

**Figueiredo v New Palace Painters Supply Co. Inc.**

2005 NY Slip Op 30521(U)

January 3, 2005

Supreme Court, Bronx County

Docket Number: 8151/2004

Judge: Dianne T. Renwick

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[\* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 01

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

- Case Disposed
- Settle Order
- Schedule Appearance

FIGUEIREDO, MARIA B.

Index N<sup>o</sup>. 0008151/2004

-against-

Hon. DIANNE T. RENWICK

NEW PALACE PAINTERS SUPPLY

Justice.

The following papers numbered 1 to 5 Read on this motion, **REARGUE/RENEW/RESETTLE/RECONSIDER**  
 Noticed on **October 15 2004** and duly submitted as No. 2 on the Motion Calendar of 11/5/04

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	2
Answering Affidavit and Exhibits	3	4
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

FILED  
 JAN 21 2005  
 BRONX COUNTY CLERK'S OFFICE

Upon the foregoing papers this

*This motion is decided  
 pursuant to the attached  
 memorandum.*

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 1/3/05

Hon.   
**DIANNE T. RENWICK, J.S.C.**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-1**

MARIA B. FIGUEIREDO, as EXECUTRIX  
of the Estate of ANTONIO FIGUEIREDO,  
deceased and MARIA FIGUEIREDO,  
Individually,

Index No. 8151/2004  
On November 5, 2004

Plaintiffs,

-- against --

**DECISION/ORDER**

NEW PALACE PAINTERS SUPPLY CO.  
INC., FRAN-JU, INC., and GERALDO  
MARCHESI, INC.,

Defendants.

**Present:**  
**Hon. Dianne T. Renwick**  
**Justice of the Supreme Court**

**FILED**  
JAN 11 2005  
CLERK'S OFFICE

The following documents were considered in reviewing plaintiffs' motion to renew and reargue their previous motion for an order granting partial summary judgment on liability:

<b>Papers</b>	<b>Numbered</b>
<b>Plaintiff's Notice of Motion, Affirmation</b>	<b>1, 2 (Exhibits)</b>
<b>Defendant's Affirmation in Opposition</b>	<b>3 (Exhibits)</b>
<b>Co-Defendant's Affirmation in Opposition</b>	<b>4 (Exhibits)</b>
<b>Reply Affirmation</b>	<b>5</b>

This matter arise out of a fatal construction site accident. The executrix of the decedent plaintiff's estate commenced this action seeking to recover for his personal injuries and wrongful death. Plaintiffs previously moved for partial summary judgment on liability based upon the alleged violation of Labor Law 240(1). This Court denied the previous motion as premature without prejudice and with leave to renew upon the completion of discovery. Here, plaintiff moves to renew and reargue a prior summary judgment motion pursuant to C.P.L.R. §2221(e).

C.P.L.R. §2221(f) demands this Court to treat a combined motion for leave

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to argue and leave to renew as if separate respective motions are made. This Court first considers plaintiff's motion to renew. A motion to renew must be supported by evidence of new facts not offered on the prior motion that would affect the prior determination. C.P.L.R. §2221(e). Furthermore, the movant must show a reasonable justification for not presenting such facts in the prior motion. Id. "If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination." C.P.L.R. §2221(f). Here, plaintiffs proffered no new fact not offered in the prior motion. Therefore, the motion to renew is denied.

This Court now focuses on plaintiffs' motion to reargue. A motion to reargue is addressed to the sound discretion of the court, and the grounds for such relief are strictly limited. Pro Brokerage v. Home Ins. Co., 99 A.D.2d 971 (1st Dept. 1984); 300 West Realty Co. v. City of New York, 99 A.D.2d 708 (1st Dept. 1984). A motion to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. C.P.L.R. §2221 (d)(2).

Plaintiffs assert that this Court overlooked the eyewitness' affidavit in dismissing plaintiffs' previous motion. The affidavit by David Balgobin was indeed attached to the motion, but plaintiffs' counsel did not mention the affidavit in his affirmation. Consequently, this Court inadvertently overlooked the eyewitness' affidavit. This Court finds that plaintiffs, therefore, showed that they are entitled to re-argument of the prior motion.

"If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination." C.P.L.R. §2221(f). Here, this Court decides to adhere to its determination on the original motion, that the motion for summary judgment is premature because defendants have not had the opportunity to conduct discovery. Particularly, defendants did not have a chance to depose plaintiffs' eyewitness, Mr. Balgobin, or any of the decedent's representatives. See, e.g., Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993) (summary judgment premature where defendant's representatives are not deposed); Stajano v. United Techs. Corp., 5 A.D.3d 260 (1st Dept. 2004) (summary judgment premature before discovery is completed); George v. N.Y. City Transit Auth., 306 A.D.2d 16

(reversing the motion court's grant of summary judgment where defendant did not respond to discovery). This Court, therefore, finds that the motion for summary judgment is premature at this stage of litigation.

For the foregoing reasons, it is hereby


ORDERED that plaintiffs' motion to renew is denied; it is further

ORDERED that plaintiffs' motion to re-argue is granted; and it is further

ORDERED that upon reargument this Court denies plaintiffs' motion for summary judgment.

This constitutes the Decision and Order of the court.

Dated: January 3, 2005  
Bronx, New York



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Hon. Dianne T. Renwick, J.S.C.