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Matter of Bennett v New York State Board of Parole
2007 NY Slip Op 31651(U)
June 15, 2007
Supreme Court, Clinton County
Docket Number: 00-0035/2007
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

X

In the Matter of the Application of
MARQUE BENNETT, #91-B-2004,
Petitioner,

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

-against-

**DECISION, ORDER AND
JUDGMENT**

RJI #09-1-2007-0019.02

INDEX #07-35

ORI # NY009013J

**NEW YORK STATE
BOARD OF PAROLE,**

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Marque Bennett, verified on December 21, 2006, and stamped as filed in the Clinton County Clerk's office on January 9, 2007. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the November 2, 2005, determination denying him parole and directing that he be held for an addition 24 months. The Court issued an order to Show Cause on January 16, 2007. As part of that Order to Show Cause it was directed that petitioner serve a true copy of the Order to Show Cause by ordinary first class mail to each of the respondents and to the Plattsburgh Regional Office of the New York State Attorney General on or before February 16, 2007, would be deemed sufficient service. The Order to Show Cause further directed the petitioner to mail an affidavit of service, evidencing compliance with the above service requirements, to the Court Clerk's office on or before February 23, 2007. On February 1, 2007, the petitioner filed an affidavit of service alleging that on January 30, 2007, he mailed the "**ORDER TO SHOW CAUSE/AFFIDAVIT OF SERVICE**" to the respondent and to the New York State Attorney General's office in Albany. Attached to

petitioner's affidavit of service was a photocopy of an unsigned, proposed Order to Show Cause. The petitioner's affidavit of service, moreover, made no mention of the mailing of a copy of the petition and supporting documents to either the respondent or the office of the Attorney General.

In response to the petitioner's April 5, 2007, inquiry as to the status of this proceeding the Court issued a letter order dated April 23, 2007. In that letter order the Court reviewed the relevant provisions of the Order to Show Cause of January 16, 2007, as well as the fact that petitioner's affidavit of service was accompanied by a copy of an unsigned, proposed order to show cause. The letter order of April 23, 2007, continued as follows:

“It is thus not altogether clear that you mailed anyone a copy of the Court-issued Order to Show Cause of January 16, 2007, much less your underlying petition. In any event, it is clear that the respondent has not served or filed any answering papers.

In view of the above circumstances the Court will take no further action pending its receipt of a more formal motion for judgment on default and/or motion to dismiss for lack of personal jurisdiction. If, after receiving this correspondence, you reach the conclusion that you fail to meet the relaxed service requirements set forth in the Order to Show Cause of January 16, 2007, you are free to request an extension of time to effect service. Any request for such extension should include a statement of the reason or reasons why service by mail was not completed in a timely fashion.”

On May 9, 2007, the petitioner filed a somewhat informal motion for judgment on default in the Clinton County Clerk's office. Attached to the petitioner's papers was a copy of a certified mailed receipt indicating that the office of the New York State Attorney General in Albany received mail from the petitioner on February 5, 2007. The Court next received respondent's Notice of Cross-Motion to Dismiss, supported by the Affirmation of Robert C. Glennon, Esq., Assistant Attorney General, dated May 14, 2007,

as well as by the affidavit of Robin Filmer, an employee of the New York State Division of Parole at counsel's office in Albany, sworn to on May 11, 2007, and the affidavit of Karen Thornton, an employee of the Plattsburgh Regional Office of the New York State Attorney General, sworn to on May 14, 2007. The respondent's papers indicate that on January 5, 2007, before this proceeding was commenced, the Office of the New York State Attorney General in Albany received by mail from the petitioner a set of documents including the petition and memorandum of law. Assistant Attorney General Glennon, assigned to the Plattsburgh Regional Office of the New York State Attorney General, wrote to the petitioner on January 9, 2007, advising him that the documents received in Albany on January 5, 2007, were being treated ". . . as a nullity as they were not served pursuant to the Civil Practice Law and Rules, nor were they accompanied by an executed Order to Show Cause authorizing alternate service." The respondent's cross-motion papers also indicate that on February 5, 2007, the Attorney general's office received from the petitioner, via certified mail, an unsigned Order to Show Cause. On February 6, 2007, Assistant Attorney General again wrote to the petitioner acknowledging receipt of the unsigned Order to Show Cause on February 5, 2007, and again advising the petitioner that such papers were being treated ". . . as a nullity as they were not served pursuant to the Civil Practice Law and Rules, nor were they accompanied by an executed Order to Show Cause authorizing alternate service."

The respondent's cross-motion papers also indicate that on December 28, 2006, before this proceeding was commenced, the Division of Parole was served, presumably by mail, with a Notice of Petition and Petition without a signed Order to Show Cause and

that on February 6, 2007, the Division of Parole was served, presumably by mail, with an unsigned Order to Show Cause.

In the absence of satisfactory proof that the relaxed service requirements set forth in the order to Show Cause of January 16, 2007, were met, and in the absence of any showing the petitioner's imprisonment presented obstacles beyond his control which prevented compliance, the Court finds that the petitioner's motion for judgment on default must be denied and the respondent's cross motion to dismiss for lack of personal jurisdiction over the respondent must be granted. *See Davis v. Goord*, 20 AD3d 785 and *Hickey v. Goord*, 3 AD3d 802. The court also notes that the petitioner never requested an extension of time within which to obtain personal jurisdiction over the respondent.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that the petitioner's motion for judgment on default is denied; and it is further

ORDERED, that the respondent's cross-motion to dismiss for lack of personal jurisdiction over the respondent is granted; and it is further

ADJUDGED, that the petition is dismissed.

Dated: June 15 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice