

**Matter of Legal Aid Society v New York State Dept.  
of Corr. & Community Supervision**

2022 NY Slip Op 34451(U)

October 21, 2022

Supreme Court, Albany County

Docket Number: Index No. 902827-21

Judge: Richard M. Platkin

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

ALBANY COUNTY

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In the Matter of the Application of

THE LEGAL AID SOCIETY, a nonprofit  
corporation,

Petitioner,

**DECISION & ORDER**

-against-

NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY  
SUPERVISION,

Respondent.

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules.

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Index No.: 902827-21

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

THE LEGAL AID SOCIETY, CRIMINAL PRACTICE, PRISONERS' RIGHTS PROJECT  
*Attorneys for Petitioner*  
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LETTITIA JAMES, ATTORNEY GENERAL  
*Attorney for Respondent*  
(Stacey Hamilton, of counsel)  
The Capitol  
Albany, New York 12224

Hon. Richard M. Platkin, A.J.S.C.

Petitioner Legal Aid Society commenced this CPLR article 78 proceeding on March 31, 2021, challenging the denial of its January 21, 2021 request for records pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [“FOIL”]). Petitioner sought an order compelling respondent New York State Department of Corrections and Community Supervision (“DOCCS”) to disclose “all records reflecting the number of DOCCS employees, by facility, tested for COVID-19, and the number of DOCCS employees who tested positive for COVID-19, by facility, from October 1, 2020 to the date of DOCCS’ final determination denying access” to the requested records (NYSCEF Doc No. 16 [“Amended Petition”], ¶ 1 [emphasis omitted]).

Following extensive motion practice, the Court ultimately issued a Decision, Order & Judgment on March 15, 2022, granting the parties’ joint request to dismiss the Amended Petition as moot, based on DOCCS having provided access to all records responsive to the FOIL request (*see* NYSCEF Doc No. 61, p. 3). The Court further determined that petitioner was a prevailing party and that DOCCS lacked a reasonable basis for denial of the FOIL request, thereby entitling petitioner to an award of counsel fees under Public Officers Law § 89 (4) (c) (ii) (*see id.*, pp. 4-6). Petitioner was directed to submit an attorney affirmation in support of its fee request within twenty (20) days, and respondent was given ten (10) days to oppose the request (*see id.*, p. 6).

On March 28, 2022, petitioner’s counsel requested “a three-week adjournment of the submission date for Petitioner’s affirmation concerning attorneys’ fees,” a request that was made with the consent of respondent’s counsel (NYSCEF Doc No. 63). The Court granted the request, which extended petitioner’s deadline to April 27, 2022 (*see* NYSCEF Doc No. 64).

Petitioner served its fee affirmation on April 27, 2022 (*see* NYSCEF Doc Nos. 65-70), which made respondent’s opposition due by May 9, 2022.

Respondent did not file any opposition or otherwise communicate with the Court prior to the expiration of the May 9, 2022 deadline. Accordingly, on May 11, 2022, the Court signed petitioner's proposed order, which awarded \$11,859 in counsel fees, on a default basis (*see* NYSCEF Doc No. 71 ["Fee Award"]).

Later on May 11, 2022, respondent's counsel requested an extension of time to file opposition to the fee request, *nunc pro tunc* (*see* NYSCEF Doc Nos. 72-73). Counsel also wrote to the Court on May 12, 2022, again requesting to vacate the Fee Award and reopen briefing (*see* NYSCEF Doc No. 74). Petitioner opposed both requests (*see* NYSCEF Doc Nos. 75, 83).

By letter dated May 17, 2022, the Court denied the request to vacate the Fee Award and reopen the motion practice (*see* NYSCEF Doc No. 84).

Respondent then moved under CPLR 5015 (a) (1) for an order vacating the Fee Award (*see* NYSCEF Doc Nos. 86-89). By Decision & Order dated August 15, 2022, the Court denied the motion, "find[ing], in the exercise of discretion, that respondent has not proffered a credible and reasonable excuse warranting vacatur of the Fee Award" (NYSCEF Doc No. 95 ["Prior Decision"]).

Respondent now moves pursuant to CPLR 2221 (d) (2) for leave to reargue its motion to vacate the Fee Award. Petitioner opposes the motion.

### **DISCUSSION**

CPLR 2221 provides a court with discretion to allow reargument of a motion (*see* *Guidarelli v City of Schenectady*, 167 AD3d 1402, 1403 [3d Dept 2018]; *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]). Such motions "shall be based upon matters of fact and 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" (CPLR 2221 [d] [2]). A

motion to reargue will be denied where the movant fails to “show[] how the motion court misconstrued relevant facts or misapplied governing law” (*DeSoignies v Cornasesk House Tenants’ Corp.*, 21 AD3d 715, 718 [1st Dept 2005]).

Respondent argues that the Court “improvidently exercised its discretion” in declining to vacate the Fee Award and that it “misapprehended or overlooked facts and the law applicable to this proceeding, namely that Respondent’s attorney had a reasonable excuse for the default, and the Court did not give proper weight to the relevant factors” (NYSCEF Doc No. 98, ¶ 7).

“A motion for leave to reargue pursuant to CPLR 2221 is . . . not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided” (*Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 [3d Dept 1993]). “In other words, [reargument] does not afford [a second] bite of the apple” (*Weaver v Weaver*, 198 AD3d 1140, 1144 [3d Dept 2021]), much less the *third* “bite” that respondent’s counsel seeks here.



### CONCLUSION

Accordingly, it is

**ORDERED** that respondent’s motion for leave to reargue is denied.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for petitioner shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York  
October 21, 2022

  
RICHARD M. PLATKIN  
A.J.S.C.  
  
10/24/2022

Papers Considered:<sup>1</sup>

NYSCEF Doc Nos. 97-99.

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<sup>1</sup> The Court takes judicial notice of the prior proceedings and filings in this matter (*see Matter of Shirley v Shirley*, 101 AD3d 1391, 1394 [3d Dept 2012]; *Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985], *appeal dismissed* 65 NY2d 637 [1985]).