

Lema v 1148 Corp.
2022 NY Slip Op 31673(U)
May 24, 2022
Supreme Court, New York County
Docket Number: Index No. 450904/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JESUS LEMA, MARIA LEMA,
Plaintiffs,

- v -

THE 1148 CORPORATION,
Defendant.

-----X

JORGE BEDOYA,
Plaintiff,

-against-

THE 1148 CORPORATION,
Defendant.

-----X

MARIA URQUIZO FLORES,
Plaintiff,

-against-

THE 1148 CORPORATION,
Defendant.

-----X

INDEX NO. 450904/2018

MOTION DATE _____

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

Index No. 450865/2018
(Action #2)

Index No. 150221/2018
(Action #3)

By order to show cause, plaintiffs in each captioned matter seek permission to submit a supplemental affirmation in opposition to defendant’s motion for summary judgment, limited in scope to opposing the motion as to its claims of violations of Industrial Code §§ 23- 1.5(c)(3) and 23-9.2(a). They also ask that a hearing and determination of the respective parties’ motions

for summary judgment (mot. seq. nos. 4 and 5) be stayed until all necessary, filed papers are submitted for full consideration. Defendant opposes.

Plaintiffs observe that the violations of these sections are set forth in their bills of particulars and that they each specifically preserved their viability in their memoranda of law in support of their motions for summary judgment. And, in opposition to defendant's motion, plaintiffs had submitted an expert affidavit in support thereof. (NYSCEF 225).

The inadvertent mistake plaintiffs' counsels made in failing to include arguments in opposition to the dismissal of these two Code provisions, they contend, was not willful. Rather, they allege, it resulted from an inadvertent and unintentional law office failure, evidenced by the material contained in their motion for summary judgment, wherein they specifically reserved their claims based on the two Code sections as they were not amenable to resolution by summary judgment. (*Id.*).

Counsels each affirm having extensively researched the opposition papers, along with a partner from another law firm, and, having focused on the Code provisions on which they had moved for summary judgment in light of "the complexity of working remotely with another firm," each counsel mistakenly and in concert, neglected to include the two provisions. All affirm that they intended to include them and that as soon as the omission was discovered while they were drafting the replies on their motions, they fruitlessly sought defendant's consent. (*Id.*) Plaintiffs also set forth the merits of their claims based on the two Code provisions. (*Id.*).

In opposition, defendant observes that the realization of the omission had arisen only after plaintiffs' counsels had a chance to read the opposition papers to their own motions, and that therefore, plaintiffs seek not the correction of an inadvertent error, but a chance to change litigation strategies, even though they had considered "preposterous" defendant's arguments in

support of its motion for summary judgment. (NYSCEF 236). Thus, given counsels' apparent confidence that the Code provisions not overlooked were "indisputably" sufficient to warrant summary judgment in their favor, there was no need to address the two omitted Code provisions, especially as only one is needed to state a claim under Labor Law § 241(6). Consequently, defendant infers that plaintiffs are attempting to obtain an unfair strategic advantage with the instant motion. (*Id.*).

Defendant also alleges that plaintiffs offer no firsthand account of the alleged law office failure or a lack of a strategy to omit the arguments now sought to be added. It denies the merit of plaintiffs' position on the omitted Code provisions and, to the extent that plaintiffs criticize defense counsel's refusal to permit their submission of supplemental oppositions, counsel observes that plaintiffs' counsels can be similarly criticized. (*Id.*).

Plaintiffs sufficiently demonstrate, by counsels' first-hand accounts, that they inadvertently failed to address the two Code provisions in opposing defendant's motion for summary judgment. As defendant provides a lengthy analysis of the merits of plaintiffs' arguments concerning the two omitted provisions, it is difficult to discern that defendant will suffer prejudice if leave to file supplemental opposition is granted. That plaintiffs seek to address them, even if their position as to another Code provision may be dispositive, constitutes proper and thorough representation of a client. Moreover, defendant's opposition to this motion is based only on supposition. Accordingly, it is hereby

ORDERED, that plaintiffs' motions for leave to file supplemental papers in opposition to defendant's motion for summary judgment is granted; it is further

ORDERED, that a determination of the respective parties' motions for summary judgment (mot. seq. nos. 4 and 5) is stayed until all necessary, filed papers are submitted for full consideration; it is further

ORDERED, that plaintiffs file their supplemental opposition on or before June 1, 2022; it is further

ORDERED, that defendant file its supplemental reply, if it chooses to do so, on or before June 13, 2022; and it is further

ORDERED, that the motion will be deemed submitted on June 13, 2022 whether or not defendant files a supplemental reply.

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5/24/2022
DATE

BARBARA JAFFE, 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