| **Matter of Povoski v Fischer** |
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| 2012 NY Slip Op 32717(U) |
| September 6, 2012 |
| Supreme Court, Albany County |
| Docket Number: 3599-11 |
| Judge: George B. Ceresia Jr |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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In The Matter of FRANK J. POVOSKI, JR.,

Petitioner,

-against-

BRIAN FISCHER,

Respondent,

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

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Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2819 Index No. 3599-11

Appearances: Frank J. Povoski, Jr.
Inmate No. 05-B-2531
Petitioner, Pro Se
Great Meadow Correctional Facility
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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Great Meadow Correctional Facility, commenced a CPLR Article 78 proceeding to review a disciplinary determination dated November 25, 2010 in which he was found guilty of violating prison rules. Specifically, he was found guilty of violating Rule 108.13, possession of escape paraphernalia. Because the

respondent did not serve an answer to the amended order to show cause and petition, the Court, pursuant to CPLR 7804 (e), on November 16, 2011, directed that the respondent either serve and file an answer or make an appropriate motion, within twenty days. The respondent complied with the order by making a motion to dismiss the petition, which also requested that the Court remand the matter to the respondent to conduct a *de novo* administrative hearing. In support of the motion, the respondent submitted the affidavit of Albert Prack, Director of Special Housing and Inmate Disciplinary Programs of the New York State Department of Corrections and Community Supervision ("DOCCS"). In his affidavit, Director Prack indicated that "due to a technical error with the hearing tape of December 6, 2010, respondent requests an Order from the Court directing that petitioner be given a re-hearing." The Court reviewed the petition, and noted that a major argument advanced by the petitioner was that the determination must be annulled by reason that large portions of the hearing tape were inaudible. The Court also reviewed a transcript which the petitioner had caused to be prepared from his audio tape of the hearing. The petitioner's transcriber documented numerous and lengthy gaps in the hearing tape, which rendered much of the transcript unintelligible. Based upon the foregoing, the Court found that the condition of the transcript was such that it, indeed, precluded meaningful review of the disciplinary determination. By order dated April 4, 2012, the Court granted respondent's motion to dismiss the petition, but directed that the matter be remitted to the respondent for a *de novo* hearing.

The petitioner has now made a motion to reargue and renew. The petitioner argues that the motion to dismiss was improperly granted by reason that it was not based upon an

objection in point of law, and that several of the issues which he raised could have been reviewed, despite the flawed audio tape. With respect to the motion to renew, the petitioner maintains that, as of the date of the motion, the respondent failed to conduct the *de novo* hearing. In a separate motion, the petitioner seeks to hold the respondent in contempt of court by reason of his failure to obey the April 4, 2012 order of the Court.

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]).

Respondent's motion to dismiss was predicated upon the uncontroverted evidence (as documented by the petitioner, and independently confirmed through the Court's inspection of the transcript), that the condition of the hearing audiotape precluded meaningful review. This factor, when combined with respondent's administrative decision to expunge the disciplinary determination and conduct a *de novo* hearing, was tantamount to an objection in point of law that the matter (which was essentially resolved in petitioner's favor) had been rendered non-justiciable and/or moot. The Court finds that the petitioner failed to demonstrate that the Court overlooked, misapplied or misapprehended the relevant facts or law.

With respect to petitioner's motion to renew, petitioner indicates that since the date of the Court's decision, the respondent has failed to hold the *de novo* hearing. A motion to renew, however, must "be based upon newly discovered material facts or evidence which existed at the time the prior motion was made, but were unknown to the party * * * seeking

renewal * * *" (Carota v Wu, 284 AD2d 614, 617 [3d Dept., 2001], quotation and citations omitted). In this instance, petitioner's motion to renew is not based upon undiscovered evidence which existed at the time respondent made his motion to dismiss, but rather upon subsequent events. As such, the motion to renew must be denied.

Turning to petitioner's motion to hold the respondent in contempt of court, in order to support a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and that the party alleged to have violated that order had actual knowledge of its terms (see Matter of McCormick v Axelrod, 59 NY2d 574, 583 [1983], amended 60 NY2d 652; Matter of Frandsen v Frandsen, 190 AD2d 975, 976 [3d Dept., 1993]; Graham v Graham, 152 AD2d 653, 654 [2d Dept., 1989]). Contempt should not be granted unless the order violated is clear and explicit and unless the act complained of is clearly proscribed (see, Kuenen v Kuenen, 122 AD2d 616 [Fourth Dept., 1986]; Matter of Hoglund v Hoglund, 234 AD2d 794, 795 [3d Dept.,1996]). "The mandate alleged to be violated should be clearly expressed, and when applied to the act complained of it should appear, with reasonable certainty, that it had been violated" (Pereira v Pereira, 35 NY2d 301, 308 [1974], quoting Ketchum v Edwards, 153 NY 534, 539; see also, Matter of Perazone v Perazone, 188 AD2d 750 [3d Dept., 1992]; Richards v Estate of Kaskel, 169 AD2d 111, 121 [First Dept. 1991], lv dismissed, lv denied 78 NY2d 1042). Finally, "it must be demonstrated that the offending conduct `defeated, impaired, impeded, or prejudiced' a right or remedy of the complaining party" (Matter of Betancourt v Boughton, 204 AD2d 804, 808 [3d Dept., 1994], quoting Judiciary Law § 753 [A]).

The Court observes that the order dated April 4, 2012 did not specify a deadline by

which the *de novo* hearing must be held. As such it did not contain a clear unequivocal mandate with regard to when the hearing must be held. Apart from the foregoing, the respondent indicates that the re-hearing was held on June 22, 2012. Because the December 6, 2010 Tier III hearing has been expunged, and a *de novo* hearing held, the Court finds that the petitioner not demonstrated that the respondent failed to comply with the April 4, 2012 court order. For this reason, the motion to hold the respondent in contempt of court must be denied. Any and all procedural objections with regard to the timeliness and/or conduct of the re- hearing would need to be addressed in a separate CPLR Article 78 proceeding.

Accordingly it is

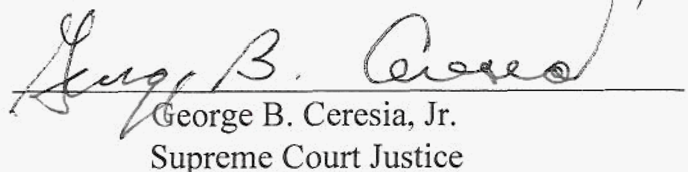
**ORDERED,** that petitioner's motion to reargue and/or renew is denied; and it is further

**ORDERED,** that petitioner's motion to hold the respondent in contempt of court is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: September 6 , 2012
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Petitioner's Notice of Motion To Reargue/Renew dated April 19, 2012, Supporting Papers and Exhibits
2. Petitioner's Notice of Motion For Contempt of Court dated July 11, 2012, Supporting Papers and Exhibits
3. Letter of Cathy Y. Sheehan, Assistant Attorney General dated July 25, 2012