

Matter of Green v Denk
2011 NY Slip Op 30454(U)
February 15, 2011
Supreme Court, Broome County
Docket Number: 2010-3079
Judge: Ferris D. Lebus
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 14th day of January, 2011.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

In the Matter of the Application of

ERIC A. GREEN,

Petitioner,

-vs-

ERIC DENK,

JOANN ROSE PARRY,

Respondents.

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

APPEARANCES:

PETITIONER:

ERIC A. GREEN, PRO SE
GROVELAND CORRECTIONAL FACILITY
P.O. BOX 50
SONYEA, NY 14556

COUNSEL FOR RESPONDENTS:

BROOME COUNTY ATTORNEY'S OFFICE
BY: AARON J. MARCUS, ESQ. and
PETER DEWIND, ESQ., OF COUNSEL
EDWIN L. CRAWFORD COUNTY OFFICE
BUILDING
P.O. BOX 1766
BINGHAMTON, NY 13902

FERRIS D. LEBOUS, J.S.C.

Petitioner, Eric A. Green, an inmate appearing pro se, seeks a judgment pursuant to Article 78 of the CPLR to vacate and set aside a freedom of information law (hereinafter "FOIL") determination. Petitioner also seeks permission to proceed as a poor person in that endeavor.¹

Petitioner commenced this Article 78 proceeding by way of an Order to Show Cause signed November 29th, 2010 seeking, among other things, an order: (1) vacating and setting aside respondents FOIL determination; and (2) directing respondents to turn over the requested phone records.

BACKGROUND

The exact history and sequence of events is difficult to determine on these papers, but it appears that petitioner is serving time for Criminal Sale of a Controlled Substance in the 3rd degree, a B felony.²

On or about August 30, 2010, petitioner submitted an "Application for Public Access to Records" seeking phone records that were the subject of testimony at his Wade hearing. On September 9, 2010, Eric S. Denk, the Broome County Records Access Officer, advised that the application was denied because court records are not covered under FOIL and that any

¹The County concedes petitioner would be eligible for a reduced filing fee as provided by CPLR § 1101 (f) should his inmate account contain insufficient means to pay the entire filing fee. However, the County does object to the application on the grounds that it lacks merit as outlined in respondents' opposing papers.

²The court obtained this information from the New York State Department of Corrections website.

information provided to defense counsel need not be provided again under FOIL. Additionally, Mr. Denk's letter included a copy of a letter from Joann Rose Parry, Chief Assistant District Attorney, dated September 8, 2010 setting forth the same grounds for denial.

On or about September 8, 2010, petitioner filed an appeal of said decision (hereinafter "Appeal #1"). On September 17, 2010, Mr. Denk acknowledged receipt of Appeal #1 and responded with 2 pages of information.

On September 20, 2010, petitioner filed a further appeal to Mr. Denk's response indicating that the information provided was not what he had requested (hereinafter "Appeal #2"). On September 23, 2010, Mr. Denk acknowledged receipt of Appeal #2 and advised that his office would make every effort to find the information requested. Thereafter, on October 1, 2010, Mr. Denk advised that Appeal #2 had been denied because no other information existed other than the 2 pages previously provided.

On October 11, 2010, petitioner filed another appeal insisting that the information must exist and had never been turned over to his defense counsel (hereinafter "Appeal #3"). Petitioner commenced this proceeding after receiving no response to Appeal #3.

DISCUSSION

Initially, respondents argue that petitioner has failed to exhaust his administrative remedies because neither Appeal #1 nor Appeal #3 were received by Jennifer K. Royer, the

Deputy Legislative Clerk with the Broome County Legislature.³ The court does not find this argument compelling. It is unclear how or why Mr. Denk - as Records Access Officer - made four separate responses to petitioner (dated September 9, 2010, September 17, 2010, September 23, 2010 and October 1, 2010), but respondents are now alleging that petitioner's Appeals #1 and #3 were never received by the Records Access Office. As such, the court will address the substance of the petition.

The court finds that petitioner has not met the statutory requirement that he establish a meritorious cause of action (CPLR § 1101 [a]). According to the Affidavits of Joann Rose Parry, Chief Assistant District Attorney, none of the records requested by petitioner are in the possession of the District Attorney. Additionally, Affidavits from Matthew J. Cower, a detective with the Broome County Sheriff's Office, deny the existence of those records in the first instance. In view of the foregoing, the court finds the requested records do not exist or are not in the possession of respondents.

Parenthetically, respondents argue and the court agrees, that even if the requested documents did exist and were in their possession, that the disclosure of such informant information could jeopardize the life or safety of any persons whose phone numbers appeared therein (Public Officers Law § 87 [2][e] and [f]).

Consequently, petitioner's application for permission to proceed as a poor person is

³Respondents also note that petitioner's Appeal #1 dated September 8, 2010 appears to pre-date the denial letter from Mr. Denk dated September 9, 2010. The court will assume this was just a typographical error on petitioner's Appeal #1.

denied and Article 78 petition is dismissed.

CONCLUSION

Accordingly, it hereby is ORDERED and ADJUDGED that the petition is DISMISSED.

This constitutes the decision, order and judgment of the court.

Dated: February 15, 2011
Binghamton, New York

s/ Ferris D. Lebous _____
Hon. Ferris D. Lebous
Justice, Supreme Court