

**Aviles v New York State Off. of Children & Family
Servs.**

2012 NY Slip Op 32670(U)

October 23, 2012

Sup Ct, NY County

Docket Number: 102082/12

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

ALICE AVILES, INDEX NO. 102082/12
Petitioner, MOTION DATE 10-03-2012
- v - MOTION SEQ. NO. 002
NEW YORK STATE OFFICE OF CHILDREN AND MOTION CAL. NO. _____
FAMILY SERVICES, and NEW YORK CITY
ADMINISTRATION FOR CHILDREN'S SERVICES,
Respondent(s).

The following papers, numbered 1 to 10 were read on this motion to/ for Reargue:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>3 - 7</u>
Replying Affidavits _____	<u>8 - 10</u>

UNFILED JUDGMENT

Cross-Motion: Yes No
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that Petitioner's Motion and Respondent's Cross-Motion are denied.

In this Motion to Reargue, Petitioner, Alice Aviles, seeks an order pursuant to CPLR Section 2221, granting reargument of a motion identified by Petitioner as being returnable on June 6, 2012 that sought an extension of time to serve a verified petition upon the State Respondent, New York State Office of Children and Family Services. Petitioner is also seeking an order, pursuant to CPLR Section 306-b, granting Petitioner an extension of time to serve a verified petition on State Respondent before the proceeding is fully transferred for a determination by the Appellate Division, First Department pursuant to CPLR Section 7804(g) as was ordered in this Courts's August 9, 2012 decision in the underlying Article 78 petition.

State Respondent cross-moves for an order, pursuant to CPLR Section 7804(f) and/or 2221(f), granting State Respondent leave to file a verified answer, administrative record, and affirmations in the underlying Article 78 Petition and/or renew the Petition.

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

Petitioner commenced the underlying Article 78 petition on March 2, 2012 challenging determinations by Respondent(s) to deny Petitioner foster care benefits at a special rate on behalf of a child in the care of Petitioner.

According to Petitioner, on June 5, 2012, Petitioner filed a Notice Of Cross-Motion, seeking an order pursuant to CPLR 306-b, for an extension of time to serve a verified petition.

On June 6, 2012, State Respondent submitted a Cross-Motion to dismiss the Article 78 petition on the basis that the Petition was time-barred by the four month statute of limitations applicable to Article 78 proceedings and that the Petition was jurisdictionally defective because Petitioner served the New York State Office of the Attorney General, but failed to serve State Respondent.

On July 11, 2012, Oral Arguments were heard by this Court on the Cross-Motion to Dismiss.

On August 9, 2012 this Court denied the Cross-Motion to Dismiss, finding that the Petition had been commenced within the four month statute of limitations applicable to Article 78 petitions. This Court ordered that because the proceeding involved an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, on the entire record, was supported by substantial evidence, that the application by Petitioner was to be transferred to the Appellate Division, First Department.

Petitioner served a copy of the Order with Notice of Entry on both Respondents on August 21, 2012. On or about August 21, 2012 Petitioner subpoenaed the New York County Clerk to perfect Petitioner's transfer of the case to the Appellate Division, First Department. Petitioner's subpoena commanded the Clerk of the Supreme Court to transfer all records of the underlying Article 78 Petition to the Appellate Division no later than August 24, 2012.

On or about September 11, 2012, the Petitioner filed the subject Order to Show Cause requesting reargument of the Cross-Motion Petitioner identifies as having been returnable June 6, 2012 or an extension of time to serve a verified complaint.

On or about September 27, 2012, State Respondent filed papers opposing Petitioner's Motion to Reargue. At that same time, State Respondent filed a cross-motion to restore the underlying Article 78 petition to this Court's calendar for the purpose of filing a verified answer and filed a cross motion seeking to grant renewal of State Respondent's Cross-Motion

to Dismiss the underlying Petition because the Court's decision, "was incorrect and transferred the petition without permitting State [R]espondent, pursuant to CPLR 7804(f), to file its answer." State Respondent's use of the words "reargue" and "renew" creates confusion as to what State Respondent is actually seeking.

The first motion presented to this Court is Petitioner's request, pursuant to CPLR Section 2221, for reargument of the Cross-Motion identified by Petitioner as being returnable June 6, 2012. According to Petitioner, this Cross-Motion sought an extension of time, pursuant to CPLR Section 306-b, to serve a verified petition on State Respondent. Extensions of time to serve a verified petition, pursuant to CPLR Section 306-b can be granted by courts under two bases, excusable neglect or in the interest of justice. See *Sutter v. Reyes*, 60 A.D. 3d 448, 874 N.Y.S. 2d 120, (N.Y.A.D. 1st Dept., 2009).

However, before the Court can consider an extension, it must address more fundamental defects in Petitioner's Cross-Motion in the underlying Petition and Motion in the instant case. According to Petitioner, the Cross-Motion was served June 5, 2012. At the time Petitioner alleges to have made her Cross-Motion, State Respondent had not yet made its Cross-Motion to Dismiss. This means that Petitioner was the only moving party in the case at the time she made her Cross-Motion. "A Cross-Motion is an improper vehicle for seeking affirmative relief from a non-moving party." *Mango v. Long Is. Jewish - Hillside Med. Ctr.*, 123 A.D. 2d 843, 507 N.Y.S. 2d 456 (N.Y.A.D. 2nd Dept., 1986). While it is true that courts have overlooked this technical defect and treated such cross-motions as motions in cases where there is no prejudice and the non-moving party had an opportunity to be heard on the issue, See *Daramboukas v. Samlidis*, 84 A.D. 3d 719, 922 N.Y.S. 2d 207, (N.Y.A.D. 2nd Dept. 2011), this Court need not do so because of an even more fundamental defect in Petitioner's Cross-Motion and consequently its Motion to reargue.

The Cross-Motion that Petitioner alleges was submitted June 5, 2012, was never before this Court for consideration. Consequently, this Court never issued a decision on the Cross-Motion. This means that there is no decision to reargue. CPLR Section 2221 makes it clear from its title that it pertains to "Motion[s] affecting prior orders." There is no prior order to affect. CPLR Section 2221 (d)(2) states that a motion to reargue, "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." This clearly can not apply to the instant case where the Court never determined a prior motion. Upon investigation by this Court, it is not clear that Petitioner ever submitted its Cross-Motion. The copy of the Cross-Motion Petitioner included in its papers appear to be stamped by the New York County Clerk's Office, which

suggests that Petitioner began the submission process and paid the administrative fees associated with filing a motion. However, it is not clear that the Cross-Motion process went any further. Whatever may have happened, it is clear to this Court that Petitioner's Cross-Motion was never before this Court and this Court certainly never issued a decision on such a Cross-Motion. For this reason, Petitioner's Motion to Reargue must be denied.

Setting aside, for a moment, Petitioner's request pursuant to CPLR Section 306-b for an extension of time to serve a verified petition in the underlying Article 78 Petition, the Court turns instead to State Respondent's Cross-Motion seeking, pursuant to CPLR Section 7804(f), to restore the underlying Article 78 Petition to this Court's calendar so that State Respondent may submit a verified answer, the administrative record, and affirmations. State Respondent is correct that CPLR Section 7804(f) states that if a motion to dismiss is denied, the court shall permit the respondent to serve an answer. However, a respondent's time to serve an answer is limited to five days after the service of the order with notice of entry. According to Petitioner, Service of the Order with Notice of Entry was made on August 21, 2012. State Respondent made its Cross-Motion and served a verified answer and other documents on or about September 24, 2012. This is well beyond the five days allowable. Therefore, State Respondent's Motion pursuant to CPLR Section 7804(f) is denied.

Next, the Court shall address State Respondent's Motion, pursuant to CPLR Section 2221. There is some confusion as to what the State Respondent is seeking. State Respondent's two part Cross-Motion consists of only one sentence. State Respondent's papers are labeled, "State Respondent's Cross-Motion to Restore to Calendar for Submission of Verified Answer and Administrative Record and/or to *Reargue*" (emphasis added). Conversely, in the text of the document, State Respondent requests an order "to *renew* this proceeding on the grounds that [this Court's denial of State Respondent's Cross-Motion to Dismiss] was incorrect and [the underlying Petition was] transferred without permitting State Respondent [time to file its verified answer pursuant to CPLR Section 7804(f)]" (emphasis added). In the same sentence, State Respondent later asks the Court, "upon...granting reargument" to vacate it prior decision or dismiss the Petition outright. Given this confusing language, it is not clear to this Court what State Respondent is seeking.

CPLR Section 2221 is very clear that any motion made pursuant to it must specifically identify whether it is a motion to renew or a motion to reargue. However, given the confusing history of this case and the fact that the case has been transferred to the Appellate Division, First Department, this Court is inclined to speak to both as neither a motion to renew nor a

motion to reargue changes how this Court will dispense with State Respondent's Cross-Motion.

A motion to renew, pursuant to CPLR Section 2221, "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." There has been no change in the law brought to this Court's attention that would change the denial of State Petitioner's Cross-Motion to Dismiss. Nor has State Petitioner offered any new facts that would change this Court's denial of the Cross-Motion. Therefore, there is no basis for this Court to grant a motion to renew.

A motion to reargue, pursuant to CPLR Section 2221, "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. In this Court's August 9, 2012 decision, the underlying Petition was transferred to the Appellate Division, First Department, pursuant to CPLR Section 7804(g). CPLR Section 7804(g) states that, "the court shall first dispose of such other objections as could terminate the proceeding...If the determination of the other objections does not terminate the proceeding, the court shall [transfer the case to the appellate division]...when the proceeding comes before it, the appellate division shall dispose of all issues in the proceeding." Following this Court's determination, the proceeding was not terminated. The case was then transferred to the Appellate Division, First Department, pursuant to the requirements of CPLR Section 7804(g).

State Respondent seems to argue that this Court overlooked or misapprehended the matter of law that provided State Respondent the right to serve an answer. Nothing in this Court's August 9, 2012 Order precluded State Respondent from filing an answer following the denial of the Cross-Motion to Dismiss. As noted above, State Respondent could have taken advantage of its rights to serve an answer pursuant to CPLR 7804(f), but failed to do so within the time provided. For these reasons, whatever motion State Respondent intended pursuant to CPLR Section 2221 must be denied by this Court.

Lastly, the Court turns back to Petitioner's Motion, pursuant to CPLR Section 306-b, seeking an extension of time to file a verified petition in the underlying Article 78 Petition. This Court cannot grant Petitioner's Motion because this Court is not the proper forum for such a motion. Pursuant to this Court's August 9, 2012 decision, this case has been transferred to the Appellate Division, First Department, which according to CPLR Section 7804(g), is empowered to "dispose of all issues in the proceeding."

