

Matter of Braun v City of New York

2014 NY Slip Op 33816(U)

September 10, 2014

Supreme Court, New York County

Docket Number: 150476/14

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Application of
DANIEL BRAUN,

INDEX NO. 150476/14

MOTION DATE 7/14/14

Petitioner,

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK and THE NEW YORK
CITY FIRE DEPARTMENT,

Respondents.

The following papers, numbered 1 to 3, 9-13, 16-19, 21-27, 18 were read on this petition for pre-action disclosure

Petition; Order to Show Cause; Affidavit in Support

No(s). 1; 2; 3

Affirmation in Opposition — Exhibits 1; 2; 3

No(s). 9; 10; 11; 12

Sur-reply

No(s). 13

Order to Show Cause; Pre Argument Statement (Affidavit in Support)

No(s). 15; 19

Affirmation in Opposition — Exhibits 1; 2; 3; 4; 6; 6

No(s). 21; 22; 23; 24;
25; 26; 27

Sur-reply

No(s). 2B

Upon the foregoing papers, it is **ADJUDGED** that this petition is decided in accordance with annexed memorandum decision and judgment.

Dated: 9/10/14
New York, New York

 J.S.C.

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

1. Check one:.....

CASE DISPOSED

NON-FINAL DISPOSITION

2. Check if appropriate:.....PETITION IS:

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:.....

SETTLE ORDER SUBMIT ORDER

DO NOT POST FIOUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
In the Matter of the Application of
DANIEL BRAUN,

Petitioner,

Index No. 150475/14

- against -

THE CITY OF NEW YORK and THE NEW YORK
CITY FIRE DEPARTMENT,

**Decision and
Judgment**

Respondents.
-----X

HON. MICHAEL D. STALLMAN, J.:

Petitioner Daniel Braun seeks an order pursuant to CPLR 3102 (c) to compel pre-action disclosure of documents from respondents City of New York (City) and the New York City Fire Department (FDNY) related to the termination of petitioner's employment. Respondents oppose the petition.

BACKGROUND

Petitioner Daniel Braun alleges that he worked as a firefighter for the FDNY for over seven years. (Petition Aff. dated December 29, 2013 [Aff. I] ¶ 5.) On or around August 12, 2009, petitioner was arrested by federal law enforcement authorities for conspiracy to possess and distribute MDMA, a Schedule I controlled substance commonly known as "ecstasy," or "X." (See Petition Aff. I ¶ 6, Ex. A [Criminal Complaint].) On or around

November 22, 2010, petitioner pled guilty in federal court to two felony counts of conspiracy to distribute marijuana and ecstasy. (Down Affirm. Ex. 1.) The records relating to petitioner's criminal proceedings were sealed. (Petition Aff. I ¶ 7.) Pursuant to an unsealing order of Judge Edward R. Korman of the United States District Court, Eastern District of New York dated March 31, 2014, petitioner's guilty plea became public record. (Down Affirm. Ex. 2.)

On February 27, 2013, petitioner gave sworn testimony pursuant to an investigation by the FDNY Bureau of Investigations and Trials (FDNY Investigations) in connection with his August 12, 2009, arrest. (Down Affirm. Ex. 4.) The FDNY gave petitioner the opportunity to resign prior to the testimony and told petitioner that if he did not resign, he would be questioned regarding his arrest. (*Id.* at 13.) Despite declining the offer to resign, petitioner refused to answer questions regarding his arrest or guilty plea during his testimony. Petitioner also testified that he understood that if he pled guilty or was convicted of a felony, he forfeited his position as a firefighter by operation of the New York Public Officers Law. (*Id.* at 16-17.)

On March 1, 2013, before the continuation of petitioner's testimony before FDNY Investigations, the FDNY gave petitioner another opportunity to resign and told petitioner that if he did not resign he would be questioned

regarding his guilty plea, or terminated if he refused to answer questions. (*Id.* at 18-19.) Despite petitioner's admission that a conviction or guilty plea to felony charges would cause him to automatically forfeit his employment under the Public Officers Law, and his contention that answering the FDNY's questions regarding his criminal proceedings would cause him to commit a contempt of court and put his life in danger, petitioner refused the FDNY's offer to resign prior to his continued testimony. (Down Affirm. Ex. 5 at 31-33.) During his continued testimony, petitioner refused to answer questions regarding his guilty plea and did not acknowledge that he pled guilty to two felony counts of conspiracy to distribute marijuana and ecstasy in federal court. (*Id.* at 40.)

On April 2, 2013, petitioner continued his testimony before FDNY Investigations. He testified that he took medical leave from his employment with FDNY on June 3, 2009 and August 12, 2009. (Down Affirm. Ex. 6. At 52, 59.) According to the Criminal Complaint, on June 3, 2009 and August 12, 2009, petitioner engaged in the criminal activity to which he pled guilty. (See Criminal Complaint ¶¶ 20, 29.)

By letter dated December 9, 2013, the FDNY notified petitioner that he was terminated from his employment. The letter stated in pertinent part,

"On or about November 22, 2010 you entered a plea of guilty to Conspiracy to Distribute Marijuana and Ecstasy under Section 21 of

the United States Code Controlled Substance Act. Pursuant to Public Officers Law § 30(1)(e) you have vacated your office and you are dismissed from the Department effective immediately."

(Petition Aff. I Ex. B, Aff. dated May 14, 2014 [Aff. II] Ex. A.)

By petition dated January 17, 2014, petitioner commenced this proceeding. Petitioner seeks copies of any and all documents and records in the custody, control, and / or possession of respondents, upon which respondents based their termination of his employment. Petitioner also alleges that he suffered a line of duty injury prior to his arrest in July 2009, which resulted in permanent disability rendering him unfit for firefighting duty and the FDNY has not yet acted on his application for retirement for accident disability. (Petition Aff. II ¶ 13.)

DISCUSSION

Respondents contend that petitioner does not state any basis for granting the disclosure sought. Respondents contend that the FDNY has no discretion with regard to automatic vacancy of an office under Public Officers Law § 30 (1) (e) when an officer is convicted of a felony.

Respondents argue that no cause of action exists with regard to petitioner's alleged application for disability retirement from March 4, 2011 because petitioner's employment had already automatically terminated upon his guilty plea and felony conviction on December 22, 2010.

Public Officers Law § 30 (1) (e) provides that "Every office shall be vacant upon . . . conviction of a felony . . ." In *Matter of Duffy v Ward* (81 NY2d 127, 131 [1993]), the Court of Appeals discussed the policy concerns of Public Officers Law § 30 (1) (e):

"Summary termination is not a punishment for the officeholder's crime, and reversal of the conviction on appeal does not automatically entitle the officeholder to return to the vacated position. Rather, the statute's requirement that the office be vacated on conviction reflects two legislative concerns. First, as a practical matter, governmental work should not go unattended, or a position unfilled, while a convicted officeholder pursues a potentially lengthy appeal. Second, and more fundamentally, the public has a 'right to rest assured that its officers are individuals of moral integrity in whom they may, without second thought, place their confidence and trust'. Although the result of implementing the statute is sometimes harsh, it is clear that 'the balance must be struck in favor of the public' when the officer's interest is weighed against that of State's citizens."

The Administrative Code of the City of New York § 15-103(b) also provides that "A conviction of a felony shall disqualify all persons from membership in the [FDNY]."

Here, petitioner pled guilty to two felony counts of conspiracy to distribute marijuana and ecstasy in federal court on November 22, 2010. (See Down Affirm. Ex. 1.) Generally speaking, the entry of a guilty plea constitutes a conviction (Criminal Procedure Law § 1.20 [13]), and so it does for the purpose of Public Officers Law § 30 (1)

(e). (See e.g. *Matter of Bowman v Kerik*, 271 AD2d 225, 225 [1st Dept 2000] [petitioners pled guilty to misdemeanor under Tax Law § 1801 (a)]; *Holt v Marinelli*, 45 AD3d 1317, 1317-1318 [4th Dept 2007] [petitioner pled guilty to misdemeanor under Tax Law § 1817(b)[1]; *Matter of Papa v DeLuca*, 160 AD2d 876 [2d Dept 1990] [petitioner pled guilty to a felony].) Thus, petitioner was automatically terminated from service by operation of law when he pled guilty to the felony charges against him. (See *Matter of Foley v Bratton*, 92 NY2d 781, 789 [1999] ["[W]hen an officer is convicted of a felony or an 'oath of office' crime the result is automatic expulsion under Public Officers Law § 30 (1) (e)."]; *Matter of Depamphilis v Kelly*, 107 AD3d 611 [1st Dept 2013] ["Accordingly, [petitioner's] office was vacated automatically upon conviction pursuant to Public Officers Law § 30 (1) (e)."] [internal citations omitted.]

CPLR § 3102(c) provides that "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." A petition under CPLR 3102(c) for pre-action disclosure to aid in bringing an action is granted only where the party seeking the disclosure can show facts which indicate that a cause of action exists and that the information

sought is "material and necessary to the actionable wrong." (*Matter of Gleich v Kissinger*, 111 AD2d 130, 131 [1st Dept 1985] [internal quotations and citations omitted].) Pre-action disclosure may not be had to ascertain whether facts sufficient to form a cause of action exist; the petitioner's papers must allege facts to show that a cause of action exists in order to obtain pre-action disclosure pursuant to CPLR § 3102(c). (See *Matter of Verdon v New York City Tr. Auth.*, 92 A.D.2d 465 [1st Dep't. 1983].)

By letter dated December 9, 2013, the FDNY notified petitioner that he had been terminated from his employment. Petitioner seeks pre-action disclosure, specifically copies of any and all documents and records in the custody, control, and / or possession of respondents, upon which respondents based their termination of his employment. Petitioner has not demonstrated that any cause of action against respondents exists, let alone that the disclosure he seeks will have any bearing or relevance to any cause of action.

Petitioner cannot state a cause of action for wrongful termination because petitioner's employment automatically terminated when he entered his guilty plea on November 22, 2010 pursuant to Public Officers Law § 30 (1) (e).

To the extent that petitioner attempts to establish a right to privacy cause of action because respondents learned of the conviction even though petitioner's criminal records were sealed until March 31, 2014, sealing does not amount to a "gag order" issued by the federal court and does not vitiate the effect of petitioner's guilty plea for purposes of Public Officers Law § 30 (1) (e). Petitioner took pay and benefits for three years after he automatically lost his job by virtue of his guilty plea and the operation of Public Officers Law § 30 (1) (e). Petitioner cannot prove that he was damaged by any act of respondents or by any act of any person who might have informed respondents of petitioner's wrongful conduct or guilty plea.

To the extent that petitioner attempts to establish that a cause of action exists with regard to his alleged application for disability retirement, the Medical Board memorandum dated March 4, 2011 (Petition Aff. II Ex. B), cannot be used to support any such claims because petitioner's employment was automatically terminated upon his guilty plea and felony conviction on November 22, 2010. (See *Gunning v Codd*, 49 NY2d 495 [1980] [affirming holding that petitioner was no longer police officer at time he applied for pension by operation of Public Officers Law so that he was not entitled to pension]; see also *Mahoney v McGuire*, 107 AD2d 363, 366

[1st Dept 1985] ["Pensions are not only compensation for services rendered ... they serve also as a reward for faithfulness to duty and honesty of performance. It is the public policy of this state not to pension employees who have betrayed the faith reposed in them by virtue of their position."] [internal quotations and citations omitted].)

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

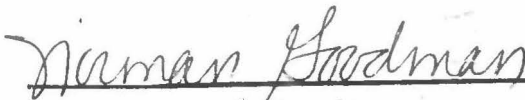
Dated: September 10, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN



Clerk

FILED
OCT 23 2014
COUNTY CLERK'S OFFICE
NEW YORK