

<b>Hrychorczuk v 1677 43rd St LLC</b>
2022 NY Slip Op 31207(U)
April 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 502912/17
Judge: Karen B. Rothenberg
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: TRIAL TERM PART 35 X  
DARIUSZ HRYCHORCZUK,

Plaintiff,

Index No: 502912/17

-against-

DECISION AND ORDER

1677 43<sup>RD</sup> ST LLC and BBM CONSTRUCTION CORP.,

Defendants.

X

677 43RD ST LLC,

Third-Party Plaintiff,

-against-

BBM CONSTRUCTION CORP.,

Third-Party Defendant.

X

BBM CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Second Third-Party Defendant.

X

1677 43RD ST LLC,

Third Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Third Third-Party Defendant.

X

Recitation as required by CPLR 2219(a), of the papers considered in this motion and cross-motion to renew.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	375-419
Cross-motion and supporting papers.....	
Answering Affidavits.....	423-442, 444-456, 459-460, 503-505
Reply Papers.....	457-458, 500-502

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for personal injuries, defendant 1677 43<sup>rd</sup> St LLC [1699] moves [seq. no. 14] for an order pursuant to CPLR 2221(e) for leave to renew its opposition to plaintiff’s motion for partial summary judgment under Labor Law §§ 240(1) and 241(6), and upon renewal, denying plaintiff’s motion based on the one- and two-family homeowner exemption contained in those statutes<sup>1</sup>.

Second third-party defendant/Third third-party defendant Gilmar Design Corporation [Gilmar] moves [seq. no. 15] for an order (1) pursuant to CPLR 2221(d) and (e) for leave to renew and reargue its prior motion for summary judgment, and upon renewal and reargument, granting summary judgment in its favor and denying the plaintiff’s motion; (2) pursuant to 22 NYCRR §202.21(d) and/or (e) vacating the note of issue; (3) pursuant to CPLR §2004 extending the time for the parties to engage in further discovery; (4) granting it leave under CPLR 3212(a) to move for summary judgment based upon recently disclosed information and/or other such evidence obtained through the further discovery sought above.

On December 14, 2016, plaintiff, a carpenter/laborer, was allegedly injured during the course of a construction/renovation project on an existing two-family residence located at 1677 43<sup>rd</sup> Street, Brooklyn, when the temporary wooden staircase he was descending collapsed causing him to fall some eight feet to the ground. Plaintiff commenced this action against 1677, the owner of the building, and BBM Construction Corp. [BBM], his employer and the general contractor on the project, asserting several causes of action including violations of Labor Law §§ 240(1), 241(6), and 200. 1677 commenced a third-party action against BBM asserting causes of action for common-law and contractual indemnification. BBM commenced a second third-party action against Gilmar for indemnification. 1677 commenced a third third-party action against Gilmar for common-law and contractual indemnification. At some point a stipulation was entered into among the parties discontinuing plaintiff’s first party claims against BBM.

After the filing of the note of issue on March 12, 2019, plaintiff moved [seq. no. 5] for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims. 1677 moved [seq. no. 6] for summary judgment dismissing plaintiff’s common-law and Labor Law § 200

<sup>1</sup> 1677’s previous motion [seq. no. 12] for summary judgment dismissing the plaintiff’s Labor Law §§ 240 and 241(6) claims based on the one- and two-family homeowner’s exemption defense was withdrawn on December 13, 2021.

claims and further moved for summary judgment on its third-party common-law and contractual indemnification claims against BBM. Gilmar moved [seq. no. 7] for summary judgment dismissing all third-party claims against it. By order dated August 3, 2020, the Hon. Lara J. Genovesi granted plaintiff partial summary judgment under Labor Law §§ 240(1) and 241(6); granted 1677 summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims; granted 1677 summary judgment against BBM on its contractual indemnification claim but denied it as to the common-law indemnification claim; and denied Gilmar's motion for summary judgment dismissing all third-party claims against it.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination... and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; *see Carmike Holding I, LLC v Smith*, 180 AD3d 744 [2d Dept 2020]). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Id.* at 747).

Here, 1677 and Gilmar fail to establish that the alleged new fact, to wit, that Goldie Pinter, a member of 1677, resided in the building with her family on the date of this accident, was information not available at the time of the original motion (*id.*). The 2018 deed executed by Goldie Pinter, as a member of 1677, which alerted counsel to the fact that the building may have been owner-occupied on the date of this incident, was recorded and publicly available prior to the date of the original motion (*see Citimortgage, Inc v Roque*, 202 AD3d 1041 [2d Dept 2022]). Moreover, the parties fail to offer a reasonable justification for failing to present this information in opposition to the original motion, because any alleged misstatements made by Chaim Pinter, the building manager and husband of Goldie Pinter, in his testimony regarding the ownership of the property does not provide a reasonable justification for the failure to exercise due diligence (*id.*).

In any event, the purported new fact/evidence would not have changed the prior determination (*see Lanzillo v 4 World Trade Center, LLC*, 195 AD3d 907 [2d Dept 2021]). While the 2018 deed reflects that Goldie Pinter was a member of 1677 in 2018, this is not evidence that Ms. Pinter was a member of 1677 on December 14, 2016, the date of plaintiff's accident. 1677 fails to submit its operating agreement or any other documentary evidence to demonstrate the date that Ms. Pinter became a member. Though Ms. Pinter states in her affidavit that she was a member of 1677 at the time of this incident, her subsequent deposition testimony reveals that she was not familiar with 1677, did not know that 1677 owned the building in 2016, and that the only basis for her belief that she was a member of 1677 was that her signature appears on the 2018 deed – but had no knowledge as to when she became a member. Ms. Pinter's testimony also reflects that she did not recall reading or signing her affidavit but acknowledged her signature on the document and indicated she would sign whatever documents her husband asked her to sign. Ms. Pinter's affidavit is without probative value and, therefore, insufficient to raise a triable issue of fact as to whether the building was owner-occupied on the date of this occurrence (*see generally Izzo v*

*Town of Smithtown*, 151 AD3d 1035 [2d Dept 2017]). It is also noted that while Chaim Pinter submits an affidavit attesting to the fact that his wife was a member of 1677 on the date of this accident, contradicting his earlier testimony that an individual named Martin Gubitz was the sole owner of 1677 on that date and that neither he nor his wife had any interest in 1677 at that time, it is solely based on the contents of the 2018 recorded deed which is not indicative of when Ms. Pinter became a member of 1677. Therefore, Mr. Pinter's affidavit also lacks probative value and does not raise a triable issue of fact herein (see *Phillips v Bronx Lebanon Hos.* 268 AD2d 318 [1<sup>st</sup> Dept 2000])

Furthermore, contrary to 1677 and Gilmar's contentions, the allegations in the original pleadings in the plaintiff's subsequent voidable transaction lawsuit relating to Goldie Pinter's ownership interest in 1677, which were made upon mere information and belief of counsel, do not constitute informal judicial admissions and do not establish that Ms. Pinter was a member of 1677 at the time of the incident (cf. *Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014]).

With respect to Gilmar's motion for reargument, leave "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion..." [CPLR 2221[d][2)]. The motion "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Jasper Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582, 584 [2d Dept 2020]) quoting *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). Here, Gilmar fails to demonstrate that Justice Genovesi, in denying its motion for summary judgment, overlooked or misapprehended the facts or the law in determining that there are triable issues of fact as to whether it proximately caused the accident by moving the temporary staircase (see *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]).


Finally, as renewal is not warranted and as discovery is now complete, there is no basis for vacating the note of issue, or to permit further discovery, or to extend the time for the making of further summary judgment with respect to the issue as to the ownership of the building and the applicability of the homeowner's exemption defense.

Accordingly, 1677 and Gilmar's respective motions are denied in their entirety.

This constitutes the decision/order of the Court

Dated: April 7, 2022

Enter,

  
\_\_\_\_\_  
Karen B. Rothenberg, J.S.C.