

**Quizhpe v Luvin Constr. Corp.**

2009 NY Slip Op 31251(U)

May 22, 2009

Supreme Court, Nassau County

Docket Number: 21761/06

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 6  
NASSAU COUNTY**

\_\_\_\_\_  
**SEGUNDO QUIZHPE,**

**Plaintiff,**

**-against-**

**MOTION SEQ. NO.: 006  
MOTION DATE: 3/12/09**

**LUVIN CONSTRUCTION CORP, BIAGIO  
VIGLIOTTI and JOSE I SANCHEZ,**

**INDEX NO.:21761/06**

**Defendants.**

\_\_\_\_\_  
**The following papers having been read on the motion (numbered 1-2):**

**Notice of Motion.....1  
Affirmation in Opposition.....2**

*Relief Requested:*

The plaintiff moves for an order granting the following relief: [1] for an order pursuant to CPLR §2221 vacating the decision of this Court dated December 12, 2008; [2] and for an order pursuant to CPLR §2221[d] granting leave to reargue this Court's December 12, 2008 decision and upon such reargument denying the defendant's motion for summary judgment and granting the plaintiff's motion for summary judgment; [3] and for an order pursuant to CPLR §2221[e], granting renewal of Plaintiff's application for an order denying the defendant's motion for summary judgment and granting plaintiff's motion for summary judgment. (Sequence #006).

*Factual and Procedural Background:*

The underlying action was commenced by the plaintiff as a result of injuries he sustained in a one vehicle accident which occurred at 7:30 a.m. on July 21, 2006, while he was a passenger in a 1998 Nissan minivan operated by defendant Jose I. Sanchez and owned by co-defendant Luvín Construction Corp. (*see* Affirmation in Support of

Plaintiff's Motion to Reargue at Exhs. B, E).

*Deposition Testimony of Plaintiff Segundo Quizhpe:*

The plaintiff states that on the day of his accident he was employed for FML Contracting Inc. in the capacity of a mason/bricklayer and was traveling in the minivan to a particular work site accompanied exclusively by other co-employees, including Jose I. Sanchez, the driver of the minivan (*see* Plaintiff's Verified Bill of Particulars annexed at Exh. B; *see also* Plaintiff's Deposition Testimony at Exh B at pp. 6,7,11,12,14 ). He testified that as the van was moving on the parkway, it "began to shake" and thereafter "overturned about three times" causing him to sustain injury to his right shoulder and neck (*see* Plaintiff's Deposition Testimony at Exh. B at pp. 16,19,22,23,43). The plaintiff stated that as a result of the accident he filed a claim for workers' compensation and as of the date of his deposition was receiving benefits in the amount of \$400 per week (*id.* at pp. 24,37).

*Deposition Testimony of Defendant Jose I. Sanchez:*

Defendant Jose I. Sanchez testified that on the day of the accident he was employed by FML Contracting Inc. and was directed by the company to utilize the minivan to pick up the other employees for transportation to the construction site (*see* Deposition Testimony of defendant Jose I. Sanchez at Exh. B. pp. 7,9). He states that as he was on the entrance ramp to the Northern State Parkway, the minivan "started moving from side to side" and the steering wheel became unresponsive causing him lose control of the vehicle (*id.* at pp.18,20). The defendant further testified that as a result of his inability to steer the vehicle, it rolled over at least two times and ultimately landed in a position with the tires facing skyward (*id.* at pp.19,20). Mr. Sanchez stated that during the two weeks prior to the subject accident he noticed that the minivan "would start going from side to side whenever I would drive around 65 miles per hour" and that he informed a manager of the problem (*id.* at p.13).

Relief Previously Requested

The plaintiff, Segundo Quizhpe, thereafter moved pursuant to CPLR §3212 for an order granting summary judgment as to the issue of liability and dismissing all affirmative defenses in the defendants' Answer. Defendants Luvin Construction Corp. and Jose I. Sanchez moved pursuant to CPLR §3212 seeking an order granting summary judgment dismissing the plaintiff's complaint (*see* Affirmation in Support of Plaintiff's Motion to Reargue at Exhs. B, E).

By Order of this Court dated December 12, 2008, this Court denied the plaintiff's motion for an order seeking summary judgment as to the issue of liability and having searched the record granted the motion interposed by Luvin Construction Corp. and Jose I. Sanchez and dismissed the plaintiff's complaint. In so determining, the Court found that the plaintiff's injuries were sustained in the course of his employment with FML Contracting Inc., which previously had conducted its business under the name Luvin Construction Corp., and that pursuant to the Workers' Compensation Law he was precluded from filing suit against either Luvin Construction Corp. or his co-employee, Jose I. Sanchez (*id.* at Exh. A).

Plaintiff's Application

The plaintiff now moves for leave to renew and reargue this Court's prior determination. In support of the within application counsel for the plaintiff initially and correctly contends that in its prior decision, this Court improperly referred to plaintiff's employer as FML Construction, rather than its rightful designation of FML Contracting Inc.. This misstatement, however, does not change the outcome of the prior decision.

Counsel further argues that the record does not demonstrate that the operator of the minivan, Jose I. Sanchez, was a co-employee of the plaintiff. (*id.* at ¶20). Finally, counsel argues that Luvin Construction Corp. remains an active business

entity and that the record herein is devoid of any evidence which would establish either that Luvin Construction Corp. is presently “doing business as FML”, or that any relationship exists between these two companies (*id.* at ¶¶19,43,45; *see also* Affirmation in Reply at ¶¶5,8).

It is well settled that “[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision.” (*Viola v City of New York*, 13 AD3d 439 [2d Dept 2004]; *Carrillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; *McNeil v Dixon*, 9 AD3d 481 [2d Dept 2004]). A motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (*McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]; *Woody’s Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]).

Alternatively, a motion for leave to renew “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” (CPLR §2221[e][2]). The purpose of a motion to renew is “to draw the court’s attention to new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court’s attention (*Gomez, v Needham Capital Group, Inc.*, 7 AD3d 568 [2d Dept 2004] quoting *Natale v Samel & Assocs.*, 264 AD2d 384 [2d Dept 1999]). An application for renewal may also be based upon law which was not previously considered by the court (*Caryl S v Child & Adolescent Treatment Services, Inc.*, 238 AD2d 953 [4<sup>th</sup> Dept 1997]).

Decision:

As noted above, and with respect to the initial argument posited by counsel for the plaintiff, this Court's reference to plaintiff's employer as FML Construction as opposed to its correct designation as FML Contracting Inc., does not alter this Court's prior determination. Additionally, contrary to counsel's contention, the record clearly demonstrates that defendant Jose I. Sanchez was a co-employee of the plaintiff. In his examination before trial, the plaintiff stated that on the date of the accident he was employed by FML Contracting Inc. and that the driver of the minivan in which he was riding was operated by Jose Sanchez (*see* Plaintiff's Verified Bill of Particulars; *see also* Deposition of Segundo Quizhpe at pp. 6,11). The plaintiff further testify that everyone in the van were his coworkers (*see* Deposition of Segundo Quizhpe at p.14). Moreover, Jose I. Sanchez testified that at the time of the subject accident he was employed by FML Contracting Inc. and was operating the subject minivan at the direction of the company (*see* Deposition of Jose I. Sanchez at pp.7,9).

Further, the record herein contains ample evidence which demonstrates that plaintiff's employer, FML Contracting Inc., previously conducted its business under Luvin Construction Corp. In the instant matter, the plaintiff stated that at the time of the accident he was working for FML Contracting Inc. but that prior thereto the company was known as Luvin Construction Corp. and for which he had worked since 1998 doing construction work (*see* Plaintiff's Verified Bill of Particulars at Exh. B; *see also* Plaintiff Deposition Testimony at p.7,8). Defendant Jose I. Sanchez, stated that at the time of the accident he was employed by FML Contracting Inc. but that said company was previously known as Luvin Construction Corp. (*see* Deposition of Jose I. Sanchez at p. 7).

Finally, the record contains the sworn deposition testimony of Carlos Marques, who worked for FML Contracting Inc. for six and one half years in the capacity of project superintendent (*see* Deposition of Carlos Marques at p. 6). As to

his employment, Mr. Marques stated that he “started with Luvin and then we switched to FML” (*id.* at p.10). He further testified to the following: the boss of defendant Luvin Construction Corp. was Mr. Benny Vigliotti and the boss of FML Contracting Inc. is similarly Mr. Benny Vigliotti; the business address of Luvin Construction Corp. was 315 Westbury Avenue, Carle Place, New York and the business address of FML Contracting Inc. is also 315 Westbury Avenue, Carle Place, New York. (*id.* at pp. 6,8,11). Moreover, the record demonstrates that the vehicle owned by Luvin Construction Corp. was admittedly being used in the furtherance of work undertaken by FML Contracting Inc. and that both companies were involved in the same type of business, to wit: construction (*see* Affirmation in Support of Plaintiff’s Motion to Reargue at Exh. B)

Thus, in the instant matter the evidence submitted demonstrates that as between Luvin Construction Corp. and FML Contracting Inc. these companies shared the identical boss, the same business address, some of the same employees, the usage of the very vehicle in which the plaintiff was injured and were both engaged in the same type of business. Additionally, at the time of the subject accident the plaintiff was admittedly employed by FML Contracting Inc. and is receiving workers’ compensations benefits as a result of said accident (*see* Plaintiff’s Verified Bill of Particulars at Exh. B; *see also* Plaintiff’s Deposition testimony at pp 24,37). However, in the Verified Bill of Particulars, counsel for the plaintiff states that the workers’ compensation carrier is “Greenwich Insurance Co” and that the insured thereunder is “Luvin Construction Corp.” (*see* Plaintiff’s Verified Bill of Particulars at Exh. B). Thus, it appears from the Plaintiff’s own submissions that he is receiving workers’ compensation benefits under a policy issued to Luvin Construction Corp.

In conclusion, the Court finds that on the evidence contained in the record, it was well within it's discretion to search same and determine that Luvin Construction Corp. is presently doing business as FML Contracting Inc. and that these two corporate entities were sufficiently related for purposes of the exclusivity provision of the workers' compensation statute, the function of which precluded the plaintiff from filing suit against either Luvin Construction Corp. or his co-employee, Jose I. Sanchez (see *Crespo v Pucciarelli*, 21 AD3d 1048 [2d Dept 2005]; *Thompson v Bernard G. Janowitz Construction Corp.*, 301 AD2d 588 [2d Dept 2003]; *Rodriguez v Lodato Rental*, 267 AD2d 293 [2d Dept 1999]).

Based upon the foregoing, the plaintiff's instant application which seeks leave to renew and reargue the decision of this Court dated December 12, 2008 is hereby **DENIED.**

This Constitutes the Order of the Court.

Dated:

5/22/09

ENTER:

*[Handwritten Signature]*  
 J.S.C.

**ENTERED**

JUN n 4 2009

NASSAU COUNTY  
 COUNTY CLERK'S OFFICE