

Matter of Jones v Fischer

2013 NY Slip Op 31762(U)

June 3, 2013

Supreme Court, Albany County

Docket Number: 6684-12

Judge: George B. Ceresia Jr

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Great Meadow Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review an adverse grievance determination concerning follow-up medical treatment with respect to knee replacement surgery.

The respondents have 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 December 21, 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 January 25, 2013.

The respondents have 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 papers are served upon Commissioner Brian Fischer’s Office or DOCCS the papers are forwarded to designated staff after review by her supervisor, Acting Deputy Counsel Nancy J. Heywood. It is the responsibility of appropriate staff to forward these documents to the Office of the Attorney General, along with a letter requesting representation on behalf of the respondents. Ms. Dallmann-Weaver indicates that she made a search of the files in the Counsel’s Office to determine whether any legal papers relating to the above-captioned action had been served upon the respondents. She indicates that her

office received an order to show cause, petition and supporting papers on February 12, 2013.

Respondents have also submitted the affidavit of Evan Schanz, employed in the Office of the New York State Attorney General in the Albany Litigation Bureau as a Clerk. His responsibilities include making entries in, and searching, the database of cases maintained in the office of the Attorney General. Mr. Schanz indicates that he searched the computerized database of the Attorney General for information concerning the above-captioned action. He found that the Attorney General was served with a copy of the order to show cause, petition and supporting papers on February 12, 2013. Mr. Schanz further indicates that on February 22, 2013, the office of the Attorney General received two letters requesting representation from respondents Dr. Karandy and Mary Harris, RN. These letters indicated that each respondent was served with the order to show cause and petition on February 12, 2013.

The affidavits of service submitted by the petitioner indicate that he served the order to show cause, petition and supporting papers on February 7, 2013, after the January 25, 2013 deadline.

The petitioner indicates that he suffers from a variety of physical and mental disabilities which impaired his ability to follow the service requirements set forth in the order to show cause. He indicates that he did not receive a replacement custom fitted orthosis knee brace until February 20, 2013. Prior to that time, he could not walk without pain, including walking to the prison law library. In addition to the foregoing, he wears two hearing aids to

address his hearing impairment. He asserts that Great Meadow Correctional Facility, where he is currently incarcerated, does not have Law Library Staff trained to assist inmates with hearing impairments, and that this makes utilization of library services more time consuming. Lastly, the petitioner indicates that he is receiving treatment for schizophrenia. He avers that the medication which he receives daily for this condition prevents him from being able to comprehend legal material until the following morning.

Under the unique circumstances present here, and mindful that service of the papers was only thirteen days late, for good cause shown and in the interest of justice, the Court finds pursuant to CPLR 306-b that an extension should be granted to and including February 7, 2013 for service of the order to show cause, petition and supporting papers. For this reason, the motion will be denied, and the Court will direct the respondent to serve an answer.

Accordingly, it is

ORDERED, that the petitioner is granted an extension for service of the order to show cause, petition, and supporting papers, *nunc pro tunc*, to and including February 7, 2013; and it is further

ORDERED, that respondents' motion to dismiss the petition be and hereby is denied; and it is further

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

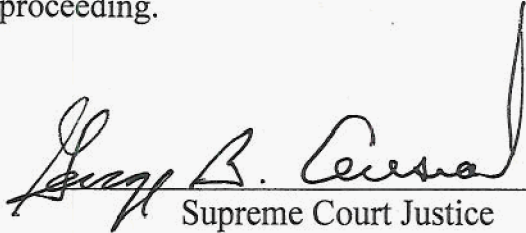
ORDERED, that the respondents re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

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: June 3, 2013
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated February 25, 2013
3. Reply to Notice of Motion dated March 5, 2013