Ray v County of Suffolk
2020 NY Slip Op 30087(U)
January 10, 2020
Supreme Court, Suffolk County
Docket Number: 06116-2017
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 06116-2017

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JOHN RAY,

Petitioner,

-against-

COUNTY OF SUFFOLK, COUNTY EXECUTIVE STEVE BELLONE, COUNTY COMPTROLLER JOHN M. KENNEDY, ROBERT BIANCAVILLA, CHRISTOPHER MCPARTLAND, JOHN SCOTT PRUDENTI, EDWARD HEILIG, EMILY CONSTANT, JOHN DOES and JANE DOES, IN THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, WHOSE NAMES ARE PRESENTLY NOT KNOWN,

Respondents.

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MOTION DATE:	04/29/19
SUBMITTED:	05/29/19
MOTION SEQ. NO.:	5
MOTION DEC.:	MD

Upon the reading and filing of the following papers in this matter: (1) Petitioner's Notice of Motion dated April 10, 2019 and supporting papers; (2) Respondents Biancavilla, McPartland, Prudenti, Heilig and Constant's Affirmation in Opposition and Memorandum of Law dated April 22, 2019; (3) Respondents Bellone and County of Suffolk's Memorandum of Law dated April 23, 2019; (4) Respondent Kennedy's Memorandum of Law dated May 13, 2019; and

(5) Petitioner's Reply Affidavit dated May 14, 2018 and supporting papers (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's application for an Order granting him leave to renew/reargue the prior Order of this Court dated January 22, 2019 is denied.

In this Article 78 proceeding petitioner is a resident and taxpayer in Suffolk County. He alleges that between January 1, 2012 and the present, numerous salaried employees of the Suffolk County District Attorney's Office solicited and received money payments, alternatively referred to as stipends, from civil forfeiture funds which were secured by the Suffolk County Police Department, Suffolk County District Attorney's Office and the New York State and Federal governments. These funds are alleged to have been held in an account controlled by respondent John M. Kennedy as the Suffolk County Comptroller. The total of these payments, or stipends, totals approximately $3.25 million.

Petitioner alleges that as a result of these payments the pension benefits due the employees who received them will necessarily increase, leading to a greater burden on the taxpayers of Suffolk County and New York State. Petitioner further maintains that these forfeiture fund payments were made in violation of state and local laws which grant the New York State Legislature and Suffolk County Legislature the power to fix the wages of respondent county employees. Petitioner asks the Court for an Order directing respondents to take all action necessary to obtain the return of these funds, stating "[T]his honorable Court is explicitly obligated 'to enforce the restitution and recovery thereof,' of all such funds, paid out, under New York State General Municipal Law §51."

On January 22, 2019 this Court issued a decision and Order which granted the respondents' motions to dismiss the proceeding stating,

> With respect to the instant petition, before commencing a proceeding in the nature of mandamus to compel, it is necessary to make a demand and await a refusal, and the statute of limitations begins to run on the date of refusal by the body or officer and expires four months thereafter (***Austin v Board of Higher Education***, 5 NY2d 430, 186 NYS2d 1 [1959]; ***Matter of Level 3 Communications, LLC v DeBellis***, 72 AD3d 164, 895 NYS2d 110 [2d Dept 2010]; ***Matter of Whitted v City of Newburgh***, 65 AD3d 1365, 886 NYS2d 207 [2d Dept 2009]; ***Yonkers Racing Corp. v City of Yonkers***, 301 AD2d 592, 754 NYS2d 48 [2d Dept 2003]; CPLR 217). Here, petitioner failed to demand repayment of the civil forfeiture funds prior to making this petition. Therefore, mandamus to compel does not lie on these facts.

Petitioner now moves to reargue/renew that decision and Order arguing, among other things, that the filing of the original petition constituted a formal demand as required by case law which provides that "often the petition will be deemed the demand, and the answer thereto the refusal" (***Community Bd. No. 3 v State of New York, Off. of Retardation & Dev. Disabilities***, 76 AD2d 851, 428 NYS2d 520 [2d Dept 1980]). Accordingly, petitioner maintains that the Court misapprehended the facts and applicable law in determining the prior motions.

Alternatively, petitioner seeks to renew the January 22, 2019 decision and Order. In this regard, petitioner contends that he served a Notice of Claim upon all respondents on November 30, 2017 and served a Demand on Respondents on December 1, 2017 and that respondents have not replied to petitioner regarding the demand. Petitioner claims that he did not supply these facts in response to the prior motions to dismiss because the case law supports the petition being a satisfactory demand.

Each of the groups of respondents, other than those designated as "John Doe" or "Jane Doe," have submitted opposition to the instant application which is determined as follows.

A motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining a prior motion, and may not be used to advance arguments different than those presented on such prior motion (CPLR 2221 [d][2]; *see* ***Ahmed v Pannone***, 116 AD2d 802, 984 NYS2d 104 [2d Dept 2014]; ***Grimm v Bailey***, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]; ***Haque v Daddazio***, 84 AD3d 940, 922 NYS2d 548 [2d Dept 2011]; ***V. Veeraswamy Realty v Yenom Corp.***, 71 AD3d 874, 895 NYS2d 860 [2d Dept 2010]; ***Pryor v Commonwealth Land Title Ins. Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). Reargument may be granted upon a showing that the court overlooked or misapprehended the facts or the law "or for some other reason mistakenly arrived at its earlier decision" (***Carrillo v PM Realty Group***, 16 AD3d 611, 611, 793 NYS2d 69 [2d Dept 2005]; *see e.g.* ***Grimm v Bailey***, *supra*; ***E.W. Howell Co., Inc. v S.A.F. La Sala Corp.***, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]).

Here, despite the respondents Bellone and County of Suffolk arguing that petitioner failed to properly make a demand prior to the commencement of this action, petitioner failed to address this contention in his opposition to the motions to dismiss. Although the Court recognizes that a petition *may* serve as a formal demand (***Community Bd. No. 3 v State***, supra)(*Emphasis supplied*), a motion for leave to reargue is not designed to provide the unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (***Ahmed v Pannone***, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014]). Inasmuch as petitioner failed to address the issue of a proper demand in the prior motions he has failed to establish that the Court overlooked or misapprehended the relevant facts or misapplied the law (*see* ***Bigun v Ahmed***, 150 AD3d 1186, 52 NYS3d 896 [2d Dept 2017]; ***Rodriguez v Gutierrez***, 138 AD3d 97, 31 NYS3d 97 [2d Dept 2016]; ***Carrillo v PM Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]).

"A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination and shall contain a reasonable justification for the failure to present such facts on the prior motion" (***Constructamax, Inc. v Dodge Chamberlin Luzin Weber, Assoc. Architects, LLP***, 157 AD3d 852, 853, 70 NYS3d 521 [2d Dept 2018] quoting CPLR 2221[e]). The party seeking renewal must not have known the new or additional facts presented, or, in the Supreme Court's discretion, may have known the facts at the time of the original motion (***Cioffi v S.M. Foods, Inc.***, 142 AD3d 526, 36 NYS3d 664 [2d Dept 2016]). "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" (***Elder v Elder***, 21 AD3d 1055, 1055, 802 NYS2d 457 [2d Dept 2005]; *see also* ***Serviss v Incorporated Vil. of Floral Park***, 164 AD3d 512, 82 NYS3d 495 [2d Dept 2018]). The Court has no discretion to grant renewal when the moving party does not provide a reasonable justification for failing to present the new facts with the original motion (***Cioffi v S.M. Foods, Inc.***, *supra*).

Here, petitioner could not provide reasonable justification for failing to present the Notice of Claim (served on November 30, 2017) and the Demand on Respondents (in a letter dated December 1, 2017) because they are dated after the petition in this action was filed. As such, petitioner cannot offer a reasonable justification for his failure to include these alleged demands in his original petition and he did not do so even in the face of motions to dismiss.

Accordingly, petitioner's motion to reargue/renew the prior applications is denied.

The Court further notes, for the sake of clarity, that the motions to dismiss could alternatively be granted based on a violation of the applicable statute of limitations. Petitioner claims that the earliest one could have known that funds were allegedly used inappropriately was on October 12, 2017 when the Wall Street Journal posted an article detailing the payments made to Assistant District Attorneys from forfeiture funds. Therefore, petitioner argues, he made timely demand on the respondents with the filing of his petition on November 28, 2017, well within the four month statute of limitations applicable to Article 78 proceedings (*see* CPLR 217).[1]

The Court finds the petitioner's argument without merit. Where, as here, "a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete" (CPLR 206). "The courts have interpreted the 'demand is complete' language to mean that the Statute of Limitations runs from the time when the party making the demand first becomes entitled to make the demand, and not from the actual time the actual demand is made" (***Woodlaurel, Inc v Wittman***, 199 AD2d 497, 606 NYS2d 39 [2d Dept 1993]),citing ***Gower v Weinberg***, 184 AD2d 844, 584 NYS2d 496 [3d Dept 1992]).

Here, petitioner first became entitled to commence this proceeding on March 9, 2017 when the last payments were made from civil forfeiture funds to Assistant District Attorneys. This date is evidenced by the affidavit of Louis A. Necroto, the Chief Deputy Comptroller of Suffolk County dated April 23, 2018 (*see* Petitioner's Notice of Motion, Exhibit 4). Because petitioner commenced this proceeding on November 28, 2017, more than eight months after he became entitled to make the demand, the statute of limitations had expired and the proceeding must be dismissed on this alternate ground.

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[1]The Court addresses this issue within the scope of the motion to reargue/renew as it was raised by the petitioner in his moving papers.

Based on the sum of the foregoing, the petitioner's motion to renew/reargue is denied.

This constitutes the decision and Order of the Court.

Dated: **January 10, 2020**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

___X___ FINAL DISPOSITION _____ NON-FINAL DISPOSITION