

Keep Food Legal v New York City Dept. of Health & Mental Hygiene

2014 NY Slip Op 30359(U)

February 10, 2014

Supreme Court, New York County

Docket Number: 101367/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 101367/2013

KEEP FOOD LEGAL

vs

NYC DEPARTMENT OF HEALTH

Sequence Number : 001

ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

is decided in accordance with the annexed decision.

FILED

FEB 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/10/14

COG, J.S.C.

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

- 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 55

-----X
KEEP FOOD LEGAL,

Petitioner,

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

-against-

NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE,

Respondent.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Index No. 101367/2013

DECISION/ORDER

FILED

FEB 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Petitioner Keep Food Legal brings the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge the determination made by respondent with respect to its 2013 Freedom of Information Law ("FOIL") request. Respondent seeks dismissal of the petition on various grounds including a failure to exhaust administrative remedies. As will be explained more fully below, the petition is dismissed.

The relevant background facts are as follows. In July of 2012, petitioner Keep Food Legal sent respondent a FOIL request (the "July 2012 Foil Request"), which requested all records

“regarding food regulations or food policy since January 1, 2007.” In October 2012, respondent denied this request as not reasonably described as required by Public Officers Law section 89(3)(a) and gave petitioner 30 days to refine its request. Petitioner then sent a letter dated November 26, 2012, denominated a clarification of its earlier 2012 request, in which it sought all records concerning the “prohibition of sugar-sweetened beverages in serving of 16 ounces or greater.” In December of 2012, petitioner submitted another FOIL request. This FOIL request requested the same documents as the earlier 2012 FOIL request, albeit in slightly more specific form. On December 27, 2012, respondent denied the request as too broad and requested additional clarification within 30 days. Respondent never received a response to this denial letter. In January 2013, petitioner emailed respondent enquiring about the status of the FOIL requests and informing respondent that it would commence litigation to have the documents produced. Petitioner then retained different counsel. By letter dated February 19, 2013, petitioner’s newly retained counsel stated that the firm had assumed representation of petitioner with respect to the FOIL requests that had been previously submitted. By email dated February 25, 2013, petitioner’s new counsel stated that while documents concerning the sugar-sweetened beverages portion cap were of the most immediate interest, petitioner had not abandoned its other FOIL requests. On February 26, 2013, respondent provided petitioner a CD containing documents concerning the maximum sugar-sweetened beverage size rule. On the same day, February 26, 2013, respondent sent petitioner’s counsel a letter denying petitioner’s July 2012 FOIL request with one exception-documents concerning the beverage size rule. The letter stated that petitioner has thirty business days to appeal the denial and provided the name and address of the FOIL Appeal Officer to whom an appeal should be addressed. The letter also states that

petitioner's counsel could file new narrowed FOIL requests without prejudice to his client. Petitioner never administratively appealed the denial of its July 2012 FOIL Request, nor did it administratively appeal the denial of its December 2012 request. Instead, petitioner made a new FOIL request, received on March 28, 2013 (the "2013 FOIL request"). This new FOIL Request requested documents concerning the current prohibition by the City of New York on the use of trans fats in food, documents relating to or concerning New York City's current restaurant labeling mandate, documents concerning New York City's current restaurant health inspection system, documents concerning New York City's donating food to the homeless and documents concerning grant money that New York City has sought or received for matters of food policy and public health. The request also sought documents concerning the sugar-sweetened beverage ban and documents concerning proposed regulations having to do with various food and beverage issues. Respondent has processed this request, produced certain documents in response to this request and rendered a FOIL decision partially granting and partially denying the request. Petitioner did administratively appeal the 2013 FOIL Request and the FOIL Appeal Decision partially granted and partially denied the appeal. Petitioner then commenced the present Article 78 proceeding challenging the administrative decisions regarding the 2013 FOIL Request.

The First Department has clearly held that where a subsequent FOIL request is duplicative of a prior request, even where the requested records are more specifically described in the later request, then judicial review is barred concerning the later FOIL request if petitioner failed to exhaust its administrative remedies concerning the prior FOIL request. *See Matter of Jamison v. Teller*, 300 A.D.2d 194 (1st Dept 2002) ("belated judicial review of respondent's

[earlier] response cannot be based on petitioner's second request..for the same records, albeit more specifically described"); *Lorenzo v. Bratton*, 293 A.D.2d 401 (1st Dept 2002) ("Upon denial of the first request as too broad to permit a search, petitioner, in order to preserve his right to judicial review, was required to exhaust his administrative remedies by filing an administrative appeal within 30 days....Belated judicial review of that denial cannot be based on petitioner's second request for the same information, albeit more detailed").

In the present case, as in *Jamison* and *Lorenzo*, petitioner is barred from challenging the denial of its subsequent FOIL request in July 2013 for the same records that it had requested in the July 2012 FOIL Request because it failed to exhaust its administrative remedies with respect to the earlier 2012 FOIL Request by filing an administrative appeal within thirty days of the denial of that request. Based on this court's review of the 2012 and 2013 FOIL Requests, the court finds that the 2013 FOIL Request is duplicative of the 2012 FOIL Request, the only difference between the requests being that the documents are more specifically described in the 2013 FOIL Request.

Moreover, respondent is not barred from asserting that petitioner failed to exhaust its administrative remedies based on the statement in one of the denial letters that new more narrowly tailored FOIL requests may be filed at any time "without prejudice to your client as a result of this partial denial." Initially, "it has long been held that estoppel is unavailable against a government agency except in extraordinary circumstances, and receiving misinformation from a government employee does not constitute such a circumstance." *Matter of Cahill (Rowan Group, Inc. v. Commissioner of Labor*, 79 A.D.3d 1514, 1514-1515 (3d Dept 2010). In *Cahill*, the court rejected an estoppel argument by petitioner that she did not request a hearing of an

adverse determination within the thirty day time limit because she relied on the erroneous advice of the governmental agency employees to wait until a decision was rendered on her complaint. *Id. See also Matter of Grela v. Hevesi*, 38 A.D.3d 113 (1st Dept 2007) (State cannot be equitably estopped from suspending petitioner's retirement benefits based on his reliance on erroneous advice from an office of court administration employee regarding his right to receive benefits as estoppel cannot be invoked against state based on erroneous advice from a government employee). In the present case, as in the foregoing cases, respondent cannot be equitably estopped from asserting that this action is barred based on petitioner's failure to exhaust his administrative remedies due to the erroneous statement by an employee of respondent that petitioner could bring another FOIL request for the same information without exhausting its administrative remedies. Moreover, a petitioner's failure to exhaust administrative remedies deprives the court of subject matter jurisdiction of the matter. *See Indemini v. Beth Israel Med. Ctr.*, 4 N.Y.3d 63, 66 (2005). Therefore, this court does not have subject matter of this dispute based on petitioner's failure to appeal the earlier FOIL request.

Based on the foregoing, this petition is dismissed. The clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 2/10/14

OK

J.S.C.

FILED

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NEW YORK