

**Matter of Pearson-Hinds v Hogan**

2011 NY Slip Op 33224(U)

September 30, 2011

Supreme Court, Franklin County

Docket Number: 2011-530

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**

**X**

In the Matter of the Application of  
**NATHANIEL PEARSON-HINDS,**  
**#07-A-1725,**

Plaintiff,

**DECISION AND ORDER**  
**RJI #16-1-2011-0232.48**  
**INDEX # 2011-530**  
**ORI #NY016015J**

-against-

**MICHAEL HOGAN,** Commissioner and  
**BRIAN S. FISCHER,** Commissioner

Defendants.

**X**

This is a combined action for declaratory judgment (CPLR §3001) and civil rights action (42 U.S.C. §1983) seeking compensatory/punitive damages and injunctive relief. The plaintiff's complaint, verified on May 25, 2011, was filed in the Franklin County Clerk's office on May 26, 2011 together with a summons. Plaintiff seeks the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail. In addition, the plaintiff submitted an application pursuant to CPLR §1101 for poor person status.

Before addressing plaintiff's application for the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail and his application for poor person status the Court notes several defects in the summons filed in the Franklin County Clerk's office on May 25, 2011. The summons does not properly specify the time frame within which defendants must answer. The summons states that the defendants must serve "[a]n answer to the complaint which is served on you with this

summons, within 20 days after service of this summons on you, exclusive of the day of service.” The 20-day response time, however, it is not applicable in certain service scenarios, including service pursuant to CPLR §308(5), which plaintiff seeks to utilize in this action. *See* CPLR §320 (a). In addition, the summons incorporates features unique to federal, rather than state practice.<sup>1</sup> More specifically, the summons states that “[a]ny answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.” This language is apparently taken from rule 5(d)(1) of the Federal Rules of Civil Procedure (FRCP) which provides, in relevant part, that “[a]ny paper after the complaint that is to be required to be served . . . must be filed within a reasonable time after service.” While a mandatory filing system is used in federal practice, the CPLR has no uniform mandatory filing requirement akin to that set forth in the above-quoted federal rule. In addition, under New York practice there is no reason for the amended summons to include a line for the signature of the clerk of the court. Although federal procedure requires that a summons be signed by the clerk of the court (*see* FRCP 4(a)(1)(F)), there is no analogous requirement in the CPLR.

For the reasons set forth in the preceding paragraph, this Court finds that an amended summons must be filed before this action can move forward. When filing an amended summons the plaintiff should also take note of the provisions of CPLR §305(a) which state, *inter alia*, that “[a] summons shall specify the basis of venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff’s address, and also shall bear the index assigned and the date of filing with the clerk of the court.”

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<sup>1</sup> Indeed, the summons form employed by plaintiff appears to be a federal form.

Turning to plaintiff's application for the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail, the Court notes, as a technical matter, that although it may issue an Order to Show Cause in lieu of a notice of petition in a special proceeding (*see* CPLR §403(d)), there is no statutory provision authorizing the issuance of an Order to Show Cause as an initiatory paper in an action, such as this. Accordingly, the plaintiff seeks an order pursuant to CPLR §308(5) directing an alternative method of service of the summons and complaint where service is "impracticable" under CPLR §308(1), (2) or (4).

A notice of petition in a special proceeding serves a similar function as a summons in an action and must be served in the same manner as a summons. CPLR §403(c). As alluded to previously, however, CPLR §403(d) authorizes the Court wherein a special proceeding is pending to "... grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein." A petitioner in a special proceeding is not obligated to make any particular showing before the court may issue an Order to Show Cause in lieu of a notice of petition. The issuance of the Order to Show Cause and the provisions for the time and manner of service specified therein are left to the sound discretion of the Court. This Court handles numerous special proceedings - habeas corpus proceedings (CPLR §7001) and CPLR Article 78 proceedings (CPLR §7804(a)) - commenced by inmates confined in various DOCCS facilities. It is the routine practice of this Court to issue Orders to Show Cause in such proceedings directing service on the named respondent(s) and the appropriate office of New York State Attorney General, by ordinary first class mail. It is noted, however, that the respondent(s) in

habeas corpus proceedings and CPLR Article 78 proceeding are not directly exposed to any personal liability.

The plaintiff in an action, such as this one, may effect personal service of a summons and complaint upon a named defendant(s), without first obtaining a court order, pursuant to the methods described in CPLR §308(1), (2) or (4).<sup>2</sup> CPLR §308(5) permits service upon a named defendant “ . . .in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.” Absent of showing of impracticability, a court is without power to direct an alternative means of service pursuant to CPLR §308(5). *See Alvarez v. Klein*, 55 AD3d 643, *Tyler v. Selsky*, 267 AD2d 522 and *Cooper-Fry v. Kolket*, 245 AD2d 846. In cases such as this one, moreover, where the plaintiff seeks compensatory damages in the amount \$250,000.00, jointly and severally against both defendants in their individual capacities, together with punitive damages in the amount of \$50,000.00 against each defendant in his individual capacity, the Court is particularly concerned with the quality of notice afforded to such defendants. In this regard it is noted that “[p]ersonal delivery under CPLR 308(1) is a time-honored method of personal service. It is the method best calculated to give actual notice to the defendant.” Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C308:2. To this end, plaintiff’s application for expedient service pursuant to CPLR §308(5) will be closely scrutinized.

In connection with his applications for poor person status and for an order pursuant to CPLR §308(5) petitioner has filed an Affidavit in Support of Application

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<sup>2</sup> CPLR §308(3) authorizes personal service on an natural person through a designated agent. *See* CPLR §318. CPLR §308(3) is not relevant to this action.

Pursuant to CPLR 1101, sworn to on May 25, 2011 (hereinafter the Poor Person Affidavit) and an Affidavit in Support of Motion for an Order to Show Cause, also sworn to on May 25, 2011 (hereinafter the Expedient Service Affidavit). In paragraph four of the Expedient Service Affidavit petitioner asserts, in conclusory fashion, as follows: “Because personal service pursuant to subdivisions 1, 2 and 4 of CPLR 308 has been, and is impracticable, I ask to proceed by Order to Show Cause so as to authorize me to effect service by regular mail.” He then goes on to assert in paragraph five of the Expedient Service Affidavit as follows: “I have asked all my friends and relatives to assist me in executing personal service in this matter. Each as refused to assist me, due largely to their unwillingness to take time off from work to travel the long distance necessary for them to provide me with such assistance.” No details, however, were provided as to the identities of the friends and relatives contacted by plaintiff, when such contact took place and the specific responses received by petitioner. Other than the above-quoted paragraphs four and five, the plaintiff, in his Expedient Service Affidavit, simply references his Poor Person Affidavit as indicative of his inability to afford a process server. He then asserts, in paragraph seven of the Expedient Service Affidavit as follows: “By virtue of my incarceration at the Upstate C. F., and my poverty, it will be impossible for me to serve process in this action unless the Court fashions a method of service that my situation will permit me to complete.” The poor person affidavit, which is the standard affidavit utilized by inmates in habeas corpus proceedings and CPLR Article 78 proceedings, broadly states, in relevant part, that plaintiff has “no savings, property, assets or income,” and that he is “unable to pay the costs, fees, and expenses necessary to prosecute this case.” It is further noted that the DOCCS printout detailing the activity/status of plaintiff’s inmate account shows

several small deposits therein over the past six months along with one monthly deposit of \$1,130.69. The current spendable balance of petitioner's inmate account is listed as \$0.02.

The Court finds that additional information is needed in order for it to make an informed determination as to whether or not service of process on the two named defendants, under the provisions of CPLR §308(1),(2) or (4), is "impracticable" so as to support an expedient service order pursuant to CPLR §308(5). In this regard the Court finds that plaintiff must submit a supplemental affidavit addressing the following matters:

(1) The identities of the friends and family members plaintiff contacted to solicit assistance in effecting personal service on the defendants must be disclosed along with the approximate date(s) of such contacts and the specific details of each response. If any of such contacts or responses were in writing, copies of same, if available, must be annexed to plaintiff's supplemental affidavit; and

(2) Plaintiff must state why he would find it impracticable to avail himself of the personal service by mail methodology set forth in CPLR §312-a; and

(3) Plaintiff must state whether or not he has sought the assistance of any private or legal aid attorney in prosecuting this action, on a contingency fee or similar basis, and, if so, the results of such efforts. If plaintiff has not sought any such outside legal representation he must set forth his reason(s) of not doing so; and

(4) Plaintiff must specifically state whether or not he has any funds available, in any form, outside of his inmate account. In addition, the plaintiff must disclose the circumstances of the disposition of the \$1,130.69 previously deposited into his inmate account.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

**ORDERED**, that petitioner's application for poor person status, as well as his application for an order pursuant to CPLR §308(5) are denied at this time without prejudice for the plaintiff to re-request such relief upon the filing of an Amended Summons and submission of a supplemental affidavit, as described in this Decision and Order; and it is further

**ORDERED**, that if plaintiff does not file an Amended Summons and submit a supplemental affidavit on or before November 18, 2011 his applications for poor person status and for an order pursuant to CPLR §308(5) will be denied.

**Dated:** September 30, 2011 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice