

Matter of Kozlow v City of New York

2014 NY Slip Op 30595(U)

March 11, 2014

Supreme Court, New York County

Docket Number: 101725/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

Index Number : 101725/2013
KOZLOW, JR., DAVID R.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

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FILED
MAR 13 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/11/14

J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

DAVID R. KOZLOW, JR.,

Petitioner,

Index No. 101725/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

THE CITY OF NEW YORK, MICHAEL BLOOMBERG,
as Mayor of the City of New York, THE NEW YORK
CITY POLICE DEPARTMENT, RAYMOND KELLY,
as Commissioner of the New York City Police Department,

Respondents.
-----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	FILED	Numbered
Notice of Motion and Affidavits Annexed.....	MAY 15 2013	1
Affirmations in Opposition.....		2
Replying Affidavits.....		3
Exhibits.....		4

Petitioner David R. Kozlow commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge, *inter alia*, respondents the City of New York (the "City") and the New York City Police Department (the "NYPD")'s termination of petitioner from his job as a police officer and respondents' denial of petitioner's application for certain records pursuant to the Freedom of Information Law ("FOIL"). Petitioner now moves for an Order granting petitioner's application for a judicial subpoena ordering the City to produce documents material and necessary for the prosecution of petitioner's Article 78 petition and

extending petitioner's time to amend his petition until some time after the judicial subpoena has been complied with. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner was employed by the City as an NYPD police officer beginning in July 1986. At some point during 1996, petitioner was investigated by the NYPD's Internal Affairs Bureau ("IAB") for failure to properly report alleged corruption that he observed within the NYPD. As a result of the investigation, petitioner was placed on Special Disciplinary Monitoring and reassigned to the property clerk's office. On February 4, 2010, petitioner was again reassigned to perform patrol duty in the 84th Precinct.

On February 22, 2012, petitioner was served with fourteen disciplinary charges and specifications, including, *inter alia*, "conduct prejudicial to the good order, efficiency or discipline of the Department," "neglect of duty" and "disrespectful and belligerent behavior." A disciplinary proceeding was convened before Robert W. Vinal, the NYPD Assistant Deputy Commissioner - Trials ("Deputy Commissioner Vinal"). Evidentiary hearings were held on January 29, 2013, March 19, 2013 and April 8, 2013 during which ten members of the NYPD, including seven sergeants and three lieutenants, testified on behalf of the NYPD and four police officers, including petitioner, testified on behalf of petitioner. On July 29, 2013, Deputy Commissioner Vinal issued a 54-page report in which he found petitioner guilty of thirteen of the fourteen specifications charged against him and recommended that petitioner be dismissed from the NYPD. On August 22, 2013, respondent Raymond Kelly, then-Commissioner of the NYPD, approved of the disposition of charges against petitioner. On or about August 23, 2013, petitioner was notified that he was to be terminated from his position as police officer effective that day.

On or about November 7, 2013, petitioner's counsel submitted a FOIL request to the NYPD seeking, *inter alia*, official records generated during his work-related disciplinary hearing and other

work-related records to assist petitioner in appealing the NYPD's finding that he engaged in misconduct and the decision to terminate his employment. On or about November 19, 2013, petitioner's counsel received a response denying the FOIL request and advising him to redirect his request to Jonathan David of the NYPD's Personnel Bureau. On or about November 28, 2013, petitioner's counsel submitted an appeal of the denial of the FOIL request.

On or about December 20, 2013, prior to receiving a decision on his appeal, petitioner commenced the instant Article 78 proceeding seeking to challenge, *inter alia*, the NYPD's decision to terminate his employment and its denial of petitioner's FOIL request. On or about January 10, 2014, petitioner's counsel received NYPD's denial of petitioner's FOIL appeal with the exception of the NYPD vacation policy and petitioner's Final Order of Dismissal. Petitioner was notified that the remainder of his FOIL appeal was being denied on the ground that many of the documents he sought were exempt from disclosure pursuant to Public Officers Law §§ 87(2)(g), 87(2)(a) and 87(2)(e)(iv) and New York State Civil Rights Law § 50-a. On or about January 14, 2014, respondents' counsel contacted petitioner's counsel and requested an adjournment of the return date of the petition in order to give respondents time to collect the documents necessary to properly answer the petition. Petitioner's counsel agreed to the adjournment and the parties executed a stipulation adjourning the return date of the petition until April 15, 2014. Petitioner now moves for an Order granting petitioner's application for a judicial subpoena ordering the City to produce documents material and necessary for the prosecution of petitioner's Article 78 petition and extending petitioner's time to amend his petition until some time after the judicial subpoena has been complied with.

In a special proceeding brought pursuant to Article 78 of the CPLR, a petitioner is not entitled to discovery as of right but must seek leave of court. *See* CPLR § 408. The party seeking

discovery in an Article 78 proceeding must demonstrate that the materials sought are likely to be material and necessary to the prosecution or defense of the proceeding. *See Matter of Stapleton Studios v. City of New York*, 7 A.D.3d 273 (1st Dept 2004). In an Article 78 proceeding, “[g]enerally, the trial court has broad discretion in granting or denying disclosure, although it must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality.” *Town Pleasant Val. v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 16 (2d Dept 1999) (internal citations omitted).

In the instant proceeding, petitioner’s motion for an Order granting his application for a judicial subpoena ordering the City to produce certain documents for the prosecution of petitioner’s Article 78 petition must be denied on the ground that it is premature. As an initial matter, the parties have stipulated that the return date for the underlying petition is April 15, 2014 in order to give respondents sufficient time to respond. Respondents have affirmed that they “fully intend to submit an answer [by that date] and...will include therewith copies of the transcripts of the disciplinary hearing and the other materials considered by Deputy Commissioner Vinal in rendering his Report and Recommendation.” Thus, petitioner may obtain some of the records he seeks at that time. Additionally, petitioner’s motion seeks to compel respondents to produce some of the documents that petitioner sought through his FOIL request, the denial of which is the subject of the underlying petition. Thus, petitioner may seek to obtain such documents in the Article 78 proceeding and not by way of the instant motion.

Accordingly, petitioner’s motion is denied without prejudice to renew when the petition and the responses thereto are fully submitted. This constitutes the decision and order of the court.

Dated:

3/11/14

FILED

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J.S.C.

MAR 13 2014
 NEW YORK 4
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