

**Matter of Johnson v Ramsdell**

2012 NY Slip Op 30357(U)

January 13, 2012

Supreme Court, Albany County

Docket Number: 4571-11

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 JONATHAN JOHNSON,

Petitioner,

-against-

TIMOTHY RAMSDELL, PRISON GUARD;  
BRIAN FISCHER, COMMISSIONER, NYSDOCS,

Respondent,

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  
RJI # 01-11-ST2865 Index No. 4571-11

Appearances: Jonathan Johnson  
Inmate No. 89-A-1042  
Petitioner, Pro Se  
Upstate Correctional Facility  
P.O. Box 2000  
309 Bare Hill Road  
Malone, NY 12953

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(William J. McCarthy,  
Assistant Attorney General  
of Counsel)

### **DECISION/ORDER**

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Upstate Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a grievance determination arising out of an incident which allegedly occurred on February 17, 2011 in which he alleges that respondent Timothy

Ramsdell refused to deliver mail to him. The respondent has made a motion to dismiss under CPLR 7804 (c) on grounds that the petitioner failed to properly serve the order to show cause upon the respondent or the Attorney General, and that the petition fails to state a cause of action.

Turning first to a threshold issue, the petitioner maintains that the respondent's motion was untimely served because he received it on October 18, 2011. The Court observes that under CPLR 7804 (c) and (f) answering papers (which would include a motion to dismiss) must be served at least five days before the return date. In this instance, according to court records, the respondent was granted an adjournment by the court of the original September 30, 2011 return date to October 21, 2011. As indicated in the affidavit of service submitted by the respondent, the motion papers were served on October 14, 2011. The Court finds that the motion papers were timely served with respect to the October 21, 2011 return date.

Turning to the issue regarding petitioner's alleged failure to serve the order to show cause, petition and supporting papers upon the respondent and the Attorney General, the Court notes that the order to show cause, dated July 21, 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 August 19, 2011.

The respondent has submitted the affidavit of Patricia E. Dallmann-Weaver, employed by the New York State Department of Corrections and Community Supervision ("DOCCS") in the Counsel's Office as an Administrative Assistant. Ms. Dallmann-Weaver indicates that whenever legal papers are served upon Commissioner Brian Fisher's office or DOCCS, the papers are forwarded to support staff after review by the Deputy Counsel. It is the

responsibility of support staff to forward such papers, together with a letter requesting legal representation in that matter, to the Office of the Attorney General. A copy of the letters requesting legal representation is maintained in Counsel's Office files. Ms. Dallmann-Weaver caused a search of Counsel's Office files to determine if any legal papers in the above matter had been received. She indicates that she found that on August 8, 2011 her office received an affidavit in support of a request for an order to show cause, a verified petition and an exhibit from the petitioner. However, no order to show cause was received.

The respondent has also submitted the affidavit of Donna Mainville, an Inmate Records Coordinator II at Upstate Correctional Facility. Her responsibilities include maintaining files of all legal papers served upon DOCCS employees at Upstate Correctional Facility and providing the Office of the Attorney General with records relevant to proceedings such as the instant one. She searched for information concerning the instant proceeding and found that on August 26, 2011 respondent Timothy Ramsdell, Correction Officer at Upstate Correctional Facility was served with a request for judicial intervention, an affidavit in support of request for an order to show cause, and verified petition with Exhibit A.

Lastly, respondent has submitted the affidavit of Evan Schanz a Clerk in the Office of the Attorney General. In his affidavit, Mr. Schanz indicates that the office of the Attorney General 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. Schanz further indicates that he searched the database of the Attorney General for information concerning the above-

captioned matter, and found that on August 8, 2011 the Attorney General's Office received a request for judicial intervention, affidavit in support of request for order to show cause, verified petition with exhibit A, affidavit of service and letter dated August 5, 2011 addressed to Hon. Joseph Teresi with Exhibit B. The office of the Attorney General was not served with the executed 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 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 [3<sup>rd</sup> Dept., 2010]; Matter of Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3<sup>rd</sup> Dept., 2009]; People ex rel. Holman v Cunningham, 73 AD3d 1298, 1299 [3<sup>rd</sup> Dept., 2010]).

The petitioner, in response, indicates that he specifically requested the Upstate Correctional Facility law library to make photocopies of the order to show cause (and also one in an unrelated CPLR Article 78 proceeding) but library personnel did not do so. The respondents, however, submitted an affidavit sworn to September 22, 2011 from K. Wilson, the Facility Law Library Correction Officer who provided the following explanation:

“Inmate Johnson sent several documents to the Law Library to be photocopied. Due to insufficient funds in his account, he must provide verification from the Court in order to be advanced the funds to cover the cost of the requested # of photocopies. It was our understanding that The Order To Show Cause was his verification and it was not photocopied for that reason. I explained this to inmate Johnson and directed him to send the Order To Show Cause back to the Law Library and we would photocopy it for him. To his date he has refused to do so.”

Notably, this affidavit fails to indicate when C.O. Wilson directed the petitioner to return the order to show cause to the law library for photocopying, and whether this was done before the August 19, 2011 deadline for service of papers. In addition, the Court notes that the petitioner, by letter dated August 5, 2011, alerted the Court, with respect to this problem:

“The gravamen of this letter is to bring to your attention that on August 1, 2011 the undersigned (petitioner) had requested the Law Library Supervisor (Kenneth Wilson) [to] Copy the Article 78 petition (herewith annexed) by letter requesting eight (8) copies of each documents. (See exhibit “B”)[,] August 1, 2011 letter[.]. The Law Library failed to make copies of this court’s order to show cause. Therefore the petitioner was unable to serve the respondents and the[ir] attorney with this court’s order to show cause, an obstacle beyond petitioner’s control.”

In this respect, it appears on its face that the petitioner anticipated the potential jurisdictional problem with regard to service of the order to show cause, and attempted to seek the Court’s guidance. Under the circumstances, by reason of the misunderstanding of law library staff corroborated by C.O. Kenneth Wilson, the Court finds that the petitioner has sufficiently demonstrated that imprisonment prevented compliance with the terms of the order to show cause. Because, however, the order to show cause was not served, the Court will direct the petitioner to serve a copy of the order to show cause upon the respondents.

Turning to respondents’ argument under CPLR 3211 (a) (7) 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 plaintiffs (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]; Gizara v The New York Times Company, 80 AD3d 1026, 2027 [3d Dept., 2011]; Gray v Schenectady City School District, 86 AD3d

771, 772 [3d Dept., 2011]). 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]; Gray v Schenectady City School District, supra). 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]).

The pertinent portions of the petition recites as follows:

“4. This petition is in the nature of mandamus, and challenges respondent’s determination, on June 8, 2011 which denied the inmate grievance complaint to produce the February 17, 2011, legal mail confiscated by Timothy Ramsdell and not returned to petitioner nor the mail room, grievance UST #45553-11.

#### FACTS

“5. On February 17, 2011 at Upstate Correctional Facility Eleven Building prison guard Timothy Ramsdell had malicious [sic] denied petitioner his legal mail in violation of Directive 4421 and has to date has refused to return that mail to petitioner or the mail room in accordance with Directive 4421.

## AS AND FOR A FIRST CAUSE OF ACTION

“6. First amendment right to access to the courts, and in violation of their own rules and regulations directive 4421 (interference claim). Privileges and immunities clause of Article IV of the constitution. Fifth amendment due process clause. Fourteenth amendment equal protection and due process clauses. Christopher v Harburg, 536 US 403, 415 n. 12, 122 S Ct. 2179 [2002] Lewis v Casey, 518 US 343, 351-53, 116 S Ct. 2175 [1996].

“Wherefore the petitioner requests that judgment under New York Civil Practice Law and Rules Article 78 be entered: Ordering return of petitioner legal mail for February 17, 2011 in accordance with Directive 4421.”

The petition makes reference to petitioner’s grievance complaint and the decision of the Central Office Review Committee (“CORC”) dated June 8, 2011. Crediting the petition with every possible inference, the Court finds that the petition can be construed as seeking review of the June 8, 2011 determination with regard to whether there is factual support for the determination or whether, as he claims, respondent Ramsdell improperly refused to deliver mail to him, in violation of Directive 4421. The Court agrees that the petition fails to set forth facts in support of his various constitutional allegations (set forth in paragraph 6) which must be dismissed.

Lastly, the petitioner has made a motion to amend his petition to add a claim for \$1,000,000.00 in money damages for constitutional infringement of his right to access to the courts. While the motion is unopposed, it appears that the affidavit of service, sworn to by the petitioner on August 12, 2011, recites that service was made three days later, on August 15, 2011. As such, the Court finds that the affidavit of service does not serve as any evidence of when the motion was served, and the motion must be denied.

Accordingly, it is

**ORDERED**, that petitioner's motion to amend the petition be and hereby is denied;  
and it is

**ORDERED**, that respondent's motion to dismiss the petition be and hereby is granted with respect to the allegations set forth in paragraph 6 of the petition, which is hereby dismissed, but is otherwise denied, provided that the petitioner on or before **February 3, 2012**, serves a copy of the order to show cause by ordinary first class mail upon the respondents and the attorney for the respondents at the following addresses:

Brian Fischer, Commissioner  
NYS Department of Corrections and  
Community Supervision  
Building 2  
1220 Washington Ave  
Albany, New York 12226-2050

Officer Timothy Ramsdell  
Upstate Correctional Facility  
309 Barehill Road  
Box 2000  
Malone, NY 12953

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

Attn.: William J. McCarthy, Esq.  
Assistant Attorney General

and it is

**ORDERED**, that the petitioner within ten (10) days of the date of such service file with the Court an affidavit of service demonstrating full compliance with the preceding paragraph, and serve a copy thereof upon the attorney for the respondents; and it is

**ORDERED**, that respondent be and hereby is directed to serve and file an answer on or before **February 24, 2012**, and it is further

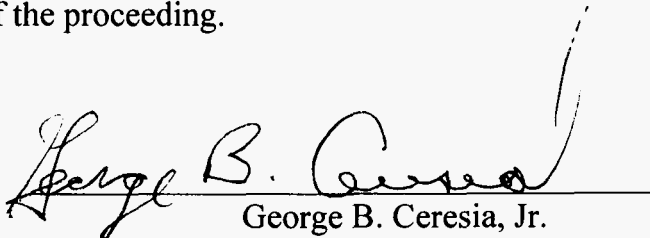
**ORDERED**, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

**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: January 13, 2012  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated July 21, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Notice of Motion dated October 12, 2011, Supporting Papers and Exhibits
3. Petitioner's Notice of Motion To Amend the Petition dated August 12, 2011 and Supporting Papers
4. Petitioner's Affirmation in Opposition To Respondent's Motion Dated October 18, 2011