

<b>Matter of Rodriguez v City of New York Police Dept.</b>
2013 NY Slip Op 30979(U)
May 3, 2013
Sup Ct, New York County
Docket Number: 401688/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KERN  
Justice

PART 55

RODRIGUEZ, LUIS

INDEX NO.

401688/12

MOTION DATE

- v -  
CITY OF N.Y. POLICE DEPT.,  
ETAL.

MOTION SEQ. NO.

01

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

MAY 07 2013

COUNTY CLERK'S OFFICE  
NEW YORK

is decided in accordance with the annexed

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

Dated: 5/13/13

OK  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
In the Matter of the Application of

LUIS RODRIGUEZ,

Petitioner,

Index No. 401688/12

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

**DECISION/ORDER**

-against-

CITY OF NEW YORK POLICE DEPARTMENT,  
OFFICE OF DEPUTY COMMISSIONER, JAMES  
RUSSO, ASS. INV. HIPPOLYTE, JONATHAN  
DAVID,

Respondents.

**FILED**

**MAY 07 2013**

**COUNTY CLERK'S OFFICE  
NEW YORK**

-----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 Petition and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Pro Se petitioner Luis Rodriguez commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law & Rules ("CPLR") challenging respondents New York City Police Department ("NYPD"), Office of Deputy Commissioner, James Russo ("Mr. Russo") and Ass. Inv. Hippolyte, Jonathan David's ("Mr. David") denial of petitioner's request for materials under the Freedom of Information Law ("FOIL"). Respondent cross-moves to dismiss the petition. For the reasons set forth below, the petition is denied and respondent's cross-motion to dismiss is

granted.

The relevant facts are as follows. On July 29, 2010, petitioner was convicted of conspiracy to distribute and possess with intent to distribute cocaine, two counts of murder while involved in a continuing criminal enterprise, one count of possession of a firearm in relation to a drug trafficking crime and two counts of use of a firearm to commit murder. Petitioner is currently serving a life sentence plus ten years. On that same day, petitioner filed a Notice of Appeal of his conviction in the United States District Court for the Eastern District of New York. At the time petitioner commenced this proceeding, that appeal was still pending.

By letter dated February 14, 2011, petitioner requested law enforcement records related to the investigation into the murders for which petitioner was convicted pursuant to FOIL. On July 25, 2011, the Records Access Officer ("RAO") granted petitioner access to seven pages of records. By letter dated August 2, 2011, petitioner appealed the denial of access to the records that were not disclosed by the RAO. By letter dated November 10, 2011, the Records Access Appeals Officer ("Appeals Officer") denied the appeal citing several FOIL exemptions. Thereafter, petitioner commenced the instant Article 78 proceeding by Order to Show Cause dated July 31, 2012. In the Order, Justice Deborah A. Kaplan permitted service by first class mail but directed petitioner to serve a copy of the order and the petition commencing the instant Article 78 proceeding upon respondents, the Attorney General and the Corporation Counsel.

In the instant action, the petition must be dismissed as it is time-barred. 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. *See* CPLR § 217. Respondents made the final determination denying petitioner's

\* 4]

appeal on November 10, 2011, which is when the four month statute of limitations period began to run as the date of a letter of denial by the Appeals Officer triggers commencement of the four month limitations period. *See Swinton v. Records Access Officer*, 98 A.D.2d 165 (1<sup>st</sup> Dept 1993). Thus, petitioner's time to challenge the denial of his FOIL request expired on March 10, 2012. However, petitioner did not commence the instant proceeding until July 30, 2012, more than four months after the statute of limitations period had run.

Petitioner's assertion that he timely filed the papers commencing this proceeding on March 8, 2012 by handing those papers to the mail room staff at the federal correctional facility in which he is detained is without merit. Petitioner relies on *Houston v. Lack*, 487 U.S. 266 (1988) for the proposition that pleadings by *pro se* prisoners are to be considered filed at the moment such pleadings are delivered to prison authorities for forwarding to the court clerk, also known as the "mailbox rule." However, the Court of Appeals has held that the Supreme Court's holding in *Houston* was based on an interpretation of the Federal Rules of Appellate Procedure and explained that CPLR § 304 leaves no room for interpretation but rather defines the term "filing" as the delivery of certain litigation papers to the clerk of the court or other person designated by the clerk. *See Grant v. Senkowski*, 95 N.Y.2d 605 (2001). Furthermore, the filing of pleading papers will not be accepted if the required fee has not been paid. *See* CPLR § 304(c). Pursuant to CPLR § 1101(f), *pro se* prisoners may commence a proceeding by paying a reduced filing fee. However, if an inmate chooses to commence his action by paying a reduced fee, "[s]uch inmate shall file the form affidavit...along with the summons...or petition...or order to show cause." CPLR § 1101(f). Thereafter, the inmate's case will be given an index number and "the application will be submitted to a judge of the court." CPLR § 1101(f)(1). As petitioner

failed to properly timely file the papers and failed to timely pay the requisite fee, he is now time-barred from doing so. "No court shall extend the time limited by law for the commencement of an action." CPLR § 201. Petitioner admits in his papers that the papers he filed in March 2012 with the court were defective in that the necessary proof to establish poor person status was not initially provided to the Clerk. Rather, petitioner's papers were properly filed on July 30, 2012 when the Clerk received a full set of papers, along with the fee.

Moreover, even if the instant petition was timely, which it is not, it must be dismissed as petitioner failed to obtain personal jurisdiction over defendants. Pursuant to CPLR § 403(b), which applies to all special proceedings, "[a] notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party..." Further, pursuant to CPLR § 403(d), "[t]he court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein." In this case, the Order to Show Cause, signed by Justice Kaplan, provided for service by mail, on or before August 22, 2012, of "this order and the papers upon which this order is granted, upon the respondent...(and the Corporation Counsel)." However, petitioner failed to serve the papers on the Corporation Counsel, which only received a copy of the papers from the Attorney General's office. Petitioner's failure to serve the Corporation Counsel with any papers requires dismissal of the petition. *See Matter of Sorli v. Furchak*, 51 N.Y.2d 713 (1980)(holding that the petition should have been dismissed as "petitioner failed to follow the provisions for service specified in the order to show cause.") Although petitioner admits that he failed to serve Corporation Counsel as directed in the Order to Show Cause, he asserts that this should be excused because he did not have the address of the Corporation Counsel. However, such assertion is without merit. Petitioner could have obtained

