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| <b>Arias v Allen J. Reyen, Inc.</b>                                                                                                                                                                                            |
| 2019 NY Slip Op 34433(U)                                                                                                                                                                                                       |
| December 9, 2019                                                                                                                                                                                                               |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 59834/2018                                                                                                                                                                                            |
| Judge: Janet C. Malone                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X  
RODRIGO ARIAS

Index No. 59834/2018

Plaintiff,

-against-

DECISION AND ORDER  
(*Summary Judgment*)

ALLEN J. REYEN, INC. AND ALLEN J. REYEN,

Defendants.

Motion Sequences: 1 & 2

-----X  
MALONE, J.

The following papers numbered 1-7 were read and considered in deciding Defendants' motions for summary judgment:

| <u>Papers</u>                                                                                                                | <u>Numbered</u> |
|------------------------------------------------------------------------------------------------------------------------------|-----------------|
| <u>Motion Sequence 1</u>                                                                                                     |                 |
| Defendant Allen J. Reyen's Notice of Motion/Affirmation of Shawn D. Wagner, Esq. in Support/Exhibits A-E <sup>1</sup>        | 1               |
| Affirmation of Barry Semel-Weinstein, Esq. in Opposition/Exhibit B <sup>2</sup>                                              | 2               |
| Reply Affirmation of Shawn D. Wagner, Esq.                                                                                   | 3               |
| <u>Motion Sequence 2</u>                                                                                                     |                 |
| Defendant Allen J. Reyen, Inc.'s Notice of Motion/Affirmation of Darren P. Renner, Esq. in Support/Exhibits A-D <sup>3</sup> | 4               |
| Memorandum of Law in Support by Darren P. Renner, Esq.                                                                       | 5               |
| Affirmation of Barry Semel-Weinstein, Esq. in Opposition/ Exhibits A-B                                                       | 6               |
| Reply Memorandum of Law by Darren P. Renner, Esq.                                                                            | 7               |

<sup>1</sup> Defendant Allen J. Reyen's Affidavit is Exhibit D to the Notice of Motion.

<sup>2</sup> Barry Semel-Weinstein, Esq.'s Affirmation in Opposition is one document filed in opposition to both Motion Sequences 1 and 2. Further, as the purported affidavit of Plaintiff Rodrigo Arias was translated to him and is filed without a corresponding affidavit from a qualified translator in compliance with [CPLR §2101 (b)], the purported affidavit attached as Exhibit A to Barry Semel-Weinstein, Esq.'s Affirmation in Opposition, was not considered by the Court

<sup>3</sup> Defendant Allen J. Reyen's Affidavit is Exhibit D to the Notice of Motion.

Starting at the bottom of Plaintiff Rodrigo Arias' ("Plaintiff") purported affidavit is Rigoberto Reyes' notarized statement that he translated to Plaintiff from English to Spanish the statements in Plaintiff's purported affidavit. As Mr. Reyes' statement is insufficient under CPLR § 2101(b), which requires that Plaintiff's purported affidavit be accompanied by an affidavit from Mr. Reyes as to his qualifications as a translator, the Court has not considered the document Plaintiff's Counsel submits as Plaintiff's affidavit. *See, Raza v. Gunik*, 129 A.D.3d 700 (2d Dept. 2015), *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 A.D.3d 901 (2d Dept. 2008), and *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d 47, 54 (2d Dept. 2011)("Accordingly, the plaintiff's English-language affidavit, without a corresponding affidavit from a qualified translator, cannot be considered in opposition.").

Regardless, Defendant Allen J. Reyen and Allen J. Reyen, Inc. (hereinafter individually Defendant Reyen, Defendant Reyen, Inc. and collectively Defendants"), still fail to make a *prima facie* showing of entitlement to judgment as a matter of law, as there exists the questions whether the barn unattached from the single-family dwelling located at 23 White Birch Road, Pound Ridge, New York (the "Premises") exempts Defendants from liability for Plaintiff's alleged injuries under New York Labor Law §§ 200, 240 and 241 and whether Defendants directed, supervised or controlled Plaintiff's work at the Premises. Therefore, summary judgment is **denied** as set forth herein. *See*, CPLR R 3212, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, (1986), and *Zuckerman v. New York*, 49 N.Y.2d 557, (1980); *see also*, Affidavit of Allen J. Reyen, at paragraphs 1-5 as Exhibit D to Defendants' Reyen's Notice of Motions.

By way of relevant background, Plaintiff alleges in the underlying personal injury action that while performing work at the direction of Defendant Reyen and Defendant Reyen, Inc., he fell

from a ladder that Defendants directed him to use resulting in Plaintiff allegedly sustaining serious physical injuries. *See*, Summons and Verified Complaint as Exhibit A, Defendant Allen J. Reyén's Verified Answer as Exhibit B, and Defendant Allen J. Reyén, Inc.'s Verified Answer as Exhibit C on Motion Sequence 1.

Undisputed is that Defendant Reyén is a co-owner of the single-family dwelling located at the Premises and that at the back of the single-family dwelling is an unattached barn. It is also undisputed that Defendant Reyén is a principal in Defendant Reyén, Inc., a general contracting business in Stamford, Connecticut. *See*, Affidavit of Allen J. Reyén at paragraphs 1-5 as Exhibit D to Motion Sequences 1 and 2, Affirmation of Darren P. Renner, Esq. at paragraph 11 on Motion Sequence 2 and Verified Complaint at paragraphs 2-4 and 7-8 on Motion Sequence 1.

On Defendants' motions for summary judgment they argue that under New York Labor Law §§ 200, 240 (1) and 241 (6), Defendants are exempt from liability because located at the Premises is a single-family dwelling co-owned by Defendant Reyén and that neither Defendant Reyén nor Defendant Reyén, Inc. directed, supervised nor controlled Plaintiff's work at the Premises. *See*, Affirmation of Shawn D. Wagner, Esq. at paragraphs 23-39 on Motion Sequence 1 and Memorandum of Law in Support by Darren P. Renner, Esq.

Nonetheless, Defendant Reyén, co-owner of the Premises, submitted the identical Affidavit in support of both motions brought by Defendants without making it clear to the Court that he is authorized as a principal to speak on behalf of Defendant Reyén, Inc. when he states that he hired Jorge Cardona ". . . to re-side my barn" in or about July 2016, and that it was Mr. Cardona who brought Plaintiff to the Premises to work on the barn. Further, Defendant Reyén's Affidavit states that Defendant Reyén, Inc. played no role in the re-siding work performed at the Premises in 2016 and that Defendant Reyén did not give direction to Mr. Cardona or Mr. Cardona's workers with



respect to the re-siding work on the barn at the Premises and that Defendant Reyen did not give Mr. Cardona or his workers permission to use any of the tools or materials located at the Premises. *See*, Affidavit of Allen J. Reyen, at paragraphs 8-14 as Exhibit D to Motion Sequences 1 and 2

Consequently, Defendants have failed to make a *prima facie* showing that Plaintiff, was solely under the direction, supervision and/or control of Mr. Cardona and not under the direction, supervision and/or control of Defendant Reyen and/or Defendant Reyen, Inc. when Plaintiff performed work at the Premises. *See*, Affidavit of Defendant Allen J. Reyen, at paragraphs 4 and 8 as Exhibit D to Motion Sequences 1 and 2; *see also*, Verified Complaint at paragraphs 19-31.

Additionally, in dispute is whether Defendant Reyen uses the barn at the Premises as an extension of the single-family dwelling on the Premises or if the status of the barn as a dwelling was compromised by Defendant Reyen, Inc. having allegedly used the barn to conduct business including on July 13, 2016, when Plaintiff claims he fell off the ladder that Defendant Reyen and/or Defendant Reyen, Inc. allegedly provided to Plaintiff to perform work at the Premises. *See*, Verified Complaint at paragraphs 34-36 and Bill of Particulars as Exhibits A and E on Motion Sequence 1.

Although Defendant Reyen states that the barn serves no commercial purpose for Defendant Reyen, Inc., again, Defendant Reyen's Affidavit is devoid of any language indicating that Allen J. Reyen is authorized to and is speaking on behalf of Defendant Reyen, Inc. in the Affidavit of Defendant Reyen. *See*, Affidavit of Allen J. Reyen, at paragraph 6 as Exhibit D to Defendant Reyen's Notice of Motion.

Based on the foregoing, Defendant Allen J. Reyen's motion for summary judgment is **denied** and Defendant Allen J. Reyen, Inc.'s motion for summary judgment is **denied**.

The Parties are to appear for a Pre-Trial Conference in the Settlement Conference  
Part, Courtroom 1600 at 9:15 a.m. on Tuesday, January 7, 2020.

To the extent relief sought was not addressed herein, it is denied.

This constitutes the Decision and Order of this Court.

Dated: December 9, 2019  
White Plains, New York

ENTER:

*Janet C. Malone.*

HONORABLE JANET C. MALONE  
Justice of the Supreme Court

VIA NYSCEF:

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