

**Marquez v Trustees of Columbia Univ. in the City of
N.Y.**

2013 NY Slip Op 30757(U)

April 5, 2013

Sup Ct, New York County

Docket Number: 104744/09

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN

PART 11

Justice

Teodora Marquez

INDEX NO.

104744/09

MOTION DATE

MOTION SEQ. NO.

005

MOTION CAL. NO.

Plaintiffs,

- v -

Trustees of Columbia Univ.
of City of NY
Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion

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

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 5, 2013

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
TEODORO MARQUEZ,

Plaintiff,

-against-

Index No. 104744/09

TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,
Defendant.

FILED

APR 15 2013

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JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action arising out of a construction site accident, defendant Trustees of Columbia University in the City of New York (Columbia) moves, by order to show cause, for an order (i) granting leave to renew and reargue this court's decision and order dated June 25, 2012 ("the original decision"), denying its motion to preclude plaintiff from introducing evidence concerning past and future lost earnings "stemming from his illegal employment in the United States," and precluding any expert testimony regarding plaintiff's life care costs, future medical expenses and treatment and other anticipated expenses or, in the alternative, (ii) granting leave to renew and reargue its request to compel plaintiff to provide documentary evidence concerning his identity and immigration status and ordering a further deposition of plaintiff regarding his immigration status. Plaintiff opposes the motion, which is denied.

Background

Plaintiff was allegedly injured on November 3, 2008, while performing plastering work at a construction site located at 606 West 116th Street in Manhattan. Plaintiff fell from an unsecured A-frame ladder while working in an apartment on the 11th floor of the building.

Columbia was the owner of the construction site. Plaintiff was an employee of Izzo Construction Corp. (Izzo), which was hired by Columbia to perform plastering work. Plaintiff is known by four names: Teodoro Marquez, Teodoro Quispe, Fernando Teodoro Marquez, and Teodoro Fenando Marquez Quispe.

Plaintiff commenced the instant action on April 6, 2009, asserting the following claims: (1) common-law negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240 (1); and (4) violation of Labor Law § 241 (6).

Plaintiff filed his note of issue on August 28, 2010. On or about September 21, 2010, plaintiff moved for partial summary judgment on the issue of liability under Labor Law § 240 (1) against Columbia. Columbia opposed the motion and cross moved to dismiss the complaint. By decision and order dated November 29, 2011, this court granted plaintiff's motion and denied Columbia's cross motion. Columbia appealed, and on May 10, 2012, the court's decision and order was affirmed by the Appellate Division, First Department.

On May 7, 2012, Columbia submitted an order to show cause seeking various relief, including precluding plaintiff from introducing evidence concerning past and future lost earnings stemming from his "illegal employment" in the United States, and precluding certain expert testimony relevant to future costs and expenses, or, in the alternative requiring plaintiff to produce certain evidence regarding, inter alia, his immigration status, his identity, and lost earnings claims.

Plaintiff opposed the motion, pointing out that the note of issue was filed almost two years ago, and that plaintiff has already been deposed, and testified that he did not have a green card or social security number, and that plaintiff came to the United States from Peru in 2002 and

has been in this county continuously ever since and is not a United States citizen. Plaintiff also argued that his immigration status is irrelevant since, under New York law, an undocumented worker is entitled to lost earnings in connection with a personal injury action, unless the worker supplied his employer with a false social security card and the employer relied on it, and that there is no evidence that these circumstances exist in the instant case.

Plaintiff also sought a protective order regarding recent discovery demands served by Columbia and submits various discovery orders showing that plaintiff complied with orders directing that he produce records relevant to earnings, including authorizations for W-2's from his employer, Izzo and attaches W-2's issued by Izzo to plaintiff for 2006-2008.

In its original decision, the court denied Columbia's motion except with respect to permitting it to depose plaintiff with respect to his medical condition and treatment between the time of this last deposition and the present and as to any known future medical treatment, and life care costs. The court granted plaintiff a protective order with respect to the other discovery sought. The court specifically rejected Columbia's argument that it was entitled to discovery as to plaintiff's immigration status or that plaintiff should be precluded from concerning past and future lost earnings. In this regard the court wrote that:

There is no dispute that plaintiff is not a United States citizen, does not have a green card or a social security number. More significantly, it is well established that although he is not a United States citizen, plaintiff has a right to recover lost earnings arising out of violation of the Labor Law. See Balbuena v. IDR Realty LLC, 6 NY3d 338 (2005)(holding that unauthorized worker is entitled to recovery damages for his lost earnings due to a violation of Labor Law §§ 240, 241(6), and § 200); Macedo v. J.D. Posillico, Inc., 68 AD2d 508, 511 (1st Dept 2009)(holding that undocumented worker was entitled to lost earnings even assuming he submitted a false social security card to his employer where there is no

evidence that the employer sought to comply with his employment verification obligations). In fact, the only apparent exception to this rule is when an employee submits a false social security number to an employer and the employer obtained verifying documentation as required under Immigration Reform and Control Act of 1986. Id.; see also, Coque v Wildflower Estates Devs., Inc., 58 AD3d 44, 52 (2d Dept 2008). Here, there is no evidence that plaintiff informed his employer that he had either a social security number or green card.

Columbia now moves for renewal or reargument of the original decision based on new evidence which Columbia asserts raises new issues concerning plaintiff's identity. This evidence is based on the affidavit of Martha Beltre, a claims adjuster, hired by counsel for Columbia, to conduct a background search on the plaintiff. Ms. Beltre learned that an individual named Fernando Marquez, who is deceased, and has the same address and birthday as given by plaintiff to his employer. The investigator also reported that contrary to plaintiff's deposition testimony, plaintiff does not have a valid drivers' license or non-driver identification in Maryland. Columbia also submits an employee application which plaintiff allegedly provided to his employer. According to Ms. Beltre's affidavit, the number provided in the application is not a valid social security number but may be an individual tax identification number. Based on this additional evidence, Columbia argues that it is entitled to further discovery regarding plaintiff's identity.

Plaintiff opposes the motion, and submits evidence to substantiate his identity, including plaintiff's affidavit, plaintiff avers that his full name is Teodoro Fernando Marquez Quispe, and that Quispe is his mother's maiden name, and that it Latin culture it is sometime added to the surname. He also states that his date of birth is August 23, 1965, and submits a copy of his Peruvian passport and a certified copy of his birth certificate to confirm his identify and date of

birth. Plaintiff states that he has a Maryland drivers' license and that he obtained a license in Maryland since he did not need a social security number. Plaintiff submits a copy of the drivers' license but notes that his middle name is misspelled as Fernand instead of Fernando. Plaintiff further states that he has "never adopted the identity of any other person so as to appear to be another person for any purpose. I have never adopted a social security number of another person for any purpose. I am the person I say I am." (Plaintiff Aff. at ¶ 7).

In reply, Columbia asserts that the court should not consider the Maryland drivers' license as Maryland requires plaintiff to be a resident there before obtaining a Maryland drivers' license and plaintiff never resided in Maryland. Columbia further asserts, that plaintiff "may have used" the address of his brother, who lives in Maryland to obtain the license. Columbia also submits a color photograph which they claim is from plaintiff's employers' file and assert that the individual in the photograph does not resemble the individual in the passport photo or in the Maryland drivers' license photo submitted by plaintiff in opposition to the motion.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were

unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).

Here, there is no basis for granting reargument, as the court correctly applied the law in denying Columbia's motion to preclude plaintiff from introducing evidence concerning past and future lost earnings "stemming from his illegal employment in the United States," and in denying defendant's request to compel plaintiff to provide documentary evidence concerning his identity and immigration status and denying Columbia's request for a further deposition of plaintiff regarding his immigration status.

As the court noted in its original decision, although plaintiff is not a United States citizen, he has a right to recover lost earnings arising out of violation of the Labor Law, and the only apparent exception to this rule is when an employee submits a false social security number to an employer and the employer obtained verifying documentation as required under Immigration Reform and Control Act of 1986. Macedo v. J.D. Posillico, Inc., 68 AD2d at 511; see also, Coque v Wildflower Estates Devs., Inc., 58 AD3d at 52. As the record contained no evidence that the exception applies here and Columbia did not show that discovery would lead to such evidence, the court correctly found that Columbia was not entitled to an order precluding plaintiff's lost earnings claim or compelling discovery regarding plaintiff's immigration status. Accordingly, Columbia's motion for reargument is denied.

Next, although Columbia submits allegedly new evidence, including the affidavit of its claims adjuster in support of renewal, the court adheres to its original decision as the new evidence does not show or suggest that plaintiff submitted a false social security number to his

employer and/or that his employer obtained verifying documentation as required under Immigration Reform and Control Act of 1986. In particular, Columbia's claim adjuster concedes that the plaintiff's employment application does not contain a social security number and, if anything, has an individual tax identification number of the kind used to report earnings for individuals, like plaintiff, who are not United States citizens. Furthermore, the claims adjuster's findings purportedly calling into question plaintiff's identity do not provide a basis for denying plaintiff's lost earnings claims and, in any event, are rebutted by the evidence submitted by plaintiff in opposition.

As for Columbia's reply affirmation, plaintiff objects to its submission on the grounds that it was served late. Even if the court were to consider Columbia's reply, it provides no evidence sufficient to alter the original decision. As for the photograph of plaintiff which is allegedly from the file of plaintiff's employer, it is without evidentiary foundation and therefore cannot be considered by the court.

In view of the above, it is

ORDERED that Columbia's motion for reargument is denied; and it is further

ORDERED that Columbia's motion to renew is granted and, upon renewal, the court adheres to its original decision.

DATED: April 5, 2013

J.S.C.

FILED

APR 15 2013

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