

**Matter of Barnes v Venettozzi**

2013 NY Slip Op 31757(U)

July 3, 2013

Supreme Court, Albany County

Docket Number: 4949-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of JESSIE J. BARNES,

Petitioner,

-against-

DON VENETTOZZI, Acting Director  
Special Housing Unit State of New  
York Department of Corrections and  
Community Service,

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-ST4063 Index No. 4949-12

Appearances: Jessie J. Barnes  
Inmate No. 09-B-2707  
Petitioner, Pro Se  
Upstate Correctional Facility  
PO Box 2001  
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  
(Laura A. Sprague,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Upstate Correctional Facility, commenced the above-captioned CPLR Article 78 proceeding to review a disciplinary determination in which

he was found guilty of violating prison rules. By notice of motion dated November 15, 2012, 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. The order to show cause required the petitioner to serve the papers on or before October 5, 2012. The petitioner opposed the motion by providing an account of a series of circumstances which he claimed prevented him from timely serving his papers. He indicated that on September 6, 2012 he was transferred out of his institutional residence, Upstate Correctional Facility, to the Ontario County Jail for a re-trial of a criminal action. On September 21, 2012 he was returned to Upstate Correctional Facility, but did not receive the signed order to show cause until Monday, September 24, 2012. On September 25, 2012 he sent the papers to the Upstate Correctional Facility law library to make photocopies. He received the papers back on September 28, 2012, however one of the correction officers refused to notarize his papers so that he could mail them out. He claims that he was forced to pack up all his legal papers on September 28, 2012 in connection with a temporary transfer to Five Points Correctional Facility. He indicates that he did not receive his legal papers back until October 3, 2012, but that a notary public was not available. In a decision-order dated February 28, 2013, the Court denied the motion to dismiss and granted the petitioner an extension of time, to March 18, 2013, to serve his papers. The Court subsequently received a letter from the petitioner dated March 6, 2013 in which he indicated that on February 21, 2013 he was transferred from Upstate Correctional Facility to Ontario County Jail for trial, and did not return to Upstate Correctional Facility until March 5, 2013. He indicated that as of March 6, 2013 he had not yet received possession of his legal papers. He requested a fourteen day extension of time.

By order dated April 1, 2013 the Court granted him an extension until April 15, 2013 to serve the papers.<sup>1</sup>

At the time the Court signed the April 1, 2013 order, the Court was unaware that in the meantime, the petitioner, by amended notice of motion returnable on April 1, 2013, had made a motion for an extension of time to serve his papers. The Court finds that the petitioner's motion was rendered moot by the grant of such relief in the order issued on April 1, 2013. For this reason, the petitioner's motion will be denied.

The respondent has made a second motion to dismiss the petition on grounds that the petitioner has failed to serve the order to show cause, petition and supporting papers. In response, the petitioner indicates that he continues to have problems securing photocopies of his legal papers from the Upstate Correctional Facility Law Library.<sup>2</sup>

Failure of an inmate to satisfy the service requirements set forth in a court order 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

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<sup>1</sup>The Court granted the petitioner far more time than he had requested, in order to provide him ample opportunity to serve the papers.

<sup>2</sup>Specifically, he mentions that Law Library personnel failed to make a photocopy of the April 1, 2013 court order. Notably, the Court never directed the petitioner to serve the April 1, 2013 court order on either the Attorney General or the respondent, and its inclusion in the papers which he was required to serve was entirely unnecessary. Thus it created no obstacle to his ability to comply with the Court's order.

v Cunningham, 73 AD3d 1298, 1299 [3<sup>rd</sup> Dept., 2010]). No such showing has been made.

On numerous occasions it has been held that an inmate's inability to obtain photocopies of his legal papers does not excuse his failure to timely serve his papers upon the respondent (see Matter of Thomas v Selsky, 34 AD3d 904, 904-905[3<sup>rd</sup> Dept., 2006]; Matter of Vargas v Unger, 29 AD3d 1258, 1258 [3<sup>rd</sup> Dept., 2006]; Matter of Hickey v Goord, 3 AD3d 802, 802-803 [3d Dept., 2004]; Matter of Williams v Lacy, 253 AD2d 915, 916 [3d Dept., 1998]). In this instance, the petitioner has acknowledged that he did not timely serve the order to show cause, petition and supporting papers. In addition, as noted, he has failed to demonstrate that imprisonment prevented him from doing so.

Under the circumstances, the Court finds that the respondent's motion must be granted, and the petition dismissed.

Accordingly, it is

**ORDERED**, that petitioner's motion for an extension of time to serve the order to show cause, petition and supporting papers is denied; and it is

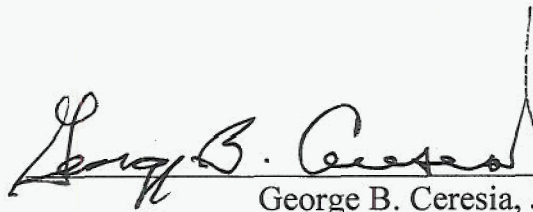
**ORDERED**, that respondent's motion to dismiss the petition is granted; and it is

**ORDERED**, that the petition be and hereby is dismissed.

This shall constitute the decision and order of the Court. The original decision/order 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 and delivery of this decision/order 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: July 3, 2013  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 10, 2012, Petition, Supporting Papers and Exhibits
2. Petitioner's Amended Notice of Motion dated March 27, 2013, Supporting Papers and Exhibits.
3. Petitioner's Letter dated April 9, 2013
4. Petitioner's Letter dated April 15, 2013
5. Respondent's Notice of Motion dated April 16, 2013, Supporting Papers and Exhibits
6. Petitioner's Affidavit in Opposition sworn to April 23, 2013 and Exhibits