

**Matter of Batista v NYS Dept. of Corr. & Community
Supervision**

2012 NY Slip Op 32977(U)

December 4, 2012

Sup Ct, Albany County

Docket Number: 2628-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HECTOR BATISTA,
Petitioner,
-against-

NYS DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION (NYS BOARD
OF PAROLE),
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 # 01-12-ST3646 Index No.2628-12

Appearances: Cheryl L. Kates, P.C.
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Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Gregory J. Rodriguez,
Assistant Attorney General
of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of
Corrections and Community Supervision, commenced the instant CPLR Article 78
proceeding to review a determination dated April 5, 2011 in which he was denied release on

parole.

Respondent has made a motion pursuant to 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 May 8, 2012, 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 May 25, 2012.

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 on May 14, 2012 the Attorney General's Office received a copy of the verified petition, memorandum, a request for judicial intervention and supporting affidavits in this proceeding. However, as of June 19, 2012, the Attorney General had not been served with any other documents in this matter, including the order to show cause.

Respondent has also submitted the affidavit of Robin Filmer, an Administrative Assistant employed in the Counsel's Office of the New York State Department of Corrections and Community Supervision. Filmer indicates that legal mail and court papers addressed to the Chairwoman and Commissioners of the Board of Parole are forwarded to the Counsel's Office, where they are included in litigation logs and litigation files. Filmer

reviewed the ligation log and litigation files. The records indicate that on May 15, 2012 the Board of Parole was served with an affidavit in support of order to show cause, affidavit in support of motion for poor person status, memorandum of law, and verified petition with exhibits, but without a signed order to show cause. Filmer further avers that as of June 14, 2012 the Board had not received any additional documents.

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]).

Counsel for the petitioner indicates that she believes that the order to show cause was served upon the respondent and the Attorney General. When counsel learned that service was being contested, she re-served the order to show cause by express mail on July 3, 2012. She also contacted the Clerk of the Albany County Supreme Court Clerk's Office to request that the return date be adjourned. Petitioner's counsel made a motion, returnable on July 13, 2012, "for an order granting an amended order to show cause / order allowing for correction of omission or defect, and dismissal of the motion to dismiss []".

As set forth in CPLR 2001:

“[a]t any state of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, [] to be corrected, upon such terms as may be just,

or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded [].”

Although petitioner may have failed to timely serve the signed order to show cause in accordance with its terms, upon becoming aware of the defect, the petitioner made a significant effort, prior to the return date, to correct the error. This included serving a copy of the order to show cause by express mail upon the respondent and the Attorney General. The Court discerns no prejudice to the respondent arising from the belated service of the order to show cause. Nor has the delay been shown to be willful. The Court is further mindful of the strong public policy in favor of resolving cases on the merits. Viewed either as a motion for an extension of time to serve the order to show cause, or one to disregard the mistake, the Court finds that the motion should be granted (see Dinstber v Allstate Ins. Co., 96 AD3d 1198 [3d Dept., 2012]).

Under the circumstances, pursuant to CPLR 2001, the Court finds that respondent’s motion should be granted to the extent of authorizing service of the signed order to show cause, *nunc pro tunc*¹, to and including July 3, 2012, and determining that said document was timely served.

Accordingly, it is

ORDERED, that respondent's motion to dismiss be and hereby is denied; and it is

ORDERED, that petitioner’s motion be granted as set forth herein; and it is

- **ORDERED**, that respondent be and hereby is directed to serve and file an answer within twenty (20) days of the date hereof; and it is further

¹Under the facts present here, it would serve no useful purpose to direct the petitioner to re-serve the papers.

ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804

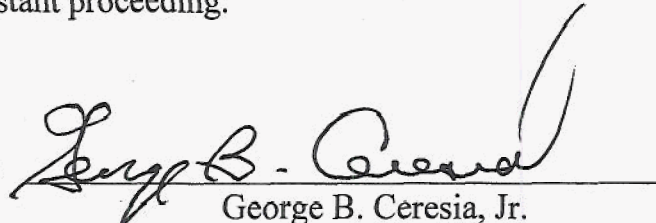
(f); and it is further

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

This will constitute the decision and order of the Court. The Court will retain all papers until final disposition of the instant proceeding.

ENTER

Dated: December 4, 2012
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Petitioner's Order To Show Cause dated May 8, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Notice of Motion dated June 28, 2012, Supporting Papers and Exhibits.
3. Petitioner's Notice of Motion dated July 2, 2012, Supporting Papers and Exhibits
4. Petitioner's Reply dated July 2, 2012

Not Considered:

1. Ex Parte Letter of Cheryl L. Kates, Esq. dated November 19, 2012 labeled "New Evidence" With Attachments, submitted without permission after the return date.