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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARTIN J. SCHULMAN Justice — IA Part 7

LUIS COQUE

Plaintiff,

- against -

WILDFLOWER ESTATES DEVELOPERS, INC., et al.,

Defendants.

Index Number 18365 2001

Motion Date February 24, 2004

Motion Cal. Numbers 9 and 10

WILDFLOWER ESTATES DEVELOPERS, INC.,

Third-Party Plaintiff,

- against -

CITY WIDE BUILDING CORP.,

Third-Party Defendant.

Third-Party Index Number 350541 2001

CLASSIC CONSTRUCTION,

Second Third-Party Plaintiff,

- against -

BROTHERS HOME RENOVATION, INC.,

Second Third-Party Defendant.

Second Third-Party Index Number 350750 2001

Motion Calendar Numbers 9 and 10 are combined herein for disposition.

The following papers numbered 1 to 28 read on this motion by defendant/third-party plaintiff Wildflower Estates Developers, Inc. ("Wildflower") to renew and reargue portions of its prior motion for summary judgment and to resettle the order dated October 9, 2003 (Dye, J.), and upon reargument/renewal for summary judgment on its common-law indemnification claim against third-party defendant City Wide Building Corp. ("City Wide") and dismissal of plaintiff's

claim for lost wages; and on this motion by Classic Construction and this cross motion by City Wide to reargue a portion of Wildflower's prior motion for summary judgment.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-9
Notice of Cross Motion - Affidavits - Exhibits ...	10-13
Answering Affidavits - Exhibits	14-23
Reply Affidavits	24-28

Upon the foregoing papers it is ordered that the motions and cross motion are decided as follows.

The court's error in overlooking Wildflower's arguments regarding dismissal of plaintiff's lost wages claim as set forth in the papers in support of the motion is a proper basis for reargument (see, CPLR 2221[d][2]). Therefore, leave to reargue is granted.

Wildflower argues that based upon plaintiff's admissions, he is not entitled to work in the United States under the Immigration Reform & Control Act of 1986. Therefore, based upon the holding in Hoffman Plastic Compounds, Inc. v National Labor Relations Board (535 US 137) and the application of this holding to a claim for lost wages in a Labor Law case (Majlinger v Casino Contr. (1 Misc 3d 659), Wildflower maintains that plaintiff's lost wages claim must be summarily dismissed.

This court does not agree. Prior to Hoffman, courts have held that neither the plaintiff's allegedly improper conduct in obtaining his or her employment, nor his or her status as an illegal alien constitutes a bar to a claim for lost wages (see, Mazur v Rock-McGraw, 246 AD2d 515; Collins v NYCHHC, 201 AD2d 447; Public Admin. of Bronx County v Equitable Life Assurance Soc. of the U.S., 192 AD2d 325; Klapa v O & Y Liberty Plaza Co., 168 Misc 2d 911). Notably, the aforementioned cases were all decided after Congress' enactment of the Immigration Reform and Control Act of 1986 ("IRCA") which made it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.

Negligence actions brought in New York courts decided subsequent to Hoffman have gone both ways with regard to whether an undocumented alien can recover lost wages in a tort action (see, Cano v Mallory Mgt., 195 Misc 2d 666 [holding that a plaintiff's undocumented alien status is not a bar to recovery, but rather

evidence that should be presented to the jury on the issue of lost wages]; Balbuena v IDR Rlty., LLC, NYLJ, May 28, 2003, at 18, col 1 [denied dismissal of lost wages claims expressing that nothing in the Hoffman decision "states, or even implies, that its holding would be applicable to tort actions brought under state common law"]; cf., Majlinger v Casino Contr. Corp., supra [constrained by Hoffman, the court dismissed plaintiff's lost wages claim]). This court, however, is persuaded that Hoffman should not be read so broadly as to preclude recovery of lost wages in tort actions. As previously stated in Balbuena v IDR Rlty., LLC (supra), the Supreme Court in Hoffman

> merely held that an undocumented worker could not be awarded backpay under the NLRA, a specific federal statute not pertinent to [plaintiff's] claims. The only matter before this Court is whether [plaintiff] has the right, under New York common law, to recover for lost wages.

Indeed, the court in Majlinger recognized that its opinions were in contrast to the other decisions rendered subsequent to the Hoffman case. Hence, the branch of Wildflower's motion for summary judgment dismissing plaintiff's lost wages claim is denied. The branch of the motion for leave to renew is also denied. To prevail on its claim for common-law indemnification against City Wide, plaintiff's employer, Wildflower as the movant seeking summary judgment, has the burden of coming forward with competent medical evidence that plaintiff sustained a grave injury as defined in Workers' Compensation Law § 11 (see, Sergeant v Murphy Family Trust, 292 AD2d 761; Way v George Grantling Chemung Contr. Corp., 289 AD2d 790; Potter v M.A. Bongiovanni Inc., 271 AD2d 918; Marte v Snapple Beverage Corp., 193 Misc 2d 662; see also, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). On its initial motion, Wildflower failed to submit any medical evidence that plaintiff's injuries included permanent paraplegia as contemplated by the Legislature (see, Workers' Compensation Law § 11; Bradt v Lustig, 280 AD2d 739, appeal dismissed 96 NY2d 823). In support of its motion to renew, Wildflower has submitted an affirmation and report of a neurologist.

An application for leave to renew must be supported by additional material facts which existed at the time of the original motion but were not known to the party seeking renewal, and by a justifiable excuse for not initially presenting those facts to the court (see, Foley v Roche, 68 AD2d 558, appeal denied 56 NY2d 507; see also, Miller v Fein, 269 AD2d 371, lv dismissed 95 NY2d 887; Palmer v Toledo, 266 AD2d 268; Haussmann v Wolf, 187 AD2d 371). An

application for renewal, however, must be denied if, by using due diligence at the time of the original motion, the additional facts could have been ascertained (see, Zdanis v Town of Islip, 238 AD2d 334, lv dismissed in part, denied in part 90 NY2d 923; Dyer v Planning Bd. of the Town of Schaghticoke, 251 AD2d 907, lv dismissed 93 NY2d 1000; Haussmann v Wolf, supra).

Measured against this standard, renewal is not warranted. The neurologist's affirmation and report do not set forth any new facts or information not readily available in the first instance, and no excuse has been proffered for failing to submit this evidence on the original motion (see, Zdanis v Town of Islip, supra; Dyer v Planning Bd. of the Town of Schaghticoke; supra; Haussmann v Wolf, supra). Therefore, leave to renew is denied.

Wildflower's request to resettle the order is granted. Opposition to the original motions were received and considered. Therefore, the last sentence of the second paragraph on page 2 of the October 9, 2003 order is deleted.

The motion by Classic Construction and the cross motion by City Wide to reargue are denied. A motion to reargue allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law" (Foley v Roche, supra, at 567). This court finds that Classic Construction and City Wide each have failed to satisfy the burden of establishing that this court misapprehended either the facts or the law so as to warrant reargument. A motion to reargue should not be used as "a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (id.; see also, Pahl Equip. v Kassis, 182 AD2d 22, lv dismissed in part, denied in part 80 NY2d 1005).

To summarize, the motion by Wildflower is granted to the extent of granting reargument, and upon reargument, the motion for summary judgment dismissing plaintiff's lost wages claim and granting judgment on the common-law indemnification claim against City Wide is denied. The motion is also granted to the extent of deleting the sentence "No opposition has been submitted" on page 2 at the end of paragraph 2 of the October 10, 2003 order. Leave to renew is denied. The motion by Classic Construction and the cross motion by City Wide to reargue are denied.

Dated: April 30, 2004

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J.S.C.