

<b>Fox v Pena</b>
2018 NY Slip Op 33426(U)
December 14, 2018
Supreme Court, Kings County
Docket Number: 514330/2016
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14<sup>th</sup> day of DECEMBER, 2018.

PRESENT:  
HON. RICHARD VELASQUEZ

Justice.

-----X  
CHRISTOPHER FOX,

Petitioner,

Index No.: 514330/2016

-against-

**AMENDED**  
Decision and Order

JOSE A. PENA, LISA M. CABRERA, PV  
HOLDING CORP., DEANDRE DOUGLAS,

Respondent(s).  
-----X

2019 JAN -7 PM 11:00  
KINGS COUNTY CLERK  
FILED

The following papers numbered 1 to 8 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	1
Opposing Affidavits (Affirmations)_____	2-4
Reply Affidavits (Affirmations)_____	5-8

This Order hereby amends the order dated November 26, 2018 to correct scrivener's error in the last sentence in the order to reflect summary judgment was granted against defendant Pena not Fox as indicated in the Order dated November 26, 2018.

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant. LISA CABRERA, moves this court by motion (1) for leave to reargue and upon reargument modifying subsections 2, 3, and 4 of this courts March 21, 2018 Order and an (2) order pursuant to CPLR 5015 vacating the default in opposing plaintiff's cross-motion. Respondent opposes the same and request this court deny the Petitioner's motion. Defendant Douglas partially opposes defendant Cabrera's motion contending only that part of the order applying to defendant Cabrera should be considered in the motion to reargue not any part of the order concerning defendant Douglas.

### ARGUMENTS

Petitioner contends leave to reargue and modify the order granting plaintiff's cross-motion for summary judgment. Defendant Lisa M. Cabrera contends the court overlooked the non-negligent excuse in her motion for summary judgment and the plaintiff did not make a prima facie case for the court to dismiss the defendant, Lisa M. Cabrera's affirmative defenses of emergency situation and seat belt, and as a result the plaintiff's cross motion for summary judgment against her should have been denied. In addition, the default against defendant, Lisa M. Cabrera's, although not explicitly stated in the order, should be vacated because defendant can demonstrate a reasonable excuse of law office error and never receiving a copy of the cross-motion filed in opposition to their motion for summary judgment.

Respondent contends the court should deny this motion because failed to show what the Court got wrong in its analysis of the laws herein.

### ANALYSIS

CPLR 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "shall 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. CPLR 2221.

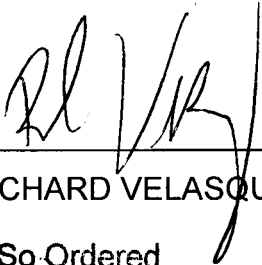
Under the caselaw existing prior to the 1999 amendments, a motion for re-argument was often used when there was a change in the law after the prior order. CPLR 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue, is the proper expedient when the motion is based on a change in the law that occurs while the case is still subjudice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. See *Siegel, New York Practice* 449 (4th ed. 2005). The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind. NY CPLR 2221. Additionally, A court has inherent discretionary power to vacate an order or judgment in the interests of substantial justice. See *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727, 790 NE2d 1156 (2003).

In the present case, defendant Cabrera has pointed out the court overlooked that defendant Cabrera, has offered a non-negligent excuse, which raises a question of fact for the jury to determine. Therefore, summary judgment should not have been granted to

the plaintiff as against defendant, Cabrera. There are disputed facts in the present case, it is the function of the jury to assess and weigh the credibility of the parties. Resolving questions of credibility assessing the accuracy of witnesses and reconciling conflicting statements are tasks entrusted to the trier of fact to decide. *Bravo v. Vargas*, 113 AD3d 579 (2d Dept., 2014); *Yefer v. Shalmoni*, 81 AD3d 637 (2nd Dept., 2001); *Nye v. Putnam Nursing and Rehabilitation Center*, 62 AD3d 767 (2nd Dept.), 2009).

Accordingly, Petitioners request to reargue is granted and upon reargument this Court modifies the order dated March 21, 2018 to read as follows: "(1) Defendant Douglas motion for dismissal of complaint and cross claims is hereby granted. (2) Defendant Cabrera motion for dismissal is denied due to questions of fact; (3) Plaintiff cross motion for summary judgment as to Cabrera is denied as issues of facts exist, and all of defendant Cabrera's affirmative defenses remain intact; (4) plaintiff's motion for summary judgment as to liability against defendant Pena is hereby granted, on default and without opposition, for the reasons stated above.

This constitutes the Decision/Order of the Court.  
 Date: December 14, 2018

  
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 RICHARD VELASQUEZ, J.S.C.

So Ordered  
 Hon. Richard Velasquez

DEC 14 2018

2019 JAN -7 PM 11:00  
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