

Williams v 1375 Rockaway Parkway LLC

2025 NY Slip Op 33796(U)

October 2, 2025

Supreme Court, Kings County

Docket Number: Index No. 527461/2019

Judge: Inga M. O'Neale

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of October, 2025.

P R E S E N T:

HON. INGA M. O'NEALE,

Justice.

-----X
CURTIS WILLIAMS,

Plaintiff,

-against-

Index No.: 527461/2019
Motion Sequence: 4, 5, 6

1375 ROCKAWAY PARKWAY LLC, DUNKIN' BRANDS INC., DUNKIN' DONUTS FRANCHISING LLC, BASKIN-ROBBINS FRANCHISING LLC, AND DUNKIN DONUTS & BASKIN-ROBBINS,

Defendants.

-----X
1375 ROCKAWAY PARKWAY LLC,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.
-----X

KINGS COUNTY CLERK
FILED
2025 OCT -6 A 10:04

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits Annexed
Affirmations in Opposition and Exhibits Annexed

168-184; 188-192; 210-214
193-194, 204-206; 195-198;
215-218

Reply Affirmations and Exhibits Annexed

207-209; 219-220

In this action to recover personal injuries, defendant 1375 Parkway Enterprises, Inc., d/b/a Dunkin Donuts & Baskin-Robbins ("Dunkin") moves (in motion [mot.] sequence [seq.] 4), pursuant to CPLR 2221(d)-(e), seeking leave to reargue and/or renew its prior

motion (mot. seq. 3) (“Dunkin’s prior motion”) which was for summary judgment dismissing the complaint and all cross-claims and counterclaims against it and, upon reargument and/or renewal, granting its prior motion. Defendant/third-party plaintiff 1375 Rockaway Parkway LLC (“Rockaway”) moves (in mot. seq. nos. 5 and 6, respectively), pursuant to CPLR 2221(d)-(e), seeking leave to reargue and renew, respectively, the portion of its prior motion (mot. seq. 2) (“Rockaway’s prior motion”) which was for summary judgment dismissing the complaint and Dunkin’s cross-claims against it, and for summary judgment on Rockaway’s cross-claims against Dunkin and, upon reargument and renewal, granting such portions of its prior motion.

Background

Plaintiff Curtis Williams (plaintiff) commenced this action against Rockaway and Dunkin, among others¹, alleging that, on September 29, 2018, he sustained injuries as a result of a trip and fall accident due to an allegedly defective condition on a sidewalk located at 1375 Rockaway Parkway in Brooklyn, New York, a commercial building owned by Rockaway. A portion of the building is leased to Dunkin, which operates a Dunkin Donuts & Baskin Robbins franchise on the premises. The sidewalk on which the plaintiff was injured is located in between the building owned by Rockaway (in which Dunkin leases space) and the nearby Canarsie Municipal Parking Field (the municipal parking lot), located at 1389 Rockaway Parkway, which is owned by third-party defendant City of New

¹ By stipulation dated October 1, 2020, the action was discontinued as to Dunkin’ Brands Inc., Dunkin’ Donuts Franchising LLC, and Baskin-Robbins Franchising LLC (NYSCEF Doc No. 25).

York.² Rockaway and Dunkin each moved for summary judgment dismissing plaintiff's complaint and all cross-claims and counterclaims against them. The decisive issue on the prior motions, as identified by the Court, was the relative location of the sidewalk on which plaintiff's accident occurred; namely (1) whether the alleged accident happened on the sidewalk abutting premises owned by Rockaway and leased by Dunkin; or, alternatively (2) whether the accident happened on the sidewalk abutting the municipal parking lot, which was owned by the City. Assuming that the defect abutted the Dunkin store, the parties (as between themselves) further disputed whether Rockaway, as the owner, or Dunkin, as the lessee, owed a duty of care to the plaintiff.

In a Modified Decision and Order³ dated March 12, 2025, the Court denied in full the respective summary judgment motions previously filed by Dunkin and Rockaway (the "Prior Order"). Specifically, the court held that Rockaway and Dunkin each failed to submit sufficient evidence in admissible form to establish their respective prima facie entitlement to summary judgment as a matter of law on whether (or not) the alleged defective condition abutted their premises (the Dunkin store) (NYSCEF Doc No. 164). The Court further held that since the defendants failed to demonstrate that they were free from any negligence, they were unable to establish their prima facie entitlement to summary judgment on their respective cross-claims/counterclaims for common-law and contractual

² On August 2, 2022, Rockaway commenced a third-party action against the City (NYSCEF Doc Nos. 41, 44), and the City interposed a Verified Third-Party Answer dated October 25, 2022 (NYSCEF Doc No. 47). In response to the First Notice to Admit dated November 4, 2022 served by Rockaway, the City admitted to its ownership of the Canarsie Municipal Parking Field at the time of the alleged accident (NYSCEF Doc Nos. 50-51).

³ The Court's initial Decision and Order dated February 28, 2025 (NYSCEF Doc No. 158) was modified in response to a letter from Rockaway's counsel seeking clarification (NYSCEF Doc No. 163).

indemnification. The Court lastly held that Dunkin's and Rockaway's respective failure to address the remaining cross-claims and counterclaims warranted denial of the remainder of their prior motions.

Standard of Review

A motion for reargument under CPLR 2221(d) is at “the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; see *Wells Fargo Bank, N.A. v Weiss*, 237 AD3d 1003, 1005 [2d Dept 2025]; *Emigrant Bank v Kaufman*, 223 AD3d 650, 651–652 [2d Dept 2024]; *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019]). However, courts have cautioned that a motion for leave to reargue is “not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014], *lv dismissed* 25 NY3d 964 [2015], *rearg denied* 25 NY3d 964 [2015]; see *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 435-36 [2d Dept 2005] citing *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004] and *Frisenda v X Large Enter.*, 280 AD2d 514 [2d Dept 2001]). Rather it is designed to “point out controlling principles of law or fact that the court may have overlooked” (see *Simon v Mehrvari*, 16 AD3d 664, 665 [2d Dept 2005]). The moving papers “shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d][2]).

A motion to renew, on the other hand, “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that

there has been a change in the law” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][2]-[3]; see *JPMorgan Chase Bank N.A. v EY Bay Ridge, LLC*, 212 AD3d 794, 795 [2d Dept 2023]). It is in the court’s discretion whether the justification provided by the movant is “reasonable under the circumstances” (*Castor v Cuevas*, 137 AD3d 734, 734-735 [2d Dept 2016]). Denying renewal is warranted, as a matter of law, where the movant does not offer a reasonable justification for their failure to present the alleged new facts previously and demonstrate that the new facts would have changed the prior determination (see *Agostinacchio v Jofaz Transportation, Inc.*, 238 AD3d 691, 693–694 [2d Dept 2025]; *Hersko v Hersko*, 224 AD3d 813, 816 [2d Dept 2024]; *Nunez v Yonkers Racing Corp.*, 218 AD3d 480, 482 [2d Dept 2023]; *Seegopaul v MTA Bus Co.*, 210 AD3d 715, 716 [2d Dept 2022]). Furthermore, it is well-established that parties are encouraged to make a diligent first factual presentation rather than rely on either a motion for reargument or renewal to take another bite at the apple (see *Wells Fargo Bank, N.A. v Weiss*, 237 AD3d at 1005 [reargument]; *Orrego v Knipfing*, No. 2021-09209, 2025 WL 1888517, at *2 [2d Dept 2025] [renewal]; *Flanagan v Delaney*, 194 AD3d 694, 698 [2d Dept 2021] [renewal]; *McGill v Goldman*, 261 AD2d at 594 [reargument]). Similar to motions to reargue, “[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Carmike Holding I, LLC v Smith*, 180 AD3d 744, 747 [2d Dept 2020] [internal citations and quotations omitted]; see also *Marino v Brown*, 225 AD2d 529, 529 [2d Dept 1996], quoting *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]).

Analysis

Dunkin's Motion for Leave to Renew and Reargue (Mot. Seq. 4)

When a litigant makes a combined motion for leave to reargue and renew, such as here, the motion “shall identify separately and support separately each item of relief sought” (CPLR 2221 [f]). The court “shall decide each part of the motion as if it were separately made” and, upon granting leave to reargue or renew, “may adhere to the determination on the original motion or may alter that determination” (*id.*).

Here, in its prior motion for summary judgment, Dunkin argued that (i) the accident location abuts the municipal owned parking lot; (ii) it did not owe a duty of care to plaintiff even if the accident did occur at 1375 Rockaway Parkway; and (iii) the cross-claims and counterclaims against it should be dismissed as it was not negligent, and all defendants were sued for their active negligence rather than vicarious liability (NYSCEF Doc Nos. 114-115). In support of its prior motion, Dunkin submitted a survey dated April 26, 2023, conducted by Montrose Surveying Co., LLP (hereinafter, “Montrose”), that was accompanied by an affidavit by Mr. Saied Jalilvand, a licensed New York State land surveyor, with almost 27 years of experience (NYSCEF Doc Nos. 133, ¶ 6 and 134). Mr. Jalilvand, a partner and employee of Montrose, attested that counsel for both Rockaway and Dunkin retained Montrose to conduct a survey of the subject area (including of the property line between 1375 Rockaway Parkway and the municipal parking lot) in order to determine the specific property on which plaintiff’s accident occurred (NYSCEF Doc No. 133, ¶ 2).

In seeking leave to reargue, Dunkin maintains that the Court (i) overlooked its arguments pertaining to a duty of care and the contribution and indemnification claims asserted against it; and (ii) overlooked and misapprehended the facts and law in finding that the Jalilvand affidavit was insufficient (NYSCEF Doc No. 169).

Contrary to Dunkin's assertion, its duty of care argument was acknowledged in the Prior Order as follows: “[Rockaway] and [Dunkin] argue that they do not owe a duty to plaintiff because, *among other things*, the alleged defect does not abut the premises owned by . . . Rockaway and leased by [Dunkin]” (NYSCEF Doc No. 164 [emphasis added]). The emphasized phrase “among other things” reflects that, after considering Dunkin's arguments—namely, that it neither owned the Dunkin' Donuts store located at 1375 Rockaway Parkway nor created or had notice of the alleged defective condition—the Court identified the central issue in dispute: whether the alleged defect is adjacent to property owned by Rockaway or to a municipally owned parking lot. Until this underlying property ownership issue is resolved, the obligations of an owner or tenant under NYC Administrative Code § 7-210 cannot be properly assessed.

The Prior Order also explained that “since . . . Rockaway and Dunkin Donuts did not demonstrate that they were free from negligence, they have failed to establish their *prima facie* entitlement to judgment as a matter of law on any cross-claims and counterclaims as asserted against them” (NYSCEF Doc No. 164). Because Dunkin's prior motion failed to adequately address the cross-claims for contribution and common-law indemnification, it may not now use a motion to reargue as a vehicle to reassert its

previously unsuccessful arguments that were already considered and rejected (NYSCEF Doc Nos. 115 and 141).

In the instant motion, counsel argues that, by signing his name and affixing his New York State Licensed Land Surveyor seal to the survey, Mr. Jalilvand attests to the truthfulness and accuracy of its contents, including the alleged accident location marked by plaintiff in Exhibit A1 (NYSCEF Doc No. 133, ¶ 5). Counsel also cites paragraph 4 of the Jalilvand affidavit stating that the survey was conducted by Montrose “in accordance with the requirements of a New York State Licensed Land Surveyor” as proof of the competency and authority of the employee who conducted the survey (NYSCEF Doc No. 133, ¶ 4).

However, Mr. Jalilvand does not have the requisite personal knowledge for his “opinion within a reasonable degree of certainty that the accident location...is approximately four feet nine inches away from the reflected property line” between the two lots (NYSCEF Doc No. 133, ¶ 6). His affidavit did not indicate that he personally conducted the survey, or that he was present at the location when the survey was conducted, or that he visited the location at any other point to compare his observations with the prepared survey. Jalilvand’s affidavit lacked probative value because it failed to explain who, with what competency and authority, performed the measurements and created the survey (*see Castro v New York Univ.*, 5 AD3d 135, 136 [2d Dept 2004] [“affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief...”]; *Kalil v Zissis*, 281 AD2d 397 [2d Dept 2001] [“...a factual issue may not be established by hearsay

information provided by an individual who has no personal knowledge of the facts.”)). Additionally, “[i]t is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness” (*Hambusch v New York City Trans. Auth.*, 63 NY2d 723, 725-726 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643 [1959]). Regardless of his signature and seal on the survey, Mr. Jalilvand cannot confirm the truth and accuracy of the property line – a critical issue in this matter.

Lastly, counsel’s reliance on *Liuni v Haubert* (289 AD2d 729 [3d Dept2001]),⁴ to argue that the survey is admissible and should be given full weight misconstrues the Prior Order. The survey in the present case was rejected because the accompanying affidavit and other supporting evidence were insufficient to lay the foundation, not because Mr. Jalilvand did not personally conduct the survey. The affidavit and curriculum vitae of Mr. Jalilvand were insufficient to demonstrate the “identity, competency, and authority of the surveyor *in the particular case*” because they did not “name and establish the competency and authority of the employee who actually conducted the survey” (*Raab v Lefkowitz*, 76 AD3d 619, 621 [2d Dept 2010] [emphasis added]). As Dunkin has failed to establish that the Court overlooked or misapprehended the facts or applicable law in determining that the

⁴ *Liuni v Haubert*, 289 AD2d 729 (3d Dept 2001), is not to the contrary because it involved the appellate court’s assessment of the weight of the judge’s admission of certain testimony at trial (*see id.* at 729-730 [“(D)efendants contend that the opinion of Patricia Brooks, a licensed surveyor, and the sketch which she prepared based on her comparison of the O’Buckley survey of the Van Nostrand property and a survey of defendants’ property prepared by Richard Barger *should not have been received by Supreme Court* [at bench trial] since it was based on surveys she did not personally perform. [*Patricia*] Brooks’ testimony was based on three visits to the property and the physical evidence that she found there, including remnants of stonewalls and rebars set by the surveyors. Her application of this evidence to the surveys formed the basis for her opinion that the farm lane did not encroach on defendants’ property. We find no error in the court’s admission of this evidence.”] [emphasis added]). Conversely, nothing in the Jalilvand affidavit indicates (or even suggests) that he visited either of the properties at issue here.

Jalilvand affidavit was insufficient, that branch of Dunkin's motion seeking leave to reargue is denied.

Turning to that branch of Dunkin's motion seeking leave to renew, Dunkin maintains that it seeks to clarify the controlling decisional law cited in the Prior Order, *Raab v Lefkowitz* (76 AD3d 619), arguing that its own interpretation of *Raab* should change the Court's prior determination as to the admissibility of the survey (NYSCEF Doc No. 169; see *U.S. Bank N.A. v Zapata*, 218 AD3d 623 [2d Dept 2023] ["...a clarification of existing law may in some circumstances suffice to constitute a change in law for purposes of a motion to renew" [internal quotation marks omitted]). In support of this contention, Dunkin's counsel submits a copy of the land surveyor Barry Fahrer affidavit from *Raab*, *supra* as a "new fact" for Dunkin's renewal motion (NYSCEF Doc Nos. 159 and 183).

Contrary to Dunkin's contention, its belated submission, on renewal, of the land surveyor affidavit in *Raab* from the record on appeal to the Second Judicial Department (Docket No. 2008-11698) cannot be excused by plaintiff's failure to cite to *Raab* in his opposition papers. The Second Judicial Department's decision in *Raab*, handed down in 2010, is a controlling authority on this Court and which defendants failed to cite (let alone distinguish) in their prior motions. There was no reasonable justification for defendants in their prior motions to ignore *Raab* which impacted the Court's ruling. In any event, the *Raab* land surveyor affidavit (NYSCEF Doc No. 183) reinforces (rather than detracts from) the Court's ruling on the inadmissibility of the Jalilvand affidavit.

In contrast to the factual comparisons attempted by Dunkin between the Jalilvand affidavit herein and the Fahrer affidavit (NYSCEF Doc No. 169, ¶¶ 38-43), the present

case is analogous to *Raab, supra*. In both cases, the supporting affidavit was written by a licensed New York State Land Surveyor who represents the survey company, but not the person(s) who actually performed the survey. The Jalilvand affidavit states: “On April 26, 2023, Montrose went to the location to conduct the survey, which was conducted in accordance with the requirements of a New York State Licensed Land Surveyor.” (NYSCEF Doc No. 133, ¶ 4). The Fahrer affidavit in *Raab, supra* similarly states: “[O]n January 2, 2006, my company performed a field visit to conduct a survey of the property...the survey crew was led by Freddie Santiago, a Party Chief employed by my company...the survey crew was able to observe the entire foundation wall in place on the 1219 property...” (NYSCEF Doc No. 183, ¶¶ 2-4). The land surveyor affidavit in *Raab* used the generic terms “my survey crew” or “the survey crew,” while an all-encompassing word “Montrose,” meaning Montrose LLP, is used in this case. As in *Raab, supra*, Mr. Jalilvand did not perform the survey himself and did not establish the competency and authority of the employees who did perform the survey by his “vague statement that Montrose...conducted the subject survey.” (NYSCEF Doc No. 164). Thus, in either case, the “identity, competency, and authority of the surveyor in the particular case” was not demonstrated by the land surveyor affidavit.

Counsel also argues that the competency and authority of the surveyors was only relevant in *Raab, supra* because there were three competing surveys, and that plaintiff herein did not submit a competing survey in opposition to the motion for summary judgment. Conversely, the competency and authority of the surveyors was an issue in *Raab, supra* because the admissibility of the survey determines the moving party’s entitlement to

summary judgment, not because there happened to be competing surveys. A defendant must satisfy its prima facie burden of proof regardless of the sufficiency of plaintiff's opposition papers and, as such, plaintiff was not required to submit a competing survey. Whether the plaintiff submitted a competing survey is irrelevant, as it does not alter Dunkin's prima facie burden of proof on its prior motion – a burden that Dunkin failed to satisfy (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Since Dunkin has failed to distinguish the present case from *Raab, supra* or otherwise provide a clarification of the decisional law that would change the prior determination, that branch of Dunkin's motion seeking leave to renew is denied.

Rockaway's Motion for Leave to Reargue (Mot. Seq. 5)

In its prior motion, Rockaway argued that the alleged defective condition “completely abuts the municipal parking lot” and therefore it “owed no duty [under New York City Admin. Code. § 7-210 (c)⁵] to maintain sidewalk that does not abut its property” (NYSCEF Doc Nos. 97, ¶¶ 19, 24, 113). Rockaway relied on (i) plaintiff's testimony that the photographs he took of the cracked sidewalk looked the same as it did on the date of the accident (NYSCEF Doc No. 109 at 92) and (ii) testimony of the property manager of 1375 Rockaway Parkway, Zamir Nasary that, at some point after plaintiff's fall, Rockaway repaired a portion of the sidewalk in front of the Dunkin Donuts building which did not

⁵ Section 7-210 (c) of the New York City Admin. Code provides: “Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” (emphasis added).

include the area at issue (NYSCEF Doc Nos. 100, 111 at 76-79, 80-83, 112). While the testimonial evidence may be used to establish the area where plaintiff fell and sustained injuries, neither plaintiff nor Nasary have personal knowledge as to the property line in relation to the area at issue.

In its prior motion, Rockaway failed to lay a proper foundation for the survey of the subject sidewalk conducted by Montrose on November 12, 2021, in which the accident area appears to be 4'9" into City-owned property (NYSCEF Doc No. 113). There was no affidavit attesting to the identity, competency, and authority of the surveyor, no accompanying testimony or other evidence as to the authenticity of this survey, and no evidence to interpret and explain the survey (*see Raab*, 76 AD3d at 621; *Thomson v Nayyar*, 90 AD3d 1024, 1025-1026 [2d Dept 2011] ["the survey did not constitute competent evidence of the alleged encroachment, as it was not accompanied by an affidavit of the surveyor."]; *see also City of New York v Gowanus Indus. Park.*, 65 AD3d 1071 [2d Dept 2009] [finding City met its prima facie burden on the property dispute with a certified city affidavit [authenticated by affidavit], whereas the competing unsigned, uncertified survey submitted without an affidavit by the preparer of the survey did not raise a triable issue of material fact]; *Seaman v Three Vill. Garden Club, Inc.*, 67 AD3d 889, 890 [2d Dept 2009]). It is not enough that the survey is signed by a land surveyor licensed by the State of New York. Rockaway did not satisfy the threshold evidentiary issue of admissibility in its original moving papers. As explained in the Prior Order, the evidence provided did not support Rockaway's conclusory contention that the "alleged sidewalk defect solely abuts

the parking lot owned by [the City], and not the building owned by 1375 Rockaway” (NYSCEF Doc No. 97, ¶ 20).

Seeking leave to reargue, Rockaway asserts that this Court (i) overlooked its duty of care argument under NYC Admin. Code § 7-210, and that (ii) Rockaway’s failure to include the affidavit of Mr. Jalilvand was a “technical error” due to law office failure.⁶ However, as discussed below, Rockaway improperly seeks to use this reargument motion to repeat the arguments in its prior motion because it is dissatisfied or disagrees with the Court’s analysis of the facts and evidence.

As to the first contention, that portion of Rockaway’s prior motion also depended on the survey. Rockaway’s argument that it owed no duty of care to plaintiff because the defective condition was not on its property is premised on the same survey that the court found was inadmissible for the reasons stated above. In the Second Department, a certified survey, without more, is hearsay evidence (*see e.g., Thomson v Nayyar*, 90 AD3d 1024, 1026 [2d Dept 2011]; *Raab*, 76 AD3d at 621; *Seaman*, 67 AD3d at 890). Denial of summary judgment is warranted when the moving party fails to establish its prima facie showing, as here, regardless of the sufficiency or existence of any opposition papers (*see Winegrad*, 64 NY2d at 853). Thus, the Court did not overlook the duty of care argument initially presented on the prior motion.

⁶ Plaintiff argues in opposition that Rockaway’s motion is submitted 30 days after the notice of entry dated March 18, 2025. However, the 30-day time period begins the day after, on March 19, 2025. Rockaway’s counsel filed the motion on April 18, 2025 (*see NY Gen. Constr. Law § 20*). Thus, this motion is timely made under CPLR 2221(d)(3).

As to the second contention, Rockaway’s counsel asserts that the Jalilvand affidavit was “inadvertently excluded” from its prior motion, and argues that this technical error—allegedly non-prejudicial to the other parties—should be disregarded (NYSCEF Doc No. 189, ¶ 10). This argument is unpersuasive. Rockaway offers no additional facts or meaningful explanation to substantiate the claimed law office failure. Notably, in its prior motion papers, Rockaway affirmatively stated that the survey was admissible, made no reference to any missing affidavit, and expressly represented that all exhibits were “filed in their entirety” (NYSCEF Doc Nos. 97 and 152). On a motion for reargument, the moving party must show more than “mere neglect” or a “conclusory, undetailed...and...uncorroborated claim” for law office failure to be considered a “reasonable excuse” on a motion to renew (*see Sutton v Sylva*, 223 AD3d 764, 766 [2d Dept 2024]; *U.S. Bank Nat’l. Ass’n. v Jack*, 219 AD3d 1369, 1371 [2d Dept 2023]; *Burro v Kang*, 167 AD3d 694, 698-99 [2d Dept 2018]).

The motion for reargument is not a vehicle for the court to consider the Jalilvand affidavit that was not attached to the prior motion, regardless of any law office failure now alleged. Dunkin’s survey was conducted by Montrose on April 26, 2023, and the Jalilvand affidavit it submitted was dated June 20, 2023 (NYSCEF Doc No. 133). The survey provided by Rockaway was conducted on November 11, 2021 (NYSCEF Doc. No 113). Rockaway’s counsel requests that the Court accept an affidavit dated more than a year and a half *after* the survey at issue, which was annexed to its co-defendant’s motion. This goes well beyond a mere “technical defect” or simple neglect. Such conduct is untenable and further undermines both the admissibility and the evidentiary weight of the proffered

survey. As Rockaway's remaining arguments for reargument are also unavailing, Rockaway's motion for leave to reargue is denied.

Rockaway's Motion for Leave to Renew (Mot. Seq. 6)

In support of its renewal motion, Rockaway asserts that "new facts" exist based on the (1) Notice to Admit dated May 15, 2025, and served on the City on May 28, 2025 (NYSCEF Doc No. 203) and (2) a second survey by Montrose and the licensed surveyor's affidavit dated May 14, 2025 (NYSCEF Doc No. 212).

Contrary to Rockaway's position, its subsequent notice to admit was improper. As an initial matter, Rockaway served the subsequent notice to admit on the City approximately nine months after the note-of-issue filing date of September 27, 2024 and without leave of court (NYSCEF Doc No. 95). "Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings" (22 NYCRR 202.21 [d]). Rockaway did not demonstrate any unusual or unanticipated circumstances that warranted additional discovery following the filing of the note of issue (*see Sanquintin v Cogliture*, 226 AD3d 445 [1st Dept 2024]; *Hodes v City of New York*, 165 AD2d 168, 171 [1st Dept 1991]). More fundamentally, Rockaway's subsequent notice to admit improperly sought "admissions as to material and ultimate issues" (*Singh v G&A Mounting & Die Cutting, Inc.*, 292 AD2d 516, 516 [2d Dept 2002] [internal quotation marks omitted]; *see American Builders & Contractors Supply Co., Inc. v Vinyl Is Final, Inc.*, 222 AD3d 708, 709 [2d Dept 2023] ["A notice to admit is not to be

employed . . . to compel admissions of fundamental and material issues or contested ultimate facts.”]). Rockaway’s subsequent notice to admit “goes to the heart of the matters at issue⁷,” and is therefore palpably improper (*DeSilva by DeSilva v Rosenberg*, 236 AD2d 508 [2d Dept 1997]).

Lastly, the Court declines to consider a subsequent survey and affidavit by Jalilvand, both dated April 14, 2025 (NYSCEF Doc Nos. 212 and 214, respectively). Such “new evidence” offered by Rockaway consists of information which it knew or should have known to have existed at the time of its prior motion, and it did not set forth a reasonable justification as to why it failed to submit such information in the first instance (*see Orrego v Knipfing*, 240 AD3d 605, 609 [2d Dept 2025]; *Deutsche Bank Tr. Co. v Ghaness* 100 AD3d 585, 586 [2d Dept 2012]; *Worrell v Parkway Estates*, 43 AD3d 436, 437 [2d Dept 2007]). It is true (as Rockaway asserts) that “[t]he requirement that a motion for renewal be based upon newly-discovered facts is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion” (*Daniel Perla Assoc. v Ginsberg*, 256 AD2d 303 [2d Dept 1998]). However, where, as here, “no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal” (*HSBC Bank USA, N.A. v Joseph*, 238 AD3d 1009, 1011 [2d Dept 2025]). Accordingly, Rockaway’s motion for leave to renew is denied.

⁷ Defendant’s Second Notice to Admit seeks for the City to admit that, on the incident date of September 18, 2019, the City owned the property located at 9503 Smiths Lane, Brooklyn, NY 11236 (also known by coordinates 40.64627703560934, -73.9032139357647), and that the portion of the sidewalk marked by plaintiff as Exhibit A1 at his deposition and the defective condition therein about the sidewalk within the property lines of the municipal parking lot (NYSCEF Doc No. 203).

