Matter of Lowney v New York State Div. of Human Rights

2009 NY Slip Op 30270(U)

February 4, 2009

Supreme Court, New York County

Docket Number: 108754/07

Judge: Walter B. Tolub

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SCANNED ON 2/9/2009
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB, Justice

PART 15

Index Number : 108754/2007

LOWNEY, CYNTHIA

vs.

N.Y.S.D.H.R.

SEQUENCE NUMBER : 004

REARGUMENT/RECONSIDERATION

INDEX NO. ______

MOTION DATE 8.8.08

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ___ were read on 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 is denied in accordance with the accompanying memorandum decision.

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

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/4/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

In the Matter of the Application of
CYNTHIA LOWNEY

Petitioner,

Index No. 108754/07
Mtn Seq. 004

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS and NEW YORK STATE DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE APPEAL BOARD.

Respondents.

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This motion revisits a decision issued by this court in October of 2007.

Briefly restated, Petitioner, an admitted New York State attorney appearing *pro se*, is a former Department of Labor ("DOL") employee who was terminated from her position as an Administrative Law Judge in Bronx County in April of 1992. Claiming charges of discrimination, petitioner filed a formal complaint against DOL, which resulted in a determination of "probable cause" in petitioner's favor and a call for a public hearing in April of 1996.

More than eight years of delays transpired before petitioner's public hearing was finally held in April of 2007. On April 25, 2007, The New York State Division of Human Rights (SDHR) issued its Final Order (the "Final Order"), in which it concluded that petitioner had won her retaliation claim. The

order additionally directed respondent to refrain from discrimination and to pay petitioner for back pay earned from April 22, 1992 through December 31, 2003; $50,000 in compensatory damages; and out-of-pocket losses.

On June 22, 2007, petitioner commenced this Article 78 proceeding seeking review of SDHR's Final Order. Three motions followed. The first motion, advanced by petitioner, sought the inclusion of a finding of gender discrimination, an award of back pay, an increase in compensatory damages and an award of the value of certain fringe benefits (Motion Sequence 001). Motion sequence 002, also advanced by petitioner sought consolidation of this proceeding with a related case in Albany, and transfer of that case to New York County. The third motion, taking the form of a motion to dismiss for lack of personal jurisdiction and failure to state a cause of action was advanced by respondents.

By decision dated October 3, 2007, this court, in a decision addressing three motion sequences, granted DOL's motion to dismiss, and dismissed the petition in its entirety. Motion sequence 001 and 002 were denied as moot.

Dismissal of the petition was deemed warranted because the DOL was a necessary party who had not been properly served in accordance with CPLR 307(2)(see, CPLR 307(2); See also, Executive Law §297(2)(b); Jeanty v. New York State Dept. Of Correctional Services et. al., 36 AD2d 811 [2d Dept 2007]; NW Liquidating

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Corp. v. Industrial Bd. Of Appeals, 213 AD2d 549 [2d Dept 1995]).
As discussed in this court's October, 2007 decision:

> The principal office of the DOL is located at the W. Averill Harriman State Office Campus, Building 12, Albany, NY 12240. The Commissioner designated all attorneys in the Counsel's Office of the DOL to receive service on behalf of the DOL, herself or any other official being sued in a representative capacity. This designation has been in effect, and is the only designation, since March 13, 2007.
>
> On June 26, 2007 a notice of petition and petition were served to an office secretary, Roxanna Diaz, at a DOL office located at 345 Hudson Street, New York, NY. Ms. Diaz was not authorized to accept service on behalf of the DOL, nor was she authorized to accept service on behalf of M. Patricia Smith, the Commissioner of the DOL. As set forth in Ms. Smith's affidavit, the Commissioner was never personally served with any summons or notice of petition in this proceeding nor did she receive any documents in the mail from Petitioner. There was no service on anyone designated by the Commissioner. The only person served was Ms. Diaz and service of process on an agency employee who is not designated to receive service of process does not constitute process service upon the agency. (Duroseau v. Johnson, 289 AD2d 489, 490 [2d Dept 2001]).

On May 30, 2008, petitioner brought the instant motion seeking to renew and reargue this court's decision, and upon renewal and re-argument, a complete reversal of this court's October 2007 decision. In the alterative, petitioner seeks a traverse hearing with respect to the service of process issue; renewal of motion sequence 001 based on the production of an

identification card; an opportunity to re-serve the DOL, or an order directing mediation.

Discussion

CPLR 2221 provides two very different modes in which a party may reopen a decision issued by the court. Motions to renew are strictly limited to the presentation of new or additional facts which could not have been presented to the court on the original motion (CPLR 2221(e)). *Successful* motions for renewal require the presentation of a justifiable excuse for not having brought the newly offered evidence to the court's attention on the original motion (CPLR 2221(e)(2)(3); Martin v. Triborough Bridge and Tunnel Authority, 180 AD2d 596 [1st Dept 1992]). By contrast, a successful motion to reargue requires a demonstration that in arriving at its earlier decision, the court either overlooked or misapprehended the facts or the law or, somehow mistakenly arrived at its conclusion (CPLR 2221(d)(2); Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]; Schneider v Solowey, 141 AD2d 813 [2nd Dept 1988]; Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1st Dept 1992]). A successful motion to reargue also requires that the motion be made within thirty days of service of a copy of the order with written notice of entry (CPLR 2221(d)(3)).

The October 2007 decision issued by this court, which is the basis of petitioner's motion, was served upon petitioner with

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notice of entry on October 15, 2007. The portion of petitioner's motion seeking re-argument, which was not made until May of 2008, is therefore untimely and as such, is dismissed.

The only legitimate remaining question before this court is whether petitioner has presented new or additional facts to the court warranting an order granting a motion to renew.

In support of her application, petitioner claims that she possesses a visitor's pass which was issued to her on June 26, 2007 upon her arrival at 345 Hudson Street in Manhattan. According to petitioner, the badge, lists respondent's address as 110 King Street, the side entrance of 345 Hudson Street and specifically lists "Commissioner's Office" (Notice of Motion, p. 5-6).

By far, the most disconcerting problem this court has with this "new evidence", aside from the fact that the phrase, "Commissioner's Office" is handwritten, is that the badge was presented to the process server, Maurice Molloy, on June 26, 2007. Nowhere in petitioner's six page affidavit or eighteen page reply is there any justification for why the badge, which was clearly in petitioner's possession in June of 2007 (see, Affidavit of Maurice Molloy ¶10), is first being brought to the court's attention now.

Even if there were justification for the failure to present the badge however, its introduction, if proper, would not change

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this court's result. Service of a state agency must be completed in accordance with CPLR 307(2). The service of a petition upon an employee of an agency who is not designated to receive service of process does not constitute proper service upon the agency. (Duroseau v. Johnson, 289 AD2d 489, 490 [2d Dept 2001]). Ms. Diaz, the office secretary at a DOL office located at 345 Hudson Street, was not authorized to accept service on behalf of the DOL, nor was she authorized to accept service on behalf of M. Patricia Smith, the Commissioner of the DOL. Service upon the respondent agency was therefore never properly effectuated, and cannot be corrected now. Accordingly, it is

ORDERED that petitioner's motion to renew and/or reargue this court's decision dated October 3, 2007 is denied; and it is further

ORDERED that for necessitating this motion and in accordance with CPLR 8301, petitioner pay defendant $200 for costs.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/4/09

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. WALTER B. TOLUB, J.S.C.