

Trent-Clark v City of New York
2009 NY Slip Op 33340(U)
November 6, 2009
Sup Ct, Bronx County
Docket Number: 0015485/2007
Judge: Wilma Guzman
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PART 07

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed
 Settle Order
 Schedule Appearance

TRENT-CLARK, SEBRINA

Index No. 0015485/2007

-against-

Hon. WILMA GUZMAN,

THE CITY OF NEW YORK

Justice.

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
 Noticed on **July 06 2009** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion to dismiss by the defendant*
is decided in accordance to the annexed
Decision / order.

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

RECEIVED
 BRONX COUNTY CLERK'S OFFICE
 NOV 16 2009
 PAID NO FEE

Dated: NOV/ 6 2009

Hon. _____
 WILMA GUZMAN, J.S.C.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 15485/07
Motion Calendar No.18,19
Motion Date: 8/10/09

SEBRINA TRENT-CLARK

Plaintiff(s),
-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court,

THE CITY OF NEW YORK, H.A., ESTATE ASSOCIATES
L.P., J.P. MORGAN CHASE & CO. and CHASE MANHATTAN
BANKING CORPORATION

Defendant(s).

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

<u>Papers</u>	<u>Numbered</u>
Plaintiff Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition to Motion and Exhibits Thereto	2
Reply Affirmation	3
JP Morgan Notice of Motion	4
Affirmation in Opposition	5
Reply Affirmation	6

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Plaintiffs move pursuant to CPLR § 2221 fo an Order to vacate, reargue and renew this Court’s prior Order dated May 11, 2009 which denied plaintiff’s motion to amend the complaint to reflect the correct location of the alleged accident. Defendant submitted written opposition. Defendant submits a motion to dismiss plaintiffs complaint pursuant to C.P.L.R. § 3211(a)(7). Plaintiff submitted written opposition. For purposes of disposition, both motions are consolidated and decided as follows.

A combined motion for leave to reargue and renew shall identify separately and support each item of relief sought. C.P.L.R. § 2221. A motion for leave to reargue under C.P.L.R. § 2221(d) shall

be identified specifically as such and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. A motion for leave to renew under C.P.L.R. § 2221 shall be identified specifically as such and 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 that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion.

In the instant matter, plaintiff properly separated and argued the motion to reargue and the motion to renew.

A motion seeking leave to reargue is addressed to the court's sound discretion and can be granted only if it is shown that the court overlooked or misapprehended the facts or the law or was otherwise mistaken in its earlier decision; the motion does not allow reargument of issues previously decided or consideration of arguments different from those originally entertained. *See*, Rule 2221 of the C.P.L.R. and William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 588 N.Y.S.2d 8, (1st Dept. 1992), leave to appeal dismissed in part and denied in part, 80 N.Y.2d 1005, 592 N.Y.S.2d 665, 607 N.E.2d 812, reargument denied, 81 N.Y.2d 782, 594 N.Y.S.2d 714, 610 N.E.2d 387.

A motion for leave to amend a pleading is committed to the sound discretion of the trial court (see Edenwald Contr. Co., Inc. v. City of New York, 60 N.Y.2d 957, 471 N.Y.S.2d 55, 459 N.E.2d 164). Generally, leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted (see CPLR 3025[b]; Inwood Tower, Inc. v. Fireman's Fund Ins. Co., 290 A.D.2d 252, 252-253, 735 N.Y.S.2d 762). However, “ ‘[w]here there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay’ ” (Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 24, 756 N.Y.S.2d 26, quoting Jablonski v. County of Erie, 286 A.D.2d 927, 928, 730 N.Y.S.2d 626).

Plaintiff argues that this Court misapprehended the facts since the introduction paragraph of this Court's decision lists the underlying motion as one to amend the complaint and add a new cause of action. A review of the motion reveals that it was addressed as a motion to amend the complaint and not add a new cause of action.

A motion to renew should be based on newly discovered facts, but it is within the court's discretion to grant renewal even upon facts that were known to the movant at the time the original


motion was made. Tishman c. Const. Corp of New York v. City of New York, 280 A.D.2d 374 (1st Dept. 2001); Lupoli v. Venus Labs., 264 A.D.2d 820, 695 N.Y.S.2d 598. Plaintiff has now provided this Court with a copy of the ambulance call record which indicates where plaintiff was picked up from. As such there is no prejudice to the defendant as there was an ambulance call record in existence generated as the result of the ambulance that was in front of the accident location. Plaintiff also submits a Record Search which indicates that the Chase Manhattan Bank, N.A. is the owner of the record for the premises located at 725/729 East 233rd Street, which is N/ East 233rd Street 180.65' East of White Plains Road. As indicated above the motion to amend the pleadings should be freely granted. In the interest of justice and so as not to defeat substantive fairness, this Court grants the plaintiff's motion to renew based upon the submitted documents. Plaintiff has provided new facts and shown justification for the failure to present the same on the prior motion.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., *supra*, citing Kliebert v. McKoan, 228 A.D.2d 232, *lv denied*, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

In light of this Court's decision to grant the plaintiff's application to renew the motion to amend the pleadings to correct the location of the alleged accident, the defendants motion to dismiss

must be denied. A liberal reading of the complaint, inclusive of the corrected address states a cause of action for negligence against the defendant.

Accordingly, it is

 ORDERED that plaintiff's motion to renew this Court's decision dated May 11, 2009 is hereby granted and the Court's decision is vacated. It is further

ORDERED that plaintiff's motion to amend the pleadings to include the correct location of the accident is hereby granted.

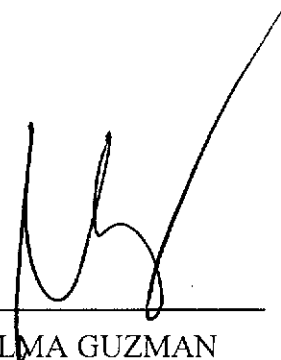
ORDERED that defendants motion to dismiss is hereby denied. It is further

ORDERED that Plaintiff ^{is} ~~are~~ directed to serve a copy of this Order along with the amended pleadings, with Notice of Entry upon defendants within thirty (30) days of entry of this Order.

This constitutes the Decision and Order of the Court.

NOV 6 2009

DATE



HON. WILMA GUZMAN
Justice Supreme Court