

Hernandez v High Rise Bldg. & Design, Inc.

2019 NY Slip Op 34909(U)

November 6, 2019

Supreme Court, Kings County

Docket Number: Index No. 514076/17

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 6th day of November 2019

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X,
JESUS ANTONIO HERNANDEZ and YISSEL BATISTA,

Plaintiffs,

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-against-

HIGH RISE BUILDING & DESIGN, INC., J.J.B. RETAIL CORP. d/b/a SUNRISE AUTO SALES, and SSG GROUP,

Defendants.

-----X

DECISION/ORDER

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers, and after oral argument, defendant J.J.B. Retail Corp. d/b/a Sunrise Auto Sales moves for summary judgment, dismissing plaintiffs Jesus Antonio Hernandez and Yissel Batista's ("Plaintiffs") Complaint.

The underlying action was commenced by Plaintiffs as a result of serious injuries that Jesus Antonio Hernandez ("Hernandez/Plaintiff") allegedly sustained on May 24, 2017, after falling from a scaffold on premises located at 241-02 Linden Boulevard, Elmont, New York ("Subject Premises"). Hernandez represents that he was employed by High Rise Building & Design, Inc. ("High Rise"), and was responsible for putting sheetrock in the ceiling. High Rise contracted with J.J.B. Retail Corp. d/b/a Sunrise Auto Sales ("J.J.B. Retail Corp."), the owner of the Subject Premises, to perform demolition and renovation work.

A party moving for summary judgment meets its prima facie showing of entitlement to judgment as a matter of law "by tendering sufficient evidence to eliminate any material issues of fact from the case (*St. Claire v. Empire Gen. Const. & Painting Corp.*, 33 AD3d 611 [2d Dept 2006]) [citations omitted]). Once the movant makes its prima facie case, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Id.* (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of the instant motion, J.J.B. Retail Corp. contends that Hernandez was neither employed nor present at the Subject Premises on the day of the alleged accident. To buttress its assertions, J.J.B. Retail Corp. submits, *inter alia*, a supporting affidavit from Andre McDonald ("McDonald"), High Rise's supervisor (Exhibit "7" of J.J.B. Retail Corp.'s motion). McDonald avers that no one from High Rise employed Hernandez to work at the site, and that he did not

receive any compensation from the company. In fact, McDonald states that Plaintiff was not present at the site on May 24, 2017.

J.J.B. Retail Corp. also produces an affidavit from Otis Sessoms (“Sessoms”), a supervisor at non-party C.D. James Electric, Inc., another company that worked at the site (Exhibit “10” of J.J.B. Retail Corp.’s motion). Sessoms attested that neither he nor anyone hired Hernandez to work at the Subject Premises. He added that no one with Hernandez’s name was present at the Subject Premises on May 24, 2017, or was injured that day.

Moreover, J.J.B. Retail Corp. notes that Hernandez testified at his deposition that he was employed by High Rise; however, his Bill of Particulars claims that he was employed by a Carlos Carmona (“Carmona”) (Exhibit “3” pg. 20:6-8, and Exhibit “6” of J.J.B. Retail Corp.’s motion). J.J.B. Retail Corp. also submits select Workers Compensation records, which reflect that Hernandez initially filed his claim against Carmona (Exhibit “9” of J.J.B. Retail Corp.’s motion).

In opposition¹, Plaintiff points out that he testified at his deposition that he was a High Rise employee, and worked under the supervision of his co-worker, Carmona (Exhibit “3,” pgs. 20-23, 34, 179-187, 189, 192 of Defendant’s motion). Plaintiff avers that he had worked for High Rise for approximately one month prior to the accident (Exhibit “D” of Plaintiffs’ opposition). He explains that he was paid in cash, and had initially believed that Carmona was his employer because he gave him instructions at the job site. Plaintiff argues that he satisfied the burden of establishing that he is a proper Labor Law plaintiff, as he was High Rise’s employee when the accident occurred.

¹ The court notes that Plaintiffs submitted a document styled, “Second Affirmation in Opposition.” This document will not be considered, as Plaintiff was not granted leave to submit it.

Plaintiffs further contend that McDonald's and Sessoms' affidavits are insufficient, as they do not state that they were present on the date that Hernandez was injured; and do not indicate their basis for concluding that he was not at the job site on May 24, 2017. Plaintiffs also submit transcriptions of cell phone text messages, and audio recordings allegedly exchanged between him and Carmona, that were translated from Spanish to English (Exhibits "B" and "C" of Plaintiffs' opposition). Plaintiffs maintain that the communications serve as evidence that Hernandez was injured at the Subject Premises.

J.J.B. Retail Corp., in rebuttal, stresses that the court should not consider the transcriptions, as they are inadmissible hearsay; and are the only evidence that Plaintiffs submit to oppose its motion.

Case law provides that "[i]n order to invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon the contractors, owners and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on or a building or structure and that he was hired by someone, be it an owner, contractor, or their agent" (*Daeira v Genting NY, LLC*, 173 AD3d 831 [2d Dept 2019]).



In the instant case, the parties provide conflicting arguments as to whether Plaintiff was a High Rise employee, and worked at the Subject Premises on the day of the alleged accident. This Court credits Plaintiff's argument that McDonald's and Sessoms' affidavits are insufficient. Both affiants do not indicate that they were at the site on May 24, 2017; and explain how they arrived at the conclusion that Hernandez was not there. Notably, High Rise does not deny that Carmona worked on the project as its employee.

Moreover, at the Workers Compensation hearing, Plaintiff testified that he was employed by High Rise, and that Carmona was his supervisor. The Workers Compensation Board's findings, *inter alia*, was that Plaintiff's testimony "as to the details of [sic] accident and earnings" was credible. Workers Compensation noted that Hernandez initially filed his claim against Carmona. However, Carmona subsequently provided Hernandez with High Rise's name. This court notes that J.J.B. Retail Corp. produced an incomplete set of Workers Compensation records, which do not reflect that Hernandez eventually filed his claim against High Rise (Exhibit "9" of J.J.B. Retail Corp.'s motion).

Consequently, this Court determines that there are triable issues of material fact, including whether Plaintiff was a High Rise employee, and was injured at the Subject Premises. In reaching this determination, the court did not consider Plaintiff's text and audio message transcriptions, as they are unauthenticated hearsay.

Accordingly, based upon the above, J.J.B. Retail Corp. d/b/a Sunrise Auto Sales' Motion for Summary Judgment is **DENIED**.

This constitutes the Decision and Order of the court.


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 HON. CAROLYN E. WADE
 A.J.S.C.
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 ACTING SUPREME COURT JUSTICE