

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2024

CV-23-1707

In the Matter of SAMUEL RIVERA,
Appellant,

v

ANTHONY RODRIGUEZ, as Acting
Director of Special Housing
and Inmate Disciplinary
Programs,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: April 19, 2024

Before: Egan Jr., J.P., Clark, Lynch, Reynolds Fitzgerald and Fisher, JJ.

Samuel Rivera, Malone, appellant pro se.

Letitia James, Attorney General, Albany (*Kate H. Nepveu* of counsel), for respondent.

Appeal from a judgment of the Supreme Court (John T. Ellis, J.), entered August 3, 2023 in Franklin County, which, in a proceeding pursuant to CPLR article 78, granted respondent's motion to dismiss the petition.

Petitioner, an incarcerated individual, attempted to commence this CPLR article 78 proceeding challenging a tier III prison disciplinary determination finding him guilty of violating certain prison disciplinary rules. Together with his petition, petitioner filed an affidavit in support of a proposed order to show cause, an affidavit in support of an application for reduced filing fees, and an appendix of documents (exhibits A-F). In its own order to show cause, Supreme Court directed, among other things, that petitioner

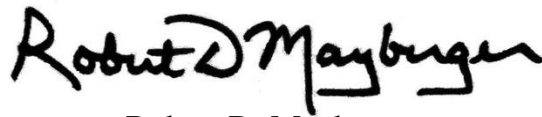
"serve a true copy of *this* Order to Show Cause, *together* with the Petition (with exhibits), and *each of the above-referenced papers* submitted in connection with the Petition, by ordinary first-class mail to the named [r]espondent" (emphasis in original). To verify compliance with the service requirements, the court ordered petitioner to "file an affidavit of service evidencing proof of such service by specifically listing each document that was served" (internal quotation marks and brackets omitted). Respondent subsequently moved to dismiss the petition on the ground, among others, that petitioner failed to comply with the service requirements of the order to show cause. Supreme Court granted the motion and dismissed the petition, prompting this appeal by petitioner.

We affirm. "An [incarcerated individual's] failure to serve papers as directed by an order to show cause results in a jurisdictional defect that requires the dismissal of the petition, unless the [incarcerated individual] can show that imprisonment presented an obstacle to compliance" (*Matter of Pettus v Wetmore*, 81 AD3d 1019, 1020 [3d Dept 2011] [citations omitted]; see *Matter of Green v Bell*, 190 AD3d 1169, 1170 [3d Dept 2021]; *Matter of Perez v Harper*, 161 AD3d 1472, 1472-1473 [3d Dept 2018]). Although petitioner's May 2023 affidavit of service reflects service of the order to show cause and verified petition with exhibits, it does not evidence service of the affidavit in support of the order to show cause as was directed by Supreme Court. Inasmuch as petitioner did not "comply with the service requirements [set forth in] the order to show cause" (*Matter of Pettus v Wetmore*, 81 AD3d at 1020) and has not demonstrated that obstacles presented by his imprisonment precluded him from doing so, Supreme Court properly dismissed the petition. Petitioner's remaining contentions are either without merit or, having been raised for the first time in his appellate brief, not properly before us (see *Matter of Wilson v Artus*, 71 AD3d 1294, 1295 [3d Dept 2010]).

Egan Jr., J.P., Clark, Lynch, Reynolds Fitzgerald and Fisher, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court