STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

TERENCE CARDINAL COOKE HEALTH CENTER,

Plaintiff,

-against-

COMMISSIONER OF HEALTH of the State of New York; COMMISSIONER OF THE OFFICE OF PEOPLE WITH DEVELOPMENTAL DISABILITIES of the State of New York; and THE DIRECTOR OF THE BUDGET OF THE STATE OF NEW YORK,

Defendants.

Index No. 906935-18
RJI No. 01-18-ST9996

DECISION AND ORDER

APPEARANCES:

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Attorneys for Petitioner
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This is a motion by respondents to reargue a compliance order, signed by the undersigned, on October 22, 2020. The motion is made pursuant to CPLR §§ 2221 and 5015. It is opposed by the petitioner. For the reasons that follow, the motion is denied.

BACKGROUND

On May 14, 2020, this Court issued a Decision, Order and Judgment (hereinafter "May 14 decision"), which invalidated retroactive rate revisions of the respondent because of their failure to apply inflation factors and ordered respondents to recalculate and reissue such rates as required by the Office for People With Developmental Disabilities ("OPWDD") regulations. No appeal of the May 14 decision was taken by the respondents nor did they move for reargument or renewal.

Petitioner forwarded a request for information to the respondents in an effort to obtain compliance with the directions contained in the May 14 decision. No response was received from the respondents. On August 25, 2020, Petitioner sent a copy of a proposed compliance order, indicating they intended to submit the same to the Court in the event of a failure to respond. No response was forthcoming. By letter dated September 2, 2020, petitioner sent a written request to the Court, with a copy to the respondents, for a compliance conference and again submitted a copy of the proposed compliance order. Respondents finally responded with a letter dated September 21, 2020. The letter was addressed to Anmarie Cologne, the executive VP and Chief financial Officer of Arch Care and purported to transmit rate sheets for Terence Cardinal Cooke Specialty Hospital (petitioner) for July 1, 2011, to December 31, 2015, rate periods. It stated that

OPWDD had received no budget appropriations for the trend factors greater than zero for any of their programs after 2010 and, therefore, the agency had no authority to issue rates that were not calculated in accordance with the budget appropriation authority. The rates contained in that letter were identical to the rates can in the contested litigation. Although the respondents did not send a copy of this letter to the Court, the petitioner did, prior to the October hearing.

On October 9, 2020, the Court held a hearing to determine whether it should sign the proposed order of compliance that had been submitted by the petitioner, seeking to enforce the Court's May 14 decision. Attorneys for the petitioner appeared, remotely, as did Joshua McMahon, Esq., Assistant Attorney General; Joseph K. Dier, attorney for OPWDD; Joel Lombardi, attorney for the New York State Division of the Budget; and Tracy Hennige, lawyer for the New York State Department of Health. Petitioner argued that the proposed order, of which respondents had had notice since August 25, 2020, be signed. The Order directed the respondents to release the funds they had seized based on improper rate calculation. Respondents argued that the Court had erred in its May 14 decision. They further argued that the proposed order was not contemplated by the May 14 decision and would be inappropriate to sign. They also conceded they had not appealed the May 14 decision nor had they moved to reargue it. At no time did the respondents deny that they had not been in possession of the proposed order since

August 25, 2020. Nor did they contest the manner in which the proceeding had been scheduled.

The Court signed the proposed order on October 22, 2020. It directed the respondents to replace the invalidated rates with those rates previously promulgated and paid for the periods of January 1, 2012, and, thereafter, within 30 days from the date of the order. It further directed respondents to refund to petitioner all recoupments taken to date based upon the invalidated rates, within 30 days of the date of the order, as well as interest charged and recouped on the alleged overpayment amounts within 30 days of the date of the order and to otherwise comply with the May 14 decision. The instant motion to renew and or reargue followed, returnable December 21, 2020.

In the interim, on November 16, 2020, the respondents also filed a notice of appeal and/or application for permission to appeal, seeking to vacate the October 22, 2020, Order, with the Appellate Division Third Department. On December 31, 2020, the Third Department denied the motion to vacate the order of Supreme Court dated October 22, 2020. Notice of entry of this order was served upon respondents on January 4, 2021.

DISCUSSION

CPLR §2221 requires that a party moving for leave to renew or reargue identify which subdivision they are electing to proceed under. (CPLR §2221 (d),

(e)). The respondents do not specify which section they are choosing. Nevertheless, from a reading of their argument, it appears they are proceeding under subdivision d. That section provides that such a motion:

> 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.

A motion to reargue is directed to the sound discretion of the court. It must demonstrate that the court overlooked, misapplied, or misapprehended the relevant facts or law. HSBC Bank USA, NA v. Halls, 98 A.D. 3d 718 (2d Dept. 2012); Grassel v. Albany Medical Center Hospital, 223 A.D.2d 803 (3d Dept. 1996), lv denied 88 N.Y.2d 842 (1996). Its purpose 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 A.D.2d 558, 568 (1st Dept. 1979), appeal denied 56 N.Y.2d 507 (1982). Nor is a motion for reargument an appropriate vehicle for raising new questions. People v. D'Alessandro, 13 N.Y.3d 216 (2009); Simpson v. Loehmann, 21 N.Y.2d 990 (1968). The denial of a motion to reargue is not appealable. Weiss v. Deloitte & Touche, LLP, 63 A.D.3d 1045 (2d Dept. 2009).

Here, respondents argue that this Court erroneously determined that they had failed to take action to comply with the May 14 decision. They contend that they eventually furnished the Court with a revised rate sheet, as contained in the letter

of September 21, 2020, which, they assert, articulated a rationale for the application of the 0% trend factor in computing the revised rates, i.e. the absence of budget appropriation authority. Of course, as petitioner points out, no such argument was made when the Court was considering the matter in the first place. The presence or absence of budget appropriation authority was never previously raised and no explanation is offered by respondents in this motion why it was not previously raised. Even if this Court were to consider the matter on the merits, it is unpersuasive. Matter of New York Tel Company v. Nassau County, 267 A.D.2d 629 (3d Dept. 1999), lv denied 95 N.Y.2d 756 (2000).

This Court's May 14 decision required the respondents to recalculate the petitioner's rates based upon appropriate trend factors as required by the regulations. The proposed order, of which the respondents had ample notice, requires no more in that regard. Thus, the argument that the compliance order was issued ex parte is not persuasive. Rather it appears to be an attempt to avoid the consequences of failing to file a timely notice of appeal to the May 14 decision.

Respondent's next argument, that the holding in the May 14 decision that the respondents had not adequately explained why they used a 0% trend factor and that now that they have supplied one (as they assert) as contained in the September 21, 2020, letter, and have, therefore, cured their defect, is likewise unpersuasive. The Court, in its May 14 decision, held:

> The record that is submitted in support of respondent's opposition to the petition contains no factual basis for the claimed election to use a -0- trend factor, such as a demonstration of by whom within "the State" made that decision, no documents reflecting consideration of economic data that would inform respondents determination of the amount of the trend factor or a decision to apply a -0- trend factor, or any other factual support for the state's asserted affirmative decision "not to apply a positive trend factor".

That decision went on to hold:

> There is nothing before the court supporting the conclusory and identical statements in the Carter and Howard affidavits that the State did, in fact, exercise that discretion here. (pages 8 and 9 of the May 14 decision).

Clearly, here, the respondents do not deny their failure to supply adequate proof that led to this Court's May 14 decision. That decision invalidated the retroactive rate revisions, which form the basis for retroactive recoupment, and provided a specific time frame for compliance with the obligation to properly apply inflation factors for the years in question.

Respondents' argument that the petitioner now has an additional obligation to start another proceeding to contest the allegedly "new" determination of the zero-trend factor is likewise unpersuasive. They offer no legal authority in support of this contention and it frankly flies in the face of reason and common sense.

In short, respondents have failed to supply any matters of fact or law allegedly overlooked or misapprehended by the Court. To the extent that they

attempt to introduce new matters of fact, i.e. lack of budgetary authority, CPLR §2221 (d)(2) specifically prohibits the same. The motion to reargue is denied.

Respondents make no attempt to specifically tie any of their arguments to CPLR §5015. That section empowers a court to relieve a party from a judgment or order upon the grounds of (1) excusable neglect, (2) newly discovered evidence, (3) fraud, misrepresentation or other misconduct of an adverse party, (4) lack of jurisdiction to render the judgment or order (5) or reversal modification or vacatur of a prior judgment or order upon which it is based. No plausible argument has been advanced that would persuade this Court that relief under this section is appropriate. Accordingly, the motion to vacate or be relieved of the consequences of the May 14 decision under this section is likewise denied.

The original Decision and Order is being mailed to Bond, Schoeneck & King, PLLC. All papers considered in this matter are e-filed at https://iapps.courts.state.ny.us/nyscef/HomePage under Index Number 906935-18. The signing of this Decision, Order and Judgment shall not constitute entry of filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: February 8, 2021
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

02/09/2021

Papers Considered:

1. Notice of Motion to Vacate of Joshua E. McMahon, Esq., Assistant Attorney General, dated November 19, 2020 (NYSEF Doc No. 76)

2. Memorandum of Law of Joshua E. McMahon, Esq., Assistant Attorney General, dated November 19, 2020 (NYSEF Doc Nos. 77 and 78)

3. Affirmation of Joshua E. McMahon, Esq., Assistant Attorney General, dated November 19, 2020 (NYSCEF Doc No. 79)

4. Exhibit "A" to Affirmation of Joshua E. McMahon (NYSCEF Doc No. 80)

5. Affirmation in Opposition of John F. Darling, Esq., dated December 14, 2020 (NYSCEF Doc No. 83)

6. Exhibits "A" through "H" to Affirmation of John F. Darling, Esq. (NYSCEF Doc Nos. 84-91)