

Matter of Rourke v David
2010 NY Slip Op 33453(U)
December 13, 2010
Supreme Court, New York County
Docket Number: 401874/10
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY PART 16

PRESENT: ALICE SCHLESINGER
SCHLESINGER
Justice

PART 16
PART 16

ROURKE, SEAN
- v -
JONATHAN DAVID

INDEX NO. 401874/10
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be taken based hereon. To obtain entry counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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 to dismiss by respondent is granted, and the petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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

DEC 13 2010

Dated: December 13, 2010

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

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

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

-----X

In the Matter of the Application of
SEAN ROURKE,

Petitioner,

Index No. 401874/10
Motion Seq. No. 001

-against-

JONATHAN DAVID, RECORD ACCESS
APPEALS OFFICER, for the NEW YORK
CITY POLICE DEPARTMENT

Respondent,
(1/18)

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 1218).

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SCHLESINGER, J.

Petitioner Sean Rourke is an inmate who is representing himself in this Article 78 proceeding against respondent Jonathan David, Record Access Appeals Officer for the NYPD. Petitioner is challenging the denial of his request for documents pursuant to the Freedom of Information Law (FOIL). Respondent has cross-moved to dismiss the petition on procedural grounds.

Facts and Procedural History

In the instant proceeding, petitioner is challenging the denial of requests for two different sets of documents from the NYPD. On January 28, 2010, petitioner made his first request to the Legal Bureau of the NYPD for a copy of the Department's "Vehicle Pursuit Policy." (Cross-Motion, Exh. C).¹ The Legal Bureau's Record Access Officer, James Russo, responded on May 18, 2010 denying petitioner's request as exempt from disclosure under Public Officers Law § 87, subd. 2(e)(iii & iv) on the ground that "the

¹ Unless otherwise noted, all referenced Exhibits are attached to the NYPD cross-motion, though petitioner has also attached most to his papers as well.

release of such would reveal non-routine investigatory techniques.” (Exh. E). On May 22, 2010, petitioner appealed this decision to the Record Access Appeals Officer, Jonathan David, but did not receive a response.²

On March 26, 2010, petitioner made a separate request to the Legal Bureau of the NYPD for copies of the memo books and activity logs for Police Officers A. Phillips and P. McPhatter for the period of January 1 through January 7, 2010. (Exh. H). Both officers are presumably linked to petitioner’s arrest as they are in the 72nd precinct, which is the precinct of petitioner’s arrest. This request was denied by the Record Access Officer on April 4, 2010 on the ground that disclosure was exempt under Public Officers Law § 87, subd. (2)(e)(i) because it would “interfere with law enforcement investigations or judicial proceedings.” (Exh. I). Petitioner appealed this determination on April 18, 2010, but did not receive a determination on his appeal.

Not having received a response to either of his two appeals within the requisite ten days, petitioner deemed it a denial of his requests and proceeded by commencing this Article 78 proceeding. Respondent cross-moved to have the petition dismissed, arguing that: (1) petitioner failed to obtain personal jurisdiction over respondent because he did not strictly comply with the service requirements of the Order to Show Cause; and (2) the proceeding was now moot because all the records sought by petitioner were provided to him either as exhibits to respondent’s papers or to petitioner’s attorney in connection with his criminal trial.

² In a letter dated January 29, 2010, petitioner made an almost identical request that was denied on February 2, 2010 on the same ground but in a different format. (Exh. B).

Discussion

According to respondent, petitioner failed to establish personal jurisdiction over respondent because he did not strictly comply with the terms of the Order to Show Cause. In the form Order to Show Cause, Justice Heitler directed service on respondent and the Corporation Counsel by personal delivery or ordinary first class mail on or before August 4, 2010. The postmark indicates that the papers were mailed to respondent and the Corporation Counsel one day late on August 5, 2010.

Although strict compliance is traditionally required, rules regarding service of process may be relaxed for the purpose of enabling prison inmates to overcome obstacles to service that are beyond the inmate's control. *Hoyer v. Coughlin*, 179 A.D.2d 921 (3d Dep't 1992). Petitioner amply demonstrates that he took appropriate steps to comply with the Order to Show Cause, but that strict compliance was beyond his control. In his affirmation, petitioner attests to the fact that he received the Order to Show Cause on Saturday July 31, 2010 and that he submitted his papers for mailing in the depository at the George Motchan Detention Center on the same day. (Petitioner's Reply). According to petitioner, after he as an inmate deposits his outgoing mail, he must rely on Social Services to pay for and process his mail and he cannot control whether it is processed in a timely manner. Respondent provides no evidence to the contrary apart from a conclusory statement that compliance was within petitioner's control. Because petitioner did everything within his power to comply with the Order to Show Cause, and because respondent was caused no prejudice by this *de minimis* delay, respondent's cross-motion to dismiss based on improper service is denied.

However, respondent correctly asserts that the proceeding is moot because all requested information has now been provided to petitioner. With respect to petitioner's first request, respondent provided the NYPD Vehicle Pursuit Policy, Patrol Guide §§ 212-39, attached to its cross-motion as Exhibit M. Although petitioner now argues that respondent has withheld "Patrol Guide Sections 103-2 and Chief of Operations Memo No. 3," petitioner's January 28 letter merely asked for the NYPD's "Vehicle Pursuit Policy" and did not make any mention of these specific policy statements, which, as respondent points out, are outdated and no longer in effect. Respondent's provision of the "Vehicle Pursuit Policy" in effect at the time of petitioner's request is responsive to petitioner's request. To the extent that petitioner seeks superceded policies, he must make a separate and specific request for such policies.

With respect to petitioner's request for memo book entries of Officer Phillips, respondent provides a copy of a Stipulation in Lieu of Discovery signed by ADA Joshua Lee indicating that five pages of Officer Phillips' memo books were disclosed to petitioner's attorney on September 15, 2010. According to respondent, these five pages included entries for January 2 through January 6, 2010. (Exh. K). The remaining entries for January 1 and January 7, 2010 were provided in respondent's cross-motion as Exhibit M. Additionally, respondent provides an affidavit from ADA Lee attesting to the fact that six pages of the memo book entries for Officer McPhatter from January 1 through January 7, 2010 were served on petitioner's counsel by the District Attorney's Office on October 15, 2010. (Respondent's Reply Affirmation, Affirmation of Joshua Lee, ¶ 4). Presumably, when petitioner drafted his October 22 opposition to respondent's cross-motion, he had not yet received those papers from his attorney.

Since petitioner has not since disputed respondent's assertions, the Court assumes that he has received all the documents by now.

In sum, because all requested documents have been provided either directly to petitioner as exhibits to respondent's papers or to petitioner's counsel in his criminal case, respondent's cross-motion is granted and the proceeding is dismissed as moot.

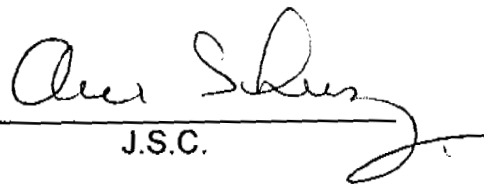
Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss is granted; and it is further

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

Dated: December 13, 2010

DEC 13 2010


J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT
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