

<b>Taveras v Brezenoff</b>
2019 NY Slip Op 33102(U)
October 18, 2019
Supreme Court, New York County
Docket Number: 452051/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE
Justice

PART 15

SANTA ROJAS TAVERAS,

Petitioner,

INDEX NO. 452051/2018
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

For a judgment pursuant to CPLR Article 78

- v -

STANLEY BREZENOFF, as Interim Chairman
of the New York City Housing Authority

Respondent.

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

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

PAPERS NUMBERED

CROSS-MOTION: YES NO

Petitioner seeks attorneys fees connected to a Freedom of Information Law ("FOIL") request regarding an application for public housing.

BACKGROUND

In March 2018, Santa Rojas Taveras ("Ms. Rojas" or "Petitioner") applied for public housing under the code "N0" priority - the highest priority application - with the New York City Housing Authority ("NYCHA" or "Respondent") public housing with code (NY St Cts Elec Filing ["NYSCEF"] Doc No. 1, p. 1-2). On April 23, 2018 and June 27, 2018, Ms. Rojas submitted additional documents for her application; this included a letter from her immigration attorney explaining Ms. Rojas' "permanent resident" card was stolen, that she was in the process of replacing it, and that having the card or not did not affect her underlying legal immigration status" (NYSCEF Doc. No. 4, p. 1). On or about July 1, 2018, NYCHA labeled Ms.

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

Rojas' application "dead... because [she] did not submit all the information required to determine...eligibility" (*Id.*). Petitioner claimed her application was "dead" due to discrimination based upon her national origin (*Id.*).

On October 16, 2018, petitioner submitted a FOIL request by email to the NYCHA FOIL Unit (the "FOIL Unit"), requesting "a complete copy of [her] public housing application file" (NYSCEF Doc. No 21, p. 4, ¶ 16). Then on October 24, 2018, petitioner submitted a formal administrative appeal to the FOIL Unit, to appeal the constructive denial of petitioner's FOIL request (*Id.* at p. 5, ¶ 18). The next day, October 25, 2018, a representative of the FOIL Unit responded, "but only to inquire about a 'DOB or SS number to help us isolate the correct applicant'" (*Id.* at ¶ 20). Then on October 26, 2018, petitioner commenced an Article 78 proceeding against respondent (NYSCEF Doc. No 4, p. 1). Four days later, on October 30, 2018, respondent was served with petitioner's Article 78 motion (NYSCEF Doc. No 21, p. 5, ¶ 23). When November 8, 2018 rolled around, and petitioner had still not received a response from the FOIL Unit, petitioner waited until after close of the business day to amend her Article 78 petition by adding a cause of action under FOIL and serve by mail (*Id.* at ¶ 24).

On November 15, 2018, respondent reached out to petitioner and began to turn over the requested records (*Id.* at p. 6, ¶ 26). In a Stipulation of Partial Settlement dated November 21, 2018, petitioner withdrew her First and Second causes of action, because respondent was processing petitioner's application for public housing and responded to petitioner's FOIL request (NYSCEF Doc. 7). Then on December 28, 2018, the FOIL Unit responded to petitioner on an unrelated matter in an email that, "due to the significant increase in FOIL requests this Unit has received, when you submit a request you may also want to call the Records Access Officer

directly at 212-776-5052. This will help to insure your requests are addressed promptly and to avoid any issues with requests being overlooked” (NYSCEF Doc. No 31).

### DISCUSSION

It is undisputed that respondent did not conform to the strict requirements of POL § 89 that required them to respond to petitioner within certain time frames throughout the FOIL process. POL § 89(4)(a) is very clear that any agency that fails to conform to the guidelines in POL § 89(3) constitutes a denial to access of requested documents. Here, under POL § 89(3)(a), NYCHA was supposed to respond to the petitioner’s initial FOIL request within five business days (October 23, 2018). NYCHA did not respond by this date. This violated POL § 89(3) and is therefore tantamount to a denial of access under POL § 89(4)(a).

The next day, October 24, 2018, petitioner submitted a formal administrative appeal to the FOIL Unit, which was supposed to respond within ten business days with a full explanation in writing as to why there was a denial or give petitioner access to the records (POL § 89[4][a]). The FOIL Unit responded the next day, but merely to gather additional information regarding Ms. Rojas’ birthday and social security number. This did not conform to an appropriate response under POL § 89(4)(a). When petitioner commenced the Article 78 proceeding on October 26, 2018, this action was preemptive, because per POL § 89(4)(a), the FOIL Unit had ten business days (excluding Election Day), until November 8, 2018, either to respond or give petitioner access to the requested documents.<sup>1</sup> Accordingly, when petitioner did not hear back from the

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<sup>1</sup> “...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial (N.Y. POL § 89[4][a] [McKinney]).

FOIL Unit on November 8, 2018 by close of business day, petitioner could amend the Article 78 petition and add a cause of action under FOIL.

While respondent voluntarily disclosed the records in question once the Article 78 action commenced, voluntary disclosure does not preclude an award of attorney's fees (*Kohler-Hausmann*, 133 A.D.3d 437, 438 [1<sup>st</sup> Dept. 2015]). The fact that judicial intervention was not needed to obtain the requested documents is a factor the court may use in its discretion in determining whether to award counsel fees. "Voluntariness" is irrelevant to whether petitioner substantially prevailed within the meaning of POL § 89(4)(c) (*New York State Defs. Ass'n v. New York State Police*, 87 A.D.3d 193, 195 [N.Y. App. Div. 2011]). Here, were it not for the Article 78 action, it cannot be certain if or when the FOIL request would have been fulfilled. Thus, petitioner has substantially prevailed (*see Madeiros v New York State Education Dep't et al*, 30 NY3d 67, 79 [2017]). To deny recovery of attorney's fees when an agency merely releases the requested documents before asserting a defense, would contravene the purpose of FOIL's fee-shifting provision<sup>2</sup> (*Id.* at 196; *see also Matter of Global Tel\*Link v State of N.Y. Dept. of Correctional Servs.*, 68 AD3d 1599, 1601 [N.Y. App. Div. 2009]; *see also Matter of Powhida v City of Albany*, 147 AD2d 236, 239 [N.Y. App. Div. 1989]).

Here, the situation was urgent as Ms. Rojas was homeless and unable to reunite with her children until she secured housing (NYSCEF Doc. No 32, p. 8-9, Court Transcript May 20, 2019). Respondent states that an intense increase in FOIL requests has overwhelmed them

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<sup>2</sup> The counsel fee provision was added to FOIL in 1982, based upon the premise that "persons denied access to documents must engage in costly litigation to obtain them and that '[c]ertain agencies have adopted a "sue us" attitude in relation to providing access to public records,' thereby violating the Legislature's intent in enacting FOIL to foster open government (Assembly Mem in Support, at 1, Bill Jacket, L 1982, ch 73). The provision was subsequently amended—by eliminating one requirement and adding another possible basis for recovery—in order to 'create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL'" (Senate Introducer's Mem in Support, Bill Jacket, L 2006, ch 492, at 5) *New York State Defs. Ass'n v. New York State Police*, 87 A.D.3d 193, 197, (2011).

(NYSCEF Doc. No 31), but this does not substantially justify<sup>3</sup> why they were unable to conform to the statutory timeframe in this instance. Respondent postures their delayed response here was brief (NYSCEF Doc. No 28, p. 3, ¶ 6), but had respondent adhered to procedure, petitioner would have had the requested documents seven days earlier and been able to appeal that much sooner. In light of the serious situation related to this FOIL request, a person being homeless for even one-day more than necessary, the delay is substantial. Moreover, just as applicants must conform to NYCHA's rules and procedures to gain approval in the housing application process, NYCHA must conform to the deadlines the legislature has assigned to it.

Although Ms. Rojas received free legal representation from the Bronx Defenders, this does not preclude petitioner from an award of attorneys' fees.<sup>4</sup> (*Kohler-Hausmann v. New York City Police Dep't*, 133 A.D.3d 437, 438 (1<sup>st</sup> Dept. 2015). Under POL § 89(4)(c), the court (i) may assess, against an agency, "reasonable attorney's fees and other litigation costs reasonably incurred" by a person who has prevailed, "and when the agency failed to respond to a request or appeal within the statutory time"; and (ii) "shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (N.Y. POL § 89 [McKinney]). Other statutes worded similarly have been interpreted to authorize an award of attorneys' fees to

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<sup>3</sup> "...except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action" (N.Y. C.P.L.R. 8601[a] [McKinney]).

<sup>4</sup> "Fees shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings" (N.Y. C.P.L.R. 8601[a] [McKinney])

a prevailing litigant who had free legal services or was pro se (*Kohler-Hausmann*, 133 A.D.3d at 438). CPLR § 8601(a) clearly states “a court shall award a prevailing party, other than the state, fees and other expenses incurred by such party *in any civil action brought against the state*,” (emphasis added). Accordingly, for a prevailing party to be awarded attorney’s fees and other allowable expenses, there must first be a civil action against the state. Thus, the award cannot encompass fees pertaining to the administrative process prior to the civil action (*Greer v. Wing*, 95 N.Y.2d 676, 680 (2001)).

Accordingly, it is

**ORDERED** that petitioner’s motion for attorney’s fees against respondent is granted, but only with respect to those incurred in this action; and it is further

**ORDERED** the court will hold an inquest on the reasonable amount of attorney’s fees on December 19, 2019 at 2:15pm in the court room at 71 Thomas Street, Room 304.

DATED: 10-18, 2018

  
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MELISSA A. CRANE, J.S.C.

**HON. MELISSA A. CRANE**  
J.S.C.

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