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[*1]

Matter of Radtke v Stanford
2019 NY Slip Op 51582(U) [65 Misc 3d 1211(A)]
Decided on October 2, 2019
Supreme Court, Albany County
Elliott, III, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 2, 2019

Supreme Court, Albany County

<p style="text-align: center;">In the Matter of the Application of Jason Radtke, Petitioner,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">Tina M. Stanford, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE, Respondent.</p>

3718-19

JASON RADTKE,
Pro Se Petitioner

HON. LETITA JAMES
Attorney General for the State of New York
(CHRIS LIBERATI-CONANT, ESQ.)
Assistant Attorney General
Attorney for the Respondent

Raymond J. Elliott, III, J.

Petitioner commenced the instant CPLR article 78 proceeding challenging the final determination of the Board of Parole. Respondent moves to dismiss on the ground that Petitioner has failed to obtain jurisdiction over Respondent by failing to comply with the service requirements of the Order to Show Cause issued herein. Petitioner has not [*2] opposed the Motion, though the record contains an affidavit of service stating he placed the Order to Show Cause, Verified Petition and Memorandum of Law in the mail.

In support of the Motion to Dismiss, Respondent have submitted evidence in affidavit form which states that Petitioner has failed to serve Respondent by "ordinary First Class Mail" with the Order to Show Cause, as required therein, but was rather made by internal facility mail. By exhibit attached to the affidavit, Respondent provided a copy of the relevant envelope showing no postal markings.

In *Matter of Jackson v Fischer*, (80 AD3d 1066, 1066 [3d Dept 2011]), the petitioner sought to commence an Article 78 proceeding to challenge a determination denying his request for parole release. The order to show cause signed by Supreme Court directed petitioner to serve "a true copy of this Order to Show Cause, the Petition and any supporting affidavits, exhibits and/or memoranda, by ordinary first-class mail to each of the respondents and to the Attorney General" (*Id.*). Petitioner, however, did not serve executed copies of the papers on the opposing parties as directed (*Id.*). Respondents moved to dismiss the proceeding for lack of personal jurisdiction (*Id.*). Petitioner conceded that he mistakenly served unexecuted copies of the papers upon the parties, but requested an extension of time to serve the proper papers (*Id.*). Supreme Court denied petitioner's request, granted respondents' motion and dismissed the petition (*Id.*). Petitioner appealed, and the Third Department affirmed, noting that "[a]n inmate's failure to comply

with the service requirements set forth in an order to show cause will result in dismissal of the petition unless the inmate demonstrates that obstacles presented by his or her incarceration precluded compliance. Petitioner has not made that showing here as his failure to serve the proper papers was attributable to his own mistake" (*Id.*).

In *Matter of Ciochenda v Department of Correctional Servs.*, (68 AD3d 1363, 1363 [3d Dept 2009]), the Order to Show Cause directed that the inmate petitioner serve the Order, the petition, exhibits and supporting affidavits upon the respondent and the Attorney General. While petitioner served a copy of the order to show cause, he neglected to include the other papers referenced therein (*Id.*). The Court dismissed the petition, and the Appellate Division affirmed on similar grounds as in *Matter of Jackson v Fischer* (*supra*) (*Id.*).

"[T]he mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed" (*Matter of Bell v State University of New York at Stony Brook*, 185 AD2d 925, 925 [2d Dept 1992]; *see Matter of Jones v Dennison*, 30 AD3d 952, 952 [3d Dept 2006]; *cf. Matter of Bruno v Ackerson*, 51 AD2d 1051, 1051 [2d Dept 1976], *affd* 39 NY2d 718 [1976] [Holding actual notice and even "a better mode of service" do not overcome the jurisdictional defect of failure to comply with the service requirements of the Order to Show Cause]). Notably, "[t]he petitioner's pro se status entitles him to no greater rights in this respect than those of any other litigant, and he cannot use such status to deprive the respondent of the same rights as other respondents" (*Matter of Correnti v Suffolk County Dist. Attorney's Off.*, 34 AD3d 578, 580 [2d Dept 2006] [internal quotation marks, brackets, and citations omitted]).

It is therefore evident that the Courts construe the service requirements of the Order to Show Cause strictly, and that even a slight deviation should result in dismissal (*see People v O'Meara*, 2018 NY Slip Op 31129 [U] [Sup Ct, St. Lawrence County 2018, Feldstein, J.] [Holding that use of facility mail instead of first class mail as called for in the Order to Show Cause deprived the Court of jurisdiction]). While this Court notes that Petitioner is *pro se* and incarcerated, thereby limiting his ability to serve, the Court is bound by this precedent. Further, Petitioner has submitted no opposition or otherwise argued that his status as an inmate prevented compliance with the Order to Show Cause. Given that Respondent has demonstrated the lack of compliance by documentary evidence, "[u]nder these circumstances, [Petitioner's submission is] insufficient to raise an issue of fact and he [is] not entitled to a hearing" (*Matter of Barnes v Prack*, 108 AD3d 894, 895 [3d Dept 2013] [internal quotation marks and citations omitted]). Considering "petitioner made no showing that his imprisonment presented any obstacle to his compliance with the service requirements," a motion to dismiss is proper (*Matter of Pettus v Bezio*, 69 AD3d 1253, 1254 [3d Dept 2010]).

As such, Respondent's motion to dismiss is **granted**.

This shall constitute the Decision, Order and Judgment of the Court. All papers, including this Decision, Order and Judgment are being returned to the attorney for the Respondent. All original supporting documentation is being filed with the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: October 2, 2019

Albany, New York

RAYMOND J. ELLIOTT, III

Supreme Court Justice

Papers Considered:

1. Supreme Court (Connelly J.) Order to Show Cause.
2. Petitioner's Verified Petition sworn June 18, 2019.
3. Petitioner's Memorandum of Law dated December 7, 2018.

4. Petitioner's Affidavit of Service sworn July 30, 2019.
5. Respondent's Notice of Motion dated September 13, 2019; Attorney Affirmation dated September 13, 2019; Annexed Exhibits A-B.
6. Respondent's Memorandum of Law dated September 13, 2019.

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