

Matter of Samuels v City of New York Police Dept.
2014 NY Slip Op 31581(U)
June 19, 2014
Sup Ct, New York County
Docket Number: 402026/2013
Judge: Jr., Alexander W. Hunter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER, JR.

PART 33

Justice

Maurice Samuels

INDEX NO. 402026/13

MOTION DATE _____

City of NY Police Dept.
Legal Bureau

MOTION SEQ. NO. 01

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

*decided in accordance with the memorandum
order and judgment annexed hereto.*

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

UNFILED JUDGMENT

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 1418).

Dated: 6/19/14

Alexander W. Hunter, Jr., J.S.C.

ALEXANDER W. HUNTER, JR.

- 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

Shawangunk Correctional Facility, located in Wallkill, New York. By various letters, petitioner submitted FOIL requests seeking records related to his arrest and criminal conviction under indictment number 3241/1984, in New York County. Among other records, petitioner requested police notes, rape kits and a listing of the expert witnesses. Petition, ¶ 8.

By letter dated May 7, 2013, the Records Access Officer (RAO) advised petitioner that his FOIL request was denied. The letter explains that the documents requested were protected under Section 50b of the New York Civil Rights Law, and could not be released. Petitioner was informed that he could appeal this decision within 30 days.

Within 30 days, petitioner appealed the denial of his FOIL request. By letter dated June 28, 2013, Jonathan David, who is the Records Access Appeal Officer (RAAO), informed petitioner that his appeal for records was denied.¹ The letter stated, in pertinent part,

"The appeal is denied because the requested records are exempt from disclosure on the basis of Public Officers Law (POL) Section 87 (2) (e) (I), in that such records, if disclosed, would interfere with judicial proceedings, including litigation

¹ Petitioner also requested documents, such as police reports, from the New York City Police Department. This request was sent to the FOIL unit. Petitioner's requests and communications are condensed into the June 28, 2013 denial letter.

[* 4]

In addition, the appeal is denied because access to the records you requested is barred by Civil Rights Law Section 50-b, which prohibits disclosure of records that tend to identify the victim of a sex offense."

Respondent's exhibit 6.

The letter also explained to petitioner that he "may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision." *Id.*

By letter dated October 24, 2013, petitioner contested the denial of his FOIL request with the RAAO. The letter was mailed to the RAAO. Petitioner wrote that he did not receive the June 28, 2013 letter "until after the day of Independence, on July 8, 2013." Respondent's exhibit 7 at 1.

Pursuant to a letter dated December 6, 2013, the RAAO notified petitioner that the June 28, 2013 determination was the "final" determination of the June 2, 2013 appeal. The letter advised petitioner, "[t]o the extent that your October 24, 2013 letter may be construed to be a request for reconsideration," the FOIL law does not provide for a reconsideration of a determination by the RAAO. Respondent's exhibit 8.

Petitioner commenced this Article 78 proceeding by an order to show cause and verified petition dated October 30, 2013. The order to show cause was received by the court on November 6, 2013, however the ex-parte motion part could not process the papers due to their being incomplete. The note from the ex-parte

motion part explained to petitioner that his papers could not be processed as "they stand right now" and that he needed to either notarize both affidavits, or affirm under penalty of perjury pursuant to US Code 28. See petitioner's order to show cause at 2. Petitioner eventually commenced this proceeding on November 25, 2013, by filing his unsigned order to show cause, verified petition and other required documents with the Clerk of the Court.

In his petition, petitioner seeks to have respondent "reverse the final decision, [and] produce requested documents . . ." pursuant to his FOIL request. Petition, ¶ 3. Among other things, petitioner contends that his request for records was "specific and identifiable" and that respondent's denial of his request for records was an "abuse of discretion." *Id.*, ¶ 5. The petition alleges that he received the June 28, 2013 letter on July 8, 2013.²

Respondent cross-moves to dismiss the petition on the ground that the proceeding is time-barred. According to respondent, June 28, 2013, the date of the denial letter, is the date which triggers the statute of limitations. Petitioner commenced the proceeding on November 25, 2013. Since this date is more than four months after the date of the final determination, the

² This is contrary to the Shawangunk incoming legal mail log which indicates that petitioner received the June 28, 2013 letter on July 1, 2013. Aff of Maurice Samuels, exhibit 13 at 2.

petition is untimely and should be dismissed.

In response, petitioner informs the court that he encountered problems while attempting to commence this instant proceeding. For instance, petitioner alleges that he was not provided with a notary for weeks in October 2013, and that the copy machine was not working. Although he previously mentioned receipt of the June 28, 2013 letter, petitioner alleges that "the record does not conclusively establish" when he received the letter. Petitioner's opposition, ¶ 19.

In addition, petitioner refers to the June 28, 2013 letter as the final notice letter and the December 6, 2013 letter as the "binding letter." Petitioner's affirmation in opposition, at 5. He further seeks the court to direct respondent to reverse its December 6, 2013 determination, claiming that this was the date whereby an "adverse impact" was felt by him. Aff of Maurice Samuels, ¶ 11. Petitioner provides arguments for why it was unreasonable for respondent to deny his FOIL request.

DISCUSSION

Pursuant to CPLR 217 (1), an Article 78 "proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" Case law provides that June 28, 2013 is the date of the final determination denying petitioner's FOIL request. This date, which is the date of the letter from the

RAAO denying petitioner's appeal, starts the four month statute of limitations period. See e.g. *Matter of Johnson v Kelly*, 2012 NY Slip Op 30193 (U), *6 (Sup Ct, NY County [2012]), *affd* 116 AD3d 605 (1st Dept 2014) ("The court finds that the four-month statute of limitations for filing an Article 78 proceeding began to run on December 3, 2010. That was the date of the letter from the RAAO, denying the appeal. This would constitute the final agency determination with respect to the FOIL request"); see also *Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 (1st Dept 2001) ("On June 6, 1997, respondent partially denied petitioner's [FOIL] request for documents That determination was final and binding upon petitioner and commenced the running of the applicable four-month limitations period").³

Therefore, petitioner had until October 28, 2013 to commence this proceeding, yet did not do so until November 25, 2013.⁴ Accordingly, the proceeding is untimely.

While the court recognizes petitioner's hardships in commencing this proceeding, the Court of Appeals has set forth that the court "cannot depart from the statutorily mandated filing requirements by incorporating a *pro se* prisoner mailbox

³ See generally *Matter of Timmons v Green*, 57 AD3d 1393, 1394 (4th Dept 2008); *Matter of Swinton v Record Access Officers for City of N.Y. Police Dept.*, 198 AD2d 165 (1st Dept 1993);.

⁴ Even if the statute of limitations started when petitioner allegedly received the letter, on or around July 8, 2013, the petition would still be untimely.

exception." *Matter of Grant v Senkowski*, 95 NY2d 605, 609 (2001). An Article 78 proceeding is commenced by "'filing a notice of petition or order to show cause and a petition [citation omitted]'" *Id.* at 608. Filing requires the "actual receipt of the litigation papers which are date-stamped by the court clerk" *Id.* at 609. CPLR 306-a (a) further provides that an index number "shall be assigned upon filing [internal quotation marks and citation omitted]."⁵ *Id.*

While the petition may be dated October 30, 2013 and the order to show cause was received by the court on November 6, 2013, petitioner acknowledges that his papers were returned to him for being incomplete. The record indicates that the instant order to show cause and petition were not filed with the Clerk of the Court and given an index number until November 25, 2013. Therefore, the proceeding is untimely and the respondent's cross motion for dismissal is granted.

In addition, petitioner's allegations that the statute of limitations was somehow tolled since he received further communication from the RAAO, is without merit. Petitioner was advised by the June 28, 2013 letter that his appeal was denied and that he may seek judicial review by commencing an Article 78

⁵ *Matter of Grant v Senkowski* 95 NY2d at 609-610, also notes that pro se prisoners do have some leeway commencing an action in that they may commence a proceeding with an unsigned order to show cause and that they are entitled to a reduced filing fee. See CPLR 1101 (f).

proceeding within four months of the date of the letter. Despite this, he continued to communicate with the RAAO, who, again, advised him on December 2, 2013 that the June 28, 2013 letter was the final determination. It is well settled that, "[n]either an application for reconsideration . . . nor a series of inquiries regarding reconsideration . . . will extend or toll the four-month Statute of Limitations [internal quotation marks and citation omitted]." *Concourse Nursing Home v Perales*, 219 AD2d 451, 453 (1st Dept 1995); see also *Matter of Tivoli Stock LLC v New York City Dept. of Hous. Preserv. & Dev.*, 63 AD3d 543, 544 (1st Dept 2009).

As a result of this decision, petitioner's arguments regarding the merits of his petition, need not be addressed.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby
 ORDERED that the respondent's cross motion is granted; and
 it is further
 ADJUDGED that the petition is denied, and the proceeding is
 dismissed.

Dated: June 19, 2014

UNFILED JUDGMENT

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ENTER:


J.S.C.
ALEXANDER W. HUNTER JR