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

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

CITIZENS DEFENDING LIBRARIES, EDMUND MORRIS ANNALYN SWAN, STANLEY N. KATZ, THOMAS BENDER, DAVID NASAW, JOAN W. SCOTT, CYNTHIA M. PYLE, CHRISTABEL GOUGH, and BLANCHE WEISEN COOK,

Plaintiffs,

- against -

DR. ANTHONY W. MARX, NEIL L. RUDENSTINE, BOARD OF TRUSTEES OF THE NEW YORK PUBLIC LIBRARY, NEW YORK PUBLIC LIBRARY, ASTOR, LENOX, AND TILDEN FOUNDATIONS, MICHAEL R. BLOOMBERG, VERONICA WHITE, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, CITY OF NEW YORK, ROBERT SILMAN ASSOCIATES, P.C., and JOSEPH TORTORELLA,

Defendants.

- and -

STATE OF NEW YORK, NEW YORK STATE OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION (NEW YORK STATE HISTORIC PRESERVATION OFFICE),

Nominal Defendants.

INDEX NO. 652427/13

MOTION SEQ. NO. 002

The following papers were read on this motion by plaintiffs for renewal and reargument.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Before the Court is a motion by plaintiffs for leave to renew defendants' cross-motions to dismiss the complaint, resulting in the Decision and Order dated May 30, 2014, and entered June 3, 2014 (Prior Decision), dismissing the complaint, and, upon renewal, vacating the Prior Decision, upon the grounds that changed circumstances rendered this action moot, and the court was therefore without subject matter jurisdiction to issue the Prior Decision; or in the

alternative, granting plaintiffs leave to reargue the cross-motions, based upon matters of fact and law overlooked or misapprehended by the court in determining the cross motions, and, upon reargument, reinstating the complaint at least insofar as it contains allegations sufficient to state a private cause of action for public nuisance.

For the reasons discussed below, the branch of the motion seeking renewal is denied. The branch of the motion seeking reargument is granted and, upon reargument, the Court adheres to its original decision.

STANDARDS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *see Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; *see also Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). "A motion for reargument . . . is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or]. . . to provide a party an opportunity to advance arguments different from those tendered on the original application" (*id.* at 567-568; *see also Mariani v Dyer*, 193 AD2d 456 [1st Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

A renewal motion "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 . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2] and [3]). "Renewal is granted

sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny,* 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]). Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], citing *Matter of Weinberg*, 132 AD2d at 210, *app dismissed*, 15 NY3d 820 [2010], *reconsideration denied*, 16 NY3d 726 [2011]).

DISCUSSION

I. Renewal

Plaintiffs brought this action to prevent the demolition of what they characterize as an irreplaceable portion of the main branch of the New York Public Library (NYPL), located in Manhattan between 40th and 42nd Streets along Fifth Avenue (Central Library). They sought to challenge the "Central Library Plan" (CLP), which entails the proposed destruction of the steel book stacks at the Central Library, as well as the displacement of millions of books to remote storage facilities.

In seeking renewal, Michael S. Hiller Esq., managing director of Hiller, PC, attorneys for plaintiffs, states as follows: On May 7, 2014, his firm became aware through media reports that NYPL, Astor, Lenox and Tilden Foundations planned to abandon the CLP (affirmation of Michael S. Hiller, Esq. [Hiller] dated July 3, 2014 [Hiller affirmation], ¶ 3). Thereafter, plaintiffs and the Board of Trustees of the NYPL, Dr. Anthony W. Marx, and Neil L. Rudenstine (collectively, Library Defendants) opened a dialogue about the briefing schedule in the related Article 78 proceeding; the Library Defendants sought an adjournment, ostensibly because the issues underlying the Article 78 proceeding had been, or would soon be, rendered moot by the abandonment of the CLP. Hiller contends that Mr. Richard G. Leland, Esq., counsel for the

Library Defendants, informed Mr. Hiller that he would contact this Court's chambers about the changed circumstances regarding the CLP, and to ascertain the appropriate procedure to adjust the briefing schedule in the related Article 78 proceeding (*id.*, ¶ 4).

On May 16, 2014, Mr. Leland informed Mr. Hiller that this Court's chambers instructed the parties to submit a letter explaining the reasons underlying the Library Defendants' request for an adjournment. Mr. Leland attached a draft of his proposed letter and invited comments (*id.*, ¶ 5). Mr. Hiller states further that, upon review, he realized that it might not be clear to the court that the changed circumstances would result in a complete, rather than partial, resolution of this action and the related Article 78 proceeding. Accordingly, Mr. Hiller prepared a redlined version of the letter making it more clear that the likely outcome was a complete resolution of the action and related Article 78 proceeding. Later that day, Mr. Leland accepted the changes to the letter, and submitted that letter to the court (*id.*, ¶ 6).

Unbeknownst to plaintiffs and the members of his firm, however, NYPL was not merely considering proposed changes to the CLP. Subsequent reports confirmed that NYPL had already decided to make those changes. On or before May 7, 2014, NYPL abandoned its plan to destroy the "Historic Stacks" and remotely store the Central Library's books, in favor of a new superseding plan to preserve the Historic Stacks and return the books to the Central Library (*id.*, ¶ 7). Nonetheless, even after submission to the court of the letter on May 16, 2014, plaintiffs' counsel awaited information from Mr. Leland regarding whether NYPL had actually abandoned the CLP. While they awaited Mr. Leland's report, this Court issued the Prior Decision (*id.*, ¶ 8).

It should be noted that, in his reply affirmation, Mr. Hiller challenges the accuracy of some of the assertions put forth by Mr. Leland in his own affirmation submitted in opposition to the motion. The Court need not resolve these discrepancies because, for purposes of this motion, the Court assumes the accuracy of the portrayal set forth by Mr. Hiller as to the relevant

facts.

Plaintiffs argue that when the court rendered the Prior Decision, the action had been rendered moot because: (1) NYPL conceded during a hearing held on December 17, 2013 that no structural work at the Central Library would be conducted absent approval from the State Defendants; and (2) NYPL decided, as widely reported on May 7, 2014, to abandon its plan to destroy the Historic Stacks and maintain the "Rare Research Materials" off site, in favor of a new, superseding plan to preserve the Historic Stacks and maintain the Rare Research Materials on site.

The courts are not to issue judicial decisions that "can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811, *cert denied* 540 US 1017 [2003]). An action is not moot, however, where the adjudication of the merits will result in immediate and practical consequences to the parties (*see Coleman v Daines*, 19 NY3d at 1090). Such is the case here.

That NYPL may have changed its intention regarding the CLP did not render the action moot. Plaintiffs had not discontinued the action, defendants had not withdrawn their motions to dismiss, and it would not have been appropriate for the court to have drawn conclusions about the action from the "widely-reported" news articles. The cases cited by plaintiffs, discussed below, demonstrate why the so-called changed circumstances had not rendered the action moot when the court rendered its decision.

Matter of Park E. Corp. v Whalen (43 NY2d 735 [1977]), involved consolidated article 78 proceedings pertaining to the revocation by the Commissioner of Health of the State of New York of petitioners' certificates for operating a hospital. The Court of Appeals determined that

the matter was moot, because the hospitals involved had been closed, the mortgages on their premises had been foreclosed and the premises sold, and the operating corporations were in bankruptcy (*id.* at 736).

In *Matter of MHS Venture Mgt. Corp. v Utilisave LLC* (63 AD3d 840 [2009]), the Court held that a "claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction" (*id.* at 841).

In *Matter of Cerniglia v Ambach* (145 AD2d 893 [3d Dept 1988], *appeal denied* 74 NY2d 603 [1989]), the district, its Board of Education, and individual taxpayers sought a determination that 8 NYCRR 175.34(a)(6) was illegal in requiring use of "five-year average full value statistics" to determine formula aid eligibility under Education Law § 3602(31). They sought a preliminary injunction directing respondents to pay the district its full difference funding amount for the 1986-1987 school year. Meanwhile, the Legislature enacted, and the Governor signed, Laws of 1987, which ordered the district to issue a supplemental tax warrant to collect $367,500, the amount by which the district was deemed short of qualifying for full difference funding under the Commissioner's regulations. The Court held that the "likelihood of any dispute over future application of the challenged regulation has been obviated by the passage of Laws of 1987 (ch 616)" (*id.* at 230).

In *Square Parking Sys. v Metropolitan Transp. Auth.* (92 AD2d 782 [1st Dept], *lv dismissed* 60 NY2d 586 [1983]), plaintiff brought an action to require the Metropolitan Transportation Authority to accept its bid as the winning bid. Plaintiff sought, among other things, a declaration that any lease executed pursuant to the second solicitation of bids be deemed void and unenforceable. The Court held that the passage of time had made this question academic (*id.* at 785).

In *Campbell v Blum* (91 AD2d 937 [1st Dept 1983]), plaintiffs sought a declaratory judgment that the proprietors of an adult home may not involuntarily evict a resident, except

upon service of a 30-day written notice containing the alleged cause for eviction and commencement of a special proceeding in accordance with section 461-h of the Social Services Law. The Court held that legislation enacted subsequent to the commencement of the action, requiring due process prior to eviction, rendered the action moot (*id.*).

In four of these actions, the legal issue was mooted because of a significant change over which the parties had no control, and that went beyond the mere intention of the parties, such as: (1) the closure of a hospital, foreclosure of a mortgage, the sale of the premises, and the bankruptcy of the operating corporations (*Matter of Park E. Corp. v Whalen*); (2) subsequently enacted legislation (*Matter of Cerniglia v Ambach*); (3) passage of time as to the solicitation of bids for a government contract (*Square Parking Sys. v Metropolitan Transp. Auth.*); and (4) subsequently enacted legislation (*Campbell v Blum*). In *Matter of MHS Venture Mgt. Corp. v Utilisave, LLC* (63 AD3d 840), the claim for dissolution of a foreign limited liability company was not within the court's jurisdiction. Here, in contrast, the alleged changed circumstances were not of a conclusive nature, but were akin to settlement negotiations; parties changing intentions based upon pending litigation. As such, the matter was not moot.

Moreover, an exception to the mootness doctrine may be applicable where the issue to be decided, though moot, is likely to recur, either between the parties or other members of the public (*Coleman v Daines*, 19 NY3d at 1090). It is apparent from the parties' papers that there is a strong probability that the issues are likely to recur (*cf.* the affirmations of Michael Hiller and Richard Leland).

Plaintiffs also cite as a changed circumstance rendering the action moot that NYPL conceded during the hearing held on December 17, 2013, that no structural work at the Central Library would be conducted absent approval from the State Defendants. However, plaintiffs themselves state that they:

> "were obviously aware of the NYPL's concession with respect to the 1978 Agreement and the acknowledged obligation to obtain the State's consent. To the Coalition, this was a victory, fully obtained at oral argument. Nonetheless, the Coalition remained concerned that the State might ultimately consent to the demolition of the Historic Stacks and/or the Rare Research materials might never be returned to the Central Library" (plaintiffs' memorandum in support at 9).

Thus, they did not deem that the so-called concession at the hearing rendered the action moot. Accordingly, the motion for renewal is denied, because the purported new evidence "would not warrant a different outcome" (*Joplin v City of New York*, 116 AD3d 443, 443 [1st Dept 2014]).

II. Reargument

In the Prior Decision, the Court rejected plaintiffs' argument that they had standing to bring a claim for public nuisance, finding that the complaint did not contain a cause of action for nuisance. The complaint contained four causes of action for breach of contract, breach of trust, breach of fiduciary duties, and for negligence. Although not identified as such in the complaint, the allegations of the complaint can be construed to also allege public nuisance, as argued by plaintiffs in their papers submitted in opposition to the motions to dismiss (*see Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Thus, the Court exercises its discretion, and deems the granting of reargument warranted (*Ricketts v Cuffe Auto Sales, Inc.*, 106 AD3d 635, 635 [1st Dept 2013]).

As asserted by plaintiffs, the complaint alleges that NYPL had removed the Central Library's millions of volumes of research materials to remote off-site storage facilities, thereby interfering with the rights of the public to the use of a public place (i.e., the Central Library). This falls within the legal definition of a public nuisance, which consists of,

> "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (*Copart Indus. v Consolidated Edison Co. of NY*, 41 NY2d 564, 568

[citations omitted], *rearg denied* 42 NY2d 1102 [1997]).

However, a "public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 292, *rearg denied* 96 NY2d 938 [2001]). "This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public" (*id.*). "[A]lthough an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance" (*Copart Indus. v Consolidated Edison Co. of NY*, 41 NY2d at 568).

The assertion that the harm upon plaintiffs is distinct from the harm suffered by the public in general is unpersuasive. Plaintiffs contend that each of them has made regular use of the research materials previously housed in the Historic Stacks, and that plaintiffs brought this action based upon their regular, long-time use of the Central Library for their research, and upon the private, special, and peculiar harm visited upon them by the NYPL's removal of the Rare Research Materials necessary for their work.

Notwithstanding plaintiffs' assertions about the importance of the use that they make of the CPL research facilities, they do not allege to have any greater rights to the use of the materials than the general public has. Even if the Court were to carve out of the general public those who use the research facilities at the NYPL, the number would be too large so as to permit standing (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d at 292 ["the Madison Avenue and Times Square closures caused the same sort of injury to the communities that live and work in those extraordinarily populous areas"]; *see also Wall St. Garage Parking Corp. v New York Stock Exch., Inc.*, 10 AD3d 223, 228 [1st Dept 2004] ["Any impediment to plaintiff's right to operate its garage will not support recovery of damages on a public nuisance theory where the same circumstances have impeded the similar rights of a large number of

other businesses located in the area"]).

CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiffs is granted to the extent that the Court grants reargument as to the claim of public nuisance, and, upon reargument, the Court adheres to its Prior Decision and Order dated May 30, 2014, but is otherwise denied; and it is further,

ORDERED that counsel for the NYPL Defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiffs and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4/20/15

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**