

<b>Zucker v New York State Div. of Hous. &amp; Community Renewal</b>
2020 NY Slip Op 31244(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 152416/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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CHERIE ZUCKER,

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL, CENTURY APARTMENTS  
ASSOCIATES

Defendant.

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INDEX NO. 152416/2019  
MOTION DATE 11/06/2019  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 59, 60, 61, 62

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

Petitioner moves pursuant to CPLR 2221(d) and (e) for renewal and/or re-argument of this Court’s order entered October 2, 2019. In that order, the Court denied petitioner’s Article 78 petition to annul DHCR’s order, determining that petitioner’s apartment was to be deregulated at the end of her current lease. The DHCR decision was based on the determination of the Department of Taxation and Finance, which found that petitioner/tenant’s relevant household income exceeded the \$200,000.00 statutory threshold in both relevant tax years.

Petitioner seeks renewal of the Court’s order, arguing that DHCR’s mistakenly relied on a tax document which incorrectly listed petitioner’s federal adjusted gross income above the \$200,000.00 threshold. In support of her motion, petitioner produces a letter from the Department of Finance showing that in her 2014 amended tax return, her federal adjusted income was below \$200,000.00.

Petitioner’s counsel affirms that he provided this information to counsel for DHCR and to counsel representing Century Apartments Associates and requested that DHCR reconsider its position in light of the fact that their determination was not based on accurate information. However, counsel states that he never received a reply from DHCR.

Petitioner now seeks to have this Court renew its order, arguing that based upon the amended federal tax return, the information provided to and used by DHCR was inaccurate. In the alternative, petitioner requests that the Court direct DHCR to request a verification of petitioner's 2014 tax return or that the Court remand this matter to DHCY for further consideration.

Petitioner also seeks leave to reargue the Court's decision arguing that the Court's misapprehension of the legal position taken by DHCR in this proceeding led the Court to an incorrect conclusion.

Petitioner acknowledges that she received the Notice of Proposed Deregulation from DHCR. She states that when she responded to the Notice, she discovered that an error had been made in her 2014 tax return. She states that the original 2014 tax return included income invoices for which no payment had been made, causing the return to indicate that her federal adjusted income was higher than it actually was. Petitioner states that she later amended the 2014 tax return to more accurately reflect her income. According to petitioner, the Department of Tax and Finance accepted the amended 2014 return and gave her a refund.

Petitioner further argues that she then sent a letter to DHCR, advising it that an amended 2014 tax return had been filed. However, no explanation was given at that time for the filing of the late return. Petitioner has posited possible explanations as to why the second verification to the Department of Taxation and Finance produced a false verification, but she is unable to point to a concrete reason.

Petitioner asserts that throughout these proceedings she has argued that her 2014 amended tax return was below the threshold for deregulation. However, she argues that her arguments were not addressed. Petitioner, thus wishes the Court to consider her amended tax return as proof of her actual income at the time of DHCR's deregulation decision.

Motions for leave to reargue and/or renew are governed by CPLR 2221. A motion for leave to reargue and a motion for leave to renew must be specifically identified as such motions (CPLR 2221 [d][1]; 2221 [e][1]). A combined motion for leave to reargue and leave to renew must identify separately and support separately made (CPLR 2221 [f]).

A motion to renew is based upon new facts not presented on the prior application that would change the prior decision and must contain a reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e][2][3]). It has been held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable

to the movant at the time of the prior application (*Wiinograd v. Neiman Marcus Group*, 11AD3d 455 [2004]; *Seltzer v. City of New York*, 288 AD2d 207 [2007]). Where the movant has not advanced any argument to support a claim of reasonable justification as to why the facts presented could not have been presented to the court on the prior motion, the mandatory language of CPLR 2221 [e][3] requires denial of the motion.

A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d][2]). It is a basic principle that movant on rearargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Andrea v. E.I. du Pont de Nemours & Co.*, 289 AD2d 1039 [2001]; *Bolos v. Staten Island Hosp.*, 217 AD2d 643 [1995]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp v. Kassiss*, 182 AD2d 22 [1992]; *Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971[1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovaniello v. Carolina Wholesale Off. Machine Co., Inc.*, 29 AD3d 737 [2006]).

Nevertheless, “[i]t is well settled that a motion to leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision.” (*Peak v. Northway Travel Trailers*, 260 AD2d 840 [1999]).

Upon review of the record and the papers submitted, the Court finds that the Petitioner has failed to present any new facts in support of the motion to renew, which would alter the Court’s original determination. The record reflects that DHCR exercised its discretion to verify the 2014 amended tax return and found that petitioner was above the threshold for deregulation.

The Court’s October 3, 2019 decision found that DHCR’s issuance of the Order of Deregulation was proper and rational. The ruling was consistent with relevant case law regarding DHCR’s reliance on the Department of Taxation and Finance’s verification of income in a luxury deregulation proceeding. No showing was made that the Department of Taxation and Finance erred in its determination.

Petitioner has also not demonstrated that the Court overlooked or misapprehended the facts or law in reaching its decision.

Petitioner states that the issue regarding the reason that she filed an amended tax return had not been raised. The record reflects that this issue was first raised in opposition to the within Article 78 petition. The Court did not consider or review this issue in making its determination, as it was not part of the record. *Classic Realty, LLC v. N.Y. State Div. of Housing and Community Renewal*, 2 NY3d 142 (2004).

Petitioner now requests that even though the issue was not raised, she now offers it to this Court as an explanation for her filing of the amended tax return to demonstrate that the amended filing was legitimate.

As stated above, the Court did not consider any argument regarding the amended tax return issue at the time it rendered its October 3, 2019 decision and will not consider it now.

The motion is denied, as petitioner has failed to meet her burden to sustain the relief requested.

This is the Decision and Order of the Court.

05/08/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
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<input type="checkbox"/>	SUBMIT ORDER	
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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