Saguay v Eastside 77 Assoc., LLC
2015 NY Slip Op 32960(U)
April 20, 2015
Supreme Court, New York County
Docket Number: 112783/09
Judge: Paul Wooten
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

JORGE SAGUAY,

Plaintiff,

-against-

INDEX NO. 112783/09

MOTION SEQ. NO. 007

EASTSIDE 77 ASSOCIATES, LLC and ALCHEMY PROPERTIES, INC.,

Defendants.

The following papers were read on this motion by defendant, pursuant to CPLR 2221, for leave to renew.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhi...

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

Cross-Motion: ☐ Yes ■ No

Before the Court is a motion by defendant Alchemy Properties, Inc. (Alchemy), pursuant to CPLR 2221(e), for leave to renew its opposition to plaintiff's motion for summary judgment as to liability on plaintiff's Labor Law § 240(1) claim. The Court previously granted plaintiff's motion as against both defendants on his Labor Law § 240(1) claim in an Order dated October 21, 2013. Upon renewal, Alchemy seeks to have plaintiff's motion for summary judgment as against it on plaintiff's Labor Law § 240(1) claim denied.

BACKGROUND

The underlying facts are more fully set out in the prior decision in this action, familiarity with which is presumed. Briefly, plaintiff commenced this action to recover damages for personal injuries that he sustained when, while working as a welder, he fell through an opening in the 16th floor of the construction site located at 303 East 77th Street in Manhattan. The complaint asserted causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) against Eastside 77 Associates, LLC (Eastside) and Alchemy, each of which was alleged to be both an owner and a general contractor.

At the conclusion of discovery, defendants moved for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims. In their moving papers, defendants identified Eastside as the owner of the property and Alchemy as the general contractor.

Shortly thereafter, plaintiff moved for summary judgment against both defendants on the issue of liability with respect to his Labor Law §§ 200, 240(1), and 241(6) claims. In their opposing papers, defendants again identified Eastside as the owner of the property and Alchemy as the general contractor.

By an Order dated October 21, 2013, this Court denied the defendants' motion for summary judgment to dismiss plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims, as well as plaintiff's motion for summary judgment on these claims. However, the Court granted plaintiff's motion for summary judgment as to liability against Eastside and Alchemy with respect to plaintiff's Labor Law § 240(1) claim. The Court determined that plaintiff had established his entitlement to summary judgment by producing evidence that he was subject to a gravity-related risk, that he was not provided with adequate safety devices that provided proper protection, and that the lack of such devices was a contributory cause of his injury. The Court rejected defendants' two arguments in opposition that plaintiff had been the sole proximate cause of his accident, and that plaintiff had been furnished with all necessary and adequate safety devices and had unreasonably chosen not to use them.

Alchemy now seeks leave to renew its opposition to plaintiff's motion for summary judgment as to liability on the Labor Law § 240(1) claim, and upon renewal, for an order denying plaintiff's motion for summary judgment as against it. Alchemy bases its motion on evidence that it claims is sufficient to raise an issue of fact as to whether Alchemy was, in fact, the general contractor on the project. Alchemy acknowledges that this evidence was previously available but not submitted on the prior motion. Nevertheless, Alchemy argues that its motion to renew should be granted because this evidence likely would have changed the outcome on

the prior motion.

In his affirmation in support of the motion, Alchemy's attorney states that this Court's prior decision, granting the summary judgment motion against Alchemy, unquestionably was based upon Alchemy's purported status as the general contractor for the construction project. The attorney states that he has since discovered, as a result of communications with his client following the decision on the summary judgment motion, that Alchemy was not the general contractor on the construction project, but that Alchemy had been retained by Eastside as its agent in the pre-development design, marketing, and sale of the condominium units under construction. As evidence of these facts, Alchemy submits a copy of a "Sales Agent and Marketing Agreement" that Eastside and Alchemy allegedly executed in 2007 (*see* Ryan Affirmation, Exhibit 9). Alchemy also submits an affidavit in support of the motion to renew from Kenneth Horn, the President of Alchemy, who avers that Alchemy was retained by Eastside for the purpose of assisting in the pre-development design, marketing and sale of the condominium units under construction, and that Alchemy never acted as the general contractor or performed any construction activities in connection with project (*id.*, exhibit 10).

Alchemy's attorney states that the true nature of Alchemy's role in the construction project was not offered as part of the defendants' opposition to plaintiff's prior motion due to law office failure, i.e., the attorney's mistaken impression and misunderstanding of Alchemy's role in the project, which led him incorrectly to identify Alchemy as the general contractor in the moving papers. The attorney states that this misunderstanding continued until late February 2014, when, as a result of his efforts to communicate with defendants about the status of this action, Alchemy put him in contact with Alchemy's construction counsel. The construction counsel, after reviewing the case file, contacted Alchemy's attorney to clarify that Alchemy had not acted as a general contractor on the project, but as a pre-development design, marketing, and sales agent. The construction counsel also provided Alchemy's attorney with a copy of the "Sales Agent and Marketing Agreement" evidencing the nature of Alchemy's alleged involvement in the

project. It is this document, in combination with the averments contained in Horn's affidavit in support of the motion to renew, that comprise the evidence upon which Alchemy now bases its motion for leave to renew.

DISCUSSION

CPLR 2221(e)(2) and (3) provide that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." Our courts have held that "[r]enewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed Matter of Beiny*, 71 NY2d 994 [1988] [internal citation omitted]; *see also Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]).

Although "[a] motion for leave to renew is intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention," this rule is not inflexible (*Garner v Latimer*, 306 AD2d 209, 209 [1st Dept 2003]; *see also Rancho Santa Fe Ass'n v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]). Thus, our courts have held that "renewal may be granted in the court's discretion, in the interest of justice, even on facts that were known to the movant at the time of the original motion" (*Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487, 487 [1st Dept 2010]). Indeed, "even if the rigorous requirements for renewal are not satisfied, such relief may still be granted so as not to defeat substantive fairness" (*Rancho Santa Fe Ass'n*, 36 AD3d at 461). Even then, however, our courts have held that such treatment is available only in a "rare case" (*Pinto v Pinto*, 120 AD2d 337, 338 [1st Dept 1986]), such as where liberality is warranted as a matter of judicial policy (*see Wattson v TMC Holdings Corp.*, 135 AD2d 375 [1st Dept 1987], and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]; *Henry*, 72 AD3d

at 602). Moreover, our courts repeatedly have emphasized that renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Queens Unit Venture, LLC v Tyson Court Owners Corp.*, 111 AD3d 552, 552 [1st Dept 2013]; *see also Henry*, 72 AD3d at 602, citing *Matter of Weinberg*, 132 AD2d at 210).

Alchemy argues that its motion to renew should be granted because Alchemy's actual role in the project was not offered as a defense on the prior motion due to "law office failure," and because the evidence of Alchemy's role, had it been submitted on the prior motion, would have resulted in the denial of plaintiff's summary judgment motion. Horn additionally avers in his affidavit in support of the motion, that Alchemy was not made aware of its attorney's misunderstanding until after the issuance of this Court's decision on the summary judgment motion. Horn indicates that the attorneys' erroneous identification resulted from the attorney's failure to communicate with Alchemy regarding its role in the project and to advise Alchemy of plaintiff's summary judgment motion.

Because this Court finds that Alchemy has failed to offer a reasonable justification for its failure to present the evidence regarding Alchemy's role in the project on the prior motion, Alchemy's motion for leave to renew will be denied. While "law office failure" can be a reasonable excuse for the failure to include new facts or evidence on a prior motion (*see Joseph v Board of Educ. of the City of N.Y.*, 91 AD3d 528 [1st Dept 2012]), the alleged mistakes and omissions involved here, in failing to ascertain Alchemy's status and to oppose plaintiff's motion for summary judgment based on Alchemy's alleged role in the project, are beyond what our courts traditionally have considered excusable as "law office failure" (*see e.g. id.*, 91 AD3d at 529 [defendant's inadvertent failure to append the "so ordered" version of the parties stipulation to a date for making a summary judgment motion, which otherwise would have been untimely, is reasonably excusable as law office failure]; *see also Hackney v Monge*, 103 AD3d 844, 845 [2d Dept 2013] [defendant's inadvertent omission in failing to include, with the papers submitted to court, the second page of the defendant's affidavit containing his

notarized signature, was tantamount to law office failure; which constituted a reasonable justification for the failure to present such facts on the prior motion]; *Tsioumas v Time Out Health & Fitness*, 78 AD3d 619, 619 [1st Dept 2010] [delay in making a formal motion to restore the action due to a paralegal in plaintiff's counsel's office allegedly having seen the case as "active" on the court's Web site, thereby leading counsel to believe that no formal motion to restore was needed, was excusable as law office failure]).

Alternatively, Alchemy argues that where, as here, the newly submitted evidence would have changed the outcome of the prior motion, by creating an issue of fact as to Alchemy's status as a general contractor, the court may grant renewal in the interests of justice even where no or an inadequate excuse is offered for failing to include the evidence in support of the initial motion.

Arguably, the evidence of the parties sales and marketing agreement, when combined with the factual averments contained in the Horn supporting affidavit, might have been sufficient to raise an issue of fact as to whether Alchemy acted as the general contractor on the project. However, it also is apparent, when the totality of the parties' various submissions are considered, that Alchemy's role, and the extent of its involvement in the project, has yet to be made clear.

In any event, although a court may, in the interest of justice, exercise its discretion to grant a motion to renew upon facts that were known to the movant at the time of the original motion, notwithstanding the absence of an excuse (*see Trinidad v Lantigua*, 2 AD3d 163, 163, [1st Dept 2003] ["Under the particular circumstances presented, the affidavit of plaintiff's expert, which plaintiff's prior counsel inexplicably failed to submit, was properly considered by the court on renewal"]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003] [appropriate to grant renewal on a motion to change venue based on evidence not presented on the prior motion, i.e., defendants' affidavits and documentary evidence establishing their claimed residence]), a court also may decline to exercise such discretion where the movant failed to exercise due diligence in

obtaining the evidence proffered in support of renewal, and also failed to provide a reasonable explanation for not presenting those facts on the prior motion (*see Eddine*, 72 AD3d at 487-488; *see also Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416, 417 [1st Dept 2011] [interests of justice did not warrant renewal where City failed to show that it exercised due diligence in investigating the facts relevant to its liability or that it had a reasonable excuse for failing to present these facts, which it discovered in publicly available documents concerning its own property]).

As Alchemy has not shown that the failure to submit its evidence as to Alchemy's role and status as general contractor, or to assert Alchemy's status as a defense in opposing plaintiff's motion, involved anything other than the failure to exercise due diligence in making its first factual presentation, the exercise of such discretion is not warranted in this case.

CONCLUSION

Accordingly, it is

ORDERED that defendant Alchemy Properties, Inc.'s motion for leave to renew, made pursuant to CPLR 2221(e), is denied.

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

FILED

APR 21 2015

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/20/15

Paul Wooten J.S.C.

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