SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

----------X	**TRIAL/IAS PART 17**
PETER DERKEVICS,	
Plaintiff,	**Index No. 602362/12**
- against -	
	Mot. Seq. #006
BROOKHAVEN SCIENCE ASSOCIATES, LLC., BATTELLE MEMORIAL INSTITUTE, AND E.W. HOWELL CO., LLC,	**Mot. Date: 2-29-16** **Submit Date: 2-29-16**
Defendants.	
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The following papers have been read on this motion:

Notice of Motion, dated 2-3-16.....1
Affirmation in Opposition, dated 2-10-16.....2
Defendant's Reply Affirmation, dated 2-26-16.....3

The motion of defendants Brookhaven and Howell (as such terms are defined in the Prior Decision) pursuant to CPLR §2221(d) to reargue this Court's Decision and Order dated December 23, 2015 (Prior Decision) is denied. To the extent that the addition of new evidence may cause this motion to be deemed a motion to renew (CPLR § 2221(e)) it is similarly denied and the Court adheres to the result set forth in the Prior Decision.

All requests for relief not specifically addressed are denied.

The Prior Decision recites the history and facts of this action which will not be repeated here. In sum plaintiff claims that he was injured when 10-12 beams fell on him from above while working at a construction site. The Court found that defendants were not entitled to summary judgment dismissing claims under Labor Law §§ 240(1) and 241(6).

In this motion defendants have simply attached the motion and cross motion papers originally submitted. By way of reply defendants contend that the Court misapprehended the testimony of

plaintiff with respect to whether or not certain nails driven through plywood cement forms constitute a "safety device" under Labor Law §240(1) and secondly as to the proper use of an expert affidavit.

A 1999 amendment to CPLR 2221 addresses the rules for making a motion to reargue or a motion to renew and describes the differences. Paragraph (f) of CPLR 2221 permits the movant to combine in one motion both a reargument and renewal request, but adds the requirement that the movant "identify separately and support separately each item of relief sought." David Siegel, Esq. suggests the most practical method of dealing with this requirement is by separately labeling each segment of the motion and referring to the separate segments in any accompanying memorandum. See, *Siegel's Practice Review, No. 86, August 1999 p. 2.* See also, *Aloe, Revamping Motions to Reargue or Renew, NYLJ, October 1, 1999 p. 1.* The Court is directed to decide the combined motion as if separately made and to address each separately. Here defendants have not submitted any new evidence hence there is no basis for renewal.

A motion to reargue is designed to afford a party an opportunity to establish that the Court overlooked or misapprehended the relevant facts or misapplied principles of law. It is not a vehicle to permit a party to argue again the very questions previously decided *Foley v. Roche*, 68 AD2d 558 (1st Dept. 1979); see also *Frisenda v. X Large Enterprises Inc.*, 280 AD2d 514 (2d Dept.2001) and *Rodney v. New York Pyrotechnic Products Co., Inc.*, 112 AD2d 410 (2nd Dept. 1985) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced. *Giovanniello v. Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737 (2d Dept. 2006).

As to reargument, defendants make the same arguments based on the same papers previously submitted that were made in the prior request but now by way of reply reemphasizes and relies on the contentions described above.

The new material and contentions contained in the reply for the first time should not be considered. *Ramos v Cooper Tire and Rubber Co.,* 51 AD3d 896 (2d Dept. 2008). The function of reply papers is to address arguments made in opposition to the position taken by the movants and not to permit the introduction of new arguments in support of the motion. *Paul v. Cooper*, 45 AD3d 1485 (4th Dept. 2007); *Allstate Insurance Company v. Dawkins*, 52 AD3d 826 (2d Dept. 2008).

As plaintiff correctly contends, the papers attached to the notice of motion are the papers submitted on the prior motion and there is no memorandum of law. Hence the moving papers do not in any way specify how or in what manner the Court misapprehended or overlooked relevant facts or misapplied principles of law. A reading of the moving papers gives no hint as to why the motion to reargue is being made. The belated attempt to cure this defect by way of reply is not fair to the responding plaintiff as he is given no clue as to what arguments he should be addressing in his opposition.

For the above reasons the reply should not be considered.

In any event however, the Prior Decision specifically addressed the above contentions and defendants have failed, on this motion to sufficiently distinguish those concerns and conclusions. That defendants disagree with the result is not grounds for reargument much less grounds to modify the Prior Decision.

The Court found that defendants failed to make a *prima facie* showing of entitlement to relief and that there are questions of fact as to inadequacy of a safety device including a determination that under the facts presented certain nails, which played a role in the happening of the injuries should be considered to be safety devices for purposes of the Labor Law. A further triable issue was created by

the conflicting opinions of the experts for the competing sides.

Finally the attempt by defendant to have the Court consider the testimony of the plaintiff as being that of an expert is of no avail as there is no doubt that his testimony, was factual in nature. Hence there is no conflict between the plaintiff and his own expert, but even if there was such a conflict that would be an issue to be resolved by the fact finder or taken into account in determining the weight of the testimony.

In sum, on the issue of reargument the Court does not agree that it misapprehended any material facts or misapplied applicable law.

Based on the foregoing defendants' motion is denied and the Court adheres to its Prior Decision.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: March 18, 2016

HON. DANIEL PALMIERI
Supreme Court Justice

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