

Yonamine v New York City Police Dept.

2011 NY Slip Op 30464(U)

March 1, 2011

Supreme Court, New York County

Docket Number: 401772/2010

Judge: Martin Schoenfeld

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

PRESENT: Hon. Schoenfeld
Justice

PART 28

Masao Yonamine

INDEX NO. 401772-10

MOTION DATE _____

NYCPD, Raymond Kelly; James Russo; Hypolyte, Associate Investigator; and Jonathan David

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for A.T. 78

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-6

Replying Affidavits _____

7-9 / 10-11

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

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: 3/11/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

----- X
MASAO YONAMINE,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

Index No.: 401772/2010

-against-

NEW YORK CITY POLICE DEPARTMENT,
RAYMOND KELLY, JAMES RUSSO,
HYPPOLYTE, ASSOCIATE INVESTIGATOR,
and JONATHAN DAVID,

UNFILED JUDGMENT
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141B).

Respondents.

----- X
MARTIN SCHOENFELD, J.:

Petitioner, acting pro se, brought an Article 78 Petition after Respondents the New York City Police Department (NYCPD), Raymond Kelly, James Russo, Hyppolyte, Associate Investigator and Jonathan David (collectively, Respondents), failed to produce information pursuant to a request under NY Public Officers Law, § 84, et. seq. (POL), also known as the Freedom of Information Law (FOIL). Petitioner also requested that the court issue a subpoena duces tucem directing Respondents to produce the requested documents for an in camera review, pursuant to CPLR 2307. Respondents filed a cross motion to dismiss the petition. Respondents argue that the petition should be dismissed, pursuant to 7804 (f), on the ground that the Petitioner has failed to exhaust the mandatory administrative remedies prior to

commencement of this petition. Petitioner then filed a motion to strike the cross motion.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is currently a prisoner incarcerated at the Fishkill Correctional Facility in Beacon, New York. In December 1986, Petitioner was arrested for the homicides of two people and was prosecuted in the county of Queens, New York, under indictment number 7840/86.

By a letter dated August 19, 2009, Petitioner submitted a FOIL request seeking records related to his indictment number. Among other records, Petitioner requested copies of handwritten notes and statements recorded on tape from a witness and a detective. Respondents' Exhibit 1, at 2.

By a letter dated September 10, 2009, the Records Access Officer (RAO) advised Petitioner that the FOIL unit had received his request, and that it would take approximately three months to provide a response. Respondents' Exhibit 2.

By a letter dated January 14, 2010, the RAO advised Petitioner that the FOIL unit was able to provide Petitioner with some, but not all, of his requests. The letter stated, in pertinent part,

Responsive to your request, the following document(s) have been accessed and/or photocopied: Arrest report (12/4/86) complaint and follow up.

Based on the information you provided, this

[* 4]

Unit conducted a diligent search for the following requested document(s) which could not be found: Hand written notes, statements, memo book.

Respondents' Exhibit 3.

The letter also advised Petitioner that he was entitled to appeal the decision in writing within 30 days.

By a letter dated February 13, 2010, Petitioner appealed the portion of the RAO's decision which denied certain record requests.

By a letter dated April 19, 2010, Petitioner was notified that his appeal was granted "to the extent that the matter has been remanded to the RAO to conduct a further search of the requested records." Respondents' Exhibit 5.

Petitioner commenced this Article 78 proceeding by an order to show cause dated July 7, 2010. Petitioner contends that Respondents failed to act timely, and that Petitioner should, therefore, be provided with all the documents to which he requested access. Petitioner also explains why he believes he is entitled to every requested record.

Petitioner contends that he did not receive a timely response pursuant to POL § 89 (4) (a), which provides that the person designated to determine appeals "shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial," or provide the records. As such, Petitioner believed that the

Respondents' delay constituted a "blanket denial." Yonamine Affidavit, ¶ 13.

Based on the alleged denial of his document request, Petitioner also seeks an order compelling Respondents to provide the requested records to the court for an in camera review.

Respondents argue that the petition is premature, as Petitioner has not exhausted his administrative remedies, as he has not yet received a final determination from the RAO.

DISCUSSION

It is well settled that an Article 78 proceeding may not be used to challenge a determination that is not yet final. *Committee to Save Beacon Theater v New York*, 146 AD2d 397, 402 (1st Dept 1989); *Matter of Newton v Police Department of City of New York*, 183 AD2d 621, 623 (1st Dept 1992) ("[b]efore a person seeking information under FOIL may resort to a judicial forum to gain relief, he must have exhausted his administrative remedies."); see CPLR 7801 (1). Moreover, NY Public Officers Law § 89 (4) (b) states that a person may file an Article 78 proceeding against Respondents if he is "denied access to a record in an appeal determination."

Here, although Petitioner was initially denied access to certain records, his appeal was granted, and the matter was remanded to the RAO for another record search. Petitioner acknowledged that he received Respondents' April 19, 2010 letter

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informing him that his request was being remanded to the RAO for a further search.

The Appellate Division, First Department, has found that a Petitioner's obligation to wait for a final administrative determination is not negated by the administrative agency's failure to respond to a FOIL request in a "timely fashion." *Carty v New York City Police Department*, 41 AD3d 150, 150 (1st Dept 2007) (citing *Taylor v. New York City Police Dept. FOIL Unit*, 25 AD3d 347 (1st Dept. 2006)). Here, there has been a substantial delay. However, because the RAO has not informed Petitioner whether or not it will be granting Petitioner's original record request, he has not been "denied access to a record in an appeal determination." Thus, no final determination has been made on Petitioner's appeal.

Accordingly, the Petitioner has not yet exhausted his administrative remedies and, therefore, the cross motion to dismiss is granted.

Petitioner also requested that the court issue a subpoena duces tecum directing Respondents to produce the requested documents for an in camera review pursuant to CPLR 2307. As Petitioner has not yet been denied the records, this request is premature and, therefore, is denied.

The court notes, however, that Petitioner's initial FOIL request was over a year and a half ago. Respondents have taken

[* 7]
too long to give Petitioner a final determination. Moreover, Respondents unnecessarily delayed the determination by staying their search for Petitioner's documents when he commenced this Article 78 proceeding. Chasan Affirmation, ¶ 11. These delays are unacceptable. Therefore, to move the administrative process forward, the court finds that Respondents must supply Petitioner with an answer to his document request by April 15, 2011 or the request will be considered a final denial of Petitioner's request as of that date.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the Respondents' cross motion to dismiss the Petition is granted; and it is further

ORDERED that Respondents must issue a final determination by April 15, 2011 or the FOIL request will be considered denied as of that date; and it is further

ADJUDGED that the Petition is denied without prejudice, and the proceeding is dismissed.



J.S.C.

UNFILED JUDGMENT

Dated: New York, New York
March 1, 2011

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