SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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DAVID ANDERSON,

Plaintiff,

-against-

MSG HOLDINGS, L.P. and TURNER CONSTRUCTION COMPANY,

Defendants.

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Index No.: 154892/12

DECISION/ORDER

Mot. Seq. 006

KELLY O'NEILL LEVY, J.:

This is an action to recover damages for personal injuries sustained by an ironworker when he fell from a concrete panel while installing stadium seating at Madison Square Garden in New York, New York on July 21, 2012.

Defendants MSG Holdings, L.P. (MSG) and Turner Construction Company (Turner) (together, defendants) move, pursuant to CPLR 2221, for an order granting them leave to reargue those parts of the decision and order of the court, dated March 22, 2016 (the Prior Order), which denied the parts of their prior motion for summary judgment which sought dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them and granted plaintiff David Anderson's cross motion for summary judgment in his favor as to liability on those claims.

DISCUSSION

CPLR 2221 (d) states, in pertinent part:

"(d) A motion for leave to reargue:

* * *

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by

the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

"'Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision'[citation omitted]" (*Marini v Lombardo*, 17 AD3d 545, 546 [2d Dept 2005]; *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 435-436 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]).

In their motion to reargue, defendants contend that, in making its determination that plaintiff was not recalcitrant and the sole proximate cause of the accident, the court overlooked testimonial and documentary evidence that plaintiff was provided with appropriate and safe tie-off points that plaintiff opted not to use. Specifically, defendants assert that the availability of such tie-off points, which included multiple raker beam ears above his head and certain clip inserts, were confirmed by the testimonies of Turner's site safety manager and Falcon Steel's project and site safety managers, as well as an expert affidavit put forth by engineer David B. Peraza, who conducted a timely inspection of the accident site.

Defendants also note that, in the Prior Order, the court relies on the affidavit of plaintiff's coworker, Paul Maiolini, who confirmed plaintiff's testimony that, at the time of the incident, there were no appropriate tie-off points available at his work location. Defendants now advise the court that recently discovered documents show that, after he signed his affidavit, Maiolini

was convicted of a serious felony. Defendants argue that Maiolini's felony conviction raises a question as to his credibility as a witness, which could possibly affect the credibility of plaintiff's entire case. Further, these issues of credibility and impeachment must be left to a jury to decide from live testimony at trial.

Here, a review of the Prior Order, as well as the underlying record, reveals that the court did not overlook or misapprehend any facts when it determined that defendants failed to sufficiently refute the case put forth by plaintiff that there was no appropriate place for plaintiff to tie off to in the accident area at the time of the accident (*see Marini v Lombardo*, 17 AD3d at 546). Accordingly, the court's findings that plaintiff was not recalcitrant and the sole proximate cause of the accident, and that defendants were liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) were not made in error (*see Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"]).

As to defendants' argument that the recent news of Maiolini's criminal activity creates questions of fact as to his credibility and the credibility of plaintiff's case, it should be noted that, even if Maiolini's affidavit were not considered by the court, its finding would nevertheless remain the same in light of plaintiff's strong and consistent testimony that he knew of no appropriate tie-off points available for his use in the accident area, the statements made in the affidavits of several other workers confirming said allegation, and the fact that the aforementioned testimonies, expert affidavit and arguments offered by defendants regarding the recalcitrant worker/sole proximate cause issue have already been carefully considered by the court and rejected for the various reasons outlined in the decision.

Thus, defendants' motion to reargue is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants MSG Holdings, L.P. and Turner Construction Company, pursuant to CPLR 2221, for leave to reargue those parts of the Prior Order which granted plaintiff David Anderson's cross motion for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants and denied those parts of defendants' motion seeking dismissal of said claims against them is denied.

This constitutes the decision and order of the court.

DATED: September 30, 2016

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.