

<b>Coquis Sales Appliances LLC v de Blasio</b>
2020 NY Slip Op 30457(U)
February 7, 2020
Supreme Court, Bronx County
Docket Number: 260317/2019
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Mtn. Seq. # 5

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COQUIS SALES APPLIANCES LLC, WINDOW KING,  
LLC, FRANCESCO INC., CAPTAINS OF MORRIS  
PARK LLC, MORRIS PARK COMMUNITY  
ASSOCIATION, and Mark GJONAJ in his Official  
Capacity as Council Member of the 13<sup>th</sup> Council District,  
New York City Council,

Index No.: 260317/2019

Petitioners,

- against -

**DECISION and ORDER**

MAYOR WILLIAM DEBLASIO, in his Official Capacity  
as Mayor of the City of New York, POLLY  
TROTTEBERG, in her Official Capacity as  
Commissioner, New York City Department of  
Transportation, and NIVARDO LOPEZ, in his Official  
Capacity as Bronx Borough Commissioner, New York City  
Department of Transportation,

Respondents.

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PRESENT: Hon. Lucindo Suarez

The issue in Petitioners' motion is whether Petitioners proffered new facts not offered on their prior motion that would change this court's prior determination.<sup>1</sup> This court finds that the evidence Petitioners now offer does not warrant disturbing this court's prior determination nor did they provide reasonable justification for their failure to present said evidence on their prior motion.

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<sup>1</sup> Although Petitioners styled the instant motion as one seeking leave to re-argue, they failed to demonstrate what facts or points of law were purportedly overlooked or misapprehended by this court when it made its determination with respect to their prior motion. Moreover, re-argument is not designed to afford Petitioners successive opportunities to reargue issues previously decided, thus, Petitioners attempt to regurgitate nearly identical legal arguments that were already considered and denied on their prior motion is improper. *See William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dep't 1992). Furthermore, the crux of Petitioners' motion seeks consideration of purported new evidence that was not offered on the prior motion, which this court cannot entertain in a re-argument application under CPLR §2221(d)(2). *See Matter of Setters v. AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492, 32 N.Y.S.3d 87 (1st Dep't 2016). Therefore, that branch of Petitioners' motion is denied.

It lies within the sound discretion of the court whether to grant a movant leave to renew under CPLR §2221. See *Matter of S. Bronx Unite! v. NY City Indus. Dev. Agency*, 138 A.D.3d 462, 31 N.Y.S.3d 1 (1st Dep't 2016). It is axiomatic that a motion to renew must be based upon new facts not offered on the prior motion that would change the prior determination. *Melcher v. Apollo Med. Fund Mgt. L.L.C.*, 105 A.D.3d 15, 959 N.Y.S.2d 133 (1st Dep't 2013). Moreover, a movant must demonstrate a reasonable justification for the failure to present such facts on the prior motion. See *Murlar Equities Partnership v. Jiminez*, 161 A.D.3d 569, 73 N.Y.S.3d 751 (1st Dep't 2018).

Here, Petitioners argue that they are now in possession of three new evidentiary items that were unavailable at the time of their prior motion. Petitioners allege that the new items of evidence include a supplemental affidavit by their expert, Mr. John Russo, that analyzes new data by Respondent in its decision making process for the implementation of Morris Park Avenue Street Improvement Project (“ Morris Park SIP”), e-mail correspondence that purportedly exhibited FDNY’s deliberations about the Morris Park SIP, and the 2019 Mayor’s Management Report identifying a decrease in emergency response effectiveness blamed in part by Respondents’ road dieting efforts. In addition, Petitioners attached an affidavit from the President of the Uniformed Firefighters Association of Greater New York, Gerald Fitzgerald, regarding the impacts on public health and safety and emergency response caused by Respondents’ Vision Zero Initiative, which was not provided on their prior motion.

Respondents counter by arguing that as a threshold matter Petitioners failed to offer a valid justification for their failure to submit the affidavits and documents it now proffers prior to this court’s ordered final submission deadline of August 16, 2019. Respondents further contend that even assuming, *arguendo*, that Petitioners did possess a valid justification they failed to

present any new facts or a change in the law to warrant altering this court's prior determination. Moreover, Respondents argue that this court cannot consider any new evidence as it is constrained to view Respondents' administrative actions through the record that was before it at the time the administrative act was made. Furthermore, Respondents argue that Petitioners did not present a reasonable justification for their failure in providing their expert, Mr. John Russo's, supplemental affidavit on their prior motion.

Respondents allege they provided Petitioners the data, which Mr. Russo analyzed in his supplemental affidavit on June 25, 2019. They claim that after providing Petitioners said data, they made several attempts to inquire how much time Petitioners needed to submit supplemental responses. After not receiving a response, they sought judicial intervention resulting in this court rendering an order dated August 9, 2019, compelling Petitioner to file their final submissions by August 16, 2019.

Moreover, Respondents contend that even if this court were to consider Mr. Russo's supplemental affidavit as "new evidence" it substantively did not provide any new facts that would warrant this court to disturb its prior determination. Respondents argue that Mr. Russo simply repeats the same previously rejected arguments made in his prior affidavit namely that because Morris Park Avenue was delisted as a priority corridor that it demonstrates that Morris Park SIP was not rationally based. Moreover, Respondents attack Mr. Russo credentials to serve as an expert witness in this matter.

Furthermore, Respondents argue that the President of the Uniformed Firefighters Association of Greater New York, Gerald Fitzgerald's, affidavit, the FDNY's e-mail communication, and the 2019 Mayor's Management Report also do not serve as new evidence. They posit that both Mr. Fitzgerald's affidavit and the 2019 Mayor's Management Report were

created after Respondents made its determination to implement the Morris Park SIP and after the commencement of this action. Lastly, Respondents argue that neither Mr. Fitzgerald's affidavit, the 2019 Mayor's Management Report nor FDNY's e-mail correspondence contained any probative evidence regarding Respondents' rational basis to implement the Morris Park SIP or FDNY response time in emergency situations.

This court finds that Respondents' assertion that the data Mr. Russo analyzed, which served as the basis for his supplemental affidavit was previously provided to Petitioners on June 25, 2019, nearly two months prior to this court's ordered deadline of August 16, 2019, for final submissions went unrefuted by Petitioners. Moreover, Petitioners' claim that they did not have the sufficient resources to adequately process Respondents' disclosures prior to this court's deadline for final submissions due to said disclosures volume is unavailing.

Petitioners upon commencing this matter should have been cognizant that due to the complexity and time sensitive nature of this matter, that it would require from them the expenditure of extensive resources and time in order to effectively prosecute this matter. Therefore, this court finds that said evidentiary item was available to Petitioners at the time of their prior motion and they did not offer a reasonable justification for failing to present Mr. Russo's supplemental affidavit at said time. *See Zetlin & De Chiara LLP v. Gene Kaufman Architect, P.C.*, 132 A.D.3d 411, 16 N.Y.S.3d 739 (1st Dep't 2015).

Likewise, this court is unpersuaded that Mr. Fitzgerald's affidavit was "unavailable" at the time that Petitioners' prior motion was made. There was no indication by Petitioners why they could not procure Mr. Fitzgerald's affidavit at the time of their prior motion nor were there any averments by Mr. Fitzgerald to lay a foundation that he was unavailable at said time.

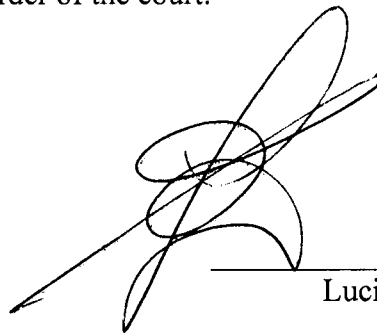
Even placing aside that the above evidence was available to Petitioners at the time they made their prior motion, this court finds that there was nothing substantively contained in either Mr. Russo's supplemental affidavit, FDNY's e-mail correspondence, Mr. Fitzgerald's affidavit or the 2019 Mayor's Management Report that would warrant altering this court's prior determination. Similar arguments as the ones now raised by Mr. Russo, Mr. Fitzgerald, and Petitioners with respect to emergency vehicles response times was already considered on Petitioners' prior motion and denied. In addition, Mr. Russo's argument about Respondents "delisting" Morris Park Avenue as a priority corridor was also previously considered and denied. More importantly, none of the evidence now presented by Petitioners challenged this court's prior findings that Respondents were statutorily empowered pursuant to New York City Charter §2903 to implement the Morris Park SIP or that they possessed a rational basis rooted in public safety.

Accordingly, it is

ORDERED, that Petitioners' motion seeking leave to re-argue and renew is denied.

This constitutes the decision and order of the court.

Dated: February 7, 2020



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Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**