

Matter of EON Shepherd #96-A-0356 v New York City Police Dept.
2011 NY Slip Op 31916(U)
June 30, 2011
Supreme Court, New York County
Docket Number: 402560/2010
Judge: Emily Jane Goodman
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SCANNED ON 7/13/2011
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 402560/2010
SHEPHERS, EON
vs.
NYCPD
SEQUENCE NUMBER : 001
ARTICLE 78

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

is granted
for attached
per above decided

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: 6/30/11

EMILY JANE GOODMAN J.S.C.

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):

On or about March 12, 2010 Petitioner filed a FOIL request and received four redacted documents in response, and was also notified that line up photos and documents, 911 recordings and the investigation folder, could not be located. However, Petitioner maintains that various documents were improperly withheld, noting that agents testified at pretrial and trial hearings regarding the investigation, interviews and lineups. In his papers, Petitioner indicates that he seeks copies of 911 recordings, sprint sheets, memo books, witness statements, investigators reports, follow up reports, finger print reports, line up photos and information, arrest records, investigation records, and all documents, all prepared from January 3, 1994 and in the possession of Respondent. During the pendency of this proceeding, an additional 17 pages of documents were provided concerning documents/materials in Respondent's possession. Therefore, Respondent's argue that with respect to Petitioner request for items corresponding to numbers 6, 7, 9 and 10, of Petitioner's March 12, 2010 FOIL request, the matter is moot.

In its cross motion, Respondent attaches the 1996 letter from Petitioner, postmarked 10/22/96, requesting 18 types of documents related to his February 2, 1994 arrest. Of these documents, some were provided, some were withheld based on exemptions, and some were denied because they were never created or they could not be located. Petitioner challenged the denial

of access to these documents in a 1998 Article 78, resulting in the July 6, 1998 decision of Judge Shainswit, wherein she concluded that the action was time-barred because Petitioner did not bring the Article 78 within four months of the July 8, 1997 denial of Petitioner's FOIL request. Respondent further notes that Petitioner filed another FOIL request, by letter dated March 23, 2000, requesting 18 types of documents related to his February 2, 1994 arrest. Four pages of records were provided, with redactions Respondent states was to protect the privacy and safety of the individuals. Petitioner was also informed that the officers did not keep memo books, that other documents could not be located, and that certain documents were in the possession of another agency. Instead of commencing an Article 78, Petitioner requested 9 types of documents by letter dated September 24, 2001. The request was denied by the Records Officer as duplicative. Petitioner commenced an Article 78 in 2002, which resulted in March 3, 2003 decision of Judge Wetzel, wherein he concluded that the matter is res judicata and that "respondent is enjoined from any further filings or appeals on this subject."

In paragraphs 13, 26 and 30 of the Affirmation In Support of the Cross Motion To Dismiss, Respondent painstakingly correlates the documents requested now with the documents previously provided.

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Where a request for records duplicates an earlier FOIL request, the Article 78 proceeding is "properly dismissed as a belated attempt to seek judicial review of the denial of the first request" (Mendez v NYC Police Dept, 260 AD2d 262 [1st Dept 1999]; see also Corbin v Ward, 160 AD2d 596 [1st Dept 1990] [second request was time barred as it related to the first request which was also time barred, without any change in circumstances]). Further, principles of res judicata and collateral estoppel preclude relitigation of all matters that were, or might have been, litigated in a prior proceeding (see Matter of Reilly v Reid, 45 NY2d 24, 30 [1978]).

In opposition to the cross motion, Petitioner argues that because this proceeding relates to a different FOIL number, the proceeding is not barred. Also, Petitioner argues, for the first time, that the reason why he made duplicative requests was because prison officials lost two bags of his legal documents between December 3, 2009 and February 2, 2010.

The cross motion to dismiss is granted based on res judicata, and because the proceeding is time barred and moot. Sanctions are not awarded because Petitioner states, credibility, that he was not aware that he could not file this proceeding as it relates to a different FOIL number and because he did not recall the 2003 Wetzel decision. However, Respondent is directed to notify Petitioner within 30 days after a receipt of a copy of

this Decision, Order and Judgement, as to whether there is a procedure by which Petitioner may seek copies of all documents previously turned over to him, in the form previously turned over to him, which can be located, and which are in Respondent's possession, based on Petitioner's contention that those documents were lost, due to no fault of his own.²

It is hereby

ORDERED and ADJUDGED that the cross motion is granted to the extent it seeks to dismiss the petition as moot, time barred and based on the principals of res judicata but is denied as unwarranted as to sanctions; and it is further

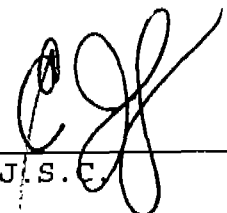
ORDERED and ADJUDGED the petition is denied and the proceeding is dismissed, without costs and disbursements, except that Respondent is directed to notify Petitioner within 30 days after a receipt of a copy of this Decision, Order and Judgement, as to whether there is a procedure by which Petitioner may seek copies of all documents previously turned over to him, in the form previously turned over to him, which can be located and which are in Respondent's possession.

²Respondent is not required to provide Petitioner with documents which it does not possess (see Davidson v Police Dept., 197 AD2d 466 [1st Dept 1993]). It is Petitioner's burden to establish that the requested documents exist and have not been provided to Petitioner's attorney at trial, or, that they are no longer available to Petitioner" (see Brightly v Lai, 266 AD2d 131 [1st Dept 1999])

This constitutes the Decision, Order and Judgment of
the Court.

Dated: June 30, 2011

ENTER:



J. S. C.
EMILY JANE GOODMAN

UNFILED JUDGMENT

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