

**Matter of Ponce-Francisco v Plainview Old Bethpage  
Cent. School Dist.**

2008 NY Slip Op 31487(U)

May 15, 2008

Supreme Court, Nassau County

Docket Number: 8196-08/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**PRESENT: HON. WILLIAM R. LaMARCA  
Justice.**

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**In the matter of the Application of  
ESTEBAN PONCE-FRANCISCO,**

**Motion Sequence #1  
Submitted May 9, 2008**

**Petitioner,**

**-against-**

**INDEX NO: 8196/08**

**PLAINVIEW OLD BETHPAGE CENTRAL  
SCHOOL DISTRICT,**

**Respondent.**

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**The following papers were read on this petition:**

<b>Notice of Motion/Order to Show Cause.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Supplemental and Reply Affirmation.....</b>	<b>3</b>

Counsel for petitioner, ESTABAN PONCE-FRANCISCO, moves for an order permitting pre-action discovery to conduct the non-party deposition of Jesus Ponce a/k/a Jesus Francisco-Ponce, who is currently incarcerated in a Pennsylvania prison, and compelling respondent, PLAINVIEW OLD BETHPAGE CENTRAL SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"), to appear at said non-party deposition. The DISTRICT opposes the motion, which is determined as follows:

Counsel for petitioner moves the Court by order to show cause, on an emergency basis, and states that an action for personal injuries sustained by petitioner in a fall from the roof at the Parkway Elementary School in the DISTRICT is about to be commenced and that he has learned that, Jesus Ponce, the petitioner's brother who witnessed the accident, is about to be released from prison and will, due to his illegal immigration status, be picked up by the U.S. Citizen and Immigration Services ("USCIS") and held until he is deported. Counsel for petitioner asserts that if his office is unable to conduct the non-party deposition of Jesus Ponce prior to the commencement of the action, his whereabouts will become unknown and, in all likelihood, he will be deported before his testimony is preserved.

Counsel for petitioner relates that, on July 27, 2007, petitioner was employed by Hygrade Insulators, Inc., which, upon information and belief, was awarded a contract by the DISTRICT to remove and replace the existing roof at the Parkway Elementary School with a new roof. Counsel for petitioner states that, while working on the roof, petitioner was caused to trip and fall approximately twenty (20) feet, through a skylight situated on the roof, to the concrete floor below. Counsel for petitioner states that petitioner sustained severe and serious injuries which have resulted in a total paralysis to his lower torso and extremities. It is alleged that the accident was the result of the defective and dangerous condition of the roof and skylight at the subject location and, on October 24, 2007, a Notice of Claim was served on the DISTRICT, claiming, *inter alia*, that it failed to warn workers of the dangerous condition on the roof and failed to place protective barriers around the skylight to protect workers performing work in the area.

Counsel for petitioner states that at the 50-h municipal hearing, petitioner testified that he had no recollection of the events surrounding the incident, that he did not recall the reason he was working at the Parkway Elementary School, that he did not recall there being a skylight on the roof of the school or his being on the roof at any time before the accident. In essence he had no recollection of how the accident happened. However, he stated that he learned about the accident from his brother, Jesus Ponce, who was doing the same work as the petitioner at the time of the accident. Petitioner stated that his brother told him he saw him fall through the roof and that he knew how the accident occurred.

In support of the motion, counsel for petitioners contends that there is a meritorious cause of action against the DISTRICT for their carelessness and negligence in creating the dangerous and defective condition on the roof which resulted in the accident, as well as a further cause of action for violation of the Labor Law §240(1) as the DISTRICT failed to furnish or erect safety devices around the skylight to protect the petitioner from an accidental fall, citing *Petterson v Museum Towner Corp.*, 151 AD2d 403, 543 NYS2d 435 (2<sup>nd</sup> Dept. 1989) and *Linney v Consistory of Bellrose Reformed Church*, 115 AD2d 2009, 495 NYS2d 293 (3<sup>rd</sup> Dept. 1985). Counsel for petitioner urges that the motion be granted while he knows of Jesus Ponce's location, which may quickly change in the coming days. He states that counsel for respondent initially agreed to attend the deposition that he had arranged for May 5, 2008 at the Northhampton County Jail located in Easton, Pennsylvania, but later advised that respondent would not consent to attend the non-party deposition. Counsel for petitioner states that, although petitioner testified to the names of other persons working at the school on the day of the accident, he does not presently

posses information relating to their present whereabouts and is unaware as to whether they witnessed the accident. Counsel for petitioner argues that the non-party deposition of Jesus Ponce a/k/a Jesus Francisco-Ponce will help determine the conditions at the Parkway Elementary School on the date of the accident and aid in establishing a *prima facie* case.

In opposition to the motion, counsel for the DISTRICT points to the petitioner's testimony at the 50-h hearing where he stated that there were four (4) other workers on the roof when the accident occurred. He claims that no adequate showing has been made that only the testimony of petitioner's brother can enable him to establish a *prima facie* case. Moreover, he states that it is questionable that the location of Jesus Ponce will become unknown after his release from jail and, as brothers, it is likely that Jesus Ponce's deposition can be conducted during normal discovery. Counsel for the DISTRICT states that the Immigration and Naturalization Service of the Federal Government is not bound to observe an order issued by any Court other than a Federal Court and that the motion should be denied.

CPLR §3102 (c) provides that "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order". Pre-action disclosure is available when the party seeking disclosure has demonstrated both a meritorious cause of action and the materiality and necessity of the information sought. *Liberty Imports Inc. v Bourguet*, 146 AD2d 535, 536 NYS2d 784 (1<sup>st</sup> Dept. 1989); *Wein & Malkin, LLP. v Wichman*, 255 AD2d 244, 680 NYS2d 250 (1<sup>st</sup> Dept. 1998).

After a careful reading of the submissions herein, it is the judgment of the Court that the requested deposition of non-party Jesus Ponce a/k/a Jesus Francisco-Ponce is warranted. The Court finds that petitioner has demonstrated that he can establish a meritorious cause of action and that the information sought from the non-party witness is material and necessary to the framing of the complaint. . Given the tenuous circumstances of the non-party witness, and his imminent deportation, it is hereby

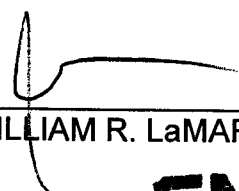
**ORDERED**, that, for as long as Jesus Ponce, a/k/a Jesus Francisco Ponce, remains in custody in the United States, counsel for petitioner shall arrange with the prison officials for his non-party deposition concerning this matter. The Court directs the warden of the prison where Jesus Ponce ak/a Jesus Francisco-Ponce is located to make their inmate available for the non-party deposition, to be held within ten (10) days from the date of this order, or as is convenient to the facility; and it is further

**ORDERED**, that counsel for the DISTRICT shall appear at said non-party deposition. Counsel for petitioner shall notify counsel for the DISTRICT of the time and place of the deposition and counsel for the DISTRICT shall make arrangements to appear.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 15, 2008

  
WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

MAY 19 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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