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| Davey v Jones Hirsch Connors & Bull P.C. |
| 2014 NY Slip Op 33624(U) |
| December 18, 2014 |
| Supreme Court, New York County |
| Docket Number: 100500/13 |
| Judge: Kathryn E. Freed |
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| This opinion is uncorrected and not selected for official publication. |

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12/22/14
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 2

Javey, Peter

-v-
Jones Hirsch Connors + Bull

INDEX NO. 100500/13

MOTION DATE _____

MOTION SEQ. NO. 02

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED
DEC 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/18/14
DEC 18 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
PETER DAVEY,

Plaintiff,

-against-

ORDER AND DECISION
Index No. 100500/13
Seq. No. 002

JONES HIRSCH CONNORS & BULL P.C.,

Defendant.

FILED

-----X
HON. KATHRYN E. FREED:

DEC 22 2014

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

**NEW YORK
COUNTY CLERK'S OFFICE**

| PAPERS | NUMBERED |
|---|-----------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... | 1-2(Exs. A-B) |
| ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED..... | |
| ANSWERING AFFIDAVITS..... | ..3(Exs. A-F).. |
| REPLYING AFFIDAVITS..... |4..... |
| EXHIBITS..... | |
| OTHER...(Memoranda of Law) |5,6..... |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action sounding, inter alia, in wrongful termination and age discrimination, plaintiff Peter Davey, an attorney acting pro se, moves, in effect, pursuant to CPLR 2221, to reargue an order of this Court (York, J.) dated March 5, 2014 and entered March 7, 2014, which granted the motion to dismiss made by defendant Jones Hirsch Connors & Bull, P.C. ("the firm"), a law firm acting pro se. Upon a review of the papers submitted and the relevant statutes and case law, the motion is **denied.**

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from plaintiff's termination of employment from the defendant firm on May 6, 2005. Plaintiff was terminated at age 62 ½ after he failed to file a notice of appeal as directed by a client. He had worked for the firm for 16 years.

Plaintiff thereafter filed a complaint against the firm and its partner, Winfield Jones, in the United States District Court for the Southern District of New York ("SDNY") alleging that his termination constituted discrimination based on his age, in violation of several federal and state statutes.

By memorandum decision and order dated December 1, 2008, the SDNY (Chin, J.) granted summary judgment to the defendants dismissing the complaint. *See Davey v Jones*, 2008 US Dist LEXIS 99828 (SDNY, December 1, 2008). Plaintiff thereafter moved for reconsideration of the said order, which was denied by the SDNY. *See Davey v Jones*, 2008 US Dist LEXIS 103982 (SDNY, December 16, 2008). Plaintiff then appealed to the United States District Court for the Second Circuit. By order dated March 29, 2010, the Second Circuit affirmed the judgment of the SDNY dismissing the complaint. *See Davey v Jones*, 371 Fed. Appx. 146 (2d Cir 2010).

On or about March 27, 2013, plaintiff commenced the above-captioned state court action against the firm alleging, inter alia, wrongful termination and age discrimination. On or about October 15, 2013, the firm moved to dismiss the complaint based on the statute of limitations, res judicata and collateral estoppel, and a failure to state a cause of action, and plaintiff opposed the motion.

By order dated March 5, 2014 and entered March 7, 2014, this Court (York, J.) granted the firm's motion to dismiss, holding that:

Plaintiff's claims were already denied in federal court both at the trial level and on appeal. Given the extent that plaintiff has utilized the federal system, this Court will not allow any further motion practice by plaintiff without his further obtaining this Judge's authorization.

Plaintiff's Motion, at Ex. B.

POSITIONS OF THE PARTIES:

Plaintiff now moves, in effect, pursuant to CPLR 2221, for reargument of the March 7, 2014 order on the ground that this Court erred in dismissing his complaint.¹ The defendant firm opposes plaintiff's motion on the ground that this Court did not overlook or misapprehend any issue of law or fact which would warrant granting the motion.

LEGAL CONSIDERATIONS:

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *See William P.Pahl Equip. Corp. v. Kassis*, 182 A.D.2d *supra* at 27; *Foley v. Roche*, 68 A.D.2d 558 (1st

¹Plaintiff's notice of motion states that he seeks "reconsideration, reversal or change" of the order.

Dept 1979). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 434 [4th ed] succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

Initially, although plaintiff's failure to include a complete set of the underlying motion papers warrants the denial of his application on procedural grounds (*see* CPLR 2214[c]; *Biscone v JetBlue Airways Corp.*, 103 AD3d 158 [2d Dept 2012], *appeal dismissed* 20 NY3d 1084 [2013]), this Court will nevertheless consider plaintiff's motion on the merits given that defendant has annexed copies of all underlying motion papers to its affirmation in opposition to plaintiff's motion.

Upon addressing the merits, however, this Court sees no reason to grant reargument of defendant's motion to dismiss, since plaintiff fails to explain how this Court misapprehended any issue or issues of law or fact. On the contrary, Justice York made it abundantly clear in his order that plaintiff had been given ample opportunity to argue his case in federal court, thereby finding that there was no need to re-litigate the claims in state court.

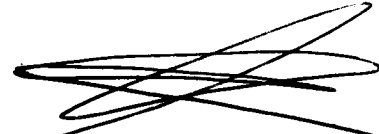
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for reargument is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: December 18, 2014

ENTER:



Hon. Kathryn E. Freed,

J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

DEC 22 2014

NEW YORK
COUNTY CLERKS OFFICE