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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 102802/2002
DEKENIPP, THOMAS
VS.
ROCKEFELLER CENTER, INC.,
SEQUENCE NUMBER : # 002
LEAVE TO REARGUE

INDEX NO. 102802-02

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

re read on this motion to/for

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

Cross-Motion: ☑ Yes ☐ No 3, 4

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

JUSTICE DORIS LING-COHAN

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

Dated: 10/8/08

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: PART 36

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THOMAS DEKENIPP,

Plaintiff,

-against-

ROCKEFELLER CENTER, INC., ROCKEFELLER GROUP, INC., ROCKEFELLER CENTER PROPERTIES, RCP ASSOCIATES, 75 PLAZA/WEST 51ST ASSOCIATES and AOL-TIME WARNER INC.,

Defendants.

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Index No.: 102802/02

Motion seq. no.: 002

Ling-Cohan, J:

This is an action to recover monetary damages for personal injuries sustained by plaintiff Thomas DeKenipp when his foot fell into a grill located on top of a radiator cover (convector cover) while washing interior windows in the premises located at 75 Rockefeller Plaza, New York, New York on February 8, 1999.

Plaintiff moves, pursuant to CPLR 2221, for an order granting him leave to reargue the parts of defendants Rockefeller Center, Inc., Rockefeller Group, Inc., Rockefeller Center Properties, RCP Associates, 75 Plaza/West 51st Street Associates and AOL-Time Warner Inc.'s (collectively, defendants) motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action on the grounds that matters of fact or law were allegedly overlooked or misapprehended by the court in determining the prior motion and, upon reargument, for a further order modifying the decision and order dated November 14, 2007, vacating that part of the order that dismissed plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action and denying that part of

defendants' motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) causes of action; as well as for an order finding good cause for an otherwise late cross motion for summary judgment and thereafter granting summary judgment in plaintiff's favor on his Labor Law § 240 (1) cause of action.

Defendants cross-move, pursuant to CPLR 2221, for an order granting them leave to reargue the part of their motion for summary judgment which sought to dismiss plaintiff's Labor Law § 202 cause of action on the grounds that matters of fact or law were allegedly overlooked or misapprehended by the court in determining the prior motion and, upon reargument, for a further order modifying the decision and order dated November 14, 2007, vacating that part of the order that denied dismissal of plaintiff's Labor Law § 202 cause of action and granting that part of defendants' motion for summary judgment which sought to dismiss plaintiff's Labor Law § 202 cause of action.

DISCUSSION

CPLR 2221 (d) states, in pertinent part:

"(d) A motion for leave to reargue:

* * *

2. 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."

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 facts or law or, mistakenly arrived at its earlier decision (Marini v Lombardo, 17 AD3d 545, 546 [2d Dept 2005]; Carrillo v PM Realty Group, 16 AD3d 611, 611 [2d Dept

2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (Pryor v Commonwealth Land Title Insurance Company, 17 AD3d 434, 436 [2d Dept 2005]; Amato v Lord & Taylor, Inc., 10 AD3d 374, 375 [2d Dept 2004]). New questions which were not previously advanced may not be raised on a motion to reargue (Levi v Utica First Insurance Company, 12 AD3d 256, 258 [1st Dept 2004]).

Here, as the court did not overlook or misapprehend relevant facts, or misapply controlling principles of law in determining that part of the prior summary judgment motion of defendants seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action, plaintiff is not entitled to leave to reargue those causes of action. In support of his motion for leave to reargue the part of defendants' motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action, plaintiff asserts that the court did not apply the appropriate "target of inquiry" in reaching its conclusion to preclude plaintiff from relying on the theory of res ipsa loquitur. Regarding whether the grill, as the instrumentality that caused his accident, was in the exclusive control of defendants, plaintiff maintains that the appropriate target of inquiry should have been whether the grill in particular, which was located on top of the convector cover and which bent downward when plaintiff stepped on it, was generally handled by the public, and not, as the court reasoned, whether the public utilized the convector cover as a whole.

To that effect, plaintiff puts forth the case of Pavon v Rudin (254 AD2d 143, 146 [1st Dept 1998]), wherein the plaintiff sustained injuries when she was struck in the head by a heavy door which had become dislodged after the top pivot hinge broke loose from the door's frame. In

that case, the Court recognized that the instrumentality that caused the plaintiff's injuries was the pivot hinge, rather than the door as a whole. As such, the appropriate target of inquiry in that case was whether the defendant had exclusive control over the pivot hinge, which was not generally handled by the public, rather than whether the public handled the door, which was used daily by numerous employees.

However, in opposition to the defendants' motion, plaintiff submitted his deposition testimony that the convector covers, which contained grill areas which sat on top of them, were customarily used as platforms by window washers when cleaning the upper portions of interior windows. In addition, one of defendants' witnesses testified that he had observed various people standing on top of the convector covers for purposes in addition to window washing, as well as people storing files and other items on top of the convectors from time to time. As such, it is clear from the record that the convector cover was not in the exclusive control of defendants and therefore, plaintiff's res ipsa loquitur theory of liability must fail.

Thus, based upon the foregoing, the plaintiff's motion for leave to reargue the part of defendants' motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action is denied.

Plaintiff also moves for an order granting him leave to reargue the part of defendants' motion for summary judgment which sought to dismiss plaintiff's Labor Law § 240 (1) cause of action on the ground that there has been a recent change in the law regarding the issue of whether window cleaning of the nature performed by plaintiff at the time of his accident is afforded protection under Labor Law § 240 (1).

As that part of plaintiff's motion which seeks to reargue defendants' prior motion for

summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is based upon "a change in the law that would change the prior determination" it is, in actuality, a motion for renewal (CPLR 2221 [e] [2]; see Daniels v Millar Elevator Industries, Inc., 44 AD3d 895, 895 [2d Dept 2007]).

CPLR 2221 (e) states, in pertinent part:

"(e) A motion for leave to renew:

* * *

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion."

"A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence on the original motion" (Leonard Fuchs, Inc. v Laser Processing Corporation, 222 AD2d 280, 280 [1st Dept 1995]). "[R]enewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (Rubenstein v Goldman, 225 AD2d 328, 328-329 [1st Dept 1996], quoting Matter of Bieny, 132 AD2d 190, 210 [1st Dept 1987]; Chelsea Piers Management v Forest Electric Corporation, 281 AD2d 252, 252 [1st Dept 2001]).

Here, plaintiff is entitled to leave to renew that part of defendants' motion for summary judgment seeking to dismiss plaintiff's Labor Law § 240 (1) cause of action. In its initial order, this court dismissed plaintiff's Labor Law § 240 (1) claim against defendants on the ground that

the interior window cleaning work plaintiff was performing at the time of his accident was routine maintenance and not incidental to construction, demolition or repair work, and did not involve a significant alteration to the premises. However, since that finding, the Court of Appeals has clarified the law, holding that "'cleaning' is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity" (Broggy v Rockefeller Group, Inc., 8 NY3d 675, 680 [2007]). "Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (id.; Swiderska v New York University, 10 NY3d 792, 793 [2008]; Fischetto v LB 745 LLC, York, 43 AD3d 810, 810 [1st Dept 2007]).

"The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (id. at 681; see Berg v Albany Ladder Company, 10 NY3d 902, 902 [2008] [although plaintiff asserted that the height at which he worked created an elevation-related risk, he failed to adduce proof sufficient to create a question of fact regarding whether his fall resulted from the lack of a safety device]; Swiderska v New York University, 10 NY3d at 793 [plaintiff established that she was injured while cleaning 10-foot high windows in a college dormitory with a rag, requiring her to climb on pieces of furniture, which created an elevation-related risk for which she was not provided with any safety devices of the kind contemplated under the statute]).

Here, plaintiff sustained this burden. Plaintiff testified that, on the day before his accident, he asked his supervisor to provide him with an extension pole to attach to his wand in order to reach the windows, but none was available. Plaintiff noted that he requested the extension pole because the convector covers were "not safe to jump on" (Plaintiff's Amended

Notice of Motion, Exhibit E, DeKenipp Deposition, at 35). Plaintiff's supervisor then advised him to "[d]o the best you can" and to "[c]limb on the convector covers" to perform his duties (id.). Defendants did not provide plaintiff with any tools or equipment for washing windows.

Thus, plaintiff explained that, in order to clean the tops of the windows, it was necessary for him to stand on the convector covers located beneath the windows and positioned flush against the wall. Plaintiff also testified that, before his accident, he stepped onto a convector cover, which contained a grill area where heat rises, and reached upwards with his wand. After standing on the convector cover with both feet for approximately 10 to 15 seconds, the convector cover moved away from the wall and toppled over, causing him to lose his balance and fall backwards onto the carpeted floor. Specifically, plaintiff noted that "[t]he convector cover was loose. It wasn't fastened to the wall securely" (id. at 57).

This case can be distinguished from Broggy (supra), wherein the Court held that, although window cleaning is afforded protection under Labor Law § 240 (1) whether or not incidental to any other enumerated activity, the plaintiff did not sustain his burden of showing that an elevation-related risk existed, and that the owner or contractor did not provide adequate safety devices. In that case, the Court noted that, in order to recover under Labor Law § 240 (1), plaintiff had to establish that he stood on the desk because he was obliged to work at an elevation to wash the interior window. To this effect, the plaintiff in Broggy did not testify how high he could reach with his cleaning wand while standing on the floor. Although the plaintiff maintained that he had to stand on the desk, he provided no evidence that this was because he was required to work at an elevation to clean the interior windows. The Court reasoned that the desk could have been in plaintiff's way, or that it may have been quicker for plaintiff to climb on

assistance to move it out of the way.

Moreover, the Court in Broggy reasoned that summary judgment in favor of the defendants was proper, because the evidence in the record established "as a matter of law that plaintiff did not here need protection against the effects of gravity," as prior to his accident, the plaintiff had cleaned the interior of eight other windows of exactly the same height without the need of a ladder or other protective device (id. at 681-682). Thus, the part of this court's order that granted defendants' motion for summary judgment which sought to dismiss plaintiff's Labor Law § 240 (1) cause of action is vacated, and the order is modified so that the part of defendants' motion seeking to dismiss plaintiff's Labor Law § 240 (1) cause of action is now denied.

Plaintiff also moves for an order permitting his late motion for summary judgment on his Labor Law § 240 (1) cause of action. "The merits of an untimely motion for summary judgment may be considered by the court only if the movant demonstrates 'good cause for the delay in making the motion – a satisfactory explanation for the untimeliness'" (Crawford v Liz Claiborne, Inc., 45 AD3d 284, 285 [1st Dept 2007] quoting Brill v City of New York, 2 NY3d 648, 652 [2004]). "That the motion was only a few days late does not eliminate the requirement that good cause be demonstrated" (id. at 286).

Here, plaintiff asserts that good cause exists for his delay in seeking summary judgment, because no good faith basis for seeking summary relief on his Labor Law § 240 (1) cause of action existed until the Court of Appeals decision was issued in Broggy. Plaintiff has therefore demonstrated good cause for his delay in seeking summary judgment and plaintiff has also met his burden on his Labor Law § 240 (1) cause of action, as discussed above; thus, plaintiff's motion for an order permitting his late motion for summary judgment is granted and summary judgment is

judgment is granted in his favor on his Labor Law § 240 (1) cause of action.

Defendants cross-move to reargue the part of their summary judgment motion seeking to dismiss plaintiff's Labor Law § 202 cause of action. However, defendant's cross motion to reargue is untimely. "A motion to reargue must be made within 30 days after service of a copy of the prior order with notice of entry" (Pearson v Goord, 290 AD2d 910, 910 [3d Dept 2002]; CPLR 2221 [d] [3]).

Here, service of a copy of the prior order was served on defendants with notice of entry on February 14, 2008. Defendants' cross motion is dated April 9, 2008, nearly two months after it was served. Unlike a summary judgment motion, CPLR 2221 (d) (3) does not confer discretion upon the courts with respect to belated motions or cross motions for leave to reargue, although the merits of an untimely cross motion can nonetheless be considered where defendant has filed a timely notice of appeal from the order (see Dugas v Bernstein, 5 Misc 3d 818 [Sup Ct, NY County 2004] [court held that the merits of the untimely cross motion could nonetheless be considered because a timely taken, yet unsubmitted appeal was pending]). In the instant case, no such notice of appeal has been filed. Accordingly, there can be no consideration of defendants' cross motion for leave to reargue. Thus, based upon the foregoing, the defendants' cross motion for leave to reargue the part of defendants' motion for summary judgment seeking to dismiss plaintiff's Labor Law § 202 cause of action is denied as time-barred.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff Thomas DeKenipp's motion, pursuant to CPLR 2221, for an order granting him leave to reargue the parts of defendants Rockefeller Center, Inc.,

Rockefeller Group, Inc., Rockefeller Center Properties, RCP Associates, 75 Plaza/West 51st Street Associates and AOL-Time Warner Inc.'s (collectively, defendants') motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action and, upon reargument, for a further order modifying the decision and order dated November 14, 2007, vacating that part of the order that dismissed plaintiff's common-law negligence and Labor Law § 200 causes of action and denying that part of defendants' motion for summary judgment which sought to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action, is denied; and it is further

ORDERED that part of plaintiff's motion, pursuant to CPLR 2221, for an order granting him leave to reargue/renew the part of defendants' motion for summary judgment which sought to dismiss plaintiff's Labor Law § 240 (1) cause of action and, upon reargument, for a further order modifying the decision and order dated November 14, 2007, vacating that part of the order that dismissed plaintiff's Labor Law § 240 (1) cause of action and denying that part of defendants' motion for summary judgment which sought to dismiss plaintiff's Labor Law § 240 (1) cause of action, as well as for an order finding good cause for an otherwise late cross motion for summary judgment and thereafter granting summary judgment in his favor on his Labor Law § 240 (1) cause of action, is granted; the portion of this court's November 14, 2007 order which granted summary judgment in favor of defendants on plaintiff's Labor Law 240 (1) cause of action is vacated; summary judgment is granted in favor of plaintiff on his Labor Law 240(1) cause of action;

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue; it is further

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

DATED: October 8, 2008

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

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