SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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IN THE MATTER OF THE APPLICATION OF

ANDREW ANSBRO, INDIVIDUALLY AND AS PRESIDENT OF THE UNIFORMED FIREFIGHTERS ASSOCIATION, DANIEL RICHTER, KEVIN MARTINEZ, JAMES MURPHY

Petitioners,

- v -

DANIEL NIGRO, DAVE A. CHOKSHI, ERIC ADAMS, THE CITY OF NEW YORK,

Respondents.

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INDEX NO. 150230/2022

MOTION DATE 10/20/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Petitioners' motion for "summary judgment" is denied.

Background

Petitioners brought this proceeding seeking injunctive relief relating to the accommodation process for the COVID-19 vaccine mandate for city firefighters. They complained that the process for evaluating religious or medical accommodations violated applicable laws as there was a complete lack of a cooperative dialogue and that certain denials did not receive individualized reasoning from respondents.

One of the judges previously assigned to this proceeding issued a decision in July 2022 in which he denied petitioners' request for injunctive relief (NYSCEF Doc. No. 54). That decision

marked the case as disposed (*id.*). However, that decision did not explicitly note that it was deciding the entire petition and did not have an "ordered" or "adjudged" section at the end. Petitioners filed a Notice of Appeal of that decision (NYSCEF Doc. No. 57).

Petitioners now move for "summary judgment" on liability. They claim that respondents' denials of reasonable accommodations were arbitrary and capricious and that respondents have not cited an objective basis for evaluating religious accommodation requests. Petitioners argue that the denials violate both the State and City Human Rights Laws. They add that the denials also violate the free exercise rights of petitioners and that they were coerced to either get the vaccination or stay on an indefinite leave without pay.

In opposition, respondents contend that petitioner cannot move for summary judgment in an Article 78 proceeding. They claim that petitioners have attempted to attach additional affidavits not included with the petition. On the merits, respondents contend that the accommodation process was rational. They point out that petitioners' claims related to the free exercise clause were not included in the petition and therefore should be disregarded.

In reply, petitioners contend that the Court already found that the religious accommodation process was arbitrary and capricious. With respect to whether or not petitioners are permitted to make a motion for summary judgment in a special proceeding, petitioners argue that "Article 78 proceedings are summary by nature" (NYSCEF Doc. No. 71 at 4).

Discussion

As an initial matter, the Court apologizes for the lengthy delay in the resolution of this motion. The record shows that the parties submitted letters to one of the justices previously assigned to this proceeding throughout 2023 (NYSCEF Doc. Nos. 72, 74, 75, 76) but this motion

did not get resolved. Even though the matter was only assigned to the undersigned this week, the parties deserve an apology and so this Court offers one.

As for the substance of the motion, a review of the decision in MS001 compels the Court to deny the motion for summary judgment and to mark this case disposed again.

CPLR 403 sets forth the procedure for the commencement of a special proceeding. A petitioner may either commence an Article 78 via a petition and a notice of petition, or a petition with an order to show cause (CPLR 403). "The commencement of a special proceeding requires the preparation of two documents: a petition and either a notice of petition or order to show cause" (Vincent C. Alexander, Practice Commentaries, C403:1). Here, petitioners filed an order to show cause that specifically cited the verified petition (NYSCEF Doc. No. 4). No notice of petition was filed, which meant that the return date for the petition was the same as the order to show cause, i.e., for MS001. Respondents then filed an answer (NYSCEF Doc. No. 25). "Once the answer is served, the proceeding is to be adjudicated in the same manner as a motion for summary judgment" (*Emigrant Bank v Solimano*, 209 AD3d 153, 161, 175 NYS3d 299 [2d Dept 2022]). In practice, this means that the entire proceeding is usually resolved based on the petition and the answer.

The Court therefore finds that the decision in MS001 functioned as a decision on the petition because the order to show cause was based on the petition and there was no separate notice of petition setting a different return date for the proceeding. In other words, there was no other way for the petition to be decided. Moreover, the decision (on page 1-2) repeats, nearly verbatim, the requests for relief in the petition itself (*see* NYSCEF Doc. No. 1 at 24-25). And the decision evaluates the merits of many of petitioner's arguments raised in the petition; it also marked the proceeding as disposed.

To be sure, the decision on MS001 does not specifically say that it is deciding the petition and there is no order section at the end laying out the actual holding. The Court observes that counsel for petitioners sent a letter inquiring about the reach of the decision (NYSCEF Doc. No. 56) but no motion was made to reargue in order to clarify the decision. Letters are not motions. In any event, this Court is unable to consider or grant a motion for summary judgment in a special proceeding where the merits were seemingly already considered.

A petitioner may not get a second chance to prevail on petition in a special proceeding by making a motion for summary judgment. And unfortunately, this Court cannot act as an appellate court for the decision of a fellow justice nor can it *sua sponte* modify another justice's decision. Besides, the time to move to reargue has long since passed. And the Court also observes that a notice of appeal was filed for MS001 (NYSCEF Doc. No. 57).

In summary, the entire petition was ready to be decided on the return date of the order to show cause. The judge issued a decision and marked the case disposed. No one moved to reargue or clarify that decision. Instead, eventually, this motion for summary judgment was brought and the motion was transferred to another judge. That judge unfortunately did not issue a decision. But the fact is that the case was over after the first decision, even though that decision lacked the typical language found at the end of decisions. It is too late to reargue that first decision, and it was too late to reargue it by the time this motion for summary judgment was brought. And nothing in the CPLR allows a motion for summary judgment in an Article 78. In fact, nothing in the CPLR allows a motion for summary judgment once the case is completed.

Accordingly, it is hereby

ADJUDGED that the petition is denied without costs or disbursements pursuant to NYSCEF Doc. No. 54 which decided this special proceeding.

3/21/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE