At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of FEBRUARY, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

----------X

I.P., infant by his father
JOSE MUGUEL PEREZ HERNANDEZ,

Plaintiff,

-against-

RAUL BONILLA,

Defendants,

----------X

Index No.: 518539/2017
Decision and Order

The following *papers NYSCEF* Doc #'s 63 to 76 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	63-74
Opposing Affidavits (Affirmations)	76

After having heard Oral Argument on FEBRUARY 10, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff, moves this court pursuant to C.P.L.R. § 2221 for an order granting leave to renew and reargue this Court's Decision and Order dated September 28, 2020, which granted the defendants motion for summary judgment.

ARGUMENTS

Plaintiff, moves this court to reargue, contending that this court erred in not considering the non-party affidavit and that the court overlooked the December 3, 2019

witness exchange. Specifically plaintiff contends the court misapprehended (1) that an address for non-party witness Jairo Lopez was provided prior to the Note of Issue and thus the affidavit should have been considered and that (2) the affidavit of Jairo Lopez raises triable issues of fact as to whether or not the defendants son was acting as an agent of the defendant on the date of the accident.

Defendant opposes the same contending plaintiff fails to point out any law misapplied or fact overlooked by the court. Defendant specifically contends that these issues were addressed in the Court's decision dated September 24, 2020 and is based on sound interpretation and legal reasoning.

ANALYSIS

N.Y. C.P.L.R. § 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. N.Y. C.P.L.R. § 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "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. N.Y. C.P.L.R. 2221 (McKinney).

Under the caselaw existing prior to the 1999 amendments, a motion for re-argument was often used when there was a change in the law after the prior order. N.Y. C.P.L.R. § 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue,

is the proper expedient when the motion is based on a change in the law that occurs while the case is still subjudice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. *See* Siegel, New York Practice § 449 (4th ed. 2005). The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind. N.Y. C.P.L.R. § 2221 (McKinney)

In the present case, plaintiff contends that in deciding the previous motion in defendants' favor, the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in plaintiffs' renewal which indicates that the Court overlooked or misapprehended relevant facts. Plaintiff fails to set forth any facts that the Court overlooked, however, but contends apparently that the Court misapplied controlling principles of law. The Court disagrees.

In the present case, in this Court's decision and Order dated September 28, 2020 the Court found the following with regard to the labor law claims and the non-party affidavit;

> "As a preliminary matter the court notes there is nothing in this record that establishes there was a construction project in progress at the premises where the alleged incident occurred. Specifically, there is no contract for any construction work between the plaintiffs employer and the defendant owner of the property. The only testimony before this court is that there was a construction project for roof replacement being performed at the unconnected/detached property next door to the property in which the incident took place. There is no testimony that the owner of the property contracted for any work to be performed at the property where the incident occurred. There is no testimony by the plaintiffs employer that they were hired to perform work at defendants property. There is no testimony that the defendant did hire

> or engage plaintiff and or plaintiffs employer for any work at the premise in question.
>
> As to the Labor Law 200 and Common Law negligence claim, in the present case, there is not a scintilla of evidence establishing the defendant had the authority to supervise or control the performance of the work. In fact, the only testimony before the court is that people other than the defendant supervised and controlled the work. Any testimony regarding who gave "Bentys" the ladder is purely speculative as the plaintiff was not present when "Bentys" was allegedly speaking with a man across the street. **Additionally, this court will not consider the alleged affidavit of "Jario Lopez" signed by a "Jarron David Lopez Aguilar". It is well settled, "where a party defends a failure to comply with a notice to produce witness information …., failure to provide the information in his [or her] possession would preclude him from later offering proof regarding that information" (*Corriel v Volkswagen of Am.*, 127 AD2d 729, 731 [1987]).** In the present case, the plaintiff offers no explanation for failing to disclose the address of this alleged witness until after the filing of the note of issue. Accordingly, the affidavit was improperly submitted, and will not be considered. *See Kontos v. Koakos Syllogos ""Ippocrates," Inc.*, 11 AD3d 661, 783 NYS2d 653 (2 Dep't 2004)."

To be clear, the affidavit not considered because the correct address of the alleged Jairo Lopez was not provided to the defendants prior to the date by which the defendants were required to file the motion for summary judgment. Additionally, plaintiff was noticed by defendant that the address provided for said non-party witness was incorrect twice before the defendants were required to file their motion for summary judgment. The plaintiffs did not provide the correct address for the non-party witness until May 15, 2020 and the defendants filed the motion for summary judgment on February 7, 2020. As such, plaintiffs motion to renew and reargue is hereby granted and upon reargument the court adheres to its prior decision. Moreover, this court decision dated September 28, 2020 goes on to explain that even if the affidavit were considered it is insufficient to raise an issue of fact see excerpt from decision below:

> "**Even if the court were to consider the affidavit of "Jario Lopez" submitted in opposition by the plaintiff, which it is not, an affidavit by a non-party that is an alleged co-worker that was not deposed nor his complete address exchanged after demands, alleging a guy across the street gave them a ladder and that he heard that guy say to someone else i.e. "Bentys"(the foreman) he was defendants son, without more, is insufficient to raise a triable issue of fact as to whether defendants son was an agent of the defendant and contracted for the alleged work.** (*see Huerta v. Three Star Constr. Co., Inc.,* 56 AD3d 613, 868 NYS2d 679; *Aversano v. JWH Contr., LLC,* 37 AD3d at 746, 831 NYS2d 222; *Feltt v. Owens,* 247 AD2d at 690–691, 668 NYS2d 757); *quoting Kilmetis v. Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1290–91, 904 NYS2d 495, 497 (2010). As such, there is no circumstance in which a jury could rationally find based on this record that defendants son was an agent of defendant, and defendant authorized said agent to contract on his behalf for the alleged work of patching the alleged pin hole in the roof of the garage. As such, plaintiffs Labor Law 240(1) cause of action must be dismissed."

As such, The Court can find nothing in plaintiffs' renewal which indicates that the Court overlooked or misapprehended relevant facts.

Accordingly, plaintiffs motion pursuant to CPLR 2221 are hereby granted and upon reargument the court adheres to its prior decision. (MS#4)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
February 10, 2021

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ