

**Matter of Henry Schein, Inc. v Eristoff**

2007 NY Slip Op 30335(U)

March 23, 2007

Supreme Court, Albany County

Docket Number: 0223905

Judge: George B. Ceresia

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.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

---

In the Matter of the Application of  
HENRY SCHEIN, INC.,

Petitioner,

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

-against-

Index No. 2239-05

RJI No. 01-05-ST5562

ANDREW S. ERISTOFF, in his capacity as  
Commissioner of Taxation and Finance for the  
State of New York,

Respondent.

---

Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances: Jones Day  
Attorneys for Petitioner  
(Christine E. Jennings, Maryann B. Gall and  
Phyllis J Shambaugh, Esqs., of Counsel)  
222 East 41<sup>st</sup> Street  
New York, New York 10017-6702

Eliot Spitzer  
Attorney General  
State of New York  
(Jaime I. Roth, Esq., Assistant Attorney General of Counsel)  
The Capitol  
Albany, New York 12224

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

Petitioner has moved for an order vacating the decision, order and judgment of this

Court dated September 26, 2005 on the grounds of newly discovered evidence and misconduct on the part of respondent in procuring the order and judgment. The petition herein sought a judgment ordering respondent to produce documents requested by petitioner pursuant to the Freedom of Information Law (“FOIL”). The petition challenged the denial of production of 287 specific pages of documents based upon various stated exemptions under FOIL.

Petitioner was the subject of a sales tax audit covering many years. Due to the unavailability of any discovery procedures in tax audits, on August 19, 2004, petitioner filed a FOIL request with the Department’s Records Access Office. The request sought the following documents:

- (a) Any and all documents and information reviewed, analyzed or prepared by the Department during its continuing sales tax audit of HSI for the audit periods March 1, 1993 through November 30, 1999.
- (b) Any and all documents, reports and workpapers promulgated by the Department during this audit.
- (c) Any and all documents reviewed, analyzed or prepared by the Department during its review of HSI’s claim that the August 6, 2000 Consent signed by its Tax Director is invalid to extend the limitations period.

The Department responded with the release of approximately 1,121 pages of documents on November 4, 2004. Additional documents were released by respondent prior to issuance of the subject decision, order and judgment, which required respondent to release an additional 17 pages of documents following in camera review. It appears that such documents were produced by respondent. The Court also denied an award of

attorneys fees. Such determination was affirmed on appeal (Matter of Henry Schein, Inc. v Eristoff, 35 AD3d 1124 [3d Dept 2006]).

During an administrative hearing on the alleged tax liability, respondent produced two pages from a fax log as additional evidence that two faxes were sent to petitioner. Nether of such pages were produced pursuant to the FOIL request even though they appear to come within the request for documents prepared in conjunction with the sales tax audit. Petitioner contends in entirely conclusory fashion that the two pages of the fax log are critical to the issue of the period of limitations, that the result of the decision, order and judgment challenged herein would likely have been different if petitioner had known of the failure to produce at the time of the original proceeding and that the order and judgment were procured by the misconduct of failing to comply with the FOIL request.

A motion to vacate a judgment pursuant to CPLR 5015 (a) is subject to the discretion of the Court (see Solomon v Solomon, 27 AD3d 988, 989 [3d Dept 2006]; S.A.B. Enters. v Stewart's Ice Cream Co., 242 AD2d 845, 846 [3d Dept 1997]).

“The party seeking relief pursuant to CPLR 5015(a)(2) must show that the newly discovered evidence is material, is not merely cumulative, is not of such a nature as would merely impeach the credibility of an adverse witness and that it would probably change the result previously reached’ (Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc., 226 AD2d 102, 103; see Ramos v 1199 Hous. Corp., 6 AD3d 416).” (Matter of Catapano, 17 AD3d 673, 674 [2d Dept 2005]; see also Solomon v Solomon, 27 AD3d at 989; Evergreen Bank v Dashnaw, 262 AD2d 737, 738 [3d Dept 1999]).

The petition herein did not challenge a defacto denial of a FOIL request based upon a

documents. Moreover, it does not appear that the fax log was directly related to any of the substantive issues in the sales tax audit, and any failure to comply appears to have been made in good faith. In order to be entitled to vacatur of a judgment based upon fraud or misconduct, the judgment must have been procured by fraud or misconduct (see e.g. Citicorp Vendor Fin., Inc. v Island Garden Basketball, Inc., 27 AD3d 608, 609 [2d Dept 2006]; Bovenzi v Bovenzi, 305 AD2d 671 [2d Dept 2003]; Matter of Oneida County Dept. of Social Servs. v Joseph C., 289 AD2d 1077, 1078 [4th Dept 2001]). The fraud or misconduct must have been practiced against the Court, not against a party as part of the underlying cause of action (see Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York, 64 NY2d 188, 198 [1984] [concurring opinion]) and must be of a sort which could have altered the outcome (Siegel, NY Prac § 429, at 728 [4th ed]).

The alleged misconduct occurred in relation to the FOIL request, and was unrelated to the defense of the instant article 78 proceeding. It was clearly not against the Court and could not have altered the outcome, as it had nothing to do with the claimed exemptions from disclosure asserted by respondent. The fax log pages are also case specific and only of marginal interest in this proceeding. The pages are certainly not of significant interest to the general public. Moreover, even if petitioner had sought production of such pages in the article 78 proceeding and had prevailed on such issue, that would not indicate that petitioner had substantially prevailed in the article 78

failure to produce documents. Rather it was limited to specifically claimed exemptions from disclosure concerning specifically identified documents. The issues before the Court were limited to whether the claimed exemptions were applicable. The two pages of fax log are not subject to any exemptions from FOIL, nor did the respondent ever make a final determination as to whether the documents should be produced. Petitioner never exhausted its administrative remedies with respect to the fax log. As such, the newly discovered evidence of respondent's failure to produce two pages of documents is neither material nor relevant to the issues raised in the instant article 78 proceeding.

It further appears that respondent did produce the actual faxes which were noted in the log. One of the faxes submitted by petitioner in support of its application includes fax identification information including the date, time, phone number and sender. The fax log thus appears to be merely cumulative evidence not critical to the issues raised in the administrative proceeding. Moreover, while the failure to produce may be relevant to general FOIL compliance, it is not relevant to any perjury or even credibility issues within the article 78 proceeding. It is thus clear that submission of evidence of a failure to comply with FOIL unrelated to the issues raised in this proceeding would not have altered the outcome (see Dyno v Village of Johnson City, 255 AD2d 737, 738 [3d Dept 1998]).

Petitioner also seeks to vacate the order and judgment on the ground of misconduct. The only misconduct alleged is respondent's failure to produce two pages of documents pursuant to a FOIL request involving approximately 1400 pages of

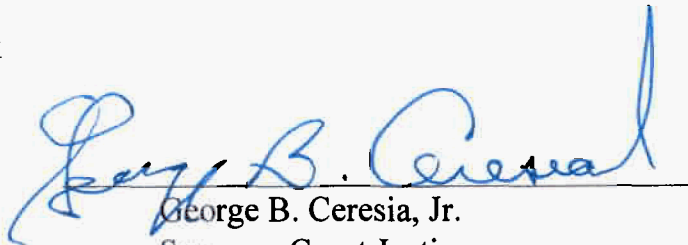
proceeding (see Matter of Henry Schein, Inc. v Eristoff, 35 AD3d at 1126) nor would it have provided a sufficient ground for this Court to exercise its discretion to award counsel fees (id.).

Accordingly it is hereby,

**ORDERED**, that the motion to vacate the decision, order and judgment of this Court dated September 26, 2005 is hereby denied in all respects.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the respondent, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
March 23, 2007



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated October 6, 2006;
2. Affidavit of Maryann B. Gall, Esq. sworn to October 3, 2006 with Exhibits 1-9 annexed;
3. Affidavit of Phyllis J. Shambaugh, Esq. sworn to October 3, 2006 with Exhibits 1-9 annexed;
4. Petitioner's Memorandum of Law dated October 6, 2006;
5. Affidavit of Scott Presser sworn to November 6, 2006 with Exhibits annexed;
6. Affidavit of Albert Coringrato sworn to November 7, 2006 with Exhibits

annexed;

7. Respondent's Memorandum of Law, dated November 14, 2006;
8. Affidavit of Irwin Salomon sworn to December 12, 2006 with Exhibits 1-2 annexed;
9. Petitioner's Reply Memorandum of Law, dated December 13, 2006.