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

PRESENT: ROSALYN Richter PART 24
Justice

Balbuena, Gorgonio

INDEX NO. 110868/00

MOTION DATE

- v -

MOTION SEQ. NO. 001

IDR Realty

MOTION CAL. NO.

The following papers, numbered 1 to w ere read on this motion to for

	PAPERS NUMBERED
Notice of Motion/ Order Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED MAY 15 2003

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/12/03

Rosalyn Richter

HON. ROSALYN RICHTER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

GORGONIO BALBUENA and MARINA VEGA,

Plaintiffs,

-against-

IDR REALTY, LLC and DORA WECLER,

Defendants.

IDR REALTY, LLC and DORA WECLER,

Third-party Plaintiffs,

-against-

TAMAN MANAGEMENT CORP.,

Third-Party Defendant.

DECISION **AND** ORDER
Index No. 110868/2000
Motion Sequence No. 5

Richter, J.:

This personal injury action arises out of an incident at a construction site during which plaintiff Gorgonio Balbuena was allegedly injured. In his complaint, Balbuena alleges both common law negligence claims as well as various violations of the Labor Law. In this motion, third-party defendant Taman Management Corp. ("Taman") seeks partial summary judgment dismissing Balbuena's claim for lost earnings on the grounds that he is an undocumented immigrant and thus is unable to lawfully earn wages in this country.

It is well-settled that "where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiffs conduct constitutes a *serious* violation of the law and the injuries for which the plaintiff seeks recovery are the *direct* result of that violation." *Manning v. Brown*, 91

N.Y.2d 116, 120 (1997)(emphasis in original). However, this rule "would not apply in every instance where the plaintiffs injury occurs while he is engaged in illegal activity. . . A complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act." *Alami v. Volkswagen of America, Inc.*, 97 N.Y.2d 281, 285-86 (2002), *quoting Barker v. Kallash*, 63 N.Y.2d 19, 25 (1984).

Lower courts have held that undocumented immigrants are not precluded from recovering damages of future lost wages based solely on the fact that they were not employed legally in this country. Thus, for instance, in *Kirby v. Equitable Life Assurance Society*, 192 A.D.2d 325 (1st Dept. 1993), the First Department held that the plaintiff administrator could offer evidence of any wages the decedent, who was working in the United States illegally, might have earned. Citing the above line of Court of Appeals cases, the court reasoned that the decedent's allegedly illegal conduct did not, as a matter of law, amount to a serious crime that directly caused his injuries. Likewise, in *Collins v. New York City Health and Hospitals Corporation*, 201 A.D.2d 447 (2d Dept. 1994), the Second Department concluded that summary judgment with regard to an undocumented worker's lost earnings was improper since the record failed to establish as a matter of law that any wages the worker might have earned would have been the product of illegal activity. *See also Klapa v. O & Y Liberty Plaza Company*, 168 Misc.2d 911 (Sup. Ct. N.Y. Cty. 1996)(a plaintiffs status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost earnings). Applying these principles, the Court concludes that Taman's motion for partial summary judgment must be denied.

Taman argues, however, that the United States Supreme Court decision in *Hoffman Plastic Compounds v. National Labor Relations Board*, 535 U.S. 137 (2002), supercedes the above New York precedent and requires this Court to dismiss Balbuena's future lost wages claim. In *Hoffman*,

the Supreme Court held that federal immigration policy, expressed by Congress in the Immigration Reform and Control Act of 1986 ("IRCA")', foreclosed the National Labor Relations Board ("NLRB") from awarding backpay under the National Labor Relations Act ("NLRA") to an undocumented immigrant who had never been legally authorized to work in the United States. Taman argues that because of *Hoffman,* the legal landscape in New York has changed, and that awards of lost wages to undocumented immigrants are no longer permissible.

Where a conflict exists between the state courts and the United States Supreme Court as to the meaning of Federal statutes and the Federal Constitutions, "[a]ll courts are, of course, bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution." *People v. Kin Kan, 78* N.Y.2d 54 (1991). In the instant case, however, there is no federal statute at issue, nor is there any federal Constitutional issue in dispute. In *Hoffman,* the Supreme Court merely held that an undocumented worker could not be awarded backpay *under the NLRA,* a specific federal statute not pertinent to Balbuena's claims. The only matter before this Court is whether Balbuena has the right, under New York common law, to recover for lost wages. Nothing in the Supreme Court decision states, or even implies, that its holding would be applicable to tort actions brought under state common law. Thus, this Court concludes that in this state tort matter, it is not bound by *Hoffman. See Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.,* 41 N.Y.2d 84 (1976)(United States Supreme Court's interpretation of title VII of the Federal Civil Rights Act of 1964 is not binding upon New York courts' interpretation of state anti-discrimination laws, even though the pertinent provisions of the federal statute are substantially identical to those of the state

[1] Among other provisions, IRCA makes it illegal for employers to knowingly hire undocumented workers.

statute); *Nicolo v. Citibank,* 147 Misc.2d 111, 114 (Sup. Ct. Monroe Cty. 1990)("there is nothing precluding a court of this State from making a more expansive interpretation" of our State law than that given title VII); *Maffei v. Kolaeton Industries,* 164 Misc.2d 547 (Sup. Ct. N.Y. Cty. 1995)(same).

Notably, several courts have concluded that *Hoffman* does not stand for the broad proposition that an undocumented worker's recoveryon *all* claims for wages is barred. For instance, in *Zeng Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002) and *Flores v. Amigon*, *233* F.Supp.2d 462 (E.D.N.Y. 2002), the courts held that *Hoffman* does not preclude an undocumented immigrant from being awarded unpaid past wages under the Fair Labor Standards Act. Furthermore, nothing in *Hoffman,* nor its underlying rationale, would preclude the recovery of lost wages which the undocumented worker might have legally earned in another country. Thus, even assuming *Hoffman's* applicability to the instant case, a factual issue remains precluding summary judgment, namely, whether, and how much, Balbuena might have earned in another country. *See Collins v. New York City Health and Hospitals Corporation,* 201 A.D.2d at 447 (length of time during which undocumented worker might have continued earning wages in the United States, and the likelihood of his potential deportation are factual issues for resolution by a jury).

Taman also seeks an Order compelling plaintiffs to respond to Taman's July 1, 2002 notice for discovery and inspection and its August 26, 2002 notice to admit. In the discoverynotice, Taman seeks documentation that Balbuena was authorized to be employed in the United States at the time of the accident. In the notice to admit, Taman seeks admissions that at the time of the accident, Balbuena was not in possession of, nor had been issued, documents permitting him to work in the United States. In his response to the instant motion, Balbuena's attorney states that his client is not

a documented worker. Nevertheless, Taman is entitled to formal responses to the discovery notice and notice to admit. *See Vasquez v. Sokolowski*, 277 A.D.2d 370 (2d Dept. 2000)(notice of discovery and inspection regarding plaintiffs status in this country under the immigration laws is relevant to the claim for lost wages); *Gomez v. Long Island Railroad*, 201 A.D.2d 455 (2d Dept. 1994)(notice to admit involving plaintiffs immigration status is relevant to lost earnings claim). Accordingly, it is

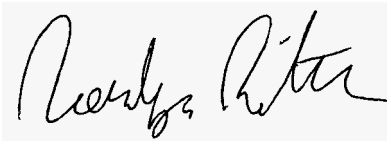
ORDERED that Taman's motion for partial summary judgment is denied; and it is further

ORDERED that Taman's motion for an Order compelling plaintiffs to respond to Taman's July 1,2002 notice for discovery and inspection and its August 26,2002 notice to admit is granted; and it is further

ORDERED that plaintiffs shall serve the above responses by May 21,2003.

This constitutes the decision and order of the Court.

May 12,2003



Justice Rosalyn Richter

HON. ROSALYN RICHTER