18, 2011, the Inmate Records Office has no record that Deputy Superintendent Kelly was served with a petition, order to show cause or other papers in this matter.

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 Gibson v Fischer, 87 AD3d 1190 [3d Dept., 2011]; Matter of DeFilippo v Fischer, 85 AD3d 1421, 1421 [3d Dept., 2011]; 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]). No such showing has been made. Petitioner did not oppose the motion. The only affidavit of service submitted by the petitioner indicates that he served "the annexed documents" (none of which are annexed to the affidavit of service or otherwise identified) upon "State Director & Superintendent" (with

no mailing address provided) on August 31, 2011. Thus, the Court has no way of knowing what papers were served, for whom they were intended, or to what address they were mailed.

The Court finds that the order to show cause, the petition and supporting papers were not served upon respondents or the Attorney General as required in the order to show cause. The Court concludes that the petition must be dismissed on this basis alone, by reason of the failure of petitioner to comply with the service requirements contained in the order to show cause (see Matter of Gibson v Fischer, *supra*; Matter of DeFilippo v Fischer, *supra*; Matter of Pettus v New York State Dept. of Corr. Serv., *supra*; Matter of Ciochenda v Department of Correctional Services, *supra*; People ex rel. Holman v Cunningham, *supra*).

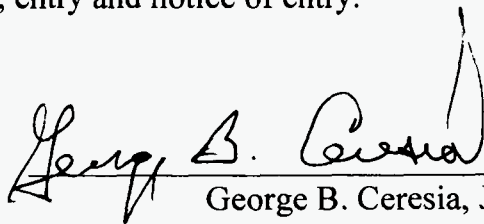
Accordingly, it is

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. 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: November 16, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. **Order To Show Cause dated August 11, 2011, Petition, Supporting Papers and Exhibits**
2. **Notice of Motion dated October 20, 2011, Supporting Papers and Exhibits**