STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
In the Matter of the Application of,

WILLIAM M. WINDSOR,

Petitioner and Plaintiff,

DECISION and ORDER
INDEX NO. 9808-09

For a Judgment Pursuant to Article78
of the Civil Practice Law and Rules,

RJI NO. 01-09-ST0926

-against-

STATE OF NEW YORK, GEORGE PATAKI, DAVID PATERSON, NEW YORK OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, BERNADETTE CASTRO, CAROL ASH, CHRISTOPHER PUSHKARSH, NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, CARL MC CALL, THOMAS D. DiNAPOLI, OFFICE OF NEW YORK ATTORNEY GENERAL ELIOT L. SPITZER, ANDREW CUOMO, MAID OF THE MIST CORPORATION, JAMES V. GLYNN, CHRISTOPHER GLYNN, EDWARD J. RUTKOWSKI, AND DOES 1 TO 100,

Respondents and Defendants.

Supreme Court Albany County All Purpose Term, March 26, 2010
Reassigned to Justice Joseph C. Teresi

APPEARANCES:

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Petitioner/Plaintiff Pro Se
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TERESI, J.:

The pro se petitioner/plaintiff commenced this action to set aside a 40 year lease agreement between the Maid of the Mist Corporation ("Maid") and the NYS Office of Parks, Recreation & Historic Preservation ("State") for the operation of boat excursions under Niagara Falls and in the Niagara River. The petitioner served a hybrid verified petition and verified complaint alleging the license agreement was obtained by fraud and in violation of the New York State Finance Law. Initially, the petitioner moved for leave of court for disclosure and a motion for a default judgment against Maid, its two principal corporate officers and the State respondents. The Maid and the State cross-moved to dismiss the article 78 petition and the complaint pursuant to CPLR 3211(a)(7) and CPLR § 7804(f). Subsequently, the petitioner filed 12 additional motions/admission requests seeking procedural and substantive relief. On March 7, 2010, this Court dismissed the petition and the complaint in its entirety finding the relief sought by the petitioner/plaintiff was barred by the statute of limitations.

The petitioner served a Motion to Vacate or Modify Order and Motion for Reconsideration; a Motion to Reargue pursuant to CPLR 2221(d); a Motion to Renew pursuant

to CPLR 2221(e) and a Motion to Strike respondents' reply papers pursuant to CPLR 2214.

A motion to reargue, directed to the sound discretion of the court, must demonstrate that the Court overlooked, misapplied or misapprehended the relevant facts or law. (see, CPLR 2221(d)(2); Grassel v. Albany Medical Center Hosp., 223 AD2d 803 [3rd Dept. 1996], lv denied 88 NY2d 842 [1996]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very question previously decided. (Foley v. Roche, 68 AD2d 558 [1st Dept. 1979], appeal denied 56 NY2d 507 [1982]). Nor is a motion for rearguemnet an appropriate vehicle for raising new questions. (Simpson v. Loehmann, 21 NY2d 773 [1967]).

The Decision and Order of this Court dated March 7, 2020, determined the statute of limitations began to run on September 10, 2002 when the Maid and the State signed a lease agreement for services to be provided by the Maid for boat excursions at Niagara Falls and in the Niagara River. This Court determined the instant hybrid actions were subject to a four month statute of limitations for both the CPLR article 78 special proceeding (Press v. County of Monroe, 50 NY2d 695 [1980] and the declaratory judgment action. (Solnick v. Whalen, 49 NY2d 224 [1980]).

After a review of the motions to vacate, reconsider, and reargue, the petitioner has not offered any definitive proof that this Court overlooked, misapplied or misapprehended the relevant facts or law. The petitioner offers voluminous documentation in support of his motions but after a review of the submissions, the Court concludes the majority of petitioner's arguments are on the merits which the Decision and Order never reached. This Court dismissed the petition/complaint in its entirety as untimely and found the respondents/defendants timely opposed the petition/complaint pursuant to CPLR 7804(c). Petitioner's claim that he was entitled

to a default judgment for the failure to answer the complaint is without merit.

A motion to renew must be based upon facts not offered on the prior motion that would change the prior determination. (see, CPLR 2221(e)(2); Lafferty v. Eklecco, 34 AD3d 754 [2nd Dept. 2006]; Spa Realty Associates v. Springs Associates, 213 AD2d 781 [3rd Dept. 1995] or upon a demonstration that there has been a change in the law that would change the prior determination. (see, CPLR 2221(e)(2)). A motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but was unknown to the party seeking renewal. (First Union Bank v. Williams, 45 AD3d 1029 [3rd Dept. 2007])."Renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." (Hart v. City of New York, 5 AD3d 438 [2nd Dept. 2004]). While a motion for leave generally should be based on newly discovered facts, the rule is flexible, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided the movant offers a reasonable excuse for the failure to submit additional facts on the original motion. (Allstate Ins. Co. v. Liberty Mut. Ins., 58 AD3d 727 [2nd Dept. 2009]).

In March, 2009 the petitioner filed a FOIL request with the State seeking documents relating to the State's relationship with the Maid. The petitioner received many documents from the State in February 2010 after the submission of the motions in the original proceeding and prior to the decision of this Court. The respondents maintain the petitioner sought the same information in a FOIL request in December 2007 but failed to obtain the documents for the failure to pay a photocopy charge. The respondents contend the petitioner could have obtained the documents he now claims are new evidence in 2007. The respondents claim the petitioner

failed to exercise due diligence in obtaining the materials.

After a review of the motions to vacate, reconsider and renew, the materials the petitioner obtained in February 2010 do not present facts that would establish that the petition/complaint was not barred by the statute of limitations. The petitioner alleges the documents obtained in 2010 indicate that the Canadian Niagara Falls Parks Commission may have provided false information to the State in 2002. The Canadian Niagara Falls Parks Commission is not a party in this action. This allegation does not indicate that any of the named defendants herein committed an alleged newly discovered fraud which would extend the statute of limitations pursuant to CPLR § 213(8).

In petitioner's motion to renew, he clearly states, "In 2005, I became aware that there was a business relationship of some type between the State of New York and Maid or some related entity. All that I knew was that the State of New York owned the dock space that the Maid of the Mist boat ride used in New York, and the Province of Ontario owned the dock space that the Maid of the Mist boat ride used in Canada.." (see, Twenty-First Affidavit of William M. Windsor sworn to March 15, 2005 at ¶ 48). Again, petitioner admits that he was aware of a business relationship between the Maid and the State and he requested a copy of the relevant lease/contract with the State in 2005. (see, Fourth Affidavit of William M. Windsor sworn to January 5, 2010 at ¶ 55). Petitioner also stated in his Fourth Affidavit that "I attempted to obtain a copy of the contract in 2005, 2006 and 2007."

Petitioner cannot now claim the material he received from the State pursuant to the FOIL request in 2010 contained new facts that he was unaware of at the time of the motions to dismiss the petition/complaint. Petitioner has not shown he used due diligence to obtain documents that

he previously requested in 2005, 2006 and 2007. Supreme Court lacks discretion to grant renewal where the moving party fails to offer a reasonable justification for not presenting new facts on the original motion. (Sobin v. Tylutki, 59 AD3d 701 [2nd Dept. 2009]). Moreover, documents that can be obtained as matters of public record cannot serve as a proper basis for a motion to renew when they existed before the court issued its decision. (Elder v. Elder, 21 AD3d 1055 [2nd Dept. 2005]).

Finally, petitioner seeks to strike the reply affidavits of the Maid pursuant to CPLR 2214. Petitioner served a Motion to Reargue and a Motion to Renew on March 15, 2010 with a return date of March 26, 2010. Petitioner alleges he did not receive Maid's opposition papers by the return date and he was denied the opportunity to reply. The Maid offers an Affidavit of Service that indicates the petitioner was served with the Maid's opposition papers on March 24, 2010, two days before the March 26, 2010 return date. CPLR 2214(b) requires answering affidavits to be served at least seven days before the return date if the motion was noticed at least sixteen days before the return date. Since the petitioner did not serve his motions at least sixteen days before the return date, the Maid was only required to serve its opposition papers two days before the return date. (see, CPLR 2214(b)).

Accordingly, the motions to vacate or modify, for reconsideration, to reargue, to renew and to strike the reply papers are denied.

This Memorandum shall constitute both the Decision and Order of the Court. The Original Decision and Order are returned to attorneys for the State of New York respondents. A copy of this Decision and Order and all other papers are delivered to the Albany County Clerk. The signing of this Decision and Order and delivery of a copy of this Decision and Order to the

Albany County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

So Ordered.

Dated: Albany, New York
May 14, 2010

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion to Vacate or Modify Order and Motion for Reconsideration dated March 11, 2010;
2. Affidavit of William M. Windsor dated March 11, 2010 with annexed exhibits 1-31;
3. Petitioner's Memorandum of Law dated March 11, 2010;
4. Motion for Leave To Renew dated March 15, 2010;
5. Affidavit of William M. Windsor dated March 15, 2010 with attached exhibits 1-19;
6. Motion for Leave to Reargue dated March 15, 2010;
7. Affidavit of William M. Windsor dated March 15, 2010;
8. Affirmation of Adrienne J. Kerwin, Esq. dated March 23, 2010 with attached exhibits A-J;
9. Affidavit of Marc C. Brown, Esq. dated March 24, 2010 with attached exhibits A-E;
10. Affidavit of Marc C. Brown, Esq. dated March 24, 2010 with attached exhibits A-E;
11. Notice of Motion to Strike dated March 29, 2010
12. Motion to Strike dated March 29, 2010;
13. Affidavit of William M. Windsor dated March 29, 2010;
14. Affidavit of Marc C. Brown, Esq. dated April 7, 2010 with attached exhibit A.