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

PRESENT: Hon. Debra A. James - Cohen Justice PART 36

Index Number : 115545/2008
MAYO, MANUEL
vs.
METROPOLITAN OPERA ASSOCIATION
SEQUENCE NUMBER : 014
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 reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4
interim orders dated 12/29/2011 & 2/21/2012	5, 6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to reargue by Creative Finishes Limited is denied in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence number 015)

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-16-2012

Hon. Debra A. James - Cohen J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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MANUEL MAYO and ISABEL MAYO,

Plaintiffs,

-against-

METROPOLITAN OPERA ASSOCIATION, INC. and LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,

Defendants.

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METROPOLITAN OPERA ASSOCIATION, INC.,

Third-Party Plaintiff,

-against-

STRAUSS PAINTING, INC., CREATIVE FINISHES LIMITED and NOVA CASUALTY COMPANY,

Third-Party Defendants.

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Index No.: 115545/08
DECISION/ORDER

Motion Seq. No.: 014 & 015

Index No.: 590119/09

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, third-party defendant Creative Finishes Limited (Creative) moves for leave to reargue a portion of this court's earlier decision dated October 13, 2011 (motion sequence number 014). Defendants/third party plaintiffs Metropolitan Opera Association, Inc. (The Met) and Lincoln Center for the Performing Arts, Inc. (Lincoln Center) move separately for the same relief (motion sequence number 015). For the following reasons, both motions are denied.

BACKGROUND

The court has discussed the facts of this case extensively in several previous decisions, and will not repeat them at length now. For the purposes of this motion, it is sufficient to recount

that plaintiff Manuel Mayo (Mayo)[1] was a painter employed by Creative to perform work at one of the buildings located at the Lincoln Center complex in the County, City and State of New York (the building), which building is owned by Lincoln Center and operated by the Met. Third-party defendant Strauss Painting, Inc. (Strauss) is the general contractor that the Met had hired, and that, in turn, hired Creative as a subcontractor. Third-party defendant Nova Casualty Company (Nova) is an insurance company from which Creative obtained a comprehensive general liability insurance policy (the GCL policy) that named the Met and Strauss as "additional insureds."

There has been extensive motion practice in this case; the court's decision dated October 13, 2011 is at issue in this current pair of motions to reargue. *See* Notice of Motion, Exhibit A. The portion of that decision that concerns Creative specifically found that:

> "The second branch of Nova's motion seeks a declaratory judgment that it is not obligated to defend or indemnify Creative in Mayo's personal injury/negligence action. *Id.* at 23-28. Nova argues that, like the Met, Creative violated the GCL policy's notice provision by waiting over three months to serve Nova with notice of Mayo's accident and/or claim. *Id.* at 23-24. Creative responds that Drewes notified Creative's own insurance broker contemporaneously with the occurrence of Mayo's accident, and argues that this act satisfies the subject notice provision. *See* Dachs Affirmation in Opposition, ¶ 6. Nova replies that this is incorrect as a matter of law. *See* Gill Reply Affirmation, ¶¶ 56-48. Nova is correct.
>
> The Appellate Division, First Department, plainly holds that notice to a party's insurance broker does *not* constitute notice to a party's insurer. *See e.g. Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 (1st Dept 2009). Therefore, the court rejects Creative's argument, as, like the Met, Creative violated the GCL policy's notice provision.
>
> Creative nonetheless argues that despite admittedly learning of Mayo's accident on the day it occurred, it had a reasonable belief that it would not be held

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[1] Co-plaintiff Isabel Mayo is Mayo's wife.

liable for such accident. *See* Dachs Affirmation in Opposition, ¶ 10-18. Nova vigorously contests this point. *See* Gill Reply Affirmation, ¶¶ 59-79.

While Creative argues that it had a reasonable belief that it would not be held liable for Mayo's accident since Mayo was Creative's employee receiving Workers' Compensation therefore precluding any additional liability on Creative's part, this argument has been consistently rejected by the Appellate Division, First Department. *See National Union Fire Ins. Co. of Pittsburgh, Pa*, 86 AD3d 425 (1st Dept 201 l) (insured's belief that Workers' Compensation was the injured's exclusive remedy was not reasonable as a matter of law); *Macro Enterprises, Ltd. v. ABE Ins. Corp.*, 43 AD3d 728 (1st Dept 2007). Further, the Drewes Affidavit that it relies upon in further support is not relevant to the issues between Nova and Creative. Thus, as Creative failed to raise an issue of fact as to the reasonableness of its belief in liability, this Court determines, as a matter of law, that Creative's delay in reporting Mayo's accident to Nova for over three months, violated the terms of the Nova policy. *See e.g. 2130 Williamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d at 372 (1st Dept 2008); *Juvenex Ltd v. Burlington Ins.* Co., 63 AD3d 554 (1st Dept 2009) (two month delay unreasonable as a matter of law); *Young Israel Co-op City v. Guideone Mutual Ins. Co.*, 52 AD2d 245 (1st Dept 2008 (unexcused 40 day delay unreasonable as a matter of law). Nova's motion for a declaration that it is not obligated to defend or indemnify Creative in Mayo's personal injury action is therefore granted."

Id. at 49-50. The portions of the court's October 13, 2011 decision that concerns Lincoln Center and the Met specifically found that:

"With respect to Mayo's third cause of action, Labor Law § 240 (1) provides, in pertinent part, that:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals holds that the hazards contemplated by the statute 'are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.' *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). This statute

"exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 342 (2008). A plaintiff is required "to show that the statute was violated and that the violation proximately caused his injury." *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 (2004).

Here, Mayo argues that his accident falls squarely within the purview of Labor Law § 240 (1) because there is sufficient evidence of both a violation and causation. *See* Notice of Motion (motion sequence number 006), Faegenburg Affirmation, ¶¶ 22-35. With respect to the former element, Mayo notes that the Appellate Division, First Department, has long recognized that fixed-wall ladders are "specifically included within the statute's coverage." *Spiteri v Chatwal Hotels*, 247 AD2d 297, 299 (1st Dept 1998), citing *Oprea v New York City Hous. Auth.*, 226 AD2d 310, 311 (1 st Dept 1996). Here, there is no doubt that Mayo had to ascend a fixed-wall ladder at the building in order to perform his scraping and painting work on the roof above it. Nevertheless, in their cross-motion, defendants raise three arguments in support of their contention that Mayo has failed to establish that the condition of the ladder violated Labor Law § 240 (1).

Defendants first cite to the decision of the Appellate Division, Second Department, in *O'Donoghue v New York City School Constr. Auth.* (1 AD3d 333 [2d Dept 2003]), in which the plaintiff, while ascending a ladder affixed to the wall, fell after being struck in the head by a hatch that fell and closed on him while he was attempting to pass through it. The Second Department overturned the trial court's ruling and dismissed the plaintiffs Labor Law § 240 (1) claim on the ground that the hatch did not constitute a "falling object" against which the statute was designed to afford protection. *Id.* at 335. Defendants argue that the *O'Donoghue* holding mandates the dismissal of Mayo's claim because the hatch at issue in this action is, similarly, not a "safety device" within the meaning of Labor Law § 240 (1). *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶ 23.

Mayo replies that this holding is both factually inapposite and bad law. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 26-27. The court agrees that the within case is distinguishable. Mayo does not contend that the instant hatch fell on him, but only that he fell while trying to close it. Also, although Mayo's moving papers occasionally describe the hatch as "defective," he has never advanced an argument that the hatch's purported defects (such as the hatch fell on him) caused his injuries, but has, instead, maintained that the condition of the ladder violated the statute because it lacked safety features, and that this was the proximate cause of his injuries. Thus, the court agrees that *O'Donoghue* is inapposite, since it applies to both a different factual

scenario - i.e., a falling hatch - and a different elevation-related risk - i.e., a worker positioned below a load being hoisted above him. Mayo also argues that *O'Donoghue* is no longer good law because it has been "overruled" by the Court of Appeals' decision in *Runner v New York Stock Exchange, Inc.* (13 NY3d 599 [2009]). *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 26. This does not appear to be entirely accurate; however, the court need not address Mayo's contention since *O'Donoghue* is not controlling under the within facts.

Defendants next cite the Second Department's recent decision in *Walker v City of New York* (72 AD3d 936 [2d Dept 2010]), in which the plaintiff, while ascending a fixed-wall ladder from a subterranean sewer, fell after an inflatable support device that he had placed in the sewer burst and caused him to lose his grip. The court upheld the trial court's dismissal of the plaintiffs Labor Law § 240 (1) claim on the ground that the ladder itself was a "proper safety device[] ... entirely sound and in place." *Id.* at 937. Defendants argue that the instant ladder is, similarly, "not defective." *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶ 24.

Mayo replies that the ladder that he fell from did violate the statute because its top two rungs were unusable (due to inadequate clearance between those rungs and the wall to which the ladder was affixed), and because the ladder lacked a safety cage or other safety device. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶¶ 25, 27-28. Mayo cites to Berkenfield's engineer's report to support his argument. *Id.* at 27. Mayo also cites to the Appellate Division, First Department's, decision in *Mennis v Commet 380, Inc.* (54 AD3d 641 [1st Dept 2008]), in which the Court upheld the trial court's finding of liability pursuant to Labor Law § 240 (1) where the fixed-wall ladder that the plaintiff fell from had water regularly sprayed onto it from cooling towers located above a roof hatch, and thus rendering it periodically slippery.

Mayo further cites the First Department's decision in *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.* (10 AD3d 493,494 [1st Dept 2004]), in which the Court reversed the trial court's dismissal of the plaintiffs Labor Law § 240 (1) claim because the ladder that he fell from while ascending a rooftop water cooling tower "wobbled and swayed, ... was only two feet wide and lacked side rails for gripping, and ... there was a slippery substance on the very narrow, round rungs." The Court concluded that the condition of the ladder "establishes that his injuries were "at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law § 240 (1) were established [internal citation omitted]." *Id.* at 494. Mayo concludes that, like these two ladders, the ladder that he fell from violated Labor Law § 240 (1) because the lack of clearance on its top two rungs rendered it

permanently hazardous, and because it lacked a safety device to protect against that hazard. *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 28. Defendants' reply papers object - improperly - to the timeliness of Mayo's submission of Berkenfield's report, but otherwise merely restate their original argument. *See* Mot. Seq. No. 006, Berkowitz Affirmation in Reply, ¶¶ 5-16.

After consideration, the court discounts defendants' reliance on the Second Department's decision in *Walker v City of New York* (72 AD3d 936, *supra*). That decision is clearly factually inapposite, since the plaintiff therein fell from the ladder in question when he was startled by an exploding rubber support device. No similar situation is alleged to exist here. Moreover, defendants are incorrect to assert that the statute imposes on Mayo the burden of proving that the subject ladder was "defective." Labor Law § 240 (1) requires a claimant to establish that a ladder was not "so constructed, placed and operated as to give proper protection to a person so employed." In *Montalvo v J. Petrocelli Const., Inc.* (8 AD3d 173, 175 [1st Dept 2004]), the Appellate Division, First Department, flatly held that:

> [Plaintiff was] not required to show that the ladder on which he was standing was defective (*Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 290-291, [lst Dept 2002]) ...
>
> "It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d at 291; *see also Dasilva v A.J. Contr. Co.*, 262 AD2d 214 [1st Dept 1999]; *Schultze v 585 W 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]).

Thus, the court rejects defendants' argument regarding the alleged non-"defectiveness" of the ladder. The law allows Mayo to establish a violation of Labor Law 240 (1) if he can demonstrate that he was exposed to an elevation-related hazard because the subject ladder was not properly "placed" (i.e., affixed to the wall in such a way that its top rungs were unusable), and no adequate safety devices were provided to him.

Here, Mayo's factual evidence regarding the purportedly hazardous condition of the ladder that he fell from (i.e., the deposition testimony regarding the inability to use the top rungs of the ladder closest to the roof hatch, and the expert's report that such constitutes a violation of the ANSI safety requirements) is compelling. The court notes that defendants have not presented any similar factual evidence to refute Mayo's contention that the ladder was hazardous and/or not properly "placed". The court further notes that in *Priestly v Montefiore Med.*

Ctr/Einstein Med. Ctr. (10 AD3d 493, *supra*), the First Department did indeed reinstate the plaintiffs Labor Law § 240 (1) claim based on evidence of the subject ladder's condition that "establishes that [plaintiffs] injuries were 'at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential.'" *Id.* at 494-95. Similarly, here, Mayo's injuries were at least partially attributable to defendants' failure to provide him with a ladder or other safety device "so constructed, placed [or] operated as to give proper protection to a person" employed at a job that involved a risk caused by an elevation differential. Labor Law § 240 (1). Had all of the ladder's rungs been usable, or had the ladder been equipped with a safety cage, it may have been "constructed" to provide against such a risk; had it been provided with a "tie off," it may have been "operated" to provide against said risk; however, it is not disputed that it was not. Therefore, the court concludes that Mayo has indeed established that the construction and placement, or inadequacy of safety devices of the subject ladder, violated Labor Law § 240 (1).

Defendants' final argument is that "any purported defects in the hatch and/or ladder were not a proximate cause of this accident." *See* Notice of Cross Motion (motion sequence number 008), Berkowitz Affirmation, ¶¶ 25-29. Defendants cite the Court of Appeals' ruling in *Cahill v Triborough Bridge and Tunnel Authority* (4 NY3d 35, *supra*) that "where a plaintiffs own actions are the sole proximate cause of the accident, there can be no liability" under Labor Law § 240 (1). *Id.* at 39. Defendants refer to Drewes's deposition testimony that Strauss had supplied safety equipment at the building, that Mayo chose not to use that equipment, and assert that, therefore, "the sole proximate cause of this accident was the actions of the plaintiff." Mot. Seq. No. 008, Berkowitz Affirmation, ¶ 27. Creative joins in this argument. *See* Mot. Seq. No. 006, Dachs Affirmation in Opposition, ¶¶ 7-10. Mayo responds that it was "the absence of necessary safety features such as a safety cage ... or other safety device [that was] the proximate cause of [his] fall." *See* Mot. Seq. No. 006, Faegenburg Affirmation in Opposition and Reply, ¶ 29. Mayo cites a quantity of Appellate Division, First Department, precedent that evidence of a defendant contractor's failure to provide safety devices warrants a finding of absolute liability under Labor Law § 240 (1). *See e.g. Romanczuk v Metropolitan Ins. and Annuity Co.*, 72 AD3d 592 (1st Dept 2010); *Ritzer v 6 East 43rd Street Corp.*, 57 AD3d 412 (1st Dept 2008); *Ranieri v Holt Constr. Corp.*, 33 AD3d 425 (1st Dept 2006); *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493 (1st Dept 2006); *Ben Gui Zhu v Great River Holding, LLC*, 16 AD3d 185 (1st Dept 2005).

Defendants' reply papers restate their original argument, and reassert the contention that "for whatever reason, as [Mayo] came down the ladder ... he did not use any of the safety equipment that was available to him." *See* Mot. Seq. No. 006, Berkowitz Affirmation in Reply, ¶ 20. After reviewing the record,

defendants' proximate causation argument is rejected.

> Drewes's deposition testimony did not indicate that there was safety equipment available for Mayo to use while ascending the ladder to the building's roof. It stated that the extant safety equipment was kept in a locked gang box on the roof and was intended to be used only while performing work on the roof. *See* Notice of Motion (motion sequence number 006), Exhibit G, at 17, 19,27-31. Indeed, Drewes specifically stated that he did not know of any safety equipment that was capable of being used on the subject ladder, and opined that such equipment was unnecessary. *Id.* This is, of course, mere speculation, as is defendants' implication that, had he been truly concerned, Mayo could have returned to the roof, somehow obtain a key, open the gang box, taken a safety harness out, and used it, while closing the hatch when he descended the ladder at the end of his shift. Such speculation cannot substitute for defendants' statutory duty to provide Mayo with a ladder "so constructed, placed and operated as to give proper protection" while he was entering and exiting his work place. Labor Law § 240 (1). Further, even if it were factually supported, defendants' characterization would at best describe an act of comparative negligence, which is not a defense under Labor Law § 240 (1). *See e.g. Picano v Rockefeller Center North, Inc.*, 68 AD3d 425 (1st Dept 2009); *Aponte v City of New York*, 55 AD3d 485 (1st Dept 2008); *Ernish v City of New York*, 2 AD3d 256 (1st Dept 2003). Accordingly, having established both a statutory violation and proximate causation, Mayo is entitled to partial summary judgment on his third cause of action on the issue of liability, with the issue of damages being reserved for trial, and that the branch of defendants' cross motion that seeks summary judgment to dismiss said cause of action is denied."

Id. at 14-21 (fns. 3 and 4 omitted).

DISCUSSION

Pursuant to CPLR 2221, a motion for leave to reargue may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Id.*, citing *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept

1984). Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" *Rubinstein v Goldman*, 225 AD2d 328, 328 (1st Dept 1996), quoting *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979). Here, both of the instant motions fail under the above statutory criteria.

In its motion, Creative argues that the court misapprehended the law in its earlier decision by failing to address the issue of whether it (i.e., Creative) had presented sufficient evidence of mitigating circumstances to excuse its improper and untimely notification of Nova about Mayo's accident. *See* Notice of Motion (motion sequence number 014), Dachs Affirmation, ¶¶ 8-10. Creative cites the Court of Appeals decision in *Mighty Midgets, Inc. v Centennial Ins. Co.* (47 NY2d 12, [1979]) for the proposition that an insured who notifies its broker about the occurrence of a potentially covered incident, instead of notifying the insurer as specified in the insurance policy, may be excused from violating the policy's terms if certain mitigating circumstances are found. *See* Notice of Motion (motion sequence number 014), Dachs Affirmation, ¶¶ 12-14. Creative then asserts that such circumstances exist herein because it, like the insured in *Mighty Midgets*, had a "good faith belief that its ... broker was providing notice to its insurers" as a result of the "special relationship" that Creative purportedly enjoys with its broker. *Id.* Nova responds that this court's earlier decision did not misapprehend the law because the holding of *Mighty Midgets* is inapposite to the facts of this one. *See* Melito Affirmation in Opposition, ¶ 6-8; this court agrees.

In *Mighty Midgets*, the Court of Appeals based its decision to abrogate the general rule, that failure to comply with an insurance policy's notice provisions will preclude coverage, on the extraordinary circumstances that the plaintiff's employee, who notified the broker (instead of the

insurance company) about the incident in question, was an "unsophisticated" 21 year old "unpaid volunteer" of a not-for-profit children's football league, and was entitled to rely on the league's "special relationship" with its insurance broker, who had assumed an agent-like role toward the league. By contrast, the case at bar involves a sophisticated commercial contractor that presumably does business regularly with Nova and/or other commercial liability insurers, every time it takes on a construction job. There are no extraordinary facts presented here that would warrant that this court follow the holding of *Mighty Midgets*. Thus, this court did not misapprehend any law when it applied the general rule, that failure to abide by an insurance policy's notice provisions will vitiate coverage, in its earlier decision. Creative raises no other arguments in its current motion. Accordingly, Creative's motion to reargue is denied.

In their motion, the Met and Lincoln Center argue that the court misapprehended the law when it determined that Mayo had established a claim pursuant to Labor Law § 240 (1). *See* Notice of Motion (motion sequence number 015), Berkowitz Affirmation, ¶¶ 24-33. However, the Met and Lincoln Center then argue that "the court mistakenly focused on the fixed ladder and, in doing so, essentially made a factual determination that the hatch is irrelevant." *Id.*, ¶ 25. They then cite to the pleadings and the deposition testimony that the court reviewed in its earlier decision, and argue that "[the] court erred in finding that Mayo has never advanced an argument that the hatch's purported defects ... caused his injuries," and that "Mayo has always alleged that the accident happened as a result of the combination of the allegedly defective hatch and ladder." *Id.*, ¶¶ 26, 28. Mayo responds by citing to the same evidence, and arguing that it shows, instead, that his accident was proximately caused by a combination of factors, and concluding that "neither this court nor [he] ignored the hatch or focused solely on the condition of the ladder."

See Faegenburg Affirmation in Opposition, ¶ 30. The Met and Lincoln Center reply that the court engaged in a "selective reading of the record," and that there are "issues of fact as to whether the fixed ladder was defective, and if so, whether the defective condition was a proximate cause of this accident." *See* Berkowitz Reply Affirmation, ¶ 9; the Met's and Lincoln Center's arguments, however, lack merit.

First, the Met's and Lincoln Center's arguments are plainly all fact-based, rather than legal, and therefore cannot be directed to a claim that the court misapprehended the controlling law. Second, this court already considered and rejected those fact based arguments in its earlier decision. Specifically, this court held that "defendants are incorrect to assert that the statute imposes on Mayo the burden of proving that the subject ladder was 'defective'" because " Labor Law § 240 (1) [merely] requires a claimant to establish that a ladder was not '[so constructed, placed and operated as to give proper protection to a person so employed.'" *See* Notice of Motion, Exhibit A at 18. The Met's and Lincoln Center's current arguments are clearly a rehash of their earlier arguments regarding the alleged non-defectiveness of the ladder and/or hatch. As the court previously observed, a motion for "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d at 27. Here, that is what the Met and Lincoln Center are clearly seeking to do. Therefore, the court rejects their first argument.

The Met and Lincoln Center also argue that the court improperly relied on Mayo's expert's opinion that the improper placement of the subject ladder's top two rungs constituted a violation of ANSI standards, because those standards are merely guidelines, and will not support a finding of liability under Labor Law § 240 (1). *See* Notice of Motion (motion sequence number

015), Berkowitz Affirmation, ¶ 29. This appears to be an accurate statement of the law regarding ANSI standards. *See e.g. Owens v City of New York*, 24 Misc. 3d 1204(A), 2009 Slip Op. 51247 (U) (Sup Ct Kings Cty 2009), *affd* 72 AD3d 775 (2d Dept 2010). However, it is plain that the court's earlier decision did not hold that a violation of ANSI standards would support a cause of action under Labor Law § 240 (1), or even find that ANSI violations were present herein. Therefore, the court rejects the Met's and Lincoln Center's argument as inapposite. Accordingly, the Met's and Lincoln Center's motion is denied.

DECISION

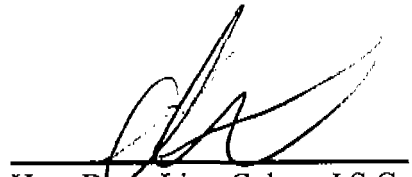
ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of third-party defendant Creative Finishes Limited (motion sequence number 014) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 2221, of defendant/third party plaintiff Metropolitan Opera Association, Inc. and defendant Lincoln Center for the Performing Arts, Inc. (motion sequence number 015) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York
July 16, 2012



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

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