

**Vasquez v New York City Fire Dept.**

2023 NY Slip Op 34224(U)

November 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 533122/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of November 2023

HONORABLE FRANCOIS A. RIVERA

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JAVIER VASQUEZ,

Petitioner,  
FOR A JUDGMENT PURSUANT TO ARTICLE 78  
OF THE CPLR  
-against-

**DECISION & ORDER**

Index No. 533122/2022

NEW YORK CITY FIRE DEPARTMENT AND  
THE CITY OF NEW YORK,

Respondents.

Oral Argument: 11/9/23

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By notice of motion, filed on May 25, 2023, under motion sequence number two, Respondent sought an order for relief from judgment pursuant to CPLR §5015, or in the alternative, to renew the Court’s March 30, 2023 Decision and Order and its May 9, 2023 Superseding Decision and Order pursuant to CPLR §2221, to modify or vacate such Decisions and Orders, and to dismiss the Petition in this proceeding in its entirety for lack of subject matter jurisdiction and in the interests of justice, and for such other and further relief as the Court deems just and proper.

The following NYSCEF documents numbers 70 through 75, and 78 were considered. The Petitioner opposed the Respondents’ motion sequence two, by affirmation filed on August 29, 2023, and memorandum of law filed on August 11, 2023. The following NYSCEF documents

numbers 79, 83, 84, and 93 were considered. The Respondents filed their reply on November 3, 2023. The following NYSCEF document number 94 was considered.

By notice of cross-motion, filed on November 1, 2023, under motion sequence three, Petitioner sought an order pursuant to CPLR §5104 and New York Judiciary Law §753 holding the Respondents in civil contempt for violating for violating the Court's May 9, 2023 Decision & Order requiring them to reinstate the PETITIONER to his full employment status; assessing a daily fine against Respondents of \$10,000 for the failure to reinstate Petitioner to his full employment status or an amount deemed by the Court to be otherwise sufficient to coerce the Respondents' compliance with the Court's May 9, 2023 Decision & Order; compelling Respondents to comply with this Court's May 9, 2023 Decision & Order and pay Petitioner backpay in salary and benefits retroactively from the date his unpaid leave began – July, 23, 2022; compelling Respondents to comply with this Court's May 9, 2023 Decision & Order and reinstate the Petitioner to his former employment position; compelling Respondents to comply with this Court's August 17, 2023 Decision & Order awarding Attorney for Petitioner, Christina Martinez, \$18,000 in attorney's fees, with interest at the rate of 9% annum; awarding Petitioner attorney's fees in connection with the filing of this Motion; and such other and further relief as this Court deems just and proper. The following NYSCEF documents numbered 87 through 92 were considered.

Respondents New York City Fire Department and the City of New York opposed the Petitioner's cross-motion, motion sequence three, by affirmation filed on November 3, 2023. The following NYSCEF documents numbers 95 through 96 were considered.

Oral arguments on both motions were heard on November 9, 2023. After oral arguments, the order of the Court is as follows:

The Respondents' motion for relief from judgment pursuant to CPLR §5015 is denied. The Respondents' reliance on CPLR §5015(a)(4) based on the lack of subject matter jurisdiction is misplaced. The election of remedies doctrine "do[es] not implicate the subject matter jurisdiction of the court, but rather deprive[s] a plaintiff of a cause of action." *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170-1171 (2d Dept 2017). Additionally, Respondents' argument pursuant to CPLR §5015(a)(2) fails because the Petitioner's complaint with the New York State Division of Human Rights ("NYSDHR") is not "newly discovered evidence... which could not have been discovered in time". CPLR §5015(a)(2). The Court declines to exercise its inherent discretionary power to grant relief from an order in the interests of justice.

The Respondents' motion to renew pursuant to CPLR §2221(e) is denied. It is not the NYSDHR's determination that triggers the election of remedies doctrine but rather the "filing of a complaint". N.Y.C. Admin Code §8-502(a). As the Respondents stated in their motion, the Petitioner's NYSDHR complaint was "long pending" since November of 2021. NYSCEF Doc. No. 71. The Respondents have proffered no "reasonable justification for the failure to present" this fact in its answer or at any other stage of this proceeding. CPLR § 2221(e)(3); *Greene v. New York City Housing Authority*, 283 A.D.2d 458, 724 N.Y.S.2d 631 (2d Dep't 2001). Moreover, the First Department's decision in *Marsteller* does not constitute a change in the law that would change this Court's prior determination. *Matter of Marsteller v. City of New York*, 217 A.D.3d 543 (1st Dep't 2023).

The Petitioner's cross-motion to compel compliance with this Court's May 9, 2023, Decision & Order and for contempt is granted to the extent that an evidentiary hearing will be conducted on January 16, 2024, on the issue raised by this branch of the cross motion.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francois A. Rivera*

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J.S.C.

**HON. FRANCOIS A. RIVERA**  
J.S.C.