

Herman v Judlau Contr., Inc.

2024 NY Slip Op 33024(U)

August 27, 2024

Supreme Court, New York County

Docket Number: Index No. 652249/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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RACHEL HERMAN, RENDA GREENHILL, RANDY
WILKINS

Plaintiff,

- v -

JUDLAU CONTRACTING, INC.,

Defendant.

INDEX NO. 652249/2017

MOTION DATE 04/04/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 346, 347

were read on this motion to/for RENEWAL.

Upon the foregoing documents, the defendant’s motion to renew (Mtn. Seq. No. 006) pursuant to CPLR § 2221(e) is DENIED.

Previously, this Court (i) granted class certification in a Decision and Order dated December 18, 2019 (NYSCEF Doc. No. 84) and (ii) granted summary judgment in the plaintiffs’ favor on liability and referred the matter of damages to a special referee in a Decision and Order dated May 11, 2021 (NYSCEF Doc. No. 191; collectively hereinafter, the **Prior Decisions**). The defendant thereafter appealed. Upon review, the Appellate Division affirmed (*Herman v Judlau Contr., Inc.*, 204 AD3d 496, 496-97 [1st Dept 2022], *lv to appeal dismissed*, 39 NY3d 1055 [2023]).

CPLR § 2221 provides for renewal upon a subsequent change in law:

(e) A motion for leave to renew:

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Motion No. 006

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.

([emphasis added]).

Relying principally on *Van Osten v Huicatao Corp.* (Index. No. 709785/2022, NYSCEF Doc. No. 53 [Sup Ct, February 14, 2024]), which denied class certification ***based on an argument that was never made in this case***, the defendant now argues that it is entitled to renewal because it argues that there has been a change in the law that would change the prior determinations of this Court (*Herman v Judlau Contr., Inc.*, 204 AD3d 496, 496-97 [1st Dept 2022], *lv to appeal dismissed*, 39 NY3d 1055 [2023]).

The argument fails. *Van Osten* does not represent a change in the law that would change the Prior Decisions. The decisions relied upon by the *Van Osten* court predate the Court's Prior Decisions (*Gym Door Repairs, Inc., v. Astoria General Contracting Corp.*, 144 A.D.3d 1093 [2d Dept 2016]; *Brandy v. Canea Mare Contr., Inc.*, 34 A.D.3d 512 [2d Dept 2006]; *P&T Iron Works v. Talisman Contr. Co.*, 18 A.D.3d 527 [2d Dept 2005]; *Tenalp Const. Corp., v. Roberts*, 141 A.D.2d 81 [2d Dept 1988]). The argument that the defendant **now** seeks to assert (*i.e.*, that class certification should be denied where [i] there was no clear evidence that the plaintiffs' work fell within the prevailing wage classification and [ii] the putative class members had not sought an administrative hearing in connection with what amounted to a prevailing wage claim under

Labor Law § 220) was, as the *Van Osten* court noted itself in distinguishing the Prior Decisions, not made in this case:

This Court has considered *Herman v Judlau Contracting, Inc.*, 204 AD3d 496 [2022], however in that case, the court below did not consider the issue of exhaustion of administrative remedies.

(Index 709785-2022, NYSCEF Doc. No. 53, at 4). Indeed, it was because the *Van Osten* court held that the argument advanced in that case had not been made in this case, that it was not bound by the Appellate Division's decision in this case. Thus, *Van Osten* does not represent a change in the law that would change the outcome of the Prior Decisions as affirmed by the Appellate Division and the motion is therefore be denied.

The defendant's argument that the Court may (and should) in its discretion grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Nassau County v Metro. Transp. Auth.*, 99 AD3d 617, 619 [1st Dept 2012]) also fails. Simply put, the defendant does not move for renewal based on prior known facts. They do so based on what they incorrectly argue is "new" law and based on facts and law which could have been made and was not. Thus, this too does not provide a proper predicate for the defendant's motion.

Stated differently, at bottom, this is a motion to renew that merely seeks to proceed upon a different legal theory for a second bite at the apple. This is patently improper and contrary to the purpose of CPLR § 2221(e):

Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Fosdick v Town of Hempstead*, 126 NY 651; *American Trading Co. v Fish*, 87 Misc 2d 193). Nor does reargument serve to provide a

party an opportunity to advance arguments different from those tendered on the original application.

...

Nor should the remedy be available where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application.

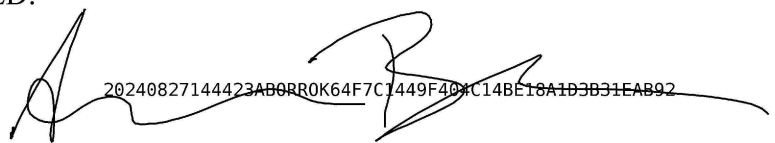
(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]).

Finally, the Court notes that *Van Osten* is not binding on this Court in any event.

The Court has considered the defendant's remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion to renew is DENIED.


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8/27/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN
 DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: