

Kaminski v Carlyle One
2007 NY Slip Op 31773(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0106087/2005
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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MARCIN KAMINSKI,

Plaintiff,

-against-

Index No. 106087/05

CARLYLE ONE, CARLYLE TWO, CARLYLE THREE,
CARLYLE THREE, LLC, SKYLINE TOWERS 5,
SKYLINE TOWERS 6, DIAN WOODNER, as Co-
Executrix of the Estate of IAN WOODNER, a
partner in CARLYLE ONE, CARLYLE TWO,
CARLYLE THREE, CARLYLE THREE, LLC, SKYLINE
TOWERS 5, SKYLINE TOWERS 6, ANDREA
WOODNER, as Co-Executrix of the Estate of
IAN WOODNER, a partner in CARLYLE ONE,
CARLYLE TWO, CARLYLE THREE, CARLYLE THREE,
LLC, SKYLINE TOWERS 5, SKYLINE TOWERS 6,
JONATHAN WOODNER CO. and WOODNER COMPANY,
INC.,

Defendants.

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CARLYLE ONE LLC, CARLYLE TWO LLC, CARLYLE
THREE LLC, SKYLINE TOWERS 5 LLC, SKYLINE
TOWERS 6 LLC, DIAN WOODNER, ANDREA
WOODNER, JONATHAN WOODNER CO. and WOODNER
COMPANY, INC.,

Third-Party
Index No. 590825/05

Third-Party Plaintiffs,

-against-

WEST NEW YORK RESTORATION OF CT., INC.,

Third-Party Defendant.

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Walter B. Tolub, J.:

Plaintiffs move, by order to show cause, for leave to
reargue, pursuant to CPLR 2221, this court's February 1, 2007
Order which denied plaintiff's motion for partial summary

judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6), and denied defendants' cross motion for the dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.¹ Upon reargument, plaintiff seeks the grant of partial summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims.

The facts of this case are set forth in the February 1, 2007 Order, familiarity with which is presumed.

CPLR 2221 (d) (2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." The motion is addressed to the discretion of the court (see e.g. *Rivera v Benaroti*, 29 AD3d 340, 341 [1st Dept 2006]).

Here, plaintiff maintains that the court failed to consider the facts and applicable law when it determined that there were questions of fact "as to whether Plaintiff's injury was in any part attributable to the absence of a safety device," and "whether Plaintiff's injury was in any part attributable to a statutory violation or was the result of his own actions" (February 1, 2007 Order, at 4). Upon careful review of all the papers underlying the February 1, 2007 Order, and the papers

¹The other determinations made in the February 1, 2007 Order are not in issue on this motion.

submitted on this motion, the court concludes that a change in its prior determination is in order, and grants reargument.

Plaintiff basically argues the same points that he did in his prior motion. However, plaintiff and the court were mistaken in stating as a fact that plaintiff was not supplied with a safety device. Plaintiff was given a secure sideboard which failed only after he disabled it by knocking its nails loose. The circumstances in this case are similar to those in *Negron v City of New York* (22 AD3d 546 [2d Dept 2005]), where the worker was safely secured until he told a co-worker to disable the safety device, and the worker then continued to perform his task unprotected. Plaintiff here decided to disregard the risk that he was subjecting himself to by temporarily disabling the sideboard (see *McCormack v Universal Carpet & Upholstery Cleaners*, 29 AD3d 542 [2d Dept 2006] [worker disregarded risk posed by not wearing his goggles]), and he chose to realign the sideboard without asking his co-workers for help (see *Cannata v One Estate*, 127 AD2d 811 [2d Dept 1987]). His decisions were the sole proximate cause of his injury (see e.g. *Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003], citing *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]).

Accordingly, it is

ORDERED that plaintiff's motion for leave to reargue is granted, and upon reargument, it is

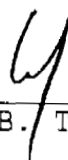
ORDERED that plaintiff's motion for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/19/07

ENTER:



WALTER B. TOLUB J.S.C.