

Palomino v. Gill

Supreme Court
IA Part 6

Justice Bransten

In this Article 78 proceeding, petitioner Fabian Palomino ("Mr. Palomino") petitions for a Decision and Judgment compelling, upon payment of reproduction costs, James F. Gill, Chairman, Charles F. Urstadt, Vice Chairman, and David B. Comstein, members of the Hugh L. Carey Battery Park City Authority ("Authority") to turn over a copy of the settlement agreement that was executed after a rent strike.

Mr. Palomino also seeks costs and requests that financial sanctions be imposed on the Authority for engaging in "frivolous" litigation.

Background

The Authority was established under the New York State Public Authorities Law to create, in cooperation with New York City, a mixed residential and commercial community in lower Manhattan. Affirmation in Response to Article 78 Petition ("Opposition"), at ¶3. The Authority developed land known as Battery Park City and entered into long-term ground leases with private developers ("Developers") to build housing in accordance with a master plan and the ground leases.

The ground leases required payment of PILOT charges (payments in lieu of taxes) to the Authority, which allocated the payments to its operating expenses and payment of the City. *Id.*, at ¶5.

Pursuant to the ground leases, the Developers constructed buildings and converted them into condominiums. The Developers next sold apartments to buyers ("Unit Owners"). Each Unit Owner, as part of its lease, agreed to assume the rights and obligations contained in the ground lease between the Developer and the Authority. Thus, Unit Owners assumed an obligation to make "rent" payments to the Authority in addition to their monthly condominium payments.

The Board of Managers for each condominium was charged with collecting and delivering rent payments from the Unit Owners to the Authority. In the event that Unit Owners defaulted on their rent payments, the Boards of Managers were required to certify the default and advise the Authority of the deficiencies. *Id.*, at ¶10. After delivering a "Default Certificate" to the Authority, Boards of Managers would then be relieved of tendering the delinquent rent payments to the Authority until the rent was recovered.

After the terrorist attack of September 11, 2001, several Boards of Managers formed a coalition ("Coalition") that refused to make rent payments to the Authority. The Coalition further failed to certify and advise the Authority of any Unit Owner defaults. *Id.*, at ¶12. The result was a rent strike, which had negative repercussions on the Authority and New York City.

The Authority sought to resolve the rent strike with the Coalition and negotiated for immediate payment. *Id.*, at ¶14. After lengthy negotiations, the Authority and the Coalition entered into a settlement agreement ("Settlement"). The Settlement contains a confidentiality provision, which expressly precludes the Authority from disclosing or disseminating the contents of the agreement. *Id.*, at ¶15.

On October 22, 2003, Mr. Palomino—a resident of Battery Park City—requested, pursuant to New York's Freedom of Information Law ("FOIL"), that the Authority provide him with a copy of the Settlement. Petition, Ex. A. On December 4, 2003, the Authority's FOIL Officer denied Mr. Palomino's request, explaining that:

"the Settlement Agreement contains a confidentiality provision prohibiting disclosure of the terms of the Agreement. As such [the Authority] is precluded from releasing same by virtue of the express terms of the Settlement Agreement.

"In addition, the Settlement Agreement is exempt from disclosure pursuant to the public interest exception to the Freedom of Information Law." Petition, Ex. C.

After Mr. Palomino pointed out that the denial was defective—it did not set forth any appeal procedure—the Authority's FOIL Officer wrote a December 17, 2003 letter stating that appeals should be addressed to the Vice President of Internal Audit of the Authority. *Id.*, Ex. D.

On December 22, 2003, Mr. Fabian appealed the denial of his FOIL request. Citing *Matter of The Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557 (1984), Mr. Fabian explained that the Authority had no right to agree to keep public records confidential and insulated from FOIL. Petition, Ex. D. He further stressed that New York law is well settled: common-law privileges do not exempt information

from FOIL. *Id.* (citing *Matter of Doolan v. Board of Cooperative Educational Servs.*, 48 N.Y.2d 341 [1979]).

On January 9, 2004, the Authority rejected Mr. Palomino's appeal. Citing a 1976 Supreme Court, Suffolk County case (authority that predates the Court of Appeals case law Mr. Palomino cited in his appeal), the Authority stated that its "decision to deny [the] request is based on the principal [sic] that common law public interest privilege was not abolished by the Freedom of Information Law." Petition, Ex. F.

Mr. Palomino commenced this Article 78 proceeding to compel production of the Settlement in accordance with FOIL. He urges that the Authority is subject to FOIL's provisions; therefore, it must provide him with a copy of the Settlement. Mr. Palomino argues that the Authority's basis for denying his request sinks to the level of frivolity because the Court of Appeals has definitively rejected use of a common-law public interest privilege to undermine FOIL. Petition, at ¶10. Because, according to Mr. Palomino, there is absolutely no legal merit to the Authority's position, he requests costs and sanctions pursuant to 22 N.Y.C.R.R. 130-1.

The Authority opposes the petition. Without citing any legal authority, it argues that the petition must be denied because Mr. Palomino failed to exhaust "all administrative remedies." *Id.*, at 6. The Authority maintains that Mr. Palomino is a Unit Owner and that his Board of Managers participated in the rent strike. As such, the Authority asserts that Mr. Palomino is an "indirect party" to the Settlement and has standing to make a demand of his Board of Managers to obtain a copy of the Settlement. Until he has done so, the Authority deems the petition to be "premature." Opposition, at ¶31.

The Authority also objects to disclosure of the Settlement, urging that its confidentiality clause serves a "substantial public interest, which [the Authority] feels constrained to honor." Opposition, at ¶22. The Authority argues that disclosing the Settlement would render it in breach of the agreement's confidentiality provisions, potentially subjecting it to liability. As "an indirect party who has realized the full benefit of the [Settlement]," the Authority asserts that Mr. Palomino "should also be bound to all its terms and conditions, including the confidentiality clause, which was negotiated by the Board of Managers representing him and the other Unit Owners." Opposition, at ¶34.

The Authority contends, again without citing a single case in support of its position, that Mr. Palomino's FOIL request must be denied as "disclosure of the [Settlement] is contrary to the public interest at large." Opposition, at 5.

It is amazing that the Authority feels "constrained to honor the Settlement," yet, it does not feel similarly constrained to follow FOIL, a state statute, or the decisions of this State's highest Court. The petition is granted, the Authority having demonstrated absolutely no legal basis for its denial.

Analysis

FOIL provides "that government is the public's business and the public should have access to the records of government." Public Officers Law §84. To promote open government and public accountability, it imposes "a broad duty" on government to make its records publicly available. See, *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996); see also, *Matter of Newsday v. Empire State Development Corp.*, 98 N.Y.2d 359, 362 (2002). Indeed, all government records are presumptively open for public inspection and copying unless an enumerated exemption contained in Public Officers Law §78(2) insulates them from disclosure. *Matter of Gould v. New York City Police Dep't*, supra, 89 N.Y.2d, at 274-275. To "ensure maximum access" the exemptions are narrowly construed and the governmental agency opposing disclosure bears the burden of demonstrating that material requested qualifies for exemption. *Id.*, at 275. The agency, moreover, must articulate a "particularized and specific" justification for exempting documents pursuant to Public Officers Law §87(2). *Id.*

In *Matter of Doolan v. Board of Cooperative Educational Services*, supra, 48 N.Y.2d 341, 346 (1979), the Court of Appeals made plain that the "public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common interest privilege *cannot* protect from disclosure materials which the law requires to be disclosed" (emphasis added). The Court, almost five years later, re-emphasized that common law privileges have no place in the face of FOIL. *Matter of The Washington Post Co. v. New York State Ins. Co.*, supra, 61 N.Y.2d, at 567.

Assurances of confidentiality made by a public agency to third parties, the Court further stated, cannot be honored when records requested are subject to FOIL and are not explicitly statutorily exempted from its public access mandate. *Id.*

The Authority does not dispute that the Settlement comes within FOIL's ambit. Its opposition to disclosing the agreement is primarily predicated on the confidentiality provision in the Settlement. The Authority, however, offers absolutely no legal support for its position that the Settlement's confidentiality clause trumps FOIL. Case law-from this State's highest authority-compels the exact opposite result. Clearly, the Authority, which did not even offer a statutory exemption to disclosure, has not met its burden of establishing that the Settlement is exempt from FOIL.

The Authority's argument that Mr. Palomino was required to make a demand for the Settlement from his Board of Managers before he could commence an article 78 proceeding to vindicate his rights is similarly unavailing. Mr. Palomino does not have any obligation to request the Settlement from a private entity before requesting it from a public agency duty bound to provide access to its records.

Perhaps the Authority will be spared liability for providing a copy of the Settlement to Mr. Palomino since he is an "indirect" party to the agreement. Regardless of any potential liability, however, the Authority must provide access to the Settlement. It certainly should have considered FOIL when it agreed to (or possibly even sought) the impermissible, unenforceable confidentiality provision.

Costs

There is absolutely no legal authority supporting non-disclosure of the Settlement. Confronted with compelling legal precedent, the Authority, nonetheless refused to comply with its statutory mandate without any acceptable legal justification. The Court finds that the Authority's position "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." See, 22 N.Y.C.R.R. 130-1.1(c)(1). Therefore, Mr. Palomino is awarded his costs for this proceeding

Accordingly, it is

ADJUDGED that the petition is granted and a copy of the Settlement must be provided to Mr. Palomino within 30 days of this Decision and Judgment; it is further

ADJUDGED that the Authority is to reimburse Mr. Palomino for the costs of this motion.

This constitutes the decision and judgment of the Court.