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

NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, DEAN G. SKELOS and JEFFREY D. KLEIN, as members and as Temporary Presidents of the New York State Senate, and SHELDON SILVER, as member and as Speaker of the New York State Assembly, Plaintiffs, - against - KATHLEEN RICE, WILLIAM J. FITZPATRICK and MILTON L. WILLIAMS, Jr. in their official capacities as Co-Chairs of the Moreland Commission on Public Corruption, and THE MORELAND COMMISSION TO INVESTIGATE PUBLIC CORRUPTION. Defendants.	Index No. 160941/2013 I.A.S. Part: 16 Justice Alice Schlesinger

THE NEW YORK STATE ASSEMBLY'S AND SHELDON SILVER'S MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED INTERVENOR'S MOTION FOR REARGUMENT, RENEWAL, VACATUR, AND OTHER RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

The New York State Assembly ("Assembly") and Sheldon Silver, as member and as Speaker of the Assembly, respectfully submit this memorandum of law in opposition to the motion by proposed intervenor, Elena Ruth Sassower, for reargument/renewal of her order to show cause, vacatur of the April 24, 2014 stipulation of discontinuance, and other relief.[1]

INTRODUCTION

In the instant motion to reargue, the proposed intervenor seeks, again, to improperly revive a dismissed action in which there is no extant dispute among the parties. This action was properly discontinued by the Court months ago, and the proposed intervenor's motion should be denied.

On July 2, 2013, Governor Andrew Cuomo empanelled a Moreland Commission to Investigate Public Corruption (the "Commission"). (Dkt. 65, Executive Order No. 106.) On November 22, 2013, the New York State Senate, the Assembly, Dean G. Skelos and Jeffrey D. Klein, as members and as Temporary Presidents of the New York State Senate, and Sheldon Silver, as member and as Speaker of the Assembly, commenced a declaratory judgment action asserting constitutional and statutory violations arising from the Commission's formation and activities, including its investigation of, and demands for information directly or indirectly from, the Legislature. (Dkt. 1, Summons and Complaint.) During the pendency of the declaratory judgment action, on March 29, 2014, Governor Cuomo announced his decision to disband the Commission. (Sassower Aff., Ex. 13-c(1).) Accordingly, by letter dated April 22, 2014, counsel for the Commission requested that the Court dismiss plaintiffs' declaratory judgment complaint as moot. (Sassower Aff., Ex. 10.) Two days later, on April 24, 2014, the parties jointly filed a stipulation of discontinuance. (Sassower Aff., Ex. 13-c(1).) In the absence of a live dispute

---

[1] References to Elena Ruth Sassower's June 17, 2014 Affidavit are to "Sassower Aff."

between the parties to this action, on April 30, 2014, the Court entered an order discontinuing the action. (Sassower, Aff., Ex. 16-a.)

Nearly five months after plaintiffs commenced this declaratory judgment action, and nearly one month after Governor Cuomo shut down the Commission, Ms. Sassower moved by order to show cause to intervene and to oppose the dismissal of the action. (Sassower Aff. ¶ 3.) On April 28, 2014, the Court heard oral argument on Ms. Sassower's motion. By order dated April 30, 2014 ("April 30, 2014 Order"), the Court ruled that "no viable action exists in which this petitioner can intervene" and thus, the "Court decline[d] to sign [Ms. Sassower's] Order to Show Cause and to consider the application for the relief [ ] sought." (Sassower Aff., Ex. 8-b.)

At the April 28, 2014 hearing, the Court walked through each of Ms. Sassower's arguments and extensively addressed all the relevant issues, properly concluding that there was no basis to allow Ms. Sassower to intervene in a case that no longer was viable. Notwithstanding the Court's painstaking consideration of her arguments, Ms. Sassower now asserts that the Court "'overlooked or misapprehended' ALL the facts, law, and legal arguments [ ] presented at oral argument and by [the] order to show cause to intervene." (Sassower Aff. ¶ 6 (emphasis in original).) Failing reargument, Ms. Sassower seeks renewal on the basis that "the Court was actually biased and duty-bound to have disqualified itself." (Id.) Because Ms. Sassower's motion amounts to nothing more than an attempt to re-litigate the same arguments which this Court has already rejected, her motion for reargument and renewal should be denied.

ARGUMENT

I. There Is No Basis For Reargument Or Renewal

A. The Court Did Not Misapprehend The Facts Or The Law

A motion for reargument will only be granted where the moving party demonstrates that a court either overlooked or misapprehended the facts of the case or the relevant law. See CPLR

§ 2221(d)(2); Foley v. Roche, 68 A.D.2d 558, 567-68 (1st Dep't 1979). While the determination of whether to grant leave to reargue a motion lies within the sound discretion of the Court, a motion for reargument 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. Id.; William P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dep't 1992); McGill v. Goldman, 261 A.D.2d 593, 594 (2d Dep't 1999); see also Am. Trading Co., Inc. v. Fish, 87 Misc. 2d 193, 194-96 (Sup. Ct. N.Y. Cnty. 1975) ("A decision rendered upon a motion is a disposition of the issues therein presented and should not be deemed an invitation to a response by means of reargument.")

Here, Ms. Sassower merely repeats the same flawed arguments previously set forth in her order to show cause and presented to the Court at oral argument. The instant motion amounts to nothing more than an attempt by Ms. Sassower to get a second "bite at the apple" after having failed to prevail on her original application. Indeed, the crux of Ms. Sassower's motion is that she is entitled to re-litigate all the facts, law and legal arguments set forth in her order to show cause and presented at oral argument, simply because she contends that the Court did not sufficiently address each argument in the April 30, 2014 Order. (See Sassower Aff. ¶¶ 6-7.) However, "[t]he fact that certain points made upon argument are not discussed in the opinion does not warrant the conclusion that they were overlooked." Burke v. Cont'l Ins. Co., 184 N.Y. 570, 571 (1906); see also Amato v. New York City Dep't of Parks and Recreation, 2013 WL 361146, at *3 (Sup. Ct. N.Y. Cnty. Jan. 8, 2013) ("It is a mistake for counsel to assume that any particular portion of his argument, which has not been the subject of express reference in the opinion, has been overlooked."); Kassis, 182 A.D.2d at 27-28 ("Having heard the same argument repeated three times, the court, understandably, did not feel obligated to articulate the claim any

further or expound on the reasons why the authorities did not entitle [the party to prevail]. Nor was the court required to do so."); Fosdick v. Town of Hempstead, 126 N.Y. 651, 652 (1891).

Likewise, the mere fact that the April 30, 2014 Order does not "recite the papers used on motion," does not warrant reargument. (See Sassower Aff. ¶¶ 3-5, citing CPLR § 2219(a).) It is axiomatic that "[t]he recital requirement contained in CPLR § 2219(a) is designed to identify those papers which should be included in the record on appeal" and therefore, "an order is no less of an order simply because it lacks such a recital." Singer v. Bd. of Educ. of City of New York, 97 A.D.2d 507, 507 (2d Dep't 1983). To the contrary, courts have routinely recognized that "the omission of such a recital is not an uncommon irregularity which a party may remedy by seeking resettlement even after an appeal has been taken." Id.; see also Acme Markets, Inc. v. Tri-City Shopping Ctr., Inc., 24 A.D. 2d 728, 728 (3d Dep't 1965) (same).[2]

Accordingly, Ms. Sassower has failed to demonstrate that the April 30, 2014 Order was the product of either a misapprehension of the law or a failure to consider evidence, and thus her motion for reargument should be denied.

B. Ms. Sassower Has Not Offered Any Additional Facts To Support Her Application For Renewal

Nor is Ms. Sassower's motion properly one to renew. An application for leave to renew pursuant to CPLR § 2221(e) must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and therefore, not made known to the court. Foley, 68 A.D.2d at 594. "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application." Matter of Beiny, 132 A.D.2d 190, 210 (1st Dep't 1987). A motion for leave to renew should be denied where a party has proceeded on one legal theory on

[2] Because the action was discontinued by a court order (see Sassower Aff., Ex. 16), Ms. Sassower's claim that the Court failed to comply with CPLR § 3217(b), should be rejected.

the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful in the original application. Foley, 68 A.D.2d at 594.

Ms. Sassower's motion to renew is devoid of any new facts to support the arguments set forth in her order to show cause. Nor does Ms. Sassower identify any relevant change in the law. Instead, Ms. Sassower argues that renewal is warranted because "the Court was actually biased and duty bound to disqualify itself." (Sassower Aff. ¶ 6.) As an initial matter, Ms. Sassower has not set forth any credible evidence to support these conclusory allegations. But, in any event, Ms. Sassower is not entitled to assert new arguments not previously raised, and thus, her motion for renewal should be denied. See Matter of Beiny, 132 A.D.2d at 214 (denying motion to renew where new facts presented supported a new argument not previously asserted); Episcopal Diocese of Rochester v. Harnish, 17 Misc. 3d 1105(A), at *1, *5 (Sup. Ct. Monroe Cnty. 2007) (denying motion to renew where movant asked court to consider "an issue which was never raised until th[e] instant motion to renew").

II. The Motion To Intervene Is Improper

Even if Ms. Sassower had established grounds for reargument or renewal -- which she has not -- her motion to intervene was, and remains, procedurally improper and thus was correctly denied as a matter of law.

A. The Motion Is Moot

Courts routinely deny a request for leave to intervene when the underlying action has been rendered moot by resolution, dismissal, settlement or discontinuance. See Advanced Med. and Alt. Care, P.C. v. New York Energy Sav. Corp., 21 Misc. 3d 1145(A) (Sup. Ct. Kings Cnty. 2008) (motion to intervene rendered moot when parties entered into a stipulation of discontinuance); ADJMI 936 Realty Ass'n v. New York Prop. Ins. Underwriting Ass'n, 224

A.D.2d 319 (1st Dep't 1996) (appeal of denial of motion to intervene rendered moot by dismissal of underlying action); Lawyers Title Ins. Co. v. Weiser's Poultry Farm Inc., 289 A.D.2d 739 (3d Dep't 2001) (appeal of denial of motion to intervene dismissed as moot when, in the interim between denial of motion to intervene and appeal, parties settled the underlying action); McDonald v. Capital Dist. Transp. Auth., 199 A.D.2d 671 (3d Dep't 1993) (affirming denial of motion to intervene as moot when court granted defendant's motion to dismiss, which motions were before the court at the same time); Modjeska Sign Studios, Inc. v. Berle, 55 A.D.2d 340 (3d Dep't 1977) rev'd on other grounds, 43 N.Y.2d 468 (1977) (proposed-intervenor's appeal of denial of motion to intervene rendered moot when Third Department affirmed declaration of constitutionality of statute which proposed-intervenor sought to challenge).

Here, Ms. Sassower sought to intervene in plaintiffs' declaratory judgment action, but the allegations in the complaint, including allegations of statutory and constitutional violations arising from the Commission's formation and activities, were rendered moot at the time Governor Cuomo announced his decision to disband the Commission and withdraw the subpoenas issued. Accordingly, the Court correctly declined to sign Ms. Sassower's order to show cause upon a finding that "no viable action exists in which this petitioner can intervene." (Sassower Aff., Ex. 8-b.)

Ms. Sassower erroneously argues that the Court erred in denying her motion as moot, because the stipulation of discontinuance was not filed until after Ms. Sassower filed her motion to intervene. (Sassower Aff. ¶ 7.) However, this argument suffers from a fundamental misunderstanding of the doctrine of mootness. Indeed, it was the decision to disband the Commission and withdraw the subpoenas, not the filing of the stipulation of discontinuance that rendered the matter moot. Once the Commission had been disbanded and the subpoenas

withdrawn, questions as to the constitutionality of the Commission and the validity of the subpoenas were rendered purely academic. Thus, even in the absence of a stipulation of discontinuance, the Court lacked jurisdiction to issue a declaratory judgment as to the constitutionality of the Commission's actions and the validity of the subpoenas issued. See CPLR § 3001 ("The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy.") (emphasis added); Simon v. Nortrax N.E., LLC, 44 A.D.3d 1027 (2d Dep't 2007) ("The courts of New York do not issue advisory opinions for the fundamental reason that in this State 'the giving of such opinions is not the exercise of judicial function.' Thus courts may not issue judicial decisions which 'can have no immediate effect and may never resolve anything.'") (internal quotations and citations omitted.)[3]

B. The Motion Raises Issues Tangential To Plaintiffs' Declaratory Judgment Complaint

Ms. Sassower's motion to intervene should also properly be denied because it raises issues that are tangential to those raised by plaintiffs in this action. It is well-settled that a proposed intervenor is not permitted to raise issues which are not before the Court in the main action. See Jiggetts v. Dowling, 21 A.D.3d 178, 181-82 (1st Dep't 2005) ("Intervention is a

---

[3] Ms. Sassower's assertion that this case constitutes an exception to the mootness doctrine is also unavailing. Ms. Sassower challenges the Court's finding that "the situation here is unique and not likely to recur in precisely the same manner," suggesting that the Court should consider the issues raised in this action notwithstanding the lack of any actual continuing dispute among the parties (one of which no longer even exists). (Sassower Aff. ¶ 7.) However, three common factors must exist for an exception to the mootness doctrine to apply: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on." Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 (1980). Ms. Sassower has made no showing that the issues raised in the underlying action are either likely to recur or are in any way evading review. The fact is that in more than a century between the passage of the Moreland Act in 1907 and Governor Cuomo's July 2, 2013 decision to empanel the Commission to Investigate Public Corruption, New York Governors had empanelled more than 50 Moreland Commissions, none of which sought to investigate the Legislature. Moreover, should these issues arise again in the context of another Moreland Commission, judicial relief will be available at that time to address the specific facts at issue. There is nothing in the nature of the original dispute between the parties (now resolved) that requires the Court to take the extraordinary step of rendering an advisory opinion in the absence of a live dispute.

device to allow judicial economies, rather than a technique to permit already-litigated cases to transmute into new cases based on different facts and legal theories that were not adjudicated in the underlying action."); E. Side Car Wash, Inc. v. K.R.K. Capitol, Inc., 102 A.D.2d 157, 160 (1st Dep't 1984) ("A Proposed intervenor is not permitted to raise issues which are not before the court in the main action."); see also 43 N.Y. Jur. 2d Declaratory Judgments § 169 ("An intervenor in a declaratory judgment action is not permitted to raise issues which are not before the court in the main action."); 24C Carmody-Wait 2d § 147:154 (same).

The proposed complaint Ms. Sassower attached to her order to show cause raised new facts and legal theories that were not addressed in plaintiffs' declaratory judgment complaint. For example, one of the central allegations set forth in Ms. Sassower's proposed complaint was that the Commission failed to properly investigate and respond to the litany of allegations that Ms. Sassower raised in public hearings and letters. (See Dkt. 61-63, Proposed Complaint, at ¶¶ 32-100.) These allegations have nothing to do with the issues raised in plaintiffs' declaratory judgment complaint, and thus were not properly raised by motion to intervene. Rather, as the First Department directed in Jiggetts, Ms. Sassower's "remedy is to bring a new action, under [her] own banner, where [her] claims can be reviewed on the merits." 21 A.D.3d at 182.

III. There Is No Basis For The Other Relief Sought

Finally, Ms. Sassower requests that the Court vacate the April 24, 2014 stipulation of discontinuance, and refer the parties and their attorneys to disciplinary and criminal authorities for fraud, misrepresentations, and other misconduct.[4] These arguments were previously raised by Ms. Sassower at oral argument and were properly rejected by the Court. (Sassower Aff., Ex. 14 at 34:12-15.) Ms. Sassower has not offered any new facts to support these conclusory and

[4] Ms. Sassower's reliance on the Chief Administrator's Rules Governing Judicial Misconduct § 100.3(D)(2) to support her request that the Court refer the parties and their attorneys to disciplinary and criminal authorities is misplaced. This rule only applies to judges, and thus has no application here.

baseless allegations, nor has she demonstrated that the Court misapprehended evidence, and thus she should not be entitled to re-litigate these claims. (Supra § I(A), (B).)

CONCLUSION

For the foregoing reasons, Ms. Sassower's motion for reargument, renewal, vacatur, and other relief, should be denied in all respects.

Dated: July 22, 2014
New York, New York

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: _____

Marc E. Kasowitz
Daniel R. Benson
Michael J. Bowe

1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Plaintiffs New York State Assembly and Sheldon Silver, as Member and Speaker