

Matter of Covington v Kelly

2011 NY Slip Op 33451(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 401840/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

IN THE MATTER OF THE APPLICATION OF
RONNIE COVINGTON,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

-against-

RAYMOND KELLY, COMMISSIONER,
NEW YORK CITY POLICE DEPARTMENT,

Respondent.

INDEX NO. 401840/11

MOTION SEQ. NO. 001

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1-6 were considered on this Article 78:

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

1, 2, 3

6

Cross-Motion: Yes No

4, 5

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

Petitioner Ronnie Covington seeks an order pursuant to Article 78 of the CPLR: (i) vacating the determination of respondent Raymond Kelly, as commissioner of the New York City Police Department (NYPD), dated February 28, 2011, denying petitioner's New York State Freedom of Information Law (FOIL) request, dated November 4, 2010; and (ii) directing NYPD to grant petitioner's FOIL request. Petitioner asserts that the decision was arbitrary and capricious, unlawful, improper, and a violation of petitioner's rights.

NYPD cross-moves to dismiss this proceeding pursuant to CPLR §§ 7804(f) and 217(1) on the grounds that this proceeding is time-barred and that the matter is moot in that the records requested have

been the subject of a diligent search yielding negative results. For the reasons stated below, the petition is denied as provided and the cross-motion to dismiss is granted.

BACKGROUND

Petitioner is currently an inmate of Five Points Correctional Facility. On November 7, 2008, petitioner sent a FOIL request (First Request) to the NYPD seeking “the shield number, title or employment position, and salary of a current or prior officer...of the New York City Police Department with the last name of Booney (“Booney” is in phonetics)... [and] whether or not this subject officer...was employed by your agency during the Spring of 2003.” Petitioner’s First Request. This request was denied because the NYPD was “unable to locate records responsive to [the] request based on the information provided.” NYPD’s 2008 FOIL response, dated December 9, 2008. Petitioner appealed the 2008 denial on January 7, 2009 and received a final determination denying the appeal because “the Records Access Officer conducted a diligent search for requested records based upon the information provided...with negative results.” NYPD’s 2009 Final Determination, dated January 30, 2009.

On November 4, 2010, petitioner sent a FOIL request (Second Request) to the NYPD seeking the identical information sought in his First Request, “the shield number title or employment position and salary of a current and or prior officer...of the New York City Police Department with the last name of Booney (“Booney” is in phonetics)... [and] whether or not this subject officer...was employed by your agency during the Spring of 2003.” Petitioner’s Second Request. The NYPD denied this request “on the basis that [petitioner’s] request is too broad in nature and does not describe a specific document.” NYPD’s 2010 FOIL response, dated December 7, 2010. Petitioner appealed the 2010 denial on December 19, 2010 and the NYPD made a final determination denying petitioner’s appeal on February 28, 2011. The NYPD based the 2011 final determination on the duplicative nature of petitioner’s request and the NYPD’s final determination of this matter, dated January 30, 2009. Thereafter, petitioner commenced this proceeding.

In seeking dismissal of this proceeding, the NYPD maintains that petitioner's challenge to the final determination is time barred and that the matter is moot. The NYPD states that a final determination was made on petitioner's First Request on January 30, 2009. The NYPD further states that petitioner did not challenge this determination, instead he made the Second Request almost two years later. The NYPD claims that making a second, duplicative request does not revive the earlier request or toll the statute of limitations. Moreover, the NYPD alleges that this proceeding is time-barred even if the Second Request was not duplicative, since petitioner failed to commence this proceeding within four months of the final determination dated February 28, 2011.

In opposition to the NYPD's cross-motion to dismiss, petitioner argues that this proceeding is timely since the four month statute of limitations did not begin to run until he received the final determination. Additionally, petitioner argues that no such final determination was made for his First Request, necessitating his Second Request. Petitioner argues that he sent the Request for Judicial Intervention (RJI), Index Number and Application for Poor Person Status for an Inmate on June 12, 2011, well within the four month statute of limitations. However, petitioner asserts that blank forms of these documents were mailed to him by the court, which he timely returned by mail on June 30, 2011. Petitioner relies on *Matter of Mandala v Jablonsky*, 242 AD2d 271 (2nd Dep't 1997) in arguing that the relevant "papers were received by [the] Court's Inmate Processing Clerk in ample time to be signed and filed within the statute of limitations, [thus] this proceeding must be deemed timely commenced." Petitioner's Reply, p. 3.

DISCUSSION

At the outset, this court must determine whether this Article 78 proceeding was timely filed. Pursuant to CPLR §217, "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner". Respondent argues that the four month period to commence an Article 78 proceeding began to run on January 30,

2009, the date of the NYPD's final determination. Petitioner argues that the four month period did not begin to run until March 3, 2011, when he received notice of the final determination of his Second Request. As this proceeding was commenced over four months from either start date, it is time-barred.

Here, a final determination, dated January 30, 2009, was made on petitioner's First Request. See Notice of Cross-Motion to Dismiss, Exh. 4. The Appellate Division, First Department has held that a "[b]elated judicial review of that denial [of a first request] cannot be based on petitioner's second request for the same information". *Matter of McGrif v Bratton*, 293 AD2d 401, 402 (1st Dep't 2002). See also *Matter of Mendez v NYC Police Dep't.*, 260 AD2d 262, 262-263 (1st Dep't 1999); *Matter of Kelly v NYC Police Dep't.*, 286 AD2d 581, 581 (1st Dep't 2001). Thus, this proceeding, to challenge the NYPD's denial of a FOIL request, which was not commenced until July 14, 2011, is time-barred.

Petitioner's argument that this proceeding is timely, since it was received by the Court's Inmate Processing Clerk prior to the running of the statute of limitations, is misplaced. Petitioner failed to establish that he timely sought judicial review of the final determination dated January 30, 2009 and failed to proffer any evidence that his Second Request wasn't duplicative of his First Request. However, petitioner alleges that he never received a final determination for his First Request. Even assuming petitioner's Second Request is not duplicative of his First Request or that he did not receive notice of the January 30, 2009 final determination, he has still failed to establish that he timely filed this Article 78 proceeding. The final determination of petitioner's Second Request was dated February 28, 2011. Petitioner relies on *Matter of Biondo v NYS Board of Parole*, 60 NY2d 832, 834 (1983), to argue that the statute of limitations did not begin to run until he received notice of the final determination. Petitioner admits and proffers evidence to establish that the final determination was not received by him until at least March 3, 2011. However, this proceeding was not filed until July 14, 2011, over four months from the date petitioner argues the statute of limitations began to run.

Petitioner's remaining arguments are similarly misplaced. The Court of Appeals has held that

“absent any evidence that the Legislature intended to vary for their benefit the filing-by-receipt requirement established in CPLR 304, we cannot depart from the statutorily mandated filing requirements by incorporating a *pro se* prisoner mailbox exception.” *Matter of Grant v Senkowski*, 95 NY2d 605, 609 (2001). Further, the *Grant* court stated that the “statutory scheme [of CPLR 1101(f)] evinces the Legislature’s intent to treat an inmate’s unsigned order to show cause as ‘filed’ when the case is assigned an index number upon receipt of the papers by the clerk of the court.” *Id.* at 610. However, here, as in *Grant*, “CPLR 1101(f)...is of no avail to petitioner... [as p]etitioner’s proposed order to show cause, verified petition and request for poor person relief were not received by the clerk of the court until...after the Statute of Limitations expired and, thus, were not timely filed even under the procedure for commencement of actions and proceedings by indigent prison inmates established in CPLR 1101(f).” *Id.* As the RJI is dated July 12, 2011 and petitioner’s Order to Show Cause is dated July 14, 2011, this Article 78 proceeding was commenced over four months from March 3, 2011, the date petitioner argues the statute of limitation began to run, and thus, it is time-barred.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent’s cross-motion to dismiss is granted; and it is further

ORDERED that within 30 days of entry, respondent shall serve a copy of this order upon petitioner with notice of entry.

This constitutes the decision of this Court.

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK’S OFFICE

Dated: _____

12/23/11

DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION