

**The Plumbing Found. of the City of N.Y., Inc. v
Department of Bldgs. of the City of N.Y.**

2010 NY Slip Op 33667(U)

December 14, 2010

Sup Ct, New York County

Docket Number: 110578/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 110578/2010

PLUMBING FOUNDATION OF THE

VS.

DEPT OF BUILDINGS OF THE

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2, 3

4

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 **UNFILED JUDGMENT** appear in person at the Judgment Clerk's Desk (Room 141B) and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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: 12/14/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
THE PLUMBING FOUNDATION OF THE CITY OF
NEW YORK, INC., Acting on Behalf of All its
Members,

Index No.
110578/10

Petitioners,

**DECISION
and ORDER**

- against -

Mot. Seq.
001

DEPARTMENT OF BUILDINGS OF THE CITY OF
NEW YORK,

Respondents

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
1415).

HON. EILEEN A. RAKOWER

The Plumbing Foundation of the City of New York ("Petitioner") commenced this Article 78 proceeding based upon Respondent New York City Department of Buildings' ("DOB") denial of its request for records pursuant to the Freedom of Information Law ("FOIL").

According to the Petition, on January 11, 2010, WCBS TV aired a story and interview with DOB Commissioner Robert LiMandri about an investigation in which DOB hired an investigator to follow and videotape an individual who was believed to be installing plumbing without a license.

On March 3, 2010, Petitioner made a written FOIL request to DOB seeking the production of

The name of the alleged illegal plumber and firm [reported in the WCBS story], copies of any violations and/or summonses and/or desk appearance tickets issued[,]. . . the license plate number of the vehicle DOB seized of the alleged illegal plumber as well as address of the job where the unlicensed plumbing occurred.

On March 15, 2010 DOB sent a letter to Petitioner denying the request pursuant to Public Officer's Law ("POL") §87(2)(e)(i) "because the documents requested are compiled for law enforcement purposes and, if disclosed, would interfere with law enforcement investigations or judicial proceedings."

By letter dated March 23, 2010, Petitioner requested an appeal of DOB's denial of its FOIL request. Petitioner argued that "[c]opies of violations, summonses, etc. already issued, are clearly not covered by the "law enforcement" exception to FOIL."

By letter dated April 12, 2010, DOB denied Petitioner's appeal, stating that

Since disclosure of these documents would reveal confidential information such as the identity of the person(s) or firm(s) being investigated, and thereby potentially jeopardize[s] the investigation, these documents are covered by the law enforcement exception to FOIL.

Despite the fact that the April 12, 2010 letter constituted DOB's "final determination," Petitioner wrote a letter dated May 27, 2010 responding to DOB's April 12th letter. Petitioner questioned DOB's assertion that the sought-after records were exempt from FOIL, and argued that these documents "are a matter of public record." Petitioner further requested that DOB at least provide responsive documents with redactions if it still maintained that the records were exempt.

DOB responded by letter dated July 22, 2010. In its response, DOB attached copies of three violations issued on November 12, 2009, with redactions made over the violation number, the name of the individual or individuals the violations were issued to, the address where the unlicensed plumbing occurred and the name of the issuing officer.

Petitioner subsequently commenced this Article 78 proceeding, seeking production of all responsive documents without redactions. Petitioner also seeks costs and attorney's fees pursuant to POL §89(4)(c).

DOB cross-moves to dismiss the Petition. DOB argues that the Petition is moot due to DOB's subsequent production of all requested documents without redactions.

In its affirmation in support of its cross-motion, DOB states that

an investigation [was] being conducted by the New York City Department of Investigation ('DOI') and the Department of Building's Special Investigations Unit ('BSIU'). The investigation was not limited to the unlicensed plumber whose records were requested by Petitioner.

DOB further asserts that the decision to deny Petitioner's appeal "was reached after conferring with DOI and SIU officials," who advised that the disclosures sought by Petitioner "could compromise the ongoing investigation" by publicizing the identity of one of the investigation's targets.

DOB states that, by letter dated September 24, 2010 (after Petitioner commenced this proceeding), it provided unredacted copies of all responsive records after it "learned from DOI and BSIU that the investigation . . . had evolved and changed such that disclosure of the unlicensed plumber's identity would no longer jeopardize the investigation."

As stated by the Court of Appeals,

Pursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that 'substantially prevailed' in the proceeding if the court finds that (1) 'the record involved was, in fact, of clearly significant interest to the general public,' and (2) 'the agency lacked a reasonable basis in law for withholding the record' (*Public Officers Law* § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees.

(*Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005]).

Here, even if the Court were to find that Petitioner has made the requisite three-prong showing, the Court finds nothing in the record which would compel it, in the

exercise of its discretion, to award costs and attorney's fees. Accordingly, inasmuch as the Court declines to award costs and attorney's fees; and Petitioner has received all of the records it seeks, this proceeding is moot.

Wherefore it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

DATED: December 14, 2010


EILEEN A. RAKOWER, J.S.C.

This judgment shall be entered by the County Clerk and notice of entry shall be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).