[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Index Number : 100715/2004

MATTHEWS, ANTHONY

VS

TRUMP 767 FIFTH AVENUE

Sequence Number : 004

RESETTLE ORDER

INDEX NO. 100715/04

MOTION DATE 4/16/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion (seq. no. 004) by defendant Otis Elevator Company for resettlement and leave to reargue and renew the court's decision and order dated January 31, 2007 is granted to the extent of granting leave to reargue, and upon reargument, the court dismisses the cross claims asserted against Otis by defendants/third-party plaintiffs Trump 767 Fifth Avenue, LLC and Trump 767 Management, LLC for contribution and contractual indemnification, and is otherwise denied; and it is further

ORDERED that the cross motion by third-party defendant Triangle Services, Inc. for leave to reargue is granted to the extent of granting leave to reargue, and upon reargument, the court adheres to its original determination. It is further

ORDERED that counsel for defendant Otis Elevator shall serve a copy of this order with notice of entry within twenty days of entry.

Dated: 7/12/07

CAROL EDMEAD J.S.C. J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

ANTHONY MATTHEWS and CAROLINE MATTHEWS,

Index No. 100715/04

Plaintiffs,

-against-

TRUMP 767 FIFTH AVENUE, LLC, TRUMP 767 MANAGEMENT, LLC, OTIS ELEVATOR COMPANY and CONSECO, INC.,

Defendants.

----------X

TRUMP 767 FIFTH AVENUE, LLC and TRUMP 767 MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

TRIANGLE SERVICES, INC.,

Third-Party Defendant.

----------X

CAROL R. EDMEAD, J.:

MEMORANDUM DECISION

Defendant Otis Elevator Company (Otis) moves (seq. no. 004), pursuant to CPLR 2221, for resettlement and leave to reargue and renew the court's decision and order dated January 31, 2007 (the prior order). Otis seeks dismissal of three cross claims asserted against it by defendants/third-party plaintiffs Trump 767 Fifth Avenue, LLC and Trump 767 Management, LLC (collectively, the Trump defendants) for (1) contribution, (2) contractual indemnification, and (3) breach of contract for failure to procure insurance.

Third-party defendant Triangle Services, Inc. (Triangle) cross-moves for leave to reargue

the prior order. Plaintiffs join in Triangle's motion.

The relevant facts are set forth in detail in the prior order. Briefly, plaintiff Anthony Matthews, a professional window washer employed by Triangle, was injured in attempting to reengage an armature of a window washing platform into its tracks on the side of a building. Plaintiffs sued Otis, the platform maintenance company, and the Trump defendants, as the building owner and manager, asserting that they violated the Labor Law and were negligent in causing his injuries.

A motion to resettle an order may be made to correct an inconsistency between the court's decision and its order (CPLR 2221). Where a conflict exists, the court's decision controls (*Scheuering v Scheuering*, 27 AD3d 446, 447 [2d Dept 2006]). It "may not be used to effect a substantive change in or to amplify the prior decision of the court" (*Foley v Roche*, 68 AD2d 558, 566 [1st Dept 1979]).

"'Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision'" (*E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept 2007], quoting *Carrillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]). Reargument is not designed to afford a party an opportunity to relitigate issues already decided or to present new arguments (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor is reargument to be employed as a vehicle for seeking new forms of relief (*Fox v Abe Schrader Corp.*, 36 AD2d 591 [1st Dept 1971]; *see*

also DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715, 718 [1st Dept 2005]).

A motion for renewal is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention (CPLR 2221 [e] [2]). The movant must present a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; *see also Crawford v Sorkin*, – AD3d – , 2007 WL 1775356, *1 [1st Dept, June 21, 2007]).

Otis has not identified any inconsistency between the court's decision and its order that would require resettlement. Rather, Otis argues that it would be a "discordant" result to permit the Trump defendants' remaining cross claims to stand. Notably, Otis moved for summary judgment dismissing the complaint but did not seek dismissal of the Trump defendants' cross claims asserted against it. The Trump defendants did, however, move for summary judgment on their cross claims for common-law and contractual indemnification against Otis. The court granted Otis's motion and dismissed the Labor Law and negligence claims against it. Upon considering common-law indemnification, the court searched the record and granted summary judgment dismissing that cross claim. The court also specifically noted that the parties had not addressed the cross claim for failure to procure insurance. Although Otis did not specifically seek dismissal of the cross claims for contribution and contractual indemnification, the court now finds that dismissal of these cross claims was warranted in light of its general prayer for relief, and the court's finding that it had not breached any duty to plaintiff (*see Hajdari v 437 Madison Ave. Fee Assoc.*, 293 AD2d 360 [1st Dept 2002]; *Lubov v Berman*, 260 AD2d 236, 237 [1st Dept 1999]; *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 774-775 [2d Dept

1991]). However, the cross claim for failure to procure insurance was not rendered academic by dismissal of plaintiff's complaint as against Otis (*Natarus v Corporate Prop. Invs., Inc.*, 13 AD3d 500, 501 [2d Dept 2004]; *Hajdari*, 293 AD2d at 361).

Otis offers a certificate of insurance and insurance policies in support of dismissal of the insurance procurement claim, which were not part of the record on the underlying motions. Nevertheless, there is no basis for renewal. Otis has failed to establish that these documents are newly discovered evidence, and has not offered any excuse for not presenting them on the original motion (*see Renna v Gullo*, 19 AD3d 472, 473 [2d Dept 2005] [motion to renew is not a "second chance freely given to parties who have not exercised due diligence in making their first factual presentation"]).

The court now turns to Triangle's cross motion. To impose liability on a defendant under Labor Law § 200 or in negligence, the plaintiff must prove that the defendant supervised the injury-producing work, or created or had actual or constructive notice of the dangerous or defective condition (*Mitchell v New York Univ.*, 12 AD3d 200, 200-201 [1st Dept 2004]). The court found that Otis established by uncontradicted evidence that it exercised no supervision or control over plaintiff's work (prior order, at 5). Based upon Otis's expert evidence, maintenance records, and the deposition testimony, the court also found that it had made a prima facie showing that the platform was operating properly on the date of plaintiff's accident, and that it had no notice that the platform's armatures disengaged from the building during its operation (prior order, at 5-7, 8). Plaintiff's expert's affidavit failed to raise issues of fact as to whether Otis was on notice of a defective condition, and whether the platform was negligently maintained by Otis (prior order, at 7-9).

Triangle takes issue with the court's conclusion that plaintiff's evidence failed to raise an issue of fact. It further argues that the court overlooked facts as to whether Otis was on notice that the armatures disengaged from the building, and whether Otis's failure to perform certain contractual obligations caused or contributed to plaintiff's accident. The court considered these arguments and evidence in making its original decision, and Triangle has not pointed to anything showing that it misapprehended the facts or the law (*see Pro Brokerage*, 99 AD2d at 971).

One final point is worthy of mention. Triangle states in its attorney's affirmation that plaintiff was injured when the platform "misaligned." However, plaintiff never claimed that the platform misaligned, and only claimed that he was injured while attempting to reengage the armature into the building. In any case, an attorney's affirmation is without evidentiary value on a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Accordingly, it is

ORDERED that the motion (seq. no. 004) by defendant Otis Elevator Company for resettlement and leave to reargue and renew the court's decision and order dated January 31, 2007 is granted to the extent of granting leave to reargue, and upon reargument, the court dismisses the cross claims asserted against Otis by defendants/third-party plaintiffs Trump 767 Fifth Avenue, LLC and Trump 767 Management, LLC for contribution and contractual indemnification, and is otherwise denied; and it is further

ORDERED that the cross motion by third-party defendant Triangle Services, Inc. for leave to reargue is granted to the extent of granting leave to reargue, and upon reargument, the

court adheres to its original determination. It is further

ORDERED that counsel for defendant Otis Elevator shall serve a copy of this order with notice of entry within twenty days of entry.

Dated: July 12, 20097

ENTER:

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE