Matter of DiMattia v City of New York
2019 NY Slip Op 31344(U)
March 11, 2019
Supreme Court, Richmond County
Docket Number: 85126/2018
Judge: Thomas P. Aliotta
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

---X

In the Matter of the Application of Maryellen DiMattia, for Leave to Serve an Amended Notice of Claim, in connection with the commencement of an action,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent.

---X

Present:
Hon. Thomas P. Aliotta

DECISION and ORDER

Index No. 85126/2018
Motion No. 4804-002

The following papers numbered "1" through "3" were fully submitted on the 20th day of February 2019.

	Papers Numbered
Notice of Motion and Affirmation with Exhibits	1, 2
Respondent's Affirmation in Opposition with Exhibits	3

Upon the foregoing papers, petitioner's motion to renew and argue is denied in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by petitioner Maryellen DiMattia on April 18, 2017 when she tripped and fell on a broken and defective sidewalk. A Notice of Claim was served on July 10, 2017, within ninety days of the accrual of petitioner's cause of action as required by General Municipal Law § 50-i. The New York City Comptroller's Office held a 50-h hearing on May 2, 2018. Within the initial Notice of Claim, the location of the incident is stated to be "near 165 Seagate Court, Staten Island, New

York". However, after the 50-h hearing was conducted, it was learned that the actual location of petitioner's alleged accident is 165 Father Capodanno Boulevard, Staten Island, New York.

Petitioner previously moved for leave to amend the Notice of Claim to identify the correct location of her accident. In support, petitioner averred that based upon photographs depicting the defective sidewalk taken more than one year after the accident and marked at her 50-h hearing no prejudice inured to respondent. These photographs were not provided to the Court for its consideration without explanation. By a decision dated October 4, 2018, this Court denied petitioner's application for leave to amend the notice of claim holding, *inter alia,* that although "the Court may consider the evidence adduced at a hearing conducted pursuant to General Municipal Law § 50-h…Each photograph was admittedly taken the day before. Petitioner's attorney points to no portion of the transcript to substantiate his assertion that photographs of the defective sidewalk *at the time of the accident* were introduced."

Petitioner has now moved pursuant to CPLR § 5015 [a] [2] and CPLR§ 2221 seeking relief from the prior order and to reargue the prior application. In support of the current application, the only photographs submitted are the ones taken the day before the statutory hearing and marked as exhibits during petitioner's testimony. Petitioner argues that this Court presumed prejudice to the City in contravention of the holding in *Newcombe v. Middle Country Central School District,* 28 NY3d 455 [2016]. Petitioner further argues that by applying the *Newcombe* standard, a determination in her favor is warranted even though the level of prejudice required in *Newcombe* is higher since the injured claimant therein was seeking to file a late notice of claim rather than to amend a timely one. The respondent's opposition was then and remains now that it is reasonable to assume that the condition of the actual location could have

changed. Therefore, the photographs taken more than year later, and her 50-h testimony do not overcome the prejudice that has inured (*Eagle v. City of Yonkers,* 143 AD2d 626 [2d Dept. 1988]). It is the lack of contemporaneous documentary evidence under the totality of the circumstances that demonstrates prejudice.[1]

A court has the discretion to grant a motion for leave to reargue upon a showing that "the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (see CPLR 221[d][2]; *SantaMaria v. Schwartz*, 238 AD2d 674; *Schneider v. Solowey*, 141 AD2d 813). If such a showing is made, the motion may be granted (*Loland v. City of New York*, 212 AD2d at 674). The Court in its discretion is granting re-argument and upon re-argument, the motion is denied.

The Court "may, in its discretion, allow a mistake, irregularity, or defect in a notice of claim to be corrected as long as that mistake, irregularity, or defect was made in good faith and the public corporation was not prejudiced thereby" (*Bowers v. City of New York,* 147 AD3d 894, 895 [2d Dept. 2017] *citing, Ming v. City of New York,* 54 AD3d 1011, 1012 [2d Dept. 2008]). The burden initially rests on the petitioner to show that the amendment to the notice of claim will not prejudice the respondent (see *Newcombe v. Middle Country Central School District,* 28 NY3d 466). There must be some evidence in the record or plausible argument that supports a finding of no prejudice; prejudice may not be presumed (*Newcombe v. Middle Country Central School District, supra,* and *Bowers v. City of New York,* 147 AD3d 895). Once petitioner meets this burden, the respondent must demonstrate the existence of actual prejudice through

[1] See Respondent's Affirmation in Opposition dated July 26, 2018 (NYSCEF DOC. #7) and Petitioner's Exhibit "F", paragraphs 18, 19 and 20. See also, Respondent's Affirmation in Opposition dated February 1, 2019 (NYSCEF DOC. #34), paragraph 12.

particularized and admissible evidence (*Newcombe v. Middle Country Central School District,* and *Bowers v. City of New York, supra*). A comparison of the standards in *Newcombe* and *Bowers* (post-*Newcombe*) reveals that under the former, the standard is whether the public corporation was "substantially prejudiced" in its investigation. Under the latter, the standard is whether the public corporation was prejudiced by a good faith mistake. In either scenario, the order in which the parties must proceed with their respective burdens of proof remains the same.

From the outset, the Court notes that petitioner has not set forth an explanation for omitting the photographs marked at her statutory hearing from the initial application.[2] The fact that respondent did not annex the photographs to her original opposition papers did not relieve petitioner of her initial burden to come forward with evidence to establish the lack of prejudice (*see Newcombe v. Middle Country Central School District,* and *Bowers v. City of New York, supra*). Therefore, that branch of petitioner's motion pursuant to CPLR § 5015 [a] [2] and CPLR § 2221 [e] based upon new evidence is denied.

Petitioner misconstrues the Court's prior ruling. The Court did not rule that the application was based upon petitioner's failure to provide the photographs taken one year later and marked as exhibits at her statutory hearing. The Court ruled that the failure to provide pictures taken contemporaneously with petitioner's accident prejudiced respondent's investigation once it learned of the true accident location. This failure is significant when the photographs marked as exhibits are compared with petitioner's notice of claim. Petitioner's notice of claim alleged that, "claimant was caused to slip and fall to the concrete sidewalk on the

---

[2] It is unclear if petitioner is now alleging that the respondent retained the exhibits after the statutory hearing without providing copies to petitioner. This argument was not alleged in the petitioner's underlying papers. As discussed below, the post-accident photographs were not germane to the Court's prior order.

ground by a separated and highly raised section of the concrete sidewalk" (Notice of Motion, Exhibit "A"). The notice of claim does not allege the dimensions of this defect as it existed on the date of the accident or the presence of a tree adjacent to the sidewalk defect. The notice of claim states in a conclusory fashion that the sidewalk was "separated and highly raised." Therefore, the respondent was unable to investigate and determine the actual height and nature of the defect as it existed on the date of the accident absent photographs or other proof of measurements taken contemporaneously with petitioner's accident (see *Eagle v. City of Yonkers,* 143 AD2d 626, 627). Neither petitioner's statutory testimony that she thought the sidewalk was raised two or more inches and was in the same condition, nor respondent's failure to investigate the accident location upon learning of its correct location more than one year later, establish a lack of prejudice. Based upon the foregoing, respondent could not conduct a meaningful investigation (Id).

Therefore, petitioner's motion to reargue is denied because the mistaken accident location under the totality of the circumstances was not an inconsequential defect that could have been cured without prejudice to the respondent's ability to meaningfully investigate the claim and assess its merits (*see Matter of Maldonado v. City of New*, 152 AD3d 522, 522 [2d Dept 2017] and *Eagle v. City of Yonkers,* 143 AD2d 627). Petitioner's current arguments based upon the photographs submitted at this time merely reiterate the same arguments that were made in support of the initial application.

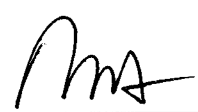
Petitioner's remaining contentions have been considered and are without merit.

Accordingly, it is

ORDERED, that petitioner's motion pursuant to CPLR § 5015 [a] [2] and CPLR§ 2221 is denied in its entirety.

This constitutes the decision and order of this Court.

E N T E R,



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: March 11, 2019