Matter of Alston v City of New York Commn. on Human Rights
2010 NY Slip Op 34065(U)
March 26, 2010
Supreme Court, New York County
Docket Number: 101818/2009
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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In the Matter of the Application of

ALSON ALSTON,

Petitioner,

-against-

CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS, MICROSOFT CORPORATION, TERESA ULUS, ALBERT KIM,

Respondents.

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DECISION AND ORDER

Index No.101818/2009

O. PETER SHERWOOD, J.:

Petitioner Alson Alston ("petitioner") *pro se* moves for an order: (1) seeking the disqualification or recusal of the assigned Justice from proceeding to determine the instant matter and reassigning the matter to another Judge; (2) pursuant to CPLR § 2221 for leave to reargue and/or renew the Court's October 6, 2009 decision, order and judgment which, *inter alia,* denied the petition and dismissed the proceeding and, upon reargument, vacating the decision and reinstating the petition; (3) pursuant to CPLR § 3025 for leave to amend the petition; or, alternatively, (4) granting leave to appeal the October 6, 2009 decision, order and judgment to the Appellate Division.

For the reasons which follow, petitioner's motion is denied in its entirety.

The facts of the instant matter have been set forth in detail in the Court's October 6, 2009 decision, order and judgment and will not be repeated here except if necessary to clarify the reasoning underlying the determination.

Petitioner first argues that this assigned Justice should have recused himself and should now be disqualified from reconsidering this matter under New York Judiciary Law § 14 and the Rules of Judicial Conduct § 100.3 because, as the former Corporation Counsel of the City of New York, petitioner contends that respondent New York City Commission on Human Rights ("the Commission") was a former client and the Commission and the assigned Justice shared the same employer, the City of New York. In addition, petitioner contends that the October 6, 2009 decision

contained numerous instances of bias which petitioner contends demonstrate that the assigned Justice cannot render an impartial and fair decision in this proceeding.

Respondents separately oppose petitioner's motion. The Commission contends that petitioner's motion insofar as it seeks to have the assigned Justice disqualified or recuse himself is both belated and unfounded. It notes that at no time prior to the Court's decision, which was adverse to him, did petitioner seek the assigned Justice's recusal even though the basis of the disqualification and/or recusal, namely, Justice Sherwood's tenure as Corporation Counsel, was a matter of public record. The Commission further argues that Justice Sherwood's two-year term as Corporation Counsel ended in 1993, some 12 years prior to petitioner's commencement of the instant proceeding, and, therefore, provides no basis for a finding that Justice Sherwood either participated in the underlying decision making or had any direct interest in the subject matter of the case. The Commission, in reliance upon several opinions of the New York State Advisory Commission on Judicial Ethics, argues that the mere fact Justice Sherwood was the former Corporation Counsel does not forever disqualify him from presiding over matters in which any agency of the City of New York is involved no matter how remote in time the circumstances of the case at issue. The Committee further asserts that there is no evidence of bias such that Justice Sherwood should recuse himself, but even if such evidence existed, it is an issue for determination on appeal from the Court's decision and judgment.

Microsoft's arguments in opposition to petitioner's motion on this issue are essentially identical to those of the Commission.

Section 14 of the Judiciary Law provides, in pertinent part:

> A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

Here, the assigned Justice is not "interested" in this proceeding within the meaning of the Judiciary Law by the mere fact that he served as the Corporation Counsel. As noted, such tenure ended in 1993, and there has been no showing that the assigned Justice has participated in or been involved in any manner with the events at issue in this proceeding. In the absence of any statutory

ground, the decision upon a motion for recusal is a discretionary one, "within the personal conscience of the court" (*People v Moreno*, 70 NY2d 403, 405 [1987], which will not be overturned unless the moving party can point to an actual ruling which demonstrates bias (*see, Anderson v Harris*, 68 AD3d 472, 473 [1st Dept 2009]; *Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271 [1st Dept 1998], *lv dismissed* 92 NY2d 875 [1998]). Moreover, petitioner's contentions concerning alleged bias or prejudice on the part of the assigned Justice are completely unsupported by the record and lack any good faith basis. Rather, such contentions on the recusal issue simply appear to reflect petitioner's disagreement or displeasure with the Court's October 6, 2009 decision, order and judgment which denied his petition seeking a judgment vacating and setting aside the determination of the City of New York Commission on Human Rights, and which was affirmed by order of the Chair of the City of New York Commission on Human Rights.

With respect to that branch of petitioner's motion as seeks leave to reargue this Court's October 6, 2009 decision, order and judgment, petitioner has failed to demonstrate that the Court overlooked any relevant facts or misapplied any controlling principle of law in reaching its prior decision (CPLR §2221). Reargument is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*see, Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992], *lv dismissed* 80 NY2d 1005) *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). To the extent that petitioner is seeking leave to renew, the Court also denies that branch of the motion as petitioner fails to demonstrate that any "new" facts proffered on the instant motion were unavailable at the time of his original application (*Pahl Equip. Corp. v Kassis, supra*). Although this requirement is not inflexible (*see, Garner v Latimer*, 306 AD2d 209 [1st Dept 2003], the Court has determined no reason upon the record before it to grant the relief of leave to renew in the interest of justice.

The Court further denies so much of the motion as seeks leave to amend the petition. In the first instance, petitioner has failed to annex a copy of a proposed amended petition to his moving papers so that the Court can properly assess the merit of any changes petitioner proposes to make. This omission alone requires denial of his motion for leave to amend (*see, Lupski v County of Nassau*, 32 AD3d 997 [2d Dept 2006]; *Chang v First American Title Ins. Co. Of New York*, 20 AD3d 502 [2d Dept 2005]). Secondly, the claims that petitioner seeks to raise in an amended

petition to the extent they can be discerned from petitioner's motion submissions are either palpably insufficient or patently lacking in merit. Therefore, the Court declines to exercise its discretion by granting leave to amend the petition.

Lastly, petitioner's application for leave to appeal to the Appellate Division from the October 6, 2009 decision, order and judgment is denied as unnecessary. A judgment dismissing a petition in an Article 78 proceeding is a final judgment terminating the proceeding and is appealable as of right to the Appellate Division (*see, Matter of Troy Ambulance Service v New York State Dept. of Health,* 260 AD2d 715 [3d Dept 1999]; *Knieriemen Oil Co. v Lane*, 21 AD2d 797 [2d Dept 1964]; *see generally,* 6A NY Jur 2d Article 78 § 405).

Based upon the foregoing discussion, it is

ORDERED that petitioner's motion, *inter alia,* to disqualify the assigned Justice and for leave to reargue and/or renew the Court's October 6, 2009 decision, order and judgment is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: 3/24/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.