

Matter of Gerrara v New York City Police Dept.

2011 NY Slip Op 32331(U)

August 19, 2011

Supreme Court, New York County

Docket Number: 402832/08

Judge: Joan A. Madden

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

PRESENT: Madden
Justice

PART 11

Gerrara Steva

- v -

NYC PD

INDEX NO. 4 02832/08
MOTION DATE _____
MOTION SEQ. NO. 02
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Rescind/Review

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached Memorandum Decision, Order & Judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: August 19, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
In the Matter of the Application of
STEVEN GERRARA,

Index No. 402832/08

Petitioner,

-against-
NEW YORK CITY POLICE DEPARTMENT FOIL and
NEW YORK CITY DEPT. OF CORRECTION,

UNFILED JUDGMENT

Respondent
For A Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

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and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).-----X

-----X
Joan A. Madden, J.:

Respondent New York City Police Department ("NYPD") moves for an order granting it leave to renew, pursuant to CPLR §2221(e), based on new facts not previously considered by this court that would change its prior decisions dated September 30, 2009, and September 28, 2010 (together "the original decisions"). NYPD also moves for leave to reargue pursuant to CPLR §2221(d), asserting that the court misapprehended certain legal principles. Petitioner opposes the motion, which is granted to the extent of granting renewal and, upon renewal, dismissing the complaint on statute of limitations grounds.

Background

By letter dated September 5, 2007, petitioner made a request, pursuant to the New York State Freedom of Information Law ("FOIL"), that the NYPD turn over certain documents relating to his arrest and conviction. On May 7, 2008, the Record Access Officer ("RAO") of the NYPD FOIL Unit ("Unit") partially granted petitioner's request by sending petitioner nine pages of material. Petitioner notified the RAO that many of the records that he had requested were not accounted for in the Unit's response. In a letter dated June 24, 2008, the RAO informed petitioner that after a "diligent search," several of the requested documents could not be located. In the meantime, on May 27, 2008, petitioner appealed the RAO's May 7, 2008 decision.

In a letter dated June 27, 2008, the Records Access Appeals Officer (“RAAO”) denied petitioner’s appeal on several grounds and notified petitioner that he had four months from the date of the RAAO’s decision to commence an Article 78 proceeding seeking judicial review. Petitioner filed this Article 78 petition on November 24, 2008. NYPD cross moved to dismiss the petition on various grounds, including that the petition was filed beyond the applicable four month limitations period as the determination was made on June 27, 2008, and the petition was not filed until about five months later on November 24, 2008.

By Interim Decision and Order dated September 30, 2009, this court denied the NYPD’s cross motion to dismiss, finding, *inter alia*, that contrary to the NYPD’s position, the four month limitation period began to run upon petitioner’s receipt of the June 27, 2008 determination, and not on the date that the determination was made. See e.g. Biondo v. New York State Board of Parole, 60 NY2d 832 (1983)(statute of limitations does not begin to run until petitioner receives notice of the determination since until that time petitioner was not aggrieved by the decision); Shell v. McCray, 261 AD2d 664 (3d Dept 1999), lv dismissed, 97 NY2d 700 (2002)(inmate’s receipt of determination of his appeal of prison disciplinary rule triggers the four month statute of limitations period); Sunter v. David, 20 Misc3d 1142(A)(Sup Ct NY Co. 2008)(four month statute of limitations period for inmate to appeal denial of FOIL request ran from receipt of denial).

The court further found that as the NYPD failed to submit an affidavit of service, or any other proof establishing when it served petitioner, and as petitioner himself did not indicate when he had received the determination, it was unclear from the record when the statute of limitations had commenced and subsequently expired.

By decision and order dated September 28, 2010, this court granted petitioner's application for FOIL relief to the extent of ordering an in-camera inspection of those documents located by the NYPD which were responsive to petitioner's FOIL request and had not already been provided to petitioner.

Renewal Motion

NYPD now moves for renewal based on new evidence that it asserts demonstrates that this proceeding is untimely. Specifically, in support of its motion to renew, NYPD submits a copy of an excerpt from the Five Points Correctional Facility's Mail Room Log Book, which it asserts indicates that petitioner received the determination on June 30, 2008. The relevant page of the log book dated June 30, 2008, shows that petitioner signed for and received two pieces of mail on that date, one of which was from the NYPD Legal Bureau. NYPD also submits an affidavit from Jonathan David, the RAAO. According to Mr. David, a review of his records relating to petitioner's appeal shows that on June 27, 2008, the date he signed the determination denying petitioner's appeal, he personally mailed the determination to petitioner.

Based on the above-referenced evidence, NYPD argues, *inter alia*, that the petition is time barred as it was filed on November 24, 2008, which is more than four months after petitioner received the determination. NYPD also asserts that it did not have this information previously as it is not within its practice to obtain such information since it worked under the assumption that the statute of limitations began to run on the date that the final agency determination was issued, not when the petitioner received it.

In opposition, petitioner argues that NYPD failed to offer a reasonable excuse for failing to provide the evidence earlier. Petitioner also argues that the Inmate Intake Clerk at the court received his papers on October 29, 2008, and therefore this proceeding was commenced within four months of June 30, 2008.

Discussion

“A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination; and (3) shall contain a reasonable justification for the failure to present such facts on the prior motion.” See, CPLR 2221(e). “A motion for leave to renew is intended to bring to the court’s attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court’s attention.” Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted). However, the requirements for renewal are flexible. Id.

In this case, renewal should be granted based on the evidence indicating that petitioner received the June 27, 2008 determination on June 30, 2008. This evidence includes log book at the correctional facility showing that petitioner received mail from the NYPD Legal Bureau on June 30, 2008, and Mr. David’s affidavit that he mailed the determination on June 27, 2008. Notably, petitioner does not deny that he received the determination on June 30, 2008. Furthermore, NYPD has provided a reasonable excuse for its failure to obtain the evidence relating to the date of petitioner’s receipt of the determination earlier based on its erroneous interpretation of the law. In addition, petitioner cannot claim prejudice since throughout the proceeding, he knew the date that he received the determination. Campbell v. Cloverleaf Tranp., Inc., 5 AD3d 169 (1st Dept 2004); Ramos v. City of New York, 61 AD3d 51 (1st Dept. 2009).

Upon renewal, the court finds that petition should be dismissed as untimely since petitioner received the determination on June 30, 2008 but did not commence this proceeding until November 24, 2008, or approximately three weeks after the expiration of the four month limitations period. See CPLR 217 (1). Moreover, petitioner’s

argument that the action was timely commenced when the Inmate Intake Clerk received his papers is without merit since the petition was not filed until the filing fee was paid on November 24, 2008. See Grant v. Senkowski, 95 NY2d 605, 609 (2001).¹

As the petition is subject to dismissal on statute of limitations grounds, the court need not reach the NYPD's arguments in support of its motion for reargument.

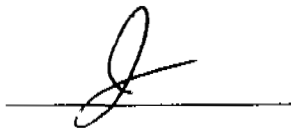
Conclusion

In view of the above, it is

ORDERED and ADJUDGED that NYPD's motion to renew is granted, and upon renewal, the petition is denied and dismissed; and it is further

ORDERED that NYPD's motion to reargue is denied as moot.

DATED: ~~July~~ ^{August 19}, 2011



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

¹Petitioner previously made this argument in opposition to the cross motion to dismiss, and it was rejected by the court in its interim decision and order dated September 30, 2009 for the same grounds set forth herein. As noted in that interim decision and order, there was a delay in filing petitioner's papers (which were received by the inmate processing clerk by October 29, 2008) as petitioner's application for poor persons relief was incomplete and the delay in the Clerk's receipt of petitioner's reduced filing fee of \$15. However, the court found that under controlling precedent, the proceeding was not commenced until the petition the index number was purchased.