Zaborski v MB Lorimer LLC
2022 NY Slip Op 33449(U)
October 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 504273/17
Judge: Debra Silber
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At an IAS Term, Part 9 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 11th day of October, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

ROBERT ZABORSKI,

Plaintiff,

- against -

MB LORIMER LLC and
CORNERSTONE BUILDERS NY LLC,

Defendants.

- X

CORNERSTONE BUILDERS NY LLC,

Third-Party Plaintiff,

-against-

NEW YORK BUILDER OF STAIRS, INC.,

Third-Party Defendant.

- X

DECISION/ORDER

Index No. 504273/17

Motion Sequence No. 5

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	89-105
Opposing Affidavits (Affirmations)	106-108; 110-113
Reply Affidavits (Affirmations)	114-117

This action arises from a work-related accident which took place in 2016. The action was commenced in 2017 and is now on the trial calendar.

Upon the foregoing papers, plaintiff Robert Zaborski moves in motion sequence five for leave to renew and reargue the court's decision dated March 1, 2021. After virtual oral argument, leave is denied.

In the court's prior decision, on Motion Seq. #3 and #4, the court denied plaintiff Zaborski's partial summary judgment motion against defendant/third-party plaintiff Cornerstone on the issue of liability under Labor Law § 240 (1), and granted third-party defendant NY Builder's cross motion for summary judgment solely to the extent that plaintiff's Labor Law § 241 (6) claim was dismissed, and was otherwise denied.

On May 19, 2022, plaintiff filed the instant motion. The branch of the motion for leave to renew states that it is based on newly discovered evidence that could not have been included in the prior motions. Specifically, plaintiff's attorney claims "in November 2021, Plaintiff happened to encounter a former coworker, Miroslaw Sztark, on a street near his home; as set forth here, this was the first time that Plaintiff had seen Mr. Sztark since the accident. In talking, Plaintiff learned that Mr. Sztark lived near him, and that he had witnessed the accident . . . Prior to this chance encounter, Plaintiff had no contact information for Mr. Sztark" [affirmation Doc 91 ¶7]. Plaintiff claims that "until recently, I did not know that Miroslaw Sztark was either inside the building when my accident occurred or that he witnessed it" [Affidavit Doc 92 ¶4].

At his EBT, plaintiff testified that he was employed by third-party defendant NY Builder of Stairs and was engaged in the installation of a staircase at the time of his accident. On the day of his accident, there were four employees of NY Builder of Stairs at the job site, including himself. He testified that after his accident, Miroslaw Sztark, whom

he refers to as "Merek" came to his assistance [Doc 102 Page 7]. Now, he avers that he did not know that this co-worker witnessed his accident. He offers an affidavit from the co-worker, an affidavit from himself, and an affidavit from an engineer, James Pugh. In his prior motion for summary judgment, plaintiff did not submit an affidavit from an engineer. Plaintiff claims that upon granting him leave to renew and reviewing this "new" evidence, the court should grant plaintiff summary judgment on his Labor Law 240(1) claim.

Third-party defendant opposes the motion and argues that "Plaintiff's instant motion to renew is simply seeking a second bite of the apple by a plaintiff who has not exercised due diligence in making his first factual presentation" [Doc 110 ¶4]. He continues "Plaintiff's own deposition testimony establishes that plaintiff had full knowledge (or should have known) that Mr. Sztark was a witness to his alleged accident before his prior motion. Specifically, plaintiff testified that Mr. Sztark was one of four (4) employees (including himself) working on the staircase at the time of the accident, that Mr. Sztark was present when his accident occurred, and that Mr. Sztark came to plaintiff's assistance immediately after the accident. Plaintiff offers no reason why he failed to exercise due diligence in locating Mr. Sztark, a known witness to his accident, to obtain his Affidavit or testimony, prior to his original motion." Further, counsel points out [¶7] "Nor has plaintiff cited to any reasonable justification for his failure to submit the Expert Affidavit of Mr. Pugh on the prior motion. In fact, plaintiff's motion to renew offers no justification whatsoever for his failure to submit expert evidence on the prior motion. Plaintiff does not make a single argument as to why expert evidence was not submitted with his original motion papers."

Defendant Cornerstone Builders also opposes the motion, and their counsel argues that "For the reasons set forth in the accompanying counter statement of facts and Memorandum of Law, the Defendant, Cornerstone Builders, respectfully requests that this Court deny the Plaintiff's Motion to Renew summary judgment in its entirety" [Doc 106 ¶9]. The memo of law points out that "The testimony elicited by Plaintiff in this case establishes that Plaintiff knew of Merek's existence on the jobsite since the date of the accident in 2016." Counsel elaborates "Plaintiff commenced this action in 2017, while Merek was still working for New York Builder of Stairs, Inc. In this regard, Merek's whereabouts were known and a statement could have been obtained accordingly. Should reasonable justification be found here, it would open the door for future Plaintiffs to be excused from due diligence in investigating their claim. Plaintiff cannot be absolved of his duty to have sought out a statement from Merek when he knew his involvement from the very beginning."

The court notes that Document 72 in the court file, e-filed on May 15, 2020, is a copy of the plaintiff's Workers' Compensation Employee Claim Form, signed by plaintiff on August 2, 2016, which states that the accident occurred on July 18, 2016, and in answering question D(11) "Did anyone see your injury happen?" plaintiff answered "Mirek Szlark."

In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and must set forth a reasonable justification for the failure to present such facts on the prior motion (*see Worrell v. Parkway Estates, LLC*, 43 AD3d 436, 437, 840 N.Y.S.2d 817; *Heaven v. McGowan*, 40 AD3d 583, 586, 835 N.Y.S.2d 641). A motion to renew "shall be identified specifically as such" (CPLR

2221(e)(1)). 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 (*see Worrell v. Parkway Estates, LLC*, 43 AD3d at 437, 840 N.Y.S.2d 817; *Renna v. Gullo*, 19 AD3d 472, 797 N.Y.S.2d 115). Indeed, the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion (*see Worrell v. Parkway Estates, LLC*, 43 AD3d at 437, 840 N.Y.S.2d 817; *Greene v. New York City Hous. Auth.*, 283 AD2d 458, 459, 724 N.Y.S.2d 631).

Here, the justification proffered, that plaintiff could not have previously located his co-worker, Mr. Sztark, is not supported by the facts in the record. Mr. Sztark's affidavit asserts that he was employed by the company for more than 15 years and did not leave the company to change jobs until 2018. Plaintiff listed him as the only witness to his accident on his Workers' Compensation claim just weeks after the accident. Thus, the court finds that plaintiff has failed to make the necessary showing to support the request for leave to renew (*see Chiarella v Quitoni*, 178 AD2d 502, 577 N.Y.S.2d 429 [2d Dept 1991] ["Generally, a motion to renew must be based upon newly-discovered material facts or evidence *which existed at the time that the prior motion* was made but which were unknown to the party seeking renewal" (emphasis added)]). Thus, movant has not established that the "new evidence" was not available at the time he made his original motion. In any event, the "new evidence" would not have changed the outcome of the motion, as the plaintiff's motion was denied due to the factual issues in dispute. The witness' affidavit would not have changed the prior determination. The new engineer's report certainly may not be

considered. There is no explanation for obtaining an engineer for the first time for this motion to renew.

The other branch of the motion seeks leave to reargue the court's determination granting third-party defendant NY Builder of Stairs summary judgment dismissing the plaintiff's Labor Law §241(6) claim. However, there is not one word addressed to this branch of the motion in the affirmation in support. Therefore, leave to reargue must be denied.

The parties' next in person appearance in JCP is on February 1, 2023. It appears that is intended to be a date to commence jury selection, from the notes in the court's computer records.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.