STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
John Platten, 90-C-0145,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NORMAN BEZIO, as Director of Special Housing
and Inmate Disciplinary Programs,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2359 Index No. 621-11

Appearances: John Platten,
DIN # 90-C-0145
Petitioner, Pro se
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

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Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Oneida Correctional Facility is serving an indeterminate sentence with a maximum term of life. He was found guilty of violating prison rules after

a Tier III disciplinary hearing held on April 29, 2009. The determination was reviewed and administratively affirmed on June 2, 2009. The petitioner thereafter commenced a CPLR Article 78 proceeding, which was transferred to the Third Department Appellate Division. The Appellate Division, on May 27, 2010, issued a decision modifying the disciplinary determination by dismissing one of the charges, and remitting the matter back to the Department of Correctional Services for an administrative redetermination of the penalty with respect to the remaining violations (see Matter of Platten v Bezio, 73 AD3d 1419 [3d Dept., 2010]). Upon remittal, in a decision dated June 15, 2010, the respondent modified the penalty, as relevant here, by reducing the recommended good time withheld from twelve months to nine months.

In letters dated September 13, 2010 and October 14, 2010 addressed to the Chairman of the Time Allowance Committee, the petitioner requested that he be permitted to appear before the Time Allowance Committee to determine the amount of good time, if any, to be restored. This request was denied, apparently on October 15, 2010. By letter dated October 16, 2010 the petitioner attempted to appeal the decision of the Time Allowance Committee. By letter dated October 25, 2010, Lucien J. Leclaire, Jr., Deputy Commissioner of the Department of Correctional Services, indicated that petitioner's good time is not subject to review by the facility Time Allowance Committee since he does not have a maximum expiration date. He further indicated that the petitioner may be eligible for a Limited Credit Time Allowance (see Correction Law § 803-b), but only after the expiration of five years without any further recommended loss of good time. On November 2, 2010 and December 28, 2010, in letters addressed to the respondent, the petitioner requested reconsideration.

Respondent made a motion to dismiss the petition on grounds that the applicable statute of limitations had expired before the proceeding was commenced. In a decision dated June 22, 2011 the Court denied the motion, finding that the respondent never provided evidence to establish when the cause of action accrued, and therefore did not establish when the four month statute of limitation (see CPLR 217) commenced to run.

The respondent has made a second motion to dismiss on statute of limitation grounds. This time, the respondent has submitted an affidavit which demonstrates that the June 15, 2010 determination was received by the petitioner on June 21, 2010. The petitioner opposes the motion, arguing that the respondent failed to timely move for leave to reargue, in violation of CPLR 2221 (d); and that as a motion to renew, the additional information was readily available at the time that the prior motion was made, and the respondent has failed to present reasonable justification for the failure to present such facts on the prior motion (see CPLR 2221 [e]).

A motion to reargue, directed to the sound discretion of the Court, must demonstrate that the Court overlooked, misapplied or misapprehended the relevant facts or law (see, CPLR 2221 [d] [2]; Loris v S & W Realty Corp., 16 AD3d 729, 730 [3rd Dept., 2005]; Matter of Smith v Town of Plattekill, 274 AD2d 900, 901-902 [3d Dept., 2000]; Spa Realty Associates v. Springs Associates, 213 AD2d 781, 783 [3rd Dept., 1995]; Grassel v Albany Medical Center, 223 AD2d 803, 803 [3rd Dept., 1996]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (see, Foley v Roche 68 AD2d 558, 567 [1st Dept., 1979]), lv denied 56 NY2d 507).

A motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but was unknown to the party seeking renewal (see CPLR 2221 [e] [2]; M & R Ginsburg, LLC v Orange Canyon Development Company, LLC, 84 AD3d 1470, 1472 [3d Dept., 2011]; 2 North Street Corporation v Getty Saugerties Corporation, 68 AD3d 1392,1396-1397 [3rd Dept., 2009]; First Union Bank v Williams, 45 AD3d 1029, 1030-1031 [3rd Dept., 2007]; Spa Realty Associates v. Springs Associates, supra, at p. 783; Grassel v. Albany Medical Center, supra, at p. 804), or upon a demonstration that there has been a change in the law that would change the prior determination (see, CPLR 2221 [e] [2]). It must also demonstrate a reasonable justification for not placing such new facts before the Court on the original application (see, CPLR 2221 [e] [3]; Matter of Mouawad, 61 AD3d 1169 [3rd Dept., 2009]; First Union Bank v Williams, supra; see also, Spa Realty Associates v. Springs Associates, supra, at p. 783-784; Grassel v. Albany Medical Center, supra, at p. 804; Barnes v State, 159 AD2d 753, 753, 754 [3rd Dept., 1990]). "Renewal is not a means by which to remedy the failure to present evidence which, with due diligence, could have been produced at the time of the original motion" (Kahn v Levy, 52 AD3d 928, 930 [3rd Dept.,2008], citing Tibbits v Verizon N.Y., Inc., 40 AD3d 1300, at 1303, Johnson v Title N., Inc., 31 AD3d at 1072, Matter of Cooke Ctr. for Learning & Dev v Mills, 19 AD3d at 837, and N.A.S. Partnership v Kligerman, 271 AD2d 922, 923 [2000]).

The respondent's motion is predicated upon his contention that the petitioner seeks to review the June 15, 2010 administrative determination which modified the disciplinary penalty by reducing the recommended loss of good time from twelve months to nine months. The petitioner, on the other hand, denies that he seeks to review the June 15, 2010

determination, (although he still maintains that he seeks to have the recommended loss of good time removed from his record).

Addressing the respondent's motion, the Court finds that it must be denied. First, as a motion to reargue, the respondent has not demonstrated how or in what respect the Court overlooked, misapplied or misapprehended the relevant facts or law in its prior decision. Second, as a motion to renew, the respondent failed to demonstrate reasonable justification for respondent's failure to submit the new evidence on the prior motion.

One further point should be made. In the Court's view, the respondent may still properly assert an affirmative defense in its answer predicated upon the statute of limitations (see Zito v County of Suffolk, 81 AD3d 611 [2d Dept., 2011]). In Zito, the County of Suffolk made a motion to dismiss pursuant to CPLR 3211 (a) (1), (5) and (7) based on the statute of limitations and the statute of frauds. The lower court denied the motion. The lower court also denied the County's subsequent motion to amend its answer to assert the same affirmative defenses. The Appellate Division reversed, finding that the order denying the County's CPLR 3211 dismissal motion did not determine, as a matter of law, that the affirmative defenses had no merit. The Appellate Division granted the County's motion to amend its answer to assert the same affirmative defenses.

The Court concludes that the motion must be denied, subject to respondent's right to assert the statute of limitations defense in its answer.

Accordingly, it is

ORDERED, that respondent's motion to dismiss be and hereby is denied, subject to

respondent's right to raise the statute of limitations defense in its answer; and it is further

ORDERED, that respondent be and hereby is directed to serve and file an answer within thirty (30) days of the date hereof; and it is further

ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding, after being re-noticed, shall be referred to the undersigned for disposition.

This shall constitute the decision and order of the Court. The Court will retain the papers until final disposition of the proceeding.

ENTER

Dated: December 1, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 3, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Notice of Motion dated July 21, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply Dated July 26, 2011