

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 21-01577

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF GEORGE D. MAZIARZ,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION,
RESPONDENT-RESPONDENT.

MICHAEL KUZMA, BUFFALO, FOR PETITIONER-APPELLANT.

CONNORS LLP, BUFFALO (REBECCA F. IZZO OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered March 25, 2021. The order, among other things, denied petitioner's request for attorney's fees and litigation costs.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this CPLR article 78 proceeding to compel respondent to produce records requested by petitioner under the Freedom of Information Law ([FOIL] Public Officers Law art 6), petitioner appeals from an order that, inter alia, denied his request for attorney's fees and litigation costs. We affirm.

As relevant here, a court may assess reasonable attorney's fees and other litigation costs against an agency in a FOIL proceeding where the petitioner "has substantially prevailed, and . . . the agency failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [4] [c] [i]; see *Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328, 1329 [4th Dept 2010]). Even if the party meets those requirements, the award of attorney's fees and litigation costs remains discretionary with the court (see *Matter of LTTR Home Care, LLC v City of Mount Vernon*, 179 AD3d 798, 800 [2d Dept 2020]). We agree with petitioner that respondent failed to respond to petitioner's FOIL appeal within the statutory time and that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) did not toll respondent's statutory time within which to respond (see Public Officers Law § 89 [4] [a]; *Matter of Oustatcher v Clark*, 198 AD3d 420, 421-422 [1st Dept 2021]). Nevertheless, even assuming, arguendo, that it could be said that petitioner substantially prevailed in this proceeding, we conclude that Supreme Court did not abuse its

discretion in denying petitioner's request for attorneys' fees and litigation costs inasmuch as respondent's delay was caused by the ongoing COVID-19 pandemic (*cf. Matter of Edmond v Suffolk County*, 197 AD3d 1297, 1299-1300 [2d Dept 2021]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court