

Winkler v Sherman

2015 NY Slip Op 32053(U)

May 26, 2015

Supreme Court, New York County

Docket Number: 101428/2013

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. Kalish
Justice

PART 29

Winkler, Richard E.

INDEX NO. 101428/2013

- v -

MOTION DATE Assigned to Court on 3/26/2015

Joe Sherman, a/k/a Joseph Daniel Sherman, a/k/a Joseph D. Sherman, a/k/a Joseph Sherman, and The New York State Legislature

MOTION SEQ. NO. 002

The following papers, numbered 1 - 6 were read on the Plaintiffs' motion for summary judgment

Notice of Motion to Reargue and/or Renew ----- — Affidavit — Exhibits	No(s). <u>1</u>
Affirmation in Opposition to Motion to Reargue and/or Renew ----- — Affidavit — Exhibits	No(s). <u>2</u>
Reply Affidavit in Support of Motion to reargue or Renew	No(s). <u>3</u>

The Plaintiffs' motion to reargue and/or renew a prior decision is decided in accordance with the attached memorandum decision.

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

FILED

MAY 29 2015

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NEW YORK COUNTY CLERK'S OFFICE

Dated: May 26, 2015

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29

-----X
Winkler, Richard E.

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 101428/2013

Sherman, Joe, a/k/a Joseph Daniel Sherman,
a/k/a Joseph D. Sherman,
a/k/a Joseph Sherman, and
The New York State Legislature

FILED

MAY 29 2015

Defendant

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the pro-se Plaintiff's motion to reargue and/or renew the prior decision of Justice Tingling granting the Defendant's prior motion to dismiss the Plaintiff's underlying action for failure to state a cause of action is hereby denied as follows:

Procedural History

The Plaintiff Richard E. Winkler's brought his prior action against the Defendant Joe Sherman pursuant to the Family Court Act section 523 seeking an Order of the Court compelling the Defendant to submit to a genetic marker test as defined under New York Human Rights Law sections 292, 291-a and 291-b.¹ The Plaintiff further sought a declaratory judgment by the Court holding that the Family Court Act section 517 is unconstitutional. The Defendant moved to dismiss the Plaintiff's action pursuant to CPLR §3211(a)(1) on the basis that the defense was founded upon documentary evidence and (a)(7) for failure to state a cause of action, and for the Court to deny the Plaintiff's motion for a declaratory judgment holding that the Family Court Act section 517 is unconstitutional.

¹ The Court notes that upon review, Article 15 - Human Rights Law of the New York State Executive Law does not include sections numbered 291-a or 291-b. Plaintiff is apparently referring to 292 subsections 21-a and 21-b. Further, NY CLS Exec § 292 does not include a definition for "Genetic Marker Test" as indicated by the Plaintiff in his summons and complaint. Subsection 21-b of NY CLS Exec § 292 does define "Genetic Test" as "a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic." Further, NY CLS Family Ct Act § 532 - Genetic marker and DNA tests; admissibility of records or reports of test results; costs of tests specifically addresses the types of genetic marker tests to be used in connection with paternity proceedings pursuant to Article Five of the Family Court Act.

By decision/order dated December 12, 2014, the Honorable Justice Milton A. Tingling granted the Defendant's motion and dismissed the Plaintiff's action for failure to state a cause of action. The Plaintiff has now moved to reargue/renew the prior court's dismissal of the Plaintiff's action, the Defendant submitted papers in opposition to the Plaintiff's motion to reargue/renew, and the Plaintiff submitted reply papers. The instant motion was referred to this Court for decision on March 26, 2015.²³

Parties' Contentions

The Plaintiff's instant motion seeks to reargue/renew the Court's prior order pursuant to CPLR §2221 on the following bases:

- (1) the prior court denied the Plaintiff due process of law by (i) not conducting the proceedings in an open public courtroom, (ii) not allowing Plaintiff, the general public, or the media with the opportunity to hear the proceedings, and (iii) failing to have an official record or certified transcript of the proceedings made for appellate review;
- (2) the Court ignored the proper legal standard for granting the Defendant's motion to dismiss the Plaintiff's action; and
- (3) The Court ignored the numerous and various federal and state constitutional issues raised in the Plaintiff's sur-reply in the underlying motion.

In opposition, the Defense argues in sum and substance that the prior court properly considered all of the arguments presented in the Plaintiff's submitted papers in opposition to the Defendant's motion to dismiss, and that the Court granted the Defendant's motion to dismiss. The Defendant argues that the prior court did not misapprehend or overlook any facts, and further that the Plaintiff has not presented any newly discovered facts in support of the instant motion to reargue/renew the prior decision. As such, the Plaintiff has not met the his burden on a motion to reargue and/or renew the prior court's dismissal of the Plaintiff's action. The Defendant further argues that the Plaintiff was not denied his due process rights in the prior court's determination of the Defendant's motion to dismiss the Plaintiff's action. Specifically, the Defendant argues that at the time of the prior motion, the Plaintiff was represented by counsel, who appeared on the Plaintiff's behalf before the Court at oral argument on the prior motion. The Defendant argues in sum and substance that the Plaintiff's argument that he was unable to "hear" any discussions that were held at the bench amongst the attorneys and Justice Tingling, does not constitute a violation of due process.

² Justice Tingling has retired from the bench as of January 1, 2015, and the Plaintiff's instant motion to reargue/renew was referred to this Court for decision.

³ On May 1, 2015 the Court received a letter from the pro-se plaintiff. As said letter was an ex-parte communication, it was not considered by this Court in determining the Plaintiff's instant motion to reargue/renew the prior order dismissing his action for failing to state a cause of action.

In his reply papers, the Plaintiff reiterates the arguments presented in his moving papers and emphasizes that he has a “most basic fundamental right” to “know who his father is”.

Analysis

CPLR §2221 (d), (e) and (f) set forth the requirements for motions to reargue, renew and combined motions to reargue and renew:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall 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; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. 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
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

The Plaintiff bears the initial burden on a motion to reargue/renew a prior decision pursuant to CPLR §2221(f). The Plaintiff has identified the instant motion as a motion to reargue and renew the prior court’s decision granting the Defendant’s motion to dismiss the Plaintiff’s action for failing to state a cause of action. As such the Court will determine the instant motion in accordance with the requirements for both reargument and renewal.

The Plaintiff has failed to meet his burden to warrant reargument of the prior court's decision granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action.

In order to prevail on a motion to reargue, the movant must establish a basis for this Court to conclude that the prior court "overlooked or misapprehended" "matters of fact or law" in determining the prior motion. "It is well settled that a motion to reargue 'is not an appropriate vehicle for raising new questions ... which were not previously advanced'. Necessarily, where a new argument is presented on the motion, that argument could not have been 'overlooked or misapprehended' ... in the first instance." (People v D'Alessandro, 13 N.Y.3d 216, 219 (NY 2009) citing People v. Bachert, 69 N.Y.2d 593 (NY 1987)). Further, 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" (Mangine v. Keller, 182 AD2d 476, 477 (NY App Div 1st Dept 1992) citing Fosdick v. Hempstead, 126 NY 651 (NY 1891)).

Upon review of the parties' submitted papers in the instant motion and the prior court's order dated December 12, 2014, this Court finds that the Plaintiff has failed to establish that the prior court overlooked or misapprehended any matters of fact or law in granting the Defendant's prior motion to dismiss the Plaintiff's underlying action for failure to state a cause of action. Specifically, the Plaintiff argues that the prior court "ignored the numerous and various federal and state constitutional issues raised in the plaintiff's surreply" in deciding the prior motion. However, the prior court clearly addressed the Plaintiff's constitutionality argument in its prior decision in finding that there was insufficient basis for the Court to question the statutory scheme of Family Court Act § 517. Read in its entirety, the prior court's decision considered and rejected the Plaintiff's argument that Family Court Act § 517 was unconstitutional. In particular, the prior court rejected the Plaintiff's argument that the statutory requirement that proceedings for establishing paternity cannot be brought after the child reaches twenty-one years, unless the father acknowledges paternity, was unconstitutional.

As such, this Court finds that the Plaintiff has failed to meet his burden on his motion to reargue the prior court's decision granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action.

The Plaintiff has failed to state a cause of action in the underlying action.

Even assuming *arguendo* that this Court had granted the Plaintiff's motion to reargue and upon reargument, had re-evaluated the merits of the parties' arguments on the Defendant's motion to dismiss the underlying action, this Court would still grant the Defendant's motion to dismiss the Plaintiff's action pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

The scope of a Court's inquiry on a motion to dismiss an action under CPLR §3211 (a)(7) for failure to state a cause of action is very narrowly circumscribed. "The court must 'accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory'. The complaint must be construed 'liberally', and the court must accept as true not only 'the complaint's material allegations' but also 'whatever can be reasonably inferred therefrom' in favor of the pleader'. In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (People v. Sturm, Ruger & Co., 309 A.D.2d 91, 108 (NY App Div 1st Dept 2003) lv denied 100 N.Y.2d 514 (NY 2003) citing Morone v. Morone, 50 N.Y.2d 481 (NY 1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (NY 1977); CPLR §3026; McGill v. Parker, 179 AD2d 98 (NY App Div 1st Dept 1992); Cron v. Hargro Fabrics, 91 NY2d 362 (NY 1998); New York Trap Rock Corp. v. Clarkstown, 299 N.Y. 77 (NY. 1949)). Based upon this standard, the Court finds that the Plaintiff has failed to state a cause of action.

Article Five of the Family Court Act governs paternity proceedings brought under the Family Court Act. Family Court Act §§ 512, 517, 522 read as follows:

§ 512. Definitions

When used in this article,

- (a) The phrase "child born out of wedlock" refers to a child who is begotten and born out of lawful matrimony.
- (b) The word "child" refers to a child born out of wedlock.
- © The word "mother" refers to the mother of a child born out of wedlock.
- (d) The word "father" refers to the father of a child born out-of-wedlock.

§ 517. Time for instituting proceedings

Proceedings to establish the paternity of a child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the child reaches the age of twenty-one years, unless paternity has been acknowledged by the father in writing or by furnishing support.

§ 522. Persons who may originate proceedings

Proceedings to establish the paternity of the child and to compel support under this article may be commenced by the mother, whether a minor or not, by a person alleging to be the father, whether a minor or not, by the child or child's guardian or other person standing in a parental relation or being the next of kin of the child, or by any authorized representative of an incorporated society doing charitable or philanthropic work, or if the mother or child is or is likely to become a public charge on a county, city or town, by a public welfare official of the county, city or town where the mother resides or the child is found. If a proceeding is originated by a public welfare official and thereafter withdrawn or dismissed without consideration on the merits, such withdrawal or dismissal shall be without prejudice to other persons,

In the underlying action, there is no dispute that the Plaintiff does not fall within the age requirement of Family Court Act § 517 and that the Defendant has not acknowledged paternity of the Plaintiff in writing or by furnishing support. Similarly, there is no dispute that the Plaintiff does not fall within the provisions of Family Court Act §522 as a person who may originate paternity proceedings. Further, the Plaintiff does not indicate in his pleadings nor in his submitted papers in the instant motion that he fits within Family Court Act § 512 definition of a "child" defined as a "child born out of wedlock". In point of fact, the Plaintiff specifically indicates in his complaint that his mother was married to "Irving Winkler" at the time the Plaintiff was born. Further, the Plaintiff attaches with the summons and complaint a copy of his birth certificate identifying Irving Winkler as the Plaintiff's father. As such, there is an "acknowledgment" by both the Plaintiff's mother and the now deceased Irving Winkler that Irving Winkler is the Plaintiff's father.

The Plaintiff was precluded from commencing a paternity proceeding against the Defendant by both Family Court Act §§ 517 and 522. As the Plaintiff did not in any way challenge the constitutionality of Family Court Act § 522, his action was subject to dismissal for failure to state a cause of action regardless of whether or not he prevailed on his second claim for a declaratory judgment finding Family Court Act §517 to be unconstitutional.

Even assuming the truth of the Plaintiff's factual allegations in his summons and complaint, it is clear that the Plaintiff does not fall under the statutory requirements of Family Court Act §§ 517 and/or 522 to bring a paternity proceeding against the Defendant. Further the Plaintiff's summons and complaint only seeks a declaratory judgment that Family Court Act §517 is unconstitutional. The Plaintiff in no way challenges the constitutionality of Family Court Act §522 in his complaint nor does he in any way address the fact that he is also precluded pursuant to Family Court Act §522 from commencing a paternity proceeding against the Defendant under Article Five of the Family Court Act.

The Plaintiff is not only precluded by Family Court Act §517 from commencing a paternity proceeding against the Defendant due to timing and age, but is also precluded from commencing a paternity proceeding against the Defendant pursuant to Family Court Act §522 as to standing. As such, there are sufficient grounds to grant the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action pursuant to both Family Court Act §§ 517 and 522.

In the interest of judicial efficiency (assuming arguendo that this Court had granted reargument) the Court will address the Plaintiff's arguments that Family Court Act § 517 is unconstitutional in opposition to the Defendant's motion to dismiss his action, although the Defendant would still be entitled to a judgment dismissing the Plaintiff's action for failure to state a cause of action based upon the fact that the Plaintiff is precluded from commencing a paternity proceeding against the Defendant pursuant to Family Court Act §522.

The Plaintiff has failed to establish that Family Court Act § 517 is unconstitutional on its face or as applied to him.

"[I]t is a fundamental rule of constitutional law that a court will presume an act of the Legislature to be constitutional and will strike it down as unconstitutional 'only as a last resort'" (*Alliance of American Insurers v. Chu*, 77 N.Y.2d 573, 592 (NY 1991) citing *Matter of Ahern v South Buffalo Ry. Co.*, 303 NY 545, 555, *affd* 344 U.S. 367; *Cook v City of Binghamton*, 48 NY2d 323, 330; *see also Sage v. Brooklyn*, 89 N.Y. 189 (NY 1882); *People v. Pinckney*, 32 N.Y. 377 (NY 1865)).

The Court of Appeals has recognized the distinction between challenges to a statute as "unconstitutional as applied" and challenges to a statute as "unconstitutional on its face":

As the term implies, an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case. By contrast, a facial challenge requires the court to examine the words of the statute on a cold page and without reference to the defendant's conduct.

"It is well settled that facial constitutional challenges are disfavored. 'Legislative enactments enjoy a strong presumption of constitutionality ... [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.' Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional'" (*Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 593 (NY 2013) citing *Lavalle v. Hayden*, 98 NY2d 155 (NY 2002)). In pursuing a facial challenge, the Plaintiff must carry the "heavy burden" of showing that the statute is impermissibly vague in all of its applications. A successful facial challenge means that the law is "invalid in toto--and therefore incapable of any valid application" (*People v. Stuart*, 100 N.Y.2d 412, 421 (NY 2003) citing *People v. Parker*, 41 N.Y.2d 21 (NY 1976); *Chapman v. United States*, 500 U.S. 453 (US 1991); *Fallon, As-Applied and Facial Challenges and Third Party Standing*, 113 Harv L Rev 1321, 1321 (2000); *Wood v. Irving*, 85 N.Y.2d 238 (NY 1995); *People v. Bright*, 71 N.Y.2d 376 (NY 1988); *United States v. Salerno*, 481 U.S. 739 (U.S. 1987); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (US 1982); *Wood v. Irving*, 85 N.Y.2d 238, 244-245 NY 1995); *Tribe, American Constitutional Law* § 12-32, at 1036 (2d ed 1988))

The Plaintiff does not specifically indicate in his complaint whether he is arguing that Family Court Act § 517 is unconstitutional on its face or only as applied to him in the underlying action. However, this Court finds that Family Court Act § 517 is neither unconstitutional on its face nor unconstitutional as applied to the Plaintiff.

“The State's interest in establishing paternity is to protect society from having to bear the financial burden of supporting children born out of wedlock” (Matter of Monroe County Dept. of Human Servs. (Marissa T.) v. Shunte W., 13 Misc. 3d 1243A, 1243A (NY Fam Ct 2006) citing 41 Am Jur 2d Illegitimate Children § 44). “Although at one time the objective of paternity proceedings was merely to prevent a child born out of wedlock from becoming a public charge, it is now well established that the appropriate emphasis must be upon the welfare of the child. The primary purpose of establishing paternity is to ensure that adequate provision will be made for the child's needs, in accordance with the means of the parents.” (L. Pamela P. v. Frank. S., 59 N.Y.2d 1, 5 (NY 1983) citing Schaschlo v. Taishoff, 2 N.Y.2d 408 (NY 1957); Nardone v. Coyne, 18 NY2d 626 (NY 1966))

The statutory limitations of Family Court Act § 517 are not repugnant to the due process clause given the State's interest in balancing the right to prosecute an otherwise valid filiation claim against the right of the putative father to be protected from defending stale or fraudulent claims (See Discenza v. Dann OO, 148 A.D.2d 196 (NY App Div 3d Dept 1989) appeal dismissed 75 NY2d 765 (NY 1989)). Further, Family Court Act § 517 involves economic and social welfare concerns, and presents no distinctions based on race, disability or other suspect classification. The Plaintiff argues that Family Court Act § 517 is unconstitutional because he being over twenty-one, has no recourse under Article Five of the Family Court Act. However, age is not generally considered a "suspect classification" so that the standard of review is whether or not a classification based on age is rationally related to some state interest (Diamond v. Cuomo, 70 N.Y.2d 338 (NY 1987) appeal dismissed 486 US 1028 (1998)). As such, Family Court Act § 517 is subject to a “rational basis” constitutionality test (See Mores v. Feel, 73 Misc. 2d 942 (N.Y. Fam. Ct. 1973); see also Lovelace v. Gross, 80 NY2d 419 (NY 1992)). “A classification that has a rational basis or relationship to a legitimate State interest will be upheld even though it ‘is not made with mathematical nicety or because in practice it results in some inequality.’” (Lovelace v. Gross, 80 N.Y.2d 419, 427 (NY 1992) citing Dandridge v. Williams, 397 US 471 (US 1970); Bowen v. Gilliard, 483 US 587 (US 1987); Lalli v. Lalli, 439 US 259 (US 1978)).

This Court finds that the disparity between the rights of a child under 21 and of an adult over 21 to compel blood testing to establish paternity reflects sound public policy and is rationally related to both of the State's interests in ensuring that adequate provision will be made for the child's needs in accordance with the means of the parents and to prevent a child born out of wedlock from becoming a public charge. Further, the statutory age limitations of Family Court Act § 517 balance the State's interests in prosecuting otherwise valid filiation claims against the right of the putative father to be protected from defending stale or fraudulent claims. As such, it is entirely rational for the Legislature to have provided for court-compelled DNA testing to establish the paternity of a non-marital child only in a Family Court proceeding and not thereafter once the child reaches adulthood (See Brown v Dreyfus, 2003 NY Slip Op 30233U (NY Sup Ct New York County Apr. 11, 2003)). As such, the Plaintiff has failed to establish that the statutory limitation of Family Court Act § 517, including the age

limitation absent an acknowledgment of paternity, are unconstitutional on its face.

Further, upon review of the Plaintiff's summons and complaint in the prior underlying action and his submitted papers, the Court finds that the Plaintiff has also failed to establish that Family Court Act § 517 is unconstitutional as applied to him. Without reiterating the entirety of the Plaintiff's pleading and/or submitted papers, this Court finds that the Plaintiff has failed to establish that his position is substantively unique from any other person seeking a paternity proceeding under Family Court Act § 517, who does not fall within the statutory limitations. The Plaintiff includes detailed descriptions of his alleged personal and familial history. However, said descriptions, if true, in no way legally distinguish him from any other individuals who fall outside of the statutory limitations of Family Court Act § 517. Specifically, there is nothing in the Plaintiff's pleadings and/or submitted papers to indicate that the statutory limitations of Family Court Act § 517 are unconstitutional as applied to him.

The Plaintiff's first cause of action against the Defendant hinges upon the Plaintiff's argument that Family Court Act § 517 is unconstitutional. Therefore, Plaintiff's failure to establish the unconstitutionality of Family Court Act § 517 necessary dictates

In the underlying action it is clear that the Plaintiff is an adult, over twenty-one and as such does not fall within the States primary interests in ordering paternity proceedings pursuant to Article Five of the Family Court Act. There is no possibility that the Plaintiff will become a public charge for lack of parentage nor is there any state interest in ensuring that adequate provision be made for the Plaintiff's needs as there would be in the case of a child under the age of twenty-one. In point of fact, the Plaintiff does not in anyway appeal to any of the State's valid interest in ordering paternity proceedings pursuant to Article Five of the Family Court Act.

Further, although the Plaintiff's reference in his complaint to Family Court Act § 517 and 523 suggests that he is seeking to commence paternity proceedings against the Defendant, the language of the Plaintiff's pleadings and submitted papers do not clearly indicate that the Plaintiff is ultimately seeking a ruling by the Family Court under Article Five declaring that the Defendant is the Plaintiff's father. Although Family Court Act § 523 deals with petitions for the Court to enter "declarations of paternity", the Plaintiff specifically indicates in his complaint that he is seeking "an order by this Court for a Genetic Marker Test". The Plaintiff's emphasis of the "Genetic Marker Test" and complete lack of substantive argument as to any of the other aspects of a paternity proceeding pursuant to Article Five (with the exception of the Plaintiff's argument that Family Court Act § 517 is unconstitutional) further establishes that the Plaintiff is seeking relief through a statute, the purpose of which is completely unrelated to the Plaintiff's alleged causes of action.

The Plaintiff's personal desire to confirm his parentage does not outweigh the Defendant's Fourth Amendment Right to personal privacy

Putting aside the fact that the primary purposes of Article Five of the Family Court Act are completely unrelated to the Plaintiff's alleged "right to know", the Plaintiff's only substantive argument in sum and substance is that he has a "right to know" his parentage. The core of said argument is that his personal desire to confirm his parentage should be weighed as being of greater legal importance than the Defendant's Fourth Amendment right to privacy.

"As '[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State', it can hardly be disputed that defendant enjoyed the right to be free from unreasonable intrusions into his body for the purpose of obtaining his bodily fluids or, in this case, DNA" (People v Matos, 37 Misc. 3d 252, 258 (N.Y. City Crim. Ct. 2012) citing People v. Sterling, (57 A.D.3d 1110, 1111 (NY App Div 3rd Dept 2008) lv denied 12 N.Y.3d 788 (NY 2009); Schmerber v. Cal., 384 US 757 (US 1966); Vernonia Sch. Dist. 47j v. Acton, 515 US 646 (US 1995)). Contrary to the Plaintiff's arguments as presented in his pleading and in his submitted papers in the instant motion to reargue/renew, there is no legal right to satisfy one's curiosity as to one's parentage. Similarly, there is no legal right to know one's history, or to be made aware of any potential medical issues based upon one's parentage. The law does not grant to people everything they want, nor are our legal rights intended to cater to all of our personal wants and/or motivations.

Clearly, the Plaintiff's personal desire "to know" his parentage does not outweigh the Defendant's Fourth Amendment protections. As such, the Plaintiff's argument that he has a "right to know" his parentage in no way justifies compelling the Defendant to submit to genetic test pursuant to Article Five of the Family Court Act.

The Plaintiff concedes that he does not fall within the statutory purview of Article Five of the Family Court Act, but seeks a finding that Family Court Act § 517 is unconstitutional, simply because the statute does not grant him the rights that he wishes. However, as previously stated, the State's primary purpose behind Article Five of the Family Court Act is to ensure that adequate provision be made for the children born out of wedlock and to protect society from having to bear the financial burden of supporting children born out of wedlock. Neither of these interests have anything to do with the Plaintiff's personal desire to confirm his parentage. Again, in the instant case the Plaintiff is not seeking to have the Defendant declared his father for any of the purposes of Article Five of the Family Court Act, but seeks paternity testing for the sole purpose of "knowing" if the Defendant is his father. In essence the Plaintiff's causes of action seek to enforce his personal desire to confirm his parentage, which is not a legal right, over the Defendant's privacy rights through a statute that was never intended for this purpose. There is no State interest in ordering the Defendant to submit to DNA testing at the behest of the adult Plaintiff for the sole purpose of the Plaintiff knowing his parentage. The Plaintiff's interest in knowing his parentage is entirely private and not protected as a matter of law.

Accordingly, the Plaintiff has failed to state a valid cause of action in the prior underlying action.

The Plaintiff has also failed to meet his burden to warrant renewal of the prior court's decision granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action.

A motion to renew a prior determination must "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" (CPLR §2221(e) (2), (3)). Upon review of the Plaintiff's submitted papers, this Court finds that the Plaintiff has failed to offer any new facts nor demonstrated that there has been a change in the law that would effect the prior court's determination granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action. The Plaintiff's submitted papers merely reiterate many of the same arguments that were presented before the prior court in deciding the Defendant's motion to dismiss. Specifically, the Plaintiff attaches with the instant motion papers a copy of his sur-reply which was previously submitted to the prior court in opposition to the Defendant's motion to dismiss his action.

The Court notes the Plaintiff's argument that the prior court's decision dismissing the Plaintiff's action for failure to state a cause of action "mentions nothing about the surreply". However, there is no requirement that the Decisions/Orders issued by a Court must include specific references to all of the papers submitted by all of the parties. Further, the lack of any such reference does not imply that the arguments in a specific set of submitted papers was not considered by the Court in rendering its decision. A Court's decision need not specifically refer to every one of a party's arguments as included in their submitted papers regardless of how irrelevant, insufficient and/or tangential said arguments are to the issues in question.

As such, this Court finds that the Plaintiff has failed to meet his burden on his motion to renew the prior courts decision granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action.

The Plaintiff has failed to establish any basis for the Court to conclude that his due process rights were denied by the prior court in determining the Defendant's prior motion to dismiss the Plaintiff's action for failure to state a cause of action.

Upon review of the Plaintiff's submitted papers, the Court finds that the Plaintiff has failed to establish any basis for his argument that the prior court denied his due process rights in granting the Defendant's prior motion to dismiss the Plaintiff's action for failure to state a claim of action.

"Due process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand" (La Rossa, Axenfeld & Mitchell v. Abrams, 62 N.Y.2d 583 (NY 1984)). "[W]hat constitutes required due process varies with the status of the party asserting that there has been a denial thereof as well as with the governmental function involved. Though the test for determining whether due process has been accorded may be said to be constant -- i.e., whether there has been protection of the individual against arbitrary action -- the specifics required to satisfy the standard may differ." (Health Ins. Asso. v. Harnett, 44 NY2d 302, 309 (NY 1978)). Due process is not a "mechanical formula or a rigid set of rules" (Dobkin v. Chapman, 21 NY2d 490, 502 (NY 1968) and due process claims under the Federal and New York Constitutions "require the balancing of factors--'an evaluation of the interests of the parties to the dispute, the adequacy of the contested procedures to protect those interests and the government's stake in the outcome'" (People v. Thompson, 90 N.Y.2d 615, 621 (NY 1997) citing People v. Scalza, 76 NY2d 604 (NY 1990); La Rossa, Axenfeld & Mitchell v. Abrams, 62 N.Y.2d 583 (NY 1984); see also Morillo v. New York, 178 A.D.2d 7 (NY App Div 1st Dept 1992) lv denied 80 N.Y.2d 752 (NY 1992); People v Bowles, 89 AD3d 171 (NY App. Div. 2nd Dept 2011)).

The Plaintiff argues that the prior court conducted oral argument on the Defendant's prior motion, but did not make a record of said oral argument. The Plaintiff further argues that oral argument was conducted at the bench for approximately 30 minutes, while the Plaintiff was sitting in the back of the courtroom "unable to hear what was being said". The Plaintiff was represented by counsel, who actively participated in oral argument before the prior court on the Defendant's motion to dismiss the Plaintiff's action for failure to state a claim. The fact that the Plaintiff was "unable to hear what was being said" during the course of the oral argument, wherein he was represented by counsel who participated in oral argument on Plaintiff's behalf, did not deny the Plaintiff his due process rights. Further, there is no requirement that oral argument be conducted on a motion before the Court or that oral argument must be recorded for potential appeals.

In the instant action, the Plaintiff was previously represented by counsel who submitted papers on the Plaintiff's behalf in opposition to the Defendant's motion to dismiss the Plaintiff's action, and who appeared on the Plaintiff's behalf at oral argument in opposition to the motion. The prior court granted the Defendant's motion to dismiss the Plaintiff's action based upon the arguments presented in the parties' fully submitted papers and the oral argument, wherein the attorneys for both parties were given the opportunity to present said arguments before the Court. Having evaluated the parties' interests in the underlying action, the adequacy of the contested procedures to protect those interests and the government's stake in the outcome, this Court finds that the prior court's procedures in deciding the Defendant's prior motion to dismiss the Plaintiff's action (e.g. allowing both parties to fully submit written papers on the motion, conducting oral argument wherein the attorneys for both parties were given the opportunity to present their arguments before the Court and deciding the Defendant's motion to dismiss based upon both parties' fully submitted papers and oral arguments) did not in any way deny the Plaintiff his due process rights.

Finally, this Court finds that the Plaintiff's remaining arguments that the prior court did not conduct the proceedings in an open public courtroom and did not allow "Plaintiff, the general public, or the media with the opportunity to hear the proceedings" to be baseless and entirely without merit. The possibility that no outside parties nor members of the media chose to view the Parties oral argument does not in any way imply that the prior court had actively prevented them from doing so.⁴

Conclusion

For the reasons so stated in the instant decision, the Plaintiff's motion to reargue/renew the prior court's decision granting the Defendant's motion to dismiss the Plaintiff's action for failure to state a cause of action is denied in its entirety. Further, the Plaintiff's arguments that he was denied his due process rights in connection with the prior court's determination of the Defendant's motion to dismiss his action are hereby rejected in their entirety.

Accordingly, the Plaintiff's underlying action remains dismissed for failure to state a cause of action as indicated in the decision/order of the Honorable Justice Milton Tingling dated December 12, 2014.

The foregoing constitutes the Order and Decision of the Court.

Dated: May 26, 2015

FILED

MAY 29 2015

NEW YORK
COUNTY CLERK'S OFFICE


JSC
HON. ROBERT D. KALISH
J.S.C.

⁴ It should be noted that this Court has decided the Plaintiff's instant motion to reargue/renew based upon the parties' submitted papers. Having reviewed the submitted papers in their entirety, this Court found that the parties arguments were fully presented and that there was no need for oral argument.