

Hernandez v High Rise Bldg. & Design, Inc.
2020 NY Slip Op 31165(U)
April 22, 2020
Supreme Court, Kings County
Docket Number: 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 2nd day of April 2020

PRESENT:
HON. CAROLYN E. WADE,

Justice

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JESUS ANTONIO HERNANDEZ and YISSEL BATISTA,

Plaintiffs,

Index No. 514076/17

-against-

DECISION and ORDER

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

Defendants.

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

<u>Papers 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
Memoranda 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 an Order to reargue this court's order, dated November 15, 2019, which denied its motion for summary judgment.

The underlying action was commenced by Plaintiffs as a result of serious injuries that Jesus Antonio 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.

By Decision/Order, dated November 6, 2019, this Court denied J.J.B. Retail Corp.'s motion for summary judgment. The ruling noted that J.J.B. Retail Corp. relied, *inter alia*, on the underlying affidavits of Andre McDonald ("McDonald"), a High Rise supervisor, and Otis Sessoms ("Sessoms"), a supervisor at non-party C.D. James Electric, Inc., another company that worked at the site. Both indicated that he was not employed at the worksite on May 24, 2017, but neither stated that they were present on that day, nor stated the basis for their knowledge. It was further noted that Plaintiff filed a Workers Compensation Board claim against High Rise. At the hearing, it was determined that Plaintiff's testimony regarding the accident, and his earnings were credible. This Court determined that there were triable issues of material fact, including whether Plaintiff was a High Rise employee, and was injured at the Subject Premises. The instant motion ensued.

CPLR R 2221(d)(2) provides that a motion to argue "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.”

In support of the instant motion, J.J.B. Retail Corp. argues, *inter alia*, that this Court’s **ruling** improperly shifted the burden for it to establish that Plaintiff was a Labor Law protected employee. With respect to the allegation that Plaintiff did not work at the site, J.J.B. Retail Corp. asserts that supervisors McDonald and Sessoms “would be in the best position to make such statements, only after consulting with the appropriate individuals, and arriving at such a conclusion” (§ 11 of attorney’s affirmation). It further contends that the court should not have considered the Workers Compensation Board’s findings, as it was concerned with Plaintiff’s accident, and loss of earnings, rather than whether he was an employee pursuant to the Labor Law.

Plaintiffs, in opposition, argue that contrary to J.J.B. Retail Corp.’s contentions, its adversary has the burden on a summary judgment motion to make a prima facie showing of entitlement to judgment as a matter of law. Since J.J.B. Retail Corp. failed to make a prima facie case, Plaintiffs maintain that they had no burden to establish the existence of a triable issue of fact. Plaintiffs point out that J.J.B. Retail Corp. concedes that McDonald and Sessoms relied on inadmissible hearsay- consultations with other individuals, in their respective affidavits, to reach the conclusion that Plaintiff was not employed at the job site on the day of the alleged accident.

In rebuttal, J.J.B. Retail Corp. avers that Plaintiff has failed to submit evidence in admissible form to defeat its underlying motion for summary judgment. It also maintains that McDonald’s and Sessoms’ affidavits were sufficient to eliminate any triable issues of

material fact regarding whether Plaintiff worked at the job site.

It is well settled that “[w]hile the ultimate burden of proof at trial will fall upon the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form [citations omitted]” (*Vaughn v. Veolia Transp., Inc.*, 138 AD3d 979, 980 [2d Dept 2016]). “A defendant’s prima facie burden on a motion for summary judgment can not be met by pointing gaps in the plaintiff’s case (see *Gammons v. City of New York*, 109 AD3d at 203).” *Id.*

In the instant case, J.J.B. Retail Corp. argues that this Court erred in its underlying ruling by shifting the burden on it to prove that Plaintiff was a labor law protected employee. Contrary to J.J.B. Retail Corp.’s contentions, the above-referenced case law evinces that a movant must satisfy its initial burden to make a prima facie case. J.J.B. Retail Corp. maintains that McDonald’s and Sessoms’ affidavits eliminated all triable issues of material fact. However, J.J.B. Retail Corp.’s motion concedes that the supervisors relied on consultations with unidentified individuals, to determine that Plaintiff did not work at the job site. It’s reliance on these alleged communications constituted inadmissible hearsay. Moreover, J.J.B. Retail Corp. contests the court’s consideration of the Workers Compensation Board records. The documents reflect that Plaintiff filed a claim against High Rise; and that his testimony at the hearing regarding his accident, and earnings was found to be credible. Yet, J.J.B. Retail Corp. submitted the records in support of its underlying summary judgment motion. Plaintiff’s deposition testimony also includes his account as to the location, and alleged cause of his fall. Consequently, this Court finds that

J.J.B. Retail Corp. has failed to established that an issue of fact or law was overlooked/misapprehended. Triable issues of material fact remain regarding, *inter alia*, whether Plaintiff was employed by High Rise, and was injured at the Subject Premises.

Accordingly, based upon the above, J.J.B. Retail Corp.'s motion to reargue is granted, and upon reargument, is **DENIED**. This Court's Decision/Order, dated November 6, 2019, remains intact. This constitutes the Decision/Order of the court.



HON. CAROLYN E. WADE
A.J.S.C.