

Chaves v New York City Police Dept.

2009 NY Slip Op 31229(U)

May 29, 2009

Supreme Court, New York County

Docket Number: 403964/2007

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Index Number : 403964/2007
CHAVES, KASIEM
VS.
NYCPD
SEQUENCE NUMBER : 004
ENFORCEMENT PROCEEDING

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with
~~the decision dictated on the record.~~
accompanying decision

FILED
JUN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 29 2009

Lby
LOUIS B. YORK 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 2

-----X
KASIEM CHAVES,

Petitioner,

Index No. 403964/2007

- against -

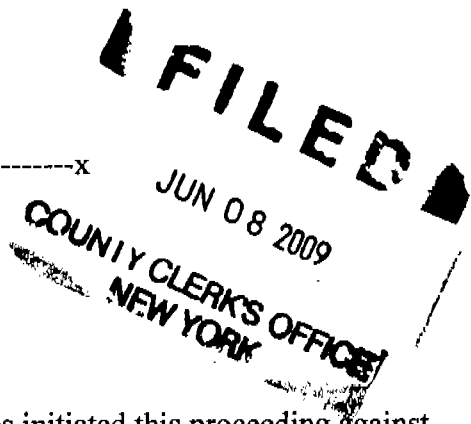
DECISION AND ORDER

NEW YORK CITY POLICE DEPARTMENT

Respondent.

-----X

LOUIS B. YORK, J.:



Background:

On May 29, 2007, Petitioner Kasiem Chaves initiated this proceeding against Respondent New York City Police Department seeking an order compelling compliance with his Freedom of Information Law (herein "FOIL") request pursuant to N.Y. Public Officer's Law §84 et seq. Petitioner requested access to documentation regarding the investigation of a 1983 homicide and armed robbery, for which he was subsequently convicted. According to the petition, Respondent contended after performing a diligent search that they no longer possessed the documents requested, and cross-moved for a dismissal. Respondent opposed the petition on the grounds that it had no duty to produce documents that could not be found and that Petitioner's FOIL request was improper. This Court determined that Respondent had not conducted a full and proper search to provide the documents Petitioner requested. Accordingly it granted the petition in an Order dated February 29, 2008 and directed Respondent to perform a diligent search for the documents requested, and provide them to Petitioner along with an explanation of the

documents being supplied. The Court found Respondent's arguments that a proper search had been performed unpersuasive. Respondent had provided some documents not clearly copied or explained, and while asserting nothing else could be found, discovered more relevant documents. The Court concluded that a thorough diligent search and clearer copies were required in order to comply with Petitioner's FOIL request.

On April 21, 2008, Respondent sent a response letter and documents to Petitioner in an attempt to comply with the order. The documents included (1) a property receipt for invoice number B393594 dated May 9, 1984, (2) an evidence voucher for B393594 dated May 17, 1984 showing that the property was retained in court, (3) a copy of the cover page of the log book, (4) a copy of a log book receipt No. 333 dated May 9, 1984, copy of docket dated May 9, 1984 showing that property under B393594 was retained in court, and (5) the property clerk's invoice B393594 showing that the property was vouchered pursuant to an arrest for 1st degree robbery on February 26, 1983. Prior to this point, Petitioner had received only scattered, confusing, unreadable copies from Respondent. Respondent stated that a search was conducted of the New York City Police Department producing the above documents, and that no records were found after a search of the 90th Precinct, the Police Laboratory, or the Property Clerk.

Subsequently, Petitioner moved to reargue this Court's February 29, 2008 decision, requesting legible copies of all requested documents and an explanation of the various stamps and writing penned on the documents. Additionally, Petitioner requested a step-by-step explanation as to what happened to the property during lapses in time between court dates and property invoices. Petitioner claimed that a police officer told him that the test of his clothing was negative, yet evidence at trial revealed positive tests

of his clothing. Thus, Petitioner asserts that an error or tainting of his clothing must have occurred after the initial test. Respondent did not oppose the motion. The Court granted the motion on September 23, 2009 and directed Respondent to provide Petitioner with clear copies of requested documents, as well as a non-legal explanation as to the stamps and alpha-numeric codes written on the documents. Lastly, the Court directed Respondent to provide an explanation of the process that his property underwent.

Respondent sent a letter in response to the Court order on December 1, 2008, which included thirteen attached pages of photocopied records and a detailed explanation of those records. In the explanation, they attempted to explain the movement of the vouchered property with the records available. The records included in this letter were the following: (1) initial property clerk's invoices numbered between B393593- B393595 (B393594 was property obtained from Kasiem Chaves); (2) property receipt dated May 9, 1984 for property in voucher B393594; (3) copy of docket dated May 9, 1984 showing that property under B393594 was retained in court; (4) copy of receipt number 332 and 333 from the property book log; (5-6) copy of the cover page and spine of book log; (7-8) copy of legal pad showing storage numbers (included property in question) destroyed in 2000 pursuant to department procedure; (9) property clerk invoice B393593 dated February 26, 1983 showing property belonging to Sharif Malik was vouchered pursuant to an arrest for 1st degree robbery; (10) property receipt dated May 9, 1984 for property in voucher B393593 turned over to the Assistant District Attorney; (11) copy of docket dated May 9, 1984 showing that property under B393593 was retained in court; (12) out of custody card log entry dated May 17, 1984 for property in voucher B393593; and finally (13) property clerk invoice B393595 dated February 26, 1983 showing property

belonging to Curtis Myrick was vouchered pursuant to an arrest for 1st degree robbery. Additionally, the letter contained an explanation for each individual document and attempted to explain the stamps and codes scrawled across some of the property invoices.

Petitioner now moves, pursuant to CPLR §5104(3) and Judiciary Law §753, to enforce this Court's order dated September 23, 2008 by holding Respondent in contempt for non-compliance. Petitioner seeks equitable relief against Respondent in lieu of a fine or imprisonment. Petitioner argues that Respondent's December 1, 2009 response failed to accurately explain all the dyes and codes written across the property invoices and that several documents have still not been sent to him. Respondent answers that Petitioner did not adhere to the appropriate procedures under to Judiciary Law §753, because he failed to supply the warnings regarding contempt motions. Respondent also asserts that the letter dated December 1, 2008 complied with the Court order, and that no additional documents or explanations can be provided. For the reasons stated, Petitioner's motion is denied.

Analysis

Judiciary Law §753 states:

“A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases [including]... for disobedience to a lawful mandate of the court.”

First, before the petitioner can move for contempt, he or she must serve the respondent with “a certified copy of the judgment... and, if he refuses or willfully neglects to obey

it, by punishing him for a contempt of the court.” CPLR §5104. Second, under Judiciary Law §756 a petitioner must do the following:

“The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.**”

The purpose of the procedure is to put the respondent on explicit notice of impending contempt charges, as a result of the high penalty and significance of these charges. See Bank Leumi Trust Co. v. Taylor Cishahayo, 147 Misc.2d 685, 690, 556 N.Y.S.2d 211, 214 (N.Y. Civ. Ct 1990). Failure to comply strictly with the procedural requirements for contempt results in a dismissal of the charges, in order to protect the liberty of the respondent. See In re Estate of Rappaport, 58 N.Y.2d 725; 726, 458 N.Y.S.2d 911, 911-912 (1982).

As Respondent notes, the required warning does not appear on the contempt motion. Thus, Petitioner did not comply with the notice requirement set forth in Judiciary Law §756. Additionally, Petitioner did not served Respondent with a certified copy of the September 23, 2009 judgment and therefore has not complied with CPLR §5104. As stated, these requirements are absolutely necessary in order to hold Respondent in contempt. "It is well settled that proceedings in contempt are to be construed stricti juris, and all the rights of the defendant must be carefully protected and no conviction should be had unless there has been a literal compliance with the law." Goldie v. Goldie, 77 A.D. 12, 14, 79 N.Y.S. 268, 268 (App. Div. 4th Dept. 1902).

Therefore, as Petitioner has not complied with the mandatory notice requirements, the Court denies Petitioner's motion.

However, even if Petitioner had complied with all the procedural requirements, this Court would still deny the contempt motion on its merits. It is important to note the pro se status of the incarcerated Petitioner, and thus explain that even if the motion had been filed properly, contempt proceedings are not a suitable remedy at this time. Additionally, Petitioner is requesting equitable relief and not a fine or imprisonment against Respondent. As such the procedural mistakes are less harmful, and the Court finds a need to explain the merits of Petitioner's contempt motion. Even taking this into account, however, Petitioner failed to show that Respondent did not comply with the September 23, 2008 judgment issued by this Court. See Chaves v. New York City Police Dept., Index No. 403964/2007 (Sup. Ct. N.Y. County September 23, 2008).

Petitioner asserts that Respondent's letter dated December 1, 2009 is insufficient to meet the terms required by this Court's order. He states that the letter failed to identify and fully explain all the codes and written numbers on the property vouchers numbered B393593, B393594, and B393595. Additionally, he claims that the letter did not provide better, more legible copies of previously sent documents, and that other requested receipts dictating the property transfers were still not made available to him. Respondent responds by stating that the letters dated April 21, 2008 and December 1, 2008 adequately fulfill the FOIL requirements and fully comply with this Court's September 23, 2009 judgment.

After reviewing the documents sent by Respondent to Petitioner, the Court determines that the letter dated December 1, 2008 complied with the Court order. In the

letter, Respondent supplied thirteen attached documents to Petitioner, and explained each document individually including descriptions of the alphanumeric codes that could be identified. Respondent also provided invoices of the property collected just before (numbered B393593) and immediately after (numbered B393595) Petitioner's property. These property vouchers depicted property belonging to Sharif Malik and Curtis Myrick and did not even pertain to Petitioner's individual demands. The Court determines that Respondent has performed diligent searches. It appears that because no additional receipts pertaining to Petitioner's property can be found they are sending irrelevant materials.

The September 23, 2008 Court Order also required Respondents to supply explanations of the stamps and numeric codes written on the documents. All three property vouchers have the CA labeled numeric code, which Respondent claims refers to a civil action number. However, the FH and CL codes are only found on Petitioner's property voucher and Respondent has been unable to determine what these numbers reference. Even after searching both the Police Department's databases and the Department's Legal Bureau, Respondent was unable to explain the codes because they are no longer in use. The Court finds that these searches were diligent, even though further information explaining the notations has not been found. In attempting to comply with this Court's order, Respondent appears to be speculating as to the meaning of the stamps and codes. The letter states that they were unable to confirm the CL notations, but estimate them to pertain to a civil case in which the Department was a named party. This speculation demonstrates that Respondent is attempting to produce as much information as possible in order to comply with Petitioner's requests.

In his final request, Petitioner reiterates demands for better copies. However, Respondent explains that because the documents are over 25 years old, some of the dyes and stamps have worn away. Therefore, these are the best copies available. Respondent cannot provide that which does not exist. See Rattley v. N.Y. City Police Dept., 96 N.Y.2d 873, 730 N.Y.S.2d 768 (2001). For these reasons, the Court concludes that Respondent complied with this Court's order dated September 23, 2008. Therefore, the Court would deny Petitioner's motion for contempt pursuant to Judiciary Law §753 and CPLR §5104 even if Petitioner had satisfied the notice requirements set forth in Judiciary Law §756.

Conclusion

Based on the above, therefore, it is

ORDERED that Petitioner's motion for contempt and enforcement of the judgment is denied.

Dated: May 29, 2009

FILED
 JUN 08 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:

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 Louis B. York, J.S.C

LOUIS B. YORK
J.S.C.