

Footman v D'Onofrio Gen. Contrs. Corp.

2022 NY Slip Op 33535(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 156910/2021

Judge: Laurence L. Love

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART 63

Justice

-----X

ERIC FOOTMAN,

Plaintiff,

- v -

D'ONOFRIO GENERAL CONTRACTORS CORP., SUNSET
PARK GENERAL CONTRACTORS, LLC

Defendants.

-----X

INDEX NO. 156910/2021

MOTION DATE 03/18/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44

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

Plaintiff – Eric Footman moves to reargue, renew, or grant leave to amend, this Court’s January 7, 2022 Decision and Order (see NYSCEF Doc. No. 29) that granted Defendant – D’Onofrio General Contractors Corp.’s motion to dismiss. Plaintiff’s sole cause of action was “breach of prevailing wage contracts for the putative class” against D’Onofrio General Contractors Corp. and Sunset Park General Contractors, LLC.

Plaintiff – Eric Footman submits a memorandum of law. “Plaintiff respectfully maintains that the Court misapprehended and overlooked the law with respect to D’Onofrio’s motion to dismiss by (i) considering affidavits on a motion to dismiss pursuant to CPLR 3211(a)(1) and (7), (ii) disregarding the allegations in Plaintiff’s Complaint because the Complaint was unverified when no obligation to verify the Complaint exists, (iii) penalizing Plaintiff for not submitting evidence, such as an affidavit or contracts, to support the allegations in the Complaint, (iv) overlooking the standard for pleading a third – party beneficiary breach of

contract cause of action for prevailing wages, (v) overlooking the First Department decision in *Wroble v. Shaw Env'tl. & Infrastructure Eng'g of NY, P.C.*, 166 A.D.3d 520 [1st Dept. 2018]) by considering Plaintiff's employment status with D'Onofrio in dismissing Plaintiff's breach of contract cause of action, and (vi) overlooking the facts in Plaintiff's Complaint along with the standard for pleading joint employer and alter ego allegations" (see NYSCEF Doc. No. 37 P. 8).

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court" (see, *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]).

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a change in the law that would change the prior determination (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, supra).

Leave to amend a pleading shall be freely given, but is properly denied where the proposed amendment is palpably insufficient or patently devoid of merit (see *Citimortgage, Inc. v. Peralta*, 200 A.D.3d 755 [2d Dep't 2021]).

Plaintiff's memorandum of law continues, "alleging that D'Onofrio and Sunset entered into contract with government agencies and utility companies ... and the contracts mandate the payment ... to workers who furnish labor in furtherance of these contracts. Plaintiff argued that the joint employer and alter ego allegations were immaterial to Plaintiff's third – party beneficiary claims against D'Onofrio, citing to the First Department decision in *Wroble*." (see NYSCEF Doc. No. 37 P. 9 – 10).

Defendant's memorandum of law states, "Plaintiff's joint employment allegations, which attempt to paint the Defendants as alter egos of one another, are conclusively rebutted by this documentary evidence. NYSCEF Doc. No. 21 at 7. The Order correctly concluded from Defendants' documentary evidence that the Defendants have a separate and distinct corporate existence, and that the Plaintiff was only employed by one of them. Plaintiff did virtually nothing to rebut this showing. He failed to offer any admissible documentary evidence, or any sworn testimony, in response to these documents" (see NYSCEF Doc. No. 43 P. 8).

A continued reading of the papers submitted, Jerry D'Onofrio III affirms, "Plaintiff was employed by Sunset as a crossing guard from approximately July 2020 to June 2021. Consistent with the fact that Plaintiff was an employee of Sunset, at all times relevant to this lawsuit, Plaintiff was paid directly by Sunset. Annexed hereto as Exhibit B is a true and correct copy, with confidential personal information redacted, of Sunset's Payroll Records for Eric Footman" (see NYSCEF Doc. No. 16 Pars. 10 – 11).

Defendant submits a "Employee Payroll (sic) History Summary – Sunset Park General Contracting LLC" for Eric L Footman (see NYSCEF Doc. No. 16 Ps. 9 – 16).

Defendant has submitted documentary evidence that refutes Plaintiff's contention. The motion to reargue, renew, and leave to amend does not point or highlight any facts,

circumstances, or theories of law that this Court missed. Further, no new facts were submitted that were not already presented or known on the original motion.

ORDERED that Plaintiff's motion to reargue, renew, leave to amend is DENIED.

10/14/2022
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE