Milch v New York City Dept. of Fin.

2022 NY Slip Op 32588(U)

August 2, 2022

Supreme Court, New York County

Docket Number: Index No. 158153/2021

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. CAROL EDMEAD	PART	35
	Justice		

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JASON MILCH, Petitioner, - v - NEW YORK CITY DEPARTMENT OF FINANCE, DIANNE PINE, IN HER OFFICIAL CAPACITY AS SENIOR ADMINISTRATIVE LAW JUDGE OF THE PARKING VIOLATIONS BUREAU, Respondent.	**INDEX NO.**	158153/2021
	MOTION DATE	06/15/2022
	MOTION SEQ. NO.	003
	DECISION + ORDER ON MOTION	

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52

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

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the motion pursuant to CPLR 2221 of petitioner Jason A. Milch (motion sequence number 003) is denied, and this proceeding remains disposed; and it is further

ORDERED AND ADJUDGED that the clerk of the court shall enter judgment accordingly; and it is further

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

In this previously dismissed Article 78 proceeding, petitioner Jason A. Milch (Milch) moves for leave to reargue his petition pursuant to CPLR 2221, and to strike a portion of respondents' prior reply papers (motion sequence number 003). For the following reasons, Milch's motion is denied.

FACTS

The court previously denied Milch's petition (motion sequence number 001) and granted the cross motion by the respondents New York City Department of Finance (DOF) and Administrative Law Judge Diane Pine (ALJ Pine) to dismiss this proceeding (motion sequence number 002) in a decision dated March 22, 2022. *See* NYSCEF documents 41, 42. The relevant portion of that decision found as follows:

> "In order to demonstrate standing to challenge the actions of a respondent agency, a petitioner must show that s/he 'has suffered an injury in fact and that the injury falls within the zone of interests protected by the laws under which petitioners claim relief.' *Matter of Bolofsky v City of New York*, 69 Misc 3d 1211(A), 2020 NY Slip Op 51259(U), *1 (Sup Ct, NY County 2020), citing *Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 (2019); *Association for a Better Long Is., Inc.*, 23 NY3d 1, 6 (2014); *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 (2004); *Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318-19 (1st Dept 2011). In order to show an 'injury in fact,' the petitioner 'must delineate how [the respondent agency's] actions actually harmed him and how the injury suffered is personal and distinct from injury to the general public.' *Matter of Bolofsky v City of New York*, 69 Misc 3d 1211(A), 2020 NY Slip Op 51259(U), *1, citing *Mental Hygiene Legal Serv. v Daniels*, 33 NY3d at 50; Real Estate Bd. of NY, Inc. v City of New York, 165 AD3d 1, 8 (1st Dept 2018); *Roberts v Health & Hosps. Corp.*, 87 AD3d at 318. Where the petitioner fails to show 'that [s/he] suffered any injury from respondents' administrative actions, [s/he] lacks standing to challenge them.' *Matter of Bolofsky v City of New York*, 69 Misc 3d 1211(A), 2020 NY Slip Op 51259(U), *1. Here, the 'law under which petitioner claims relief' is Vehicle and Traffic Law (VTL) §242, which provides, in pertinent part, as follows:
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> > "3. A party aggrieved by the final determination of a hearing examiner may obtain a review thereof by serving, either personally in writing or by certified or registered mail, return receipt requested, upon the bureau, within thirty days of the entry of such final determination, a notice of appeal setting forth the reasons why the final determination should be reversed or modified. *Upon receipt of such notice of appeal, the bureau shall furnish to the appellant, at his request and at his own expense, a transcript of the original hearing. No appeal shall be*

> *conducted less than ten days after the mailing of the transcript to the appellant or his attorney . . ..*"
>
> "VTL §242 (3) ('Administrative review') (emphasis added). However, as was observed, the documentary evidence establishes that the PVB Appeals Unit did not conduct the administrative appeal hearings of either the NOL 69 or the NOL 77 convictions 'less than ten days after the mailing of the transcript to the appellant or his attorney.' It emailed the NOL 69 transcript to Milch on April 28, 2021 and conducted the hearing 11 days later on June 9, 2021. *See* verified petition, ¶¶ 12, 14; exhibits 6, 7; notice of motion, exhibits D, E. The PVB emailed Milch the NOL 77 transcript on July 21, 2021, a month after he had requested it on June 21, 2021, but Milch offers no evidence that the Appeals Unit conducted a hearing on the NOL77 conviction less than ten days later (i.e., before July 31, 2021). *Id.*, ¶¶ 21-22; exhibits 9, 10; notice of motion, exhibits G, H, I. As a result, neither the extended delay in delivering the NOL 69 transcript nor the (purportedly) indefinite time frame for the delivery of the NOL 77 transcript resulted in an 'injury [that] falls within the zone of interests protected by' VTL §242 (3). As a result, Milch has failed to show that he suffered an 'injury in fact,' with the result that Milch lacks standing to challenge ALJ Pine's denial of his request for refunds for the transcript fees.
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> "Accordingly, the court finds that Milch's Article 78 petition must be denied for lack of standing, and consequently grants respondents' motion pursuant to CPLR 3211 (a) (3) to dismiss this proceeding on that same ground."

Id., NYSCEF documents 41, 42. Milch submitted the current motion (motion sequence number 003) on April 23, 2022, within 30 days after the court's decision was entered on March 24, 2022. *See* NYSCEF documents 43, 46. With the parties' filing of opposition and reply papers, this matter is now fully submitted. *See* NYSCEF documents 51, 52.

DISCUSSION

Pursuant to CPLR 2221 (d), a motion for leave to reargue:

> "1. shall be identified specifically as such;
> "2. 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; and
> "3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals."

Appellate precedent particularly focuses on the criteria in CPLR 2221 (d) (2) that leave to reargue may only be granted 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). Here, Milch correctly denominated his motion as seeking leave to reargue (CPLR 2221 [d] [1]) and submitted it within the specified 30-day time period (CPLR 2221 [d] [3]). *See* NYSCEF document 46. However, his arguments that the court "overlooked or misapprehended the facts or the law" of this case are unavailing.

Milch's first argument makes much of the fact that the court's March 22, 2022 decision featured paragraph cites to his original verified petition (dated September 1, 2021), rather than to his amended verified petition (dated October 15, 2021), and then asserts that "the court should grant reargument because" the decision "did not consider the amended petition." *See* petitioner's mem of law at 4-6. However, closer examination of the documents reveals this to be a disingenuous assertion based on an unjustified premise. The preliminary portion of the March 22, 2022 decision did cite certain paragraphs of the original verified petition, but only for the limited purpose of recounting the timeline of events that led to Milch's claims; e.g., the dates on which Milch's father received the two subject Notices of Violation (NOL) from the DOF's Parking Violations Bureau (PVB), and the dates on which Milch requested and received transcripts of the PVB proceedings, etc. *See* NYSCEF document 1 (original verified petition), ¶¶ 3-7, 17-22. However, no portion of the decision discussed any of the allegations set forth in the original or the amended petition. Both of Milch's pleadings asserted causes of action pursuant to CPLR 7803 that sought review of ALJ Pine's refusal to reimburse him for the cost of the aforementioned PVB transcripts under the "arbitrary and capricious" standard. *See* NYSCEF document 1 (original verified petition) at 13-27 (paragraphs not numbered); NYSCEF document 22 (amended verified petition) at 13-26 (paragraphs not numbered). However, the discussion section of the March 22, 2022 decision plainly found that "the court cannot undertake the usual review of Milch's Article 78 petition because he lacks standing to commence this proceeding

because 'he has suffered no injury.'" *See* NYSCEF documents 41, 42 at 4. Thus, Milch's assertion that his motion should be granted because the court did not "consider" the correct petition is disingenuous. The court did not "consider" the merits of either petition, but instead dismissed Milch's claims for lack of standing pursuant to CPLR 3211 (a) (3). *Id.*, NYSCEF document s 41, 42 at 6. Milch's comparison of the paragraph numbers of the respective petitions therefore amounts to no more than a game of "gotcha" which he nevertheless loses because the court never reached the merits of his Article 78 claims. Therefore, the court rejects Milch's first argument as meritless.

The court makes the same ruling with respect to Milch's (also disingenuous) second argument that "[t]he Court's decision relied on a zone of interests argument that the DOF raised for the first time in its reply." *See* petitioner's mem of law at 6-10. This assertion is completely belied by respondents' previous cross motion to dismiss Milch's petition, which respondents grounded on the argument that "*petitioner lacks standing* to seek the requested relief because he has suffered no injury." *See* notice of cross motion (motion sequence number 002); respondents' mem of law (motion sequence number 002) at 7-9 (emphasis added). As noted in the March 22, 2022 decision, "[i]n order to demonstrate standing to challenge the actions of a respondent agency, a petitioner must show that s/he '*has suffered an injury in fact and that the injury falls within the zone of interests* protected by the laws under which petitioners claim relief.'" *See* NYSCEF documents 41, 42 at 4 (emphasis added; internal citations omitted). Respondents' reply arguments regarding "zone of interests" etc.[1] were plainly offered to further support and

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[1] Milch also asserts that DOF "raised four other new arguments . . . in its reply;" however, this is not true. Two of those "arguments" simply consist of discussions of the legal definition of an "injury in fact," and the other two are uncontested factual assertions concerning Milch's payments of the PVB transcript fees. See petitioner's mem of law (motion sequence number 003) at 9-10. None of them constitute a "new argument."

develop their initial argument that Milch's claims must be dismissed for lack of standing. *See* Riggs affirmation in reply (motion sequence number 002; NYSCEF document 40), ¶¶ 11-19. The matters discussed in respondents' prior reply papers in no way constitute a "new argument" unrelated to their "lack of standing" allegation. They were instead an amplification of respondents' original argument and were offered in response to respondents' opposition arguments. *See e.g., Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept 1992) ("the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant"). Therefore, the court rejects Milch's second argument as meritless and denies so much of his motion as evidently seeks an order to strike those prior pleadings.[2]

Milch next argues that "[t]he Court's decision misunderstood which statute Petitioner claimed relief under;" specifically, by focusing on VTL §242 (3) instead of CPLR 7803 (3). *See* petitioner's mem of law at 10-11. This argument misunderstands the March 22, 2022 decision, which found that Milch's inability to establish an injury in fact flowing from a violation of VTL §242 (3) robbed him of standing to assert a claim under CPLR 7803 (3). The court rejects this argument, too, as both meritless and disingenuous.

Milch also argues that "[t]he zone of interests prong cannot be used to hold that a petitioner lacks an injury-in-fact." *See* petitioner's mem of law at 11-12. However, the March 22, 2022 decision identified a quantity of legal precedent holding that "zone of interest" analysis is often determinative of the existence (or not) of an "injury in fact" and, hence, standing. *See*

[2] Milch's moving papers do not specify a CPLR provision to support his request to strike respondents' prior reply papers. Respondents, for their part, note that Milch's request would be untimely pursuant to CPLR 3024 (c), which requires that motions to strike be made within 20 days of service of the challenged pleadings. *See* respondents' mem of law in opposition at 11-13. Because respondents served the challenged reply memorandum on February 11, 2022 (NYSCEF document 40), it is plain that that time period has long expired, and that there is now no statutory basis for Milch's request for an order to strike.

NYSCEF documents 41, 42 at 4, citing *Matter of Bolofsky v City of New York*, 69 Misc 3d 1211(A), 2020 NY Slip Op 51259(U), *1 (Sup Ct, NY County 2020), citing *Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 (2019); *Association for a Better Long Is., Inc.*, 23 NY3d 1, 6 (2014); *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 (2004); *Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318-19 (1st Dept 2011). Milch has not cited any contrary precedent to support his assertion. Therefore, the court rejects it as unfounded. Milch next argues that "[t]he Court did not consider the injuries that Petitioner identified." *See* petitioner's mem of law at 12-13. However, this argument is merely a restatement of his earlier assertions that the court "did not consider the amended petition," and that it "misunderstood which statute Petitioner claimed relief under." The court rejects Milch's argument for the same reasons it rejected those assertions, discussed *supra*.

Finally, Milch argues that he "automatically had an injury-in-fact under *Matter of Sun-Brite Car Wash v Bd. of Zoning & Appeals of Town of New Hempstead* [69 NY2d 406 (1987)]." *See* petitioner's mem of law at 13-14. Milch previously raised this argument in opposition to respondents' cross motion to dismiss. *See* NYSCEF document 39 at 3-8. Respondents previously replied that the *Matter of Sun-Brite Car Wash* holding was distiguishable on the facts because Milch was not a party to either of the underlying PVB NOL proceedings, but was instead merely the representative of the actual party, i.e., his father. *See* NYSCEF document 40 (Riggs reply affirmation), ¶¶ 14-19. Although the court did not specifically cite *Matter of Sun-Brite Car Wash* in the March 22, 2022 decision, it did consider and reject Milch's argument, as was reflected in its finding that Milch failed to show that he himself sustained an "injury in fact" with respect to the PVB transcript fees. *See* NYSCEF documents 41, 42 at 5. The Appellate Division, First Department, has long recognized that "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 (1st Dept 2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999). Because Milch's final argument herein is duplicative of the one he presented in opposition to respondents' prior dismissal motion, the court rejects it as improper now.

Accordingly, because the court concludes that Milch has failed to satisfy the "reargument" criteria set forth in CPLR 2221 (d) (2), it finds that his motion must be denied.

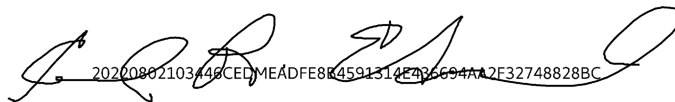
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the motion pursuant to CPLR 2221 of petitioner Jason A. Milch (motion sequence number 003) is denied, and this proceeding remains disposed; and it is further

ORDERED AND ADJUDGED that the clerk of the court shall enter judgment accordingly; and it is further

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



8/2/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	X CASE DISPOSED			NON-FINAL DISPOSITION	
	GRANTED	X DENIED		GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE