

Matter of Miller v Roque
2016 NY Slip Op 30381(U)
March 5, 2016
Supreme Court, New York County
Docket Number: 100299/15
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.

SCANNED
PART 33

Justice
Index Number : 100299/2015
MILLER, RICHARD
vs
ROQUE, SUSAN
Sequence Number : 002
RENEW

INDEX NO. 100299/15
MOTION DATE _____
MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
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 Order and Judgment annexed hereto.

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

FILED
FEB 24 2016
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
FEB 05 2016
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/5/16

AK
ALEXANDER W. HUNTER, JR. 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: IAS PART 33**

----- X
In the Matter of the Application of
RICHARD MILLER,

Index No.: 100299/2015

Petitioner,

Order and Judgment

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

-against-

SUSAN ROQUE, FOIL APPEALS OFFICER FOR THE
NEW YORK COUNTY DISTRICT ATTORNEY'S
OFFICE,

Respondent.

----- X
HON. ALEXANDER W. HUNTER, JR.:

Respondent Susan Roque (Roque), FOIL appeals officer for the New York County District Attorney's (DA) office, moves, pursuant to CPLR 2221 (e), for leave to renew this court's September 9, 2015 order and judgment partially granting petitioner Richard Miller's article 78 petition based upon new facts not previously offered. Petitioner, acting pro se, had alleged that Roque improperly failed to produce information pursuant to a request under Public Officers Law § 84, *et seq.*, also known as the Freedom of Information Law (FOIL).

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner was arrested in 2000 and is currently a prisoner incarcerated at the Green Haven Correctional Facility, located in Stormville, New York. In February 2014, petitioner submitted a FOIL request seeking 27 categories of items related to his criminal case. Respondent denied petitioner's request for certain items, citing that, among other reasons, petitioner had already received the bulk of the items through his attorney, in 2000, and that respondent was not

required to duplicate these items.

Respondent further noted that releasing certain items, such as witness statements and orders [items 21 and 22], would endanger the safety of the witnesses. She also denied certain requested items, citing exemptions such as inter-agency materials, or that she could not find them in petitioner's file.

Petitioner claimed that he did not have the requested files and that his attorney's office no longer had the outstanding files that he allegedly had already received. He wrote the following, in pertinent part:

"I assert that my attorney nor I were ever provided with these documents, and to the extent of [sic] those documents that may have been provided via trial discovery, my attorney and I are no longer in possession of the requested documents. The case is over a decade old and my attorney's office no longer maintains a file on my case, and any documents I may have possessed were lost as the result of transfers or damages while in DOCCS."

Respondent's exhibit A, exhibit c at 4.

Respondent had argued that petitioner had already received, through his attorney, items numbered 1 through 5; 11; 12; 15; 16; 18, 19, the remainder of 21, 22, 25 and 26. In addition, whether or not petitioner had already received them, respondent denied access to the items for various exemptions under FOIL.

Petitioner brought an article 78 petition to reverse and vacate respondent's determination.

In a decision dated September 9, 2015, this court granted petitioner's order to show cause to the extent that respondent is required to furnish him with all non-exempt records. The court set forth each item number and whether or not the DA's office met its burden to demonstrate that

the item qualified for an exemption.¹ For example, in item 24, petitioner requested the criminal history, drug abuse, drug treatment and psychological treatment records of the three prosecution witnesses. The court found that petitioner was not entitled to access to the medical records requested, as that would be an unwarranted invasion of privacy. However, absent proof that petitioner or his attorney had received the criminal history records, these records were exempt from disclosure.

In another instance, the court found that petitioner was not entitled to items 1-4 and 16, as respondent had already granted an alternative FOIL request for those items. The court also found that petitioner was not entitled to any materials in items 10 or 21, relating to the grand jury proceedings.

The court found that respondent failed to demonstrate how the bulk of the allegedly duplicate items had already been provided to petitioner. It held, in pertinent part:

“Petitioner claimed, in his appeal with Roque, that his attorney’s office no longer has the other outstanding files that he allegedly already received. Roque wrote she was able to determine petitioner had received these records from a conversation with the DA who handled petitioner’s criminal case. However, Roque “failed to provide any competent proof that the documents responsive to these requests were previously provided to petitioner during discovery in his criminal action.” *Matter of Rose v Albany County Dist. Attorney's Off.*, 111 AD3d 1123, 1126 (3d Dept 2013). For example, Roque does not provide an affidavit from petitioner’s criminal attorney, confirming that the attorney was provided with these records. Absent another exemption, which will be discussed below, respondent is compelled to produce the outstanding documents that are not

¹ Respondent had informed petitioner that, because he had already received the bulk of the items, these items were denied as being duplicative. Nonetheless, she also argued that, regardless, petitioner should be denied access to these items because they are exempt under FOIL. As a result, this court had to address respondent’s allegations that the requests should be denied as duplicative, as well as the specific exemptions attached to each item, even if it had been previously provided to petitioner.

already available to Miller upon payment.”

Respondent’s exhibit C at 7.

The court granted petitioner’s order to show cause, to the extent that respondent was required to furnish him with all non-exempt records. It further ordered that the non-exempt requested records containing material witness orders and statements shall be supplied to the court for an in camera inspection, and that the respondent should provide, among other things, the risks associated with the release of this information to petitioner.

Respondent now moves for leave to renew this court’s decision, based upon new facts not previously offered, which, according to respondent, will change the court’s prior determination. In support of the motion, respondent provides additional proof that petitioner was already provided with the bulk of the requested items during his criminal prosecution. Respondent provides an itemized *Rosario* list of the material provided to petitioner’s defense counsel during the dates of his trial in November 2000.² Respondent states that, after the court issued its decision on the article 78 petition, she retrieved a copy of this list from the Supreme Court file containing information from petitioner’s criminal trial. Respondent also attaches a portion of the transcript from the petitioner’s criminal trial, during which defense counsel states that he “did receive a great deal of material from the prosecutor.” Respondent’s exhibit F, tr at 3.

Respondent contends that this documentary proof would change the court’s finding that the petitioner did indeed receive the records listed in items 1-5, 11, 12, 15, 16, 18, 19, part of 21, 22, 25 and 26.

² A *Rosario* list contains discovery material that must be provided by the prosecution to the defendant. See CPL 240.45; *People v Rosario*, 9 NY2d 286 (1961).

After searching through petitioner's criminal file, respondent has determined that the file does not contain the criminal history record of the three testifying witnesses. Respondent attaches an affidavit from a paralegal in the DA's office who states that, "[d]uring my review of the file, I conducted a diligent search for records of the criminal convictions of, and pending charges against, Lakisha Ridley, Anthony Ray Hicks, and Akasi Gorkeh. DANY's case file for New York County Indictment Number 1969/2000 does not contain any such records." Respondent's exhibit E, Justin Yi aff, ¶ 3. As a result, respondent argues that she has satisfied her requirements under FOIL, and does not have to provide petitioner with the criminal history records of the prosecution witnesses (item 24).

Respondent claims that she did not provide these records in the initial article 78 proceeding because she believed that she demonstrated through documentary proof that these records had already been provided to petitioner and that petitioner had failed to establish, by admissible evidence, that the records had not been previously provided to his defense counsel, or that they were no longer available to him.

In response to respondent's motion to renew, petitioner submits a sworn notarized affidavit in which he reiterates that he did not receive the documents in the *Rosario* listing. He also claims that he did not receive any witness statements from Anthony Hicks, one of the prosecution witnesses.

DISCUSSION

After the court's initial determination, respondent retrieved a copy of petitioner's criminal trial record from November 2000. In support of the argument that petitioner was already provided with the bulk of the items already requested, respondent provides an itemized list of

materials given to petitioner's defense counsel, as well a copy of the oral transcript where defense counsel generally stated that he did receive a great deal of material.

According to CPLR 2221 (e) (2) and (3), in relevant part, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." *See e.g. Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432, 432 (1st Dept 2014). Here, respondent has not satisfied the statutory requirements for renewal. The criminal trial record, which included the *Rosario* list and the transcript from petitioner's trial in 2000, was available to respondent when petitioner initiated the article 78. It is not a "new fact." Moreover, "[r]enewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation [internal quotation marks and citation omitted]." *Henry v Peguero*, 72 AD3d 600, 602 (1st Dept 2010).

Respondent has also failed to establish a reasonable excuse for her failure to include this evidence with the original motion. *See e.g. Rowe v NYCPD*, 85 AD3d 1001, 1003 (2d Dept 2011) ("Where, as here, the 'new evidence' consists of documents which the plaintiff knew existed, and were in fact in his own possession at the time the initial motion was made, no reasonable justification exists for the plaintiff's failure to exercise due diligence by submitting the documents in the first instance"). In addition, "[w]hat constitutes a 'reasonable justification' is within the Supreme Court's discretion." *Calle v Zimmerman*, 133 AD3d 809, 810 (2d Dept 2015).

Accordingly, respondent's motion to renew with regard to the granting of the production

of non-exempt records is denied.

Respondent argues that material witness orders and witness statements [items 21 and 22], even if already provided, should be exempt under FOIL, as they could potentially endanger the life and safety of the witnesses. The court, in the prior decision, was mindful of the seriousness of the disclosure of witnesses' orders and statements. Recognizing the concern for the safety of witnesses, the court ordered that all non-exempt requested records containing material witness orders and witnesses' statements shall be supplied to the court for an in camera inspection. *See e.g. Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 983 (3d Dept 2009) (“While it is true that respondents have the burden of establishing that the records fall squarely within an exemption by providing a particularized and specific justification, a proper procedure for meeting this burden is to submit the records in question for in camera inspection by the court [internal citations omitted]”).

As explained in the court's initial determination, there is not a comprehensive prohibition against providing witness statements. *See Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348 (1st Dept 1999); *see also Matter of Sell v New York City Dept. of Educ.*, ___ AD3d ___, 2016 NY Slip Op 00425, *2 (1st Dept 2016) (“There is no blanket exemption for handwritten reports of witness interviews”). It is unclear as to why the DA is unwilling or unable to provide the documents for an in camera inspection and provide a log detailing the risk associated with these documents.

Regarding item 24, after the court's initial determination, respondent was ordered to turn over the criminal history records of the three testifying witnesses, but was not required to provide petitioner with their medical records. Respondent has now confirmed that she conducted a

diligent search for the criminal history records of the three testifying witnesses, yet could not find them in petitioner’s criminal trial record. In brief, as this court explained in its prior determination, when a FOIL request is made and the agency cannot locate the items, the agency’s obligation is to “certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search’ [n]either 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), quoting Public Officers Law § 89 (3) (a). The court has already determined that petitioner is not entitled to the other sub-items in item 24. Accordingly, respondent met the requirements under FOIL that the New York DA’s office cannot provide petitioner with the rest of item 24.

CONCLUSION

Accordingly, it is

ORDERED that the respondent’s motion for leave to renew the article 78 petition is granted with respect to item 24 of petitioner’s FOIL request as set forth above, and is otherwise denied; and it is further

ORDERED, upon renewal, the Court otherwise adheres to its Conclusion, Order and Judgment, dated September 9, 2015.

Dated: February 5, 2016

ENTER:

ALEXANDER W. HUNTER, JR.

FILED
FEB 24 2016
COUNTY CLERK'S OFFICE
NEW YORK