

<b>Ferguson v Durst Pyramid LLC</b>
2021 NY Slip Op 31158(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 161274/2014
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

-----X

SHONDEL FERGUSON and SHAREMA FERGUSON,

Plaintiffs,

- v -

DURST PYRAMID LLC and HUNTER ROBERTS  
CONSTRUCTION GROUP, LLC,

Defendants.

-----X

INDEX NO. 161274/2014

MOTION DATE \_\_\_\_\_

MOTION SEQ. NOS. 005,006, & 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287m 288, 289, 290, 291, 292, 293, 294, 322, 323, 324, 325, 326, 327, 328, 329, 330, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 389, 390, 394, 395, 421, 422, 423, 424, 426, 428, 430, 431

were read on these motions to RENEW, VACATE & QUASH.

In this action seeking to recover damages for injuries arising out of an accident at a construction site, defendants move for an order pursuant to CPLR 2221(e), granting leave to renew their prior cross motion for summary judgment dismissing plaintiffs’ claims under Labor Law §§ 240(1) and 241(6), and their opposition to plaintiffs’ summary judgment motion (motion sequence no. 005). Defendants also move for an order renewing their motion to vacate the note of issue and compelling certain discovery, including the deposition of non-party witness Carl Fumia (motion sequence no 006). Plaintiffs oppose defendants’ motions and separately move to quash a subpoena for Fumia’s deposition (motion sequence 007).<sup>1</sup> Defendants oppose the plaintiffs’ motion and cross move to compel Fumia’s deposition or, in the alternative, to hold Fumia in contempt.

**Background**

Plaintiff Shondel Ferguson was injured on October 28, 2014, while employed by non-party subcontractor Enclos Corp. (“Enclos”) as an ironworker at a project (“the Project”) to construct a residential building located at 625 West 57<sup>th</sup> Street in Manhattan (“the Building”). The Building is owned by defendants Durst Pyramid

<sup>1</sup> Motion sequence nos. 005, 006, and 007 are consolidated for disposition.

LLC and The Durst Organization, Inc., and defendant Hunter Roberts Construction Group, LLC was the general contractor for the Project. On the accident date, Ferguson was with two other ironworkers and Carl Fumia on an elevated platform known as a crane pad, where they were opening crates of curtain wall panels with a Sawzall, which is an electric-powered saw. After the Sawzall lost power, Ferguson left the crane pad to enter the Building to check on the power cord. When he returned, Ferguson used an inverted five- or six-gallon plastic bucket to reach the crane pad. According to Ferguson's deposition testimony, he suffered injuries and fell about four feet, when the bucket "kicked out" after he placed his right foot on it and was about to place his left foot on the crane pad (NYSCEF # 251, at 119, 124, 127).

Plaintiffs moved for summary judgment as to liability on their Labor Law § 240(1) claim and Labor Law § 241(6) claim, which was premised on an alleged violation of Section 23-1.7(f) of the Industrial Code, requiring that stairways, ramps, and runways be provided as the means of access to working levels. In support of their motion, plaintiffs relied, *inter alia*, on Ferguson's testimony that while there were stairs available to reach the crane pad, the general foreman on the Project, Bryan Clark instructed him not to use the stairs but to use the inverted bucket instead, and that he used the bucket to access the pad during the three-week period he was using it before the accident (*id.*, at 126-128, 131). He also testified that although there was a staircase on the northwest side of the crane pad, it was cordoned off, and he could not see the stairs because of crates around the area; and that when he had accessed the crane pad from the east side, he did so by stepping on "debris [and] pieces of wood" that were on the ground (*id.*, at 133-134). Plaintiffs also cited Clark's testimony that while he did not instruct Ferguson to use the inverted bucket, that he had observed workers using it "to go up and down them all the time because there's no stairs..." (NYSCEF Doc # 57, at 30).

Defendants opposed the motion, and cross moved for summary judgment dismissing the plaintiffs' claims, based on evidence that there were three points of access to the crane pad at the time of the accident—two staircases and a stepdown.

In reply, plaintiffs submitted Fumia's affidavit (NYSCEF # 239). Fumia, states in the affidavit that on the accident date, he was employed by Enclos, as a foreman, and that at the time of the accident he was standing on the crane pad and witnessed Ferguson step on the inverted bucket to access the pad and fall. Fumia averred that the only access to and from the crane pad was from the south side using the inverted bucket as the north side staircase was blocked by a crane, and the crates barred access from the west and east side.

By decision and order dated September 27, 2018, the court denied plaintiff's motion for summary judgment and granted defendants' cross motion dismissing plaintiffs' claims under Labor Law §§ 240(1), 241(6) and 200 (NYSEC Doc # 224).

With regard to the Labor Law §§ 240(1) and § 241(6) claims, the court found summary judgment was warranted based on undisputed evidence that there was an alternate safe means of accessing the crane pad consisting of a step down at a lower section at the northeast end of the crane pad. As for Fumia's affidavit, the court found that it was insufficient to refute the existence of the step down.

Plaintiffs appealed and by decision and order dated December 26, 2019, the Appellate Division, First Department modified the court's decision to the extent of granting plaintiffs summary judgment on their Labor Law § 240(1) and § 241(6) claims (hereinafter "the Appellate decision") (NYSCEF Doc # 225). The First Department found that § 240(1) encompassed Ferguson's fall while trying to access an elevated work area, and that defendants failed to "cite any evidence rebutting the affidavit of plaintiff's foreman (i.e. Fumia) stating that stairs or other access points to the work platform were either restricted or blocked by materials...[and that] [b]ecause no safety devices were available to plaintiff to access the platform...plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of the accident" (*id.*). As for the § 241(6) claim, which was premised on Section 23-1.7(f) of the Industrial Code, the First Department found that as no stairways, ramps or runways were available to Ferguson to access the platform as required by that section, he was entitled to summary judgment on the claim.

By motion dated February 5, 2020, defendants moved before the First Department for reargument or, in the alternative, for leave to appeal to the Court of Appeals (NYSCEF Doc # 226). By letter dated March 11, 2020, defendants requested permission to serve "compelling new evidence" (NYSCEF Doc # 228). Defendants did not receive a response to this request from the First Department and by order dated April 23, 2020, the First Department denied reargument and leave to appeal, without mentioning defendants' March 11, 2020 letter request (NYSCEF Doc # 229).

### Defendants' Renewal Motions

Defendants move for renewal of their cross motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) and § 241(6) claims and their opposition to plaintiffs' summary judgment motion, arguing that the Appellate Decision was based primarily on the version of events in Fumia's affidavit and that new evidence regarding Fumia referred to in its March 11, 2020 letter to the First Department should now be considered by this court. The new evidence relied on by defendants consists of proof (1) that Fumia was not a foreman on the accident date, and (2) Fumia was represented by plaintiffs' counsel in a Labor Law case in Nassau County Supreme Court ("the Fumia Lawsuit") arising out of an August 24, 2014 trip and fall at a worksite. In support of their assertion that Fumia was not a foreman on the date of the accident, defendants submit the affidavit of Staci Bilzing ("the Bilzing Affidavit"), a payroll technician at Enclos, who avers that based on Enclos' certified

business records, on October 28, 2014, Fumia was employed at the Project as a journeyman ironworker and not a foreman, and that he was not paid as a foreman until November 2014 (NYSCEF Doc # 236, ¶¶ 2-3).

In their second renewal motion, defendants argue that the new evidence regarding Fumia warrants renewal of their motion to vacate the note of issue and reopening discovery as to liability and damages, including to permit Fumia's deposition. In this connection, defendants note that their previous motion to vacate the note of issue based on outstanding discovery was denied as moot after this court granted summary judgment in their favor.

Plaintiffs oppose the renewal motions asserting that evidence relied on by defendants, including the Bilzing Affidavit and the existence of the Fumia Lawsuit, does not satisfy "the heavy burden" of showing that this new evidence could not, with due diligence, have been produced by defendants earlier (*Levitt v County of Suffolk*, 166 AD2d 421, 422-423 [2d Dept 1990], *lv dismissed* 77 NY2d 834 [1991]). In this connection, plaintiffs note although Fumia was identified by plaintiffs' counsel as a witness to the accident in a Response to Combined Demands exchanged by plaintiffs in February 2015, defendants did not previously seek to depose him. In any event, plaintiffs argue that the new evidence relied on by defendants is insufficient to cast doubt on Fumia's credibility or the facts as to the jobsite set forth in his affidavit. As for defendants' assertion regarding outstanding discovery, plaintiffs argue that no further discovery is warranted as to liability, which has been determined by the Appellate Decision and, in any event, they have complied with all outstanding discovery.

In reply, defendants submit the affidavit of Kenneth Freshnock ("Freshnock"), defendant Hunter Roberts' senior superintendent at the Project, who avers that he was present at the Project on a daily basis (NYSCEF # 421). Freshnock states that he observed the northeast side of the crane pad multiple times on the accident date, including on the morning of the accident, and that he did not observe any crates or any other material or equipment which would have blocked a worker from gaining access to the pad from its eight to ten-foot northeast section which was grade to the ground.

A motion 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]). And, "a court of original jurisdiction may entertain a motion to renew or vacate a prior order or judgment even after an appellate court has rendered a decision on that order or judgment...so long as the moving party exercised due diligence in attempting to produce the newly discovered evidence" (*id.*, at 377 [internal citations omitted]).

Here, even assuming defendants exercised diligence in attempting to submit the new evidence to the First Department with regard to their reargument motion, they have not sufficiently explained their failure to seek Fumia's deposition after he was identified by plaintiffs as a non-party witness in 2015. Nor have they adequately explained their failure to rebut the facts in his affidavit on appeal. In any event, the new evidence regarding Fumia is not inconsistent with the material facts in Fumia's affidavit which provided the basis for the Appellate Decision, including that on the accident date, Ferguson was not furnished with a safe method of accessing the elevated crane pad (*see e.g. Stone v Bridgehampton Race Circuit*, 244 AD2d 403, 403 [2d Dept 1997], *lv denied* 92 NY2d 846 [1998][denying motion to renew where new information submitted by movant "was not inconsistent in way material way with the information upon which this court's prior decision was predicated"). In this connection, evidence that Fumia was not paid as a foreman on the accident date does not controvert proof that Fumia was working on the site on that date, was familiar with the conditions of the site, and witnessed the accident. And, the fact that Fumia retained plaintiffs' counsel to bring an action on his behalf arising out of a separate trip and fall incident at a worksite, is immaterial to the factual issues related to this action. With regard to Freshnock's affidavit, as it was submitted for the first time in reply and defendants offer no excuse for failing to obtain this information from their own employee earlier, the court will not consider it (*Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011] [holding that trial court erred in considering amended affidavit "which was improperly submitted for the first time in reply papers"]).

Next, evidence that Fumia may not have been paid as foreman on the accident date and retained plaintiffs' counsel to bring the Fumia Lawsuit is also insufficient to demonstrate that further discovery is required or that the note of issue should be vacated. First, as stated above, the new evidence does not call into question that material facts in the Fumia affidavit relied on in the Appellate Decision in holding that plaintiffs were entitled to summary judgment on their Labor Law §§ 240(1) and 241(6) claims. As liability has been settled by the Appellate Decision, there is no basis for further discovery as to liability, including the deposition of Fumia. With respect to discovery as to damages, in their opposition, plaintiffs have provided a detailed refutation of defendants' statements as to outstanding discovery, including as to damages. Accordingly, there is no basis for vacating the note of issue or ordering additional discovery.

### **Plaintiffs' Motion to Quash Subpoena for Fumia's Deposition**

Plaintiffs move to quash the subpoena for Fumia's deposition, arguing that defendants have not shown any "unusual or unanticipated circumstances" of the kind needed to permit discovery after the note of issue has been filed. Defendants

oppose the motion and cross move to compel Fumia’s deposition or to hold him in contempt.

Under 22 NYCRR 202.21 (d), “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.” In this case, as explained above, defendants have not made the necessary factual showing of “special, unusual or extraordinary circumstances” to warrant granting them permission to take Fumia’s deposition after the filing of the note of issue (*Grant v. Wainer*, 179 AD2d 364, 365 [1st Dept 1992][internal citations and quotations omitted]; see also *Reardon v Macy’s Inc.*, 191 AD3d 712 (2d Dept 2021)).

Accordingly, plaintiffs’ motion to quash the subpoena for Fumia’s deposition is granted, and defendants’ cross motion to compel such deposition or to hold Fumia in contempt is denied.

**Conclusion**


In view of the above, it is

ORDERED that defendants’ motion for renewal of their cross motion for summary judgment motion and their opposition to plaintiffs’ motion for summary judgment (motion sequence no. 005) is denied; it is further

ORDERED that defendants’ motion for renewal of their motion to vacate the note of issue (motion sequence no. 006) is denied; it is further

ORDERED that plaintiffs’ motion to quash the subpoena for Fumia’s deposition is granted; and it is further

ORDERED that defendants’ cross motion to compel Carl Fumia’s deposition or to hold Fumia in contempt is denied.

<u>4/7/21</u> DATE		 MARGARET A. CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE