

James v Doherty

2010 NY Slip Op 30593(U)

March 15, 2010

Supreme Court, New York County

Docket Number: 102596/2009

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 102596/2009

JAMES, MICHAEL

VS.

DOHERTY, JOHN

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. _____

MOTION DATE 3/5/10

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Cross-Motion: Yes

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by respondent, John Doherty as the Commissioner of the Department of Sanitation pursuant to CPLR 2221, for leave to renew the Court's Order dated July 29, 2009, and upon renewal, vacating the Court's July 29, 2009 Order and denying the petition in its entirety, is denied; and it is further

ORDERED that the branch of the motion by respondent, John Doherty as the Commissioner of the Department of Sanitation pursuant to CPLR 2221, for leave to reargue the Court's Order dated July 29, 2009, and upon reargument, vacating the Court's July 29, 2009 Order and denying the petition in its entirety is granted; and it is further

ORDERED that the Court's July 29, 2009 Order is hereby vacated; and it is further

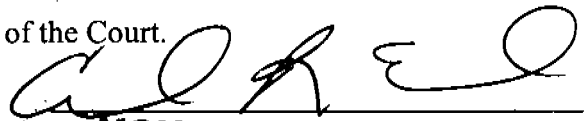
ORDERED that the cross-motion by respondent under motion sequence 001 to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed; and it is further

ORDERED that respondent serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/5/10



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

MICHAEL JAMES, KEVIN MAURICE and
WALTER GILBERT,

Petitioners,

-against-

JOHN DOHERTY, as Commissioner of the
Department of Sanitation of the City of New York,
The Office of Administrative Trials and Hearings
and the City of New York,

EDMEAD, J.S.C.

Index No. 102596/2009
Sequence 002
DECISION/ORDER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1015).

MEMORANDUM DECISION

In this Article 78 proceeding, respondent, John Doherty as the Commissioner of the Department of Sanitation (the "Commissioner") moves pursuant to CPLR 2221, for leave to renew and/or reargue the Court's Order dated July 29, 2009, and upon renewal and/or reargument, vacating the Court's July 29, 2009 Order and denying the petition in its entirety.

Factual Background

Petitioners Michael James ("James"), Kevin Maurice ("Maurice") and Walter Gilbert ("Gilbert") (collectively "petitioners") sought an order and judgment (1) prohibiting respondent from prosecuting the petitioners on Department of Sanitation ("DOS") Complaint numbers S-134987, S-134997 and S-134998 (the "Complaints"), and (2) prohibiting respondent Office of Administrative Trials and Hearings ("OATH") from conducting a hearing as to the allegations contained in the Complaints. Petitioners argued that respondents were time-barred from proceeding against them because the charges pending against them did not constitute a crime.

Respondents cross moved for an order dismissing the Petition, pursuant to CPLR §§ 7804(f) and 3211(a)(7), and in the event the petition was not dismissed, reserved the right pursuant to CPLR § 7804(f) to serve and file an Answer to the Petition.

The Court denied the petition and cross-motion, and directed further discovery, holding that:

At this juncture, it is premature to rule in favor of either party. It cannot be said with certainty at this juncture that petitioners engaged in conduct that may constitute a crime, thereby resulting in the [conclusion] that the commencement of disciplinary charges is not barred by the Statute of Limitations. A further analysis of the actual conduct undertaken by petitioners is warranted to determine if the petitioners' conduct may be criminal. Whether, what petitioners did was engaging in any action that actually violated the relevant sections of the City Charter cannot be assessed at this juncture. Likewise, whether the Penal Law has been violated by petitioners cannot be ascertained at this juncture.

Respondents argue that because petitioners may have engaged in conduct that may constitute a crime, the commencement of disciplinary charges is not barred by the Statute of Limitations. Petitioners were placed on reasonable notice that a crime was alleged. The charges against petitioners could then proceed since they were not barred by the Statute of Limitations. In its instant motion, respondent maintains that by using City sanitation vehicles to collect trade waste, petitioners violated Section 2604(b)(2) of the City Charter, which prohibits public servants from engaging in any conduct that "is in conflict with the proper discharge of his or her official duties." In violating this section, petitioners committed a misdemeanor under City Charter §2606(c). Therefore, petitioners were charged with committing an act that if proven, would constitute a crime.

Petitioners argue that the issue is whether the specifications in the underlying disciplinary complaints constitute a crime, and that assuming the facts as true in an Article 78 proceeding,

[* 4]

none of the specifications make out a violation of the Charter. Further, ALJ Tynia J. Richard (“ALJ Richard”) misinterpreted the facts and the law regarding the Statute of Limitations, in ruling that the charges that petitioners collected trade waste constituted reasonable notice that a crime was alleged. Petitioners argue that the DOS must allege a set of facts in the disciplinary complaints that spell out the commission of a crime. If they fail to do so, the complaints may not go forward. None of the petitioners is charged with any acts that are in violation of the New York State Penal Law. Since the taking of trade waste is not a crime, the DOS attempted to set forth a theory that collecting trade waste is a conflict of interest under NYC Charter §2604(b)(2), (b)(3) and (b)(13). However, none of the complaints alleged sufficient facts to make out a claim under NYC Charter §2604(b)2, (b)3 and (b)13; the DOS has not charged petitioners with having a private enterprise or having any type of business ((b)(2)), do not claim that petitioners received anything from another person or business from the collection of trade waste ((b)(3)), and has not charged them with receiving any compensation or gratuity from a third party ((b)(13)).

Since the charges do not constitute a crime, and the instant charges against all three petitioners were served beyond the 18-month Statute of Limitations applicable to disciplinary matters, the petition should be granted.

In reply, respondent argues that it is irrelevant as to whether petitioners accepted any money for the taking of trade waste. Section 2604(b)(2) of the City Charter is violated if petitioners engage in any “transaction . . . which is in conflict with the proper discharge of his or her official duties.” There is no dispute that the taking of trade waste is a violation of petitioners’ official duties.

Discussion

A motion for leave to renew under CPLR 2221 "shall 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" and "shall contain reasonable justification for the failure to present such facts on the prior motion." 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)

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] lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], rearg. denied 81 NY2d 782, 594 NYS2d 714 [1993]).

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)" (*William P. Pahl Equipment Corp. v Kassis, supra*). 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 [1st Dept 1981]).

Respondent's motion to renew and reargue is essentially a motion to reargue since respondent did not submit any new evidence on the motion. Based on the arguments that the Court misapplied the standard of review, and exceeded its authority and decided an issue not before the Court, reargument is warranted. The petition and cross-motion raised the issue of whether the complaints lodged against petitioners constituted a "crime" and thus, are not barred by the 18-month statute of limitations applicable to a "removal or disciplinary proceeding" commenced against Sanitation Workers.

CPLR 7803 states that the court review of a determination of an agency consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (CPLR 7803(3); *see Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv. den.* 70 NY2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v Board of Education*, 34 NY2d 222, 231[1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Education*, 34 NY2d at 231). The court's function is completed on finding that a rational basis supports the agency's determination (*see Howard v Wyman*, 28 NY2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a

[*7]

different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept], *aff'd* 66 NY2d 1032 [1985]).

Here, it is uncontested that the 18-month statute of limitations does not apply “when the incompetency or misconduct complained of and described in the charges would, if proved in a Court of appropriate jurisdiction, constitute a crime.”¹

In determining the issue of whether the charges constituted a crime and were therefore barred by the Statute of Limitations, ALJ Richard held, *inter alia*, the following:

. . . Section 2606(c) of the Charter . . . provides that a violation of section 2604 is a misdemeanor. NYC Charter §2606(c) (“Any person who violates [section 2604] shall be guilty of a misdemeanor and, on conviction thereof, shall forfeit his or her public office or employment.”). Under the Penal Law, a misdemeanor is a “crime.” Penal Law § 10.06(6) (definitions).

Respondents vigorously dispute that the collection of trade waste is a crime. Respondents argue that the collection of trade waste, even if proven, is not a crime absent the solicitation or receipt of a gratuity . . . Section 2604(b)(2) could be violated even without a benefit or gratuity. . . .

* * *

Despite its absence from Penal Law, the Charter provisions put the acts alleged here squarely within the purview of criminal prosecution by way of section 2606(c). . . . (ALJ Richard’s Decision, page 3).

ALJ Richard’s determination was not arbitrary, capricious or irrational. ALJ applied the Charter sections at issue, and the plain language of NYC Charter §2606(c) renders a violation of Section 2604 a “misdemeanor.” Although the Penal Law does not address the

¹ Sanitation Workers are covered by the New York City Administrative Code. Pursuant to a lawsuit commenced by Harry Nespoli, as President of the Uniformed Sanitationmen’s Association against respondent-Commissioner John Doherty, under Index No. 104520/05, a settlement was reached between Harry Nespoli and the City of New York that provided as follows:

Paragraph 7 - “No removal or disciplinary proceeding shall be commenced against any Sanitation Worker more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges...provided, *however, that such limitations shall not apply when the incompetency or misconduct complained of and described in the charges would, if proved in a Court of appropriate jurisdiction, constitute a crime.*” (Emphasis added).

collection of trade waste, the Penal Law expressly defines a “misdemeanor” as a crime.

Therefore, it cannot be said that ALJ Richard’s determination was without sound basis in reason and without regard to the facts.

Nor does petitioners’ argument that the complaints failed to allege sufficient facts to make out a claim under NYC Charter by failing to allege that petitioners had a private enterprise or any type of business ((b)(2)), that petitioners received anything from another person or business from the collection of trade waste ((b)(3)), or that petitioners received any compensation or gratuity from a third party ((b)(13)). ALJ Richards addressed this issue by essentially holding that NYC Charter §2604(b)(2) did not require an allegation that petitioners received a benefit or gratuity.

Therefore, upon reargument, the Court grants respondent’s cross-motion to dismiss the petition and the petition is hereby denied and dismissed.

Conclusion

Based on the foregoing, it is hereby


ORDERED that the branch of the motion by respondent, John Doherty as the Commissioner of the Department of Sanitation pursuant to CPLR 2221, for leave to renew the Court’s Order dated July 29, 2009, and upon renewal, vacating the Court’s July 29, 2009 Order and denying the petition in its entirety, is denied; and it is further

ORDERED that the branch of the motion by respondent, John Doherty as the Commissioner of the Department of Sanitation pursuant to CPLR 2221, for leave to reargue the Court’s Order dated July 29, 2009, and upon reargument, vacating the Court’s July 29, 2009 Order and denying the petition in its entirety is granted; and it is further

ORDERED that the Court's July 29, 2009 Order is hereby vacated; and it is further
 ORDERED that the cross-motion to dismiss the petition under motion sequence 001 is
 granted; and it is further
 ORDERED and ADJUDGED that the petition is denied and dismissed; and it is further
 ORDERED that respondent serve a copy of this order with notice of entry upon all parties
 within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 15, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk
 and notice of entry cannot be served based hereon. To
 obtain entry, counsel or authorized representative must
 appear in person at the Judgment Clerk's Desk (Room
 1272a)