

Matter of Crowley v City of New York

2008 NY Slip Op 33429(U)

December 17, 2008

Supreme Court, New York County

Docket Number: 1011377/07

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 113725/2006
SANTANGELO, RICHARD
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. _____

MOTION DATE 10/28/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion for renewal.

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-B _____	<u>1-3</u>
Answering Affidavits — Exhibits A-J _____	<u>4</u>
Replying Affirmation _____	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

DEC 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/17/08
New York, New York

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MICHAEL D. STALLMAN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
In the Matter of the Application of
WILLIAM CROWLEY,

Petitioner,
- against -

Index No. 101377/07

THE CITY OF NEW YORK,

Respondent.

-----X
In the Matter of the Application of
JEFFREY HAYDUK,

Petitioner,
- against -

Index No. 116223/06

THE CITY OF NEW YORK,

Respondent.

-----X
In the Matter of the Application of
PEDRO LOPEZ,

Petitioner,
- against -

Index No. 116231/06

THE CITY OF NEW YORK,

Respondent.

-----X
In the Matter of the Application of
RICARDO LOPEZ and YVETTE PAGAN,

Petitioners,
- against -

Index No. 114028/06

THE CITY OF NEW YORK,

Respondent.

-----X

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DEC 23 2008
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-----X

In the Matter of the Application of
MARCO OCASIO,

Petitioner,

- against -

Index No. 103384/07

THE CITY OF NEW YORK,

Respondent.

-----X

In the Matter of the Application of
FRANK PIZZUTO and TARA-ANN PIZZUTO,

Petitioners,

- against -

Index No. 102854/07

THE CITY OF NEW YORK,

Respondent.

-----X

In the Matter of the Application of
EDWIN QUINN and LINDA QUINN,

Petitioners,

- against -

Index No. 116746/06

THE CITY OF NEW YORK,

Respondent.

-----X

In the Matter of the Application of
RICHARD SANTANGELO and CAROL SANTANGELO,

Petitioners,

- against -

Index No. 113725/06

THE CITY OF NEW YORK,

Respondent.

-----X

-----X

In the Matter of the Application of
ALAN SCHWARTZ,

Petitioner,

- against -

Index No. 100035/07

THE CITY OF NEW YORK,

Respondent.

-----X

In the Matter of the Application of
GERALD SMYTH,

Petitioner,

- against -

Index No. 116236/06

THE CITY OF NEW YORK,

Respondent.

Decision and Order

-----X

HON. MICHAEL D. STALLMAN, J.:

This Court previously granted these ten petitions to serve late notices of claim upon the City of New York, alleging personal injuries from exposure to toxic substances during rescue/recovery operations, demolition or construction of Ground Zero, or its environs. Although the City of New York opposed each petition because it was not supported by an affidavit from the petitioner, an affidavit from a doctor, or by medical records, this Court did not accept the City's argument. This Court granted many similar petitions for leave to serve such late notices of claim.

On appeal of one those judgments granting leave, the Appellate Division, First Department reversed this Court's decision. Matter of Felder v City of New York, 53 AD3d 401 (1st 2008), lv denied 11 NY3d 707 (2008) (table). In Felder, the Appellate Division reasoned that

“the petitioners’ attorney’s factually unsupported, conclusory assertion that the injured petitioner’s respiratory illness ‘did not become apparent to him or his physicians’ until he was diagnosed with such illness lacks probative value as to when such illness should have been discovered (CPLR 214-c[3]), i.e., when petitioner first became aware of the ‘manifestations or symptoms of the latent disease’ as opposed to its ‘nonorganic etiology.’”

Matter of Felder, 53 AD3d at 402-403. Prior to the appellate argument in Felder, counsel for Felder agreed with the City’s Corporation Counsel that the Appellate Division’s ruling in Felder would apply to other similar petitions that counsel brought, as listed in exhibits to the stipulation. Five of the petitions here are listed in those exhibits.

Nevertheless, petitioners move for renewal of this Court’s prior decisions granting the petitions; to permit petitioners to supplement the original petition with the affidavit of petitioner, in light of Felder; and to grant the petitions once again. This decision collectively addresses the ten motions for renewal, which are consolidated for purposes of disposition.

DISCUSSION

As a threshold matter, the motions to renew are timely. “[A] motion for leave to renew pursuant to CPLR 2221(e)(2) based upon ‘a change in the law that would change the prior determination’ must be made, absent circumstances set forth in CPLR 5015, before the time to appeal the final judgment has expired.” Matter of Eagle Ins. Co. v Persaud, 1 AD3d 356, 357 (2d Dept 2003); Glicksman v Board of Educ./Central Sch. Bd. of Comsewogue Union Free School Dist., 278 AD2d 364, 366 (2d Dept 2000). Here, the parties do not dispute that the judgments granting the petitions have not been entered, and thus the time to appeal has not yet run.¹

¹ Consistent with the practice of the New York County Clerk with respect to decisions on petitions in special proceedings, the decisions granting the petitions were entered as unfiled judgments.

This Court is constrained to follow the Appellate Division's decision in Matter of Felder. The City opposed each petition on the ground that petitioner had submitted neither an affidavit nor medical records, an argument which another court accepted. Matter of Augustine v City New York, Sup Ct, NY County, Aug 5, 2006, DeGrasse, J., Index no. 109144/2005. Matter of Augustine relied Matter of Bailey v City of New York, 159 AD2d 280 (1st Dept 1990). Given the existence of decisional law that supported the City's argument, the same argument that the Appellate Division also accepted, petitioners cannot show that there was a change in the decisional law.

Even assuming that Felder were to constitute a change in the law, petitioners are not seeking to change the Court's prior determinations. CPLR 2221 (e) (2) states that "[a] motion for leave to renew . . . shall demonstrate that there has been a change in the law that would change the prior determination" (emphasis added). The motions are asking for the same relief that the Court previously granted. See 515 Ave. I Corp. v 515 Ave. I Tenants Corp., 44 AD3d 707, 708 (2d Dept 2007) ("Although the Court of Appeals' reversal of the Appellate Division, First Judicial Department's decision in Kralik v. 239 E. 79th St. Owners Corp., 5 N.Y.3d 54, 59, 799 N.Y.S.2d 433, 832 N.E.2d 707, changed the general law relevant to the plaintiff's motion for a preliminary injunction, it would not change the original determination of that motion in this action."). Petitioners are seeking to supplement the record with affidavits and medical records that the City argued was lacking in its opposition papers to the original petitions. Counsel for each petitioner apparently exercised judgment to rest the merits of the petition on the papers already submitted. Renewal is not intended to afford a proverbial "second bite at the apple." See Rubinstein v Goldman, 225 AD2d 328, 329 (1st Dept 1996). Therefore, the grounds for a motion for renewal do not lie.

Finally, five of the petitions fall within the Agreement and Stipulation dated January 9, 2007 between petitioners' counsel and the City's Corporation Counsel (Wies Opp. Affirm., Ex B), which was incorporated into a consent order. The Consent Order states, in relevant part:

"The determination of the issues by this Court on the instant appeal [Matter of Felder] . . . shall be binding upon the parties in the instant case, the parties in the cases listed on Exhibit 'A' and the parties in the additional cases, as said parties are defined in said Agreement and Stipulation, subject to all rights that may be available to such parties to appeal or otherwise seek reargument or reconsideration of the determination from the Appellate Division."

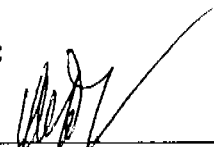
Wies Opp. Affirm., Ex C. Five petitions, Matter of Hayduk, Matter of Quinn, Matter of Swchartz, Matter of Santangelo, Matter of Smyth, are listed among the matters in Exhibit C (the "additional cases" as defined by the stipulation) to the Agreement and Stipulation. Ibid. Accordingly, Felder is binding upon these petitions, whether or not the petitioners have entered the judgments of this Court. The terms of the Agreement and Stipulation itself do not limit its scope only to those petitions where judgments have been entered. It would be inconsistent for the parties to have listed a petition on Exhibit A to the Agreement and Stipulation (or on Exhibit C as an additional matter), but not to have intended the Agreement and Stipulation to apply that petition. Moreover, petitioners' contention that this Court's underlying judgments were not entered by the Clerk lacks merit.

CONCLUSION

Accordingly, it is here **ORDERED** that petitioners' motions for leave to renew are denied.

Dated: December 23, 2008
New York, New York

FILED
DEC 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER: 

J.S.C.

MICHAEL D. STALLMAN
J.S.C.