

<b>Matter of Brathwaite v New York City Police Dept.</b>
2008 NY Slip Op 32498(U)
September 10, 2008
Supreme Court, New York County
Docket Number: 0400054/2008
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE  
*Justice*

PART 4

STEPHEN BRATHWAITE, 94A0476

INDEX NO. 400054/08

MOTION DATE 04-22-08

- v -

MOTION SEQ. NO. 001

NEW YORK CITY POLICE DEPARTMENT et al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for Art 78

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, the motion is decided in accordance with the annexed Judgment/Decision.

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

**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: September 10, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4

-----X  
In the Matter of the Application of

STEPHEN BRATHWAITE, 94A0476,

Petitioner,

Index No. 400054/08

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

Judgment/Decision

-against-

NEW YORK CITY POLICE DEPARTMENT,  
HIPPOLYTE, ASSOCIATE INVESTIGATOR  
RECORD ACCESS OFFICER, JONATHAN  
DAVID, RECORD ACCESS APPEAL OFFICER,

**UNFILED JUDGMENT**  
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obtain entry, counsel or authorized representative must  
appear, in person at the Judgment Clerk's Desk (Room  
141B).*

Respondents.

-----X  
KIBBIE F. PAYNE, J.:

In this Article 78 proceeding, petitioner Stephen Brathwaite seeks a review of a determination by respondent New York City Police Department ("NYPD"), which denied his Freedom of Information Law ("FOIL") request. Respondents cross-move for an order, pursuant to CPLR 7804 (f), denying the petition and dismissing the proceeding on the grounds that, among other things, the relief sought is time-barred pursuant to CPLR 217 (1).

Petitioner is an inmate at Shawangunk Correctional Facility of the New York State Department of Correctional Services. By letter dated July 17, 2006, he submitted a FOIL request to the NYPD, for records pertaining to indictment numbers 5068/91 and

2741/92 (the "July 17, 2006 request"). Petitioner sought (i) statements made by William Billy Banks; (ii) any agreements made between Mr. Banks and the Queens District Attorney's Office ("Queens DA") in exchange for Mr. Banks's testimony against petitioner; (iii) any "contracts" or recommendations of the Queens DA with respect to Mr. Banks as a result of his testimony against petitioner; (iv) any information pertaining to Mr. Banks as a Queens DA confidential informant; and (v) a copy of Mr. Banks's "rap sheet". By a second letter, on August 15, 2006, petitioner amended his July 17, 2006 request and sought records of Mr. Banks's criminal conviction and "pending criminal actions" against Mr. Banks, before and after Mr. Banks's alleged testimony in 1992 and 1993 (the "August 15, 2006 request").

On August 14, 2006, the NYPD responded to petitioner's July 17, 2006 request, advising him that it would conduct a search for the records requested and inform him separately about its decision. In a determination dated February 14, 2007, sergeant James Russo, the NYPD's records access officer ("RAO"), responded to the July 17, 2006 request, informing petitioner that the NYPD did not locate any statements made by Mr. Banks. The RAO explained that petitioner's request was too broad and requested the name of the detective who "received" Mr. Banks's statements. The RAO also suggested that petitioner contact the District Attorney's Office or a criminal court to obtain Mr. Banks's

statements and the New York State Division of Criminal Justice to obtain Mr. Banks's "rap sheet" (Gluck Aff., Exhibit 3).

Petitioner administratively appealed the RAO's February 2007 determination in a March 4, 2007 letter to the NYPD's records access appeals officer, Jonathan David. By letter dated March 20, 2007, Mr. David granted Mr. Brathwaite's appeal to the extent that he directed the RAO to conduct a further search for Mr. Banks's statements, denied the remainder of the appeal, and suggested that petitioner contact the DA's office to obtain the documents pertaining to that office. In the same letter, Mr. David advised petitioner that he "may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision" (Brathwaite Aff., Ex. C).

Upon remand, by letter dated April 2, 2007, the RAO informed petitioner that a copy of an arrest report and complaint report was located and photocopied. The RAO was not able to locate the statements made by Mr. Banks and directed petitioner to contact the DA's Office and "the Court" to obtain those. Petitioner did not administratively appeal the RAO's April 2, 2007 determination.

In this proceeding, petitioner seeks a review of the March 20, 2007 administrative determination. The instant proceeding was commenced on January 8, 2008, when it was filed with the

court and an index number was assigned. A Request for Judicial Intervention was filed and an order to show cause was signed by Justice Martin Schoenfeld on that date as well.<sup>1</sup>

CPLR 217 provides that Article 78 special proceedings must be commenced within four months "after the administrative determination to be reviewed becomes final and binding on the aggrieved party." In this case, as respondents argue, the March 20, 2007 administrative determination was final and binding with respect to all items in petitioner's July 17, 2006 request, except as to the statements made by Mr. Banks. Accordingly, pursuant to CPLR 217 (1), petitioner had until July 20, 2007 to commence this proceeding (*see e.g. Sanders v. Coddington*, 262 AD2d 104 [1st Dept 1999]).

Pursuant to CPLR 304 (a), commencement of an Article 78 proceeding occurs when a petition is filed with a county clerk (*see Matter of Grant v Senkowski*, 95 NY2d 605, 608 [2001]). Such filing interposes a petitioner's claims against the respondents for the purposes of the statute of limitations (*see CPLR 203 [c]; see also Matter of Grant*, 95 NY2d at 608). Additionally, pursuant to CPLR 304 (c) and 306-a (a), an index number is assigned contemporaneously with filing of a petition (*see Matter of Grant*, 95 NY2d at 608-609).

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<sup>1</sup> While petitioner's affidavit, verified petition and affidavit of service are dated July 10, 2007, the action was first filed with the court on January 8, 2008.

Here, the evidence demonstrates that the proceeding was filed and an index number was first assigned on January 8, 2008. Thus, petitioner filed the petition and commenced this proceeding more than five months after the statute of limitations had expired (*see Matter of Grant*, 95 NY2d at 609; *cf. Matter of Correnti v Suffolk County Dist. Attorney's Off.*, 34 AD3d 578, 579-580 [2d Dept 2006]). Therefore, the proceeding must be dismissed as time-barred.

With respect to the request for statements made by Mr. Banks, petitioner failed to exhaust his administrative remedies, since he failed to administratively appeal the RAO's April 2, 2007 determination. Therefore, petitioner has no right to judicial review at this time (*see e.g. Matter of Tellier v New York City Police Dept.*, 267 AD2d 9, 10 [1st Dept 1999]).

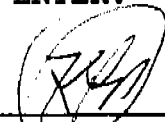
As to petitioner's August 15, 2006 request - seeking records of Banks's criminal conviction and "pending criminal actions" against Banks, before and after Banks's alleged testimony in 1992 and 1993 - it appears that respondents never responded to such request. As no administrative determination was rendered, the court cannot review petitioner's contentions with respect to the August 15, 2006 request (*see id*). Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied in its entirety, respondents' cross-motion is granted, and the special proceeding is dismissed.

The foregoing constitutes the decision and judgment of this court.

Dated: September 10, 2008

ENTER:



\_\_\_\_\_  
KIBBIE F. PAYNE  
J.S.C.

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