

Matter of A'Gard v Vance
2013 NY Slip Op 33499(U)
October 20, 2013
Supreme Court, New York County
Docket Number: 402179/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
KENITH A'GARD,
Petitioner,

INDEX NO. 402179/12

For a Judgment Pursuant to the Provisions of
Article 78 of the New York Civil Practice Law and Rules,

MOTION SEQ. NO. 002

-against-

CYRUS R. VANCE JR, DA, et al.,
Respondent.

FILED
DEC 03 2013
NEW YORK
COUNTY CLERKS OFFICE

The following papers numbered 1 to 3 were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence numbers 001 and 002 are consolidated for purposes of disposition.

Before the Court is an Article 78 proceeding in the nature of a mandamus to compel brought by petitioner Kenith A'Gard (petitioner), *pro se*, seeking an Order compelling respondents the New York County District Attorney, Cyrus R. Vance Jr. (Vance), the New York County District Attorney's Office (together, the DA respondents) various New York City police officials (police respondents), James McQueeney (McQueeney) from the Legal Aid Society of New York County, Criminal Division, Steven Banks (Banks), Attorney in Chief, Legal Aid Society of New York County (Legal Aid respondents), and the New York County Criminal Court Clerk, to disclose certain records, pursuant to the Freedom of Information Law (FOIL).

BACKGROUND

On October 12, 2010, petitioner, *pro se*, brought an Article 78 proceeding seeking an

Order compelling the DA respondents, police respondents, McQueeney, Banks, the Legal Aid respondents, and the New York County Criminal Court Clerk, to disclose certain records, pursuant to FOIL. Petitioner made the FOIL request seeking various information and documents relating to his May 25, 2010, convictions for Robbery in the First Degree (New York County Indictment number 4234/2009). Petitioner filed an appeal of such convictions on June 14, 2010 (see police responders' cross-motion, exhibit 1).

Justice S. Scarpulla signed petitioner's Order to Show Cause (OSC) on October 12, 2010, ordering the respondents to be served by November 7, 2010, and set the return date for December 5, 2010 (motion sequence 001). However, in the interim and before petitioner could serve the OSC, he was moved to a new cell and all of his original papers from his OSC were lost. Petitioner asserts that due to his incarceration all legal transactions are made through the Corrections Department legal mail service, and he could not effectuate service by November 7, 2010 (see Affidavit of Petitioner, dated November 5, 2010, attached to motion sequence 002). Thus, on November 12, 2010, petitioner filed a second OSC (motion sequence 002), seeking the same relief as in his first OSC as well as requesting additional time to serve the respondents. Justice M. Schoenfeld signed the second OSC and the return date was set for January 17, 2011.

Petitioner now seeks an Article 78 appeal from respondents' decision concerning FOIL requests filed as follows: (1) requests dated March 25, 2011¹ and July 14, 2011 to Vance; (2) request dated August 8, 2011 to the NYC Police FOIL Unit at One Police Plaza; (3) requests dated July 8, and 12, 2011 to Assistant District Attorney Harrison Schweiloch; (4) request dated July 8, 2011 to the New York County Criminal Court Clerk; and (5) requests dated, among others, on June 1, 2011 to McQueeney. The petitioner sought agency administrative appeals

¹ The March 25, 2011 FOIL request was indicated and attached to Vance's cross-motion to dismiss. This FOIL request was not mentioned, indicated or attached to the petitioner's pleading or Article 78 appeal.

for material that was denied or redacted from the requests to the DA respondents, dated March 25, 2011 and July 14, 2011 and police respondents dated August 8, 2011. All of those administrative appeals were denied. The herein petition was opposed only by the DA respondents and police respondents. The other named respondents have not appeared or responded in opposition.

Vance and the police respondents separately bring cross-motions for dismissal of the petition. Vance brings a cross-motion pursuant to CPLR §§ 3211(a)(2), (5) and 7804(f), to dismiss this proceeding for: (1) lack of subject matter jurisdiction claiming that the petitioner failed to exhaust administrative remedies on all but the material that is within the requests to the DA respondents, dated March 25, 2011 and July 14, 2011; (2) the FOIL requests are moot inasmuch as respondent has already performed a diligent search and either complied with the search or located no responsive documents; and (3) that certain material requested is exempt from disclosure pursuant to Public Officers Law § 87(2). The police respondents bring a cross-motion for dismissal pursuant to CPLR 7804(f) on the basis that the Court lacks personal jurisdiction over them as petitioner failed to serve them with the OSC, petition, and supporting documents, and on the basis that the Court lacks subject matter jurisdiction over the proceeding because petitioner failed to exhaust his administrative remedies, and lastly on the basis that the records requested are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(I). Petitioner has filed a reply in response.

STANDARD

Article 78 of the CPLR provides a uniform procedure for judicial review of government action or inaction, previously provided under the common-law writs of certiorari, mandamus and prohibition (see *Harvey v Hynes*, 174 Misc2d 174, 176 [Sup Ct, Kings County 1997]; *Matter of Newbrand v Yonkers*, 285 NY 164, 174-75 [1941]). "Although Article 78 supersedes those common-law writs, it does so in procedure only. A party's right to relief still depends upon the

substantive law of the former writs" (*Harvey*, 174 Misc2d at 177). Petitioner, in bringing an Article 78 proceeding in the nature of a mandamus to compel, "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 757 [1991]).

As a prerequisite to bringing an Article 78 petition, a petitioner must first exhaust all of the available administrative remedies (see POL § 89[4][a]; *Serrano v David*, 45 AD3d 270 [1st Dept 2007]). There exist, however, certain exceptions in which a petitioner can bypass the available administrative remedies; for example, where the petitioner challenges the agency's actions as unconstitutional or beyond the agency's grant of power, or where the administrative remedies would either be futile or cause irreparable injury (see *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Moreover, an Article 78 petition should not be dismissed pursuant to this exhaustion rule where the agency has failed to inform the petitioner of the availability of an administrative appeal (see *Barrett v Morgenthau*, 74 NY2d 907, 909 [1989]).

DISCUSSION

The Court notes that motion sequence 001 is hereby rendered moot in light of petitioner bringing a request for the same relief in motion sequence 002.

The portion of the police respondent's cross-motion to dismiss the petition on the basis of lack of personal jurisdiction is denied. According to the petitioner's affidavit of service, he followed the service directives in the OSC signed on October 12, 2012 by Justice Scarpulla which directed petitioner to serve the respondents by ordinary first class mail by serving the Corporation Counsel of the City of New York (Corporation Counsel) and the New York State Attorney General. In this matter the police respondents are all represented by the Corporation Counsel and thus service on that office is sufficient to satisfy the service directives in the OSC in effective service of process on the Police respondents. Petitioner's Affidavit of Service lists

that he served the Attorney General and the Corporation Counsel only. The Court finds, upon a review of the record that petitioner did not serve the Legal Aid respondents and the New York County Criminal Court Clerk with the pleadings, which explains their failure to appear in this proceeding. As such all claims against the Legal Aid respondents and the New York County Criminal Court Clerk are *sua sponte* dismissed for lack of personal jurisdiction.

However, the Court grants the DA respondents cross-motion to dismiss the petition for lack of subject matter jurisdiction due to petitioner's failure to exhaust his administrative remedies to all FOIL requests except the 911 Tapes in possession of the New York County District Attorney's office and the nine pages of New York County Grand Jury instructions that are within the requests to the DA respondents, dated March 25, 2011 and July 14, 2011, and the subject of an administrative appeal. Additionally, the Court grants the portion of the police respondents cross-motion to dismiss the petition for lack of subject matter jurisdiction due to petitioner's failure to exhaust his administrative remedies to all FOIL requests except the 911 Tape and Sprint report that was within the requests to the police respondents, dated August 8, 2011 and the subject of an administrative appeal.

Furthermore, even if petitioner had properly exhausted his administrative appeals with regards to the above, the Court finds that the DA and police respondents properly responded to petitioner's FOIL requests for same. Finally, even assuming that the DA and police respondents failed to respond to petitioner's requests, the Court must grant the respondents' cross-motions to dismiss this petition based upon the fact that any further information sought by petitioner is exempt from the FOIL pursuant to Public Officer Law § 87(2), because it would interfere with the respondents' handling of the petitioner's criminal appeal pending before the Appellate Division, First Department (*see Legal Aid Society v New York City Police Department*, 274 AD2d 207, 214 [1st Dept 2007]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition (motion seq 002) filed against the Legal Aid respondents and the New York County Criminal Court Clerk is *sua sponte* dismissed for lack of personal jurisdiction; and it is further,

ORDERED that the police respondents' cross-motion to dismiss the petition (motion seq. 002) based upon lack of personal jurisdiction is denied; and it is further,

ORDERED that the DA respondents and police respondents' cross-motion to dismiss for lack of subject matter jurisdiction is granted; and it is further,

ORDERED that petitioner's Article 78 petition (motion seq 001) is denied as moot; and it is further,

ORDERED that Cyrus Vance Jr., New York County District Attorney shall serve a copy of this Order, with Notice of Entry, upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated:

10/20/13

FILED
[Handwritten signature]

DEC 03 2013 PAUL WOOTEN, J.S.C.

**NEW YORK
COUNTY CLERK'S OFFICE**

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