

Matter of Vasquez v Andrews

2011 NY Slip Op 33020(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 402115/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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In the Matter of the Application of
ALEXIS VASQUEZ,

Petitioner,

Index No. 402115/11

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

EARL ANDREWS, JR., ON BEHALF OF THE NEW
YORK CITY HOUSING AUTHORITY, FOIL
APPEAL OFFICER,

FILED

NOV 16 2011

Respondents.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	3

Petitioner commenced this Article 78 proceeding to challenge the determination of defendant New York City Housing Authority's ("NYCHA") decision denying his FOIL request for information pertaining to a witness who testified against him at his criminal trial. For the reasons set forth below, the petition is denied and dismissed in its entirety.

The relevant facts are as follows. Petitioner's petition has its roots in the criminal case *People v. Vasquez*, in which petitioner was charged with multiple felony offenses, including

Murder in the First Degree and other weapon-related offenses. During the trial, the prosecutor informed the court that she had just learned of an eyewitness, Shareka Jones, who had allegedly witnessed the shooting for which petitioner was being tried. The court allowed Ms. Jones to testify against petitioner. Subsequently, petitioner was sentenced to an aggregate term of life without parole.

Following his sentencing, petitioner found out that Ms. Jones resides at 1030 President Street, Brooklyn, New York, which is Section 8 housing and subsidized by NYCHA. In a letter dated February 14, 2011, petitioner made a FOIL request to NYCHA for information related to Ms. Jones' living arrangements. Specifically, petitioner requested (1) information related to the criteria under which Ms. Jones obtained the Section 8 apartment; (2) interview records related thereto; (3) Ms. Jones' original application, supporting data and lease agreement; and (4) any letters from other agencies supporting Ms. Jones' Section 8 application.

On February 18, 2011, NYCHA denied petitioner's request on the grounds that the information could be withheld under Public Officers Law §87(2)(a)(b) and Public Housing Law §159. Petitioner was informed of his right to appeal the denial of his request and to direct said appeal to Mr. Earl Andrews, Jr., Record Appeals Officer. By letter dated March 7, 2011, petitioner appealed NYCHA's determination, reiterating his request of the documents and objecting to the applicability of both §§87(2)(a)(b) and 159. NYCHA, however, failed to respond to petitioner's appeal.

On March 28, 2011, petitioner inquired about a response to his appeal and the status of his FOIL request. Petitioner received no response from NYCHA. Subsequently, on August 4, 2011, petitioner filed the instant petition requesting review of NYCHA's denial of his FOIL

request.

There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. NY CPLR § 217. NYCHA's determination becomes final and binding once petitioner receives notice of its decision. *See Blackman v New York City Hous. Auth.*, 280 A.D.2d 324, 325 (1st Dept 2001). A party requesting documents under FOIL has thirty days to file an administrative appeal if his request is denied. If the agency does not respond to the party's appeal within ten business days, the agency's denial of the party's request is deemed final and binding. *See* N.Y. Pub. Off. Law §89(4)(a) (McKinney's 2001); *see also Council of Regulated Adult Liquor Licensees v. City of New York Police Department*, 300 A.D.2d 17 (1st Dept 2002) (holding that petitioners exhausted all administrative remedies when, after submitting their appeal of the Department's initial denial of their request, they received no reply from the Department within the statutorily mandated 10-day response period). Therefore, an Article 78 petition is untimely if it is filed more than four months after the ten-day period has run. *See Matter of Sanders v. Coddington*, 262 A.D.2d 104 (1st Dept 1999).

In the instant case, the petition is untimely and therefore must be dismissed. The statute of limitations for petitioner to file an Article 78 petition began to run ten business days after petitioner's appeal of the denial of his request. As petitioner appealed NYCHA's decision on March 7, 2011, petitioner's time to bring an Article 78 petition began to run ten business days later, on March 21, 2011. Therefore, under the four month statute of limitations, petitioner's time to challenge said determination expired on July 21, 2011. Even if petitioner is afforded the benefit of every doubt, the petition is still untimely. There is a presumption in this State that a

regular mailing is received within five days of mailing. See CPLR 2103(b)(2); see also *Ziskind v. New York City Hous. Auth.*, Index No. 112214/05, Slip Op. (Sup. Ct. N.Y. Co. 2006). If the court applies the legal presumption that NYCHA received petitioner's appeal five days after he sent it, on March 14, 2011, NYCHA had until March 28, 2011 to respond to petitioner's appeal. Accordingly, under the four month statute of limitations, petitioner had until July 28, 2011 to commence this proceeding. However, petitioner did not do so until August 4, 2011, which is after the statute of limitations had already expired. Furthermore, petitioner's March 28, 2011 letter inquiring about his appeal did not toll the statute of limitations. It is well-settled that subsequent requests for the same relief do not extend the statute of limitations. See *McBride v. City of New York*, 284 A.D.2d 197 (1st Dept 2001). Because petitioner commenced this proceeding after the statute of limitations had already run, the petition is hereby denied and dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 11/15/11

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.

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