Matter of Mingo v Police Dept. of the City of N.Y.
2014 NY Slip Op 31628(U)
June 23, 2014
Supreme Court, New York County
Docket Number: 401871/13
Judge: Jr., Alexander W. Hunter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **ALEXANDER W. HUNTER JR**   PART 93
_____
                    Justice

Gregory Mingo

-v-

Police Department of the City of New York

INDEX NO. 401871/13

MOTION DATE _____

MOTION SEQ. NO. 01

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

		No(s).
Notice of Motion/Order to Show Cause — Affidavits — Exhibits		
Answering Affidavits — Exhibits		No(s).
Replying Affidavits		No(s).

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the memorandum order and judgment annexed hereto.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S): _____

Dated: 6/23/14 _____

_____, J.S.C.
ALEXANDER W. HUNTER JR

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 33
--x
In the Matter of the Application of
GREGORY MINGO,

                                        Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice
Law and Rules   Index No.

                        -against-   401871/13

POLICE DEPARTMENT OF THE CITY OF NEW YORK,

                                        Respondent.
--x
ALEXANDER HUNTER, J. :

     Petitioner Gregory Mingo brings an Article 78 proceeding against respondent Police

Department of the City of New York in order to reverse the determination by respondent denying

petitioner's request for certain documents, pursuant to section 84 et seq. of the Public Officers

Law (POL), known as the Freedom of Information Law (FOIL). Respondent cross-moves for

dismissal of the petition.

     Petitioner is presently incarcerated after his conviction for a homicide over 30 years ago.

On April 4, 2013, petitioner made a FOIL request to respondent for a copy of the recorded

interview and/or transcribed statement of a Paul Perry, made to Police Sergeant Stanton and

Police Detective Babcock, on July 15, 1981, which was vouchered under Voucher # 960175

(108th Precinct). Perry subsequently testified as a state witness in petitioner's trial. By letter

dated May 6, 2013, petitioner's request was denied on the ground that disclosure would endanger

the life or safety of witnesses (section 87 [2] [f] of POL). Petitioner thereafter appealed the

matter, arguing that the basis of respondent's denial was not sustained, as the claimed exemption

was unjustified and that respondent has failed to demonstrate that disclosure would threaten the life or safety of any witnesses. In a letter dated June 21, 2013, the FOIL appeal officer denied the appeal. Claiming to have exhausted his administrative remedies, petitioner commences this Article 78 proceeding.

Petitioner raises the same arguments here that were raised in the appeal before the agency. He argues that respondent failed to substantiate the ground for denial, contending that Perry is not a confidential witness or informant, and that there is insufficient proof that he would be endangered as a result of this request being granted. Petitioner argues that he was denied due process by respondent. Should this court determine that his request falls within the POL exemption, then petitioner requests that respondent be ordered to prepare a redacted version with pedigree or personal information removed.

In opposition, respondent argues that the denial on appeal was based on a valid exemption. Respondent also cross-moves for dismissal of the Article 78 proceeding on the ground that the petition is untimely. Alternatively, respondent seeks dismissal due to an appeal of a coram nobis petition which respondent claims petitioner has or will file with the Court of Appeals. Petitioner's original coram nobis petition was denied by the Appellate Division, Second Department, and respondent contends that petitioner plans to appeal that denial. According to respondent, the period to appeal to the Court of Appeals has not yet expired. Respondent avers that the disclosure of the information would interfere with judicial proceedings, citing section 87 (2) (e) (i) of POL. Respondent claims that this is a valid ground upon which to deny petitioner's request.

Respondent contends that the petition is untimely as it was filed after the four-month

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statute of limitations applicable to Article 78 proceedings. Respondent claims that the statute runs from the date of the letter from the FOIL appeal officer denying petitioner's appeal. The letter was dated June 21, 2013, and the petition was filed on October 24, 2013, three days after the alleged expiration of the statute. Therefore, respondent states that the petition must be dismissed.

Respondent addresses the coram nobis petition, claiming that, in that petition, petitioner is seeking to reverse his conviction. Respondent argues that disclosure of information under FOIL would interfere with petitioner's appeal of his coram nobis petition and that a specific exemption is provided in the law for this situation. According to respondent, this exemption applies to any subsequent proceeding ensuing from the same criminal case. Since this petition is allegedly related to petitioner's trial, respondent contends that the coram nobis petition is relevant to this proceeding, and that any pending procedures would constitute judicial proceedings under the interference exemption.

In opposition to the cross motion, petitioner argues that the statute of limitations runs from the date that the letter from the appeals officer is received by him, or when he has been "notified." Petitioner states that he received the letter on June 24, 2013. He contends that the filing of the petition is timely.

Petitioner maintains that respondent's argument concerning the purported appeal on the coram nobis petition is a new argument. Petitioner claims that respondent is not allowed to raise a new basis for denying disclosure which was not raised before. Petitioner also states that his appeal of the coram nobis petition is not a sufficient or relevant ground for exempting disclosure.

In reply, respondent argues that this proceeding involves a FOIL request for disclosure,

and is based on a mandamus to compel, as opposed to a mandamus to review. According to

respondent, because of the nature of proceeding, the statute of limitations would run from the

date of the subject letter. Moreover, respondent contends that regarding a mandamus to compel,

the courts have the discretion to permit the assertions of new statutory exemptions if shown to be

valid. Respondent states that the introduction of the interference exemption here is permissible

and has relevance to this matter.

Mandamus to compel is a judicial command to an officer or body to perform a specified

ministerial act that is required by law to be performed. *See Matter of Hamptons Hosp. & Med.*

Ctr. v Moore, 52 NY2d 88, 96 (1981). It is an extraordinary remedy which lies only to compel

performance of a ministerial act where there is a clear right to the relief sought. *See Spring*

Realty Co. v New York City Loft Bd., 69 NY2d 657, 659 (1986).

Courts have treated an Article 78 proceeding under FOIL as being in the nature of

mandamus to compel. *See Matter of Rozz v Nassau County Dept. of Assessment*, 96 AD3d 952,

953-954 (2d Dept 2012). CPLR 217 (1) provides that a proceeding against a body or officer

must be commenced within four months "after the respondent's refusal, upon the demand of the

petitioner ... to perform its duty." When the proceeding is in the nature of a mandamus to

compel, the statute of limitations runs "when there has been a demand for compliance and a

rejection thereof." *See Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 (2d Dept 2009).

The statute of limitations in these proceedings runs from the date of the agency's denial letter.

Matter of Heck v Keane, 6 AD3d 95 (4th Dept 2004).

Specifically, the Appellate Division, First Department, has recently affirmed that, in a

FOIL case, the statute begins to run from the date of the denial letter. *Matter of Johnson v Kelly,*

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2012 NY Slip Op 30193(U), *affd* 116 AD3d 605 (1st Dept 2014); *See also Matter of Green v City of New York,* 196 Misc2d 125, 130 (Sup Ct, NY County 2003).

Based on the evidence here, petitioner has failed to file a timely petition pursuant to CPLR 217 (1). The court has no alternative and shall dismiss the petition. The court need not examine the other issues.

Accordingly, it is

ADJUDGED that the petition seeking a reversal of respondent's denial of petitioner's request for documents pursuant to FOIL is denied; and it is further

ORDERED that respondent's cross motion for dismissal of the petition is granted and the proceeding is dismissed, without costs and disbursements to respondent.

DATED: June 23, 2014

ENTER,

_____
J.S.C.

ALEXANDER W. HUNTER JR.

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).

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