Nadler v City of New York
2016 NY Slip Op 32967(U)
June 23, 2016
Supreme Court, Queens County
Docket Number: 710142/15
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

FILED: QUEENS COUNTY CLERK 06/14/2017 10:40 AM INDEX NO. 710142/2015
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 06/14/2017

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

John Nadler and Maria Nadler,

Petitioners,

- against -

City of New York,

Respondent.

----------X

DUPLICATE ORIGINAL
Index Number: 710142/15

Motion Date: 6/21/16

Motion Cal. Number: 168

Motion Seq. No.: 3

The following papers numbered 1 to 9 read on this motion by petitioners for reargument and renewal.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Reply	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by petitioners to reargue their prior petition for leave to serve a late notice of claim, which petition was dismissed pursuant to the order of this Court issued on January 26, 2016, is denied. Petitioners have failed to demonstrate that the Court misapprehended any question of law or fact so as to merit reargument.

That branch of the motion for leave to renew their prior petition is also denied. An application to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]). It must be demonstrated, however, that such new

FILED: QUEENS COUNTY CLERK 06/14/2017 10:40 AM INDEX NO. 710142/2015
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 06/14/2017

facts "would change the prior determination" (CPLR 2221[e][2]).

The prior petition was dismissed, inter alia, upon the ground that petitioners failed to demonstrate that the City acquired actual knowledge of the facts constituting the claim within the 90-day period for filing a notice of claim or a reasonable time thereafter. This Court, in determining that petitioners failed to demonstrate that the City acquired actual knowledge within the statutory period or a reasonable time thereafter, stated,

> Petitioner's "belief" that the accident was reported by his employer to respondents does not constitute evidence that the City acquired timely actual knowledge of the facts underlying the claim. Although he contends that it is customary for his employer to report accidents to the owner and general contractor, no evidence is proffered to support such contention. Petitioner merely alleges that he notified his employer of the accident by telephone. He does not annex to his petition a copy of an accident report prepared by his employer showing a causal nexus between the accident and any violation of the Labor Law and does not show proof that such was sent to the City within the requisite time period. His counsel merely represents that he has filed a FOIL request to ascertain whether the City is in possession of such an accident report. But counsel's mere speculation that a FOIL request may yield proof that petitioner's employer prepared an accident report imparting knowledge to the City of the essential facts of his claim and notified the City of the accident by sending it such report in a timely manner is insufficient to establish that the City acquired timely actual knowledge of the facts underlying the claim.

Petitioners' counsel now seeks renewal based upon accident reports recently received pursuant to a FOIL request. These documents consist of a Construction Accident Report prepared by the City's Department of Design and Construction (DDC)on the date of the accident and an Incident Investigation report prepared by Triton Structural Concrete, plaintiff's employer, on July 3, 2014.

Even if these reports were to be considered new facts, they would not change this Court's prior determination. As this Court indicated in its prior order, petitioner did "not annex to his petition a copy of an accident report prepared by his employer

FILED: QUEENS COUNTY CLERK 06/14/2017 10:40 AM INDEX NO. 710142/2015
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 06/14/2017

showing a causal nexus between the accident and any violation of the Labor Law"(emphasis added).

The DDC's accident report describes the accident thus: "Superintendent [petitioner] was taking field measurements for light trough at entry portal from 'A' frame step ladder. Wind gust dislodged his clipboard. Attempting to catch the clipboard, he lost balance and fell to the floor of the modular. Experienced severe pain, ambulance was called for transport to local ER-Jamaica Medical Center. Injury diagnosis was broken hip, he was admitted for corrective surgery on Wednesday morning - 7/2/2014."

The description of the accident set forth in Triton's incident investigation report is as follows: "John Nadler was supervising Ashnu Welding Gate Tabs. Ashnu was setting up safety perimeter. John was using a 6' tall 'A' frame ladder to measure B97 elec. trough for fabrication. While on the ladder the wind blew his clipboard off the ladder. John tried to grab it, lost his balance and fell off ladder landing on his right hip. John was in pain and could not get up. Ashnu super called 911. Ambulance showed up and took John to hospital. Doctors determined it was a broken hip. John had surgery mid day on 7-2-14." This report also had a checklist of questions with boxes next to them to check off either "yes" or "no". The questions and answers noted were as follows: "Does employee normally operate this equipment? - Yes"; "Was employee instructed in the safe use of this equipment? - Yes"; "Was any defect with the equipment noted or reported prior to accident/incident? - No"; "Was any recent maintenance/service performed on this equipment? - No"; "Were standard work procedures followed? - Yes"; "Was a safety rule or specific instruction violated? -No".

Contrary to petitioners' counsel's contention, these reports do not apprise the City of the essential facts of petitioner's claim under §240(1) of the Labor Law since they do not indicate a connection between petitioner's injuries and any violation of §240(1) of the Labor Law. All these reports indicate is that plaintiff lost his balance while reaching to grab his clipboard that had been blown out of his hands by the wind. They do not indicate that the ladder was defective, that it collapsed or moved, that it was insecure or otherwise failed to support him.

A fall from a ladder does not, in and of itself, establish a violation of §240(1) of the Labor Law (see Delahaye v St. Ann's School, 40 AD 3d 679 [2nd Dept 2007]). "There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries. . . Where a plaintiff

FILED: QUEENS COUNTY CLERK 06/14/2017 10:40 AM INDEX NO. 710142/2015
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 06/14/2017

falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law §240(1) does not attach" (Hugo v Sarantakos, 108 AD 3d 744, 745 [2nd Dept 2013][internal citations omitted]). Moreover, these reports do not set forth any facts that would indicate a violation of any of the sections of the Industrial Code set forth by plaintiff so as to support a cause of action under §241(6) of the Labor Law, or indicate any negligence on the part of the City so as to support a common law negligence cause of action against the City or a cause of action under §200 of the Labor Law, which is a codification of common law negligence.

Accordingly, the motion is denied.

Dated: June 23, 2016

KEVIN J. KERRIGAN, J.S.C.