

Spectrum News NY1 v New York City Police Dept.

2019 NY Slip Op 31116(U)

April 18, 2019

Supreme Court, New York County

Docket Number: 150305/2016

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 150305/2016

SPECTRUM NEWS NY1,

Petitioner,

MOTION SEQ. NO. 001, 002, 004

- v -

NEW YORK CITY POLICE DEPARTMENT and JAMES O'NEILL,
In his official capacity as Commissioner of the New York City Police
Department,

Respondents,

DECISION AND ORDER

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

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 73, 107, 108, 109, 111, 114

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 60, 61, 64, 65, 66

were read on this motion to/for REARGUMENT/RECONSIDERATION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 120, 121, 122, 123
were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, including this Court's previous Interim Orders, which are incorporated by reference into this Order, the motions are decided as follows:

This is a proceeding pursuant to CPLR Article 78 and the Freedom of Information Law (hereinafter "FOIL") (see Public Officers Law §84 *et seq*) wherein petitioner, Spectrum News NY1,¹ seeks to compel the respondents, New York City Police Department ("NYPD"), to

¹ The caption was changed from Time Warner Cable News NY1 v New York City Police Department and William J. Bratton, Commissioner, by So Ordered Stipulation, NYSCEF Doc. No. 101, signed and filed 3/20/2018.

comply with its request for certain footage from NYPD's Body Worn Cameras ("BWC") program, pursuant to FOIL.

As this Court has noted previously, this proceeding has followed a rather unusual procedural course; however the Court believes that course will lead to a full and fair hearing of the merits of this matter and the Court remains mindful that, where the parties "chart[] a procedural course that deviate[s] from the path established by the CPLR" "with the Court's consent," they are entitled to a "full consideration of [the] merits." (*Reeps v BMW of N. Am.*, 160 AD3d 603 [1st Dept 2018]; see *Corchado v City of New York*, 64 AD3d 429 [1st Dept 2009].)

This Court has outlined the facts and history of this case in its prior decisions, (53 Misc.3d 657 [Sup Ct, NY County 2016]; 2017 NY Slip Op. 30707[U] [Sup Ct, NY County 2017]; and NYSCEF Doc. No. 114, dated 1/29/2019 and entered 1/30/2019) and will only include additional facts herein as are necessary for the disposition of this motion.

After the filing of the petition and answer, this Court found that the papers presented "a question of fact as to whether redactions of the video footage can be conducted 'without unreasonable difficulty,'" (*Matter of Time Warner*, 2017 NY Slip Op 30707[U], *2) *supra*. In that order, this Court granted the parties leave to appeal but they declined. Instead the NYPD released some videos and presented the Court with 328 videos which they contended needed redactions. After consulting with the parties, the Court instructed them to choose thirty videos and specifically articulate their reasons for redacting or retaining certain portions of the footage. The parties were to then brief those issues and present them to the Court

In its January 30, 2019 decision, this Court issued legal conclusions and specific guidelines as to what types of exemptions it would allow. Additionally, this Court found that the issue of whether the NYPD could perform the redactions "without unreasonable difficulty" still

remained. This Court granted the NYPD the choice of either proceeding with a hearing on the difficulty of the redactions or withdrawing its objections.

Petitioner then filed the instant motion seeking leave to appeal this Court's January 30, 2019 decision, pursuant to CPLR 5701(c), and for a stay of the proceedings pending that appeal pursuant to CPLR 2201 and 5519(c). Spectrum contested certain of the redactions that the Court allowed in its decision and also moved the Court to renew the grant of leave to appeal contained in its April 7, 2017 order the issue of whether FOIL permits an agency to deny a FOIL request where reviewing and redacting the records would be "unreasonably difficult." Doc. No. 121, page 1 and 2. Spectrum argues that, now that "the scope and application of the claimed exemptions have been determined by the Court, the issues presented in the Court's April 7, 2017 order and [the January 30, 2019 order] are ripe for appellate review." Id.

By letter dated March 8, 2019, NYPD indicated that it would not oppose Spectrum's motion for leave to appeal. Doc. No. 118. However, NYPD reversed its position and opposed that branch of petitioner's motion for leave to appeal which sought to appeal this Court's April 7, 2017 finding that a FOIL request could be denied if it were to be found "unreasonably difficult" to perform. This Court notes that, in that decision, it also held that "[i]t is well settled that a request pursuant to FOIL cannot be rejected merely because of its 'breadth of burdensomeness' *Matter of Brown v Goord*, 45 AD3d 930, 932 (3rd Dept 2007), *lv dismissed* 10 NY3d 796(2008); see *Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 318(4th Dept 2010); *Matter of Stein v New York State Dept of Transp.*, 25 AD3d 846 (3rd Dept 2006)."

The NYPD urges that Spectrum's failure to perfect its appeal on the issue of "unreasonable difficulty" after leave was granted with respect to the April 7, 2017 order determined that the appeal must be deemed dismissed. It argues that it cannot now raise an issue

that was dismissed for want of prosecution since that failure “acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal,” *Bray v Cox* 38 NY2d 350, 353(1976) Doc. No. 122.

First, this Court notes that the Appellate Division can decide to hear whatever issues it deems relevant, in the exercise of its discretion. However, this Court disagrees that it did not raise the issue of unreasonable difficulty in its most recent decision of January 30, 2019. In the last section of that decision (Doc. 105 at p. 33), entitled “Next Steps”, the first line specifically states that “[T]he only remaining issue ... is whether the NYPD can perform the redactions necessary without unreasonable difficulty.” Further, this Court agrees with Spectrum that it was necessary to further define the issues in this matter and define the exact scope of the exemptions to be considered before the question of “unreasonable difficulty” was ripe. This Court finds that both issues are now ripe for appeal and, further, that the issues presented are of public importance and that the appeal at this time will greatly serve the interests of judicial economy. Therefore, this Court grants petitioner’s motion to appeal the Court’s January 30, 2019 Interim Order and extends the stay in this proceeding pending the determination of the appeal.

Accordingly, it is hereby:

ORDERED that the branch of the motion by petitioner Spectrum News NY1 seeking leave to appeal is granted; and it is further

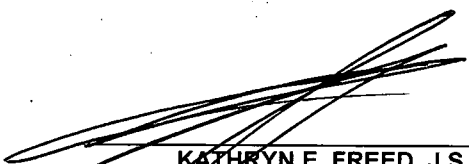
ORDERED that the appeal may encompass this Court’s rulings regarding the scope of respondents New York City Police Department and James O’Neill as Commissioner’s claimed exemptions to their disclosure obligations under the New York Freedom of Information Law; and it is further

ORDERED that the appeal may also encompass this Court’s rulings regarding the entitlement of respondents New York City Police Department and James O’Neill as Commissioner to a determination whether they are entitled to deny a New York Freedom of Information Law request based on the “unreasonable difficulty” of reviewing and redacting those records; and it is further

ORDERED that the branch of petitioner Spectrum News NY1’s motion seeking a further stay of this proceeding pending the determination of the appeal is granted; and it is further

ORDERED that this constitutes the decision and order of this Court.

4/18/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE