

**Vega v 1407 Broadway LLC**

2023 NY Slip Op 32158(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 159627/2016

Judge: Shlomo S. Hagler

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

**PRESENT: HON. SHLOMO S. HAGLER PART 17**

*Justice*

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RENE VEGA,

Plaintiff,

- v -

1407 BROADWAY LLC, THE SWEET CONSTRUCTION GROUP,

Defendant.

-----X

THE SWEET CONSTRUCTION GROUP

Plaintiff,

-against-

CHELSEA CONSTRUCTION GROUP, LLC

Defendant.

-----X

1407 BROADWAY LLC

Plaintiff,

-against-

CHELSEA CONSTRUCTION GROUP, LLC

Defendant.

-----X

INDEX NO. 159627/2016

MOTION DATE 03/07/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

Third-Party  
Index No. 595204/2017

Second Third-Party  
Index No. 595724/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for JUDGMENT - SUMMARY

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on October 3, 2016, when, while working from the top of a ladder at a

construction site located at 1407 Broadway, New York New York (the Premises), the ladder allegedly fell over, causing plaintiff to fall.

In motion sequence number 003, plaintiff Rene Vega moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants 1407 Broadway, LLC (Broadway) and the Sweet Construction Group (Sweet) (together, defendants).

### **BACKGROUND**

On the day of the accident, the premises was owned by Broadway. Broadway hired Sweet to perform general construction services for a project at the Premises that entailed, *inter alia*, the interior renovation of the 18th floor. Former third-party defendant, now a non-party, Chelsea Construction (Chelsea) provided carpentry work for the Project.<sup>1</sup> Plaintiff was employed by Chelsea.

#### ***Procedural Issues***

A threshold issue exists as to whether the court may consider the instant motion. Specifically, as defendants note, the instant motion is plaintiff's second summary judgment motion, made well after the time to file dispositive motions had elapsed.

#### ***Procedural History***

This action commenced on November 15, 2016 via the filing of the summons and complaint. Issue was joined and discovery commenced. Plaintiff was deposed on August 6, 2019 (NYSCEF Doc. No. 69). Sweet's witness was deposed on November 11, 2019 (NYSCEF Doc. No. 70). No other depositions appear to have occurred. Plaintiff then filed the note of issue

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<sup>1</sup> Third-party actions by defendants as against Chelsea were dismissed by stipulations of discontinuance dated August 2, 2017 and November 18, 2018 (NYSCEF Doc. No. 20 and 46).

on December 26, 2019 (NYSCEF Doc. No. 54), thus triggering the start of this court's 60-day summary judgment filing deadline.

Four days later, on December 30, 2019, plaintiff timely filed a summary judgment motion seeking partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants (motion sequence number 002) (NYSCEF Doc. No. 55-71). In that motion, plaintiff argued that section 240 (1) was violated because, while plaintiff was working from an a-frame ladder that he was provided (the Ladder), it moved and fell out from under him, causing him to fall. Plaintiff further argued that there was no evidence supporting that plaintiff was the sole proximate cause of his accident.

On August 12, 2020 (during the Covid pause<sup>2</sup>), defendants opposed the motion, and submitted a copy of the accident report (NYSCEF Doc. No. 78) and the affidavit of Freddy Heras, plaintiff's foreman (NYSCEF Doc. No. 77). In the affidavit, Heras averred that plaintiff had ignored his direct order to use a scaffold, rather than the Ladder and had also refused Heras's direction to have a co-worker steady the Ladder for him (*id.*, ¶ 11-13); implicating both the sole proximate cause and recalcitrant worker defenses to section 240 (1).

In response to defendants' opposition papers, on August 14, 2020, plaintiff's counsel emailed defendants' counsel stating the following:

“In light of the affidavit you submitted from Freddy Heras, in which his testimony is substantially different than Plaintiff's, we would very much like to take his deposition. . . . We would potentially be open to withdrawing the pending motion to do so”

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<sup>2</sup> On March 20, 2020, due to the Covid-19 pandemic, Governor Cuomo signed an executive order suspending and/or tolling most time limits under New York law, including the time to file and/or respond to summary judgment motions (9 NYCRR 8.202.8). This suspension/tolling expired on November 3, 2020 (9 NYCRR 8.202.72).

(NYSCEF Doc. No. 123). The court was not copied on any of these emails and no responsive email from defendants' counsel is provided to the court.

Subsequently, on August 21, 2020, plaintiff's counsel submitted a letter to the court withdrawing motion sequence number 002 (NYSCEF Doc. No. 80) (the Withdrawal Letter).

The Withdrawal Letter provided the following, as relevant:

“Please be advised that the Plaintiff, the movant, withdraws the Summary Judgment motion (Motion #002) which was filed and submitted to Your Honor's Part in order to depose the non-party witness, Freddy Heras”

(*id.*). By decision and order dated September 8, 2020, the court marked motion sequence number 002 as “withdrawn in accordance with a letter, dated August 21, 2020” (NYSCEF Doc. No. 81).

Heras's deposition was then taken on October 14, 2020 (NYSCEF Doc. No. 108). Despite being noticed for the deposition (NYSCEF Doc. No. 109), defendants' counsel did not appear at the deposition.

After Heras's deposition, on January 29, 2021, plaintiff filed the instant motion for summary judgment in his favor on the Labor Law § 240 (1) claim, relying on Heras's deposition to attack Heras's earlier affidavit (NYSCEF Doc. No. 84-110). Essentially, plaintiff now argues that Heras's deposition recants and repudiates his earlier affidavit and, therefore, the court should ignore the affidavit and grant summary judgment in his favor on the Labor Law § 240 (1) claim.

In opposition, defendants initially argue that the instant motion – plaintiff's second summary judgment motion – is untimely, as the instant motion was filed on January 29, 2021, over a year after the note of issue was filed on December 26, 2019.

**DISCUSSION**

CPLR 3212(a) sets forth the statutory deadlines for the filing of a summary judgment motion. The statute permits the court to “set a date after which no such motion may be made” (CPLR 3212[a]). If the court sets no such date, a summary judgment motion must “be made no later than [120] days after the filing of the note of issue, except with leave of court on good cause shown” (*id.*). Here, the court’s part rules limit the filing of summary judgment motions to 60-days after filing the note of issue.

The note of issue was filed on December 26, 2019. The deadline for filing summary judgment motions ended on February 24, 2020. Plaintiff timely filed his first summary judgment motion (motion sequence number 002). The instant motion was filed, effectively, 340 days late (or 111 days late accounting for the Covid pause).

Plaintiff acknowledges that his second summary judgment motion is untimely. In addition, it is uncontested that plaintiff did not have an agreement with defendants regarding resubmission of the motion.<sup>3</sup> It is also uncontested that plaintiff withdrew the original summary judgment motion without requesting leave to refile.

Further, it is uncontested that plaintiff did not seek leave to stay the original motion pending further discovery, nor did plaintiff ask leave of the court to take post-note discovery (*see*

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<sup>3</sup> The following was elicited at oral argument on March 7, 2022:

Court: “[D]id you have an agreement with counsel that you can renew the motion upon completion of that deposition?”

Defense Counsel: “No. I can answer, no.”

\* \* \*

Plaintiff’s Counsel: “I don’t think there was an explicit agreement to allow us to renew the motion”

(Court tr at 19).

22 NYCRR 202.21 [d] [“Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue . . . which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings”]). Further, plaintiff never sought leave to vacate the note of issue (22 NYCRR 202.21 [e]).

Now, plaintiff sets forth several arguments that seek to establish good cause for his delay in filing his second summary judgment motion. As discussed below, these arguments are unpersuasive.

A trial court “has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue” (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]). That said, “statutory time frames – like court-ordered time frames . . . are not options, they are requirements, to be taken seriously by the parties” (*Appleyard v Tigges*, 171 AD3d 534, 536 [1st Dept 2019]; quoting *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]).

Nevertheless, it is within the court’s discretion to consider a late filing where there is good cause shown for the delay in making the motion (CPLR 3212 [a]). To establish such good cause, a late movant must establish “a satisfactory explanation for the untimeliness” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). A failure to establish a satisfactory explanation for the untimeliness requires the dismissal of the motion. This is so, even if it means permitting less than meritorious claims or defenses to continue to trial (*id.*).

### Good Cause

Plaintiff first argues that the court should find good cause for the delay in filing the instant motion because the original summary judgment motion (motion sequence number 002),

which he voluntarily withdrew, was timely. To establish this, plaintiff relies upon the line of cases that stand for the proposition that a motion or cross-motion will not be untimely when it is “largely based on the same arguments raised in [another movant’s] timely motion” (*Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304 [1st Dept 2006]) and otherwise addresses issues “nearly identical to those raised in the timely motion” (*Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 692 [1st Dept 2018]).

These cases stand only for the proposition that one party’s late but substantively identical summary judgment motion may be considered if another timely motion presently before the court addresses those issues. They do not provide an avenue for a movant to file a late summary judgment motion that somehow ties into that movant’s own timely but withdrawn (and therefore disposed and inactive) prior motion. Plaintiff provides no case law supporting this position, and the court’s research reveals nothing supporting this theory.

The original motion is not presently active before the court, having been withdrawn nearly six months prior to the filing of the instant motion. Accordingly, plaintiff cannot establish good cause for the delay by linking his late second summary judgment motion to his prior, withdrawn summary judgment motion.

Next, plaintiff argues that there was good cause for the delay because plaintiff was actively attempting to secure the deposition of Heras. In support of this argument, plaintiff relies on *Rotante v Advance Tr. Co., Inc.*, 148 AD3d 423, 424 (1st Dept 2017) and *Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 340 (1st Dept 2007). These cases are inapposite to the facts of this case.

Initially, it is noted that in both *Rotante* and *Butt*, the defendants (or third-party defendants) sought leave to file late summary judgment motions based on depositions that were

pending at the time the plaintiff filed the note of issue. Further, in *Butt*, leave was sought because of a delay arising from the death of the deposition's stenographer and the loss of that stenographer's transcription record after the deposition had already taken place. The First Department found that there was good cause for a delay in filing a summary judgment motion to accommodate re-deposing the witness and obtaining a new transcript of his testimony (*Butt*, 47 AD3d at 339-340).

In *Rotante*, at the time the note of issue was filed, the defendants were awaiting the pending deposition of a key witness. By the time the deposition was held, the time to file had expired. The First Department found good cause for the filing delay. Specifically, it noted that the defendants showed good cause for the delay because they did not have the opportunity to "exhaust all efforts to secure" the outstanding deposition at the time the note of issue was filed (*Rotante*, 148 AD3d at 424).

Here, there was no pending deposition at the time plaintiff filed the note of issue, even though it is undisputed that Heras was known to plaintiff and his counsel.<sup>4</sup> Moreover, plaintiff's counsel acknowledges that he was aware of Heras's existence prior to filing the note of issue, but chose not to depose him because "there was no reason to expect that Heras's testimony would be any different than Plaintiff's testimony" (plaintiff's reply affirmation, ¶ 10; *see also* court tr at 21 ["We knew who the foreman was" but "we had no . . . way of knowing that [defendant] is going to [submit] [Heras's] affidavit").

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<sup>4</sup> Heras's name appears in the accident report (NYSCEF Doc. No. 78 [indicating that plaintiff "told [Chelsea] foreman Freddy Heras that when he began to climb up a 6 ft high ladder he lost his balance and fell"]). Plaintiff also discussed Heras throughout his own deposition testimony as well (*see e.g.* plaintiff's tr at 46 [noting that Heras told plaintiff to use a ladder]; 65-68 [discussing plaintiff speaking with Heras immediately after the accident]).

Prior to filing the note of issue and filing the first summary judgment motion, Plaintiff's counsel elected not to seek Heras's testimony. Accordingly, plaintiff has not established that he was unable to "exhaust all efforts" to depose Heras prior to his own filing of the note of issue or the filing of his own summary judgment motion (*Rotante*, 148 AD3d at 424). Rather, he did not seek it. Accordingly, plaintiff has failed to establish good cause for his delay based on the failure to obtain Heras's deposition in a timely manner.

Next, plaintiff relies on the case of *Quizhpi v Lochinvar Corp.*, 12 AD3d 252, 252 (1st Dept 2004) for the proposition that the court may consider a late summary judgment motion when the court "acquiesced in, and had actual knowledge of, ongoing discovery subsequent to the filing of the note of issue" (*id.* at 252).

Here, the court became aware of plaintiff's intent to seek post-note, post-motion discovery in the Withdrawal Letter (NYSCEF Doc. No. 80). The issue, then, is whether the court "acquiesced" to such discovery.

There is no definitive holding on what "acquiesced" means. That said, trial courts that cite to *Quizhpi* have considered that a court "acquiesced" to discovery (and therefore was within its discretion to contemplate a late summary judgment motion) when the court explicitly authorized post-note discovery (*see e.g. 435 Central Park W Tenant Assoc v Park Front Apts., LLC*, 2023 NY Slip Op 30799[U], \*\*8 [Sup Ct, NY County 2023] [Rosado, J.] [finding good cause to consider late summary judgment motion "where the court issued multiple orders directing discovery subsequent to the filing of the note of issue"]; *Clark-Parker v Hernandez* 2019 WL 3287907, \*1 [Sup Ct, Bronx County 2019] [Briganti, J.] [finding good cause to consider late summary judgment motion where "the Court was aware of and directed continuing discovery subsequent to the filing of the Note of Issue"]).

Here, the court did not “acquiesce” to any discovery. Specifically, as noted above, plaintiff never moved before the court for leave to take post-note discovery and the court never granted leave for such discovery, or otherwise directed any post-note discovery.

Accordingly, *Quizhpi* does not apply, and plaintiff has failed to establish good cause for his late second summary judgment motion.

Other arguments

At oral argument, plaintiff argued that he could have filed a motion to renew his first summary judgment motion rather than filing it as a new, late motion (court tr at 34 [“what would prevent us from being able to do a motion to renew based on new evidence?”]). This argument is also unpersuasive.

As an initial matter, plaintiff did not seek leave to renew, so this argument is moot (CPLR 2221 [e] [1]). That said, a motion to renew requires new facts not offered on the prior motion and reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e] [2] and [3]). While Heras’s deposition testimony may be “new” – as it was not obtained prior to the first summary judgment motion – plaintiff’s only justification for the failure to obtain the deposition (or present the deposition transcript) in regards to the first motion was that he did not think Heras’s testimony would be probative. This is not reasonable justification for the failure to present facts on a prior motion (*see e.g., Justino v Santiago*, 116 AD3d 411, 411 [1st Dept 2014] [denying the defendants’ motion for leave to renew because the defendants did not put forth a reason “for their failure to depose this plaintiff or other relevant parties before moving for summary judgment”]).

Finally, the court notes that plaintiff’s second summary judgment motion would be denied on the merits as well, given Heras’s conflicting testimony within his deposition, as well

as the disparity between Heras's affidavit and his subsequent testimony.<sup>5</sup> These issues raise factual disputes that are properly left to a jury (*Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"]]). Issues of whether plaintiff ignored an instruction, when that instruction was given, and how it was given are material issues with respect to whether defendants' recalcitrance affirmative defense to the Labor Law § 240 (1) claim is viable.

Therefore, as the court cannot dispose of this action on this motion, the court declines to consider it (*see e.g. Rotante*, 148 AD3d at 425 [finding sufficient cause to consider a second summary judgment motion because "movants' liability can be further disposed of without burdening the resources of the court and movants with a plenary trial"] [internal quotation marks and citation omitted]).

The parties remaining arguments have been considered and were unavailing.

### **CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that the plaintiff's motion (motion sequence number 003), pursuant to CPLR

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<sup>5</sup> For example, in his affidavit, Heras stated that he told plaintiff to use a scaffold (Heras aff, ¶ 11-12). At his deposition, Heras initially testified that he told plaintiff to use a scaffold (Heras tr at 19), but then also testified that he "instructed [plaintiff] that he should use the ladder or the scaffold, whatever he felt comfortable with" (*id.* at 25).

3212, for summary judgment in his favor on his Labor Law § 240 (1) claim is denied.

6/26/2023

DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE