

Matter of Hodges v Russo

2007 NY Slip Op 31867(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0404381/2006

Judge: Herman Cahn

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

PRESENT: CAHN
Justice

PART 49

HODGES, CLIFTON
- v -
SERGEANT JAMES RUSSO,
ET AL.

INDEX NO. 404381/06
MOTION DATE 1/31/07
MOTION SEQ. NO. 01
MOTION CAL. NO. 63

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUN 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

**OTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 6/26/07 Ac Ck
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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 49

-----X
 :
 In the Matter of the Application of :
 CLIFTON HODGES, :
 :
 Petitioner, :
 :
 for a Judgment Pursuant to Article 78 :
 of the Civil Practice Law and Rules :
 :
 - against - :
 :
 SERGEANT JAMES RUSSO, JONATHAN DAVID :
 and NEW YORK CITY POLICE DEPARTMENT. :
 :
 Respondents. :
 :
 -----X

Index No. 404381/06

FILED
 JUN 28 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

Herman Cahn, J.

Petitioner, Clifton Hodges, brings this Article 78 proceeding to reverse respondents' denial of his request for documents and records, pursuant to the Freedom of Information Law ("FOIL").

Respondents cross-move to dismiss the Petition on the grounds that, *inter alia*, the proceeding is time-barred, CPLR 217(1), and the principles of res judicata bar relief.

BACKGROUND

This action is based on respondents' determination that petitioner was not entitled to certain documents related to his February 21, 1990 arrest and subsequent conviction of rape and sodomy. Petitioner is currently incarcerated at Marcy Correctional Facility in Marcy, New York.

Over the past few years, petitioner has submitted numerous FOIL requests for documents

concerning the same incident.

Petitioner submitted his first request, by letter dated February 20, 2004. In addition to listing specific items, he also requested all other documents and records that related to his case and attached a list of almost one hundred general categories. On March 5, 2004, the Records Access Officer (the "RAO") sent petitioner a letter seeking additional information, such as the date of his arrest and the arrest charge, to assist him in locating the documents. After petitioner responded with the requested information, the RAO denied access to the requested records, by letter dated June 10, 2004, on the grounds that disclosure of those documents was barred, pursuant to Civil Rights Law § 50-b.

Civil Rights Law § 50-b protects the privacy rights of victims of sex offenses. It provides:

No . . . court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subsection two of this section.

Civ. Rights Law § 50-b. However, the statute also provides exceptions where court documents will nonetheless be disclosed. *Id.* at § 50-b(2).

The June 10, 2004 letter also contained a provision notifying petitioner that an appeal of the RAO's decision must be made within thirty days of the date of the letter. However, petitioner never submitted an appeal to that determination.

Instead, on August 9, 2005, petitioner submitted another FOIL request, seeking documents pertaining to the same arrest and conviction as his previous FOIL request.

Thereafter, on February 8, 2006, the RAO denied the documents requested on various grounds, including that this request was duplicative of the earlier request and that disclosure was exempted under Public Officers Law § 87(2) and barred by Civil Rights Law § 50-b. Similar to the previous denial letter, this letter contained notice that any appeal must be made in writing within thirty days from the date of the letter.

With regard to this denial, petitioner appealed the RAO's decision on March 22, 2006. However, the Records Access Appeals Officer (the "RAAO") denied petitioner's appeal stating it was untimely, as petitioner was supposed to submit his appeal within thirty days of February 8, 2006. The RAAO also indicated that even if the appeal had been timely, it would have been denied based on the same reasons given by the RAO in his February 8, 2006 letter. The June 7, 2006 letter also advised petitioner that he could seek judicial review of that determination by commencing an Article 78 proceeding within four months of the date of the decision.

However, before petitioner appealed the RAO's determination, he submitted his third FOIL request seeking various documents, but did not include any information regarding the particular incident or arrest. On March 8, 2006, the RAO denied access to the requested records on the basis that the request was too broad. On March 22, 2006, petitioner submitted his appeal to this decision, which was denied by the RAAO on June 7, 2006, on the basis that disclosure is barred by Civil Rights Law § 50-b.

Consequently, petitioner commenced this Article 78 proceeding on October 17, 2006 to contest respondents' denials of his FOIL requests.

DISCUSSION

Public Officers Law § 89(4)(b) provides that an Article 78 proceeding is the proper

mechanism to challenge a final determination denying access to records. It also states that, if access is denied pursuant to Public Officers Law § 87(2), which lists exemptions for disclosure, the agency issuing the denial has the burden of proving that the record falls within the claimed exemption. Therefore, the general standard applied in Article 78 proceedings, i.e. whether a determination was “arbitrary and capricious or an abuse of discretion,” does not apply. *Laureano v Grimes*, 179 AD2d 602, 603–04 (1st Dep’t 1992).

Respondents maintain that, under Public Officers Law § 87(2), the requested records are exempt from disclosure by a state law, namely, Civil Rights Law § 50-b. Therefore, should the case proceed, the burden of proving the exemption applies rests on the respondents.

Respondents contend that the Petition should be dismissed for various reasons, including that the petition is time-barred because the statute of limitations has expired and that the petitioner did not timely file an appeal to the RAO’s denial within the thirty-day time requirement.

Before this Court could consider whether the respondents have met their burden of proving that an exemption to disclosure applied, it must first decide the threshold issue of whether the statute of limitations precludes petitioner from proceeding in this action.

CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the challenged determination becoming final and binding on the petitioner. The determinations became final and binding when the RAAO issued his letters denying the petitioner’s appeals to the determinations of the RAO. *Laureano*, 179 AD2d at 603.

The RAAO sent two letters on June 7, 2006. One letter regarded the RAO’s determination of February 8, 2006, in which the appeal was denied as untimely because

petitioner failed to submit it within thirty days of receiving the RAO's determination. The other letter concerned the RAO's decision of March 8, 2006, in which the appeal was denied because access to the records petitioner requested was barred by Civil Rights Law § 50-b and, therefore, the documents were exempt from disclosure under Public Officers Law § 87(2)(a).

Both of the June 7, 2006 letters constituted final and binding determinations because they were the final step in the administrative process. As a result, petitioner was required to seek judicial review by commencing this proceeding within four months of the date of the letters.

CPLR 304 states that a special proceeding, such as an Article 78 proceeding, is commenced by filing a petition. A review of the court records and the documents submitted indicates that petitioner commenced this proceeding by filing his Verified Petition, among other documents, on October 17, 2006, which was more than four months after the final determinations were issued. Therefore, he did not do so within the requisite time limit. As such, the Petition should be dismissed.

As a result of finding that petitioner did not act timely in instituting this action, it is unnecessary to discuss respondents' other bases for dismissing the Petition.

If the Court were to consider the petition on substantive grounds, it would deny it, based on Civil Rights Law § 50-b.

Accordingly, it is

ORDERED that the Petition is dismissed; and it is further

ORDERED that a copy of this decision shall be mailed to petitioner at Marcy Correctional Facility; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: June 26, 2007

ENTER:



J.S.C.

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JUN 28 2007
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