

Matter of Guillory v Fischer

2013 NY Slip Op 32640(U)

September 16, 2013

Supreme Court, Albany County

Docket Number: 6714-12

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

he was denied release on parole.

The respondent 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 respondent 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 indicated 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. She indicated that it was 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 indicated 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 indicated that her office received a request for judicial intervention, a petition (without verification), and an affidavit in support of the order to show cause. As of February 22, 2013 however, no order to show cause had been received.

Respondent also submitted the affidavit of Danny McDonald, a clerk in the Office of

the Attorney General. In his affidavit, Mr. McDonald indicated that the office of the Attorney General, in the regular course of business, maintains a database to record receipt of pleadings and papers served on the Attorney General. His responsibilities include making entries into the database and searching the database for information on litigation matters. Mr. McDonald further indicated that he searched the database maintained in the office of the Attorney General for information concerning the above-captioned matter, and found that the Attorney General's Office received a copy of the petition verified on December 8, 2012 and supporting papers. The office of the Attorney General was not served however, with a copy of the order to show cause on or before January 25, 2013.

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]).

The petitioner filed an affidavit of service which recited that the order to show cause, petition and supporting papers were served by mail on January 10, 2013. In his opposing papers the petitioner indicated that if the Court would like the petitioner to re-serve the papers he "will be happy to do so".

The Court, in a letter-order dated June 7, 2013 directed the respondent to indicate its position with regard to the foregoing. By letter dated June 12, 2013¹, the respondent consented to the grant of an extension of time to the petitioner to re-serve the papers.

Under the circumstances, the Court will deny the motion to dismiss, and will direct the petitioner to re-serve the papers.

Accordingly, it is

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

ORDERED, that the petitioner is granted an extension of time for service of the order to show cause dated December 21, 2012, petition, and all supporting papers to and including **October 15, 2013**; and it is further

ORDERED, that respondent be and hereby are directed to serve and file an answer within twenty (20) days of the date of receipt of the foregoing papers; and it is further

ORDERED, that the 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.

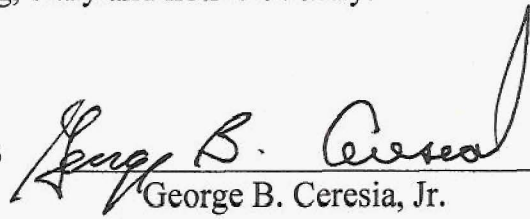
This shall constitute the decision and order of the Court. The Court will retain the papers until final disposition of the proceeding.

¹The Court did not initially receive the June 12, 2013 letter, which had to be re-mailed to the Court on July 31, 2013.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment 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/judgment and delivery of this decision/order/judgment 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: September 16, 2013
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated February 28, 2013, Supporting Papers and Exhibits
3. Plaintiff's Opposition to Respondent's Objection
4. Petitioner's Notice of Motion For a Default Judgment
5. Petitioner's Motion To Strike Default Judgment Application
6. Letter of Keith A. Muse, Assistant Attorney General, dated June 12, 2013
7. Letter of Cassandra R. Maura, Legal Assistant, II dated July 31, 2013
8. Petitioner's Letter Memorandum dated September 4, 2013