

Hernandez v 225 5th Ave. (NY), LLC
2023 NY Slip Op 30417(U)
February 9, 2023
Supreme Court, New York County
Docket Number: Index No. 155211/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 155211/2021

RIGOBERTO HERNANDEZ,

MOTION SEQ. NO. 004

Plaintiff,

- v -

225 5TH AVENUE (NY), LLC, 225 CONDOMINIUM, THE
UNIT OWNERS OF 225 CONDOMINIUM FIRST SERVICE
RESIDENTIAL, CIM GROUP LLC, COLLIERS PROJECT
LEADERS USA NE, LLC, QUEST BUILDERS GROUP,
INC., AND EVEREST SCAFFOLDING,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this Labor Law action, defendants 225 5th Avenue (NY), LLC (225 5th) and CIM Group LLC (CIM) (collectively, movants) move, pursuant to CPLR 2221(e), for leave to renew their motion for summary judgment dismissing all claims and cross claims against them; and, upon renewal, for an order granting the motion. Alternatively, they move, pursuant to CPLR 2221(d), for leave to reargue their motion. Plaintiff opposes.

Factual and Procedural Background

As set forth in this Court’s October 7, 2022 order (NYSCEF Doc No. 79), plaintiff commenced this action in May 2021 after he was allegedly injured while working at a condominium located at 4 East 27th Street in Manhattan (the premises), asserting causes of action under, among other things, Labor Law § 200, 240, and 241(6) (Doc No. 1). Following joinder of issue (Doc No. 11), movants moved for summary judgment dismissing all claims and cross claims

against them, arguing that neither 225 5th, nor CIM, owned, leased, or controlled the premises, and never contracted with anyone to perform work at the premises (Doc Nos. 48-49). In support of their motion, they submitted, among other things, an affidavit by Erik Johnson, an employee of CIM, in which he described movants' involvement with the premises (Doc No. 51).

By decision and order of October 7, 2022, the motion was denied in its entirety and movants were granted leave to renew after the completion of discovery (Doc No. 79). It was determined that the motion was premature, since a preliminary conference had not occurred and no depositions had taken place (Doc No. 79).¹ Additionally, it was determined that movants had not established prima facie entitlement to summary judgment because of deficiencies related to Johnson's affidavit, namely, the absence of several pieces of evidence mentioned expressly in the affidavit that allegedly absolved movants of liability and Johnson's failure to address whether CIM was a construction manager and whether any connections existed between CIM and 225 5th (Doc No. 79).

Movants now move for leave to renew their original motion (Doc Nos. 83-84, 91, 98). In the alternative, they move for leave to reargue and, upon reargument, for a grant of summary judgment dismissing all claims and cross claims against them (Doc Nos. 83-84, 91, 98).

Legal Analysis and Conclusions

Movants contend that renewal is warranted based on new evidence — a condominium declaration and several photographs of the premises — that could alter this Court's prior

¹ It bears mentioning that this Court incorrectly stated that no preliminary conference had occurred when movants initially moved for summary judgment. Movants moved for summary judgment in April 2022 and a preliminary conference order was issued two months earlier in February 2022. However, as will be demonstrated below, this error was not determinative in deciding the original motion.

determination, despite the failure to include them in support of their original motion.² Regarding reargument, they contend that this Court misapprehended the law by concluding that their original motion was premature, because plaintiff failed to demonstrate that additional discovery would reveal relevant evidence. They contend further that this Court overlooked facts contained in Johnson's affidavit related to CIM's status as a construction manager and its liability under Labor Law.

Defendant 225 Condominium opposes,³ arguing that leave to renew is improper because movants failed to provide a reasonable excuse for not including the evidence in their original motion. They also argue that the motion should be denied because movants failed to demonstrate entitlement to summary judgment, given Johnson's failure to assert how he had personal knowledge of the premises and 225 5th's business operations.

Plaintiff opposes, arguing akin to 225 Condominium that leave to renew is unwarranted because movants failed to explain why they did not include their new evidence with their original motion. He also reiterates his opposition to the original motion that movants' motion was premature because additional discovery will likely lead to relevant evidence.

In reply, movants reiterate their contentions.

Movant's Request for Leave to Renew

"Although it is true that a motion to renew should generally be based upon newly-discovered facts, this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant at the time the original motion

² A property deed is also included in support of movants' motion to renew/reargue (Doc No. 86). That documentary evidence, however, was also included with their original motion, so it cannot be deemed new evidence for renewal purposes.

³ 225 Condominium did not oppose movants' original motion because it had not answered or otherwise appeared in the action at that time.

was made” (*Kaszar v Cho*, 160 AD3d 501, 502 [1st Dept 2018] [citations omitted]; *accord Global Liberty Ins. Co. v Larurenceau*, 187 AD3d 570, 571 [1st Dept 2020]). However, the party seeking renewal must still supply a reasonable justification for why it failed to provide the information in support of the original motion (*see Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 484 [1st Dept 2015] [affirming denial of renewal motion because moving party “did not provide a reasonable justification for failing to submit the additional affidavit and documents in support of [its] original motion”]; *Leighton v Lowenberg*, 125 AD3d 427, 427-428 [1st Dept 2015] [similar]; *cf. Joseph v Board of Educ. of the City of N.Y.*, 91 AD3d 528, 529 [1st Dept 2012] [granting renewal after moving party demonstrated that law office failure caused omission of information previously known, but never submitted, when original motion filed]).

Here, as movants fail to explain why the condominium declaration and photographs were not submitted in its original motion, they are not entitled to leave to renew (*see Granite State Ins. Co.*, 132 AD3d at 484; *Leighton*, 125 AD3d at 427-428; *Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543, 544 [1st Dept 2013] [denying renewal motion where moving party failed to offer “any justification for not submitting the purportedly new evidence on the initial motion”], *lv dismissed* 22 NY3d 1113 [2014]).

Movants’ Request for Leave to Reargue

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [citations omitted]; *accord Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

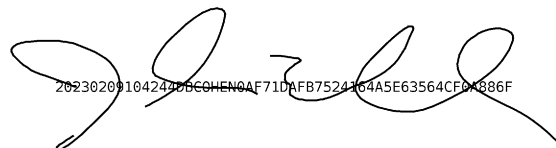
Here, movants fail to establish that this Court misapprehended the law in denying their motion as premature, as they fail to cite any authority contradicting the caselaw cited by this Court in concluding that a summary judgment motion may be denied as premature when it is made in close proximity to a preliminary conference order and depositions have not occurred (*see Robb v Knights Collision & Auto Care Ctr. Inc.*, 2018 NY Slip Op 31400[U] [Sup Ct, NY County 2018] [denying summary judgment motion as premature because no discovery conducted and motion made prior to preliminary conference]; *see generally Bradley v Ibex Constr. LLC*, 22 AD3d 380 [1st Dept 2005] [similar]; *McGlynn v Palace Co.*, 262 AD2d 116 [1st Dept 1999] [denying summary judgment motion as premature because motion “made almost immediately after entry of . . . court’s preliminary conference order” and plaintiff’s deposition was outstanding]). Although movants correctly articulate that a party seeking “[t]o avail oneself of CPLR 3212(f) to defeat or delay summary judgment” must demonstrate, among other things, “that the needed proof is within the exclusive knowledge of the moving party” (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]; *see Corona v HHSC 13th St. Dev. Corp.*, 197 AD3d 1025, 1026 [1st Dept 2021]), that was not the basis for this Court’s prematurity determination and ultimate denial of the motion.

Movants’ remaining contention that this Court overlooked facts contained in Johnson’s affidavit need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the motion for leave to renew/reargue by defendants 225 5th Avenue (NY), LLC and CIM Group, LLC is denied; and it is further

ORDERED that the parties shall appear for a status conference in person at 71 Thomas Street, Room 305, at 10:00 a.m. on April 18, 2023, unless the parties submit a stipulation by 3:00 p.m. the day before in accordance with the Part rules.



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2/9/2023
DATE

DAVID B. 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