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

HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 107211/2008

BERNARD, SHELLY

VS.

BROOKFIELD PROPERTIES CORP.

SEQUENCE NUMBER : 020

SUMMARY JUDGMENT

INDEX NO. 107211/08

MOTION DATE

MOTION SEQ. NO. 020

MOTION CAL. NO.

is motion to/for

	PAPERS NUMBERED
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 is decided in accordance with the memo decision dated 12.21.10.

FILED

DEC 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12.21.10

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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BERNARD, SHELLY

Index No. 107211/08
Motion Seq. 020

Plaintiff,

- against -

DECISION AND ORDER

BROOKFIELD PROPERTIES CORP., et al.,

Defendants.

---------- X

SHERRY KLEIN HEITLER, J:

In this asbestos-related personal injury action, defendant Colgate-Palmolive Corporation ("Colgate") moves, pursuant to CPLR § 2221, to renew its opposition to Citigroup Global Markets Inc.'s ("Citigroup") motion for summary judgment and for an order denying Citigroup's motion for summary judgment as to Colgate's cross-claims. For the reasons set forth below, Colgate's motion is denied and Citigroup's motion is granted.

BACKGROUND

This was an action commenced by Shelly Bernard, now deceased, to recover for personal injuries allegedly caused by her exposure to asbestos at 55 Water street, a commercial office building in Manhattan. Ms. Bernard was deposed on June 5, 2008. Among other things Ms. Bernard testified she was exposed to asbestos dust while working as a consultant for Salomon Brothers on the 28th floor of the building from 1985 to approximately February 1988. Ms. Bernard testified that renovations and construction on the 28th floor generated dust and debris to which she and her fellow workers were exposed. She testified to seeing dust all over her clothing and in her food, and described wading through streamers of unfettered loose material, which she

believe to be asbestos insulation, in order to move from one part of the office to another. On August 11, 2008, Ms. Bernard subsequently added Colgate as a defendant in this action based upon her use of Cashmere Bouquet, a body talcum powder. Colgate asserted cross-claims against all other defendants, including Citigroup.

On November 24, 2009, Citigroup moved for dismissal of all claims and cross-claims against it, which was unopposed by Ms. Bernard. Colgate thereafter timely opposed Citigroup's motion, because, in its view, Citigroup had failed to establish the absence of genuine issues of fact as to whether Ms. Bernard was properly considered an employee of Salomon Brothers, and accordingly of Citigroup.

On July 30, 2010, this court granted Citigroup's summary judgment motion ("Order"), but did not dismiss any cross-claims against Citigroup.[1] The court found that, at the time of her alleged exposure, Ms. Bernard was a special employee of Salomon Brothers, Citigroup's predecessor in interest. As such, her claim was barred under New York's Worker's Compensation Law. *See* July 30, 2010 Order at 6. On August 11, 2010, Ms. Bernard passed away. Colgate asserts that the death of Ms. Bernard constitutes a new fact that should change this court's prior determination.

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[1] Citigroup's motion for summary judgment, dated November 25, 2009, sought an order "dismissing with prejudice both plaintiff's Complaint and all amendments thereto, and the *cross-claims* of all defendants." This court's Order granted Citigroup's motion for summary judgment and inadvertently provided that "this action against Citigroup and any *counter-claims* related to this defendant are severed and dismissed." (emphasis added).

DISCUSSION

Pursuant to CPLR § 2221(e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination." Such a motion 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." *Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 22 [1st Dept 1992], *app. den.*, 80 NY2d 1005 [1992], *rearg. den.*, 81 NY2d 782 [1993]. If the requirements for renewal are not satisfied, leave to renew may still be granted so as not to defeat substantive fairness. *Rancho Sante Fe Ass'n v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007].

The First Department has held that a motion for leave to renew can only be based upon new evidence concerning a fact that existed before the court rendered its decision and that CPLR § 2221(e) requires this "new fact" to have been "in existence at the time of the original motion." *See Pahl, supra,* 182 AD2d at 22; *see also Annex v Telerep, Inc.*, No. 1113565-07, 2008 NY Misc LEXIS 9378, at *2 (Sup Ct NY Co. Dec. 3, 2008) (stating that an event "that takes place after the prior order is made is not considered newly discovered evidence that would support a motion to renew."). To the contrary, the First Department has also allowed a "new matter that was not available prior to the court's decision" to constitute a "new fact" for the purposes of CPLR § 2221(e). *See Haenel v November & November*, 144 AD2d 298, 299 [1st Dept 1988] (finding an insurer's suspension a month after the court's decision to be a "new fact" sufficient to warrant renewal); *see also Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009], *app. with.*, 12 NY3d 922 [2009] (finding renewal to be proper where the plaintiff's criminal conviction for harassment was reversed after summary judgment had been granted on civil

claims).

The other relevant statute in this case is the New York Workers' Compensation Law. This statute provides, in pertinent part, that "[e]very employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment." Workers' Compensation Law § 10. Workers' Compensation is the sole exclusive remedy available against an employer when an employee is injured during the course of employment. *Id.* However, third parties may seek contribution from the employer if the employee suffered a "grave injury," which is defined as one or more of the following: death, permanent loss of use or amputation of a limb, paralysis, permanent blindness, deafness, severe facial disfigurement, loss of a nose, ear, or index finger, or brain injury resulting in permanent total disability. *See* Worker's Compensation Law § 11. Of central importance, therefore, is whether Ms. Bernard's passing, which clearly falls within the definition of "grave injury," constitutes a "new fact" so as to allow this court to grant Colgate's leave to renew.

Colgate relies on *Holguin v Howard*, 248 AD2d 152 [1st Dept 1998] for the proposition that Ms. Bernard's passing is new evidence of the gravity of her injuries. In *Holguin*, the trial court originally granted defendants' summary judgment motion because there was insufficient evidence to establish that plaintiffs suffered "serious injuries" under New York Insurance Law § 5102(d). On renewal, the trial court vacated its grant of summary judgment because plaintiffs produced an affidavit from a physician indicating a new diagnosis of the plaintiffs' conditions. The new diagnosis – that plaintiffs had sustained loss of range of motion – rose to the level of "serious injuries" under New York Insurance Law § 5102(d). The First Department affirmed,

ruling that it was within the trial court's discretion to grant renewal where existing material facts relating to plaintiffs' condition were, for excusable reasons, not known to plaintiffs at the time of the summary judgment motion.

Colgate's reliance on *Holguin* is misplaced. Here, Ms. Bernard did not receive a new diagnosis. Instead, her death was the result of a previously diagnosed chronic disease. *See Commissioners of the State Insurance Fund v Hallmark Operating, Inc.*, 61 AD3d 1212, 1213 [3rd Dept 2009] (finding that death is not a new injury, "but rather a new claim consequentially related to the original injury"). This court knew that Ms. Bernard had terminal mesothelioma when it issued the July 30, 2010 Order. As such, Ms. Bernard's death does not constitute a new fact upon which a motion for leave to renew can be based. Notwithstanding, the court properly granted Citigroup's motion for summary judgment because Ms. Bernard's passing did not allow her estate to seek recovery from Citigroup outside of the Workers' Compensation Law.

This does not mean Colgate is without redress. It may of course seek contribution in a separate action should a judgment be rendered against it in the future. *See Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 471, n.2 [1986] ("absent a clear contractual expression to the contrary, a cause of action for indemnification does not arise until the indemnitee has actually sustained a loss . . ."). This cause of action stems from the exception in the Worker's Compensation Law which allows third parties to seek contribution from employers where, as here, the employee suffers a grave injury. *See* Workers' Compensation Law § 11.

Accordingly, it is hereby

ORDERED that Colgate's motion for leave to renew its opposition to Citigroup's motion for summary judgment is denied, and it is further

ORDERED that Citigroup's motion for summary judgment as to Colgate's cross-claims is granted, and it is further

ORDERED that the July 30, 2010 Order is modified by deleting the provision thereof severing and dismissing any counter-claims as related to the defendant Citigroup, and it is further

ORDERED that the July 30, 2010 Order is modified by inserting a provision severing and dismissing any cross-claims as related to the defendant Citigroup, and it is further

ORDERED that the July 30, 2010 Order remains unchanged in all other respects, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

DATED: December 21, 2010

SHERRY KLEIN HEITLER
J.S.C.