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

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In the Matter of the Application of

ROY DEN HOLLANDER

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondents.

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Index No. 13-100299

NOTICE OF MOTION TO REARGUE

PLEASE TAKE NOTICE that upon the affidavit of Roy Den Hollander, sworn to on August 1, 2013, and upon the exhibits attached to the affidavit and all the pleadings and proceedings herein, the undersigned will move in the Supreme Court of the State of New York, located at 60 Centre Street, New York, in the Submissions Part, Room 130, on the 28th day of August, 2013, at 9:30 a.m., pursuant to CPLR 2221, for an order granting this motion for leave to reargue the above captioned case in which Justice Alexander W. Hunter Jr. rendered an Order and Judgment on July 30, 2013, that did not take into account the petitioner's motion for leave to supplement the petition that was filed on the very same day—July 30th.

The motion to supplement the Article 78 petition sought judicial review of the City of New York Commission on Human Rights' deprivation of the petitioner's federally protected rights under the Fourteenth Amendment to the U.S. Constitution.

Dated: August 1, 2013
New York, N.Y.

Respectfully,

/S/

_____

Roy Den Hollander, Esq.
Petitioner and Attorney
545 East 14th Street, 10D
New York, N.Y. 10009

917-687-0652
rdhhh@yahoo.com

To: Respondent
MICHAEL A. CARDOZO
Leonard M. Braman, Esq.
Corporation Counsel of the City of New York
Attorney for Respondent The City of New York
Commission on Human Rights
100 Church Street, Room 20-l0l
New York, New York 10007
(212) 356-2294

SUPREME COURT OF THE STATE OF NEW YORK
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AFFIDAVIT IN SUPPORT OF MOTION TO REARGUE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Roy Den Hollander, being duly sworn, depose and say respondent does not consent:

1. I submit this affidavit in support of my motion for leave to reargue pursuant to CPLR 2221 the Order and Judgment by Justice Alexander W. Hunter Jr., which was rendered on July 30, 2013. (Exhibit 1, Order and Judgment).

2. The reason for the reargument request is that on the very same day—July 30th, I filed a motion under CPLR 3025(b) for an order granting me leave to supplement the verified petition by (1) adding 42 U.S.C. § 1983 equal protection and substantive due process causes of action and (2) adding as a defendant Carlos Velez, Executive Director of Law Enforcement for the Commission on Human Rights, in his individual capacity. (Exhibit 2, Date Stamped Notice of Motion, Affidavit in Support of Motion to Supplement Petition, Second Supplement to Petition).

3. I first received notification of Justice Hunter's decision on July 31st, one day after filing the Motion to Supplement the Petition. That notification came through the Court's e-tracking system. (Exhibit 3, copy of e-track email notification).

4. Due to this strange coincidence in time, Justice Hunter's Order and Judgment does not take into account the matters raised in the motion to supplement.

5. In the interest of a full and fair hearing on all the issues, the petitioner requests leave to reargue.

6. The papers previously submitted in this action are attached in chronological order as Exhibit 4.

/S/
_____
Roy Den Hollander

Sworn to before me on the
1st day of August 2013

/S/
_____
Notary Public

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

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MEMORANDUM OF LAW

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO REARGUE

The New York City Commission on Human Rights (the "Commission") submits this memorandum of law in opposition to Petitioner Roy Den Hollander's ("Petitioner") motion for leave to reargue the Commission's motion to dismiss the Petition, which the Court granted in a July 30, 2013 Order and Judgment (the "Order"). For the reasons set forth below, Petitioner's motion to reargue should be denied.

PRELIMINARY STATEMENT

Petitioner's motion for leave to reargue should be denied because it presents no valid grounds for the Court to reconsider its Order dismissing the Petition. The sole basis on which Petitioner seeks reargument is that the Order "did not take into account the petitioner's motion for leave to supplement the petition that was filed on the very same day—July 30th," in which Petitioner sought to add new equal protection and substantive due process claims, and to add a new defendant. (Mot. Reargue at 1). As set forth below and in the Commission's concurrently filed opposition to Petitioner's motion for leave to supplement the Petition, Petitioner's belated

and meritless motion to supplement provides no basis for the Court to reconsider its Order. It is black letter law that "[r]eargument is not available where the movant seeks only to argue 'a new theory of law not previously advanced.'" *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) (quoting *Frisenda v. X Large Enters.*, 280 A.D.2d 514, 515 (1st Dep't 2001)). Because Petitioner is seeking reargument solely "to argue a new theory of law not previously advanced," his motion to reargue must be denied.

PROCEDURAL BACKGROUND

In January 2010, Petitioner filed a complaint with the New York State Division of Human Rights (the "State DHR") against a nightclub known as Amnesia, alleging that he and a male friend were refused entry to the club unless they agreed to purchase bottle service for $350, while two women on line in front of them were allowed in without buying bottle service. The State DHR investigated and dismissed the complaint for lack of probable cause, finding that Amnesia required complainant to purchase a bottle for legitimate, non-discriminatory reasons. (Order, Pet. Ex. 1 at 1, 3).[1] The State DHR noted in *dicta* that Petitioner is older than the majority of the club's patrons, but that in any event age discrimination in public accommodations is beyond the State DHR's jurisdiction. (*Id.* at 1).

Subsequently, Petitioner filed a complaint with the Commission based on the same incident at Amnesia and alleging essentially identical facts, but now asserting discrimination based on age rather than gender. After investigating, the Commission's Law Enforcement Bureau ("LEB"), like the State DHR, found no probable cause to believe that Amnesia had discriminated against Petitioner. Moreover, the LEB held that Petitioner's claims were barred

[1] "Pet. Ex." refers to exhibits attached to Petitioner's Affidavit in Support of Motion to Reargue.

under section 8-109(f)(iii) of the City Human Rights Law and section 297(9) of the State Human Rights Law, which prohibit bringing successive discrimination complaints based on the same incident. Petitioner appealed the dismissal of his complaint to the Commission's Chairperson, who affirmed the decision.

Petitioner then filed a special proceeding in this Court seeking review of the Commission's decision. Petitioner alleged that the Commission's dismissal of his discrimination complaint was improper and that its investigation of his complaint was insufficient. Petitioner subsequently filed a "Supplement to Petition" (*see* Pet. Ex. 4) and an "Addendum of Exhibits to the Supplemental Petition" (*id.*), asserting that the Commission had violated Petitioner's constitutional right to due process by insufficiently investigating his complaint. The Commission moved to dismiss the Petition. The Petition and the Commission's motion to dismiss were marked fully submitted on May 20, 2013.

On July 30, 2013, this Court issued its Order granting the Commission's motion to dismiss. In the Order, the Court agreed with the Commission that Petitioner's complaint before the Commission was barred by the doctrine of election of remedies "pursuant to Admin. Code §§ 8-502(a); 8-109(f)(iii); and Exec. Law § 297(9)." (Pet. Ex. 1 at 3). The Court further held that "were this court to review the [Commission's determination], this court would find that the above mentioned determination was rationally based." (*Id.*). The Court went on to hold that "[t]here is no merit to petitioner's contention that the Commission failed to conduct an adequate inquiry into his complaint." (*Id.*). Finally, the Court held that "Petitioner's Fourteenth Amendment procedural due process claim is dismissed, as petitioner was afforded constitutional minimum due process of notice and the opportunity to be heard," and "[f]urthermore, petitioner had an adequate post-deprivation opportunity to be heard in this Article 78 proceeding." (*Id.*).

Simultaneously with the issuance of the Order, on July 30, Petitioner served and filed a motion to supplement the Petition. The motion states that it is made "pursuant to CPLR 3025(b)" (Pet. Ex. 2, Mot. Supplement at 1), a provision governing pleadings in an action, not in a special proceeding, which are governed by CPLR 402. The motion seeks "leave to supplement the verified petition by (1) adding 42 U.S.C. § 1983 equal protection and substantive due process causes of action and (2) adding as a defendant Carlos Velez, Executive Director of [the LEB], in his individual capacity." (*Id.*). In support of the motion, Petitioner submits an affidavit attaching a proposed "Second Supplement to Petition." (Pet. Ex. 2, Aff. Supp. Mot. Supplement ¶ 2). Petitioner's affidavit does not offer any explanation for why the claims in this Second Supplement could not have been brought before the Petition and the Commission's motion to dismiss were fully submitted.

On August 5, 2013, Petitioner served the instant motion to reargue. As the sole basis for reargument, Petitioner's affidavit in support of the motion states that "[t]he reason for the reargument request is that on the very same day [as the issuance of the Court's Order]—July 30th, I filed a motion under CPLR 3025(b) for an order granting me leave to supplement the verified petition by (1) adding 42 U.S.C. § 1983 equal protection and substantive due process causes of action and (2) adding as a defendant Carlos Velez, Executive Director of Law Enforcement for the Commission on Human Rights, in his individual capacity." (Aff. Supp. Mot. Reargue ¶ 2).

ARGUMENT

I. Petitioner's Belated Filing of a Motion for Leave to Supplement the Petition Presents No Basis for Reargument

The only basis on which Petitioner seeks leave to reargue – his belated filing of a motion to supplement his Petition – is not a valid basis for reargument. Under CPLR 2221(d), "[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." *Id.* Petitioner does not set forth any "matters of fact or law" that were "allegedly overlooked or misapprehended by the court" in granting the Commission's motion to dismiss. Rather, Petitioner seeks reargument on the grounds that, the day the Court issued its Order, Petitioner moved to supplement the Petition by "adding 42 U.S.C. § 1983 equal protection and substantive due process causes of action and (2) adding as a defendant Carlos Velez, Executive Director of [the LEB], in his individual capacity." (Aff. Supp. Mot. Reargue ¶ 2) (emphasis added).

It is well settled, however, that "[r]eargument is not available where the movant seeks only to argue 'a new theory of law not previously advanced.'" *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) (quoting *Frisenda v. X Large Enters.*, 280 A.D.2d 514, 515 (1st Dep't 2001)) (reargument was improperly granted where "plaintiff had not shown how the motion court misconstrued relevant facts or misapplied governing law" but rather, raised a new and different legal theory); *see Pahl Equip. Corp. v Kassis*, 182 A.D.2d 22, 27 (1st Dep't 2002) ("Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.") (emphasis added). By attempting to "ad[d]" a new defendant and causes of action that he did not assert prior to the Court's issuance of its Order, Petitioner is self-evidently seeking reargument on the basis of "a new theory of law not previously advanced." *DeSoignies*, 21 A.D.3d at 718. Petitioner offers no other grounds on which to grant reargument. Indeed, Petitioner does not assert any grounds on which the Court's Order was incorrectly decided – only that it "did not take into account the petitioner's motion for leave to supplement the petition that

was filed on the very same day" (Mot. Reargue at 1), which, as discussed above, cannot justify reargument. Thus, Petitioner's request for reargument should be denied.

CONCLUSION

For the foregoing reasons, Petitioner's motion for reargument should be denied.

Dated: August 16, 2013
New York, New York

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents
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By: _____
Leonard M. Braman
Assistant Corporation Counsel

SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 13-100299

MEMORANDUM OF LAW

(Part 33; Hunter, J.)

REPLY MEMORANDUM OF LAW TO RESPONDENT'S OPPOSITION TO MOTION TO REARGUE

Roy Den Hollander ("Petitioner") submits this memorandum of law in reply to the New York City Commission on Human Rights' ("City HR") opposition to the motion to reargue. For the reasons set forth below, the motion to reargue should be granted.

ARGUMENT

Respondent engages in a false implication to support its opposition to the motion for reargument by stating that Petitioner made a "belated" filing of a motion to supplement the petition. (City HR Memo. Law Opposing Reargument at 4). "Belated" means "late, remiss, tardy, overdue." *Webster's New World Roget's Thesuarus.*

Respondent's implication is that Petitioner waited until he learned of Justice Hunter's *Order and Judgment* before making a motion for leave to supplement the petition to include equal protection and substantive due process claims and a new defendant. That implication is false.

The motion to supplement—of which the Respondent was aware well in advance—was filed on July 30, 2013, the same day that Justice Hunter's *Order and Judgment* was dated. Knowledge of the *Order and Judgment* became electronically available the next day July 31st. No one knows whether the motion to supplement was filed before or after Justice Hunter's decision was issued. Given the bizarre coincidence in timing of the two events and a concern that allegations of civil rights violations may go unaddressed by a court of law, Petitioner filed a motion to reargue.

Respondent is well aware that the timing of the events is uncertain yet argues as though he knew the motion to supplement came after the decision. Respondent relies on CPLR 2221(d) that a motion to rearque "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 . . . ." If the motion was filed before the issuance of Justice Hunter's decision, then the "prior motion" is the motion to supplement the petition with equal protection and substantive due process allegations and add a defendant, which the Court then clearly overlooked in its decision.

Respondent ignores the fact that the motion to supplement may have been filed before the issuance of Justice Hunter's *Order and Judgment*, yet dissembles that "[Petitioner] attempting to 'add' a new defendant and causes of action that he did not assert prior to the Court's issuance of its Order, Petitioner is self-evidently seeking reargument on the basis of 'a new theory of law not previously advanced.'" (City HR Memo. Law Opposing Reargument at 5). Due to the uncertainty of timing, these claims are just as likely to be "old" and overlooked by the Court.

More important than Respondent's desire to keep Petitioner's civil rights allegations forever unlitigated is a policy behind the function of courts. In this democracy, there has been a

deliberate policy choice to make our nation's courts more accessible to people who feel aggrieved, particularly in certain areas such as civil rights. Wright, Miller & Kane, *5A Fed. Prac. & Proc. Civ.* § 1331 at 3 (3d ed.). The reasons are simple: (1) "Individual liberty is the first concern of every man for without it, life is not worth living."—Clarence Darrow. And (2) "Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same."—Ronald Reagan. The way to do that is through the courts:

> The irreplaceable value of the power [of the courts] articulated by Mr. Chief Justice Marshall [Marbury v. Madison, 5 U.S. 137, 1803 WL 893 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups [read males] against oppressive or discriminatory government action. It is this role . . . that has maintained public esteem for the . . . courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our . . . Government in the final analysis rests.

United States v. Richardson, 418 U.S. 166, 192 (1974)(Powell, J., concurring).

By Respondent's reasoning, uncertainty in timing is good reason to thwart that role of the courts.

CONCLUSION

For the foregoing reasons, Petitioner's motion to reargue should be permitted.

Dated: New York, New York
August 20, 2013

/S/

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