

Matter of Islam v City of New York

2012 NY Slip Op 30427(U)

February 24, 2012

Supreme Court, New York County

Docket Number: 107749/2010

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 107749/2010
ISLAM, PARVIN A.
vs
CITY OF NEW YORK
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 12/12/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for renew/reargue

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

PAPERS NUMBERED
<u>1-7</u>
<u>8-11</u>
<u>12</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying interim decision and order.

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

FILED

FEB 27 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/24/12

JBL
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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In the Matter of the Claim of PARVIN A. ISLAM,

Petitioner,

Index No. 107749/10

-against-

Interim Decision and Order

The City of New York, New York City Department of
Education,

FILED

Respondents.

FEB 27 2012

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JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner moves for an order granting her leave to renew, or alternatively reargue, a prior application (Motion Sequence Number 003) that she brought by order to show cause, which was marked fully submitted on May 17, 2011, and which resulted in this court's decision and order dated May 20, 2011 (the "May 2011 Decision").

A procedural history of this matter is warranted. This is petitioner's fourth application related to her attempt to obtain leave of court to serve a late notice of claim on respondents The City of New York and New York City Department of Education (collectively the "City"). In her first application on or about June 11, 2010, petitioner filed a motion for an order granting her leave to serve a late notice of claim. Such applications must be brought by notice of petition. See e.g., In re Lennon v. Roosevelt Union Free School Dist., 6 A.D.3d 713, 714 (2d Dep't 2004). However, petitioner had never actually filed a petition to commence the special proceeding. Additionally, she had not shown that she had served the motion on the City in accordance with C.P.L.R. §§ 403(c) and 311. Accordingly, the court denied petitioner's first application but granted

her leave to renew her application upon the filing of a petition and demonstration of service that complied with C.P.L.R. §§ 403(c) and 311 (the "First Decision").

In her second application, by order to show cause filed on March 11, 2011, petitioner moved for leave to renew her first application; she included a petition with her order to show cause. The order to show cause required that it and the underlying papers be personally served upon the City. The court denied petitioner's second application because she failed to demonstrate that she served the City in accordance with the order to show cause.

In her third application, by order to show cause filed on May 5, 2011, petitioner again sought leave to renew her first application; again the order to show cause required personal service of it and the supporting papers upon the City; and again, on the return date, petitioner failed to provide proof of service that the City had been personally served with the papers. Moreover, petitioner still had never formally filed a petition as directed by the court in the First Decision. Accordingly, in the May 2011 Decision, the court denied petitioner's third application.

In the instant application, petitioner moves for leave to reargue and leave to renew her prior motion seeking leave to serve a late notice of claim against the City. Petitioner initially sets forth that she failed to formally file a petition because she believed that a petition served with an order to show cause (as in her second application) need not be first filed with the county clerk's office. She avers that the petition has since been filed in the county clerk's office. She asks the court to disregard her initial failure to file the petition and permit the late filing of the petition. Petitioner

also maintains that on May 10, 2011, she personally served the City with the May 2011 order to show cause, however she failed to present proof of personal service on the return date of May 17, 2011, because the attorney who appeared on the return date did not have an affidavit of service. She now annexes an affidavit of service indicating that service of her petition and the May 2011 order to show cause was personally served on the City on May 10, 2011.

In seeking leave to reargue Motion Sequence Number 003, petitioner argues that the court overlooked or misapprehended the facts or law because—after the motion was marked fully submitted on May 17, 2011, without petitioner having offered an affidavit of service attesting to personal service—the court failed to give petitioner an opportunity to present her affidavit of service confirming personal service before deciding the motion just three days later on May 20, 2011. In seeking leave to renew Motion Sequence Number 003, petitioner argues that her instant presentation of the affidavit of personal service of her third application should serve as a “new fact” not offered on the prior motion that would change the prior determination.

Based upon the affirmation of petitioner’s counsel as to the alleged service of the order to show cause from Motion Sequence Number 003, to the extent that the petitioner seeks renewal, said application is granted. Upon renewal, as the City has not claimed any prejudice, the court deems the verified petition dated March 3, 2011 (as contained in petitioner’s second application) filed with the court as of March 11, 2011, the date that petitioner filed the order to show cause for her second application, which is the earliest time that the petition could have been considered filed with the court. See C.P.L.R. § 2001. Further, the court notes that the City does not

deny being personally served with petitioner's order to show cause and underlying papers on Motion Sequence Number 003. Accordingly, the court deems the City as having been personally served with the petition on May 10, 2011, which is the earliest time that petitioner could be considered to have effected personal service of the petition on the City.

Given the instant determination, whereby the petition has, for the first time, been deemed filed with the court, and the City has been deemed to have been personally served with the petition, the City shall be permitted to interpose a formal response to the petition. A determination on the merits of the petition shall be held in abeyance pending the City's response. Accordingly, it is hereby

ORDERED that petitioner's motion for leave to renew her petition to file a late notice of claim is granted to the extent set forth above; and it is further

ORDERED that a determination on the merits of the petition shall be held in abeyance pending a formal response to the petition from The City of New York and New York City Department of Education; and it is further

ORDERED that The City of New York and New York City Department of Education shall have twenty (20) days from the date of service of a copy of this order with notice of entry or until April 13, 2012, whichever date is earlier, to serve and file its answers and objections in point of law or otherwise move with respect to the petition; and it is further

ORDERED that all papers shall be returnable to Part 6, Courtroom 345 at 60 Centre Street, New York, New York; and it is further

ORDERED that oral argument on the petition is scheduled for Tuesday, April 24, 2012, at 9:30 a.m.

Dated: *Feb. 24*, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

FILED
FEB 27 2012
NEW YORK
COUNTY CLERK'S OFFICE