Fernandez v City of New York
2023 NY Slip Op 34782(U)
January 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 706967/2018
Judge: Chereé A. Buggs
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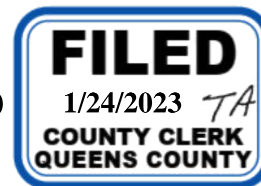
Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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ROBERTO FERNANDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, EXPRESSWAY SHOPPING LIMITED PARTNERSHIP and INDEPENDENCE CARTING INC.,

Defendants.

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Index No.706967/2018

Motion
Date: November 23, 2022

Respectfully referred by Hon. Mojgan C. Lancman on December 8, 2022

Motion Sequence No.**: 10**

The following papers numbered EF 293-312, 314-322, 334-338 submitted and/or considered on this motion by defendants, City of New York, New York City Board of Education, New York City Department of Education and New York City School Construction Authority (collectively referred to hereafter as the "City Defendants") for leave to renew pursuant to CPLR §2221(e) and for an Order: vacating the portions of the Court's Order of March 28, 2022 that granted Plaintiff Roberto Fernandez' (hereinafter "Fernandez") motion for summary judgment on Labor Law § 240(1); denying Fernandez' motion for summary judgment on Labor Law § 240(1); vacating the portions of the Court's Order of March 28, 2022 that granted co-defendant Independence Carting, Inc's (hereinafter "Independence") motion for summary judgment and dismissing the common-law negligence, Labor Law § 200 and all cross-claims asserted against it; denying Independence's motion for summary judgment and reinstating the common-law negligence, Labor Law §200 and all cross claims asserted against it, including the moving defendants' claim for common law indemnification; and for such other and further relief as this Court may deem just and proper.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 293-312
Answering Affidavits - Exhibits	EF 314-322, 334
Reply Affidavits - Exhibits	EF 335-338

City Defendants' Motion to Renew

City Defendants move for leave to renew pursuant to CPLR §2221(e) and for an Order: vacating the portions of the Court's Order of March 28, 2022 that granted Plaintiff Roberto Fernandez' (hereinafter "Fernandez") motion for summary judgment on Labor Law § 240(1); denying Fernandez' motion for summary judgment on Labor Law § 240(1); vacating the portions of the Court's Order of March 28, 2022 that granted co-defendant Independence Carting, Inc's (hereinafter "Independence") motion for summary judgment and dismissing the common-law negligence, Labor Law § 200 and all cross-claims asserted against it; denying Independence's motion for summary judgment and reinstating the common-law negligence, Labor Law §200 and all cross claims asserted against it, including the moving defendants' claim for common law indemnification.

Fernandez alleged that he sustained injuries on June 30, 2017 while performing demolition and cleaning for a subcontractor, National Environmental Safety Company (hereinafter "NESCO") at a school construction project located at 57-06 99th Street, Queens, New York. Fernandez claimed that on the date of the accident, a large construction dumpster/container fell on his hand. Independence, a trash collecting company which was hired by NESCO to pick up and drop-off dumpster containers at the site. Fernandez claimed that at the time of the accident, the dumpster container was being hoisted by a Bobcat machine; that the container/dumpster was a falling object giving rise to liability of the owner and general contractor pursuant to Labor Law § 240(1).

According to City Defendants, on July 1, 2017, one day after the accident, three of Fernandez' co-workers, James Matriciano (hereinafter "Matriciano"); Lorenzo Fioretto (hereinafter "Fioretto") and Alfredo Sciorelli (hereinafter "Sciorilli") signed statements which directly disputed Fernandez' version of how the accident occurred; that the accident occurred because the dumpster was pushed into Fernandez' hand, and not due to the dumpster dropping on his hand while it was being hoisted. Movants claimed that they now have this evidence in admissible form as sworn affidavits, and that this information did not exist at the time that they made their previous motion to reargue on April 29, 2022.

In support of the motion in addition to the prior motion papers, City Defendants submitted the sworn affidavits of Sciorilli dated June 2nd 2022 and Fioretto, dated July 7th, 2022, along with their previously signed statements taken in July 1, 2017 following the accident. Both Sciorilli and Fioretto attested that their signed statements taken on July 1, 2017 were true and accurate. Sciorilli attested that although Fernandez claimed that one end of the dumpster which struck him was being lifted by a Bobcat at the time the dumpster was hit by a truck, there was no Bobcat lifting the dumpster at the time of the accident. Fioretto claimed that the dumpster which struck Fernandez was flat on the ground when it was hit by another dumpster which was being loaded onto the truck, and that at the time of the occurrence, there was no Bobcat or any other device lifting the dumpster which struck Fernandez. City Defendants argued that Fernandez' evidentiary support for his motion for summary judgment included an Incident Report prepared by City Defendants which stated, among other things, that Independence's truck driver accidentally "jerked" the truck he was operating backwards, hitting the dumpster, which Fernandez claimed was being hoisted and which he alleged fell upon his hand. Thus, in granting summary judgment for Fernandez, the Court necessarily adopted what was included in the Incident Report, and was part of the basis for the Court's March 28, 2022 determination that Fernandez had set forth a prima facie case for liability under Labor Law § 240(1). Movants also argued that the Court did not consider the same Incident Report which was submitted in opposition to Fernandez' motion in a light most favorable to the non-moving party, the City Defendants, when considering whether Fernandez' *prima facie* entitlement to summary judgment had been rebutted.

City Defendants stated that in previously moving to reargue the undersigned's March 28, 2022 decision, they respectfully disagreed with the Court on the admissibility of the Incident Report, pointing out that Fernandez had relied on it in his supporting papers. While the reargument motion was pending, City Defendants hired an investigator to track down the three non-party eyewitnesses so that they could verify their statements under oath and movants could thereby overcome any of the Court's concerns related to the statements constituting hearsay. According to the movants, their investigator was able to obtain the non-party affidavits of two of the witnesses and the affidavits were submitted in the reply papers. The Court granted reargument but it adhered to its prior decisions on summary judgment, because the City Defendants had improperly "...put forth new evidence in their reply papers despite failing to label the motion as a motion to renew and foreclosing any opportunity for opposing parties to submit opposition." Thus, City Defendants claimed that they had no other option but to make the instant separate motion to renew based upon the newly obtained evidence. Thus, there is a material issue of fact as to whether Fernandez' is entitled to summary judgment based upon his Labor Law § 240(1) claim. Also, this same evidence demonstrates that Independence is also not entitled to summary judgment because its truck driver caused the accident. Further, City Defendants argued that the Court could have and should have considered the statements along with the accident report and denied summary judgment to Fernandez and Independence, since none of the parties substantively challenged the validity of the statements or the Incident Report, and there was no indicia of unreliability. The three signed non-party eyewitness statements were taken a day following the incident and prior to litigation, and Fernandez' co-workers contradicted his version of events surrounding the accident.

Opposition Papers

In opposition, Fernandez and Independence argued that City Defendants' motion to renew was meritless. Independence maintained that the instant motion seeking renewal is actually an attempt at another failed motion to reargue, which is now untimely pursuant to CPLR 2221(d)(3). Sworn written statements were taken from the very same co-workers of Fernandez on July 1, 2017, a day following the accident. City Defendants waited until after the adverse ruling on summary judgment to obtain notarized statements from these co-workers, however, they did not even attempt to depose these co-workers as non-party witnesses. They also failed to oppose the initial motions for summary judgment by stating that a deposition of these parties was material and necessary to their defense of the matter (*see* CPLR 3212[f]; *see generally HSBC Bank USA, Nat. Ass'n v Armijos*, 151 AD3d 943 [2d Dept 2017]; *Loughlin v City of New York*, 74 AD3d 757 [2d Dept 2010]). Thus, no reasonable justification was presented by the City Defendants for the five year delay to obtain evidence from these potential witnesses in evidentiary form (*see generally Singh v Avis Rent A Car Sys., Inc.,* 119 AD3d 768 [2d Dept 2014]; *Lardo v Rivlab Trans. Corp.,* 46 AD3d 759 [2d Dept 2007]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436 [2d Dept 2007]).

Fernandez' testimony in this case indicated that a Bobcat being operated by his co-worker, "James" was lifting the dumpster so that he could place wood underneath it, and that while placing the wood he felt an impact to his hand and his person. No one had told him that the Independence truck struck the dumpster, and he did not recall the Independence truck still being present at the time of the occurrence. Unsworn copies the statements of Fernandez' co-workers were taken on July 1, 2017 and exchanged in response to discovery demands, demonstrating that City Defendants were well aware of these potential witnesses prior to the filing of the motions for summary judgment and during the pendency of motion practice, but they failed to attempt to secure testimony or affidavits.

Further, the affidavits would not change the outcome of the prior determination of the Court. Neither Sciorilli or Fioretto's affidavit attribute the happening of the accident to Independence. Thus, City Defendants' contention that Independence launched an instrument of harm- that the Independence truck backed into the dumpster, causing the dumpster to come into contact with Fernandez' person, fails. Neither the Incident Report or the Safety Open Observation Report were inadmissible as business records of City Defendants as set forth in the Court's decisions based upon hearsay grounds (*see* CPLR 4518[a]; *Matter of Leon RR,* 48 NY2d 117 [1979]; *Autovest, LLC v Cassamajor,* 195 AD3d 672 [2d Dept 2021];*Citibank v Cabrera*, 130 AD3d 861 [2d Dept 2015]).

Fernandez maintained that the City Defendants failed to establish that the motion was based upon the discovery of material facts which were unknown when the original motion was made (*see J.D. Structures, Inc. v Waldbaum*, 282 AD2d 434 [2d Dept 2001]). No reasonable justification for the failure to submit the evidence in the first instance was presented, since they had knowledge about these witnesses long before motions for summary judgment were made and also they had the signed statements in their possession (*see Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d 613, 614 [2d Dept 2017]). In fact, City Defendants did not send an investigator to locate Fioretto and

Sciorilli until after they made the motion to reargue, wherein they improperly submitted the affidavits for the first time in their reply papers.

Fernandez contended that the argument that the Court should have considered the accident reports and hearsay contained therein despite the failure to lay a proper foundation for their admission as business records, is an application to the Court for reargument, now renewal, which must be denied as untimely under CPLR 2221 (d) as more than 30 days have elapsed since the Decision and Order of the undersigned dated March 28, 2022 was served with Notice of Entry on March 31, 2022. Here, City Defendants failed to exercise due diligence in making their first factual presentation, and there is no evidence presented on this motion which would change the prior determination (*see* CPLR 2221[e][2]); *Byun Sik Chu v Kerrigan,* 154 AD3d 731 [2d Dept 2017]; *Cusimano v Strianese Family Limited Partnership*, 97 AD3d 744 [2d Dept 2012]; *Renna v Gullo*, 19 AD3d 472 [2d Dept 2005]).

Furthermore, the affidavits were a feigned attempt to create an issue of fact. Sciorilli stated in his prior written statement dated July 1, 2017 that the Independence truck was not moving backwards because he did not hear the sound of the reverse alarm. Fioretto stated in his prior written statement dated July 1, 2017 that he did not know if the Independence truck moved before the full container slid backwards or what caused the container to slide back and hit the other container. These affidavits failed to demonstrate that Independence launched an instrument of harm. Neither the Incident Report nor the Safety Open Observation Report are admissible under the business record exception. The witness Dorel Seban, an employee of the defendant New York City School Construction Authority testified that the Incident Report was prepared by another entity, LIRO personnel (*see* CPLR 4518; *Citibank, N.A. v Cabrera*, 130 AD3d 861 [2d Dept 2015]). Neither Sciorilli or Fioretto are LIRO employees, thus, their affidavits are insufficient to lay a foundation for admission of the reports and hearsay statements contained therein pursuant to the business record exception (*see Johnson v Lutz*, 253 NY 124 [1930]). Fernandez argued that although a copy of the Incident Report exchanged by City Defendants was annexed to his supporting papers, there was no mention or discussion about it and he did not attach the witness statements in support of his motion for summary judgment. It was only discussed in his reply papers in response to arguments raised by City Defendants. Regardless of the exact manner in which his accident occurred, it does not refute his contention that no safety devices were provided to him to protect him from an elevation related danger. (See *Turisse v Dominick Milone, Inc*., 262 AD2d 305 [2d Dept 1999]; *see also Sarata v MTA*, 134 AD3d 1089 [2d Dept 2015]).

Reply Papers

In response, City Defendants argued that Fernandez' allegations of how his accident occurred, that the dumpster was being hoisted at the time raised the possibility of statutory liability, however, same was not conclusive and summary judgment should not have been granted in his favor. Now, there are sworn statements which conflict Fernandez' version of events. Further, Independence's driver negligently caused the accident. These facts should be presented to a jury and a dispositive determination by the Court in Fernandez and Independence's favor on summary

judgment is not warranted. A reasonable excuse was presented for not submitting sworn affidavits of the witnesses earlier. Also, Independence was never entitled to summary dismissal because its driver negligently caused the accident in the case where it is alleged that Independence launched the force of harm that caused the accident. Further, Fernandez attached a copy of the Incident Report to his Statement of Material Facts and thus waived any objection to its admissibility (*see Cruz v Finney*, 148 AD3d 772 [2d Dept 2017]).

Law and Application

Motion to Renew CPLR 2221(e)

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]) and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][3]; *see generally Dudley-Lanier v City of New York,* 210 AD3d 739 [2d Dept 2022]; *Sanchez v 1710 Broadway, Inc.*, 114 AD3d 748 [2d Dept 2014].) Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." (*United Med. Assoc., PLLC v Seneca Ins. Co., Inc.*, 125 AD3d 959, 961 [2d Dept 2015]; quoting *Matter of Catherine V.D. (Rachel G.)*, 100 AD3d 992, 993 [2d Dept 2012]; *see also Oparaji v ABN Mtge. Group, Inc*., 202 AD3d 988 [2d Dept 2022].) "[A] 'reasonable justification' for the failure to present such facts on the original motion must be presented." (CPLR [e][3]; *Deutsche Bank Tr. Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]). "The requirement that a motion for renewal be based on new facts is a flexible one, and the Supreme Court has the discretion to grant renewal based upon facts known to the moving party at the time of the original motion if the movant provides a reasonable excuse for the failure to present those facts on the prior motion." (*See Yebo v Cuadra*, 98 AD3d 504 [2d Dept 2012]; *see also Mooklal v Clermont Farm Corp*., 187 AD3d 740 [2d Dept 2020].)

Upon the Court's consideration of the papers submitted herein, the motion is denied in its entirety. The "new evidence" offered by City Defendants consisted of information which they should have known existed at the time that the prior motions for summary judgment and their motion to reargue were made. Movants failed to demonstrate a reasonable justification for the failure to obtain the non-party affidavits of Sciorilli and Fioretto, easily identifiable as potential witnesses, during discovery-their sworn statements could have been obtained much earlier, or non-party depositions could have been taken during the discovery phase of this case. City Defendants failed to offer a reasonable justification for their lack of due diligence, as their counsel stated that they hired an investigator to obtain these sworn affidavits only after they had filed their prior motion to reargue. (*See generally*; *Lancer Ins. v Cortes*, 208 AD3d 1176 [2d Dept 2022]; *Siyunova v 5420 Mgmt Corp.,* 203 AD3d 975 [2d Dept 2022]; *Deutsche Bank Nat. Trust Co. v Elshiekh*, 179 AD3d 1017 [2d Dept 2020]; *Worrell v Parkway Estates, LLC.,* 43 AD3d 436 [2d Dept 2007]; *Stillway v Guzewicz*, 261 AD2d 392 [2d Dept 1999]).

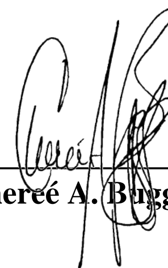
Nor would the new information change the Court's prior determination (*see Jian Feng Zhang v Roman*, 186 AD3d 1625 [2d Dept 2020]; *Moyal v Dewhurst*, 177 AD3d 666 [2d Dept 2019]).

Conclusion

Based on the foregoing, the motion by defendants, City of New York, New York City Board of Education, New York City Department of Education and New York City School Construction Authority is denied in its entirety.

This constitutes the Decision and Order of this Court.

Dated: January 20, 2023



Hon. Chereé A. Buggs, JSC