

Matter of Patti v New York State Police

2007 NY Slip Op 31819(U)

June 25, 2007

Supreme Court, Albany County

Docket Number: 0759206/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of

HENRIETTA PATTI,

Petitioner,

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

Index No. 7592-06
RJI # 01-07-ST7489

-against-

NEW YORK STATE POLICE,

Respondent.

All Purpose Term, April 13, 2007
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner commenced the instant article 78 proceeding challenging the denial of several Freedom of Information Law (FOIL) requests. Respondents have moved to dismiss on objections in point of law on the ground that the proceeding is barred by the applicable statute of limitations and that petitioner failed to obtain jurisdiction over respondent by failing to serve the Attorney General's Office as required by CPLR § 7804 (c). Petitioner has cross-moved for an order excusing the defect in service.

Petitioner made several FOIL requests for documents in 2004 and 2005 concerning the death of her son. The latest response by respondent, which denied her request, was dated May 4, 2005. The instant proceeding was not commenced until August 11, 2006.

CPLR § 217 requires that an article 78 proceeding be commenced within four months after the determination challenged becomes final and binding. Notwithstanding the fact that petitioner served several similar FOIL requests, she only served an administrative appeal with respect to her second request. The response stated "After careful review of your appeal, I have determined that your request has been previously responded to and will not be reconsidered." Petitioner contends that this constitutes a refusal to determine the appeal, that because there has never been a denial of her FOIL appeal, respondent is committing a continuing failure to act and that therefore the statute of limitations never commenced to run.

However, the petition alleges that the refusal to produce the documents and failure to

consider the appeal were arbitrary and capricious, contrary to law and an abuse of discretion. The wherefore clause merely seeks production of the records. The allegations of the petition can not reasonably be construed as challenging a continuing course of unlawful and unauthorized action by the respondents in the nature of prohibition (cf. Matter of Johnson v Carro, 24 AD3d 140, 141 [First Dept., 2005]; Taub v Committee on Professional Stds. for Third Jud. Dept., 200 AD2d 74, 77-78 [Third Dept., 1994]) as she is challenging a failure to act, not a continuing unlawful act. The cases cited by petitioner involve proceedings in the nature of mandamus to compel or, in one instance, a non-final determination. All of the denials issued by respondent are final on their face.

As noted above, the petition does not seek mandamus to compel a determination of the appeal. In any event,

“[t]he Statute of Limitations *** runs from the date that the demand *** was refused (see id., at 220). However, the four-month Statute of Limitations for review of such an administrative determination cannot be frustrated by the simple expedient of delaying the demand for a hearing so as to toll the statute (see, Austin v Board of Higher Educ., 5 NY2d 430, 442). As a consequence, it has been held that a four-month period is the measure of permissible delay in the making of a demand (see, Matter of Amsterdam City Hosp. v Hoffman, 278 App Div 292, 297). ” (Matter of Thomas v Stone, 284 AD2d 627, 628, [Third Dept., 2001]).

Petitioner has never served a demand to compel a determination of the appeal, notwithstanding the passage of over 20 months since the determination stating that the issues would not be reconsidered. It is therefore determined that the proceeding is barred by the statute of limitations. Such determination renders the remaining issues moot.

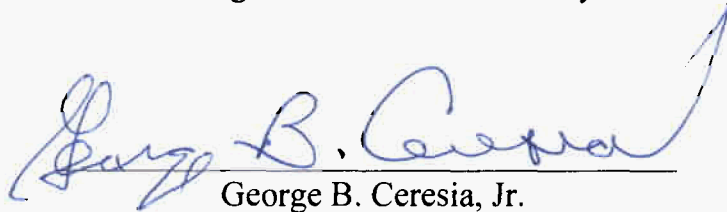
Accordingly it is hereby,

ORDERED and ADJUDGED, that the petition is hereby dismissed.

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

ENTER

Dated: Troy, New York
June 25, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Petition dated August 4, 2006; Petition verified July 27, 2006 with Exhibits A-H annexed;

Notice of Motion dated September 12, 2006; Affirmation of J. Richard Benitez, Esq. dated September 12, 2006;

Notice of Cross-Motion dated September 18, 2006; Affirmation of Dusty Renee Tinsley, Esq. dated September 18, 2006;

Affirmation of Dusty Renee Tinsley, Esq. dated September 18, 2006;