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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 100115/2006
ORELLANA, MIGUEL
VS.
1740 BROADWAY ASSOCIATES
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

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

(consolidated for disposition with motion sequence # 005).

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

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

Dated: 1/5/09

_____ 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

Motion Seq No.: 004 + 005

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MIGUEL ORELLANA,

Plaintiff,

-against-

Index No. 100115/06

1740 BROADWAY ASSOCIATES, L.P., and MENDIK REALTY COMPANY, INC. & ADVANCED CONTRACTING CORP.,

Defendants.

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1740 BROADWAY ASSOCIATES, L.P., and MENDIK REALTY COMPANY, INC.,

Third-Party Plaintiffs,

Index No. 591078/06

-against-

ADVANCED CONTRACTING CORP.,

Third-Party Defendant.

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1740 BROADWAY ASSOCIATES, L.P. and MENDIK REALTY COMPANY, INC.,

Second Third-Party Plaintiffs,

Index No. 590313/06

-against-

POLO ELECTRIC CORP.,

Second Third-Party Defendant.

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Doris Ling-Cohan, J.:

Motions with sequence numbers 004 and 005 are hereby consolidated for disposition.

In motion sequence number 004, defendants/second third-

party plaintiffs 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc. (together, B&M) move: (1) pursuant to CPLR 2221, for leave to reargue and renew their prior summary judgment motion with respect to that part of this court's April 15, 2008 decision (the April Decision) which denied dismissal of plaintiff's Labor Law § 241 (6) claim against them to the extent that it was based on Industrial Code §§ 23-1.30 and 23-3.3, and denied them indemnification against second third-party defendant Polo Electrical Corporation (Polo); (2) upon this court's reconsideration, for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, and dismissing all remaining claims and cross claims as against them; and (3) in the event that summary judgment dismissing plaintiff's Labor Law § 241 (6) claim on the basis of Industrial Code § 23-1.30 is denied, for an order granting B&M indemnity against Polo.

In motion sequence number 005, Polo moves, pursuant to CPLR 2221, for leave to renew and reargue its prior cross motion for summary judgment dismissing all claims against it.

The facts of this matter have been set forth in previous decisions, and will be repeated only as necessary.

B&M's Motion (Motion Sequence Number 004)

Reargument

"Motions for reargument are addressed to the sound

discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Ito v 324 East 9th Street Corp.*, 49 AD3d 816, 817 [2d Dept 2008]). A motion for leave to reargue is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999], citing *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]), or "'to present arguments different from those already presented'" (*Woody's Lumber Co. v Jayram Realty Corp.*, 30 AD3d 590, 593 [2d Dept 2006], citing *Gellert & Rodner v Gem Community Management*, 20 AD3d 388, 388 [2d Dept 2005]).

B&M contends that leave to reargue should be granted because this court overlooked governing case law with respect to Industrial Code §§ 23-1.30 and 23-3.3 (c) in denying B&M's motion to dismiss plaintiff's Labor Law § 241 (6) claim on the basis of these provisions. Leave to reargue is granted.

Industrial Code § 23-1.30

Industrial Code § 23-1.30 requires that illumination "sufficient for safe working conditions" shall not be "less than 10 foot candles in any area where persons are required to work." In its April Decision, this court concluded that there was a question of fact whether sufficient lighting had been provided,

in part because plaintiff's testimony was conflicting (e.g., "[t]here was a lot of light" [Plaintiff's Depo., at 15]; "[t]here wasn't a lot of light" [*id.* at 16-17]), and in part because plaintiff's factual assertions (e.g., that the accident occurred between 8-8:30 P.M. on the night of June 8, 2005 [*id.* at 12 (8 P.M.); Plaintiff's 5/6/06 Bill of Particulars, ¶ 1 (8:30 P.M.); Plaintiff's 1/3/07 Bill of Particulars, ¶ 3 (8:30 P.M.)]; that there were two temporary lights located 25-30 feet from where he was working [Plaintiff's Depo., at 15]; that he had asked "[t]he electrician" [*id.* at 16] for more light, but "[t]hey did not have any more" [*id.*]), left the issue of whether B&M had provided sufficient lighting in doubt.

B&M maintained in its prior motion, as it does now, that plaintiff's assertions are conclusory, vague and unsubstantiated. In effect, B&M contends that plaintiff's testimony failed to address the specific standard set forth in section 23-1.30 so as to establish a violation thereof.

In support of its motion to reargue, B&M argues that the court overlooked cases such as *Carty v Port Authority of New York and New Jersey* (32 AD3d 732 [1st Dept 2006]), *Cahill v Triborough Bridge & Tunnel Authority* (31 AD3d 347 [1st Dept 2006]), and *German v City of New York* (14 Misc 3d 1204[A], 2006 NY Slip Op 52406[U] [Sup Ct, NY County 2006]), all of which hold that "vague", "conclusory", and "unsubstantiated" allegations are

"'insufficient to create an inference that the amount of lighting fell below the specific statutory standard'" (*Carty*, 32 AD3d 733, quoting *Cahill*, 31 AD3d at 349), and "are insufficient to raise a triable issue of fact as to whether the specific requirements of 12 NYCRR 23-1.30, concerning proper illumination, were violated" (*German*, 14 Misc 3d 1204[A], 2006 NY Slip Op 52406[U], *5; *see also Herman v St. John's Episcopal Hospital*, 242 AD2d 316, 317 [2d Dept 1997] [conclusory and unsubstantiated allegations are insufficient to raise a triable issue of fact]).

More recently, the Supreme Court, Bronx County, in *Dipalma v Metropolitan Transportation Authority* (20 Misc 3d 1128[A], 2008 NY Slip Op 51654[U], *12-13 [Sup Ct, Bronx County 2008]), determined that

> [i]n order to establish a violation of 12 NYCRR § 23-1.30, a plaintiff must offer more than vague evidence evincing that the lighting in the area where he had his accident was dark, poor, or a little dark [citations omitted]. Instead, the evidence proffered to demonstrate inadequate lighting falling below the standard prescribed by the regulation must be of the kind which conclusively establishes an absence of light.

The *Dipalma* court cited three cases which it found illustrative. In *Hernandez v Columbus Centre, LLC* (50 AD3d 597, 598 [1st Dept 2008]), the Court found that the "[p]laintiff's testimony, confirmed by his supervisor, that lighting conditions were poor, consisting only of a street light 150 to 200 feet away, created a triable issue of fact as to adequate lighting." The Appellate

Division, Fourth Department, in *Verel v Ferguson Electric Construction Co.* (41 AD3d 1154, 1157-1158 [4th Dept 2007]), found that, after the defendants had met their initial burden, showing that temporary light stringers provided at least 10 foot candles of light throughout the work area, plaintiff raised an issue of fact when he testified that the area in which he fell "was so dark that a person 'wouldn't be able to read the newspaper' and that there was no artificial lighting." The Court, in *Murphy v Columbia University* (4 AD3d 200, 202 [1st Dept 2004]), decided that "[n]o expert testimony regarding the level of illumination was necessary to demonstrate its inadequacy, inasmuch as two witnesses testified that lighting was 'nonexistent' and 'pitch black.'"

Plaintiff in this matter has not conclusively established an absence of light; his testimony concerning the lighting is uncorroborated and inconsistent, and he fails to raise an issue of fact as to whether the lighting in the area fell below the standard set forth in Industrial Code § 23-1.30. Therefore, the part of B&M's motion which sought summary judgment dismissing plaintiff's Labor Law § 241 (6) claim on the basis of Industrial Code § 23-1.30 is granted.

Industrial Code § 23-3.3 (c)

Section 23-3.3 of the Industrial Code governs "Demolition by hand." Specifically, section 23-3.3 (c) provides:

> (c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

The "thrust" of this subdivision "'is to fashion a safeguard, in the form of "continuing inspections", against hazards which are created by the progress of the demolition work itself'" (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 670 [2d Dept 2007], quoting *Salinas v Barney Skanska Construction Co.*, 2 AD3d 619, 622 [2d Dept 2003]; *see also Campoverde v Bruckner Plaza Associates, L.P.*, 50 AD3d 836, 837 [2d Dept 2008] [section 23-3.3 (c) "govern(s) inspections"]).

In its April Decision, this court denied B&M summary judgment based on this subdivision because

> it is not clear whether the actions by plaintiff's supervisor, Miguel Mendez, on the seventh floor that day were tantamount to performing the inspections mandated by this provision. While plaintiff testified that Mendez was on the seventh floor "the whole time," "the entire time" (Plaintiff's Depo., at 37, 102, 119), he also testified that Mendez was not on the floor when the accident happened (*id.* at 14). In answer to the question of what Mendez did when he supervised, plaintiff responded, "Checking how the tools were, how the construction was, checking the personnel" (*id.* at 37). Whether checking "how the construction was" constitutes an "inspection" is a question of fact. Thus, the part of B&M's motion which

> seeks summary judgment on plaintiff's Labor Law § 241 (6) claim, on the basis of Industrial Code § 23-3.3 (c), is denied

(April Decision, at 15-16).

In its present motion, B&M does not dispute that whether Mendez's actions constituted the "inspection" required by section 23-3.3 (c) is an issue of fact, precluding summary judgment. Rather, now, as in its earlier reply papers, B&M argues that the work that plaintiff was engaged in at the time of his accident was not "demolition," as that term is defined in Industrial Code § 23-1.4 (b) (16), and thus, that section 23-3.3 (c) is inapplicable, and cannot serve as a basis for plaintiff's Labor Law § 241 (6) claim.

B&M cites to the decision in *Zuniga v Stam Realty* (169 Misc 2d 1004 [Sup Ct, Queens County 1996], *affd* 245 AD2d 561 [2d Dept 1997]), which determined that

> [d]emolition, consistent with the Industrial Code definition, necessitates the total or partial dismantling or razing of a building or structure. ... What the rule envisions is some structural change of the building, in whole or in part, i.e., some interference with, alteration or change in the structural integrity of the building, sufficient to constitute a dismantling or razing of the building, either in whole or in part

(*Zuniga*, 169 Misc 2d at 1010). This interpretation of the definition of "demolition work" was adopted by the Court in *Georgopulos v Gertz Plaza* (13 AD3d 478, 479 [2d Dept 2004] [demolition work "'necessitates the total or partial dismantling

or razing of a building or structure'", quoting *Zuniga*]).

There is no evidence that plaintiff's dismantling of the wall effected such a change in the structural integrity of the building that his work constituted "demolition" as intended by the Industrial Code. Thus, Industrial Code § 23-3.3 (c) is inapplicable to this matter, and B&M is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim which is based on this provision.

Polo's Motion (Motion Sequence Number 005)

With the dismissal of plaintiff's Labor Law § 241 (6) claim based on Industrial Code §§ 23-1.30 and 23-3.3 (c), the entire complaint has been dismissed as against B&M. As a necessary consequence of the dismissal of a complaint against a party, the third-party action is also dismissed (*see e.g. Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]). Because the entire action and third-party actions have now been dismissed,[1] Polo's motion is denied as moot.

CONCLUSION

Accordingly, it is

ORDERED that 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s motion (motion sequence number 004) for leave to reargue this court's April Decision is granted; and it

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[1]The third-party action against Advanced Contracting Corp. was dismissed in the April Decision.

is further

ORDERED that, upon reargument, summary judgment dismissing plaintiff's Labor Law § 241 (6) claim in its entirety is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the second third-party action is dismissed; and it is further

ORDERED that Polo Electric Corp.'s motion (motion sequence number 005) is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc., shall serve a copy upon all parties with notice of entry.

Dated: January 5, 2009

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

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