Matter of Green v Uhler
2015 NY Slip Op 32455(U)
December 30, 2015
Supreme Court, Franklin County
Docket Number: 2014-745
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
SHAWN GREEN, #97-A-0801,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DONALD UHLER, Superintendent,
Upstate Correction Facility,
Respondent.

DECISION, ORDER AND JUDGMENT
RJI # 16-1-2014-0407.80
INDEX # 2014-745
ORI # NY016015J

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The above-captioned proceeding, brought pursuant to Article 78 of the Civil Practice Law and Rules, now comes before the Court by the motion of petitioner Shawn Green, returnable August 7, 2015, in which he seeks leave to renew and reargue a prior Decision and Judgment of this Court, dated May 20, 2015, which dismissed the underlying petition. *See* CPLR §2221 (d). Specifically, petitioner seeks leave to renew his challenges to several grievance proceedings that were dismissed as moot and seeks leave to reargue his challenges to the outcomes of two unrelated disciplinary proceedings.

In response to petitioner's motion, the Court has received an Affirmation from respondent's attorney, Christopher J. Fleury, Esq., Assistant Attorney General. In said Affirmation, counsel opposes the relief requested in petitioner's motion, arguing that petitioner's application should have been in the nature of a motion for relief from a prior judgment or order pursuant to CPLR §5015[1], rather than as a motion for leave to reargue

[1] Counsel's Affirmation consistently refers to "CPLR §5105", rather than correctly citing to CPLR §5015. The Court hereby takes judicial notice of the fact that a motion for relief from a prior judgment or order is governed by the provisions of CPLR §5015. The Court can only presume that counsel's citation to the incorrect section of law was done in typographical error, which shall be hereby disregarded, as Petitioner

pursuant to CPLR §2221.

In the interest of judicial economy, the Court shall duly consider petitioner's application under the statutory framework of a motion for reargument, brought pursuant to CPLR §2221, as well as that of a motion for relief from a prior judgment or order, made pursuant to CPLR §5015. Inasmuch as petitioner seeks renewal pursuant to CPLR §2221 (e), the Court hereby denies petitioner's application, as motions to renew are "not the proper procedural vehicle to address a final judgment" of dismissal. *Maddux v. Schur*, 53 A.D.3d 738, 739, *citing*, *Gorman v. Hess*, 301 A.D2d 683, 686, *Matter of Urbach*, 252 A.D.2d 318, 320-321. Rather, such applications are more properly couched as motions for relief from a judgment or order based upon newly discovered evidence. *See* CPLR §5015 (a)(2); *see also James v. Shave*, 62 N.Y.2d 712, 714 (holding that appellant's "motion to vacate the prior judgment, if available at all, would be made pursuant to CPLR 5015, not CPLR 2221").

As is more thoroughly set forth below, the Court shall deny petitioner's motion for reargument, as he has failed to show that matters of fact or law were overlooked or misapprehended by the Court in rendering its Decision and Judgment. Moreover, petitioner's application as a motion for relief from a prior judgment or order shall be similarly denied, as petitioner has failed to sufficiently demonstrate that the newly discovered evidence – namely petitioner's transfer back to Upstate Correctional Facility (hereinafter "Upstate")– would have likely produced a result other than dismissal of the underling petition. *See* CPLR §5015 (a)(2).

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has not been prejudiced by the defect in citation. *See* CPLR §2101 (f).

Procedural History:

The instant proceeding was commenced upon the filing of a Verified Petition on September 24, 2014. In his pleading, petitioner challenged the result of various inmate grievance proceedings as well as the results and dispositions of two unspecified-level inmate disciplinary hearings that were presumably held at Upstate on June 10, 2014 and August 29, 2014. Having issued an Order to Show Cause in the matter, the Court subsequently received and reviewed respondent's Answer and Return and Letter Memorandum, as well as petitioner's Reply thereto.

In the process of reviewing the underlying proceeding, it came to the Court's attention that petitioner had been transferred from Upstate to the Elmira Correctional Facility. As such, by Letter Order, dated March 17, 2015, the Court directed petitioner and respondent to submit supplemental memorandums of law regarding the issue of mootness based on petitioner's transfer out of Upstate. Having received the requested memoranda, the Court issued its Decision and Judgment, dated May 20, 2015, finding that all six of petitioner's grievances were made directly against Upstate, and not DOCCS as a whole. The Court therefore found that petitioner's challenges to the grievance proceedings had been rendered moot by his transfer to Elmira and dismissed such portions of the petition which challenged the outcome of petitioner's six grievances. *See Dawes v. Annucci*, 125 AD3d 1035, *Sylvester v. Fischer*, 124 AD3d 1411 and *Ortiz v. Simmons*, 67 AD3d 1208.

In relation to the respective outcomes of petitioner's disciplinary hearings held on June 10, 2014 and August 29, 2014, respondents' counsel conceded that "[a]s the determinations in these hearings remain with Petitioner even when transferred to another

facility, the portions of the Petition relation to those proceedings [were] not rendered moot by his relocation to Elmira Correctional Facility." Respondents' Letter Memorandum, dated March 24, 2015 at pgs. 1-2. As such, the Court considered petitioner's challenges to the same upon their contended merits, ultimately dismissing all remaining claims in the petition.

Petitioner's Motion for Reargument Pursuant CPLR §2221:

In his Affirmation in support of his motion, petitioner asserts that he was transferred back to Upstate on June 11, 2015 and that he is once again aggrieved by Upstate policies that he previously challenged. Petitioner contends that his transfer back to Upstate "in and of itself" will likely change the results of the Court's recent decision, particularly in relation to his grievance proceedings. Petitioner further asserts that reargument is in order as the Court "conveniently overlooked crucial facts and applicable laws". Petitioner contends that in each of the disciplinary proceedings, the misbehavior reports issued fail to specify the cell locations to which Petitioner was moved. Moreover, he claims that the August 18, 2014 misbehavior report does not reference the fact that on the same day of the charged misbehavior, petitioner "had moved to 08-A1-14B". Petitioner's Affirmation in Support of Motion at ¶8. Petitioner further notes that "no waiting list of prisoners' (*sic*) eligible for PIMS cell move" was proffered at his disciplinary hearing, nor was it shown that the instructions given by Officers Mitchell and French were issued within the scope of their official duties. *Id* at ¶9. Among other contentions, petitioner also claims that during the course of his disciplinary proceeding, it was never demonstrated that any reasonable suspicion existed for Sergeant B. Gagnon's unscheduled attempt to search of Petitioner's cell, which ultimately resulted in Petitioner

being charged with refusing to be searched in violation of section 115.10 of the Standards of Inmate Behavior (7 NYCRR §270.2 [16][1]). *See* Respondent's Answer and Return at Exhibit "I".

"'[I]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the Court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision' (*Peak v. Northway Travel Trailers*, 260 A.D.2d 840, 842, 688 N.Y.S.2d 738 [1999])." *Loris v. S&W Realty Corp.*, 16 A.D.3d 729, 730.
"[A] motion to reargue – as distinguished from a motion to renew – does not require new proof and can be premised upon the court overlooking or misapprehending pertinent facts or law" *Paterno v. Strimling*, 107 A.D.3d 1233, 1234.

Bearing this standard in mind, the undersigned hereby finds that petitioner has failed to demonstrate how the Court overlooked or misapprehended issues of fact or law in rendering the May 20, 2015 Decision and Judgment. Having thoroughly reviewed the record before it, the Court is not persuaded by petitioner's arguments, relative to the purported inadequacies of his disciplinary proceedings, in that the underlying misbehavior reports provided petitioner with sufficient information regarding the charges against him, such that he was able to prepare an adequate defense to the allegations contained therein. *See generally Faison v. Senkowski*, 255 A.D.2d 625, 626, *app dis* 93 NY2d 847. Moreover, petitioner wholly failed to support his conclusory allegations of employee bias with record-based facts. Additionally, petitioner has failed to show how the Court misapprehended the significance of his transfer from Upstate to Elmira Correctional Facility in dismissing his grievance challenges as moot. Accordingly,

petitioner's motion, in as much as he seeks reargument pursuant to CPLR §2221 (d) shall be denied.

Petitioner's Motion for Relief From Prior a Judgment or Order Pursuant to CPLR §5015:

As noted above, respondent's counsel argues that petitioner's motion should be denied on procedural grounds, in that the application should have been made pursuant to the provisions of CPLR §5015, rather than section 2221 of the CPLR. Moreover, counsel argues that even if petitioner had moved pursuant to CPLR §5015, his application is insufficient, as what he claims to be newly discovered evidence, *i.e.* petitioner's transfer back to Upstate, is not what is contemplated as "newly discovered evidence" for purposes of CPLR §5015.

Respondent's counsel correctly argues that "'[o]nly evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized as newly discovered evidence'". *Pezenik v. Milano*, 137 A.D.2d 748, *quoting Matter of Commercial Structures v. City of Syracuse*, 97 A.D. 965, 966; *see also Matter of Dyno v. Village of Johnson City*, 255 A.D.2d 737, 737-738. The fact that petitioner had been transferred back to Upstate was not in existence at the time of issuance of the May 20, 2015 Decision and Judgment, as his transfer back had yet to occur. Therefore, it is not the type of fact that can be relied upon in moving for relief from a judgment or order pursuant to the provisions of CPLR §5015, and, as such, petitioner's application must be denied.

Discretionary Review of Petitioner's Grievance Proceedings Previously Dismissed as Moot:

Nevertheless, the Court finds that the lack of a procedural remedy with which to raise the issue of his transfer back to Upstate has prejudiced petitioner, by impeding the

Court's ability to review the contended merits of his grievance proceedings. Accordingly, in the interest of justice, the Court shall exercise its inherent discretion to revisit its prior Judgments and Orders and vacate the May 20, 2015 Decision and Judgment, as it relates to petitioner's challenges to the outcome of his six grievance proceedings.

In his *pro se* submission, petitioner challenges the outcome of six separate inmate grievance complaints (7 NYCRR Part 701), which relate to the following issues: 1.) Deprivation of recreation privileges by Sergeant B. Gagnon, commencing on May 15, 2014 (Grievance No.: UST-54089-14); 2.) Deprivation of block supplies on May 23, 2014, by Officer W. Seymour (Grievance No.: UST-54127-14); 3.) Denial of special meals during holidays to inmates who have been placed on therapeutic diets, as compared to those inmates who have not been place on restrictive diets (Grievance No.: UST-54154-14); 4.) The packing of petitioner's in-cell property five days prior his scheduled medical trip by Officer J. Barse (Grievance No.: UST-54663-14)[2]; 5.) Officer M. French's malicious transfer of petitioner to a different cell which made it more difficult for petitioner to receive necessary medical assistance and treatment (Grievance No.: UST-54663-14); and 6.) Systematic circumvention of the Hypoglycemia Nurse Protocol by Upstate Correctional Facility's medical personnel for a period of six months prior to petitioner's filing of the underlying Grievance Complaint (Grievance No.: UST-54622-14 and UST-54756-14).

The record reflects that petitioner's Inmate Grievance Complaints, along with the

[2] As pointed out in counsel's December 22, 2014 Letter Memorandum, Grievance No.: UST-54633-14 contains no allegations relating Officer Barse's early packing of petitioner's in-cell property. *See* Respondent's Answer and Return at Exhibit "F".

corresponding determinations made by the Inmate Grievance Resolution Committee (hereinafter "IGRC") and respondent, as Upstate Superintendent, have been collectively annexed to respondent's Answer and Return as Exhibits "C" through "H". In each instance, respondent appealed the IGRC's findings, and respondent either denied petitioner's grievance outright, or found that petitioner was receiving the community standard of medical care.

Annexed to respondent's March 24, 2015 Letter Memorandum are the administrative appeal determinations made by the Inmate Grievance Program Central Office Review Committee (hereinafter "CORC"), relative to petitioner's grievance proceedings. In each proceeding, CORC upheld respondent's determinations on petitioner's grievances and provided cogent reasons for doing so.

In order to prevail on his challenges to the final results of his inmate grievance proceedings, petitioner "... must carry the heavy burden of demonstrating that the determination by CORC is irrational or arbitrary and capricious." (*citation omitted*) *Frejomil v. Fischer*, 68 A.D.3d 1371, 1372. *See also Williams v. Goord*, 41 A.D.3d 1118, *lv den* 9 N.Y.3d 812 and *Winkler v. New York State Department of Correctional Services*, 34 A.D.3d 993.

By Grievance No.: UST-54089-14, dated May 20, 2014, petitioner claims that his exercise privilege was inappropriately denied after May 15, 2014, based upon his refusal to close the exercise door during his recreation period and for being removed from his cell to conduct a cell search. *See* Respondent's Answer and Return at Exhibit "C". The record reflects that a Deprivation Order was issued pursuant to 7 NYCRR §305.2, which deprived petitioner of his "RECREATION/EXERCISE" privileges from May 15, 2014, until May 21,

2014. *See Id.* On May 28, 2014, the IGRC issued its findings on Grievance No.: UST-54089-14. *See Id.* The IGRC's response noted that the block sergeant systematically reviews block deprivations, and, as a result thereof, he recommended that petitioner's deprivation be lifted on May 21, 2014, and that his recommendation was approved and petitioner received his exercise time on the 21st of May, 2014. Although he agreed with the IGRC's response, petitioner appealed to respondent who concurred with the IGRC's findings. *See Id.* Upon subsequent administrative appeal, CORC upheld respondent's findings, noting that the appropriate administrative procedures regarding deprivation orders had been followed. *See* Respondent's Supplemental Letter Memorandum at Exhibit "B". As such, the Court finds that petitioner has failed to carry his heavy burden of proving that respondent's conduct was arbitrary, capricious or an abuse of discretion.

In Grievance No.: UST-54127-14, dated May 23, 2014, petitioner alleges that Officer W. Seymour bypassed petitioner's cell while distributing supplies. *See* Respondent's Answer and Return at Exhibit "D". The record reflects that the IGRC contacted Officer Seymour regarding the alleged incident and he provided them with a written statement that petitioner "was Not on his door and he did not have his light on" during the officer's supply distribution. (*Emphasis in original*) *Id.* Having appealed the IGRC's Response, respondent concurred with their findings and noted that "[u]pon review of the information submitted, no misconduct was found by staff and no further action will be taken at this time. Grievance is denied." Respondent's Answer and Return at Exhibit "D". Similarly, on October 8, 2014, CORC unanimously denied Grievance No.: UST-54127-14, finding that petitioner's conduct, as described in Officer Seymour's written statement "was appropriately considered a refusal, and CORC advises [petitioner] to

follow facility procedure to avoid future similar difficulties." *See* Respondent's Supplemental Letter Memorandum at Exhibit "B". Once again, the Court finds that the appropriate procedural protocols were followed and petitioner has failed to demonstrate how respondent conducted himself in an arbitrary or capricious manner.

On May 27, 2014, petitioner filed Greivance No.: UST-54154-14, asserting that inmates on restricted medical diets be afforded the same times of special holiday meals as those provided to the general population. *See* Respondent's Answer and Return at Exhibit "E". In response to petitioner's grievance, the IGRC provided the following explanation: "Therapeutic meals are issued to inmates for medical reasons, medical issues do not stop or pause on holidays allowing inmates to eat whatever is offered that day only to return to their therapuetic meal the next day". *Id*. On appeal, respondent agreed with IGRC's findings for the same reasons that IGRC had provided in its response. CORC subsequently upheld respondent's determination, noting that therapeutic menus for certain holidays, including the Fourth of July, include holiday items that satisfy the dietary guidelines of a medically restricted diet. Moreover, CORC indicated that there is "no provision for an inmate who is receiving a therapeutic menu to receive a regular meal during a holiday." *Id*. Accordingly, CORC found no malfeasance on the part of Upstate staff. Given the circumstances, the Court finds respondent's determination is sound and based upon a plausible explanation for the action taken. As such, petitioner has failed to show that he is entitled to the relief requested in the Verified Petition.

The fourth issue raised by petitioner purportedly relates to an incident in which an Officer J. Barse packed up petitioner's in-cell personal property too far in advance of petitioner's medical trip. In his Verified Petition, petitioner cites Grievance No.: UST-

54663-14 as the Grievance Complaint in which this issue was raised. A copy of said Grievance Complaint is attached to respondent's Answer and Return as Exhibit "F". Having thoroughly reviewed the same, as well as petitioner's other Grievance Complaints that have been proffered by respondent, the Court finds no such reference to this alleged incident. As such, the Court finds that petitioner has failed to exhaust his administrative remedies prior to seeking judicial review of the matter. *See generally White v. State*, 117 A.D.3d 1250, 1250-1251, *Matter of Hines v. Fischer*, 101 A.D.3d 1204, 1205 and *Matter of Hawes v. Fischer*, 119 A.D.3d 1304, 1305. Accordingly, that portion of petitioner's pleading shall be denied and dismissed.

The fifth matter challenged by petitioner relates to Grievance No.: UST-54663-14, in which petitioner claims that his medical condition prevents him from being housed on the second floor or towards the back of the gallery. *See* Respondent's Answer and Return at Exhibit "F". In response to petitioner's grievance, the IGRC requested that petitioner's medical chart be reviewed and, according to the investigative report, no orders were found requiring petitioner to be housed on the first floor and toward the front of the gallery for medical purposes.[3] *See Id*. It was determined that medical care was similarly available to petitioner regardless of his location and that security staff had the right to house petitioner where they deemed fit. Respondent concurred with the IGRC's findings and

[3] A review of the IGRC response, dated September 17, 2014, reveals what appears to be a typographical error, which misstates the findings set forth in the investigative report. The IGRC's response indicates that "there is an order for the grievant to be housed at the front of his gallery and there is no order for the grievant not to be housed on the second floor". Respondent's Answer and Return at Exhibit "F". In contrast, the investigative report, which was relied upon by the IGRC in rendering its finding, states that "there is no order for the grievant to be housed at the front of his gallery and there is no order for the grievant Not to be house on the second floor". *Id*. The Court shall hereby disregard the typographical error set forth in the IGRC's findings, as the committee's true intention can be readily gleaned from the record.

petitioner appealed to CORC. *See* Respondent's Answer and Return at Exhibit "F". By decision, dated January 28, 2015, CORC unanimously denied petitioner's grievance finding that "[t]here was no medical indication for him to be house on the front of the gallery or on the bottom floor because medical staff could provide care wherever he was housed." *See* Respondent's Supplemental Letter Memorandum at Exhibit "B". In the absence of a specific medical directive requiring that petitioner be housed on the first floor, in the front of the gallery, the Court cannot find fault with respondent's determination in relation to Grievance No.: UST-54663-14. Accordingly, the pertinent portions of Verified Petition shall hereby be denied and dismissed.

Finally, in Grievances UST-54622-14 and UST-54756-14, petitioner claimed that Upstate medical staff had been circumventing nursing protocols and sick call procedures in relation to petitioner's insulin regimen and blood sugar monitoring. *See* Respondent's Answer and Return at Exhibit "G" and "H". In the process of investigating petitioner's claims, the IGRC contacted Upstate's medical unit, and an investigative report was submitted. *See* Respondent's Answer and Return at Exhibt "G". Based upon the results of the investigative report, the IGRC made the following finding:

> "On 8/12/14, the grievant's AM insulin was held. RN Wilson checked his blood sugar level and it was low. She called and advised the doctor and he ordered the grievant's insulin be held. The doctor ordered to recheck the grievant's blood sugar at 4pm that day which was done. RN Wilson as all nurse's has to carry out the MD's orders. Grievant's chart was reviewed. No complaints or lightheadedness or nocturnal foot pain found. The grievant saw the MD on 8/4/14 and never mentioned these complaints to the doctor. The grievant is seen by the doctor every 3 months and has nursing sickcall available daily. He is receiving the community standard of care." *Id*.

Respondent concurred with the IGRC's response to Grievance No.: UST-54622-14, and petitioner thereafter appealed to CORC. *See Id.*

As is set forth in Grievance No.: UST-54756-14, petitioner once again complained about his morning dosage of insulin being withheld by Upstate nursing staff. *See* Respondent's Answer and Return at Exhibit "H". It was further alleged that petitioner was aggrieved by the "inadequate and unprofessional manner" in which Nurse C. Atkinson administered petitioner's sick calls. *Id.* Upon receipt of petitioner's grievance, the IGRC once again touched base with Upstate's medical unit and an investigative report was prepared in response thereto. Petitioner's medical chart was once again reviewed and the following was determined:

> "RN Alkinson (*sic*) is following doctor's orders and using good nursing judgment withholding the AM dose of insulin when [petitioner's] blood sugar is below 60. There is no order to recheck his sugar after breakfast and no order found to give his insulin after breakfast. RN's can only follow the MD's orders. The grievant is receiving the community standard of care". *Id.*

After respondent confirmed the IGRC's findings, petitioner appealed to CORC, which upheld the respondent's determination, concluding that petitioner "is receiving appropriate medical care and [finding] insufficient evidence of malfeasance by staff". *See* Respondent's Supplemental Letter Memorandum at Exhibit "B". The record reflects that respondent's determination was rendered after having investigated the allegations with the appropriate medical professionals, who confirmed that nursing staff was following doctor's orders. Given the totality of the circumstances, respondent's actions were founded upon a reasonable basis and served a legitimate purpose. As such, the Court finds that petitioner has failed to demonstrate that respondent' conduct was arbitrary and

capricious or an abuse of discretion.

To the extent that they have not heretofore been addressed, the remaining arguments set forth in petitioner's Affirmation in support of his motion have been duly considered and found to be without merit.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that except as otherwise provided herein, the motion of Petitioner, Shawn Green, returnable August 7, 2015 is denied; and it is further

ADJUDGED, that the petition, as it relates to petitioner's challenges to the outcome of his six grievance proceedings, is dismissed.

Dated: December 30, 2015 at
Indian Lake, New York

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S. Peter Feldstein
Acting Justice, Supreme Court