SUPREME COURT OF THE STATE OF NEW YORK **Index. 101120/06**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:004**

THOMAS VARESI and
CHARLOTTE VARESI,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

BRIDGEDALE, LLC,

Defendants

The following items were considered in the review of the following motion to renew and reargue.

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiffs move pursuant to CPLR § 2221 for an order renewing and rearguing the decision and order of this court dated July 8, 2009 dismissing the complaint against the defendant, Bridgedale, LLC ("Bridgedal"). Upon reconsideration, the conclusion of this court's decision and order dated July 8, 2009 is reversed and the plaintiff's complaint is reinstated.

Facts

The plaintiff, Thomas Varesi worked as a carpenter for the New York City Housing Authority ("Housing Authority") at its Long Island City location when on March 23, 2006, he injured himself by slicing his hand while operating a table saw in the course of fabricating a ground for installation in the sheetrock walls in his foreman's office. According to deposition

testimony and documentary evidence submitted by the defendant, Thomas Varesi was constructing a "cabinet with lock and shelf" to be installed in the foreman's office. According to Varesi's testimony the foreman's office was in a separate section of the shop area on the same floor as carpentry shop. The record further reveals that the completed project would be anchored into the wall of the Varesi's foreman's office. Varesi testifies that this project was only one part of a building-wide renovation, that included the renovation of executive offices. Furthermore, prior to fabricating the ground, Varesi removed the sheetrock wall to allow the cabinet to be anchored to the newly constructed wall.

Discussion

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the sound discretion of the court and may be granted only upon the showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. A motion to renew under CPLR 2221, on the other hand, 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.[1] Although the movant may not have technically met the requirements for reargument the granting of this relief is discretionary and with the court in the interest of justice.[2]

In this case the court overlooked issues of fact that constitute issues for resolution by a jury. As such, this court's original decision granting summary judgment dismissing the complaint was improper.

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[1] *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992].

[2] *Ruggiero v. Long Island Railroad*, 161 AD2d 836 [2d Dept , 1990].

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[3] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[4] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[5] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[6] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[7]

In this case the evidence submitted by the defense in the form of deposition testimony is sufficient to demonstrate an entitlement to summary judgment. Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[8]

In opposition the plaintiff relies on the deposition testimony of Thomas Varesi that

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[3] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[4] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[5] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

[6] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[7] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[8] *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

asserts he was involved in an alteration of the subject premises. This court relied on the Appellate Division, First Department's decision in *Esposito v. New York Industrial Development Agency* to support the dismissal of the plaintiff's complaint.[9] Specifically, this court held that the ". . . claims pursuant to Labor Law § 241(6) require that the site is under construction, demolition or excavation." at the time of the accident. The plaintiff's protestations that this holding is not the law in the Appellate Division, Second Department is without merit, as the Court of Appeals affirmed the Appellate Division, First Department's holding.[10] However, this court overlooked the fact that Thomas Varesi was fabricating the ground to affix the "cabinet with lock and shelf" to his foreman's wall in an area just outside the point of installation.

This court incorrectly concluded that this was outside the "site under construction" and therefore outside the context of construction. The Court of Appeals in *Nagel v. D & Realty Corp*, held that Labor Law § 241(6) is meant to protect workers from industrial accidents in the context of construction.[11] Whether the fabrication of the ground outside the office being renovated constitutes "the context of construction" is an issue of fact that must be resolved by a jury.

Conclusion

While the defendant cites two recent decisions indicating that a plaintiff's injuries must occur in the context of construction, excavation or demolition work, each are from jurisdictions outside the Appellate Division, Second Department.[12] In fact the Appellate Division, Second Department looks at the specific work being performed, rather than the overall context. In

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[9] 305 AD2d 108, [1st Dept 2003].

[10] 1 NY3d 526, [2003].

[11] 99 NY2d 98, [2002].

[12] *See, Alexander v. Hart,* 64 AD3d 940 [3d Dept 2009]; *See also, Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d 639, [1st Dept 2009]

evaluating a similar case, the Appellate Division, Second Department found that work that involved ". . . removing or dismantling the existing elevator ceiling and disconnecting the wiring for the ceiling lighting fixtures from a junction box located on the elevator cab roof; installing a new, prefabricated ceiling which contained new lighting fixtures; and connecting the wiring for the new lighting fixtures to the alternating current in the junction box." constituted an "alteration" and was within the scope of Labor Law § 241(6).[13] This is a similar set of facts to those before this court. As such, this court erred in granting the defendant's motion for summary judgment dismissing the plaintiff's complaint.

Accordingly after allowing the reargument of the plaintiff and having reconsidered this court's decision and order of July 8, 2009, it is hereby:

ORDERED, that the decision and order of this court dated July 8, 2009 is vacated; and it is further

ORDERED, that Brdigedale LLC's motion for summary judgment is denied; and it is further

ORDERED, that the parties return to DCM Part 3 for a pre-trial conference on **Monday, January 4, 2010 at 9:30 A.M.**

ENTER,

DATED: December 14, 2009

Joseph J. Maltese
Justice of the Supreme Court

[13] *Fuchs v. Austin Mall Associates, LLC*, 62 AD3d 746, [2d Dept 2009]