

**Matter of Deponceau v Fischer**

2011 NY Slip Op 33107(U)

November 16, 2011

Sup Ct, Albany County

Docket Number: 5261-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In The Matter of VICTOR ALTHEUS DEPONCEAU,  
Petitioner,  
-against-

BRIAN S. FISCHER, AS COMMISSIONER OF SERVICES  
OF DOCS, AND NUMEROUS PRISON PUBLIC  
OFFICIALS AND CIVILIAN WORKER'S AND  
FACILITIES INDIVIDUALS, KNOWN AND UNKNOWN,  
AS PUBLIC OFFICIAL ET AL.

GREAT MEADOW CORRECTIONAL FACILITY:  
RETIRED EX SUPERINTENDENT NORMAN BEZION,  
ACTING SUPERINTENDENT CHARLES KELLY, C.  
GREEN, DEPUTY SUPT KAREN LAPOLT, GRIEVANCE  
SUPERVISOR WOODWORTH, COUNSELOR E. WHITE,  
SERGEANT VEETA, CO DANNY MULLIGAN,  
UNKNOWN DHO GMCF LIEUTENANT, CAPTAIN  
ROWE

UPSTATE CORRECTIONAL FACILITY:  
SUPERINTENDENT DAVID A. ROCK, DEPUTY SUPT J.  
OTIS, CO B. MITCHELLODDY, CO E. WOODS, CO M.  
ALBERT, HEALTH CARE ARKINSON, CO B.  
BOUGHUS,

ELMIRA CORRECTIONAL FACILITY: SERGEANT  
GILBOY, VOCATIONAL SUPERVISOR T. LEPKOWSKI,  
SUPERINTENDENT MARK BRADT, DEPUTY SUPT OF  
PROG DOUGLAS REYNOLDS, DHO JAMES ESGROW,  
ASST DEP S. CROIN, CO MCKIBBON, CO CARPENTER  
OF E BLOCK, CO WEST, SERGEANT POWERS,

DOWNSTATE CORRECTIONAL FACILITY:  
SUPERINTENDENT ADA PEREZ, CO HIRSCH OF  
BLOCK BOTH OF DOWNSTATE CORR FAC.,

Respondents,

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

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Supreme Court Albany County Article 78 Term  
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
 RJJ # 01-11-ST2939 Index No. 5261-11

Appearances: Victor Altheus DePonceau  
 Inmate No. 08-B-1912  
 Petitioner, Pro Se  
 Great Meadow Correctional Facility  
 P.O. Box 51, 11739 State Route 22  
 Comstock, NY 12821-0051

Eric T. Schneiderman  
 Attorney General  
 State of New York  
 Attorney For Respondent  
 The Capitol  
 Albany, New York 12224  
 (Cathy Y. Sheehan,  
 Assistant Attorney General  
 of Counsel)

**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 upon a petition which alleges as follows:

“1. I am an inmate State’s duty to protect you and property, your right to communicate with the Outside World and Governmental Agencies. Your right to be free from assaults, from guards and inmates.

“2. 4<sup>th</sup> Amendment your right to be free from unwarranted body searches, (illegal body searches). Your right to due process in DOH (hearing call witnesses). Your right to adequate medical care.

“3. I challenge unlawfully lost of liberty, due process hearing violation, violation of 160.50 state failed to redacted off institutional record, physical assaults. Constitutional violation.

“4. Statement of Facts: The state failed to proform the smallest duty violation of pursuant to CPL 160.50 disobay court order

signed by state Supreme Ct Justice is part of official misconduct of DOCS officials.

“5. Wherefore petitioner Victor Altheus DePonceau has been assaulted, rat poison put in my at Upstate, face hit metal object CO’s directed inmate’s to assault me.

“Based on the foregoing, I respectfully request that a judgment be entered pursuant to Article 78 of the Civil Practice Law and Rules: There is just cause for judgment against petitioner Victor Altheus DePonceau 08B1912 of GMCF has been physically and mentally scard by juris bad acts of respondents/ Nutso psychopath correctional officer’s. Request full judgment.

[]“Wherefore state officials fails to proform duty removal seal order of criminal charges showing on institutional records w/other changes as well not convicted of: All institutional Teir II & III Tickets removed based on violation of due process and on retaliation & retribution. Other request are sanction against DOCS.”

The first paragraph of an affidavit submitted in support of the petition indicates he seeks judgment against the respondents:

“on wrongdoings, assaults, wrongful lost of liberty (sic), medical practice (sic), fraud, fabrication of evidence, civil rights violations of sections 241 & 242 [,] Federal US Mail Fraud Title 18 USC Section 1341, Violation of New York State Penal Law Homicides related offenses of PL 125.00 Asking Albany County State Supreme View all submitted exhibits grant judgment in favor of the petition within this proceedings of Article 78 (sic).”

The respondents have made a motion to dismiss under CPLR 3211 (a) (7). The respondents argue that the affidavit in support of the petition violates CPLR 3013 and 3014, and that the petition is written in a conclusory and nonsensical fashion.

It is well settled that in response to a motion pursuant to CPLR 3211, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to the plaintiff (see Nonnon v The City of New York, 9 NY3d 825 [2007]; Leon v Martinez, 84 NY2d 83, 87; Lazic v Currier, 69 AD3d 1213 [3<sup>rd</sup> Dept., 2010];

Bordeleau v State of New York, 74 AD3d 1688 [3<sup>rd</sup> Dept., 2010]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268, 275). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (see Nonnon v The City of New York, *supra*; Leon v Martinez, *supra*; Lawrence v Miller, 11 NY3d 588 [2008]). Only affidavits submitted by the plaintiff in support of his or her causes of action may be considered on a motion of this nature (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636; Allen v City of New York, 49 AD3d 1126, 1127 [3<sup>rd</sup> Dept., 2008]). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see People v Coventry First LLC, 13 NY3d 758 [2009]; Leon v Martinez, *supra*; Pietrosanto v Nynex Corp., 195 AD2d 843, 844 [3<sup>rd</sup> Dept., 1993]; IMS Engineers-Architects, P.C. v State of New York, 51 AD3d 1355[3<sup>rd</sup> Dept., 2008]).

Under CPLR 3013, “statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

CPLR 3014 recites as follows:

“Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated

or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically. A copy of any writing which is attached to a pleading is a part thereof for all purposes.”

In this instance the petition, which names over thirty individual respondents (apparently employed in four separate correctional facilities), is unintelligible, non-factual, and conclusory. The statements are not plain and concise, and are not separately numbered. Fragments of disassociated causes of action are combined, unnumbered, and unsupported by simple statements of fact. The precise CPLR Article 78 relief which the petitioner seeks is not indicated. The petitioner has not identified the specific administrative determination (or determinations) of which he seeks judicial review, which of the respondents were involved, and the reasons why the administrative determination was improper. Nor has he indicated the CPLR Article 78 relief which he seeks.<sup>1</sup>

Under all of the circumstances, the Court finds that the petition fails to state a cause of action, and also fails to comply with the requirements of CPLR 3013 and CPLR 3014. The Court concludes that the petition must be dismissed, subject to petitioner’s right to recommence the proceeding upon proper papers.

In view of the foregoing, the following motions will be denied: petitioner’s application for a temporary restraining order; petitioner’s motion “to force response

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<sup>1</sup> Also, to the extent that he may be attempting to set forth a common law cause of action sounding in tort, he fails to allege the elements of the cause of action.

respondents answers”.

Accordingly it is

**ORDERED**, that the respondents’ motion to dismiss the petition is granted; and it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed; and it

is

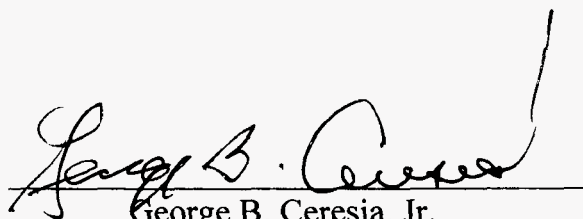
**ORDERED**, that petitioner’s motion for a temporary restraining order, and motion “to force response respondents answers” are denied and dismissed.

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 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 9, Petition, Supporting Papers and Exhibits
2. Respondent’s Notice of Motion dated October 6, 2011, Supporting Papers and Exhibits
3. Petitioner’s Application For A Temporary Restraining Order Filed October 4, 2011
4. Notice of Motion To Force Response Respondents Answers Filed October 11, 2011
5. Petitioner’s Memorandum of Law