

**Atiencia v MBBCO II, LLC**

2009 NY Slip Op 33250(U)

October 23, 2009

Supreme Court, New York County

Docket Number: 110993/06

Judge: Carol R. Edmead

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.

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 110993/2006  
**ATIENCIA, FLAVIO**  
vs.  
**MBBCO II. LLC.**  
SEQUENCE NUMBER : 010  
VACATE STAY/ORDER/JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 008 and 010 are decided in accordance with the annexed Memorandum Decision. It is hereby

**ORDERED** that plaintiffs Flavio Atiencia and Maria Atiencia's motion (motion sequence number 008), pursuant to CPLR 2221 (e) and CPLR 2221 (d), for an order granting them leave to renew, or, in the alternative, leave to reargue their motion for partial summary judgment on the issue of defendant and third-party plaintiff Farrell Building Company, Inc.'s (Farrell) liability under Labor Law § 240 (1), is denied; and it is further

**ORDERED** that defendant MBBCO II, LLC's (MBBCO) motion (motion sequence number 010), (1) pursuant to CPLR 5015 (a), to vacate the Decision and Order of this court, dated June 18, 2009 (the decision and order), to the extent that it granted summary judgment in favor of Farrell with respect to plaintiff's Labor Law § 240 (1) claim as against it, (2) to grant partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim as against Farrell and (3) to reinstate Farrell's third-party claims against third-party defendant Bayview Building & Framing, Corp. (Bayview), is denied; and it is further

Dated: \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**ORDERED** that defendant MBBCO's cross motion, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or, in the alternative, leave to reargue that part of the decision and order which granted summary judgment in defendant and third-party plaintiff Farrell's favor with respect to plaintiff's Labor Law § 240 (1) claim as against it, and upon reargument, vacating said decision and order and granting plaintiff partial summary judgment, pursuant to CPLR 3212, in his favor on his Labor Law § 240 (1) claim as against Farrell, is denied; and it is further

**ORDERED** that defendant and third-party plaintiff Farrell's cross motion, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or in the alternative, leave to reargue its motion for summary judgment as against third-party defendant Bayview, and upon reargument, vacating said decision and order and granting Farrell summary judgment, pursuant to CPLR 3212, as against third-party defendant Bayview, is denied as moot; and it is further

**ORDERED** that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated 10/23/09

ENTER:  J.S.C.

Check one:  FINAL DISPOSITION  **HON. CAROL EDMEAD** NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35**

-----X  
FLAVIO ATIENCIA and MARIA ATIENCIA,

Index No.: 110993/06

Plaintiffs,

-against-

MBBCO II, LLC and FARRELL BUILDING  
COMPANY, INC.,

Defendants.

-----X  
FARRELL BUILDING COMPANY, INC.,

Third-Party Index No.:  
590984/06

Third-Party Plaintiff,

-against-

BAYVIEW BUILDING & FRAMING, CORP.,

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Third-Party Defendant.

-----X  
**Edmead, J.:**

Motion sequence numbers 008 and 010 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a framer when he fell from a scaffold during the construction of a single-family dwelling located at 431 Captains Neck Lane, Southampton, New York on June 6, 2006.

In motion sequence number 008, plaintiffs Flavio Atiencia (plaintiff) and Maria Atiencia move, pursuant to CPLR 2221 (e) and CPLR 2221 (d), for an order granting them leave to renew, or, in the alternative, leave to reargue their motion for partial summary judgment on the issue of defendant and third-party plaintiff Farrell Building Company, Inc.'s (Farrell) liability under Labor Law § 240 (1).

In motion sequence number 010, defendant MBBCO II, LLC (MBBCO) moves, (1)

\* 4]  
pursuant to CPLR 5015 (a), to vacate the Decision and Order of this court, dated June 18, 2009 (the decision and order), to the extent that it granted summary judgment in favor of Farrell with respect to plaintiff's Labor Law § 240 (1) claim as against it; (2) to grant partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim as against Farrell; and (3) to reinstate Farrell's third-party claims against third-party defendant Bayview Building & Framing, Corp. (Bayview).

Defendant MBBCO cross-moves, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or, in the alternative, leave to reargue that part of the decision and order which granted summary judgment in favor of Farrell with respect to plaintiff's Labor Law § 240 (1) claim as against it, and upon reargument, vacating said decision and order and granting plaintiff partial summary judgment in his favor on his Labor Law § 240 (1) claim as against Farrell.

Defendant and third-party plaintiff Farrell cross-moves, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or in the alternative, leave to reargue its cross motion for summary judgment as against third-party defendant Bayview, and upon reargument, vacating said decision and order and granting Farrell summary judgment in its favor as against third-party defendant Bayview.

### **BACKGROUND**

By motion dated October 2, 2008, plaintiff moved for partial summary judgment in his favor as against both defendants with respect to his Labor Law § 240 (1) claim. Defendant Farrell cross-moved for indemnification relief as against third-party defendant Bayview. Neither defendant MBBCO nor Farrell opposed plaintiff's motion. In the decision and order, this court

granted plaintiff's motion as against MBBCO. As to Farrell, this court denied plaintiff's motion, and, sua sponte, granted summary judgment in Farrell's favor, dismissing plaintiff's entire complaint as against it. Accordingly, the court also, sua sponte, dismissed Farrell's third-party claims, with the exception of Farrell's claim for costs and attorney's fees, as against third-party defendant Bayview.

### DISCUSSION

PLAINTIFF'S MOTION AND MBBCO'S CROSS MOTION TO RENEW, OR, IN THE ALTERNATIVE, TO REARGUE PLAINTIFF'S PRIOR MOTION FOR PARTIAL SUMMARY JUDGMENT IN HIS FAVOR ON HIS LABOR LAW § 240 (1) CLAIM AS AGAINST DEFENDANT AND THIRD-PARTY PLAINTIFF FARRELL (motion sequence number 008)

CPLR 2221 (e) states, in pertinent part:

“(e) A motion for leave to renew:

\* \* \*

2. 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
3. shall contain reasonable justification for the failure to present such facts on the prior motion.”

“A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence in the original motion” (*Leonard Fuchs, Inc. v Laser Processing Corporation*, 222 AD2d 280, 280 [1<sup>st</sup> Dept 1995]). “[R]enewal ‘is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation’” (*Rubenstein v Goldman*, 225 AD2d 328, 328-329 [1<sup>st</sup> Dept 1996], quoting *Matter of Bieny*, 132

\* 6]  
AD2d 190, 210 [1<sup>st</sup> Dept 1987]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1<sup>st</sup> Dept 2001]).

In the decision and order, the court denied plaintiff's motion for partial summary judgment in his favor on his Labor Law § 240 (1) claim as against Farrell on the ground that "[p]laintiff has not submitted evidence that Farrell was the general contractor, rather than the construction manager, for the project" (Plaintiff's Notice of Motion, Exhibit B, June 18, 2009 Decision and Order, at 9). In addition, the court noted that plaintiff also failed to submit any evidence to the effect that Farrell had the ability to control the activity which brought about plaintiff's injury, so as to be considered an agent of owner MBBCO for the purposes of the statute.

Plaintiff and MBBCO now seek to renew plaintiff's original motion based on evidence not offered on the prior application that would change the determination made by this court. To this effect, plaintiff requests that the court consider the written contract between MBBCO and Farrell, which he asserts outlines the scope of Farrell's duties on the project and establishes that Farrell was, in fact, the general contractor on the project.

In justifying his failure to include the written contract with the prior motion's exhibits, plaintiff submits that he did not believe its inclusion was necessary in light of the uncontroverted, sworn testimony of the parties, which described Farrell's various duties at the construction site and its role as either the construction manager or general contractor, or in light of Farrell's lack of opposition to plaintiff's motion.

However, as plaintiff admits, the subject written contract was duly exchanged with all parties during discovery. That plaintiff did not believe that the contract was necessary to his case

in light of the testimony presented, or that Farrell's legal strategy did not include opposing the motion, does not constitute a reasonable justification for his failure to include it as support for his prior motion. Moreover, the contract, which does not specifically refer to Farrell as a general contractor, simply reiterates Farrell's general supervisory control over the workplace. In addition, plaintiff has not set forth any justification for a finding of law office failure in this case (*compare Nwauwa v Mamos*, 53 AD3d 646 [2d Dept 2008]).

In support of its cross motion to renew, MBBCO now puts forth, as newly discovered evidence, the affidavit of Michael Miller, the managing member of MBBCO (the Miller affidavit), which allegedly demonstrates that Farrell was, in fact, hired to serve as the general contractor for the project. MBBCO also puts forth as new facts various invoices provided to the court through the Miller affidavit, which allegedly reveal that Farrell had the power to hire and control the subcontractors at the project, without any involvement by MBBCO.

However, MBBCO has failed to offer a reasonable justification for not putting forth the affidavit and invoices in opposition to plaintiff's original motion, nor has it succeeded in demonstrating how Miller's recitation of previously considered facts or how the submitted invoices raise a question of fact as to whether Farrell supervised and controlled the activity which brought about the injury in this case, so as to change the court's determination that Farrell was not an agent of owner MBBCO, and therefore, not subject to absolute liability under Labor Law § 240 (1).

Thus, that part of plaintiff's motion and MBBCO's cross motion for leave to renew based upon new facts not offered on the prior motion that would change the prior determination is denied.

CPLR 2221 (d) states, in pertinent part:

“(d) A motion for leave to reargue:

\* \* \*

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision (*Marini v Lombardo*, 17 AD3d 545, 546 [2d Dept 2005]; *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Pryor v Commonwealth Land Title Insurance Company*, 17 AD3d 434, 436 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]). New questions which were not previously advanced may not be raised on a motion to reargue (*Levi v Utica First Insurance Company*, 12 AD3d 256, 258 [1<sup>st</sup> Dept 2004]).

Plaintiff and MBBCO maintain that the court misapprehended the law or the facts in its finding that Farrell was not an agent of the owner, so as to be held absolutely liable pursuant to Labor Law § 240 (1). In fact, MBBCO asserts that it did not believe it necessary to oppose the issue in light of the strong testimonial evidence put forth by plaintiff as to Farrell’s pervasive responsibilities on the project, and the fact that Farrell did not even oppose the issue.

However, although it is true that ample testimony regarding Farrell’s multiple responsibilities and duties at the job site was submitted on the prior motion, indicating that

Farrell had general supervisory oversight of the project, testimony was also submitted which clearly demonstrates that Farrell did not have the ability to control the activity which brought about the injury in this case, which is what is required for a finding of agency for the purposes of Labor Law § 240 (1) (*see Walls v Turner Construction Company*, 4 NY3d 861, 863-864 [2005]).

To that effect, plaintiff, who was injured on a scaffold that was erected by carpenters employed and supervised by his employer, Bayview, received his work instructions solely from Bayview. Thus, as plaintiff and MBBCO have not established that the court misapprehended the law or facts in its determination to deny that part of plaintiff's motion for summary judgment in his favor on his Labor Law § 240 (1) claim as against Farrell, that part of plaintiff's motion and MBBCO's cross motion for leave to reargue is denied.

DEFENDANT MBBCO'S MOTION, PURSUANT TO CPLR 5015 (a), TO VACATE THE DECISION TO THE EXTENT IT GRANTED SUMMARY JUDGMENT IN FAVOR OF FARRELL AND AGAINST PLAINTIFF (motion sequence number 010)

CPLR 5015 provides, in pertinent part:

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

\* \* \*

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404.

MBBCO asserts that this court should exercise its discretion and consider its motion to vacate the decision to the extent that it granted summary judgment in favor of Farrell and against plaintiff. To this effect, MBBCO submits that, as a judgment debtor, MBBCO has a real interest in the outcome of plaintiff's claims against Farrell, as well as Farrell's claims against Bayview.

In addition, MBCCO asserts that it had good cause for its failure to oppose the issue of Farrell's liability as an agent of the owner for the purposes of Labor Law § 240 (1), given plaintiff's strong showing and Farrell's lack of opposition.

MBBCCO now puts forth, as newly discovered evidence, the Miller affidavit, as well as various invoices attached to it, which allegedly demonstrate that Farrell was, in fact, hired to serve as the general contractor for the project. However, as discussed previously, the Miller affidavit, as well as the attached invoices, merely reflect Farrell's general oversight of the work and its quality, which is not to be equated with the level of supervisory control and authority over the activity which brought about the injury necessary to impose absolute liability pursuant to Labor Law § 240 (1) (*see Walls v Turner Construction Company*, 4 NY3d at 863-864; *Domino v Professional Consulting*, 57 AD3d 713, 714-715 [2d Dept 2008]). Thus, defendant MBBCCO's motion to vacate the decision to the extent that it granted summary judgment in favor of Farrell and against plaintiff is denied. Accordingly, those parts of MBBCCO's motion seeking summary judgment in plaintiff's favor, as well as reinstating Farrell's third-party claims against Bayview, are also denied.

**FARRELL'S CROSS MOTION TO RENEW, OR, IN THE ALTERNATIVE, TO REARGUE THE COURT'S DECISION DENYING ITS CROSS MOTION SEEKING SUMMARY JUDGMENT IN ITS FAVOR AS AGAINST THIRD-PARTY DEFENDANT BAYVIEW**

In the event that plaintiff and MBBCCO's request for relief was granted, Farrell cross-moved for leave to renew, or in the alternative, for leave to reargue the court's decision and order, which denied its cross motion seeking summary judgment in its favor on its third-party claims as against third-party defendant Bayview. As this court did not grant the relief sought by plaintiff and defendant MBBCCO, and thus, it did not vacate the decision and order, Farrell's cross

motion to renew, or in the alternative, to reargue the court's decision is denied, as moot.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED** that plaintiffs Flavio Atiencia and Maria Atiencia's motion (motion sequence number 008), pursuant to CPLR 2221 (e) and CPLR 2221 (d), for an order granting them leave to renew, or, in the alternative, leave to reargue their motion for partial summary judgment on the issue of defendant and third-party plaintiff Farrell Building Company, Inc.'s (Farrell) liability under Labor Law § 240 (1), is denied; and it is further

**ORDERED** that defendant MBBCO II, LLC's (MBBCO) motion (motion sequence number 010), (1) pursuant to CPLR 5015 (a), to vacate the Decision and Order of this court, dated June 18, 2009 (the decision and order), to the extent that it granted summary judgment in favor of Farrell with respect to plaintiff's Labor Law § 240 (1) claim as against it, (2) to grant partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim as against Farrell and (3) to reinstate Farrell's third-party claims against third-party defendant Bayview Building & Framing, Corp. (Bayview), is denied; and it is further

**ORDERED** that defendant MBBCO's cross motion, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or, in the alternative, leave to reargue that part of the decision and order which granted summary judgment in defendant and third-party plaintiff Farrell's favor with respect to plaintiff's Labor Law § 240 (1) claim as against it, and upon reargument, vacating said decision and order and granting plaintiff partial summary judgment, pursuant to CPLR 3212, in his favor on his Labor Law § 240 (1) claim as against Farrell, is denied; and it is further


**ORDERED** that defendant and third-party plaintiff Farrell's cross motion, pursuant to CPLR 2221 (e) and 2221 (d), for an order granting it leave to renew, or in the alternative, leave to reargue its motion for summary judgment as against third-party defendant Bayview, and upon reargument, vacating said decision and order and granting Farrell summary judgment, pursuant to CPLR 3212, as against third-party defendant Bayview, is denied as moot; and it is further

**ORDERED** that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

DATED: October 23, 2009

ENTER

  
\_\_\_\_\_  
Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK