

**Matter of Gorelik v New York City Dept. of Bldgs.**

2012 NY Slip Op 33172(U)

January 18, 2012

Supreme Court, New York County

Docket Number: 110038/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of* DMITRY GORELIK,

INDEX NO. 110038/11

Petitioner,

MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. NO. 001,002

THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondent.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 5

Answering Affidavits- Exhibits \_\_\_\_\_ 2, 3, 6

Replying Affidavits \_\_\_\_\_

**UNEILED JUDGMENT**

CROSS-MOTION: \_\_\_\_\_ YES  NO

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).

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/18/12

Donna M. Mills  
J.S.C.

Check one:  FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION

**UNFILED JUDGMENT**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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In the Matter of the Application of  
DMITRY GORELIK,

Petitioner,

Index No.: 110038/11

For a Judgment under and pursuant to  
Article 78 of the Civil Practice Law  
and Rules

-against-

DECISION

THE NEW YORK CITY DEPARTMENT OF  
BUILDINGS,

Respondent.

-----x

**DONNA MILLS, J.:**

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, petitioner seeks, by order to show cause: (1) to compel respondent New York City Department of Buildings (DOB), pursuant to CPLR Article 78, to produce all applications for licenses issued by DOB to applicants who had disclosed the conviction of a criminal offense, pursuant to the Freedom of Information Law, Public Officers Law Article 6 (FOIL); and (2) to assess attorneys' fees and litigation costs against DOB, pursuant to Public Officers Law § 89 (40) (c).

In motion sequence number 002, petitioner moves, by order to show cause pursuant to CPLR 3025 (b), for leave to amend the verified petition to challenge DOB's denial of petitioner's

application for a New York City Master Fire Suppression Piping Contractor's License (the License) and to compel DOB to produce the documents produced by petitioner pursuant to FOIL.

#### **BACKGROUND**

On December 7, 2007, petitioner submitted an application for the License to DOB, the agency charged with issuing such licenses and with evaluating the fitness of applicants for the License. Petitioner took and passed the required examination for the License.

By letter dated September 29, 2010, DOB denied petitioner's application, quoting section 26-133 of the New York City Administrative Code (Admin Code) that an applicant "shall be of good moral character, and shall meet additional qualifications that may be prescribed for the particular license." Motion, Ex. A. DOB determined that, because petitioner pleaded guilty, on September 20, 2000, to Criminal Procedure Law § 200.30, Giving Unlawful Gratuities, stemming from an incident in which petitioner gave an undercover agent \$2,000.00 in cash to avoid being issued a notice for improperly installing eight water meters in a housing complex, his application would be denied. *Id.* DOB explained that Article 23-A, section 752 of the Correction Law provides that an application for a license shall be denied where there is a direct relationship between the applicant's criminal conviction and the specific license sought.

DOB stated that the nature of petitioner's offense bears a direct relationship to his fitness and ability to perform the duties and responsibilities incident to the License, because his willingness to bribe an inspector to hide his own violations calls into question whether he would risk the safety of the public for his own convenience. *Id.* Further, DOB said that, even though the incident occurred in 2000, petitioner was 31 years of age at the time and, presumably, a responsible adult. *Id.* The letter also informed petitioner that he could submit information to document his rehabilitation in support of his application within 60 days from the date of the letter. *Id.*

On November 9, 2010, petitioner submitted a letter for reconsideration of his application. Petitioner has not provided a copy of that letter requesting reconsideration with the instant motion.

Petitioner claims that he personally knows many holders of this License who have been granted Licenses despite convictions for, what he characterizes, as far more serious offenses than his. On February 18, 2011, petitioner's counsel, on petitioner's behalf, submitted to DOB a FOIL request. Petitioner has not provided a copy of this letter.

On March 28, 2011, DOB denied the FOIL request, indicating that the request was for

"a copy of all applications for licenses approved by the Department for applications who had disclosed

[\* 5]

the conviction of a criminal offense, including but not limited to, the LIC-34 form, and any correspondence regarding said application, the determination letter, and all documents and/or correspondence included in said application file, from 2003 to present."

Motion, Ex. B.

In denying the request, DOB "determined that fulfilling the request would require an unreasonable effort and cause an undue burden." *Id.* Petitioner was informed in this letter that he had the right to appeal this determination.

On April 5, 2011, petitioner sent DOB a letter appealing the March 28, 2011, determination, claiming that DOB's rejection based on the request being unduly burdensome has been rejected by the courts. Motion, Ex. C.

On May 5, 2011, DOB denied petitioner's appeal of the March 28, 2011, determination. Motion, Ex. D. In this denial letter, DOB cited to section 89 (3) of FOIL, which, DOB opines, may be interpreted to permit an agency to refuse to produce records that would require an unreasonable effort to locate or review. In addition, DOB said that petitioner's FOIL request was also being denied because he failed to reasonably describe the records sought. *Id.*

In response to the instant petition, DOB reiterates its position regarding the denial of the License as detailed in its denial letters noted above. With respect to petitioner's FOIL request, DOB states that it maintains records for over 25,000

licenses that it has approved, each such record consisting of 45 to 200 pages of documents, filed in different formats and stored in several facilities. DOB asserts that to comply with petitioner's request as it now stands would require DOB employees to manually go through each document to determine whether the applicant disclosed a criminal record, then review each document to determine whether it was exempt from disclosure under FOIL, and finally to redact any response that would invade an applicant's privacy. DOB argues that to comply with petitioner's request would engender an unreasonable effort and create an undue burden on the agency. Moreover, DOB claims that the request does not sufficiently describe the records sought.

In reply, petitioner maintains that DOB has an obligation under FOIL to produce the records requested and that it would not be unduly burdensome for DOB to comply. In support of this contention, petitioner's counsel has annexed a copy of a FOIL request that he made on behalf of another individual, in which counsel requested "all license applications ... for both master plumber's license and master fire suppression piping contractor's license from 1991 to present," which DOB had no trouble fulfilling. Reply, Ex. A. Otherwise, petitioner merely reiterates his earlier arguments.

In motion sequence number 002, petitioner asserts that he should be allowed leave to amend his petition to include a

challenge to DOB's denial of his License application, pursuant to Article 78 of the CPLR. Petitioner contends that the two proceedings are interrelated because he is seeking the DOB records pursuant to FOIL to demonstrate that DOB's denial of his application is arbitrary. It is noted that motion sequence number 001 was instituted prior to DOB's final determination and that such final determination denying petitioner's application was rendered by DOB on September 19, 2011. Motion, Ex. A. In addition, petitioner states that it would be an efficient use of judicial resources to hear both matters together.

In opposition to this motion, DOB claims that there is no interdependence between petitioner's FOIL challenge and his License challenge and, since they are two discrete proceedings, they need not be joined into one action, even if they involve the same parties.

#### **DISCUSSION**

It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The arbitrary or capricious test is whether the action

taken is justified or without foundation in fact. See *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

Petitioner's motion seeking to compel DOB to honor his FOIL request (motion sequence number 001) is denied.

DOB denied petitioner's FOIL request on two grounds: (1) that to comply would be unduly burdensome; and (2) that the request was not sufficiently specific. Petitioner has failed to provide the court with a copy of his FOIL request, and so the court is unable to determine whether DOB's conclusion regarding the specificity of the request was incorrect. Although the DOB denial references the request, and partially quotes therefrom, the court cannot render a decision on partial information.

The court also notes that petitioner has provided, in both motions, FOIL requests made to DOB on other matters, but such document is irrelevant to the issue at hand.

As a consequence, the court concludes that petitioner has failed to meet his burden of rebutting DOB's assertion that the FOIL request was denied because petitioner failed to reasonably identify the records sought. Having reached this determination, the court need not address the other arguments proffered by the parties or petitioner's request for attorney's fees.

Based on the foregoing, petitioner's motion is denied and the petition is dismissed.