

McDermott v City Univ. of N.Y.

2024 NY Slip Op 33694(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 154003/2024

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 154003/2024

IAN MCDERMOTT,

MOTION DATE 05/23/2024

Petitioner,

MOTION SEQ. NO. 001

- v -

CITY UNIVERSITY OF NEW YORK, CITY UNIVERSITY OF
NEW YORK SCHOOL OF LAW,

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Upon the foregoing documents, this motion is decided as follows. This is a special proceeding brought pursuant to CPLR Article 78 arising from petitioner Ian McDermott’s Freedom of Information Law (“FOIL”) request R000035-012424 to the City University of New York (“CUNY”). McDermott seeks an order pursuant to CPLR § 7806 to compel CUNY to disclose records sought by him and award filing fees pursuant to POL § 89(4)(a). CUNY and CUNY School of Law (the “Law School” and collectively “respondents”) cross-move to dismiss, contending that McDermott failed to properly serve them and that the petition failed to state a claim. McDermott opposes the cross-motion, arguing that CUNY was sufficiently served and that the amended petition states a cognizable cause of action. For the reasons that follow, the cross-motion to dismiss is granted.

Facts

The facts alleged in the amended petition and the answer are as follows. At the time of the petition, McDermott was a Law School student scheduled to graduate on May 23, 2024.

McDermott alleges that on January 24, 2024, Law School Dean Sudha Setty stated in a faculty meeting that CUNY Hunter College would no longer be hosting the CUNY Law School commencement due to a list of complicated concerns. That night, petitioner submitted the subject FOIL request to the Law School seeking “[a]ll e-mails or communication notes regarding the arrangement and withdrawal/cancellation of Hunter College hosting CUNY Law class of 2024 commencement event” between August 1, 2023 and January 24, 2024.

On January 30, 2024, Taejong Kim (“Kim”), the Law School Records Access Officer, requested clarification as to the specific custodians McDermott’s request targeted and what “communication notes” entailed. McDermott answered on February 4 and 5 with a list of 33 custodians and described communication notes as “written minutes of meetings or calls that discuss the planning and subsequent withdrawal of Hunter's commitment to host our commencement event written summaries after or during meetings or calls that discuss planning and subsequent withdrawal of Hunter's commitment to host our commencement event written agendas for meetings or calls that discuss planning and subsequent withdrawal of Hunter's commitment to host our commencement event.” McDermott emailed Kim again on February 15 to include 15 more custodians. On February 28, the Law School agreed to include all the provided custodians in their search and notified McDermott they would respond in 20 days as to whether the request would be granted in whole, in part, or give a date by which the Law School will make the determination.

On March 22, 2024, McDermott inquired about his request, to which the Law School replied they required more time to process the request due to a high volume of work and because they were transitioning to a new school email system and that the request would be answered by April 22, 2024. CUNY claims that the Law School had migrated all their emails to Microsoft 365

on March 5 and to Microsoft Purview, the software used to conduct the search, on March 6. On March 25, 2024, McDermott filed an appeal claiming that his FOIL request was constructively denied, which respondents then denied on April 4, 2024.

On April 19, 2024, Kim responded to McDermott's request in an email stating that a "diligent search" was conducted but no records could be found that were responsive to his request. McDermott appealed that decision the same day, which was denied on May 3. The denial letter stated that to "the extent that any communications between these people were identified, none of them pertained to the commencement."

McDermott has provided to the court an email he received on September 19, 2023, stating that commencement will be held at Hunter College and includes a link to a document containing the minutes of a faculty meeting held on September. This email was sent by another former student, Flynn Beckman, to McDermott. McDermott claims that both the email and the faculty meeting minutes were responsive to his FOIL request and should have been provided by respondents.

McDermott filed his original petition on May 1, 2024, then filed an amended petition on May 23, 2024, following the denial of his second appeal.

Discussion

CUNY first argues that McDermott failed to serve the exhibits and memorandum of law along with the petition and failed to attach them again when serving the amended petition. Further, they contend the amended petition was only served electronically and CUNY never consented to electronic service. Lastly, CUNY argues that McDermott failed to serve the Office of the New York Attorney General. Because of these deficiencies of service, CUNY claims that this court does not have jurisdiction over them. McDermott contends that under CPLR § 2001,

the technical omission of the exhibits and memorandum from his service did not prejudice the respondents and may be excused.

CPLR § 7804(c) requires “a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party” (*see also Matter of Long Is. Citizens Campaign v County of Nassau*, 165 AD2d 52, 56 [2d Dept 1991]; *Matter of Rotanelli v Westchester County Bd. of Elections*, 41 Misc 3d 254, 265 [Sup Ct, Westchester County 2013], *aff'd sub nom. Matter of Rotanelli v Board of Elections of Westchester County*, 109 AD3d 562 [2d Dept 2013] [“Service of only an order to show cause, without annexing the underlying papers, does not constitute valid service]). This section also requires service “upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated” (CPLR § 7804[c]).

Meanwhile, CPLR § 2001 provides:

“At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.”

“[T]he purpose of the 2007 amendment to CPLR 2001 was to allow courts to correct or disregard technical defects, occurring at the commencement of an action, that do not prejudice the opposing party” (*Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]). “In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections.” (*id.* at 582 quoting *Raschel v Rish*, 69 NY2d 694, 696 [1986] [internal quotations omitted]).

McDermott relies on the analysis in *Nardeo v Diaz*, which determined that “mistakes, omissions, defects and irregularities” should be overlooked if “a substantial right of a party is not prejudiced” (82 Misc 3d 1092, 1104 (Civ Ct, Bronx County 2024)). In *Nardeo*, the late filing of an affidavit of service, where service was completed timely, was deemed to be merely technical and was disregarded.

However, in a special proceeding such as this one, CPLR § 7804(c) must be strictly complied with (*Nardeo*, 82 Misc 3d at 1099) and caselaw stands for the proposition that failure to comply with Section 7804(c) rises above a mere technical infirmity and is “a jurisdictional defect that courts may not overlook” (*Ruffin*, 15 NY3d at 581-582). Here, McDermott failed to comply with CPLR § 7804(c) by not serving memorandum of law and exhibits accompanying the petition on respondents, by serving the amended petition by email only, and by failing to serve the Attorney General. Therefore, the petition should be dismissed for failure to properly serve the respondents.

However, even if the court overlooks the technical service defects committed by McDermott, the petition must be dismissed on the merits. Respondents argue that McDermott has failed to state a claim because that they did not commit any error of law in completing the FOIL request. McDermott maintains that he has stated a cognizable claim.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]; see also *Matter of Pell v Board of Educ. of Union Free*

School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). However, judicial review of an agency's determination of a FOIL request in an Article 78 proceeding is limited to whether it "was affected by an error of law" (*Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 490 [1st Dept 2021] quoting *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]).

POL § 89(3)(a) states in the pertinent part:

If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

POL § 89(3)(a) also requires the agency to "certify that it does not have possession of such record or that such record cannot be found after diligent search" when requested documents cannot be found. "Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required" (*Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]).

The court agrees with respondents that they complied with POL § 89(3)(a) and informed McDermott both the reason for the delay and a reasonable date by which they would provide the response. Further, Kim's April 19, 2024 letter to McDermott containing the results of the FOIL request satisfied CUNY's burden under POL § 89(3)(a) and discharged any obligations it owed to McDermott.

McDermott's argument that CUNY's response is insufficient fails because McDermott merely speculates that CUNY is withholding documents that should have been found in the search (*see i.e. Matter of Daum v Tessler*, 24 AD3d 214, 215 [1st Dept 2005]). McDermott does

not offer any compelling evidence that they withheld responsive documents or that CUNY committed an error of law. McDermott provided an email that mentions the Hunter College ceremony, but this email does not fall into the FOIL search parameters given to Kim. It was sent from another former student to McDermott and not shown to be in the custody of one of the custodians.

Moreover, McDermott's FOIL request was inartfully written to request documents which contained information regarding the arrangement of the Hunter event and information regarding the withdrawal/cancellation of the event (as opposed to "and/or"). Thus, McDermott's proof that respondents are withholding information does not even fall within his own search parameters.


For all the reasons stated herein, the cross-motion to dismiss is granted.

Conclusion

Accordingly, it is hereby

ADJUDGED that the cross-motion to dismiss is granted, the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<u>10/11/2024</u> DATE	 LYNN R. KOTLER, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT