

**Matter of Romero v City of New York Police Dept.**

2014 NY Slip Op 30899(U)

April 7, 2014

Supreme Court, New York County

Docket Number: 400209/13

Judge: Joan B. Lobis

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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 6

Julio Romero

INDEX NO. 400209/13

MOTION DATE 1/21/14

MOTION SEQ. NO. 3

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

- v -

CITY OF NYCPD

The following papers, numbered 1 to 3 were read on this motion to/for vacate

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

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

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

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN CONFORMANCE WITH THE ACCOMPANYING MEMORANDUM DECISION &  
**ORDER**

**FILED**

APR 09 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/7/14

JBL  
**JOAN B. LOBIS** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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

JULIO ROMERO,

Petitioner,

Index No. 400209/13  
**Decision and Order**

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

-against-

**FILED**

CITY OF NEW YORK POLICE DEPARTMENT, LEGAL  
BUREAU,

Respondent.

APR 09 2014

-----X  
JOAN B. LOBIS, J.S.C.:

COUNTY CLERK'S OFFICE  
NEW YORK

Respondent City of New York Police Department Legal Bureau ("NYPD") moves pursuant to Sections 5015(a)(1) and (4) of the Civil Practice Law and Rules for an order vacating this Court's May 13, 2013 Order and Judgment. Petitioner Julio Romero, an inmate at Fishkill Correctional Facility in Beacon, NY, opposes the motion. For the following reasons, the motion is granted.

By letters dated June 17 and July 1, 2010, and September 1, 2011, Petitioner requested access to records under the Freedom of Information Law (FOIL). N.Y. Public Officers Law § 84 *et seq.* Petitioner's June 17 request was partially granted, as he was given access to 21 pages of records, some of which were redacted. Several documents could not be located after a diligent search. Petitioner's July 1 request was denied as being duplicative of the June 17 request. The September 2011 request was denied due to privacy concerns and because releasing the documents would endanger the life and safety of a person. Petitioner appealed the September 2011

decision but his appeal was denied. In particular, Petitioner has been seeking a DD-5 report of Mickey Valdez, a witness who made statements to police and testified at trial against Petitioner.

Mr. Romero commenced this action to appeal the NYPD's determination in denying access to documents pursuant to the exemptions in Sections 87(2)(b) and (f) of the Public Officers Law. On February 8, 2013, Justice Cooper signed an order to show cause that required Petitioner to either make personal service or service by ordinary first class mail upon Respondent, the Attorney General, and the New York City Corporation Counsel by February 27, 2013 (Motion Sequence No. 001). Respondent received a copy of the order and papers on March 25, 2013. The envelope containing the order was postmarked March 20, 2013, and was sent by certified mail. Respondent avers that it was not able to make a timely answer or appearance due to this error. On August 27, 2013, Respondent submitted a motion to vacate the default judgment (Motion Sequence No. 002). The motion was denied on September 4, 2013, because of improper service, which rendered the proceeding jurisdictionally defective.

In the present motion, Respondent argues that personal jurisdiction was never established over it prior to the May 2013 order. The NYPD contends that Petitioner failed to serve it with a verified petition and any supporting documents, along with a copy of the order to show cause, on or before February 27, 2013. Respondent requests that the original order be vacated and petition dismissed. Alternatively, Respondent requests that the Court vacate the judgment and allow the proceeding to be decided on the merits. It maintains that they have an excusable default and that New York state has a strong public policy favoring deciding cases on their merits.

\* 4]

Respondents aver that their default was not willful. They claim that they have a meritorious defense to the action, and that Petitioner will not be prejudiced if relief is granted. NYPD argues that they conducted a diligent search for the requested records but could not find them. Additionally, they claim that the proceeding would have been time barred, and that Petitioner's 2011 FOIL request was a belated attempt to seek judicial review of the 2010 request that Petitioner did not appeal. Lastly, they assert that the Petitioner will not be prejudiced because the requested document cannot be located.

Petitioner argues that he would be prejudiced because the NYPD has exculpatory records. He claims that the NYPD's arguments are without merit and that the documents have not been certified as not in the NYPD's possession. Petitioner maintains that the NYPD is required to articulate particularized and specific justification for denying the requested documents. Lastly, Petitioner contends that his action is not time barred since he filed his Article 78 petition 54 days after the records access officer denied his FOIL appeal on August 3, 2012.

Rule 5015(a) of the Civil Practice Law and Rules a court may relieve a party from a judgment or order by motion. Pursuant to Rule 5015(a)(4) of the Civil Practice Law and Rules, a party can make a motion if there was a lack of jurisdiction to render the judgment or order. Section 403(d) of the Civil Practice Law and Rules states that a "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." The means of service required by the order to show cause are "jurisdictional in nature and must be literally followed." Correnti v. Suffolk Cty. Dist. Attn'y's Off., 34 A.D.3d 578, 580 (2d Dep't 2006).

\* 5]

Failure to satisfy service requirements in an order to show cause requires dismissal for lack of jurisdiction unless there is a showing that imprisonment presented obstacles beyond the control of the inmate. Thomas v. Selsky, 34 A.D.3d 904 (3d Dep't 2006) (citing Matters of Gittens v. Selsky, 193 A.D.2d 986, 987 (3d Dep't 1993)).

Petitioner failed to comply with the order to show cause. Service was improper, and, as a result, the Court lacked jurisdiction over Respondent at the time of the May 2013 order. Petitioner has not made a showing that imprisonment presented any obstacles beyond his control. Accordingly, it is

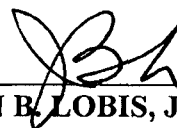
ORDERED that the motion is granted and the May 13, 2013, Order and Judgment is vacated; it is further

ORDERED Motion Sequence No. 001 is restored to the calendar; and it is further

ORDERED that Respondent has 30 days from notice of entry of this decision and order to serve Petitioner with an Answer to the petition.

Dated: April 7, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

**FILED**

APR 09 2014

COUNTY CLERK'S OFFICE  
NEW YORK