[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

EDITH JOHNSON,

Plaintiff,

-against-

LUFTHANSA GERMAN AIRLINES, INC., et al.,

Defendants.

Index No. 21101/05

Motion Date July 26, 2011

Motion Cal. No. 20 and 21

Motion Sequence No. 4 and 5

	PAPERS NUMBERED
Notice of Motion #20-Affidavits-Exhibits...	1-5
Opposition.....	6-7
Notice of Motion #21-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 2221 granting plaintiff leave to reargue this Court's decision and order dated April 14, 2011, and upon such reargument, modifying said order so as to deny the summary judgment motion of defendant Lufthansa German Airlines ("Lufthansa"); and defendants' motion for an order pursuant to CPLR 2221 granting defendant Terminal One Group Association, L.P. ("Terminal One") leave to reargue and modify the Court's order of April 14, 2011 to hereby grant summary judgment in favor of this defendant are hereby consolidated solely for purposes of disposition of the instant motions and are decided as follows:

Plaintiff's motion for an order pursuant to CPLR 2221 granting plaintiff leave to reargue this Court's decision and order dated April 14, 2011, and upon such reargument, modifying said order so as to deny the summary judgment motion of defendant Lufthansa German Airlines is hereby granted.

This is an action for personal injuries arising out of an incident occurring on November 16, 2004, whereby plaintiff, Edith

Johnson, an employee of Servisair GlobeGround, while engaged in the inspection of cargo and/or baggage being loaded onto an aircraft located at Gate #3 of John F. Kennedy International Airport, Jamaica, New York, climbed said cargo loading device and was caused to fall due to the negligence of defendants. Pursuant to the Verified Bill of Particulars, "[p]laintiff alleges that the defendants permitted a dangerous condition to exist upon the aforementioned premises in the form of a certain cargo ramp which was unsteady, improperly maintained, improperly positioned and improperly secured". Additionally, pursuant to the Verified Bill of Particulars, "[p]laintiff alleges that agents, servants and/or employees of the defendants caused, instructed and/or directed plaintiff to climb upon the aforementioned cargo ramp at the aforementioned premises against her recommendation to perform a cargo inspection that was unnecessary and unreasonably dangerous".

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, Schneider v. Solowey, 141 AD2d 813 [2d Dept 1988]; Rodney v. New York Pyrotechnic Products, Inc., 112 AD2d 410 [2d Dept 1985]).

In a decision and order dated April 14, 2011, the Court granted that branch of defendants' motion seeking summary judgment as against Lufthansa stating:

> In her opposition papers, plaintiff argues solely that: "[p]laintiff alleges that agents, servants and/or employees of the defendants caused, instructed and/or directed plaintiff to climb upon the aforementioned cargo ramp at the aforementioned premises against her recommendation to perform a cargo inspection that was unnecessary and unreasonably dangerous". However, this cause of action is not alleged in the Verified Complaint (see Exhibit A, Defendants' Notice of Motion). Plaintiff's Verified Complaint alleges that the defendants were negligent in permitting a dangerous or defective condition to exist, ie. that the cargo loading device was unsteady, unsecured, etc. Plaintiff's Verified Complaint does not state a "negligent instruction" cause of action, and plaintiff has not sought to amend her Complaint to add a new cause of action for "negligent instruction". As plaintiff cannot maintain this action based on an unplead

> cause of action, that branch of defendants' motion seeking summary judgment dismissing plaintiff's claims as against Lufthansa is hereby granted.

Plaintiff has indeed set forth controlling principles of law that this Court misapplied. Plaintiff establishes that the Court was incorrect in its assertion that "plaintiff cannot maintain this action based on an unplead cause of action", ie. that of negligent instruction. Plaintiff establishes that: New York law is well-settled that the insufficiency of a pleading is not a proper basis for an award of summary judgment (Gee v. Gee, 113 AD2d 736 [2d Dept 1985]), modern principles of procedure do not permit an unconditional grant of summary judgment against a plaintiff who, despite a defect in pleading, has made out a cause of action, (Alvord & Swift v. Stewart M. Muller Constr. Co., 46 NY2d 276 [1978]; Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175 [1982]), plaintiff's verified bill of particulars properly amplified the negligence cause of action set forth in her complaint, (Moore v. Johnson, 147 AD2d 621 [2d Dept 1989], and Lufthansa has not claimed any prejudice because plaintiff set forth her claim of negligent instruction in her verified bill of particulars in November 2006, and this claim has been the subject of each deposition held in this action (see, Fried v. Sieppel, 80 NY2d 32, [1992]).

Upon reargument, the Court finds that the branch of defendants' motion seeking summary judgment dismissing plaintiff's claims as against Lufthansa is hereby denied.

Defendants established a prima facie case that plaintiff's claims as against Lufthansa should be dismissed. In support of this branch of the motion, defendants submit, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testifies that: Lufthansa's Weight and Balance agent, Marcin Grajewski, did not have the authority to instruct her on how to complete her duties, and she did not trip over anything and could not identify the cause of her fall; the examination before trial transcript testimony of Marcin Grajewski, wherein he testifies that: Lufthansa did not supervise Globe Ground employees, he did not instruct the plaintiff to climb to the top of the subject belt loader, he did not have the authority to verbally instruct a Globe Ground employee to do a particular task; and the examination before trial transcript testimony of Madhu Chadha, who testified, inter alia, that he was employed by Lufthansa as a duty station manager on the date of the alleged incident, Mr. Grajewski did not have the authority to direct the actions of Globe Ground employees, only Ground Globe supervisors directed their employees and assigned specific tasks,

and Lufthansa did not make any decisions concerning the subject belt loader.

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff presents, inter alia, plaintiff's own examination before trial transcript testimony wherein she testifies that: Mr. Grajewski demanded that she climb up the belt loader into the belly of the plane, even though she told him that the two dogs had already been scanned, the GlobeGround supervisor present at the time of the accident; the examination before trial transcript testimony of Marcin Grajewski, wherein he testified that: he told plaintiff to "make sure the dogs are scanned before departure", after he spoke with plaintiff, he walked away to attend to other matters, he was unable to identify Mr. Masa as a GlobeGround supervisor, and he could not recall either speaking to Mr. Masa on that date or even whether Mr. Masa was on duty at the time of the incident; and the examination before trial transcript testimony of Mr. Chadha, a Lufthansa employee who was Mr. Grajewski's direct supervisor, who testified, inter alia, Mr. Grajewski was responsible for "ensur[ing] proper loading of the aircraft or supervising loading done by GlobeGround, Mr. Grajewski was not authorized to direct the actions of GlobeGround employees such as plaintiff, Mr. Grajewski's role was limited to supervising the scanning and loading of baggage, including live animals, instead of directing GlobeGround employees, and Mr. Grajewski was supposed to "call their supervisor or duty manager. He does not interact with the employees themselves".

Accordingly, there are triable issues of fact as to whether, inter alia, defendant Lufthansa negligently instructed plaintiff. As such, a trial is necessary on these issues and summary judgment is denied as against defendant Lufthansa.

Defendants' motion for an order pursuant to CPLR 2221 granting defendant Terminal One Group Association, L.P. ("Terminal One") leave to reargue and modify the Court's order of April 14, 2011 to hereby grant summary judgment in favor of this defendant is hereby granted.

In a decision and order dated April 14, 2011, the Court denied that branch of defendants' motion seeking the summary dismissal of plaintiff's complaint as against Terminal One stating:

> That branch of defendants' motion seeking summary judgment dismissing plaintiff's claims as against Terminal One is denied. Defendants failed to establish a prima facie case that there are no triable issues of fact against defendant Terminal One, as defendants have failed to attach a copy of pleadings alleging any

causes of action against Terminal One. As CPLR 3212 mandates that a summary judgment motion be supported by a copy of the pleadings, that branch of defendants' motion for summary judgment dismissing plaintiff's claims as against Terminal One is hereby denied.

Defendant established that the Court overlooked the fact that the pleadings in the action of plaintiff against Terminal One were indeed attached to the prior summary judgment motion, and as such, that branch of the motion will now be considered on its merits.

Upon reargument, the Court finds that defendant, Terminal One failed to establish a prima facie case that the plaintiff's claims against it should be dismissed. In support of this branch of the motion, defendants argue that Terminal One did not own or operate the subject belt loader and are therefore not liable for any risks plaintiff assumed in the course of her employment. However, defendants have failed to submit any admissible proof that they did not own or operate the belt loader, submitting only an attorney affirmation on this point. It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]; Wisnieski v. Kraft, 242 AD2d 290 [2d Dept 1997]; Lupinsky v. Windham Constr. Corp., 293 AD2d 317 [1st Dept 2002]). Furthermore, defendants argument that the hazard was an ordinary and obvious hazard of employment is unavailing. Whether a condition was open and obvious goes to the issue of whether plaintiff was comparatively negligent (see, Cup v. Karfunkel, 1 AD3d 48 [2d Dept 2003]). Comparative negligence is an issue that needs to be determined by the jury (Klee v. Cablevision Sys. Corp., 2010 NY Slip Op 7513 [2d Dept 2010]).

As defendants failed to establish a prima face case that the plaintiff's action against defendant Terminal One should be dismissed, the Court need not address plaintiff's opposition papers on this point and summary judgment to Terminal One as against plaintiff is denied.

This constitutes the decision and order of the Court.

Dated: August 9, 2011

.....
Howard G. Lane, J.S.C.