

**Jaskaran v City of New York**

2021 NY Slip Op 30180(U)

January 19, 2021

Supreme Court, New York County

Docket Number: 160222/2019

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

JACK JASKARAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, JAMES O'NEILL

Defendant.

-----X

INDEX NO. 160222/2019

MOTION DATE 08/19/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR 2221, of petitioner Jack Jaskaran (motion sequence number 003) is denied; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.

## MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Jack Jaskaran (Jaskaran) moves, pursuant to CPLR 2221, for leave to reargue a portion of an earlier decision by this court (motion sequence number 003). For the following reasons, the motion is denied.

## FACTS

The court rendered the decision in question on July 17, 2020. *See* notice of motion, McEnanany affirmation, exhibit A. That decision dismissed Jaskaran's Article 78 petition, and denied the cross motion by the respondents the City of New York and Police Commissioner James P. O'Neill (together, respondents) to strike Jaskaran's notice to admit (motion sequence numbers 001 & 002). *Id.* The portions of that decision that are relevant to Jaskaran's current motion provides as follows:

“For its part, the court is mindful that Public Officers Law § 89 (3) permits an agency unable to locate documents properly requested pursuant to FOIL to instead provide a certification that it does not have possession of a requested records or that such records cannot be found after diligent search. *See e.g., Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217 (2018). Here, respondents' cross motion relies entirely on the fact that they have provided Jaskaran with such a certification, rather than invoking any of the disclosure exceptions to Public Officers Law § 87 which were cited in the RAAO order. *See* notice of cross motion, Holt affirmation, ¶¶ 14-15. The court thus deems that respondents have conceded that none of those exceptions are applicable to Jaskaran's FOIL request. However, notwithstanding Jaskaran's allegations that there is evidence that the NYPD may have access to Section IV of the ‘Medical Screening Manual for Law Enforcement Officers,’ and notwithstanding the fact that respondents' certification pursuant to Public Officers Law § 89 (3) was prepared by their attorney ‘on information and belief,’ rather than by someone with actual knowledge of the NYPD's records search, the Court of Appeals has long been clear that providing such a certification satisfies the NYPD's statutory disclosure duties, rectifies any alleged noncompliance, and renders any Article 78 challenge that is based on such alleged noncompliance moot and subject to dismissal. *See Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 (2001). Accordingly, the court finds that the instant certification is sufficient to moot the open remainder of Jaskaran's FOIL request, and that his Article 78 petition to enforce that FOIL request should be dismissed.

“Respondents' motion to strike asserted that Jaskaran's February 26, 2020 notice to admit should be stricken because it is untimely and seeks improper information. See respondents' mem of law at 3-9. Jaskaran replied that respondents' moving papers were defective because they were not accompanied by an affirmation of good faith, and also disputed that his notice to admit sought improper material. *See* petitioner's mem of law in opposition, at 9-38. However, respondent's request for a protective order against Jaskaran's discovery demands has been rendered moot by the court's decision to dismiss Jaskaran's petition. Accordingly, the court finds that respondents' motion to strike should also be denied for that reason.”

*Id.*, exhibit A. Jaskaran submitted this motion to reargue on August 19, 2020. *Id.*, notice of motion. Respondents thereafter filed timely opposition to Jaskaran's motion, and this matter is now fully submitted (motion sequence number 003).

#### DISCUSSION

Pursuant to CPLR 2221 (d) (2), “[a] motion for leave to reargue . . . 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.” Such a motion may be granted only upon a showing ““that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.”” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1<sup>st</sup> Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). As the Appellate Division has observed, “a motion for leave to reargue ‘is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.’” *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999).

Here, Jaskaran seeks to reargue three points of law that the court determined in its July 17, 2020 decision. First, Jaskaran asserts that “the court denied [his] Article 78 Petition based on an application of the incorrect standard of review;” specifically, by applying the “arbitrary and capricious” standard rather than the “error of law” standard. *See* petitioner's mem of law at 4-5.

This assertion is demonstrably inaccurate. The July 17, 2020 decision mentioned the “arbitrary and capricious” standard at the beginning of the discussion section to underscore the fact that the “arbitrary and capricious” standard usually governs judicial review of Article 78 petitions. However, the balance of the decision makes it clear that the court did not apply the “arbitrary and capricious” standard to Jaskaran’s petition. Rather, the court declined to perform the standard judicial review of that petition after finding that it had been rendered moot, by operation of law, as a result of respondents’ certification that they had made a “diligent search” got the records sought in Jaskaran’s FOIL request. Jaskaran’s argument willfully misreads the first portion of the court’s July 17, 2020 decision out of context in an attempt to support an inaccurate assertion. This borders on deceitful behavior. Therefore, the court rejects Jaskaran’s first argument as a “red herring.”

Next, Jaskaran argues that “the court erroneously gave deference to respondents' interpretation of the Freedom of Information Law.” *See* petitioner’s mem of law at 6-7. This argument is also demonstrably inaccurate. Again, the first paragraph of the July 17, 2020 decision’s discussion section merely mentioned in passing the principle that an administrative agency’s rulings on the regulations that it applies are generally entitled to judicial deference. However, the balance of the decision makes it clear that the court found in respondents’ favor because of the rule that the NYPD’s FOIL obligations end when it certifies that it has performed a “diligent search” for requested records, and *not* because of deference to the NYPD’s interpretation of the FOIL. Further, the appellate precedent which the court cited remains in effect in the First Department, and Jaskaran has not identified any contrary case law in his motion to support his argument. *See Matter of Abdur-Rashid v New York City Police Dept.*, 31

NY3d 217 (2018). Therefore, the court rejects Jaskaran's second argument as both inaccurate and unfounded.

Finally, Jaskaran complains that "The court failed to address [his] entitlement to attorneys' fees" as the "prevailing party" in this proceeding. *See* petitioner's mem of law at 7-12. The portion of Public Officers Law (POL) § 89 which governs awards of attorney's fees in FOIL proceedings provides as follows:

"The court in such a proceeding: . . . (ii) *shall assess*, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed *and the court finds that the agency had no reasonable basis for denying access.*"

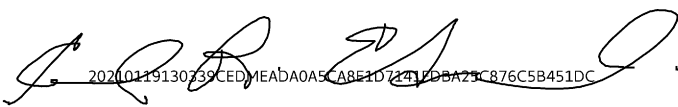
POL § 89 (4) (c) (emphasis added). It is true that POL § 89 (4) (c) (ii) codifies a mandatory award of attorney's fees to the party which "substantially prevails" in a FOIL appeal, as opposed to a discretionary award. However, it is not true that Jaskaran "substantially prevailed in this proceeding," since the court dismissed his Article 78 petition. Further, the July 17, 2020 decision found that respondents "had a reasonable basis for denying access" to the records Jaskaran sought because it had provided him with a legally sufficient certification of a "diligent search" instead. Jaskaran does not explain how he can be considered to have "substantially prevailed" in light of these two facts, nor is any of the case law that he cites supportive of his assertion. Therefore, the court rejects Jaskaran's final argument. Accordingly, having found that Jaskaran has failed to satisfy the requirements of CPLR 2221, the court concludes that Jaskaran's motion to reargue should be denied.

#### CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR 2221, of petitioner Jack Jaskaran (motion sequence number 003) is denied; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.



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1/19/2021  
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CAROL R. EDMED, J.S.C.

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| CHECK ONE:            | <input checked="" type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/>            | NON-FINAL DISPOSITION |
|                       | <input type="checkbox"/>            | GRANTED                    | <input checked="" type="checkbox"/> | DENIED                |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/>            | GRANTED IN PART       |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | SUBMIT ORDER          |
|                       |                                     |                            | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                                     |                            | <input type="checkbox"/>            | OTHER                 |
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