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[*1]

Torres v Sedgwick Ave. Dignity Devs. LLC
2022 NY Slip Op 50994(U)
Decided on September 23, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 23, 2022

Civil Court of the City of New York, Bronx County

Jason Torres, Petitioner,

against

Sedgwick Avenue Dignity Developers LLC, John Warren & MHR Management Inc., Respondents-Owners,
and
Department of Housing Preservation and Development of the City of New York, Co-Respondents.

Index No. 307644/20

Petitioner is represented by: TakeRoot Justice

Respondents are represented by: Rosenbloom & Bianco, LLP

Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	**Numbered**
Notice of Cross-Motion with Affirmation Annexed [NYSCEF Doc. No. 74]	1
Memorandum of Law in Opposition [NYSCEF Doc. No. 75]	2

Affirmation in Reply [NYSCEF Doc. No. 77] 3

After oral argument held on August 10, 2022, and upon the foregoing cited papers, the decision and order on these motions is as follows:

BACKGROUND & PROCEDURAL HISTORY

Petitioners commenced the instant proceeding by Order to Show Cause, dated December 9, 2020, seeking correction of violations, a finding of harassment, civil penalties, damages, and attorneys' fees.[FN1]

On April 22, 2021, the court issued an Order to Correct and Notice of Violations Pursuant to CPLR §409(b). Respondents were directed to correct open violations in petitioner's [*2]apartment within prescribed time frames [30 days for "immediately hazardous" class "C" violations and "hazardous" class "B" violations, and 90 days for "non-hazardous" class "A" violations].[FN2]

The court assumes familiarity with this case's procedural history and facts, particularly as recited in this court's July 21, 2021, February 10, 2022 and February 18, 2022 Decisions and Orders on various prior motions.

On or about December14, 2021 respondents filed a motion to dismiss petitioner's harassment cause of action at the close of his *prima facie* case, alleging that petitioner failed to submit proof that respondents are owners or the existence of qualifying violations.

By Decision and Order dated February 10, 2022, the court denied the motion to dismiss, finding that respondents admitted to ownership and to the existence of qualifying violations in their answer and that, in any case, petitioner was permitted to open the record and seek introduction of the HPD open violations report for the apartment, which included such qualifying violations.[FN3]

Months later, and after the harassment trial has continued, respondents made the instant motion to reargue or for "clarification" of the court's Order denying their motion to dismiss.

Respondents do not dispute that the court correctly found respondents admitted to being owners in their answer. Rather, they argue that the court misconstrued the law and overlooked material matter of fact when it found their response to paragraph 9 of the petition improper and deemed it an admission. Respondents argue that because paragraph 9 of the petition was made upon information and belief, their response of denying sufficient

knowledge or information to respond to those allegations was a proper response.

Furthermore, respondents allege that finding a deemed admission was improper because the admission goes to the heart of the matter. Respondents argue that the petition should have been verified by petitioner because petitioner's counsels do not know what violations of record or alleged conditions in the apartment actually existed. Therefore, respondents cannot properly defend themselves as they do not know what violation(s) formed the basis of the harassment claim.

Finally, respondents argue that the court's admission of the summary violation report is not sufficient to establish a cause of action for harassment as it does not show repeated failures to correct qualifying violations.

Petitioner opposes, noting that respondents' motion to reargue only deals with one of the court's *two* rationales for denying the motion to dismiss — respondents discuss only the deemed admissions in the answer, but do not dispute the propriety of reopening the record to allow the HPD summary violation report in.

Petitioner emphasizes that the court's rationale behind deeming respondents' denials as admissions under the circumstances in this proceeding is supported by longstanding, uncontroverted caselaw. Petitioner also argues that respondents' claim that the deemed admission was improper where the petition was verified by counsel must fail because the time for respondents to challenge the attorney verification has long expired.

Petitioner also argues that respondents cannot claim ignorance of the HPD violations. [*3]They are public record and therefore the court admitting them was proper. Petitioner points out that the one case relied upon by respondents pertains to notices to admit, wholly distinguishable from the circumstances here.

Further, petitioner notes that the HPD violations were *already* admitted in the Court's April 2021 Order to Correct, which respondents failed to challenge or appear. He further argues that the February 10, 2022 Decision and Order is not unclear, because respondents know exactly what violations are at issue. The Order clearly states that only the violations in the Order to Correct are admitted into the trial record. Because respondents had notice of all these violations, they were not prejudiced by the court allowing them in.

Finally, petitioner's opposition avers that respondents cannot now claim that petitioner still failed to make out his *prima facie* case after the inclusion of the summary violation

report when their original motion stated the *opposite*.

DISCUSSION

A motion to reargue pursuant to CPLR 2221(d) is at the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], *quoting Scheider v Solowey*, 141 AD2d 813, 813, 529 NYS2d 1017 [2nd Dept 1988]; *see also Foley v Roche*, 68 AD2d 558, 567, 418 NYS2d 588 [1st Dept 1979]. Its purpose is "to convince the court that it was wrong and ought to change its mind." (*Reddy v Gade*, 2015 NY Misc. LEXIS 2286, *21, 2015 NY Slip Op 31109[U], 15 [Sup Ct, New York County 2015] [internal citations and quotations omitted]).

Furthermore, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P Pahl Equip. Corp. v Kassis*, 182 AD2d at 27 [internal citations omitted]; *see also Foley v Roche*, 68 AD2d at 567-568 ["Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion."] [internal citations omitted]; *Reddy v Gade*, 2015 NY Slip Op 31109[U] at 14-15; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375, 781 NYS2d 125 [2nd Dept 2004]). A motion to reargue is based only on papers and evidence submitted in the original motion and new facts may not be presented. (*see* Siegel, NY Prac § 254, at 449 [5th ed 2011]).

Here, respondents have not shown that this court overlooked or misapprehended the facts *or* the law. Furthermore, their attempts at legal argument are cloaked in colorful language that can only be seen as an attempt to obfuscate the failure to meet the legal standard on a motion to reargue ["Particularly egregious is the Court's summary disregard ..., the result of the Court's decision is a complete rejection of due process ..., the Court's having acrobatically excused Petitioner's failure ..."].[FN4]

Respondents claim that the court improperly deemed admitted their response to paragraph 9 of the petition. That response "Denies knowledge and information to form an opinion" regarding the allegation said paragraph. Respondents' sole arguments in support are

that [*4]paragraph 9 is made upon information and belief, the petition is not verified by petitioner, but by his attorney, and that such deemed admission is improper because it goes to the "heart of the matter."

Respondents cite to *zero* cases and to *no* statutory bar to the court deeming admitted a response to an allegation made upon information and belief. Contrary to respondents' claims that the court summarily disregarded the fact that paragraph 9 of the petition was made upon information and belief, the court engaged in a detailed analysis of the law regarding improper denials and deemed admissions, citing to relevant caselaw that has been upheld for over one hundred years.

In fact, respondents failed to cite to *even one* case that distinguished the settled principle relied on by the court: that improper denials of facts within a party's knowledge, and which are public record, are deemed admitted. Respondents do not present one iota of evidence that such deemed admissions *in a pleading* are improper when the allegation was made upon information and belief.

The sole case presented by respondents is irrelevant. That case discusses deemed admissions when a party has failed to respond to a notice to admit, where those admissions concern the heart of the controversy, *and the admissions would go against prior denials in that party's pleading*. (*Rosario v City of New York*, 261 AD2d 380, 381, 689 NYS2d 519 [2nd Dept 1999]). Even if the standard regarding a notice to admit and a pleading were the same (a claim for which respondents provide *no* caselaw in support), respondents did not fail to respond to the petition and certainly did not previously deny the existence of violations.

In any case, the fact that paragraph 9 of the petition is made upon information and belief is irrelevant in light of other paragraphs in the petition [par 12, 17 and 18], which also discuss the existence of violations placed by HPD in petitioner's apartment and which directly reference the open violation report *attached as an exhibit* to the pleading.

Because the open violation report confirms the allegations in paragraph 9, a verification by petitioner himself was unnecessary as the allegations were based upon documentary evidence. Since violations were issued, the open violation report was *prima facie* proof that the violations existed, regardless of petitioner's counsel's firsthand knowledge of the violations. (*see DHPD v Living Waters Realty, Inc.*, 14 Misc 3d 484, 487 [Civ Ct, New York County 2006]; *DHPD v De Bona*, 101 AD2d 875, 875 [2d Dept 1984]; *Herclues v Bethel Capital, LLC*, 70 Misc 3d 1221(A), *7, 140 NYS3d 398, 487 [Civ Ct, Bronx County 2021] ["the existence of violations of record are prima facie proof they continue to exist"];

Steinberg v Parkash, 71 Misc 3d 1225(A), *2, 145 NYS3d 780 [Civ Ct, Bronx County 2021]; *Sanjurjo v Milio*, 70 Misc 3d 1224(A), *12, 141 NYS3d 298, [Civ Ct, Bronx County 2021]; *see also* NYC Admin Code § 27-2115 [f][7]).

Moreover, respondents conveniently overlook the fact that they admitted the allegations in paragraphs 17 and 18 in the petition to the extent that violations of record existed in the apartment.[FN5] Respondents cannot admit to the existence of violations in two subsequent paragraphs of the petition but complain in the same breath that the court improperly deemed admitted another paragraph in the petition *regarding the same violations*. Even if this court were to reverse itself and find that respondent's denial of paragraph 9 of the petition should not have been deemed an admission, it would not change the outcome or this court's decision. [*5]Respondents admitted to the existence of violations in the apartment when it admitted paragraphs 17 and 18 of the petition.

Respondents also claim that they have been prejudiced by this court's admission of the violation report into evidence. This argument wholly ignores and utterly fails to address the reasoning in the court's decision for admitting said violation report. Respondents do not bother to address the standard in a motion to reargue—no argument is made that the court misapprehended any facts or law when it admitted the Order to Correct, and the violation report attached thereto, into the trial record.

For this reason alone, respondents' instant motion must be denied. Even if the court were to agree that it improperly deemed admitted respondents' denials (and even if subsequent admissions in the answer did not negate this earlier denial), the court's holding would not change and reargument would not be granted as the second line of reasoning in the February 10, 2022 Decision and Order stands unchallenged by respondents.

Respondents argue that admitting the violation report into evidence prejudiced them and that admission of the violation report is insufficient to prove petitioner's prima facie case. Both arguments are unpersuasive.

First, respondents' counsel's allegations of prejudice, made without personal knowledge, are insufficient. Such unsupported claims made with no personal knowledge are not to be given any probative value. (*see Thelen LLP v Omni Contracting Co.*, 79 AD3d 605, 606, 914 NYS2d 119 [1st Dept 2010]; *Onewest Bank, FSB v Michel*, 143 AD3d 869, 871, 39 NYS3d 485 [2d Dept 2016]).

Furthermore, any arguments regarding prejudice must fail as respondents suffered no

prejudice by this court admitting the Order to Correct and violation report into evidence. Not only are the open violation in petitioner's apartment a matter of public record, not only do respondents receive notice of such violations from HPD, but the list of open violations has been made known to the respondents since the inception of this case, when petitioner annexed it as an exhibit to his pleadings.

The Order to Correct, which also annexed the open violation report, was issued in April 2021, more than a year ago. Since *at least* that time, respondents were aware of the qualifying violation regarding respondent's harassment claim. If that order and the annexed report were in any way unclear, or if respondents disagreed with the order or the violations it encompassed in any way, their remedy was to appeal. Respondents have not sought any clarification of the Order to the Correct in the subsequent 17 months. As such, respondents cannot now claim confusion and prejudice.

Finally, the court notes the irony in respondents' argument in this motion. Respondents spend considerable time contending that admission of the open violation report is irrelevant and does not prove petitioner's *prima facie* case. Respondents allege that even with the admission of the open violation report, petitioner cannot show repeated failure to correct, rather than, for example, old violations where the time to certify expired, or reoccurrence of new violations for the same issue after correction.

However, this argument is entirely new and, indeed, inapposite to respondents' argument in the initial motion to dismiss. In the motion to dismiss, respondents' entire reasoning was that petitioner's entire p*rima facie* case would have been proven by petitioner proving ownership and [*6]violations.[FN6]

Respondents actually argued that " Petitioner's entire prima facie case can be proven by introducing into evidence two documents, the Multiple Dwelling Registration (ownership) and the Building Summary Violation Report," and that "Upon submission into evidence of the Building Summary Violation Report the listing of multiple violations for the same 'B' or 'C' class condition over a period of time should establish the requisite repeated failures to correct based upon additional legal presumption."[FN7]

Given the black-letter principles that a motion to reargue cannot be based upon different arguments from those in the original motion and that it "may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion," [*Foley v Roche*, 68 AD2d at 567-568], it is axiomatic that respondents'

reasoning must fail and the motion to reargue denied.

Respondents cannot on one hand argue that admission of the open violation report would prove petitioner's *prima facie* case *and* establish the repeated failures necessary to show harassment, then, on the other hand, when the same violation report is admitted into evidence, reverse course. It is entirely disingenuous and improper for respondents now to argue that the violation report is insufficient to prove the *prima facie* case and that the report does not and cannot show repeated failures to correct. It may be expedient to do so, but it also takes a bit of acrobatics.

Respondents cannot allege prejudice by this finding as they had the opportunity to make the argument in their initial motion to dismiss, yet chose the *completely* opposite route. In any event, respondents remain free to present their defenses at trial.

CONCLUSION

Respondents' motion to reargue is denied in all respects. The Decision and Order, dated February 10, 2022, is upheld in its entirety. The case is adjourned to September 29, 2022, at 10:00 am for in person trial.

This constitutes the Order of the court. Copies will be emailed to the parties' counsels.

Dated: September 23, 2022
Bronx, New York
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: See Order to Show Cause and Petition.

Footnote 2: See Order to Correct dated April 22, 2021.

Footnote 3: See Decision and Order dated February 10, 2022.

Footnote 4: See Affirmation in Support of Cross-Mot at Par. 8, 10 & 29.

Footnote 5: Answer at Par. 2

Footnote 6: Ownership was deemed admitted in the February 10, 2022 Decision and Order and such admission is not contested.

Footnote 7: See Affirmation in Support of Motion to Dismiss at Par. 6 & 7.

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