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Matter of Castle House Dev. Inc. v City of New York Police Dept.
2009 NY Slip Op 51553(U) [24 Misc 3d 1222(A)]
Decided on July 10, 2009
Supreme Court, New York County
Schlesinger, J.
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Supreme Court, New York County

In the Matter of the Application of Castle House Development, Inc., Petitioner, For a Judgment under Article 78 of the Civil Practice Laws and Rules,

against

The City of New York Police Department, et al., Respondents.

112529/08

Attorney for Respondents

Krista Ashbery, Esq.

One Police Plaza, Room 1406

New York, NY 10038

646-610-5400

Attorney for Petitioners

Jeffrey C. Fegan, Esq.

Cullen & Dykman, LLP

177 Montague Street

Brooklyn, NY 11201

718-855-9000

Alice Schlesinger, J.

On September 29, 2006, an accident occurred in Brooklyn which resulted in serious injury to Joel Fried, an employee of Castle House Development, Inc., the petitioner in this Article 78 proceeding. This gave rise to a civil action on October 4, 2007 brought by Fried in Kings County against the owner of the construction site where the accident had occurred, 210 Middleton Street in Brooklyn. Castle House was brought into that litigation by the owner as a third-party defendant.

On March 11, 2008, counsel for petitioner made a Freedom of Information Law (FOIL) request to the New York City Police Department, respondent here, seeking a complete copy of any investigative reports and/or photographs which might have been prepared by the Department in investigating this incident.

The Department responded one month later, in a letter dated April 11, 2008, from Sergeant James Russo (attached as Exh. B to the petition). Russo is assigned to the Police Department's Legal Bureau FOIL Unit, although as far as this Court understands, he is not an attorney. On behalf of the Department, Russo denied the FOIL request. In a one-line statement he said that he had to deny access to these records "on the basis of Public Officers Law section 87(2)(e)(I) as such records/information, if disclosed would interfere with law enforcement investigations or judicial proceedings".

As far as what was known then and now, there was no continuing law enforcement proceeding extant and the only judicial proceeding was the aforementioned tort action in

Kings County.

Petitioner promptly appealed. The letter of appeal referred to the tort action. The appeal was denied in a May 23 letter from Jonathan David, the Appeals Officer [*2](Exh. A to the petition). He cited the same exemption as earlier but added to the statement "including the civil litigation referenced in your letter." Mr. David then, somewhat gratuitously, advised counsel that all was not lost regarding obtaining these records because although "FOIL is not the proper means by which to seek to obtain the information you requested ... a motion pursuant to CPLR Section 3120(4) and/or 2307 might be a more appropriate means for obtaining information from a non-party". I have no reason to believe Mr. David is an attorney either.

Counsel then timely commenced the instant Article 78 proceeding. In lieu of answering, respondent submitted a cross-motion to dismiss dated October 20, 2008. The basis for the motion was again the Department's reliance on the earlier cited exemption under the Public Officers Law, §87 subd. (2)(e)(I), interference with a judicial proceeding, this time explicitly naming the Kings County action and providing its index number and status. Respondent argued that petitioner had to rely on civil discovery measures, "essential to the integrity of the judicial process" where, for example, notice had to be provided to the other parties to the lawsuit. It should be noted that notice and other procedural requirements, while found in the CPLR, nowhere appear in FOIL.

Counsel additionally cited Public Officers Law §87 subd.(2)(e)(ii) because disclosure would allegedly "deprive any person of a fair trial or an impartial adjudication of a claim." Presumably the citation to this provision referred to the other parties in the Brooklyn lawsuit. Finally, the respondent argued that "indispensable parties" had to be joined in this action, those same parties from the Kings County action.

Why the Department took it upon itself to get involved in the civil action and take on the mantel of guardian of the other parties' interest still remains a mystery to this Court. This is particularly so since it seemed apparent that pursuant to case law from the New York Court of Appeals, the citations and arguments put forth by counsel were wrong. Also, respondent made no attempt to show in what way granting the FOIL request would interfere with the civil action. The petitioner then filed opposition papers with a memorandum of law

on November 6, 2008, and the matter was set down for oral argument.

This seemingly routine Article 78 then took on a peculiar but significant twist. In the course of an arguably improper reply to its cross-motion (permission to submit same had never been sought nor granted), in a footnote to paragraph 15 appearing somewhere toward the middle of the unnumbered pages, counsel stated the following:

Respondent reserves its right to serve and file a Verified Answer detailing its substantive arguments against disclosure, as the cross- motion is limited solely to procedural grounds. In particular, the Respondent is prepared to demonstrate that the records are exempt under NY Public Officers Law §87(2)(a) because they are sealed pursuant to CPL §160.50. Such arguments would be set forth in Respondent's Answer, should the Court deny Respondent's Cross Motion to Dismiss.

These papers were dated November 19, 2008. It was the first time any mention was made of the sealing of the records. It was the first time §87(2)(a) was cited. This section exempts from disclosure records that are specifically exempt pursuant to state or federal statute. Here, Criminal Procedure Law §160.50 would be the statute. It, in turn, sets up strict criteria for unsealing, where an applicant for same must show a [*3]compelling interest. Also, such an application must be made in the proper forum on notice to the person whose records have been sealed.

Argument was then held and it did appear that the sealing was dispositive as to the release of records. But why had it never been mentioned before? Why had the petitioner been compelled to apply, appeal, commence an Article 78, and respond to a cross-motion made on entirely different grounds when, as it turned out, the sealing order had occurred in November of 2006, two months after the accident which formed the basis for the civil lawsuit and these proceedings?

The answer to these inquiries is unclear. Sergeant James Russo submitted three affidavits on the subject, the first stating that the sealing had occurred in November of 2008. However, he later acknowledged in a second affidavit that his first contained a typographical error as to the date.

Petitioner responded with a new motion, brought on by Order to Show Cause, for the

Court to award costs and sanctions against the Department, pursuant to NYCRR 130-1.1, because of the NYPD's frivolous response to the countless FOIL requests. Therein counsel recounted the lengthy history of this controversy, pointing out the repeated failure to rely on the dispositive reason for denial in favor of inappropriate, inapplicable ones with little or no legal basis. Counsel also argued that the Department knew of the sealing and still proferred these other failed reasons. Further, as a result of these efforts, counsel stated petitioner had been forced to expend large amounts of time and incur thousands of dollars in legal fees. In his affirmation in support (¶12, p 9), counsel asserted as follows:

At best, the failure to disclose this information was an oversight; at worst it was part of a conscious effort to draw out Castle House's litigation and make it as costly and difficult as possible in order to discourage further attempts at pursuing Freedom of Information Law search requests in the future ...

Respondent opposed the motion for sanctions. In its papers, counsel disputed knowledge of the sealing prior to the commencement of the Article 78 proceeding and argued that the Department's response was in no way frivolous as defined in Rule 130.

With regard to the knowledge factor, a third affidavit was submitted from Sergeant Russo, this one dated April 9, 2009. There (in ¶4), Russo attempted to explain why he did not conduct a search for responsive records before he denied the FOIL request:

Because it was clear from the petitioner's FOIL request that disclosing any of the requested records to just one party in the Kings County litigation would interfere with the ordinary process of disclosure applicable to the Torts Action, which process provides for notice and disclosure to all other parties, it was possible to determine from the face of the request that any responsive records would be exempt from disclosure.

However, he goes on to explain (in ¶5) that "on or around January 27, 2009, [he] was requested by Respondents' attorneys to verify the status of the records." That is when he learned of the sealing. This could not have been accurate since, as noted earlier, respondent's counsel included the sealing footnote in her unsolicited reply papers in November of 2008. Further, no explanation was given, either by Russo or [*4]counsel, why a request to verify the status of the records was in fact made, and made for the first time well into the Article 78

proceedings.

I then directed an *in camera* inspection of the records to ascertain if they were, in fact, sealed and, if so, when that had occurred, and to hopefully obtain more information as to when an inquiry had first been made. The documents revealed that the records had been sealed on November 6, 2006. But as to when this inquiry was made, the records were silent.

In my interim order of June 5, 2009 directing such production, I stated that I would then decide the two motions that were extant. The Department's counsel, in a letter accompanying the records, reminded me that, in fact, three motions were extant, including their cross-motion to dismiss based on the alleged interference with the civil action. They are correct and, therefore, that will be the motion this Court deals with first.

That motion is emphatically denied. This exemption is not a viable one in circumstances such as this, a pending civil action. That is not to say that in a pending criminal action, or a pending criminal appeal, the exemption could not honestly be relied upon. But not here. For example, in a case cited by respondent, *Pittari v. Pirro*, 179 Misc 2d 241 (Sup. Ct., NY Co. 1998) *aff'd* 258 AD2d 202 (2nd Dep't 1999), a murder trial was pending and the defendant sought to obtain documents from a related proceeding in addition to what he had received pursuant to the CPL. The trial court presented the issue in this way: "whether in the course of the prosecution of a pending indictment the District Attorney may assert a blanket exemption under Public Officers Law §87 subd. 2(e)(I) in response to a request for production of all records relating to the prosecution of that indictment." 179 Misc 2d at 247.

The court denied the FOIL request, finding that under such circumstances there could well be "substantive interference" with the murder trial. Further, the disclosure "would have a considerable impact on the procedural path of a criminal trial." *Id.* at 249-50.

To burden the record here in distinguishing that case from ours would serve no function as the differences are so apparent.

In fact, all the cases cited by respondent's counsel in her cross-motion are easily distinguishable. For example in *Hawkins v Kurlander*, 98 AD2d 14, 17 (4th Dep't 1983), a FOIL request as to transcripts of confidential interviews was denied "because of the chilling

effect it would have on future investigations by the District Attorney." In *Morgan v. Dell Publishing Co., Inc.*, 185 AD2d 876 (2nd Dep't1992), the controversy did not even deal explicitly with a FOIL request (no one had so applied), but rather the interpretation of CPLR Article 31 vis-a-vis obtaining open commissions to depose various federal agents.

The opinion, *In the Matter of M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., et al.*, 62 NY2d 75 (1984), makes the applicable law abundantly clear. While counsel for respondent attempts to dismiss this decision in a footnote to her papers, arguing it was not relevant because the FOIL request was made to HHC rather than to the NYPD, she is simply wrong. There the disclosure sought pursuant to FOIL involved a plumbing contract between the parties, wherein the petitioner sought [*5]14 categories of records from the corporation. The request was denied and an Article 78 proceeding was commenced. Then Farbman filed a notice of claim against HHC and commenced a breach of contract action against it.

The Appellate Division reversed the IAS court that had ordered an *in camera* inspection, citing its "continually unanimous position against the use of FOIL to further in-progress litigation." 94 Ad2d 576, 578. This is the same position respondent argues here. **[FN1]**

However, Judge Kaye writing for an unanimous court in a reversal of the Appellate Division, made it clear in the opening lines of her opinion that:

Access to records of a government agency under the Freedom of Information Law ... is not affected by the fact that there is pending a potential litigation between the person making the request and the agency.

62 NY2d at 78, citations omitted. In reversing the lower court, the decision analyzed the rationale and the differences between FOIL, which implements the legislative declaration that government is the public's business (Public Officers Law §84) and imposes a broad standard of open disclosure upon agencies of government, and CPLR Article 31 rules and presumptions. For example, Article 31 is plainly more restrictive than FOIL and depends on status and need. Also pursuant to Article 31, a court can issue a protective order or regulate document production. *Id.* at 79 - 81.

Our Court of Appeals held in *Farbman* that FOIL's mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person. It emphasized that CPLR Article 31 does not specifically except public records from disclosure and stated (at p 81) that:

In the absence of indication from the Legislature, we refuse to read into FOIL the restriction that, once litigation commences, a party forfeits the rights available to all other members of the public and is confined to discovery in accordance with article 31.

Aside from *Farbman*, there is nothing in FOIL which speaks to the need to put anyone else on notice of the request, as a party would have to do when subpoenaing documents pursuant to the CPLR. Nor are any of the parties in the Kings County tort action necessary to this Article 78 proceeding. The premise that they would or should be is without any authority.

There is a certain irony to the positions argued in respondent's cross-motion to dismiss. While the Department cites the noninterference exemption as a basis for its denial, it is they who implicitly wish to interfere in the pending lawsuit, rather than to allow that action to simply proceed. Simply, it is not respondent's proper role in circumstances such as this to take a position that if one party obtains document [*6]disclosure, the other party should also. The Department has no place in that litigation. Finally, there has been a complete lack of any specific explanation as to how disclosure here would interfere in the Kings County action or upset the scales of justice there.

Yet, I still am compelled to dismiss the Petition, even though there has yet to be an Amended Answer citing to the sealing exemption. I have now verified that sealing has occurred and nothing would be served in lengthening this litigation further when it is clear that petitioner would have to move elsewhere to unseal the requested records. The CPL requires this. Therefore, the original Article 78 Petition is dismissed.

There is one remaining motion still extant, the one for costs and sanctions pursuant to Rule 130. In this regard, I was hopeful that the Department would acknowledge that it had failed to investigate the status of the records sought, that it had mechanically applied an invalid, inapt exemption, and that these lapses had resulted in needless delay and costs to the

petitioner. I was hopeful that the Department would recognize these errors and commit itself to henceforth review and correct its procedures.

But such an acknowledgment and commitment to change has not occurred. Further, as alluded to earlier, this Court still does not know when and under what circumstances the sealing inquiry was made. If, for example, the records had been reviewed in April 2008, when the FOIL request was first made and denied for other reasons, the failure to cite the sealing as the reason for denial could be sanctionable. If that knowledge was obtained at the commencement of the Article 78 in September 2008 and not revealed, that conduct could also be sanctionable. Finally, exclusively relying on outdated inapplicable law, as cited in the cross-motion to dismiss, in these circumstances could also be sanctionable.

I am therefore ordering a hearing pursuant to CPLR §7804(h) to decide in the first instance when the sealing information was first acquired, by whom, and under what circumstances. Such a hearing will aid the Court in deciding whether sanctions and/or costs are appropriate. As commented upon earlier, the relevant information has not been forthcoming to date in a full and credible manner.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that respondent's cross-motion to dismiss the petition and the petition are denied; and it is further

ORDERED that petitioner's motion for sanctions is granted on an interim basis to the extent provided herein. Counsel shall appear in Room 222 on August 5, 2009 at 9:30 a.m. to schedule the hearing.

Dated: July 10, 2009

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J.S.C.

Attorney for Respondents

Krista Ashbery, Esq. [*7]

One Police Plaza, Room 1406

New York, NY 10038

646-610-5400

Attorney for Petitioners

Jeffrey C. Fegan, Esq.

Cullen & Dykman, LLP

177 Montague Street

Brooklyn, NY 11201

718-855-9000

Footnotes

Footnote 1: The Appellate Division held in *Farbman* that, "once litigation is commenced, FOIL is not intended to afford a new research tool to private litigants' or a short cut to the CPLR discovery procedures. 94 Ad2d at 578, quoting *Matter of D'Alessandro v Unemployment Ins. Appeal Bd.*, 56 AD2d 762, 763.

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