SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LOCAL 621, S.E.I.U.; SEUPERSAUD BHARAT; BISAMBHAR KUBAIR; and ANDREW COHEN,

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION; POLLY TROTTENBERG, personally and as Commissioner of the New York City Department of Transportation; JAMES L. HALLMAN, personally and as Chief Diversity/EEO Officer of the New York City Department of Transportation; and the CITY OF NEW YORK,

Respondents.

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DECISION AND ORDER
Index No. 101831/17
Motion Seq. No. 002 and 003

CAROL R. EDMEAD, J.S.C.:

In a hybrid Article 78 petition/plenary action involving allegations of discrimination at the New York City Department of Transportation (DOT), Respondents move, pursuant to CPLR 2221 (a) and CPLR 2221 (d) to renew and reargue a memorandum decision and order dated June 28, 2018 (the June decision) (motion seq. No. 002). Petitioners also move to renew and reargue the June decision (motion seq. No. 003). The motions are consolidated for disposition.

BACKGROUND

For a fuller discussion of the facts, see the June decision. In short, Petitioners are, or were, before two of them retired, DOT employees. Following an internal investigation, the DOT issued findings and determinations, dated October 4, 2017, that Petitioners engaged in discriminatory conduct toward a fellow-employee with a disability. Additionally, the DOT issued earlier findings and determinations, dated September 15, 2017, that Petitioners Bisambhar Kubair (Kubair) and Andrew Cohen (Cohen) engaged in retaliatory conduct.

The Petition also addresses a third action by the DOT: Petitioner Bisambhar Kubair (Kubair) not having been upgraded in his employment status based on the determination of discriminatory conduct. The Petition alleges that both determinations and findings (the Determinations), as well as the failure to upgrade Kubair, were arbitrary and capricious, and violative of petitioners' right to due process. Based on these allegations, the Petition sought an order: annulling both DOT determinations; directing Respondents to expunge copies of all documents containing or referring to the Determinations; directing Respondents to upgrade Bharat's employment status with back pay and full retroactive seniority; awarding Petitioners compensatory and punitive damages; scheduling a trial, pursuant to CPLR 7408 (h) on any factual issues, including whether Respondents violated the New York State and the New York City Human Rights Laws (the State HRL and the City HRL); and awarding Petitioners costs and attorneys' fees.

Respondents cross-moved to dismiss the Petition on various grounds. The decision resolved the Petition and the cross motion to dismiss by: (1) declaring that the Determinations violated Petitioners' due process rights; (2) ordering Respondents to expunge the Determinations from their records; (3) declaring that Respondents may not consider the Determinations in any decisions regarding promotions of Petitioners to higher titles; (4) dismissing Petitioners' claims for retaliation and discrimination under the State HRL and the City HRL; (5) dismissing all claims against individual Respondents Polly Trottenberg (Trottenberg) and James Hallman (Hallman). As all issues in the Petition were disposed of by the June decision, the short-form order accompanying the memorandum decision affirmed that the case was disposed.

As discussed more fully below, Respondents motion to renew and reargue is based on their lack of an opportunity to submit an answer to the Petition before declarative relief was

granted against them. Petitioners, on the other hand, seek to revive their State HRL and City HRL claims based on newly discovered evidence.

DISCUSSION

A motion for leave to renew is sparingly granted and is not a second opportunity given freely to a party who has not acted diligently in making the initial motion (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). Under CPLR 2221 (e) (2) a motion to renew must "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." Renewal should ordinarily be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (CPLR 2221 (e) (3); *NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 (1st Dept 2007).

"A motion for leave to reargue, on the other hand, serves to offer a party the chance to demonstrate that the court overlooked or misunderstood the pertinent facts or failed to properly apply the relevant legal principles (CPLR 2221 [d] [2]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Moreover, a motion to reargue cannot be based on factual matters not raised on the original application (CPLR 2221 (d) (2); *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011).

I. Respondents' Motion to Renew and Reargue

While denominated as a motion renew and reargue, Respondents motion is essentially one to reargue. That is, Respondents offer no new evidence, but instead argue that the court made a mistake of law by granting Petitioners' declaratory relief in the June decision, while not giving them an opportunity to answer.

CPLR 7804 (f)

CPLR 7804 (f), titled "Objections in point of law" provides that respondents in Article 78 proceedings may "raise an objection in point of law" to the petition by answer or by a motion to dismiss. If the respondent chooses to bring a motion to dismiss, and it denied, CPLR 7804 (f) provides that "the court shall permit the respondent to answer, upon such terms as may be just."

The Court of Appeals has held that "a court need not" allow for the service of an answer "if the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Kickertz v New York Univ.*, 25 NY3d 942, 943 [2015] [internal quotation marks, citation, and italics omitted]; *see also Matter of Drug Policy Alliance v New York City Tax Commn.*, 131 AD3d 815 [1st Dept 2015] [holding that, as it was unclear whether the trial court considered the petitioner's opposition to the respondents' motion to dismiss, and as the court failed to provide notice that it was converting the motion to one for summary judgment, the trial court erred in failing to give the respondents time to answer the petition]).

The June decision found that the Determinations were the fruit of a process that failed to afford Petitioners adequate due process. Here, Respondents contend that the court credited the Petitioners' allegations regarding due process without affording them an opportunity to rebut these allegations. Moreover, Respondents argue that Petitioners submitted nine affidavits in

support of the Petition and in opposition to Respondents' motion to dismiss. If they had been provided with the opportunity to submit an answer, Respondents argue that they would have provided evidence that they provided notice to Petitioners sufficient to satisfy due process requirements. Finally, Respondents argue, citing to *Matter of Drug Policy Alliance*, that the court erred by not giving the parties notice that it was converting the motion to dismiss to one for summary judgment.

In opposition, Petitioners cite to *Kusyk v New York City Dep't of Buildings*, which reiterated the holding of *Kickertz* that "[a] court need not permit a respondent to file an answer if the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer (130 A.D.3d 509 [1st Dept 2018). Applying this principle, the First Department held that "[i]n contrast to Kickertz ... the submitted papers fail to disclose any possibility of a triable issue of fact.

Petitioners note that the June decision, relying on *D'Angelo v Scopetta* (19 NY2d 663 [2012]), found that the Determinations violated due process entitled to Petitioners by sustaining charges of discrimination in the absence of a hearing on those charges. Petitioners argue that there is no triable issue of fact as to whether Petitioners were afforded a hearing prior to issuance of the Determinations.

Here, Petitioners are correct that the portion of the June decision which granted Petitioners declaratory judgment were based on *D'Angelo*. That is, the June decision cited *D'Angelo* for the proposition that a hearing is required before any charges of discrimiantion could be sustained against Petitioners (*see* July decision at 4). *D'Angelo's* holding explicitly

relied on NYC Administrative Code 15-113, which grants firefighters the right to a public hearing prior to charges subjecting them to removal from the positions are sustained.

Whether the Administrative Code affords a coterminous amount of due process to DOT workers is not explicitly discussed in the June decision. However, Respondents do not argue that hearing took place before the Determinations were issued, that the court has misapplied *D'Angelo*, or that DOT workers are afforded less due process under the Administrative Code than firefighters. In these circumstances, Respondents fail to identify an issue of fact that, under *Kickertz*, would require the court to give them an opportunity to answer.

Thus, while Respondents' motion to reargue is granted, upon reargument, the court adheres to the portion of the June decision that granted Petitioners declaratory relief. This disposition is consistent with the First Department's Decision in *Kusyk*. While it is true that the First Department faulted the trial court in *Matter of Drug Policy Alliance* for failing to notify the parties that it was converting the motion to dismiss to one for summary judgment, that error was not the sole basis for reversal, as there was, in that case, also an issue of fact that required the allowance of answer. In these circumstances, where there is no such issue of fact, allowing Respondents to answer would only provide for an inefficient and redundant process.

II. Petitioners' Motion to Renew and Reargue

In contrast to Respondents' motion, which is also framed as one for renewal and reargument, Petitioners' application is primarily one for renewal, as their application is based on the submission of newly discovered evidence. Respondents also, however, argue that they are entitled to reargument as the court misconstrued the pleading standard for claims of discrimination under the State HRL, as well as the City HRL.

Application to Renew

Petitioners submit new discovery they have obtained since they brought the Petition and opposed Respondents' motion to dismiss: transcripts of all the interviews by the DOT Advocate's Office; a memo from the DOT investigator; a memo from Respondent Hallman to Respondent Trottenberg; an unredacted version of discrimination complaint against Petitioners, as well as a worker's compensation claim made by complainant; and another complaint concerning another DOT employee. Despite this scattershot approach, Petitioners offer no evidence that changes the disposition of the June decision.

The new fact that Petitioners are most concerned with is that the investigator into the disability claims against Petitioners only interviewed white witnesses. This, by itself, does not show discrimination.[1] As Petitioners new evidence is not different in kind but only amount from what the court had before it on the prior motion, the court grants Petitioners' application for renewal, and, upon renewal, adheres to the June decision.

Application to Reargue

As the branch of Petitioners' motion to reargue simply rehashes arguments that were made and rejected on the prior motion, the court denies Petitioners' application to reargue (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [holding that "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted"]).

[1] As the discrimination claims fail, the claims against the individually named defendants fail as a corollary.

CONCLUSION

Accordingly, it is

ORDERED that the branch of Respondents' motion that seeks to renew is denied; and it is further

ORDERED that the branch of Respondents' motion (motion seq. No. 002) that seeks reargument is granted, and, upon reargument, the court adheres to its decision dated June 28, 2018; and it is further

ORDERED that the branch of Petitioners' motion (motion seq. No. 003) that seeks to renew is granted, and, upon renewal, the court adheres to its decision dated June 28, 2018.

ORDERED that the branch of Petitioners' motion that seeks to reargue is denied.

Dated: November 12, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.