

Matter of Timoney v Metropolitan Transp. Auth.

2010 NY Slip Op 32948(U)

October 14, 2010

Supreme Court, New York County

Docket Number: 105815/10

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
RICHARD TIMONEY,
Petitioner,

INDEX NO. 105815/10

-against-

MOTION DATE June 8, 2010

METROPOLITAN TRANSPORTATION
AUTHORITY,
Respondent.

MOTION SEQ. NO. 001

MOTION CAL. NO. 19

The following papers, numbered 1 to 6 were read on this petition pursuant to CPLR Article 78

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

PAPERS NUMBERED	
	<u>1-2</u>
	<u>3-6</u>

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

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to Article 78 of the Civil Practice Law and Rules for a judgment annulling a determination of respondent Metropolitan Transportation Authority with respect to FOIL request is decided in accordance with the accompanying decision, order and judgment.

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: 10/14/10

O. P. Sherwood
O. PETER SHERWOOD, 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 61

In the Matter of the Application of,
RICHARD TIMONEY

DECISION, ORDER
AND JUDGMENT

Petitioner,

Index No. 105815/2010

-against-

METROPOLITAN TRANSPORTATION
AUTHORITY,

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141B).

O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding, petitioner Richard Timoney ("petitioner") *pro se* seeks a judgment annulling the final determination of respondent Metropolitan Transportation Authority (the "MTA" or "respondent"), dated February 1, 2010, relative to petitioner's request for certain records pursuant to New York's Freedom of Information Law ("FOIL") (*see*, Public Officers Law §§ 87, *et seq.*). Respondent cross moves to dismiss the petition on the ground that the matter is moot and the petition fails to state a cause of action.

The background to petitioner's FOIL request that is at issue in this proceeding is as follows: Petitioner is a realtor who apparently believes he is owed a commission from the real estate brokerage firm, Newmark & Company Real Estate, Inc. ("Newmark"), for his referral of a potential tenant, Vitt Media International, Inc. ("Vitt"), to Newmark. Petitioner based his claim upon a letter agreement between himself and Newmark, dated February 5, 1996, in which, under certain circumstances, Newmark agreed to pay petitioner 10% of commissions Newmark actually received. Although petitioner does not claim that Vitt leased any space through Newmark, he does allege that a former Newmark employee joined Brown Harris Real Estate Co. ("Brown Harris") and that an alleged Vitt affiliate, Circle Entertainment Group ("CEG") leased studio space in the Time Warner building through Brown Harris. On this basis, petitioner alleged that Newmark owed him a commission. Indeed, petitioner seems to believe that Newmark was involved in MTA's sale to Columbus Centre Partners, *et al.* in 1998 of the property located at 10 Columbus Circle where the New York Coliseum had stood the "Coliseum Property") and which was demolished for development of the Time Warner Center ("the "Project").

An action petitioner commenced against Newmark in Supreme Court, New York County in which he sought to recover the commission allegedly owed was dismissed upon Newmark's motion for summary judgment on the ground that there was no evidence that Newmark or its clients actually participated in the sale of the Coliseum Property or received any commission related to the Coliseum sale (see, *Timoney v Newmark & Co. Real Estate, Inc.*, 2001 WL 35980657). The order entered upon that decision was affirmed by the Appellate Division, First Department which also sanctioned petitioner upon its finding that in light of the contract language the appeal was of no merit and frivolous (299 AD2d 201 [2002], *lv dismissed* 99 NY2d 610 [2003]). A separate action petitioner commenced against Newmark in the Supreme Court, Nassau County for essentially the same relief was dismissed as barred by the doctrine of res judicata (*Timoney v Newmark & Co. Real Estate*, 36 AD3d 686 [2007], *lv denied* 8 NY3d 810 [2007]).

Petitioner's FOIL request, which is the subject of this proceeding, is dated June 22, 2009 and requested the following documents related to the Coliseum Property:¹

1. Any and all documents referencing any financiers, funders, joint-venturers, Construction loan, or associates involved in the purchase of the [Coliseum Property]. (In particular we are interested in a full disclosure of the "Private" sources that provided Four Hundred Million Dollars (\$400 Million \$) enabling the project to secure a 1.3 Billion Dollar (\$) Construction loan.)
2. The leasing of any facilities developed, or to be developed on the [Coliseum Property].
3. The licensing of any facilities or rights to any use of any facilities developed, or to be developed on the [Coliseum Property].

¹Prior to his June 22, 2009 FOIL request, petitioner made at least four FOIL requests relative to the sale by MTA of the Coliseum Property and the Project, dated, respectively, January 4, 2005, August 15, 2005, January 31, 2006 and June 5, 2006. Each of these FOIL requests, some of which contained repetitive demands, were addressed by the MTA in a timely manner and necessitated a search for records responsive to the requests. Petitioner did not seek review of any of MTA's final determinations relative to the prior FOIL requests (Affidavit of Anne Cutler in opposition and in support of the cross motion ¶¶ 4-19). The MTA contends that petitioner's June 22, 2009 FOIL request is partially duplicative of one or more of petitioner's prior FOIL requests

- * 4]
4. Any correspondence concerning "Studio" space in the project; since over Four Hundred Thousand Sq. Ft. (400,000 sq. ft.) of the project's (2 Million plus sq. ft.) was for TV, and/or film usage.
 5. The REP that The Related Co's made to the MTA in the year 1997 regarding the [Coliseum Property].

The MTA responded by letter dated June 29, 2009, advising petitioner that the requested documents were in an off-site storage facility and review and retrieval of relevant records would take about two months. MTA's Deputy General Counsel Roberta Bender states in her affirmation in opposition to the petition and in support of the cross motion to dismiss that MTA's response was made more burdensome due to the imprecise and unclear nature of petitioner's request (Bender Aff. ¶ 8). When petitioner did not receive a response to his June 22, 2009 FOIL request, he again wrote to the MTA by letter dated July 6, 2009, reiterating his request for The Related Co.'s bid to MTA for purchase of the Coliseum Property and a certification that MTA had conducted a diligent search for the records he requested and that none could be found (*id.* ¶ 10, Ex. "C"). In a subsequent letter dated August 31, 2009, the MTA advised petitioner that it required additional time to review its files to determine if it had documents responsive to petitioner's demand and anticipated that a response would be forthcoming by October 30, 2009 (*id.* ¶ 11, Ex. "D"). MTA subsequently, under cover of letter dated October 29, 2009, furnished copies of some documents it believed were responsive to petitioner's demand and advised that additional boxes of documents were being reviewed. MTA anticipated a further response within two weeks. Thereafter, under cover of letter dated November 13, 2009, MTA provided additional documents in response to petitioner's June 22, 2009 FOIL request, including the bid by Related Co., and advised that with the provision of such documents its response was complete (*id.* 13, Ex. "F").

By letter dated November 23, 2009, petitioner appealed the MTA's response to his FOIL request claiming it was deficient (*id.* ¶ 10, Ex. "5"). He challenged the MTA's lack of response concerning his request for documents related to private sources of funding for the construction loan to build the Project at the Coliseum Property and also the lack of responsive documents relative to his request concerning licensing agreements and studio space at the Time Warner Center (*id.* ¶ 14, Ex. "G").

In a letter dated December 1, 2009, the MTA acknowledged receipt of petitioner's administrative appeal and advised that it would retrieve and review boxes of files to determine

[* 5]

whether there were any other documents responsive to petitioner's requests. MTA anticipated a response within thirty days (*id.* ¶ 15, Ex. "H"). In a letter dated February 1, 2010, the MTA stated that it had conducted a thorough review of its records and had no additional documents responsive to petitioner's request. With the December 1, 2009 letter, the MTA enclosed a certification from Maria G. LaVaglia, a paralegal in the MTA's General Counsel's Office, that a diligent review of MTA's files had been conducted and that the records produced in response to petitioner's FOIL application were the only records responsive to his request (*id.* ¶ 18, Ex. "J").

Petitioner thereafter commenced the instant proceeding pursuant to CPLR Article 78 seeking to have the Court annul respondent's determination and compel respondent to provide the requested documents pursuant to FOIL. Petitioner particularly takes issue with MTA's failure to produce any documents relative to lease of studio space, noting that in the 1996 bid studio space accounted for 20% of the Project's entire space, and with its failure to produce any documents related to private sources of funding for the Project.

Respondent's cross motion to dismiss the petition is supported by the affirmation of Roberta Bender, the MTA's Deputy General Counsel in the Office of the General Counsel, and an affidavit of Ann Cutler, a paralegal in the Office of MTA's General Counsel responsible for responding to MTA FOIL requests. Ms. Cutler presents a recap of petitioner's FOIL requests made prior to his June 22, 2009 request and MTA's responses thereto before addressing the FOIL request which is the subject of this proceeding. Ms. Cutler contends that petitioner's request for the 1997 Related Co. Bid and for documents related to the financing of the project at the Coliseum Property site were duplicative of petitioner's earlier requests to which MTA had responded. Notwithstanding the fact that the June 22, 2009 FOIL request was partially duplicative of petitioner's earlier FOIL requests, that she had already conducted at least two searches for such documents and that the requests were unclear, Ms. Cutler contends that she once again ordered boxes of documents from MTA's off-site storage facility to search for responsive documents and produced all the documents she could find and no further responsive documents could be located.

Respondent argues that the petition must be dismissed as moot and for failure to state a cause of action inasmuch as it has provided both its attorney's affirmation as well as a certification from a paralegal responsible for responding to FOIL searches that all responsive documents have been provided and that a diligent search has been made for responsive documents. For these same

reasons; MTA contends that its determination regarding petitioner's FOIL request was not arbitrary, capricious or and abuses of discretion.

With respect to petitioner's request for documents related to a construction loan that financed the Project, MTA directs the court's attention to a letter to petitioner from the MTA dated March 4, 2005, annexed as Exhibit "D" to the Cutler affidavit, which advised petitioner that MTA has no documents regarding the construction loan as the financing of the Project took place between the purchaser of the Coliseum Property and other private persons with whom the MTA has no relationship. MTA nevertheless conducted additional searches for any documents that might be responsive to that item of petitioner's request and found no such responsive documents.

The MTA argues that items 2 and 3 of petitioner's June 22, 2009 request concerning licensing and leasing of facilities on the Coliseum Property site are so unclear and imprecise as to have made MTA's search for responsive records difficult. Although MTA advised petitioner that being precise in his FOIL requests could facilitate its search, petitioner never clarified or sought to narrow these FOIL requests. Nor has petitioner clarified them in this proceeding. MTA urges that under these circumstances the court should find that petitioner has failed to state a cause of action.

In addition, MTA asserts that the petition must be dismissed, in part, as barred by the applicable four-month statute of limitations. It claims that petitioner failed to appeal MTA's response to his earlier demands and cannot circumvent the applicable limitations period by appealing a later determination with respect to a subsequent FOIL request for the same information. The part of petitioner's June 22, 2009 FOIL request which was previously requested and denied relates to the financing of the construction loan.

It is well settled that all records of a public agency are presumptively open for public inspection and copying, and that the burden rests at all times on the government agency to justify any denial of access to records requested under FOIL (*see New York State Rifle and Pistol Assoc. v Kelly*, 55 AD3d 222, 224 [1st Dept. 2008]; *New York Civil Liberties Union v. New York Police Department*, 20 Misc.3d 1108(A) [2008]). Here, the MTA has not denied petitioner access to any records pursuant to a FOIL exemption nor has it redacted any of the records it furnished to petitioner pursuant to his FOIL request. Rather, the MTA has indicated that it engaged in a protracted and diligent search for records responsive to petitioner's request and produced such records as were located.

The court credits respondent's argument that this proceeding has been rendered moot by respondent's production of records responsive to petitioner's request and its certification that it had

conducted a diligent search for records in response to petitioner's request (see Public Officers Law § 89 [3]; *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]; *Matter of Carty v New York City Police Dept.*, 41 AD3d 150 [1st Dept 2007]; *Matter of Taylor v New York City Police Dept.*, 25 AD3d 347 [1st Dept 2006], *lv denied* 7 NY3d 714 [2006]).

In any event, petitioner failed to meet his burden of describing all of the documents sought with sufficient specificity as to permit the MTA to identify and locate them (see Public Officers Law § 89 [3]; *Matter of Lebron v NYCDOC Deputy Commissioner Smith*, 40 AD3d 515 [1st Dept 2007], *lv denied* 9 NY3d 810 [2007]; *Matter of Timmons v Record Access Officer*, 271 AD2d 320 [1st Dept 2000], *lv denied* 95 NY2d 758 [2000]; *Mitchell v Slade*, 173 AD2d 226 [1st Dept 1991], *lv denied* 78 NY2d 863 [1991]). The MTA has sufficiently established that the descriptions provided by petitioner were, as to certain items of his request, insufficient for purposes of locating and identifying the documents sought (see *Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986]). He has also failed to show by more than speculation that the MTA has not produced all responsive documents (see *Mitchell*, 173 AD2d at 226; *Matter of Corbin v Ward*, 160 AD2d 596 [1st Dept 1990], *lv denied* 76 NY2d 706 [1990]; see also *Matter of Morgan v Nassau Co. Police Dept.*, 197 AD2d 579 [2d Dept 1993]).

Lastly, the MTA has adequately demonstrated that petitioner's request for documents relative to the construction loan for the Project seeks information to which the MTA responded in an earlier FOIL application. Therefore, that branch of the petition as seeks review of MTA's response to this item of the FOIL request must be dismissed on the additional ground that it is untimely (see *Matter of Moreno v New York Co. Dist. Attorney's Office*, 38 AD3d 358 [1st Dept 2007]; *Matter of Jamison v Tessler*, 300 AD2d 194 [2002]; *Matter of McGriff*, 293 AD2d 401 [1st Dept 2001]).

Accordingly, it is hereby

ORDERED that respondent's cross motion is granted; and it is further
ADJUDGED that the petition is denied and the proceeding is dismissed
This constitutes the decision, order and judgment of the Court.

DATED: 10/14/10

ENTER,



O. PETER SHERWOOD

J.S.C.

UNFILED JUDGMENT

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