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October 2019

### Decision in Art. 78 proceeding - Bernstein, Jeffrey (2011-11-01)

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STATE OF NEW YORK  
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

JEFFREY BERNSTEIN, 12R3362,  
Petitioner,

**DECISION AND ORDER**

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

Index No.: 3804-17  
RJI No.: 01-17-ST8865

- against -

NEW YORK STATE BOARD OF PAROLE,  
Respondent.

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Jeffrey Bernstein, 12R3362  
*Petitioner, pro se*  
Otisville Correctional Facility  
57 Sanitorium Road P.O. Box 8  
Otisville, New York 10963-0008

Hon. Eric T. Schneiderman  
*Counsel for Respondent*  
Attorney General of New York State  
(Kyle W. Sturgess, Esq. Assistant Attorney General,  
Of Counsel)  
The Capitol  
Albany, New York 12224

FISHER, J.:

Petitioner, an inmate in the care and custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this CPLR article 78 proceeding to challenge Respondent's determination denying his parole release. Petitioner brought this action via Order to Show Cause requesting alternative service by mail because he is incarcerated. Supreme Court (Mackey, J.) relaxed the service requirements and granted such request by ordering service "by ordinary First Class Mail, upon each named respondent at their respective address and upon the Attorney General for the State of New York, at the Department of Law, State Capital, Albany, New York 12224[.]"

While Petitioner duly served the Attorney General's Office via first class mail, service on Respondent was made through internal facility mail. As a result, Respondent moves to dismiss on the grounds that Petitioner failed to strictly comply with the relaxed requirements of the Order to Show Cause. Respondent submits the affidavit of Robin Filmer, Administrative Assistant in Counsel's Office for Respondent, who avers she has personal knowledge of the legal mail process. She provides that Petitioner's papers were received on July 6, 2017 via "internal facility mail" as there was "no postmark on the envelope." The Court reviews the exhibit and agrees.

Petitioner submits a reply, arguing that he mailed his papers to the Attorney General's Office and Respondent via first class mail pursuant to his duly executed affidavit of service. However, he alleges that "unknown personnel" at his correctional facility "took it upon themselves to forward the Respondent's copy to Counsel's Office by inmate mail, rather than by first class mail, [which] is clearly beyond the control of Petitioner and represents an obstacle presented by his incarceration" (footnote omitted).

Section 7804 (c) of the CPLR governs procedure for the time for service of the notice of petition and answer, and mandates service upon the attorney general in proceedings against a state body or officers. CPLR § 2214 (d) similarly requires service of an order to show cause in an action against a state body or officers upon the attorney general. A court is afforded some flexibility regarding service, and "[r]elaxation of the rules respecting service of process to enable prison inmates to obtain jurisdiction is not inappropriate where imprisonment presents obstacles to service which are beyond the inmate's control" (see *Alevras v Chairman of New York Bd. of Parole*, 118 AD2d 1020, 1021 [3d Dept 1986] *appeal dismissed* 68 NY2d 753 [1986]). "However, when those rules have been eased, jurisdiction is not acquired unless those service requirements capable of being met have been satisfied" (*Alevras*, 118 AD2d at 1021).

As such, it is well-settled that "[a]n inmate's failure to comply with the service requirements of an order to show cause mandates the dismissal of the petition absent a showing that obstacles presented by his or her imprisonment prevented compliance" (*Pettus v Fischer*, 72 AD3d 1313, 1314 [3d Dept 2010]; see *Matter of Ventura v New York State Dept. of Correctional Servs.*, 68 AD3d 1406, 1406-07 [3d Dept 2009]; *Matter of Mathie v Dennison*, 39 AD3d 1059, 1060 [3d Dept 2007]).

Here, while the Court agrees with Respondent that Petitioner's papers were not sent to Respondent pursuant to the strict requirements of the Order to Show Cause, Petitioner has demonstrated that his imprisonment may have prevented compliance. This is supported by his affidavit of service which avers he mailed both sets via first class mail in his facility mailbag, and one set was actually received by the Attorney General's Office via first class mail. While Petitioner's allegations as to what happened to Respondent's set is speculative, the Respondent does not submit a reply to rebut the affidavit of service or further contest these contentions. Further, Respondent's argument that Petitioner is litigious and should know how to properly effectuate service in an article 78 action actually undermines its own argument, as it further leads to the conclusion that Petitioner's mail was roguishly rerouted rather than improperly served by Petitioner.

Even though it is correct that Petitioner's papers were ultimately served improperly, service of process needs to be "reasonably calculated to give notice to the necessary parties" (*Contessa v McCarthy*, 40 NY2d 890, 891 [1976]). Ms. Filmer's affidavit, while attacking the manner of service, admits to receiving the papers almost a month prior to the *required* date of service—and more than 60 days before the return date. The Court cannot say this was inadequate or that Respondent did not have sufficient notice. Since this is a court of equity and there is a "judicial preference for disposition of cases on their merits" (*Dodge v Commander*, 18 AD3d 943, 946 [3d Dept 2005]), coupled with the allegations that obstacles presented by incarceration prevented compliance, Respondent's motion to dismiss is **DENIED**.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

**ORDERED**, that the Respondent's motion to dismiss is **DENIED** and all relief requested therein is denied in its entirety; and it is further

**ORDERED** that the Respondent serve its answer with support papers on or before December 1, 2017; and it is further

**ORDERED** that the Petitioner shall serve his reply, if any, on or before December 15, 2017.

This constitutes the Decision/Order of the Court. Please note that a copy of this Decision/Order along with the original papers are being filed by Chambers with the County Clerk. The original Decision/Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

**IT IS SO ORDERED.**

DATED: November 1, 2017  
Catskill, New York

ENTER:

  
\_\_\_\_\_  
HON. LISA M. FISHER  
SUPREME COURT JUSTICE

**Papers Considered:**

- 1) Petition with exhibits;
- 2) Notice of motion to dismiss, dated August 30, 2017; memorandum of law, with annexed exhibits dated August 30, 2017; and
- 3) Affidavit in reply to respondent's motion to dismiss, of Jeffrey Bernstein, with annexed exhibits, dated September 6, 2017.