

**Matter of Loevy & Loevy v New York City Police
Dept.**

2013 NY Slip Op 32493(U)

October 10, 2013

Supreme Court, New York County

Docket Number: 100812/12

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

Loevy & Loevy,

INDEX NO. 100812/12

-v-

MOTION DATE _____

New York City Police Department

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this ~~motion to~~ ^{order to show cause} renew and reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this ~~motion is~~ ^{order to show cause to renew and reargue} is decided in accordance with the attached memorandum decision dated 10/10/13.

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

FILED
OCT 17 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/10/13

HON. DORIS LING-COHAN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----X
In the Matter of the Application of
LOEVY & LOEVY,

Petitioner,

Index No. 100812/12

For a Judgment under Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

FILED

-----X
Doris Ling-Cohan, J.:

OCT 17 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Respondent moves for reargument or renewal of this court's order and decision, dated January 9, 2013 (Order) (*Matter of Loevy & Loevy v New York City Police Department*, 38 Misc 3d 950 [Sup Ct, NY County 2013]), denying respondent's cross-motion to dismiss the petition.

BACKGROUND

This proceeding is brought, pursuant to CPLR Article 78, to compel respondent New York City Police Department to provide petitioner Loevy & Loevy with certain documents, pursuant to a request brought under New York Public Officers Law (POL) § 84 et seq., commonly known as the Freedom of Information Law (FOIL). In this proceeding, petitioner seeks to obtain the file pertaining to the police investigation of a rape and murder which occurred in 1987, in Long Island City, New York. Petitioner first requested the file on April 12, 2011. The FOIL request was denied, and petitioner filed an

administrative appeal.

Respondent denied petitioner's appeal on January 20, 2012. The instant proceeding was commenced by a petition dated January 17, 2012 (three days before the appeal was actually decided), and was filed on January 25, 2012. Respondent opposed the petition, because it claims that the requested file was exempt from disclosure, and that the proceeding was allegedly moot, as it was brought before the appeal was decided. Respondent cross-moved to dismiss the petition.

The court notes that respondent has provided an inaccurate procedural history of this proceeding in its moving papers. Such papers were affirmed: "[U]pon information and belief, based upon information contained in the records of this matter maintained by the NYPD and upon information provided by employees of the NYPD, which... [is believed] to be true and accurate, and upon my personal knowledge of my own actions taken in connection with this matter." Affirmation of support of OSC, ¶ 6, by Yvette Cheng, Esq. It is apparent from the submissions that such affirmant had no personal knowledge of what transpired during the several conferences which the court had with counsel, as she was not, in fact, present, and thus the court will recite what took place, which affirmant was not a party to. After several conferences with this court on the motion and cross-motion, petitioner was permitted, on consent, to correct the procedural defect in the timing of the petition by serving and submitting a verified amended petition (Amended Petition) with the Part directly (instead of Motion Support, as the proceeding was before the Part, not in Motion Support). In fact, both sides agreed to a schedule for the Amended

Petition and the respondent's responsive papers were to be submitted to the court as follows: Amended Petition to be served and submitted directly to this Part in the courtroom on July 3, 2012; with responsive papers by respondent due on July 10, 2012, submitted to this Part. The court then adjourned the proceeding to July 10, 2012 for receipt of the papers in the Part. The court's computer reflects that such proceeding/petition was adjourned to July 10, 2012 in Part 36, and that the petition was marked submitted on that day. Thus, when this Part only received the Amended Petition by July 10, 2012, the petition was submitted on default of respondent. However, the court considered the previously submitted affidavit from Detective Daniel Autera (Detective Autera), which had been submitted as part of the initial cross-motion, and the initial cross-motion.

Therefore, in its Order, this court determined that the matter was not moot, and that the issue of the production of the records could be addressed. In the Order, this court determined that respondent had failed to establish that the documents were exempt from disclosure under POL § 87 (2) (e) (i), which would have required respondent to "articulate a factual basis for the exemption," as set forth in *Matter of Leshner v Hynes* (19 NY3d 57, 67 [2012]) (*Leshner*). Respondent had produced a mere five-paragraph affidavit from Detective Autera, in which he stated, conclusorily, that "[t]he homicide is the subject of an open and active law enforcement investigation" (*Matter of Loevy & Loevy v New York City Police Department*, 38 Misc 3d 950, 954 [Sup Ct, NY County 2013]), and that "NYPD continues to actively monitor this case, periodically review the detective folder, and

search for new evidence and new leads in order to solve this homicide." *Id.* This court held that the affidavit enunciated only a "blanket exception" to the requested records (*id.*), and failed to "provide any information on the generic types of documents, or categories of documents" which were exempt, as required by *Lesher. Id.*

In the initial cross-motion (Affirmation, ¶ 22), the respondent requested in the Affirmation that the Court seal the record in this matter in order to prevent future public disclosure of the victim, pursuant to New York Civil Rights Law (CRL) § 50-b, as the verified petition included the purported name of the victim. Given that sealing of court records is governed by 22 NYCRR § 216.1(a), the Order addressed such issue nonetheless by stating that it would, at that juncture, be improvident to seal the requested records pursuant to CRL § 50-b, since respondent failed to show the required "good cause" to warrant sealing a record, and that respondents failed to explain why the victim's name could not be protected by redaction. *Id.* at 955.

Curiously, the respondent in its motion to reargue interprets this part of the Order as a decision to "foreclose the Respondent from arguing, in its verified answer, ...its right to make a particularized showing that CRL § 50-b bars disclosure of the requested records." Cheng Affirmation ¶¶ 19-20. This is not the case, as this court's Order applied to respondent's request as to the "sealing" of this court file. Having cleared up the "confusion", the court moves on to the substantive basis of respondent's current motion to reargue.

Motion to Reargue

Here, reargument is sought by respondent, based on (1) this

court's alleged misapprehension of the burden an agency faces to provide evidence of an exemption to a FOIL request, and its interpretation of CRL § 50-b; and (2) on the alleged procedural issues associated with approval of the filing of the Amended Petition with the Part directly, without such Petition being "filed" with the Clerk, and the alleged inability of respondent to file its cross-motion to dismiss the Amended Petition, discussed below. However, this court has not misapprehended the law or the facts. The Order was clear that, based on the prior submissions, respondent failed to "identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents." *Leshner*, 19 NY3d at 67. Thus, respondent's prior cross-motion to dismiss was denied. As this court has not misapprehended the law or the facts, respondent's current order to show cause to reargue is denied.

Motion to Renew

Respondent seeks renewal of the Order, based partially on the fact that it was allegedly "prevented" from filing a cross-motion to dismiss the Amended Petition. See Cheng Affirmation, ¶ 13. As indicated above, Affirmant Cheng was not a party to any of the discussions had by counsel before the court, and lacked personal knowledge that the Amended Petition and responsive papers were to be submitted to the Part directly, with submission to the Part on July 10, 2012, as reflected in the court computer. In fact, on July 10, 2012, I asked my Part Clerk whether papers had been submitted by respondent as I had received petitioner's timely submission, and none

were. Notwithstanding respondent's failure to timely submit responsive papers on July 10, 2012 to the Part for consideration, the court considered the previously submitted cross-motion and Affidavit of Detective Autera.

Apparently, in its submissions, movant faults petitioner for failing to file the Amended Petition with the Clerk of the motion support office, when it produced the Amended Petition to this Part directly. Respondent alleges that, when it attempted to file a new cross-motion in response to the Amended Petition in motion support, it was denied the right to file the cross-motion by the Motion Support Clerk because the Amended Petition was never filed, and so, the motions had already been marked as fully submitted. Thereafter, according to respondent, it attempted to file the cross-motion with the Part by sending it to chambers after the motion was marked "fully submitted", and it was returned to respondent, as the cross-motion was not timely. However, as pointed out by respondent in its response in opposition (p. 8), both sides *agreed* to a schedule for the service of an amended verified petition by July 3, 2012, with respondent submitting a response by July 10, 2012, and respondent admits that it received the Amended Petition on July 3, 2012¹. According to petitioner, notwithstanding such agreement, on July 10th, the date respondent agreed to submit a response, respondent instead sought a last-minute extension, after which it tried unsuccessfully to untimely file a new cross-motion to dismiss on July 12, 2012 by sending it

¹ Affirmant Cheng was not in court for these discussions, but her colleagues were.

directly to this Part without consent, on or about July 16, 2012. Petitioner argues that respondent's submission was late and points out that, as stated by the court attorney, Donna Albano, in her letter of July 16, 2012, the "Court notes that respondent did not request to file a cross-motion when counsel discussed amended petition filing in court, but merely requested a week to submit responsive papers, which has passed." (Exh. 2 to the OSC). The court notes that, assuming, *in arguendo*, that there was no Amended Petition in motion support, respondent, nevertheless, could have filed its motion, by re-labeling it a motion rather than a cross-motion, in a timely fashion, on the due date July 10, 2012. Indeed, noticeably absent from the submission on this OSC is any affidavit from the person who attempted to "file" the cross-motion with the Motion Support Office.² Further, the court notes that after the original petition and cross-motion was submitted in Room 130 (motion seq. no. 001), such papers were the basis of conferences in the Part, on three occasions on April 3, 2012, May 31, 2012, and June 28, 2012, with the agreement to serve an amended petition taking place in the courtroom, and the proceeding adjourned to July 10, 2012 for further submissions in the courtroom, as reflected in the computer. Thus, all sides were on notice that the submission of any further papers were to be made directly to the Part, unless directed otherwise by the court, and petitioner had no trouble understanding this, as the court received petitioner's timely

² As previously indicated, the Cheng Affirmation indicates that it is, in large part, upon information and belief, and is ambiguous as to what she personally knows (¶ 6).

submission.³

Respondent also seeks to renew based on the fact that the *Lesher* opinion by the Court of Appeals did not come out until after the motions were submitted, right before the motions were decided. Respondent claims that the *Lesher* opinion constitutes new facts which were not available to respondent prior to its submission of its cross-motion.

The court notes that, notwithstanding respondent's claims, such submission of a cross-motion was not timely. At the conference, a schedule was worked out amongst the parties and the court, for papers to be submitted to the Part directly and respondent simply failed to comply, notwithstanding its claims that petitioner's actions somehow "prevented" them from filing responsive papers. Nonetheless, at the discretion of the court, renewal is granted.

Renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate

³ The court is indeed troubled by the incendiary and sanctionable language used by respondent: "The preference shown to the Petitioner by the Court in this regard, is prejudicial to Respondent and has caused the procedural quagmire" (Reply Affirmation, ¶ 8), especially when respondent's attorneys at the conference, chose the submission date and were present when such procedure of submitting the subsequent papers to the courtroom directly, was discussed before me. Simply put, this is normal procedure once a case/ motion is before the court for argument/conference, unless otherwise directed by the judge. At no time were counsel instructed to file papers in Motion Support, once the case was before me. If respondent had submitted its responsive papers in a timely fashion with the Part, on July 10, 2012, they would not have been rejected, as petitioner's papers were not. Untimely papers, however, merit rejection. Any "procedural quagmire", if one existed, was caused by respondent's own actions.

that there has been a change in the law that would change the prior determination." CPLR 2221 (e) (2). The motion "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (3). While movant fails to explicitly satisfy the renewal statute, in the interest of justice, so as to allow the cross-motion to dismiss the amended petition to proceed with the new affidavit of Detective Autera, and respondent's briefing of *Lesher*, the court permits renewal. Also, in furtherance of the interest of justice, the Amended Petition, may be redacted to protect the victim's identity, and may be filed with the Clerk of the motion support office, *nunc pro tunc*, and re-noticed, with respondent providing a copy of the filed answer, to such Clerk.

Nevertheless, granting respondent's order to show cause to renew does not change the outcome of the Order. As noted in the Order, POL § 87 (2) states, in pertinent part, that:

[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(e) are compiled for law enforcement purposes and which, if disclosed, would:

(i) interfere with law enforcement investigations or judicial proceedings.

In *Lesher*, the Court of Appeals specifically cautioned that "not ... every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of

these categories of documents." 19 NY3d at 67.

Detective Autera's second affidavit does not cure the deficiencies of his first, notwithstanding that it is slightly longer, and has slightly more detail. Essentially, Detective Autera's second affidavit maintains that, as there is no statute of limitations for murder, the case remains an "open and active law enforcement investigation," and that

[t]he NYPD continues to actively monitor this case, periodically review the detective folder, and search for new evidence and new leads in order to solve this homicide. I review the case file periodically in an attempt to obtain additional information or uncover new evidence, and actively search for new theories related to this homicide in an attempt to solve this crime and apprehend the perpetrator.

Aff. of Autera, ¶¶ 3 & 4. Detective Autera lists several documents contained in the file, such as the complaint, reports detailing the investigative steps taken, and witness statements, and lists dates when he conducted interviews, or received information which might help in the investigation. He states that, from approximately May 2012 up to the writing of the affidavit, he "reviewed the detective folder, continued to search for prospective leads, and updated my supervisors on the status of the investigation." *Id.*, ¶ 16.

Detective Autera claims that release of the file would be "detrimental because it could lead to false confessions and because knowledge of those details could not be attributed to the guilt of an individual who may be arrested in the future and charged with commission of this crime, jeopardizing any potential prosecution as well." *Id.*, ¶ 6.

Based on Detective Autera's affidavit, respondent has again

failed to bring forward such facts as would indicate anything more than that the homicide is still unsolved, will remain open for however long it takes to solve, and that the file is updated every so often to check its status. These facts are no different from every other unsolved homicide investigation, and, if sufficient to bar a FOIL request, would effectively make all homicide investigation files off limits to FOIL requests. This is surely not the intent of *Leshner*, or a plain reading of the statute.

Respondent has failed to describe a situation where disclosure of this file would "interfere with law enforcement investigations or judicial proceedings." POL § 87 (2) (e) (i). Instead, it has described a cold case file in which no real active investigation is underway. In fact, the crime took place in 1987, and Detective Autera only describes 6 times, in which he does more than look at the file, since the date of the crime through October 2011.

Further, here, as in respondent's initial cross-motion, respondent conclusorily states that the record should be sealed "to prevent future public disclosure of the identity of a sex offense victim, pursuant to CRL § 50-b." Aff. of Katie M. Flaherty in Support of Cross-Motion to Dismiss, ¶ 22. However, respondent erroneously relies on CRL § 50-b in seeking to seal the record. As noted in the Order, 22 NYCRR § 216.1(a), which governs sealing, states that:

"[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe

appropriate notice and opportunity to be heard.”

The burden of establishing such good cause falls on the party seeking to seal the record. See *Danco Lab., Ltd. v Chemical Works of Gideon Richter*, 274 AD2d 1, 8 (1st Dep’t 2000). Aside from respondent’s conclusory statement, respondent has failed to demonstrate the “good cause” required to seal. However, as indicated above, redaction of the Amended Petition is permitted.

Even upon renewal, the proceeding should not be dismissed, and the record should not be sealed. Respondent’s cross-motion to dismiss the Amended Petition is denied in its entirety.

Accordingly, it is

ORDERED that respondent New York City Police Department’s order to show cause to reargue is denied; and it is further

ORDERED that respondent New York City Police Department’s order to show cause to renew is granted; and it is further

ORDERED that respondent New York City Police Department’s cross-motion to dismiss the Amended Petition is denied; and it is further

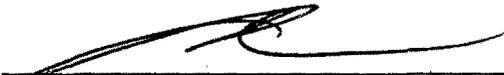
ORDERED that the Clerk of the motion support office shall accept a copy of the redacted Amended Petition, *nunc pro tunc*, as indicated below; and it is further

ORDERED that, as the court’s computer records reflect that respondent has in fact filed an answer to the Amended Petition, petitioner Loevy & Loevy may re-notice this matter in accordance with CPLR § 7804(f), returnable to the motion support office, Room 130, 60 Centre Street, submitting a copy of the Amended Petition; at which time, respondent shall submit a copy of its answer, for consideration

by the court⁴, and it is further

ORDERED that within 30 days of entry, petitioner Loevy & Loevy shall serve a copy of this order upon respondent New York City Police Department with notice of entry.

Dated: 10/10/13


JUSTICE DORIS LING-COHAN

J:\Article 78\Loevy & Loevy v NYC Police Department. -3 renew, reargue FOIL.wpd

FILED
OCT 17 2013
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⁴ Failure to comply may be deemed a default.