

Matter of Kroeger v Fischer
2012 NY Slip Op 30940(U)
March 29, 2012
Sup Ct, Albany County
Docket Number: 3390-11
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of ANTHONY P. KROEGER,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER, NYSDOCS,

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
RJ# 01-11-ST2958 Index No.3390-11

Appearances: Anthony P. Kroeger
Inmate No. 08-B-1220
Petitioner, Pro Se
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

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

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Auburn Correctional Facility, has commenced the instant

CPLR Article 78 proceeding to review a determination denying a grievance. The respondent made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that the petitioner failed to timely serve the order to show cause and petition upon the respondent and the New York State Attorney General. The order to show cause, dated June 24, 2011, required the petitioner to serve the respondents and the Attorney General with a copy of the order to show cause, petition and supporting papers on or before July 22, 2011. Prior to the September 2, 2011 return date, the petitioner applied for, and was granted, an amended order to show cause. The amended order to show cause, dated August 15, 2011, was returnable on October 21, 2011. It directed that the petitioner serve the amended order to show cause, petition and supporting papers on or before September 9, 2011.

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]).

With regard to the initial motion to dismiss, the Court finds that the amended order to show cause supplanted the original order to show cause. As such, the Court finds that the first motion to dismiss must be denied as moot.

Turning to the motion dated October 12, 2012, 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 September 15, 2011 her office received an amended order to show cause, an order to show cause, affidavit in support, an order, a verified petition and a request for judicial intervention.

The petitioner has submitted an affidavit which indicates that he served an order to show cause and petition (together with other documents) by mail, addressed to respondent Fisher and the Attorney General on August 31, 2011. There is no indication whether the amended order to show cause dated August 15, 2011 was served. Moreover, in his reply, the petitioner pretty much acknowledges that the papers were not timely served. He indicates that because he has no money (due to encumbrances placed on his inmate account) he must go through a lengthy, time-consuming process to apply for advances for postage in order to

comply with deadlines for service of papers. In this case the Facility business office did not approve the advance until September 7, 2011. He requests that if the Court finds service of the amended order to show cause was untimely, that he be granted an extension of time to serve the papers.

As noted, it appears from the affidavit of Patricia E. Dallmann-Weaver that DOCCS received a copy of the amended order to show cause, petition and supporting papers on September 15, 2011. While there is no indication with regard to the date when the envelope was post-marked, it is clear that the papers were received a mere six days after expiration of the deadline for service by mail. The Court finds that petitioner's request for an extension of time to serve the amended order to show cause, petition and supporting papers should be granted pursuant to CPLR 2004. Because it would serve no useful purpose to direct that the petitioner re-serve the papers, the Court will grant the extension *nunc pro tunc* to and including September 15, 2011. As such, the Court will deny the motion and direct the respondent to serve an answer. The Court will also direct the respondent to re-notice the proceeding in accordance with CPLR 7804 (f).

Accordingly, it is

ORDERED, that the motion to dismiss dated August 16, 2011 is denied; and it is

ORDERED, that the motion to dismiss dated October 12, 2011 is denied; and it is further

ORDERED, that the respondent serve and file an answer and supporting papers on

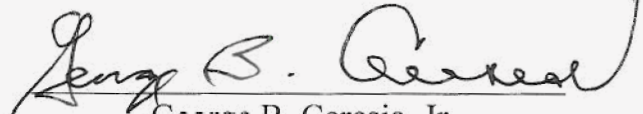
or before April 20, 2012, and re-notice the proceeding in conformity with CPLR 7804 (f);
and it is further

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

This shall constitute the decision, order and judgment of the Court. All papers will
be retained by the Court until final disposition of the proceeding.

ENTER

Dated: March 29, 2012
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated June 24, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Notice of Motion dated August 16, 2011, Supporting Papers and Exhibits
3. Amended Order To Show Cause dated August 15, 2012
4. Respondent's Notice of Motion dated October 12, 2011, Supporting Papers and Exhibits
5. Petitioner's Reply dated October 31, 2011