

**Matter of Legal Aid Socy. v New York State Dept. of
Corr. & Community Supervision**

2022 NY Slip Op 34452(U)

August 15, 2022

Supreme Court, Albany County

Docket Number: Index No. 902827-21

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

THE LEGAL AID SOCIETY, a nonprofit
corporation,

Petitioner,

DECISION & ORDER

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,

Respondent.

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

Index No.: 902827-21

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

THE LEGAL AID SOCIETY, CRIMINAL PRACTICE,
PRISONERS' RIGHTS PROJECT
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Hon. Richard M. Platkin, A.J.S.C.

Petitioner Legal Aid Society commenced this CPLR article 78 proceeding on March 31, 2021, challenging the denial of its January 21, 2021 request for records pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [“FOIL”]). Petitioner sought an order compelling respondent New York State Department of Corrections and Community Supervision (“DOCCS”) to disclose “all records reflecting the number of DOCCS employees, by facility, tested for COVID-19, and the number of DOCCS employees who tested positive for COVID-19, by facility, from October 1, 2020 to the date of DOCCS’ final determination denying access” to the requested records (NYSCEF Doc No. 16 [“Amended Petition”], ¶ 1 [emphasis omitted]).

DOCCS moved at the outset to dismiss the proceeding as moot based on its August 4, 2021 production of records. By Decision & Order dated October 12, 2021, the Court partially granted the motion by dismissing the branch of the Amended Petition seeking access to records reflecting the number of DOCCS employees who tested positive for COVID-19 (*see* NYSCEF Doc No. 48, p. 5). The motion was denied, however, as to the part of the Amended Petition that sought records reflecting the number of DOCCS employees who had been tested (*see id.*, pp. 6-8).

Rather than answer the surviving branch of the Amended Petition, DOCCS disclosed additional records to petitioner and moved for a second time to dismiss the proceeding as moot. The second motion was denied in a Decision & Order dated January 26, 2022 on the ground that DOCCS had not produced responsive records from January 21, 2021 through March 5, 2021 (*see* (NYSCEF Doc No. 57, p. 5), and DOCCS again was ordered to answer the Amended Petition.

By letter dated February 22, 2022, petitioner advised the Court that DOCCS had provided it with the remaining records responsive to the FOIL request (*see* NYSCEF Doc Nos. 59-60).

The parties therefore “agree[d] that the underlying FOIL request is . . . moot” and asked the Court to “resolve Petitioner’s request for reasonable attorneys’ fees” (NYSCEF Doc No. 59).

By Decision, Order & Judgment dated March 15, 2022, the Court granted the parties’ request to dismiss the Amended Petition as moot (*see* NYSCEF Doc No. 61, p. 3). The Court further ruled that petitioner was a prevailing party, and DOCCS lacked a reasonable basis for denial of the FOIL request, thereby entitling petitioner to an award of counsel fees under Public Officers Law 89 (4) (c) (ii) (*see id.*, pp. 4-6). Petitioner was directed to submit an attorney affirmation in support of its fee request within twenty (20) days, and respondent was given ten days to oppose the request (*see id.*, p. 6).

On March 28, 2022, petitioner’s counsel requested “a three-week adjournment of the submission date for Petitioner’s affirmation concerning attorneys’ fees,” a request that was made with the consent of respondent’s counsel (NYSCEF Doc No. 63). The Court granted the request, which extended petitioner’s deadline to April 27, 2022 (*see* NYSCEF Doc No. 64).

Petitioner served its fee affirmation on April 27, 2022 (*see* NYSCEF Doc Nos. 65-70), which made respondent’s opposition due by May 9, 2022.

Respondent did not file any opposition or otherwise communicate with the Court prior to the expiration of the May 9, 2022 deadline. Accordingly, on May 11, 2022, the Court signed petitioner’s proposed order, which awarded \$11,859 in counsel fees, on a default basis (*see* NYSCEF Doc No. 71 [“Fee Award”]).

Later on May 11, 2022, respondent’s counsel requested an extension of time to file opposition to the fee request, *nunc pro tunc* (*see* NYSCEF Doc Nos. 72-73). Counsel also wrote on May 12, 2022, again requesting to vacate the Fee Award and reopen briefing (*see* NYSCEF Doc No. 74). Petitioner opposed both requests (*see* NYSCEF Doc Nos. 75, 83).

By letter dated May 17, 2022, the Court denied the request to vacate the Fee Award and reopen the motion practice (*see* NYSCEF Doc No. 84).

By notice of motion dated May 17, 2022, respondent moved under CPLR 5015 (a) (1) for an order vacating the Fee Award (*see* NYSCEF Doc No. 86). Respondent contends that its default in opposing petitioner’s application for counsel fees was the result of excusable “law office failure” (NYSCEF Doc No. 89, p. 2). According to counsel, the default was the product of the “acknowledge[d] . . . failure” of respondent’s counsel “in not memorializing and documenting” her belief that “the due date for [r]espondent’s opposition . . . was May 15, 2022” (NYSCEF Doc No. 87 [“Hamilton Aff.”], ¶ 14).

DISCUSSION

“The party seeking to vacate a default order bears the burden of establishing a reasonable excuse for his or her default and a meritorious defense” (*Matter of Melissa F. v Raymond E.*, 193 AD3d 1123, 1125 [3d Dept 2021] [citations omitted]; *see* CPLR 5015 [a] [1]). Law office failure may constitute a reasonable excuse “where the claim is supported by a detailed and *credible* explanation of the default, but conclusory and unsubstantiated allegations of law office failure are not sufficient” (*Bank of N.Y. Mellon Trust Co. N.A. v Hsu*, 204 AD3d 874, 876 [2d Dept 2022] [internal quotation marks and citation omitted] [emphasis added]; *see* CPLR 2005; *U.S. Bank, N.A. v Clarkson*, 187 AD3d 1376, 1377 [3d Dept 2020]; *Historic Pastures Homeowners Assn., Inc. v Ace Holding, LLC*, 167 AD3d 1389, 1391 [3d Dept 2018]).

Respondent’s counsel affirms her belief that, “in communicating with [p]etitioner regarding extensions of time to file papers regarding the narrow issue of the fee award [p]etitioner was entitled to, [she] had also secured an extension of time to submit [r]espondent’s opposition papers to May 15, 2022” (Hamilton Aff., ¶ 5, citing NYSCEF Doc No. 72). Counsel

acknowledges, however, that she “failed to memorialize [that] understanding and ha[s] no documentation to support that there was an agreed upon extension for [r]espondent to file its opposition papers” (*id.*).

Respondent’s counsel further affirms that she was involved in another FOIL-related Article 78 matter in which an award of counsel fees was at issue, and she believed that “May 15, 2022 was the due date for [r]espondent’s opposition papers in both proceedings” (*id.*, ¶ 6, citing *Binghamton Pre-Cast & Supply Corp. v New York State Thruway Authority*, Albany County Index No. 908216-19 [Koweek, J.], NYSCEF Doc No. 124).

In considering the proffered excuse(s), the Court is mindful of the representations made by respondent’s counsel immediately following issuance of the Fee Award. At that time, respondent’s counsel insisted that the opposing counsel had verbally agreed “that the due date for respondent’s opposition would be **May 15, 2022**,” and she accused petitioner’s counsel of “not memorializ[ing] that part of [the] agreement in his [March 28, 2022] letter to the [C]ourt” (NYSCEF Doc No. 72, p. 1; *see* NYSCEF Doc No. 74, p. 1). Respondent’s counsel further accused opposing counsel of “fail[ing] to respond to [her] phone call and/or [her] email” concerning the fee Award while at the same time proceeding to enter the fee award (NYSCEF Doc No. 72, p. 1).

However, petitioner’s counsel responded with compelling proof of the falsity of these accusations (*see* NYSCEF Doc Nos. 75-77; *see also* NYSCEF Doc No. 90 [“Quackenbush Aff.”], ¶¶ 3-24). And respondent’s counsel now admits, as she must, that she has “no documentation to support that there was an agreed upon extension for [r]espondent to file its opposition papers” (Hamilton Aff., ¶ 5; *see also id.*, ¶ 14).

Instead, respondent's counsel shifts to an entirely new justification for missing the May 9, 2022 deadline: her confusion between the deadlines in this case and in *Binghamton Pre-Cast & Supply Corp. v New York State Thruway Authority*, a CPLR article 78 proceeding said to involve a similar issue (*see id.*, ¶ 6).¹ Although confusion between similar cases may, in the abstract, constitute a reasonable excuse, the Court simply does not find counsel's new explanation to be "credible" (*U.S. Bank, N.A. v Imtiaz*, 198 AD3d 1005, 1007 [2d Dept 2021] [internal quotation marks and citation omitted]), particularly given her prior representations to the Court and overall failure to exercise reasonable diligence with respect to this matter (*see* NYSCEF Doc No. 93, pp. 8-9).

Accordingly, the Court finds, in the exercise of discretion, that respondent has not proffered a credible and reasonable excuse warranting vacatur of the Fee Award. It therefore "is unnecessary to determine whether [respondent] demonstrated the existence of a potentially meritorious opposition" to petitioner's fee request (*id.*; *see Historic Pastures*, 167 AD3d at 1391).

CONCLUSION

Based on the foregoing, it is

ORDERED that respondent's motion to vacate the May 11, 2022 Order awarding counsel fees to petitioner is denied in the exercise of discretion.

¹ The Thruway Authority's answering papers actually were due on May 16, 2022 (*see* Albany County Index No. 908216-19, NYSCEF Doc No. 123).

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for petitioner shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
August 15, 2022



RICHARD PLATKIN, A.J.S.C.

Papers Considered:²

NYSCEF Doc Nos. 86-94.



08/15/2022

² The Court takes judicial notice of the prior proceedings and filings in this matter (*see Matter of Shirley v Shirley*, 101 AD3d 1391, 1394 [3d Dept 2012]; *Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985], *appeal dismissed* 65 NY2d 637 [1985]).