

**Robinson v Kelly**

2007 NY Slip Op 34490(U)

March 7, 2007

Sup Ct, New York County

Docket Number: 102510/2006

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDWARDS  
Justice

PART 35

Index Number : 102510/2006  
ROBINSON, DAVID  
vs  
KELLY, RAYMOND  
Sequence Number : 002  
RENEWAL

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/27/07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

RECEIVED  
MAR 08 2007  
IN MOTION  
SUBJECT OFFICE

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAR 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Respondent Raymond Kelly, Commissioner, New York City Police Department, ("respondent") moves for an order pursuant to CPLR 2221 and 5516, (1) granting leave to renew and reargue the respondent's cross-motion to dismiss and upon renewal, dismissing the petition, (2) vacating this Court's Memorandum Decision and granting respondent 20 days to serve and file an answer to the petition, or in the alternative (3) granting leave to appeal the Court's October 27, 2006 Memorandum Decision.

Respondent argues that the Court erred in not allowing respondent to answer to the petition as required under CPLR 7804 (f), which requires that the respondent be permitted to submit an answer to the petition upon the denial of an application to dismiss the petition. Further, respondent's answer would obviate the need for a hearing as it would allow respondent the opportunity to submit evidence to support the reasons for terminating petitioner and refute petitioner's claims of bad faith.

Respondent also argues that the Court erred in ordering a hearing concerning the actions taken with respect to petitioner's termination. As petitioner was a probationary employee, he is not entitled to an administrative hearing. Further, petitioner, who denies that he is an alcoholic, cannot state a cause of action under New York State's Human Rights Law, and failed to establish that the decision to terminate his probationary employment was made in bad faith. Respondent is entitled to rely on the conclusions reached by NYPD's experts and "psychological evaluations."

Dated: \_\_\_\_\_

Page 1 of 4

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE *M.H.A.R.*

Further, in the event this Court denies respondent's motion, respondent seeks permission to appeal to the extent the Court remanded the instant proceeding back to the respondent for a hearing and a statement of reasons. Respondent maintains that as a matter of law, probationary employees are not entitled to a hearing or reasons for any actions taken with respect to employment unless the probationer proves that the decision to terminate violated a statute, constitution, or decisional law, and respondent has not met this burden. Thus, if the Court denies respondent's motion to reargue, respondent seeks permission to appeal this issue.

In opposition, petitioner argues that respondent's failure to serve an answer pursuant to CPLR 7804(f) is attributable solely to respondent and not the Court, since 7804(f) requires that respondent serve and file an answer within 5 days after service of such order, unless the order specifies otherwise. Further, when a termination is based on an employer's erroneous perception that petitioner is an alcoholic, the termination violates the executive law. Thus, the Court correctly held that issues of fact exist as to whether the challenged probationary termination was lawful.

Furthermore, CPLR 5701 under which respondent seeks leave to appeal, only provides the procedures for making such a motion. CPLR 5516, which provides the substantive legal basis for leave to appeal, and respondent cannot establish good cause for the appeal since the Court's decision is consistent with Appellate Division decisional law.

In reply, respondent argues that the Court erred in (1) not allowing respondent to answer the petition and (2) remanding the matter for a hearing. Although the respondent reserved its right to answer the petition, the Court was silent as to respondent's request. Further, respondent properly sought leave to appeal pursuant to CPLR 5501 and 5516.

### Analysis

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv. dismissed* 71 NY2d 994, 529 NYS2d 277, 524 NE2d 879). A motion for renewal may be based upon law not previously considered (*Prude v County of Erie*, 47 AD2d 111, 113-114, 364 NYS2d 643) where the excuse for neglecting in the first instance to raise the statute was valid (*Johnston v National Railroad Passenger Corp.*, 161 AD2d 288 [1<sup>st</sup> Dept 1990]).

The motion to reargue, on the other hand, simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and 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 Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d

661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588); *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). 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 AD2d 790, 437 NYS2d 11 [1<sup>st</sup> Dept 1981]).

The Court's prior Memorandum Decision denied respondent's cross-motion to dismiss the petition, directed the respondent to conduct a hearing, and marked the decision as a "final disposition."

CPLR 7804 (f) provides:

The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. *If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just*; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry . . . .

Thus, CPLR 7804 (f) requires the Court to permit the respondent "to answer, upon such terms as may be just" in the event a motion to dismiss the petition is denied.

Under the circumstances in this case, respondent's motion for leave to renew and reargue is granted to the extent that this Court overlooked CPLR 7804(f). Given that the Court denied respondent's cross-motion to dismiss the petition for failure to state a cause of action, upon such dismissal, respondent should have been permitted to serve and file an answer. Although the Court did not expressly deny respondent the right to file and serve the answer, the language in the Court's order and the notation "final disposition" would not have permitted respondent to file such answer.

The Court concludes that such answer, with documentary evidence, would amplify the record in order to permit the Court to assess the veracity of respondent's conclusory allegations that petitioner's termination was based on the Commissioner's reliance on medical experts and psychological, as well as an investigation of an off-duty incident. The Court notes that although petitioner conceded that an off-duty incident occurred, petitioner did not concede that his termination was the result of the off-duty incident. Petitioner alleges that his termination was the result of an erroneous belief that he is an alcoholic, and such allegations are supported by the contentions made by respondent. Therefore, given that respondent is herein afforded the opportunity to file and serve an answer, the branch of this Court's previous order directing a hearing on remand is vacated.

Given that the Court grants respondent's motion to reargue and vacates the branch of the previous order directing respondent to conduct a hearing, permission to appeal, though procedurally correct, is unwarranted at this juncture.

Accordingly, it is hereby

ORDERED that the motion by respondent Raymond Kelly, Commissioner, New York City Police Department, ("respondent") for an order pursuant to CPLR 2221 and 5516, (1) granting leave to renew or argue the respondent's cross-motion to dismiss, (2) vacating this Court's Memorandum Decision and granting respondent 20 days to serve and file an answer to the petition, and (3) granting leave to appeal the Court's October 27, 2006 Memorandum Decision granted solely to the extent that it is hereby

ORDERED that renewal and reargument is granted; and it is further

ORDERED that upon renewal and reargument, the branch of this Court's Memorandum Decision remanding the matter for a hearing before the respondent to permit petitioner an opportunity to question witnesses and establish the facts concerning his discharge, and to be provided with reasons for any actions taken by respondent with respect to his employment is vacated; and it is further

ORDERED that respondent shall serve and file an answer to the petition within 20 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

**FILED**  
MAR 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated 3/7/07

ENTER: [Signature] J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE