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

PRESENT: Ling-Cohan Justice PART 36

Mihelis, Constantinos

- v -

i. park Lake Success, LLC

INDEX NO. 120857/07

MOTION DATE

MOTION SEQ. NO. 06

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4,5
Replying Affidavits	6,7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to reargue is decided in accordance with the attached memorandum decision.

FILED
JUL 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/19/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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CONSTANTINOS MIHELIS and CURTIS DRAKEFORD, as Administrator of the goods, chattels, and credits which were of CURTIS MOORE, a/k/a CURTIS DRAKEFORD,

Plaintiffs,

-against-

Motion Seq 006

Index No. 120857/03

I. park LAKE SUCCESS LLC, BALL CONSTRUCTION, LP, TOTAL SAFETY CONSULTING, L.L.C., and L.A. FITNESS INTERNATIONAL, LLC,

Defendants.

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I. park LAKE SUCCESS LLC and BALL CONSTRUCTION, LP,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 590346/05

PROFESSIONAL WATERPROOFING & RESTORATION, INC.,

Third-Party Defendant.

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PROFESSIONAL WATERPROOFING & RESTORATION, INC.,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 591282/05

THE VSA GROUP,

Second Third-Party Defendant.

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LING-COHAN, J.:

In this action arising out of a work-related injury, defendants/third-party plaintiffs i.park Lake Success LLC and Ball Construction, LP (hereinafter referred to as i.park and Ball) move, pursuant to CPLR 2221 (b), for leave to reargue the court's decision and order dated October 15,

2007 (seq. no. 005). Specifically, i.park and Ball seek an order: (1) granting summary judgment dismissing plaintiffs' Labor Law § 200 (1) and negligence claims against them; and (2) granting summary judgment on their third-party claim for contractual indemnification against third-party defendant Professional Waterproofing & Restoration, Inc. (PWR).

BACKGROUND

The relevant facts are set forth in detail in the court's prior decision and order. To summarize, plaintiff Constantinos Mihelis, an employee of PWR, was injured while performing demolition work on a construction job at premises owned by i.park. i.park hired Ball to serve as the construction manager to demolish and replace the roof at the main and south buildings of the premises. Ball, in turn, hired, PWR as a subcontractor to install a new roofing system on the south building. i.park also hired The VSA Group (VSA), a consulting engineering firm, which surveyed the roof system, and concluded that many of the concrete roof panels at the south building had to be replaced.

On November 17, 2003, plaintiff was injured when the concrete roof panel that he was standing on collapsed, sending him 20 feet to the ground below. Plaintiff's co-worker, who was standing on the panel with plaintiff, died as a result of the accident. Plaintiff and his wife then commenced this action against i.park and Ball, asserting causes of action under Labor Law §§ 200, 240, 241 (6) and common-law negligence. i.park and Ball impleaded PWR, seeking contribution and indemnification. PWR brought a second third-party action against VSA. Thereafter, plaintiff served a second amended complaint naming VSA as an additional defendant in the main action.

As relevant here, i.park and Ball moved for summary judgment dismissing the second amended complaint, and for contractual indemnification over and against PWR. In support of dismissal of plaintiffs' Labor Law § 200 and negligence claims, i.park and Ball argued that they did not supervise or control plaintiffs' demolition work, and did not create or have notice of any dangerous condition.

In denying i.park and Ball's motion as to these two claims, the court noted that the alleged dangerous condition in this case did not arise out of the means and methods of the demolition work, but rather out of a premises defect (Decision and Order, at 12). Since i.park and Ball submitted no evidence to demonstrate the absence of notice, the court concluded that they failed to meet their burden of establishing entitlement to summary judgment (*id.* at 12-13). Consequently, the court also denied the part of i.park and Ball's motion seeking contractual indemnification from PWR, because they had not shown their freedom of negligence as a matter of law (*id.* at 18).

i.park and Ball now argue that the court misapprehended the law concerning a defendant's burden on summary judgment on the issue of notice. Citing *Strowman v Great Atl. & Pac. Tea Co.* (252 AD2d 384 [1st Dept 1998]), they contend that they were not required to definitively deny notice, nor come forward with evidence showing the lack of notice. According to i.park and Ball, they met their burden because no party submitted evidence that any party had notice of a defective condition on the premises. Further, the record is bereft of any evidence that i.park and Ball had notice of a defective condition concerning the roof panels.

In opposition, plaintiffs, PWR, and VSA contend that the court did not misapprehend the law concerning a defendant's burden on summary judgment as to lack of notice. Because i.park

and Ball did not submit any evidence to demonstrate that they had no notice of the defective condition of the concrete roof panels, their motion as to these claims was correctly denied.

In reply, i.park and Ball contend, for the first time, that they did not owe plaintiff a duty because he was injured while attempting to fix a condition that he was employed to remedy. Moreover, they contend that under First Department case law, a proponent of a summary judgment motion can establish its entitlement thereto without submitting any evidence tending to prove the lack of notice.

DISCUSSION

"'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]).

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the cause of action has no merit, by tendering proof in admissible form (CPLR 3212 [b]; *Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Winegrad*, 64 NY2d at 853).

To succeed on Labor Law § 200 and negligence claims arising out of the means and methods of the work, the plaintiff must demonstrate that the defendant exercised supervision and control over the injury-producing work (*see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 732-733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]). However, where the alleged dangerous or defective condition is a premises defect, the plaintiff must show that the defendant either created or had actual or constructive notice of the condition (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 340 [1st Dept 2005] [supervision and control over plaintiff's work is unnecessary where injury arose from defective or dangerous condition at a work site, rather than from method of plaintiff's work]).

In the court's prior decision, the court concluded that the alleged dangerous condition did not arise out of the means and methods of the demolition work, but rather out of a premises defect. Notably, i.park and Ball do not disagree with this conclusion. The court cited *Beltran v Metropolitan Life Ins. Co.* (259 AD2d 456 [2d Dept 1999]) for the proposition that a defendant must establish the absence of notice as a matter of law when moving for summary judgment for lack of notice. Other recent First Department cases require the defendant to make such a showing (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006] ["defendant met its burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006] ["[w]here a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition"]; *Giuffrida v*

Metro N. Commuter R.R. Co., 279 AD2d 403, 404 [1st Dept 2001] ["[c]ontrary to defendants' suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law"]). Moreover, the burden of establishing lack of notice cannot be satisfied by merely pointing out gaps in the plaintiff's case (*Cox v Huntington Quadrangle No. 1 Co.*, 35 AD3d 523, 524 [2d Dept 2006]).

Strowman, supra, and *Frank v Time Equities* (292 AD2d 186 [1st Dept 2002]), relied upon by i.park and Ball, do not require a different result. *Strowman* was a slip-and-fall case in which the plaintiff fell on a banana peel in a supermarket (*Strowman*, 252 AD2d at 384). In support of its contention that it did not have notice of a defective condition, the defendant offered the testimony of the plaintiff who stated that she did not observe the banana peel prior to her accident, and that she did not notice it until after her fall (*id.*). The defendant also offered the testimony of the store's manager who stated that he inspected the store on an hourly basis, would sweep when needed, and if a defective condition was observed, either the manager or porter would take care of it (*id.* at 384-385). The Appellate Division, First Department, stated:

> On such a state of the record, it was incumbent upon plaintiff to show that defendant had either actual or constructive notice of the alleged dangerous condition. Asking anything more of a moving defendant in such circumstances on the issue of notice would skew the burden of proof, which is always on the plaintiff. A defendant's burden on the issue of notice on a summary judgment motion is met if he demonstrates the absence of a material issue of fact on the question. He is not, as the dissent holds, required "definitively [to] deny actual or constructive notice of the banana peel." Such requirement would, in effect, require a defendant to prove a negative on an issue as to which he does not bear the burden of proof.

(*Strowman*, 252 AD2d at 385 [internal citations omitted]). In *Frank, supra*, the First Department stated that "[w]hile a defendant moving for summary judgment [in a slip-and-fall case] has the

burden of demonstrating entitlement to dismissal as a matter of law, there is no need for a defendant to submit evidentiary materials establishing a lack of notice [of the dangerous condition] where the plaintiff failed to claim the existence of notice of the condition" (*Frank*, 292 AD2d at 186).

In the instant case, as noted in the court's decision, i.park and Ball did not submit any evidence on the question of notice. Indeed, i.park and Ball's sole reference to this issue was a statement in their attorney's affirmation that "[t]here is also no evidence to suggest that Ball or i.park had notice of any specific hazard in the area where the accident occurred" (i.park and Ball Affirm. in Support of Motion for Summary Judgment, ¶ 52). It is well settled that an attorney's affirmation has no evidentiary value on a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). i.park and Ball, therefore, failed to establish their entitlement to summary judgment under the recent cases of *Manning*, *Mitchell*, and *Giuffrida*, or even by the standard in *Strowman*, requiring only that the defendant establish the absence of a material question of fact. *Frank, supra*, is distinguishable because, here, plaintiffs did, in fact, allege in the bill of particulars that both i.park and Ball had actual and constructive notice of the defective condition of the concrete roof panels (Verified Bill of Particulars, ¶¶ 12, 17). Therefore, i.park and Ball were not entitled to summary judgment on their contractual indemnification claim from PWR, since they failed to establish their freedom from negligence (*Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept 2006]; *Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236-237 [1st Dept 2005]; *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]).

Finally, i.park and Ball argue in the reply that they owed no duty to plaintiff because he

was injured in attempting to fix the very condition that he was employed to remedy. Nevertheless, i.park and Ball never made this argument on their underlying summary judgment motion, and therefore, they cannot make it now (*see DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005] [reargument is not available where the movant seeks to argue a new theory of law not previously advanced]; *see also Woody's Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 593 [2d Dept 2006] ["[a] motion for reargument is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those already presented"] [internal quotation marks and citations omitted]).

Accordingly, it is

ORDERED that the motion (seq. no. 006) by defendants/third-party plaintiffs i.park Lake Success LLC and Ball Construction, LP for leave to reargue the court's decision and order dated October 15, 2007 is granted, and upon reargument, the court adheres to its prior determination; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: 6/19/08

Hon. Doris Ling-Cohan, J.S.C.

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