

STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

In the Application of
C.B. SMITH,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE COUNTY OF RENSSELAER, HENRY F.
ZWACK, As Rensselaer County Executive,
JACK MADDEN, and STEPHEN A. PECHENIK,
As Freedom of Information Officers,

Respondents.

Supreme Court Rensselaer County
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #41-1224-97 Index No. 192505

Appearances: Lee, LeForestier & Hanft, P.C.
Attorney For Petitioner
33 Second Street
Troy, New York 12180

Robert A. Smith, Esq.
Rensselaer County Attorney
Attorney For Respondents
Ned Pattison Government Center
1600 Seventh Avenue
Troy, New York 12180

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner has made a motion pursuant to CPLR 2221 to reargue
and/or renew petitioner's prior CPLR Article 78 proceeding which

had been brought pursuant to Public Officers Law ("POL") Article 6, commonly known as the New York State Freedom of Information Law ("FOIL"). The Court, in an order dated December 17, 1998, found that respondents had improperly withheld documents and records which should have been produced upon petitioner's initial FOIL application. Petitioner's motion is limited to that portion of the Court's prior decision which declined to make an award of counsel fees. The Court noted in the December 17, 1998 decision that under the case of Matter of Corvetti v. Town of Lake Pleasant (239 AD2d 841 [Third Dept., 1997]) the standard for awarding attorneys fees in a FOIL proceeding was whether (1) the petitioner substantially prevailed, (2) the record requested was of clearly significant interest to the general public, and (3) the agency lacked a reasonable basis in law for withholding the record (see, Matter of Corvetti v. Town of Lake Pleasant, supra, pp. 843-844). The Court found that petitioner had substantially prevailed and that the respondents lacked a reasonable basis in law for withholding the records. The Court further found, however, that it had not been established that the records in question were of "clearly significant interest" to the general public.

Petitioner argues that the Court erred in determining that the FOIL application in question was not of clearly significant interest to the general public. In support of the instant motion petitioner has annexed newspaper clippings from The Record (published December 22, 1998) and the Albany Times Union (published

December 23, 1998) and Metroland (published December 30, 1998) which reported on the Court's decision.

Respondents oppose the application arguing that no new issues have been presented by the petitioner in his motion papers and that there is no basis for the Court to reconsider its prior ruling.

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, Spa Realty Associates v. Springs Associates, 213 AD2d 781, 783 [Third Dept., 1995]; Grassel v. Albany Medical Center, 223 AD2d 803, 803 [Third Dept., 1996]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (see, Foley v. Roche 68 AD2d 558, 567 [First Dept., 1979]), lv denied 56 NY2d 507). A motion to renew must be based upon newly discovered evidence that was not available when the original motion was made (Spa Realty Associates v. Springs Associates, supra, at p. 783; Grassel v. Albany Medical Center, supra, at p. 804) and must demonstrate a justifiable excuse for not placing such new facts before the Court on the original application (id.; Barnes v. State, 159 AD2d 753, 753, 754 [Third Dept., 1990]).

As a motion to reargue, the Court is of the view that petitioner has failed to demonstrate how the Court overlooked, misapplied or misapprehended the relevant facts or law.

As a motion to renew, petitioner has presented evidence, to wit, the above-described newspaper clippings, which obviously could not have been produced on the original application, and which therefore would qualify as newly discovered evidence.

In view of the extent of media coverage in connection with the instant FOIL application, and upon reconsideration, the Court concludes that it must modify its prior ruling and find that the FOIL application was of clearly significant public interest.

The Court finds that petitioner's motion to reargue must be denied, but that petitioner's motion to renew should be granted. Upon renewal, the Court grants petitioner's application for attorneys fees.

Petitioner is directed to submit to the Court within twenty (20) days an affidavit of attorneys services on notice to the respondents. The affidavit of attorneys services should set forth in detail the service provided, the date of such service, the time expended, and counsel's hourly rate. Respondents should, within twenty (20) days thereafter, submit responsive papers, if any, and advise the Court if a hearing on the issue of attorneys fees is requested.

The Court directs that, subject to the foregoing, its

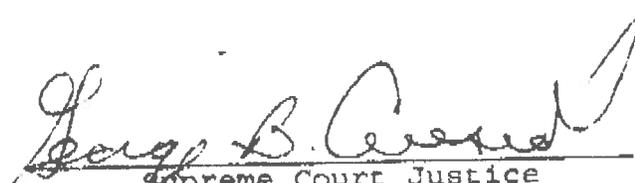
decision/order/judgment dated December 17, 1998 shall otherwise remain in full force and effect.

SO ORDERED and ADJUDGED!

This shall constitute the decision and order and judgment of the Court.

ENTER

Dated: Troy, New York
August 26, 1999



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition, Petition and Exhibits
2. Answer dated February 2, 1998
3. Reply To Answer
4. Notice of Motion dated January 19, 1999, Supporting Papers and Exhibits
5. Affirmation in Opposition of Stephen A. Pechenik, Esq., dated June 8, 1999