

Matter of Wrobel v New York State Dept. of Corr. & Community Supervision

2019 NY Slip Op 32527(U)

July 23, 2019

Supreme Court, Albany County

Docket Number: 806-19

Judge: Gerard E. Maney

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This opinion is uncorrected and not selected for official publication.

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**STATE OF NEW YORK
SUPREME COURT**

ALBANY COUNTY

In the Matter of the Application of

MELISSA WROBEL

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

Decision and Order on Motion
Index No. 806-19

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
TACONIC CORRECTIONAL FACILITY, SUPERINTENDENT
MITCHELL-VOYS, CAPTAIN MURPHY, DEPUTY
SUPERINTENDENT OF SECURITY MELVILLE,

Respondents.

Present: Gerard E. Maney, Acting JSC

APPEARANCES:

Melissa Wrobel
DIN # 17-G-0514
Taconic Correctional Facility
250 Harris Road
Bedford Hills, NY 10507

Letitia James
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224-0341
By: Chris Liberati-Conant
Assistant Attorney General, of Counsel

ALBANY COUNTY CLERK
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Maney, J.:

Petitioner, an inmate in the custody of the Department of Corrections and

Community Supervision (DOCCS), commenced this CPLR Article 78 proceeding to challenge respondents' disregard of a no-handcuff order. By Notice of Motion, respondents move to dismiss the petition on the ground that the Court lacks jurisdiction due to petitioner's failure to timely serve a copy of the executed Order to Show Cause, petition, exhibits and supporting affidavits upon respondents and for failing to serve the Attorney General, as was required by the directives of the Order to Show Cause (CPLR 3211 [a][8]; CPLR 2214 [d]; CPLR 7804 [c]). Petitioner opposes the motion and claims that obstacles due to her incarceration prevented timely service.

The February 19, 2019, Order to Show Cause provided that "service of a copy of this signed Order to Show Cause, the petition, exhibits and any supporting affidavits, by ordinary First Class Mail, upon each named respondent at their respective address and upon the Attorney General for the State of New York . . . on or before March 29, 2019, shall be deemed adequate." Respondents contend that, notwithstanding the requirements of the Order to Show Cause, petitioner did not serve respondent DOCCS on or before March 29, 2019 and never served the Office of the Attorney General. In support of its motion, respondent offered the April 30, 2019, sworn affidavit of Eileen Callaghan, Administrative Assistant in Counsel's Office for DOCCS, who averred that, at the request of the Office of the Attorney General, she caused a search to be made of the Counsel's Office's files to determine

whether any legal papers relating to this matter had been served upon the DOCCS Commissioner's Office or the Department. Based on that search, she found that respondent DOCCS was served with a copy of the Order to Show Cause and supporting papers on April 23, 2019 in an envelope bearing a postal date of April 19, 2019.

Respondents' motion is also supported by the May 1, 2019 sworn affidavit of Danny McDonald, Office Assistant II in the Albany Litigation Bureau of the Office of the Attorney General of New York State, whose responsibilities include making entries into a database maintained by the Office of the Attorney General to record the receipt of pleadings and papers served on the Attorney General. McDonald averred that he searched the computerized database of the Office of the Attorney General for information concerning this matter and found that the Attorney General had not been served with a copy of the executed Order to Show Cause, the petition or any supporting affidavits and, in fact, had not received any papers from petitioner in connection with the proceeding.

In opposition to the motion, petitioner claims that respondents were properly served by an employee of Victims Assistance Services, a rape crisis service providing services to her. Petitioner states that the Victims Assistance Services was needed to mail the documents due to the "severe retaliation" she faced, including "mail withholding, 'lost' packages and tickets for grieving incidents" that were obstacles beyond her control.

It is well settled that “[a]n inmate's failure to serve papers as directed by an order to show cause requires dismissal of the petition on jurisdictional grounds, absent a showing that imprisonment presented an obstacle to compliance” (*Matter of Watkins v New York State Dept. of Corr. & Community Supervision*, 159 AD3d 1252 [3d Dept 2018], *lv denied* 31 NY3d 913 [2018]). Petitioner was unable to make such a showing here. The record reflects that service on respondents was made on April 23, 2019, which is well beyond the March 29, 2019 date required for personal service as set forth in the Order to Show Cause. Petitioner did not dispute that service was untimely. Although petitioner claims that she faced retaliation in the form of mail withholding, lost packages and tickets for grieving incidents, which presented an obstacle to service, she admits that the Victims Assistance Services assisted her with mail service, but she did not explain why their service on her behalf was untimely.

Moreover, petitioner offered no explanation why service – timely or not – was not made on the Attorney General. She did not file an Affidavit of Service or rebut the affidavit of Danny McDonald who averred that no papers in connection with this matter were served on the Attorney General by petitioner at any time.

The fact that petitioner had the assistance of the Victims Assistance Services and that she was able to timely respond to respondents' Notice of Motion belies her claim that obstacles beyond her control due to her incarceration prevented her from timely serving the Order to Show Cause and supporting documentation on

respondents and the Attorney General.

Accordingly, the motion to dismiss the petition for lack of personal jurisdiction is granted and the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is being returned to the Attorney General. All other papers will be delivered by the Court to the Albany County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding filing, entry and notice of entry.

Date: 7/23/19

ENTER



GERARD E. MANEY
ACTING J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated February 19, 2019; Verified Petition sworn to on January 22, 2019 and Exhibits; Notice of Motion in Response to People's Opposition Pursuant to Article 78 of CPLR of Melissa Wrobel dated May 9, 2019 and exhibits.
2. Notice of Motion dated May 2, 2019; Memorandum of Law in Support of Respondents' Motion to Dismiss; Affirmation of Chris Liberati-Conant dated May 2, 2019 and exhibits A through C.