

Matter of Figueroa v Vance

2011 NY Slip Op 30393(U)

February 17, 2011

Sup Ct, New York County

Docket Number: 402225/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Figueroa

- v -

VANCE

INDEX NO. 402225/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{petition and cross} motions are determined in accordance with the accompanying decision/order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/17/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
MOISES FIGUEROA,

Petitioner,
-against-

Index No.: 402225/10
Submission Date: 11/5/10

CYRUS R. VANCE JR., DISTRICT ATTORNEY/THE
CHIEF MEDICAL EXAMINER,

DECISION AND ORDER

Respondents.

-----X

Petitioner, *pro se*:
Clinton Correctional Facility
#90-B-1047
P.O. Box 2001
Dannemora, NY 12929

For Respondent The Chief Medical Examiner:
Michael A. Cardozo, Corporation Counsel of the City of N.Y.
100 Church Street
New York, NY 10007

For Respondent Cyrus R. Vance Jr., District
Attorney:
District Attorney of N.Y. County
One Hogan Place
New York, NY 10013

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Papers considered in review of this petition and cross motion to dismiss:

- Petition 1
- Notice of Cross Motion 2, 3
- Reply 4

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Moises Figueroa ("Figueroa") challenges the respective determinations of respondents Cyrus R. Vance Jr., District Attorney ("District Attorney") and The Chief Medical Examiner ("Medical Examiner") denying his Freedom of Information Law ("FOIL") appeals. The District Attorney and the Medical Examiner each cross moves to dismiss the petition.

Figueroa was convicted of a homicide in 1990 in New York County. By letter dated November 25, 2009, Figueroa requested that the District Attorney provide him with DNA test results of blood evidence recovered from the scene of the homicide. By letter dated December 14, 2009, the District Attorney's office's FOIL Records Access Officer Eleanor Nussbaum ("Nussbaum") denied his request, informing Figueroa that she spoke with the assistant district attorney who handled the prosecution on Figueroa's case and was informed that no such document existed in the office file. She explained that her office could not provide documents that do not exist.

On December 27, 2009, Figueroa appealed Nussbaum's FOIL determination, asserting that Nussbaum's response was too vague and did not offer proof that the District Attorney's office did not possess the evidence in question. He further maintained that if the District Attorney's office had not conducted a DNA test on the blood evidence, that the office perform such test and provide the results to Figueroa or give Figueroa the blood evidence to be tested privately.

By letter dated March 5, 2010, Figueroa's appeal was denied and Nussbaum's FOIL denial was upheld by assistant district attorney Patricia J. Bailey ("Bailey"). Bailey claimed that she reviewed the case file and confirmed that the records requested by Figueroa were not in the District Attorney's office's possession. Further, the document upon which Figueroa based his belief that DNA testing had been performed did not state in any way or indicate that DNA testing was done or requested to be done. Finally, she

maintained that the assistant district attorney who handled Figueroa's case informed her that there was no DNA testing done.

In addition, by letter dated February 9, 2010, Figueroa requested that the Medical Examiner provide him with DNA test results of blood evidence recovered from the scene of the homicide or give him the blood evidence to be tested privately. By letter dated March 8, 2010, the Medical Examiner denied his request pursuant to Public Officers Law §87(2)(a) and New York City Charter Section 557(g). On April 2, 2010, Figueroa appealed the denial of his FOIL request, on the grounds that the requested evidence formed a basis for his homicide conviction and that he had not been provided with the DNA evidence found in connection with his conviction. He also maintained that his request to have the evidence tested privately was not addressed. On April 30, 2010, the Medical Examiner denied his FOIL appeal on the same grounds as the original request.

Figueroa now commences this Article 78 proceeding, challenging the District Attorney and Medical Examiner's respective determinations denying his FOIL appeals. He further seeks to compel FOIL production of the DNA test results, or if there was no DNA test conducted, to compel the testing of the blood evidence in question.

The District Attorney and the Medical Examiner each cross moves to dismiss the petition. The District Attorney and the Medical Examiner both argue that their offices conducted diligent searches and determined that the records sought by Figueroa do not exist or can not be located and therefore, Figueroa's petition is moot. The Medical

Examiner further argues that the records sought by Figueroa are exempt from FOIL disclosure pursuant to Public Officers Law §87(2)(a) and New York City Charter Section 557(g).

Discussion

Under the Freedom of Information Law, records which must otherwise be made available to applicants need not be if they are specifically exempted from disclosure by State or Federal statute. Public Officers Law §87(2)(a). Here, such exemption exists with regard to the records sought by Figueroa, under New York City Charter §557(g). *See Katz v. Scott*, 236 A.D.2d 259 (1st Dept. 1997); *Mitchell v. Borakove*, 225 A.D.2d 435 (1st Dept. 1996).

In any event, both the District Attorney and the Medical Examiner have certified that they do not have any DNA results or blood evidence in their possession. *See Rattley v. N.Y. City Police Dept.*, 96 N.Y.2d 873 (2001); *Matter of Carty v. New York City Police Dept.*, 41 A.D.3d 150 (1st Dept. 2007).

In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioner Moises Figueroa's petition is denied and the proceeding is dismissed; and it is further

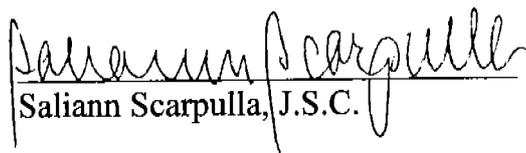
ORDERED that respondents Cyrus R. Vance Jr., District Attorney and The Chief Medical Examiner's respective cross motions to dismiss the petition are denied as moot; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
February 7, 2011

ENTER:


Saliann Scarpulla, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).