

**Matter of Burns v Annucci**

2014 NY Slip Op 30852(U)

April 7, 2014

Supreme Court, Albany County

Docket Number: 5820-13

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.



The petitioner, an inmate at Greene Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination which denied him participation in the Shock Incarceration Program. 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, dated November 12, 2013, required the petitioner to serve the respondent and the Attorney General with a copy of the order to show cause and petition on or before December 13, 2013.

In support of the motion, 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 indicates that whenever papers are served upon the Commissioner's office or DOCCS the papers are forwarded to designated staff after review by her supervisor, 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 unnotarized petition, unnotarized affidavit and unsigned order to show cause, on November 29, 2013. According to Ms. Dallmann-Weaver, no signed order to show cause had been received as of January 13, 2014, the date of her affidavit.

Respondent also 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 on 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 maintained in the office of the Attorney General for information concerning the above-captioned matter, and found that the Attorney General's Office had not been served with a copy of the executed order to show cause as of January 15, 2014, the date of his affidavit.

The petitioner submitted two affidavits of service, both of which are sworn to November 27, 2013. Each recites that the petition, supporting affidavit, request for judicial intervention and order to show cause were mailed on November 25, 2013. One envelop was addressed to the Attorney General's Office, the other to the office of the Commissioner of DOCCS. In a decision-order dated February 11, 2014 the Court made reference to the decision in Matter of Lopez v Goord (41 AD3d 992 [3d Dept., 2007]). The Court noted that the Appellate Division in Lopez identified three options to follow where a respondent makes a motion to dismiss pursuant to CPLR 3211 (a) (8), but where the petitioner has presented evidence which establishes proper service of the order to show cause, petition and supporting papers. These options are to conduct a traverse hearing, solicit an admission of service from the respondent, or extend the time for service to afford the petitioner a second opportunity

to re-serve the papers (see id.). The Court, in its decision-order dated February 11, 2013 directed the respondent to advise the Court with respect to respondent's position with regard to the alternatives set forth in the Lopez case. In a letter dated February 25, 2014 Assistant Attorney General Tiffinay M. Rutnik indicated that the respondent consented to the grant of an extension of time to the petitioner to properly serve the papers.

In reply, the petitioner indicates that after he received the signed order to show cause he copied the order to show cause and other papers by hand, by reason that he could not afford the expense of making photocopies. He indicates that because the papers were copied by hand, he did not include the signatures of the Judge or notary public. In the event he is directed to re-serve the papers, he requests that the Court provide him with a photocopy thereof, so that he can copy them.

Under all of the circumstances, the Court will direct that the petitioner to re-serve the papers. Per petitioner's request, the Court will forward a photocopy of the order to show cause, petition and supporting papers to the petitioner.

Accordingly, it is

**ORDERED**, that respondent's motion is denied; and it is

**ORDERED**, that the petitioner, on or before April 15, 2014, serve a copy of the order to show cause, petition, supporting papers and exhibits by ordinary first class mail upon the respondent and the attorney for the respondent at the following addresses:

Anthony J. Annucci, Commissioner  
NYS Department of Corrections and Community Supervision

Building 2  
1220 Washington Ave  
Albany, New York 12226-2050

Eric T. Schneiderman  
Attorney General of the  
State of New York  
The Capitol  
Albany, NY 12224  
Attn.: Tiffinay M. Rutnik  
Assistant Attorney General

**ORDERED**, that the petitioner file with the Court an affidavit of service demonstrating full compliance with this Order within ten (10) days of the date of such service; and it is

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

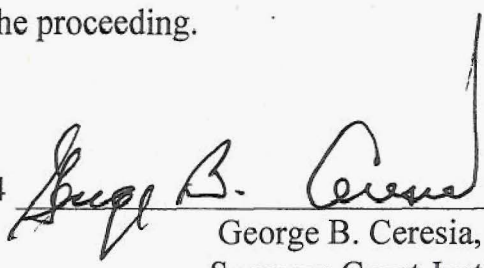
**ORDERED**, that the respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is

**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: March 7, 2014  
Troy, New York

  
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George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated November 12, 2013, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated January 15, 2014, Supporting Papers and Exhibits
3. Letter dated February 25, 2014 of Tiffinay M. Rutnik, Assistant Attorney General
4. Petitioner's Letter dated February 12, 2014.