

Collado v City of New York

2009 NY Slip Op 32226(U)

September 22, 2009

Supreme Court, New York County

Docket Number: 403369/06

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 25

Index Number : 403369/2006

COLLADO, AUSTRALIA

vs

CITY OF NEW YORK

Sequence Number : 005

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

The instant motion (sequence 005) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 005) of defendants City of New York and New York City Department of Transportation for leave to renew and/or reargue the court's decision and order dated January 15, 2009 is granted to the extent of granting leave to reargue, and upon reargument, the court adheres to its original determinations, and is otherwise denied; and it is further

ORDERED that the request of defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. for leave to reargue the court's decision and order dated January 15, 2009 is denied; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 9/22/09

[Signature]
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

FILED
SEP 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED _____

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

-----X
AUSTRALIA COLLADO AS ADMINISTRATRIX OF
THE ESTATE OF KERVIN F. COLLADO, AND
AUSTRALIA COLLADO, INDIVIDUALLY,

Plaintiffs,

Index No. 403369/06

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, and PARSONS
BRINCKERHOFF CONSTRUCTION SERVICES, INC.,

Defendants.

-----X
PARSONS BRINCKERHOFF CONSTRUCTION
SERVICES, INC.,

Third-Party Plaintiff,

Third-Party
Index No. 590874/06

-against-

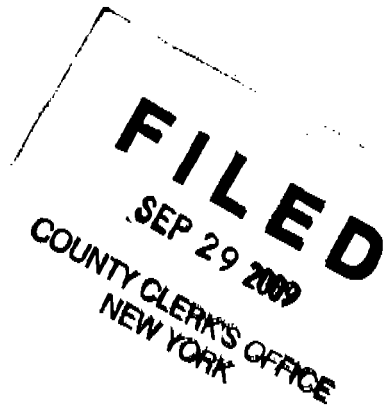
KISKA CONSTRUCTION CORP., USA,

Third-Party Defendant.

-----X
HON. CAROL R. EDMOND, J.S.C.:

MEMORANDUM DECISION

This is an action to recover damages for personal injuries and wrongful death sustained by a dock builder when he fell from a fender system on the Third Avenue Bridge. Defendants City of New York and New York City Department of Transportation (hereinafter, the City) move (motion sequence number 005), pursuant to CPLR 2221, for leave to renew and/or reargue the court's decision and order dated January 15, 2009 (the prior decision).



BACKGROUND

The relevant facts are set forth in detail in the prior decision, and will only be repeated here to the extent necessary for this decision. The City is the owner of the bridge. The City hired third-party defendant Kiska Construction Corp., USA (Kiska) as a general contractor to repair and replace the fender system of the bridge. The fender system protects the bridge from damage caused by shipping collisions. The City also hired defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. (PBCS) as the resident engineer for the construction project. On October 4, 2005, decedent Kervin F. Collado (Collado), an employee of Kiska, fell 10 feet off the fender system into the river, where he drowned. Collado was assigned to the task of installing panels on the fender system of the bridge. According to Collado's co-worker, Collado fell backwards off the fender system while retrieving an air hose to power the workers' pneumatic tools (Johansson Dep., at 44).

Collado's estate and his wife, Australia Collado, individually, commenced this action seeking recovery pursuant to Labor Law §§ 200, 240 (1), 241 (6) and under principles of common-law negligence. Mrs. Collado asserted causes of action for loss of society, services, and consortium. In its answer, PBCS asserted cross claims for contribution and indemnification against the City. The City cross-claimed against PBCS for contribution, indemnification, and failure to procure insurance. By service of a third-party summons and complaint, PBCS commenced a third-party action against Kiska, seeking indemnification and contribution.

Previously, Kiska moved for summary judgment dismissing the third-party complaint. Plaintiffs also moved for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against the City. The City cross-moved for summary judgment dismissing

the complaint, and for an order striking plaintiffs' pleadings or precluding them from offering evidence at trial based upon spoliation of evidence. Additionally, PBCS moved for summary judgment dismissing the complaint and all cross claims asserted as against it. In response to PBCS's motion, plaintiffs cross-moved for summary judgment against PBCS, and the City cross-moved for summary judgment on its cross claims for indemnification as against PBCS.

In the prior decision, to the extent relevant here, the court granted summary judgment to plaintiffs under Labor Law § 240 (1) and denied the City's motion seeking dismissal of that cause of action. With respect to Labor Law § 241 (6), the court found issues of fact on one Industrial Code provision – 12 NYCRR 23-1.7 (c). The court further found that PBCS had established that it was not a statutory agent of either the City or Kiska, and thus could not be liable under the Labor Law. In denying the City's motion for spoliation sanctions, the court found that sanctions were not warranted because the City had failed to establish any spoliation of evidence. Finally, the court denied the City's request for contractual and common-law indemnification over and against PBCS.

DISCUSSION

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 54 AD3d 748, 749 [2d Dept 2008]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is “not designed to provide an unsuccessful party with successive

opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

A motion for leave to renew a prior motion must be based upon “new facts not offered on the prior motion that would change the prior determination” or must show that “there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]; *see also Matter of Katz*, 63 AD3d 836, 837-838 [2d Dept 2009]). Furthermore, the papers must contain a “reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]).

CPLR 2221 (f) states that “[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made.”

Although the City denominates its motion as one for leave to reargue and/or renew, there is no basis for renewal. The City has not provided any new facts or shown that there has been a change in the law that would change the court’s prior decision. As for reargument, the court grants the City leave to reargue the prior decision, but upon reargument, adheres to its determinations in the prior decision. The City’s contentions are examined seriatim.

Labor Law § 240 (1)

In seeking reargument, the City contends that the court improperly granted summary judgment to plaintiffs on their Labor Law § 240 (1) cause of action, and should have dismissed

this cause of action. The City argues that Collado was a recalcitrant worker and the sole proximate cause of his injuries as a matter of law, since he failed to use a life vest provided by his employer.

In support of reargument, the City again relies upon the Court of Appeals decision in *Cahill v Triborough Bridge & Tunnel Auth.* (4 NY3d 35 [2004]), as it did in its underlying papers, for the proposition that the sole proximate cause of Collado's injuries was his failure to wear a life vest. According to the City, Collado received a life vest and was instructed to use the life vest when working over water. It was Kiska's policy for employees to wear life vests, but Collado simply did not wear the life vest on the date of the accident. The City maintains that the language of the statute is meant to prevent the "injury." Since the "injury" in this case is death, then Kiska provided adequate equipment because the life vest would have prevented him from drowning.

The City also argues that the statute does not even apply to this accident. As argued by the City, safety rails, scaffolds, and staging areas are only required when they are more than 20 feet above the ground. The City contends that the fender system was not where the workers would stand when performing the work, and that a floating barge was provided for this purpose.

In opposing the motion, plaintiffs again contend, as they did on the underlying motions, that a life vest cannot be considered fall protection as required by the statute. Plaintiffs assert that there was no evidence presented on the motions that Collado disobeyed an immediate instruction to use fall protection. They contend that, at most, Collado's failure to wear a life vest constituted comparative negligence. Although PBCS also argued that Collado was the sole proximate cause of his injuries on the underlying motions, it takes no position as to this issue in

opposition to the motion. Neither the City nor PBCS addresses the City's argument regarding the applicability of Labor Law § 240 (1).

In its reply, the City argues that the statute does not apply because Collado was simply setting up an air hose for tools that would be used later that day.

The City has failed to establish that the court misapprehended the facts or misapplied the law. First, the court finds that Labor Law § 240 (1) does, in fact, apply to Collado's accident. As the court noted in the prior decision, Collado was subject to the risk of falling off the fender system. The statute applies to "risks related to elevation differentials," including "those related to the effects of gravity where protective devices are called for [] because of a difference between the elevation level of the required work and a lower level" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). "[T]he core objective of Labor Law § 240 (1) [is to] prevent[] [a worker] from falling" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; see also *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999] ["(t)he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling"]). In the prior decision, the court stated that, contrary to the City's position, the record reflected that workers did climb on the fenders in order to perform their work (*Johansson Dep.*, at 52). The City has not provided any evidence to show that the court was incorrect in making this observation. There is no dispute that Collado was working at an elevation on the fender system, and that he fell about 10 feet to the river. Further, the court disregards the City's contention, made for the first time in its reply on reargument, that the statute does not apply because Collado was merely setting up (see *McGill*, 261 AD2d at 594 [reargument is not designed to provide an unsuccessful party with the

opportunity “to present arguments different from those originally presented”]).

Second, it cannot be said that Collado was the sole proximate cause of his injuries for failing to wear a *life vest*. In *Cahill* (4 NY3d 35, *supra*), which the court discussed in the prior decision, the Court of Appeals analyzed the sole proximate cause defense to Labor Law § 240 (1). There, the plaintiff was injured while greasing rods at an elevation, but did not use safety lines, as he had been instructed to do several weeks earlier (*Cahill*, 4 NY3d at 37). The *Cahill* Court found issues of fact as to whether the plaintiff was 100% responsible for his accident, or the sole proximate cause of his injuries (*id.* at 40). As noted by the Court,

“a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he made that choice he would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240 (1), and therefore summary judgment should not have been granted in plaintiff’s favor”

(*id.*).

In the prior decision, the court rejected the City’s assertion that Collado’s failure to use a life vest was the sole proximate cause of his injuries. The court noted that it “cannot be seriously disputed that a life vest cannot be considered fall protection. At most, the life vest would have prevented Collado from drowning, not falling. Given that the statute was violated since there were no safety devices to prevent Collado’s fall, Collado could not have been solely responsible for his injuries (*see Blake*, 1 NY3d at 290)” (Prior Decision, at 13). The court sees no reason to change its ruling. A life vest does not protect a worker from falling (*see Ross*, 81 NY2d at 501), and there is no dispute that other safety devices were not given to Collado to prevent him from falling. “[W]here there is no view of the evidence . . . to support a finding that the absence of

safety devices was not a proximate cause of the injuries,” summary judgment on liability is appropriate (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054 [1985]). Thus, plaintiffs were entitled to summary judgment under Labor Law § 240 (1).

Labor Law § 241 (6)

In support of reargument, the City argues that the court erred in finding an issue of fact as to Labor Law § 241 (6). According to the City, 12 NYCRR 23-1.7 (c) does not apply to this case inasmuch as it only applies to “work locations.” In any event, even if it is applicable, the regulation was not violated because Kiska’s project manager, Mehmet Ayverdi, testified that there was a small safety boat at the project site (Ayverdi Dep., at 32).

In response, plaintiffs contend that a tug boat does not rise to the level of a small safety skiff, as required by the regulation.

The court’s review of the underlying papers reveals that the City did not make this argument in its moving papers. The City adopted PBCS’s moving papers by reference with respect to this issue, and PBCS did not articulate any reason why 12 NYCRR 23-1.7 (c) did not apply. In any event, the court finds that it correctly determined that there were issues of fact as to whether this regulation was violated. 12 NYCRR 23-1.7 (c) provides as follows:

“Drowning hazards. Where any person is exposed to the hazard of falling into water beneath his work location in which he might drown, equipment for the prompt rescue of such person from the water shall be provided. Such equipment shall consist of a manned boat of a size suitable for the existing water conditions and area. Such boat shall be equipped with oars, with United States Coast Guard approved life preservers, with a life ring fastened to a line not less than 50 feet in length and with a boat hook. *Such boat shall continuously patrol the area beneath the work location at all times when any person is exposed to the falling and drowning hazard*”

(emphasis supplied).

In the present case, Collado was exposed to the “hazard of falling into water beneath his work location in which he might drown” (12 NYCRR 23-1.7 [c]), and, in fact, did drown. Contrary to the City’s contention, Collado fell from a location where he was performing work. The City has not provided any evidence to the contrary. Although Kiska’s project manager testified that there was a small safety boat at the project site (Ayverdi Dep., at 32), the record is inconclusive as to whether this boat was continuously patrolling the area. Therefore, there is a question of fact as to whether 12 NYCRR 23-1.7 (c) was violated.

Statutory Agency of PBCS

The City argues that the court erred in concluding that PBCS was not a statutory agent of Kiska or the City. It contends, as it did on the underlying motions, that PBCS had sufficient supervision and control over Kiska’s work to be held liable under the Labor Law. PBCS had the ability to approve or reject Kiska’s means or methods of work, and would direct Kiska’s employees to use required safety devices if they were not, in fact, being used. PBCS’s purpose at the site was to ensure compliance with the law and safety regulations.

In opposition, PBCS contends that the City’s motion consists of nothing more than a regurgitation of the facts and arguments that were rejected by the court. PBCS argues that the City makes no attempt to identify the fallacy in the court’s reasoning or in what way the court misinterpreted the facts or misapplied the law.

It is well settled that Labor Law §§ 240 and 241 (6) only apply to owners, contractors, and their agents (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). There is no

dispute that PBCS is not an owner or contractor, and thus may only be liable as an agent. “When the work giving rise to [the nondelegable duties of the owner or general contractor] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor. Only upon obtaining the authority to supervise and control [the work] does the third party fall within the class of those having nondelegable liability as an ‘agent’ under sections 240 and 241” (*id.*).

“General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [engineer] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

In finding that the City had failed to raise an issue of fact as to PBCS’s agency, the court noted that the City essentially pointed to evidence indicating that PBCS had authority to: (1) inspect the work to determine compliance with contract specifications; (2) ensure compliance with the law and safety regulations; and (3) stop work if it noticed an unsafe condition (Prior Decision, at 10).

The City has failed to demonstrate that the court misapprehended the facts or misapplied the law. PBCS made a prima facie showing that it was not an agent based on the following evidence. The contract between Kiska and the City states that “[d]uring the performance of the Work . . . , the **Contractor** shall take all reasonable precautions to protect . . . persons . . . from damage, loss or injury resulting from the **Contractor**’s, and or its **Subcontractors**’ operations under this **Contract**” (Schwarz Affirm. in Support of Summary Judgment, Exh. A [emphasis in original]). The contract between PBCS and the City provides that “[i]t is the responsibility of the

Construction Contractor(s), and not the responsibility of the Consultant, to determine the ‘Means and Methods of Construction’” (*id.*, Exh. L, § II). Kiska instructed and supervised its own employees regarding the work to be performed (Ostrander Dep., at 9-11; Marriott Dep., at 24; Burke Dep., at 9). PBCS’s responsibility on the project was to “double-check” the work performed by Kiska’s workers and to inspect the “quantity and quality” of the work (Marriott Dep., at 27-29).

Rather than showing how the court misinterpreted the facts or misapplied the law, the City merely rehashes, nearly verbatim, the identical arguments and evidence previously presented to the court (*see McGill*, 261 AD2d at 594 [reargument “is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided”]). Again, the City points to evidence indicating that PBCS had general supervisory authority. For instance, PBCS’s Senior Engineer Manager, Samuel Scozzari, testified that PBCS inspected the construction work to determine if it complied with the plans and specifications (Scozzari Dep., at 61, 64). Scozzari further stated that if PBCS inspectors saw workers performing work without life vests, they were only required to report it up the chain of command (*id.* at 61). According to Scozzari, the incident would be reported to Kiska along with a warning that Kiska may be out of compliance with its health and safety plan for the project (*id.* at 61, 62). PBCS had the authority to stop work if it saw an unsafe condition (*id.* at 184). Daniel Hom, the City’s Engineer-in-Charge, stated that PBCS had authority to stop work (Hom Dep., at 119).¹ Since none of this

¹Although the City also refers to PBCS’s internal safety plan, it has failed to establish that PBCS assumed responsibility for the safety of all workers on the project pursuant to this plan. Section 4 of PBCS’s internal safety plan states that PBCS is to ensure that personal protective measures are available for PBCS employees, not contractor employees. Sections 5, 13, 16, and 29 of the internal safety plan also refer to PBCS employees. Section 30 refers to steel operations,

evidence shows that PBCS had the authority to supervise or control how the work was done, PBCS was not a statutory agent of either Kiska or the City (*see Hughes*, 40 AD3d at 309 [safety coordinator's ability to stop work for safety reasons was general supervisory authority]; *Hutchinson v City of New York*, 18 AD3d 370, 371 [1st Dept 2005] [engineering firm's obligation to inspect work did not create an issue of fact as to its statutory agency]; *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003] ["retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations . . . does not amount to supervision and control of the work"]). Therefore, in light of the above, the court adheres to its original determination.

Spoliation of Evidence

The City further contends that the court improperly denied its request for spoliation sanctions. According to the City, the evidence establishes that Collado was not wearing his life vest on the accident date. However, plaintiffs allege that Collado was wearing a life vest at the time of his accident. Without production of the vest, the City has no means to defend against this claim.

In opposing the motion, plaintiffs contend that the vest was on site on the date of the accident. Mrs. Collado cannot be charged with preserving evidence which she did not possess or control.

In the prior decision, the court denied the City's application, noting that it had not shown any spoliation. In *Kirkland v New York City Hous. Auth.* (236 AD2d 170, 173 [1st Dept 1997]),

and Collado was not involved in steel operations at the time of his injury.

the Appellate Division, First Department held that:

“Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. We have found dismissal to be a viable remedy for loss of a ‘key piece of evidence’ that thereby precludes inspection.”

The City has not shown that plaintiffs lost, destroyed, or disposed of the life vest. Therefore, the court again adheres to its original determination.

The City’s Motion for Contractual and Common-Law Indemnification Over and Against PBCS

Finally, the City argues that the court improperly denied its motion for indemnification as against PBCS. According to the City, an ultimate finding of liability is not required for PBCS to defend and indemnify the City, as long as there is a claim of injury caused by PBCS’s negligence.

PBCS contends that the City has failed to establish any negligence or wrongful act on the part of PBCS.

The contract between PBCS and the City provides, in relevant part, that:

“The contractor shall be solely responsible for all physical injuries or death to its agents, servants, or employees or to any other person or damage to any property sustained during its operations and work on the project under this contract resulting from any negligent or wrongful act of omission or commission or error in judgment of any of its officers, trustees, employees, agents, servants, or independent contractors, and shall hold harmless and indemnify the City from liability from any and all claims for damages on account of such injuries or death to any such person or damages to property on account of any neglect, fault or default of the contractor, its officers, trustees, employees, agents, servants or independent contractors”

(Schwarz Affirm. in Support of Summary Judgment, Exh. L, Art. 4.1[B]).

In the prior decision, the court stated that “the contract does not require PBCS to defend the City, but only to indemnify and hold it harmless for any claims for death to any person. The

City is not entitled to contractual indemnification from PBCS at this juncture, inasmuch as it has not established its freedom from negligence” (Prior Decision, at 22). Notably, the City does not contend that the court incorrectly found issues of fact on Labor Law § 200 and negligence. In *Cuevas v City of New York* (32 AD3d 372 [1st Dept 2006]), cited by the court in the prior decision, the First Department noted that “Cablevision cannot enforce the contractual indemnification obligation against Trinity unless it demonstrates its own freedom from negligence, which it has yet to do” (32 AD3d at 374 [citations omitted]). This is because General Obligations Law § 5-322.1 prohibits a party from being indemnified for its own negligence (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]). Since the City has not established that it was not negligent, it is not entitled to contractual indemnification at this stage of the action (*see Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236-237 [1st Dept 2005]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999] [(i)n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability”]).

Nor has the City shown that it is entitled to common-law indemnification. “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident” (*id.*). Given that issues of fact remain as to the City’s negligence, granting common-law indemnification would be premature (*see id.*). Accordingly, the court adheres to its determinations in the prior decision.

PBCS's Request that the Court Reconsider its Rulings as to Labor Law § 200 and Negligence as Against it

In its opposition to the City's motion, PBCS asks the court to reconsider its ruling that there was a question of fact as to whether it violated Labor Law § 200 and was negligent.

According to PBCS, Collado stepped onto the fender with full knowledge of how it had been constructed at the time, and chose to walk backwards, pulling an air hose, without wearing a life vest or fall protection.

However, PBCS is not entitled to request affirmative relief without first filing a notice of motion or notice of cross motion (*see* CPLR 2214 [a], 2215; *Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001] [absent notice of motion or any other notice to plaintiff that she would be required to respond to a motion to dismiss, the court was virtually without jurisdiction to grant dismissal]; *Guggenheim v Guggenheim*, 109 AD2d 1012, 1013 [3d Dept 1985] [it was not sufficient to demand relief in opposing affidavits or memoranda; an outright notice of motion was required to avoid surprise to the original movant]).

Even if the court were to consider this request, PBCS would still not be entitled to dismissal of these causes of action. In the prior decision, the court disregarded this contention as improperly made in reply. Assuming, arguendo, that this ruling was incorrect, PBCS has still not shown that the court's determination should be changed.

Labor Law § 200 is a codification of the common-law duty imposed upon owners and contractors to provide a safe work place (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept], *lv denied* 100 NY2d 508 [2003]). This duty does not extend to

“defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age, intelligence, and experience of the servant” (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963], quoting *McLean v Studebaker Bros. Co. of New York*, 221 NY 475, 478 [1917]). However, these circumstances merely “negate[] any duty that defendant [] . . . owed plaintiff to warn of potentially dangerous conditions” (*England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124 [3d Dept 2005] [emphasis supplied and citation omitted]; see also *Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004] [liability under section 200 is not negated by “open and obvious” nature of hazard; rather, this factor goes to plaintiff’s comparative negligence]). Therefore, PBCS did not establish entitlement to summary judgment on the Labor Law § 200 and negligence claims asserted as against it.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that the motion (sequence number 005) of defendants City of New York and New York City Department of Transportation for leave to renew and/or reargue the court’s decision and order dated January 15, 2009 is granted to the extent of granting leave to reargue, and upon reargument, the court adheres to its original determinations, and is otherwise denied; and it is further

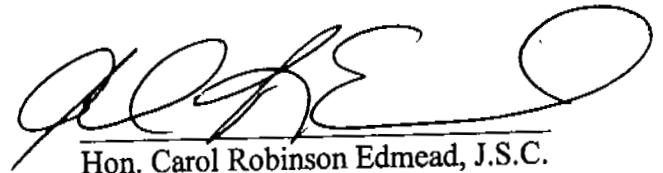
ORDERED that the request of defendant/third-party plaintiff Parsons Brinckerhoff Construction Services, Inc. for leave to reargue the court’s decision and order dated January 15,

2009 is denied; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: September 22, 2009

ENTER:



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
SEP 29 2009
COUNTY CLERK'S OFFICE
NEW YORK