

Schwarz v Schwarz

2014 NY Slip Op 33889(U)

June 5, 2014

Supreme Court, Kings County

Docket Number: 10942/12

Judge: Kathy J. King

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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of June, 2014.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X

SAMUEL SCHWARZ AND
SIMON SCHWARZ,

Plaintiffs,

- against -

Index No. 10942/12

HELENE SCHWARZ AND
JACK KARTAGINER,

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2</u> <u>3-4</u>
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, in this action brought by Simon Schwarz (Simon) on behalf of himself and purportedly on behalf of Samuel Schwarz (Samuel) against Helene Schwarz (Helene) and Jack Kartaginer (Jack) seeking to cancel and set aside deeds to certain real properties, to compel reconveyance of these real properties, and to compel an accounting as to the net rental income generated from such real properties, Simon moves for an order,

pursuant to CPLR 2221, for leave to renew and/or reargue the court's decision and order dated September 20, 2013, which granted a motion by Helene and Jack insofar as it sought to dismiss this action and to impose costs and sanctions upon him to the extent that he was directed, pursuant to the Rules of the Chief Administrator (22 NYCRR) § 130-1.3, to pay a sanction of \$5,000 for his frivolous conduct to the Lawyers' Fund for Client Protection and a hearing was ordered to determine the amount of reasonable attorney's fees and costs to be paid by him due to his frivolous conduct. Helene and Jack cross-move for an order denying Simon's motion to renew and reargue, imposing costs and sanctions upon Simon, and voiding a health care proxy dated June 8, 2010.

BACKGROUND

Simon is the brother of Samuel, who is a 59-year-old retired rabbi, Talmudic scholar, and retired economics professor. Samuel has been bedridden due to advanced multiple sclerosis, which, in recent years, became exacerbated by diabetes and leukemia. He is one of eight living siblings, which include Simon, his sister, Helene, and another sister, Risa Katz (Risa). By the filing of a petition dated June 29, 2010, Simon, as the petitioner, and as the attorney for himself, *pro se*, and purportedly as the attorney for Samuel, commenced a Mental Hygiene Law Article 81 guardianship proceeding, on behalf of Samuel, as the co-petitioner and alleged incapacitated person (*Matter of Schwarz*, Sup Ct, Kings County, Index No. 100128/10). The petition requested that Simon be appointed as the guardian of Samuel's personal needs and property with the powers to, among other things, appoint Risa as Samuel's primary caretaker, relocate Samuel from Helene's home to a new place of

residence in a rented apartment on the same floor as that of Risa's apartment, and collect his assets and pay his expenses. In the alternative, the petition sought an order, pursuant to Mental Hygiene Law § 81.16 (b), declaring that a power of attorney, which Samuel allegedly executed on January 21, 2010 (the 2010 power of attorney), appointing Simon as his attorney-in-fact, had been ratified. In opposition, Helene cross-petitioned to void the 2010 power of attorney and, if the appointment of a guardian were deemed to be appropriate, to appoint her as Samuel's guardian. Alternatively, Helene argued that the petition should be dismissed based upon the ground that the existence of advance directives, in the form of a power of attorney executed by Samuel on February 10, 2004, designating her as his attorney-in-fact (the 2004 power of attorney), and a health care proxy, which he granted her in 2008, obviated the need for a guardian.

On April 28, 2011, upon Simon's application, the proceeding for the appointment of a guardian was consolidated with a prior proceeding which Simon had commenced for a writ of habeas corpus before Justice Larry Martin, by a petition dated April 22, 2010 (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, Index No. 10031/10). The habeas corpus proceeding was based upon allegations that Helene and Jack had unlawfully detained and isolated Samuel, alienated Samuel from him and Risa, caused Samuel's physical and emotional health to deteriorate, and misappropriated his assets.

The consolidated matter (the consolidated proceeding) proceeded to a hearing, with multiple hearing dates scheduled over the course of several months, which commenced on August 11, 2010 and ended on June 22, 2011. The proceedings included the court's personal

interview of Samuel at his home, the testimony of court evaluator Julie A. Clark, Esq. (Clark), who was initially appointed in the habeas corpus proceeding and reappointed in the guardianship proceeding, and the testimony of the court-appointed psychiatrist, Dr. James Lynch (Dr. Lynch). Dr. Lynch testified, among other things, that Samuel could not have executed a power of attorney with capacity in January 2010. In addition to testifying, Clark submitted two detailed court evaluator reports regarding her findings, based upon three interviews with Samuel, interviews with Samuel's five doctors, and interviews with his siblings, including Simon and Helene. Clark also consulted with Samuel's financial advisor, and Dr. Lynch submitted his evaluation as well.

At the close of Simon's case, Helene moved, pursuant to CPLR 4401, for judgment as a matter of law dismissing the petition on the basis that Simon had failed to establish a prima facie case. The court, in a September 23, 2011 decision and order, granted Helene's motion (*Matter of Schwarz*, 2011 NY Slip Op 51770[U], *1). The court also found that the claims raised in the habeas corpus petition were without merit. Following an appeal by Simon, the Appellate Division, Second Department, by a decision and order dated June 20, 2012, affirmed the court's ruling granting Helene's motion, with costs payable by Simon (*Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 955 [2d Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]).

On December 12, 2011, Simon filed a second habeas corpus petition, along with a proposed writ of habeas corpus (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, index No. 27809/11) (the second habeas corpus proceeding). The second habeas

corpus petition alleged that since June 26, 2011, Helene and Jack had wrongfully and unlawfully imprisoned, restrained, and deprived Samuel from entertaining visits from him. By a decision and order dated December 14, 2011, Justice Martin, citing to CPLR 7003 (b), ruled that the issues raised in Simon's application were already addressed by the September 23, 2011 decision and order in the related consolidated proceeding, and, in light of this, he declined to sign the petition for a writ of habeas corpus. On April 25, 2012, upon an appeal by Simon of this ex parte order, by an application pursuant to CPLR 5704 to execute the writ of habeas corpus which Justice Martin refused to sign, the Appellate Division, Second Department, denied his application.

On May 24, 2012, Simon, on behalf of himself and purportedly on behalf of Samuel, filed the instant action against Helene and Jack, seeking to cancel and set aside deeds dated February 17, 2004, which transferred the ownership of Samuel's two-family house at 1406 Avenue N, Samuel's 50% interest in a two-family house co-owned by him and Helene located at 2024-26 Avenue L, and Samuel's 50% interest in a two-family house co-owned by him and Risa, located at 919 East 28th Street (collectively, the February 2004 deeds), to compel reconveyance of these real properties, and to compel an accounting as to the net rental income generated from such real properties. Simon alleged that the February 2004 deeds were fraudulent and based upon forged signatures obtained by Helene with the aid of Jack, and he asserted claims of fraud in the execution, and/or undue influence. On November 16, 2012, Helene and Jack moved for an order dismissing the summons and complaint in this action, pursuant to CPLR 3211, for failure to state a cause of action, and imposing costs and

sanctions upon Simon based upon his frivolous conduct in bringing this action. In support of their motion, Helene and Jack asserted that Simon lacked standing to bring this action on behalf of Samuel and that, pursuant to the court's September 23, 2011 decision and order, which was affirmed by the Appellate Division, Second Department, this action was barred by the doctrines of res judicata and collateral estoppel.

In a decision and order dated September 20, 2013 in this action, the court granted Helene and Jack's motion. In addressing Helene and Jack's claim as to Simon's lack of standing, the court noted that Simon, in claiming to represent Samuel, relied upon a purported letter retainer agreement dated June 3, 2010. This June 3, 2010 letter stated that Samuel retained Simon as his attorney for the purpose of commencing a guardianship proceeding on his behalf, and had been used by Simon, along with the 2010 power of attorney, as the basis for his authority to commence the guardianship proceeding. The court, however, pointed to its prior ruling in its September 23, 2011 decision and order that Simon had failed to offer any credible evidence in support of his argument that Samuel's deficits had not impaired his judgment to the extent required to be declared incapacitated in law for transactional or contractual purposes. The court further noted that at a hearing held on February 7, 2013 in order to determine the court evaluator fees to be awarded to Clark, pursuant to the direction of the Appellate Division, in its June 20, 2012 decision and order, the court had granted the oral motion by Helene and Jack's attorney to disqualify Simon from representing Samuel since the purported retainer agreement dated June 3, 2010 and the power

of attorney dated January 20, 2010 were void, invalid as a matter of law, and secured under false pretenses. The court thus found that this action was improperly brought by Simon.

The court, in its September 20, 2013 decision and order, also found that this action was barred by the doctrines of res judicata and collateral estoppel since the petition in the guardianship proceeding had set forth essentially the same allegations as it related to the alleged fraud and financial exploitation against Samuel which was alleged in the complaint in this action. Those allegations of financial exploitation were found to be wholly without merit in the court's September 23, 2011 decision and order, which was affirmed by the June 20, 2012 decision and order of the Appellate Division, Second Department.

The court, in its September 20, 2013 decision and order, further found that Simon knew or should have known, based upon the prior guardianship proceeding, that his claim was completely without merit in law, and that he had brought this action in bad faith and was engaging in continuous vexatious litigation, and, therefore, it imposed a financial sanction, pursuant to 22 NYCRR 130-1.1, based upon Simon's frivolous conduct, requiring him to pay \$5,000 for such frivolous conduct to the Lawyers' Fund for Client Protection (*see* 22 NYCRR 130-1.1 [a], [c]; *Selletti v Liotti*, 104 AD3d 835, 836-837 [2d Dept 2013]; *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 992 [2d Dept 2011], *lv dismissed* 19 NY3d 991 [2012], *rearg denied* 20 NY3d 965 [2012]). The court, due to the egregious nature of Simon's frivolous conduct, also awarded Helene and Jack the reasonable attorney's fees and costs incurred by them in this action (see 22 NYCRR 130-1.1), and set down the issue of the

amount of these fees and costs for a hearing to be held by the court (*see Timoney v Newmark & Co. Real Estate*, 299 AD2d 201, 202 [1st Dept 2002], *lv dismissed* 99 NY2d 610 [2003]).

On November 7, 2013, Simon filed the instant motion for reargument and renewal of the court's September 20, 2013 decision and order. On November 18, 2013, Helene and Jack filed their cross motion.

Prior to the court's September 20, 2013 decision and order in this action, Simon, on March 25, 2013, filed a third writ of habeas corpus proceeding (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, index No. 5418/13) against Helene and Jack (the third habeas corpus proceeding), alleging that after the prior guardianship petition filed by him was orally dismissed on June 24, 2011, Helene and Jack wrongfully imprisoned and imposed unlawful restraints on Samuel by terminating all visits by him with Samuel beginning on June 26, 2011 and that such termination of visitation and denial of access impeded him from making health care decisions for Samuel pursuant to a health care proxy dated June 8, 2010, which, he asserted, was executed by Samuel at that time. Simon sought a final judgment after a summary hearing directing that Helene and Jack cease and desist from preventing his visits with Samuel and permitting him to have private visitation with Samuel, seven days a week, at Helene's home, as well as at a rented apartment 15 minutes away by car from Helene's home. On March 29, 2013, Simon filed an amended writ of habeas corpus and an amended petition for a writ of habeas corpus. Helene and Jack filed a return to the writ and, on June 20, 2013, filed a cross petition for an order: (1) dismissing the writ of habeas corpus, (2) voiding the health care proxy dated June 8, 2010 and any

documents produced thereafter, (3) voiding the retainer agreement between Samuel and Simon dated March 2010 or any time thereafter, and (4) imposing costs and sanctions upon Simon, and requiring him to pay their legal fees for that proceeding.

By a decision and order dated April 8, 2014 (while the motion and cross motion in the instant action were pending) in the third habeas corpus proceeding, Simon's petition for a writ of habeas corpus was denied in its entirety, and Helene and Jack's cross petition was granted insofar as it sought an order dismissing the writ of habeas corpus, and an order voiding the health care proxy dated June 8, 2010 and the retainer agreement purportedly signed by Samuel dated March 2010 or any time thereafter. Helene and Jack's cross petition was denied insofar as it sought an order imposing further costs, sanctions, and legal fees on Simon.

DISCUSSION

Simon's Motion

In addressing Simon's instant motion, it is noted that a motion for leave to renew must be based upon new facts that were not offered on the original motion, and which would change the court's prior determination (*see* CPLR 2221 [e] [2]; *Joseph v Simmons*, 114 AD3d 644, 644 [2d Dept 2014]; *Aronov v Shimonov*, 105 AD3d 787, 788 [2d Dept 2013]; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Wilkins*, 97 AD3d 527, 528 [2d Dept 2012]; *Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011]; *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628, 629 [2d Dept 2010], *lv dismissed in part, denied in part* 15 NY3d 888 [2010]).

The party seeking renewal must have a "reasonable justification" for the failure to present such facts on the original motion (CPLR 2221 [e] [3]; *see also Deutsche Bank Natl. Trust Co.*, 97 AD3d at 528; *Bank of N.Y. Mellon v Izmiriligil*, 88 AD3d 930, 932 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 882 [2d Dept 2011]; *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 985, 986 [2d Dept 2010]; *Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884 [2d Dept 2009]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2d Dept 2007], *lv dismissed* 12 NY3d 892 [2009]). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Joseph*, 114 AD3d at 644, quoting *Elder v Elder*, 21 AD3d 1055, 1055 [2d Dept 2005]; *see also Aronov*, 105 AD3d 787; *Rose v Levine*, 98 AD3d 1015, 1015-1016 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co.*, 97 AD3d at 528; *Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009]; *Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727, 728 [2d Dept 2009]).

A motion to reargue must "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" (CPLR 2221 [d] [2]; *see also McDonald v Stroh*, 44 AD3d 720, 721 [2d Dept 2007]; *Matter of Hoffmann v Debello-Teheny*, 27 AD3d 743, 743 [2d Dept 2006]; *Daluise v Sottile*, 15 AD3d 609, 609 [2d Dept 2005]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *Matter of*

Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY3d 1005 [1992], *rearg denied* 81 NY3d 782 [1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984]; *Richardson Lindenbaum & Young*, 14 Misc 3d 1223[A], 2007 NY Slip Op 50130[U], *3 [Sup Ct, Kings County 2007], *affd in part, appeal dismissed in part* 56 AD3d 645 [2d Dept 2008]; *Bankers Trust Co. of Cal. v Payne*, 188 Misc 2d 726, 729 [Sup Ct, Kings County 2001]; *American Trading Co. v Fish*, 87 Misc 2d 193, 195 [Sup Ct, NY County 1975]). Moreover, "a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]; *see also V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 874 [2d Dept 2010]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]; *McGill*, 261 AD2d at 594; *Matter of Mayer*, 192 AD2d at 865; *Foley*, 68 AD2d at 567-568).

Simon seeks leave to renew on the basis that on March 14, 2013, Justice Bert Bunyan, who was originally assigned this case by random selection under the Individual Assignment System (IAS) system, signed an order, *sua sponte*, reassigning this case to this court based on the fact that this court had presided over the related consolidated proceeding, which involved the same parties and many of the same issues. He argues that since, at the time that this action was commenced on May 24, 2012, the consolidated proceeding had already been concluded by the decision and order dated September 23, 2011 and was thereafter affirmed on appeal on June 20, 2012 and then remitted to this court to hold a hearing and determine

the fees awarded to the court evaluator and a court appointed psychiatrist, it was no longer pending at the time that the motion to dismiss in this action had been brought. He contends that since the prior related consolidated proceeding was not still pending before this court, this transfer of this action to it was improper and that this court was, therefore, without lawful authority to dismiss this case or to sanction him for his frivolous conduct.

Simon's contention is devoid of merit. An action may be transferred from one Justice to another Justice who presided over a prior related action (*see Drasser v STP Assoc., LLC*, 90 AD3d 701, 701 [2d Dept 2011]; *Matter of Moresis v Wilk*, 138 AD2d 244, 247 [1st Dept 1988], *appeal dismissed* 72 NY2d 914 [1988]). Such a transfer is not precluded by the Uniform Rules for Trial Courts (22 NYCRR) § 202.3 pertaining to the IAS (*see Moresis*, 138 AD2d at 247). Rather, such a transfer promotes judicial economy and the interests of justice (*see Id.* at 246-247). Contrary to Simon's contention, there is no requirement for an action to still be pending for such a transfer to be warranted, and, as acknowledged by Simon, there were, in fact, continuing proceedings in the consolidated proceeding subsequent to the court's September 23, 2011 decision and order.

Furthermore, there is no basis whatsoever for Simon's argument that the court lacked authority to render the September 20, 2013 decision and order in this action. In this regard, it is noted that Simon had previously moved in this action for an order seeking the recusal of this court from presiding over any further hearings in this matter on the claimed ground that there was bias and prejudgment in the outcome of the consolidated proceeding. The court, in a decision and order dated March 25, 2014, denied that motion, finding that Simon

had failed to set forth any proof of bias or prejudice on the part of the court, and that Simon's claims of collusion, suppression of evidence, ex parte communications, or any other improper conduct were completely baseless and merely the product of his dissatisfaction with the fact that the outcome of the consolidated proceeding was not in his favor.

Simon further argues that contrary to the court's finding in its September 20, 2013 decision and order that he lacked standing to represent Samuel and to bring this action naming him as a plaintiff, his representation of Samuel as his retained attorney is lawful. He points to the fact that the court, in its September 20, 2013 decision and order, noted that he, in claiming to represent Samuel, relied upon a purported letter retainer agreement dated June 3, 2010. The court, as discussed above, found that Simon had failed to offer any credible evidence in support of his argument that Samuel's deficits had not impaired his judgment to the extent required to be declared incapacitated in law for transactional or contractual purposes, and it further found that this June 3, 2010 purported retainer agreement was void, invalid as a matter of law, and secured under false pretenses. Simon now asserts that, in claiming to represent Samuel, he was not relying upon the letter retainer agreement dated June 3, 2010, which pertained only to the guardianship proceeding. Rather, he claims that his retention is evidenced by a letter dated June 8, 2013, which he annexes as Exhibit A to his instant motion.

This June 3, 2010 letter, which is purportedly signed by Samuel, is addressed to Helene, and states, among other things, that "I instruct you to please not have me sign anything without showing it to my attorney at law in all matters and my agent, Simon." The

court, in its April 8, 2014 decision and order in the third habeas corpus proceeding, however, specifically ruled that any retainer agreement executed when Samuel lacked legal capacity was void, and it granted Helene and Jack's cross petition, to the extent that it sought an order voiding the retainer agreement between Samuel and Simon dated March 2010 or any time thereafter. Thus, since this June 3, 2013 letter was similarly executed at a time when Samuel lacked legal capacity, it cannot confer standing upon Simon to bring this action on Samuel's behalf, and, therefore, it fails to set forth any new evidence which would support his motion to renew.

Simon also contends that there is newly discovered evidence of progress notes of Dr. Mark Sloane, who was Samuel's treating pulmonologist at NYU Medical Center, which set forth his medical evaluation of Samuel on November 4, 2010. He argues that this evaluation implicitly establishes Samuel's competence to appoint him as his attorney. This argument is unavailing. Dr. Sloane, in these notes, merely stated that when Samuel was questioned about if he is forced to decide who is his primary decision maker if only one is possible, he answered that he wanted Risa as the prime person, and not Simon or Helene. While Dr. Sloane further stated, in these notes, that Samuel was able to make this level of decision, he specifically acknowledged that "details as to [the] intricacy of care [were] likely beyond his ability/attention span." Indeed, as observed by the court in its September 23, 2011 decision and order, due to Samuel's lack of capacity, he was unaware of the myriad of services required to support all of his activities of daily living and his current level of care. Furthermore, Dr. Sloane, as a pulmonologist, is not an expert qualified to evaluate Samuel's

competence, and, thus, his progress notes are not probative on this issue and patently insufficient to warrant the granting of Simon's motion for renewal.

Simon additionally argues that Samuel's deficits did not impair his judgment to the extent required to be declared incapacitated in law for transactional or contractual purposes. As discussed above, however, the issue of Samuel's competency was determined by the court, in its September 23, 2011 decision and order, after a hearing, with multiple hearing dates, scheduled over the course of several months, and included the court's personal interview of Samuel at his home, the testimony of the court evaluator, Clark, and the testimony of the court-appointed psychiatrist, Dr. Lynch. Simon merely attempts to rehash his prior arguments, which were already fully considered and determined by the court. Simon has failed to provide any facts or law demonstrating that the court, in arriving at its conclusion, misapprehended or overlooked the applicable law or facts.

Simon also reiterates many of his arguments regarding, among other things, his claims that the guardianship hearing was prematurely aborted and that he was not allowed to conduct financial discovery in this action. These arguments were already specifically addressed and rejected in the court's prior September 20, 2013 decision and order, as well as in its decision and order dated March 25, 2014, which denied his motion seeking the recusal of this court. As previously noted, a motion for reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Haque v Daddazio*, 84 AD3d 940, 942 [2d Dept 2011]; *Foley*, 68 AD2d at 567; *American Trading Co.*, 87 Misc 2d at 195).

Simon further argues that during the transfer of this action from Justice Bunyan and this court, certain documents which he submitted may have disappeared. This argument is rejected. There is no evidence of any loss of documents, and the court considered all papers submitted by Simon. In addition, the court has considered all papers submitted by Simon on this motion and does not find any basis which would change its prior determination.

Thus, the court finds, after considering all of the arguments raised by Simon, that Simon has failed to demonstrate that it misapprehended the law or facts or that there are any new facts not offered on the prior motion that would change its determination in its September 20, 2013 decision and order (*see* CPLR 2221 [d] [2], [e] [2]). Since Simon has simply rehashed arguments already considered and rejected by the court and has failed to set forth any new facts which would change the court's prior determination, his motion for reargument and renewal must be denied (*see* CPLR 2221 [d] [2], [e] [2]; *Foley*, 68 AD2d at 567; *American Trading Co.*, 87 Misc 2d at 195).

Helene and Jack's Cross Motion

With respect to Helene and Jack's cross motion insofar as it seeks an order voiding the health care proxy dated June 8, 2010, as noted above, while Helene and Jack's cross motion was pending, the court, in its April 8, 2014 decision and order in the third habeas corpus proceeding, already granted an order voiding this health care proxy. Thus, this branch of Helene and Jack's cross motion has been previously granted.

Helene and Jack, in their cross motion, also seek an order imposing costs and sanctions upon Simon. They argue that Simon, by his instant motion, has brought yet

another frivolous motion, and that sanctions and costs are the only appropriate method to curtail him from continuing such frivolous conduct. 22 NYCRR 130-1.1 (a) provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." It further provides that "[i]n addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart." 22 NYCRR 130-1.1 (b) provides that "[t]he court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Simon is both a party and an attorney (*pro se* on behalf of himself) in this litigation.

22 NYCRR 130-1.1 © defines conduct as frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

22 NYCRR 130.1.1 © further provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances

under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

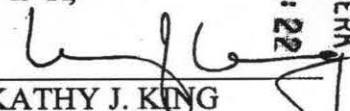
"[T]he proper use of sanctions is a desirable and appropriate way to discourage abusive litigation tactics" (*Timoney*, 299 AD2d at 202, quoting *Watson v City of New York*, 178 AD2d 126, 128 [1st Dept 1991]). Here, Simon is continuing to reiterate prior arguments which have already been found to be without merit and which were specifically addressed and rejected in this action and in the other related actions brought by him. However, since the court, in its September 20, 2013 decision and order, has already awarded a sanction of \$5,000 against Simon and has awarded the reimbursement of attorney's fees incurred by Helene and Jack in this action, it declines to award further sanctions against him at this time.

CONCLUSION

Accordingly, Simon's motion to renew and/or reargue the court's September 20, 2013 decision and order is denied. Helene and Jack's cross motion is denied insofar as it seeks an order imposing further costs and sanctions upon Simon, and it has already been granted by the court's April 8, 2014 decision and order insofar as it seeks an order voiding the June 8, 2010 health care proxy.

This constitutes the decision and order of the court.

E N T E R,


HON. KATHY J. KING
J. S. C.

FILED
KINGS COUNTY CLERK
2014 JUN 13 AM 8:22

**HON. KATHY J. KING
JSC**