

McCreery v New York City Dept. of Transp.
2021 NY Slip Op 31612(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 100030/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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DAVID MCCREERY,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,
POLLY TROTTENBERG, ANDREW BURDES, THE CITY
OF NEW YORK

Defendant.

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INDEX NO. 100030/2020
MOTION DATE 01/20/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 2221, of petitioner David T. McCreery (motion sequence number 002) is denied; and it is further

ORDERED that counsel for respondent New York City Department of Transportation shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

Petitioner David T. McCreery (McCreery) moves, pursuant to CPLR 2221, for leave to reargue the merits of the Article 78 petition to compel the respondent New York City Department of Transportation (DOT) to comply with a Freedom of Information Law (FOIL) request, which the court previously denied and dismissed in a decision dated December 18, 2020 (motion sequence number 002). For the following reasons, this motion is denied.

FACTS

The court discussed the facts of this case at length in its earlier decision (motion sequence number 001), and will not repeat them at length here. The relevant portion of the court's December 18, 2020 decision found as follows:

“The court finally notes that appellate case law has upheld the dismissal of Article 78 proceedings that were commenced by petitioners who had submitted separate successive FOIL requests for the same material, and either received the material from the agency in response to the first request, or obtained it during the pendency of the second request. *See e.g., Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 (2001); *Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072 (3d Dept 2020); *Matter of Smith v New York State Off. of the Attorney Gen.*, 159 AD3d 1090 (3d Dept 2018); *Matter of Khatibi v Weill*, 8 AD3d 485 (2d Dept 2004). In such cases, the courts deemed that the relief sought in the second FOIL request had been rendered moot or academic. As was previously discussed, this case is similar to the cited precedent as McCreery's 2018 FOIL request was satisfied by the DOT's document productions in 2015 and 2018. As a result, dismissal is appropriate herein, notwithstanding the strong general policy that favors granting FOIL requests.”
See motion sequence number 001.

McCreery filed this current motion on January 21, 2021, and DOT submitted its opposition on February 19, 2021. *See* notice of motion, McCreery and Druyan affirmations; Koroleva affirmation in opposition. This matter is now fully submitted (motion sequence number 002).

DISCUSSION

Pursuant to CPLR 2221 (d) (2), “[a] motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” Such a motion may be granted only upon a showing “that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). As the Appellate Division, First Department, has observed, “a motion for leave to reargue ‘is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.’” *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999) . Here, McCreery requests leave to reargue on two grounds.

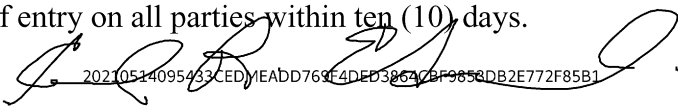
First, McCreery asserts that “[i]t has come to my attention that the outside vendor preparing the WalkNYC design guidelines publicly shared on April 20, 2018 on Twitter a graphic showing what appear to be newer versions of the design guidelines than have been previously released by the NYCDOT,” and that “the above Tweet appears to contradict the sworn statement of Public Records Officer Judith Falk that the records have not changed since their previous release.” *See* notice of motion, McCreery aff, ¶¶ 1-2. McCreery’s alleged new discovery of this 2018 Tweet plainly constitutes “a matter of fact not offered on the prior motion,” which CPLR 2221 (d) (2) excludes from consideration in motions to reargue. As a result, the court discounts McCreery’s assertion and finds that so much of his reargument motion as seeks to rely on that assertion should be denied.

Next, counsel for McCreery asserts that “the correct standard of review in an Article 78 proceeding in which the petitioner challenges the denial of a FOIL request is whether the denial by the agency was merely ‘affected by an error of law,’” and argues that the court’s December 18, 2020 decision erroneously applied the “arbitrary and capricious standard” instead. *See* notice of motion, Druyan affirmation at 1-3 (paragraphs not numbered). It is true that the court made passing reference to the “arbitrary and capricious standard” in the opening portion of the December 18, 2020 decision, as it does in the opening portion of most of its decisions reviewing Article 78 petitions. However, as the portion of the December 18, 2020 decision reproduced above makes clear, the court based its dismissal of McCreery’s Article 78 petition on its finding that the evidence in the administrative record indicated that McCreery’s FOIL request was moot. Because the court’s decision was based on the doctrine of mootness rather than an (alleged) misapplication of the standard of review, the argument that McCreery’s counsel raises in the current motion is inapposite. As a result, the court discounts that argument and finds that so much of McCreery’s reargument as seeks to rely on it should be denied.

Accordingly, the court concludes that McCreery’s motion should be denied in full.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby ORDERED that the motion, pursuant to CPLR 2221, of petitioner David T. McCreery (motion sequence number 002) is denied; and it is further ORDERED that counsel for respondent New York City Department of Transportation shall serve a copy of this order along with notice of entry on all parties within ten (10) days.



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<u>5/14/2021</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE