
Matter of Sunter v. David, 407023/07
Decided: July 17, 2008

NEW YORK COUNTY
Supreme Court

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Petitioner Self Represented

Justice Schlesinger
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Petitioner Male Sunter, an incarcerated person, has commenced this Article 78 proceeding to challenge determinations by the New York City Police Department (NYPD) and the New York County District Attorney's Office (DA) denying his request for documents pursuant to the Freedom of Information (FOIL). Both NYPD and the DA have urged dismissal, NYPD via a cross-motion to dismiss and the DA via an answer, and Sunter has opposed. The arguments regarding each respondent will be separately addressed. Both involve Sunter's conviction on June 20, 2006 after a jury trial for one count each of Robbery in the First and Second Degrees, and Criminal Possession of a Weapon in the Second and Third Degrees, for his commission of a gun-point carjacking.

The District Attorney Proceedings

By FOIL request dated September 28, 2006, petitioner requested 88 items from the

District Attorney. (Exh. A. to Answer). After some back and forth between the parties regarding the DA's search efforts, the DA denied petitioner's request by letter dated January 31, 2007 on two grounds. First, relying on Public Officers law Â§87(2)(e)(i) and various cases, the DA asserted that the documents were exempt from disclosure because disclosure would "interfere with . . . judicial proceedings," in this case, petitioner's pending appeal. The second ground for the denial was the DA's inability to locate the documents after a diligent search. In connection with that ground, the DA suggested that petitioner contact the Office of the Appellate Defender, to whom the files were being sent in connection with their assigned representation of petitioner. (Exh. G to Answer). However, it appears from an Appellate Division decision (Exh. J to Answer) that petitioner is proceeding pro se, with the appeal scheduled for the June Term.

By letter dated April 20, 2007, petitioner acknowledged receipt of the January 31, 2007 letter and inquired how he should proceed to exhaust his administrative remedies in light of the DA's inability to find the documents. (Exh. H to Answer). By letter dated May 7, 2007, the DA advised petitioner that his April 20 letter was an untimely appeal, filed more than 30 days after the January 31 determination. On the merits, the DA reaffirmed its prior decision. (Exh. I to Answer).

In this Article 78 proceeding, commenced in December 2007, petitioner emphasizes that public policy favors the release of records pursuant to FOIL, in addition to discovery in criminal proceedings. In response the DA asserts that both the administrative appeal and this Article 78 proceeding were untimely and that the denial based on the pending appeal was proper. In reply, petitioner does not address the timeliness issue but reiterates the public policy favoring disclosure.

This Court finds that the petition against the DA must be denied as untimely. The January 31, 2007 letter clearly indicated that it was a "determination of [petitioner's] FOIL request." Petitioner had 30 days to appeal that determination. As no appeal was filed for nearly 90 days, the administrative appeal was properly denied as untimely. See Jamison v. Tesler, 300 AD2d 194 (1st Dep't 2002). Further, this Article 78 proceeding is itself untimely. Petitioner was required to commence this proceeding in September of 2007. within four months of the May 7, 2007 decision denying his administrative appeal. The earliest date on petitioner's papers is the November 20, 2007 verification. Therefore, this proceeding must be dismissed as untimely. See, Swinton v. Records Access Officer, 198 AD2d 165 (1st Dep't 1993). Even if we were to address the merits, the petition must be denied, as a party cannot be compelled to produce documents not in its possession. Swinton, 198 AD2d at 166.

The NYPD Proceedings

By FOIL request dated November 13, 2006, petitioner requested 68 items from NYPD (Exh. 2 to Cross-Motion). By decision dated June 20, 2007, NYPD provided a handful of documents and denied certain others as exempt. NYPD referred petitioner to the court files and the DA for the balance of the documents (Exh. 4).

Petitioner promptly appealed the determination on June 29, 2007, disputing the claimed exemption and asserting that no other entity was in possession of the documents. (Exh. 5). By letter dated July 25, 2007, NYPD denied the appeal, citing CPL Â§160.50 and Public Officers Law Â§87(2)(a)). It is unclear why NYPD relied on this provision of the CPL, which provides for the return or destruction of certain documents upon the conclusion of a criminal action determined "in favor of the accused," when petitioner had been convicted after a jury trial. The letter continued that certain documents were not in the possession of NYPD and that "other exemptions under FOIL also may apply." Lastly, the letter advised petitioner that any Article 78 proceeding had to be commenced "within four months of the date of this decision."

This Article 78 proceeding ensued, with petitioner's commencement by filing of an application for poor person's relief, an Order to Show Cause and Verified Petition, and a Request for Judicial Intervention on November 30, 2007. According to the County Clerk's minutes, the clerk assigned an index number to the proceeding and Justice Heitler issued an order granting poor person's relief on November 30. Justice Davis signed the Order to Show Cause accompanying the Petition on December 3, and the matter was assigned to Justice Wilkins who recused herself several months thereafter. The proceeding was then assigned to this Court.

NYPD has moved to dismiss, claiming first that the requested documents are exempt because disclosure would interfere with petitioner's pending appeal. Citing cases such as Legal Aid Society v. NYPD, 274 AD2d 207 (1st Dep't 2000), app. denied 95 NY2d 956 and Moreno v. New York County District Attorney, 38 AD3d 358 (1st Dep't 2007), NYPD argues that no particularized showing of actual interference with a judicial proceeding need be made; it is sufficient for NYPD to assert, as it has here, that an appeal is pending.

The motion must be denied on this ground. The appeal was pending when petitioner's FOIL request was being processed, and the DA cited it as a ground for an exemption. However, the FOIL proceeding involving NYPD was separate from the DA proceeding, and NYPD did not rely upon the pending appeal as a basis for denying petitioner's FOIL application or administrative appeal. Since the issue was not raised by NYPD in the administrative proceeding below, it is unpreserved for review by this Court in this proceeding. Eisland v. New York City Campaign Finance Board, et al., 31 AD3d 259, 264 (1st Dep't 2006), citing Matter of Fanelli v. New York City Conciliation & Appeals Board, 90 AD2d 756, 757 (1st Dep't 1982), aff'd 58 NY2d 952 (1983); see also, Sharon Realty Company v. Abrams, 167 AD2d 121 (1st Dep't 1990)(a party may not introduce facts for the first time in an Article 78 proceeding).

NYPD has also moved to dismiss on the ground that the proceeding is barred by the statute of limitations. The relevant provision CPLR Â§217(1) provides that an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . "[1] NYPD argues that the time begins to run on July 25, 2007, when the agency issued its determination denying the

administrative appeal, and that petitioner therefore had to commence this proceeding by filing by November 25. Since the filing occurred on November 30, NYPD argues that it is untimely, citing Swinton v. Records Access Officer, 198 AD2d 165 (1st Dep't 1993) and Laureano v. Grimes, 179 AD2d 602 (1st Dep't 1992). However, neither case is instructive. Swinton contains no analysis, as the filing was clearly in excess of four months, and the issue in Laureano was whether the sixty-day extension for service then available under CPLR Â§203(b)(5) applied to Article 78 proceedings.

Petitioner opposes the motion, urging the Court to begin the clock on July 31, the day after he received the July 25 decision. He documents the date of his receipt by attaching a copy of the NYPD mailing envelope with the July 30 "Received" stamp by the prison facility. He calculates the four months to end on Saturday, December 1, extending the time for tiling to the next business day, December 3, pursuant to General Construction Law Â§25-a. Based on this computation, petitioner asserts that the November 30 filing is timely. Petitioner also asks the Court to take into account that the prison notarized his signature on the verification on November 20 (implying, but not confirming, that he gave them the papers to mail at that time), and that the Postal Service may have delayed in delivering his papers to the courthouse due to the holiday rush. He therefore asks the Court to apply the "mailbox rule," which considers papers timely based on an inmate's date of mailing.

Included in the court file is a printout from the Department of Corrections (DOC) dated November 29 showing petitioner's account balance with a debit for postage, along with the earlier discussed proof of filing in court on November 30. Therefore, while some processing delay by DOC is possible, it has not been established with certainty, and petitioner cannot reasonably dispute that the Postal Service promptly delivered the mail to the courthouse. In any event, petitioner was required to take prison mailing procedures into account when commencing the proceeding; he is not entitled to any extension of time because he relies on the prison to complete the mailing. See Grant v. Senkowski, 95 NY2d 605 (2001)(rejecting the "mailbox rule"); Bonez v. NYS Dept. Of Correction 290 AD2d 325 (1st Dep't 2002).

However, the inquiry does not stop there because, as petitioner correctly notes, the computation of the time period begins with petitioner's receipt of notice of the determination, rather than the date the determination was issued. The rationale behind this rule was eloquently explained by the Court of Appeals in Biondo v. New York State Board of Parole, 60 NY2d 832 (1983). The Appellate Division had affirmed the lower court's dismissal of the Article 78 proceeding as untimely based on a computation which began with the date the Parole Board had issued its decision. The Court of Appeals reversed, explaining (at p 834) as follows:

The four-month Statute of Limitations did not begin to run until the petitioner received notice of the appeal board's determination . . . The contrary conclusion reached by the courts below, that the running of the statutory period began to run immediately upon the issuance of the determination, overlooks the additional requirement that the petitioner be

"aggrieved" by the determination . . . We have previously held that for the purposes of the commencement of the statutory period, the petitioner cannot be said to be aggrieved by the mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final . . . A similar principle should apply when the petitioner has received no notice, ambiguous or otherwise, of the determination by which he is said to be aggrieved. Indeed, fundamental fairness would seem to compel the conclusion that a petitioner should not be held to have been dilatory in challenging a determination of which he was not aware . . . (citations omitted).

The Biondo court then remanded the matter to Special Term to determine when the petitioner had been informed of the appeal board's determination.

The Biondo principle has been repeatedly applied by the First Department in other Article 78 proceedings with similar results. Thus, for example, in Gomez v. Safir, 271 AD2d 246, 247 (2000), the Appellate Division affirmed the motion court's finding that the City's determination denying a police officer's request to engage in off-duty employment as a boxer "became final and binding within the meaning of CPLR 217(1) when petitioner was informed of the denial of his administrative appeal." In Gruber v. NYS Division of Housing and Community Renewal, 151 AD2d 426, 428 (1989), the court held that the statute of limitations did not begin to run until the petitioner had received notice of the administrative ruling, noting that to hold otherwise would lead to "a patently unfair result."See also, 90-92 Wadsworth Avenue Tenants v. City of New York, 227 AD2d 331 (1st Dep't 1996)("when a party is entitled to written notice, the statutory period of limitations does not begin to run until notice is received in that form"). And there can be no dispute that the same principle applies to inmates. See, e.g., Shell v. McCray, 261 AD2d 664 (3rd Dep't 1999), lv denied 97 NY2d 700 (inmate's receipt of determination of his appeal of prison disciplinary rules triggered the four-month statute of limitations); Dearmas v. New York State Division of Parole, 263 AD2d 709, 710 (3rd Dep't 1999)("It is well settled that the Statute of Limitations period begins to run from the point the inmate receives notice of the adverse determination and not from the date of its issuance").

Petitioner having established receipt of NYPD's written determination on July 30, the next issue is how to precisely compute the last date for filing. According to CPLR Â§217(1), the proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (i.e., within four months of petitioner's receipt of notice). In accordance with the general rules, the first day is excluded from computation when applying the statute of limitations, and a month is a calendar month. See NY Gen Constr. Law Â§Â§20 and 30. Thus, based on his July 30 receipt of the NYPD determination, petitioner was required to commence this proceeding by November 30. That he did by filing an application for poor person's relief and an order to show cause and petition on that date and obtaining an index number. The proceeding was deemed commenced with the filing of those papers on November 30, when an index number and poor person's order were issued, even though the order to show cause accompanying the petition was not filed until a few days later. See Grant v. Senkowski, 95 NY2d 605 (2001); Lovett v. City of New York, 6 Misc.3d 1032A (Sup. Ct., NY Co. 2005).

The accuracy of this computation can be confirmed by reviewing New York State Association of Counties v. Axelrod, 78 NY2d 158 (1991). There, the Court of Appeals determined (at 166) that the petitioning association had timely commenced the Article 78 proceeding on October 2, 1987, "within four months of its members' receipt [on June 2] of the rate recomputation notices which, for the first time, apprised the facilities of their actual reimbursement rates."

The burden is on the moving respondent to establish its affirmative defense of the Statute of Limitations. State of New York v. Seventh Regiment Fund, 51 AD3d 463 (1st Dep't 2008). For the above reasons, NYPD has failed to meet its burden. This proceeding was timely commenced, and NYPD's motion to dismiss must be denied.

NYPD is entitled to file a Verified Answer. As noted above, the only two exemptions claimed in the FOIL proceeding below were CPL Â§160.50, which the Court has already found inapplicable, and the assertion that documents are in the possession of another agency. As to the latter ground, NYPD is directed to conduct a diligent search for the requested records on an expedited basis. Should the agency still be unable to locate the documents, a detailed affidavit of diligent search must be provided by an individual with personal knowledge along with the Verified Answer.

Accordingly, it is hereby

ADJUDGED that the petition is denied as to respondent District Attorney; and it is further

ORDERED that the cross-motion by NYPD is denied and NYPD is directed to serve petitioner and mail to this Court by August 13, 2007 a Verified Answer, and respondent may serve a Reply by mail by September 2, 2008.

This constitutes the decision and order of this Court.

1. NYPD relies on the portion of the statute which begins the running of the time "after respondent's refusal, upon the demand of the petitioner, to perform its duty . . . " That section is inapplicable. NYPD performed its duty to determine the application. The issue here, whether the determination is proper, is subject to the provision cited above by the Court. Metropolitan Museum Historic Dist. Coalition v. De Montebello, 20 AD3d 28, 36 (1st Dep't 2005).