

Simon v Foye
2022 NY Slip Op 30848(U)
March 14, 2022
Supreme Court, New York County
Docket Number: Index No. 151510/2021
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

BARRY SIMON, PICTURE THE HOMELESS, INC., URBAN
JUSTICE CENTER-SAFETY NET PROJECT,

Petitioner,

INDEX NO. 151510/2021

MOTION DATE 08/03/2021

MOTION SEQ. NO. 002

- v -

PATRICK FOYE, SARAH FEINBERG, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY, MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING AUTHORITY

Respondent.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 25, 26
were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221 (a) of petitioners
Barry Simon, Picture the Homeless, Inc. and Urban Justice Center - Safety Net Project (motion
sequence number 002) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with
notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, individual petitioner Barry Simon (Simon) and corporate co-petitioners Picture the Homeless, Inc. (PHI) and Urban Justice Center - Safety Net Project (UJC; together, petitioners), move pursuant to CPLR 2221 (a) for leave to renew/reargue the court's June 17, 2021 decision that denied their petition and dismissed this matter (motion sequence number 002). For the following reasons, this motion is denied

BACKGROUND

The court discussed the facts of this case at length in its earlier decision and need not repeat them now. For the purposes of this motion, the portions of the court's decision that petitioners seek to challenge provided as follows:

“As mentioned earlier, SAPA [New York State Administrative Procedure Act] § 205 states that:

‘a special proceeding or action may not be maintained unless the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question and action has been taken upon such a request or more than thirty days has elapsed since such request has been filed and no final action has been taken thereon or the agency has not provided for the issuance of such declaratory rulings under section two hundred four.’

“Respondents argue that ‘despite having the opportunity to do so, Petitioners failed to raise their concerns during the public comment period, or when the NYCTA Board approved the Amended Rules to become permanent, and have thereby failed to exhaust their administrative remedies before filing the Petition.’ *See* respondents’ mem of law at 15-17. Cynthia Wilson (Wilson), the MTA’s Director of Homeless Outreach Services, specifically states that: 1) respondents published Notices of Emergency/Proposed Rule Making in the New York State Register on May 20, 2020 and August 12, 2020; 2) respondents held a public meeting about the rules on September 23, 2020; and 3) the Notice of Adoption that respondents subsequently published in the New York State Register on October 14, 2020 stated that they had not received any public comments about the rules on any of those occasions. *See* verified answer, Wilson affirmation, ¶¶ 1-14. Petitioners reply by citing the second sentence of SAPA § 205, and arguing that, because ‘respondents have not provided for the issuance of declaratory rulings in the relevant sections of the Public Authorities Law or anywhere else, . . . petitioners are not required to first seek a declaratory ruling from respondents prior to judicial review.’ *See* petitioners’ reply mem at 2-5. Petitioners further observe that ‘Section 205, which sets forth in full the administrative remedies petitioners must exhaust prior to judicial review, does not require the submission of comments during the rulemaking process as a prerequisite to obtaining judicial review on a particular issue.’ *Id.* In the court’s view, the focus of petitioners’ argument is misplaced. It is true that SAPA § 205 provides that

‘a special proceeding or action may not be maintained unless the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question . . . or the agency has not provided for the issuance of such declaratory rulings under section two hundred four.’ However, petitioners’ assertion is belied by the MTA’s public website, which links to nearly 5000 declaratory rulings that the agency has issued on a variety of topics. *See* <https://www.ny.gov/agencies/metropolitan-transportation-authority>. The MTA has clearly ‘provided for the issuance of declaratory rulings,’ as mentioned in SAPA § 205. Further, SAPA § 204 (2) (c) only permits an aggrieved party to file an Article 78 petition without first requesting a declaratory ruling from an agency in one of two situations. If a party merely wanted clarity as to ‘whether any action by [the agency] should be taken pursuant to a rule,’ as described in SAPA § 204 (1) (ii), then that party may file an Article 78 petition without first obtaining a declaratory ruling from the agency. However, if that party was concerned about ‘the applicability to any person, property, or state of facts of any rule or statute enforceable by the agency,’ as described in SAPA § 204 (1) (i), then it would be incumbent on that party to obtain a declaratory ruling from the agency before s/he could file an Article 78 petition to challenge the rule. Here, it is clear that petitioners’ challenges to the three instant rules raise the latter types of concerns. As a result, the court finds that petitioners were required to seek a declaratory ruling from the MTA before they filed the instant Article 78 proceeding, and discounts their facile reply argument as contrary to the plain text of SAPA §§ 205 & 204 (1) (i). Petitioners ‘cannot avoid the consequences of [their] failure to exhaust [the available] administrative remedies.’ *Matter of Mid City Elec. Corp. v Metropolitan Transp. Auth.*, 148 AD3d 497, 498 (1st Dept 2017), citing *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978). Therefore, the court concludes that the instant Article 78 petition should be dismissed for that reason.”

See NYSCEF document 18. Respondents¹ served and filed a notice of entry of the court’s

decision on June 17, 2021 – the same day the decision was issued. *Id.* NYSCEF document 19.

Petitioners thereafter filed this motion on July 15, 2021. With the service of opposition and reply papers, this matter is now fully submitted (motion sequence number 002).

DISCUSSION

Petitioners designate their motion as seeking “leave to renew and/or reargue their verified petition.” *See* notice of motion, Wachs affirmation, ¶ 2. However, CPLR 2221 requires moving parties to make different showings in support of motions to renew versus motions to reargue.

¹ The respondents named herein are three administrative agencies - the Metropolitan Transportation Authority (MTA), New York City Transit Authority (NYCTA), and Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) - and their respective chairs Patrick J. Foye (Foye) and Sarah E. Feinberg (Feinberg; together, respondents).

Pursuant to CPLR 2221 (e) (2) and (3), “a motion for leave to renew . . . 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 . . . shall contain reasonable justification for the failure to present such facts on the prior motion” (emphasis added). Such a motion must be based on “material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court.” *See Matter of Beiny*, 132 AD2d 190, 209-210 (1st Dept 1987), citing *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979). By contrast, under 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.”

Here, petitioners’ motion does not refer to any “new facts” that might support a request for leave to renew under CPLR 2221 (e). There is no affidavit of merits from a party competent to discuss the facts of this case, and there is no documentary evidence annexed to it. Instead, petitioners only offer the affirmation of their attorney and their memorandum of law, both of which raise legal arguments (discussed below), but neither of which contains any factual allegations. *See* notice of motion, Wachs affirmation; petitioners’ mem of law. Since this motion does not allege any “new facts . . . that would change the prior determination,” the court denies so much of it as seeks relief pursuant to CPLR 2221 (e) for failing to meet the statute’s standard of review. Accordingly, the court finds that petitioner’s motion should be construed as a request for leave to reargue pursuant to CPLR 2221 (d).

As noted, a motion to reargue 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 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). Settled appellate case law holds that “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.’” *Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582, 584-585 (2d Dept 2020), citing *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 (2d Dept 2019); *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, petitioners argue that:

“the court overlooked or misapprehended SAPA §§ 204 and 205, which provide that where an agency has not prescribed by rule, pursuant to SAPA §204, the form and procedure for the issuance of declaratory rulings, then under SAPA §205 a party is not required to first petition that agency for a declaratory ruling prior to judicial review.” *See* petitioners’ mem of law at 2-8.

Respondents correctly note that petitioners advanced this same argument in the reply papers they submitted in support of their petition (motion sequence number 001), and that the court considered and rejected their argument in its June 17, 2021 decision. *See* NYSCEF document 16 (petitioners’ mem of law in further support of petition [motion sequence number 001] at 3-4; NYSCEF document 18 (decision and order on motion [motion sequence number 001])). The court rejected such argument as it was “contrary to the plain text of SAPA §§ 205 & 204 (1) (i).” *Id.*, NYSCEF document 18. Petitioners’ current argument can be similarly characterized since they support it by citing inapposite case law. *Matter of Gill v New York State Racing and Wagering Bd.*, (8 Misc 3d 1027[A], 2005 NY Slip Op 51317[U] [Sup Ct, NY County 2005]), an unreported 2005 trial court decision, rejected a dismissal argument based on the administrative exhaustion doctrine as the subject Article 78 petition challenged “the applicability

to any person, property, or state of facts of any rule or statute enforceable by” the respondent New York State Racing and Wagering Board; specifically, the results of a horse race held on August 8, 2004 at Saratoga Race Course which the agency had reversed as a result of horse “doping.” As this court noted in its earlier decision, SAPA § 204 (2) (c) requires petitioners raising this type of challenge (provided for in SAPA § 204 [1] [i]) to obtain a declaratory ruling from the subject agency prior to filing an Article 78 proceeding, but exempts petitioners who challenge “whether any action by it should be taken pursuant to a rule” (provided for in [SAPA § 204 [1] [ii]) from the prior declaration requirement. The court’s June 17, 2021 decision found that the instant challenge falls within the ambit of SAPA § 204 (1) (ii), and is therefore exempt. The challenge at issue in *Matter of Gill v New York State Racing and Wagering Bd.* fell within the ambit of SAPA § 204 (1) (i), and was therefore not exempt. As a result, the holding of *Matter of Gill v New York State Racing and Wagering Bd.* is inapposite to the facts of this case. Therefore, the court concludes that it does not support petitioners’ instant argument.

Petitioners’ other cited caselaw is likewise inapposite. *Matter of Building Contrs. Assn. v Tully* (65 AD2d 199 [3d Dept 1979]) involved an application for tax certiorari relief that was improperly commenced via an Article 78 proceeding. *Auto Body Fedn. of Empire State v Lewis* (80 AD2d 593 [2d Dept 1981]) involved a claim for declaratory relief against the Superintendent of the New York State Department of Insurance. Neither holding contains any mention of SAPA. Therefore, neither of these cases offers any support for petitioners’ argument herein.

Matter of New York State Bldrs. Assn. v State of New York (98 Misc 2d 1045 [Sup Ct, Albany County 1978]), another older trial court decision, relied on the rule set forth in SAPA § 205 that an Article 78 proceeding may not be maintained in the absence of a prior declaratory ruling by the challenged administrative agency unless the subject agency “has not provided for

the issuance of such declaratory rulings” as provided for in SAPA § 204. However, this court’s June 17, 2021 decision found that the respondent Metropolitan Transportation Authority [MTA] was permitted to promulgate the rules challenged herein via “notice of emergency adoption” procedure permitted by SAPA § 202 (6), which specifically authorizes the use of the “public hearings” provided for in SAPA § 202-f. *See* NYSACEF document 18. The court also found that Article 78 challenges to agency rules promulgated via this emergency procedure must be commenced in conformity with the notice and comment periods proscribed in SAPA § 202. *Matter of New York State Bldrs. Assn. v State of New York* does not discuss SAPA § 202. It is therefore inapposite and offers no support to petitioners’ argument.

Having rejected petitioners’ legal arguments as unfounded, the court determines that petitioners have not demonstrated 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 Kassiss*, 182 AD2d at 27. Instead, the court finds that petitioners’ motion constitutes an improper attempt to secure a “successive opportunity to reargue issues previously decided,” in violation of CPLR 2221 (d). *Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d at 584. Accordingly, the court concludes that petitioners’ motion should be denied.

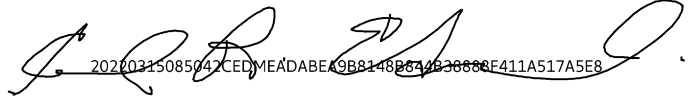
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221 (a) of petitioners Barry Simon, Picture the Homeless, Inc. and Urban Justice Center - Safety Net Project (motion sequence number 002) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.


20200315085047CEDMEADABEA9B8148267453688EF411A517A5E8

3/14/2022

DATE

CAROL EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE