

NYP Holdings, Inc. v New York City Police Dept.

2023 NY Slip Op 34170(U)

November 28, 2023

Supreme Court, New York County

Docket Number: Index No. 162416/19

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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NYP HOLDINGS, INC., and RADLEY, LP,

Petitioners-Plaintiffs,

-against-

NEW YORK CITY POLICE DEPARTMENT and
DERMOT F. SHEA, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents-Defendants,

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

DECISION AFTER TRIAL

INDEX No.: 162416/19

Mot. Seq.: 001

Present:

Hon. Lynn R. Kotler, J.S.C.

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This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules (“CPLR”), and the New York Public Officers Law § 84 et seq. (the “Freedom of Information Law” or “FOIL”) by petitioners-plaintiffs NYP Holdings, Inc. and Radley, LP (collectively, “petitioner”) against respondents-defendants the New York City Police Department (“NYPD”) and Police Commissioner Dermot F. Shea, in his official capacity (collectively, “respondents”). As a way of background, petitioner alleges that respondents refused to produce public records in response to petitioner’s FOIL requests seeking materials related to police investigations of six historical criminal investigations and prosecutions in New York City. Petitioner further asserts that this refusal violated the express statutory mandate of FOIL and is based on an improper application of the statutory exemptions to FOIL.

In its petition dated December 23, 2019, petitioner claims that it exhausted its administrative remedies and seek (1) an Order pursuant to Article 78 of the New York

Civil Practice Law and Rules directing NYPD to produce all disclosable records responsive to petitioner's requests within twenty (20) days of the Court's order; and (2) an order awarding petitioner its costs and fees.

Since January 2020, there have been seventeen requests for an adjournment either filed by stipulation of both parties or by respondents' request. Despite these many adjournments, respondents did not file an Answer in this matter.

On April 1, 2022, the parties filed a Stipulation of Partial Settlement resolving all substantive issues, more specifically materials/information related to police investigations of the aforementioned historical criminal investigations and prosecutions, leaving the sole issue of attorneys fees for the court to determine.

A bench trial was held via Microsoft Teams on January 17, 2023. Jeremy Chase, Esq., of Davis Wright Tremain appeared for and testified on behalf of the Petitioner. Respondents did not call any witnesses. At the conclusion of the trial, the court reserved decision and ordered the parties to submit the hearing transcript, which was submitted to the court on October 23, 2023.

Petitioner contends that it substantially prevailed in the matter and therefore is entitled to attorneys fees in a FOIL request. Respondents contend that petitioner did not prevail and that the matter was resolved and therefore petitioner is not entitled to attorneys fees. Respondents further argue that petitioner should not be entitled to recover "fees on fees".

After the hearing, the court's decision is as follows.

Petitioners have substantially prevailed in this matter. Respondents did not provide a "reasonable basis" for denying Petitioners' FOIL Request and in fact disclosed

the records, even though delayed due to the COVID-19 pandemic, during the pendency of this proceeding. *Dioso Faustino Freedom of Info. L. Request v. New York City*, 191 AD3d 504, 142 NYS3d 502 [1st Dept 2021]. This fact was evidenced by the parties Stipulation of Partial Settlement dated April 1, 2022 which provided in pertinent part "Subsequent to the filing of this Petition, NYPD produced to Petitioner all non-sealed documents which Respondent represented it was able to locate and which Respondent believed were responsive to Petitioner's FOIL request."

Pursuant to [POL § 89\(4\)\(c\)](#), a court may award reasonable attorneys fees and litigation costs incurred where a party has "substantially prevailed" and when the agency "failed to respond to a request or appeal within the statutory time"; and the agency had no "reasonable basis" for denial. See [POL § 89\(4\)\(c\)](#). The Court of Appeals has stated, "[p]ursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that 'substantially prevailed' in the proceeding if the court finds that (1) 'the record involved was, in fact, of clearly significant interest to the general public,' and (2) 'the agency lacked a reasonable basis in law for withholding the record' ([Public Officers Law § 89 \[4\] \[c\]](#)). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees." *Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 808 NYS2d 568 [2005].

Attorney Chase credibly testified that he is a 2009 graduate of the University of Pennsylvania Law School and a partner at Davis Wright Tremaine. He has 12 years of litigation experience in both New York State and federal courts and specializes in the representation of media and entertainment companies. He further credibly testified that

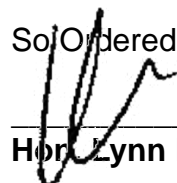
his hourly regular hourly rate during this period was \$595.00 in 2019, \$635.00 in 2020, \$660.00 in 2021, and \$725.00 in 2022 and that his discounted rate for this matter was \$432.00 in 2019, \$422.40 in 2020, \$475.20 in 2021, and \$511.70 in 2022. Attorney Chase further testified as to each person in his law firm, Abigail Everdell, associate attorney, Paralegal Megan Duffy and Senior Managing Clerk Trevor Franklin, their respective legal experience, their hourly rates and discounted rates that were used in this matter. Attorney Chase testified with regard to the legal work performed during all phases of the litigation, that DWT's billing rates are customary and reasonable and requested that the court award \$23,190.70 in attorneys' fees and costs.

While respondents claimed petitioner is not entitled to recover "fees on fees", Attorney McCaffrey did not cross-examine Attorney Chase as to which fees should be excluded from the billing nor did respondents identify any attorneys fees that should be excluded from petitioner's billing statement. Therefore, respondents' request is denied.

Based on the foregoing, it is hereby **ORDERED** that petitioner is entitled to an award of attorneys fee and costs in the amount of \$23,190.70 and the clerk is directed to enter judgement accordingly.

Dated: New York, New York
November 28, 2023

So Ordered:



Hon. Lynn R. Kotler, J.S.C.