

Wenk v Extell W. 57th St. LLC
2021 NY Slip Op 30884(U)
March 22, 2021
Supreme Court, New York County
Docket Number: 152492/2014
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 152492/2014

CHRISTOPHER WENK,

Plaintiff,

MOTION SEQ. NO. 006

- v -

EXTELL WEST 57TH STREET LLC, LEND LEASE (US)
CONSTRUCTION LMB, INC., and L. MARTONE & SONS
INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 192, 193, 194, 195, 196, 197, 198, 202, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229

were read on this motion to/for RENEWAL.

In this personal injury/Labor Law action commenced by plaintiff Christopher Wenk against defendants Extell West 57th Street LLC, Lend Lease (US) Construction LMB Inc. and L. Martone & Sons Inc. (“Martone”), Martone moves, pursuant to CPLR 2221(e), to renew the branch of plaintiff’s motion for summary judgment granting him summary judgment as to liability on his common-law negligence and Labor Law §200 claims. Plaintiff opposes the motion. After consideration of the parties’ contentions, and after a review of the relevant statutes and case law, the motion is resolved as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in the decision and order of this Court entered September 18, 2019. Docs. 144-145. In summary, plaintiff, an ornamental ironworker, alleged

that he was injured at a construction site on November 4, 2013 when he stepped backwards into a drain hole concealed by black felt. Additional relevant facts are set forth below.

In September 2018, plaintiff moved (motion sequence 003), pursuant to CPLR 3212, for summary judgment on his Labor Law §240 claims against Extell and Lend Lease and on his common-law negligence and Labor Law §200 claims against Martone. Doc. 85. Defendants also moved (motion sequence 004), pursuant to CPLR 3212, for summary judgment dismissing the amended complaint. Doc. 99.

By order entered September 18, 2019 (“the 9/18/19 order”), this Court granted plaintiff summary judgment on his common-law negligence and Labor Law §200 claims against Martone (first and second causes of action, respectively) but denied his motion insofar as it sought relief against Extell and Lend Lease. Docs. 144-145. In the 9/18/19 order, this Court also granted Extell and Lend Lease summary judgment dismissing the amended complaint against them. *Id.*

On October 18, 2019, Martone filed a notice of appeal from that branch of the 9/18/19 order which granted plaintiff’s motion for summary judgment against it and denied its motion to dismiss the complaint. Doc. 150.

On October 15, 2020, Martone filed the instant motion, pursuant to CPLR 2221(e), seeking renewal of plaintiff’s motion for partial summary judgment against it. Doc. 192. Martone argues that it is entitled to renewal of the branch of plaintiff’s motion for partial summary judgment against it on his claims of common-law negligence and a violation of Labor Law §200 and that, upon renewal, plaintiff’s motion must be denied. Doc. 193. In support of its argument, Martone submits the affidavits of Jordana Cretty (“Jordana”) (Doc. 195); Andrew Cretty (“Andrew”) (Doc. 196); and Alexis Lasky (“Lasky”) (Doc. 197) (collectively “the new witnesses”), each dated August 31, 2020.

In her affidavit, Jordana, plaintiff's sister-in-law, represents that, in February 2013, plaintiff told her at a party that he intended to cover a hole at work with tarp and claim that he fell into it so that he "would never have to work again, and he would make millions of dollars." Doc. 195. She further stated that, since 2013, she had seen plaintiff engaging in physical activity without any signs of discomfort or difficulty. *Id.*

Andrew states that he is Jordana's husband, and that, at the same party, plaintiff showed him a picture of a hole at the construction site where he (plaintiff) had been working and said that he "planned to cover the hole and say that he fell [into it]" and that he "would never have to work again." Doc. 196. Andrew substantially reiterated Jordana's representation that the plaintiff engaged in physical activities without any apparent problem. *Id.*

Lasky, also a sister of plaintiff's wife, states in an affidavit that she lived with plaintiff and his wife from March – June 2019 and, during that period, saw him engaged in manual labor and other physical activity on numerous occasions. Doc. 197, Doc. 205 at par. 26. Lasky also represents that plaintiff took certain measures to ensure that nobody saw him engaging in those activities. Doc. 197.

Martone's attorney maintains that none of the new witnesses was known to the defendants during the time plaintiff's summary judgment motion was pending. Counsel insists that none of these individuals had been disclosed by the plaintiff as a witness and that defendants had no reason to search for them because they would presumably have no information regarding the alleged accident. Defendants' attorney represents that, on August 12, 2020, he received an unsolicited voicemail from Jordana, who said that she, Andrew, and Lasky had information beneficial to the defendants. Doc. 198. Counsel then had an investigator meet with the three

individuals and obtain affidavits from them. *Id.* Thus, maintains Martone, the defendants are entitled to renewal of plaintiff's summary judgment motion pursuant to CPLR 2221(e).

By order entered November 17, 2020, the Appellate Division, First Department affirmed the 9/18/19 order reasoning, *inter alia*, that Martone, which had "the authority to control the activity which [injured plaintiff]", was liable on plaintiff's common-law negligence and Labor Law §200 claims since it was responsible for "providing temporary protection against the drain holes while awaiting plumbers to install permanent protection, that it used bags of limestone for such purposes . . . [and] was responsible for ensuring that the bags were in place until the installation of the permanent protection." Doc. 230.

On December 4, 2020, plaintiff opposed Martone's motion, arguing that the vague and false statements of the new witnesses have no probative value, are incredible as a matter of law, and are insufficient to defeat his motion for summary judgment. Doc. 205. In an affidavit in opposition to the motion, plaintiff argues that he and his wife, Rivka Wenk ("Rivka"), have been engaged "in a long and stressful family feud" with the new witnesses, from whom they have been estranged for years. Doc. 206. Plaintiff further represents that the new witnesses have filed Family Court petitions containing false information against him and Rivka in an attempt to "ruin [their] lives." *Id.* He further asserts that he could not have told his relatives that he planned to step into a hole in the roof at the premises since there was no hole in the roof at the time he allegedly made this statement. *Id.* Further, he claims that he was not at a party with the new witnesses on the day he allegedly told them he was going to stage an accident. *Id.* Rivka also submits an affidavit in opposition to the motion, in which she substantially reiterates the representations made by plaintiff in his affidavit. Doc. 207. Further, she submits her personal

calendar which, she maintains, reflects that she was not at a party with plaintiff on the day he allegedly stated that he intended to stage the accident. Doc. 226.

In reply, Martone argues that the affidavits submitted by the new witnesses raise issues of fact regarding how the alleged incident occurred, including whether it was staged. Doc. 229.

Martone further asserts that the affidavits are not incredible as a matter of law. Id.

LEGAL CONCLUSIONS

CPLR 2221(e) provides as follows:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The determination of whether to grant a renewal motion rests within the sound discretion of the court (*See Matter of Yu Chan Li v New York City Landmarks Preserv. Commn.*, 182 AD3d 478 [1st Dept 2020]). Additionally, this Court “may entertain a motion to renew . . . a prior order or judgment even after an appellate court has rendered a decision on that order or judgment, as long as the moving party exercised due diligence in attempting to produce the newly discovered evidence” (*Tishman Constr. Corp. of New York v City of New York*, 280 AD2d 374, 377 [1st Dept 2001] [citations omitted]). In *Tishman*, the Appellate Division, First Department disagreed with the IAS court’s conclusion that the defendant did not act with due diligence and instead found that “defendant provided a reasonable excuse for the unavailability of the records until [it filed its] renewal motion” (*Tishman*, 280 AD2d at 377).

This Court finds that Martone provided a reasonable excuse for its failure to submit the affidavits of the new witnesses until the time it filed its renewal motion. It is undisputed that none of the new witnesses, all of whom were related to plaintiff, was known to the defendants during the time plaintiff's summary judgment motion was pending. There is no proof that the new witnesses had been disclosed as witnesses by the plaintiff during or prior to the time plaintiff's motion for summary judgment was pending and no information has been submitted by the plaintiff even suggesting that the defendants had a reason to search for them. Defendants' attorney represents that, on August 12, 2020, after plaintiff was granted summary judgment against Martone pursuant to the 9/18/19 order, and while Martone's appeal from the said order was pending, he received an unsolicited voicemail from Jordana, who said that she, Andrew, and Lasky had information beneficial to the defendants. Doc. 198. Counsel then promptly had an investigator meet with the new witnesses on August 31, 2020 to obtain affidavits from them. *Id.* Given the unique factual scenario herein, Martone has demonstrated that it is entitled to renewal of plaintiff's motion.

Although plaintiff asserts that "there are no new facts which [constitute] admissible evidence" (Doc. 205 at par. 58), this contention is without merit given that

when a particular act of the declarant is at issue, the declarant's statement of a future intent to perform that act is admissible as proof of the declarant's intent on that issue and as inferential proof that the declarant carried out [or attempted to carry out] his intent.

(*People v Yanez*, 180 AD3d 816, 817 [2d Dept 2020] [citations omitted]).

Thus, this Court determines that plaintiff's statement of his intention to stage the accident is admissible.

Nor has plaintiff established that the new witnesses are incredible as a matter of law (*See Colon v Woolco Foods Inc.*, 177 AD3d 498 [1st Dept 2019] [citation omitted]). Thus, the

representations by the new witnesses that plaintiff staged his accident conflict with the latter’s account of how the incident occurred and, thus, raise triable issues of fact which preclude the granting of summary judgment in plaintiff’s favor (*Colon*, 177 AD3d at 498).

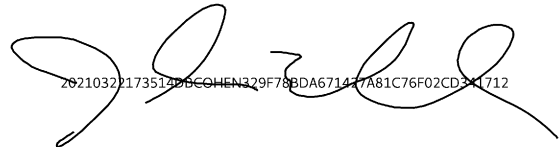
Accordingly, it is hereby:

ORDERED that the motion of defendant Martone & Sons Inc. for leave to renew plaintiff’s motion for summary judgment as to liability on his first and second causes of action is granted; and it is further

ORDERED that, upon renewal, this Court vacates that branch of its prior order, entered September 18, 2019, which granted plaintiff summary judgment against defendant Martone & Sons Inc. on his first and second causes of action, and denies summary judgment to plaintiff on those causes of action.

3/22/2021

DATE



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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE