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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

ANTHONY BARKSDALE,
Plaintiff,

-against-

BP ELEVATOR CO., THE LENOX CONDOMINIUM, BOARD OF MANAGERS OF THE LENOX CONDOMINIUM, KYROUS REALTY GROUP, INC. and CAR PARK SYSTEMS OF NEW YORK, INC.,

Defendants.

INDEX NO. 154754/2012
MOTION DATE 03/15/2017
MOTION SEQ. NO. 007
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for leave to reargue/renew.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 ; 5
Replying Affidavits	6

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants The Lenox Condominium, Board of Managers of the Lenox Condomonium and Kyrous Realty Group, Inc.'s (collectively the "Lenox Condominium") motion to reargue/renew pursuant to CPLR §2221, is denied.

Plaintiff Anthony Barksdale (herein "Barksdale") was employed as a parking attendant at a parking garage managed by Car Park Systems of New York, Inc. (herein "Car Park") located at 380 Lexington Avenue, New York, New York. On April 27, 2012, Mr. Baksdale allegedly suffered an injury when the car elevator gate (herein the "Elevator") allegedly fell on him and injured his shoulder. BP had a contract with Car Park for maintenance and repair of the Elevator (herein the "BP Contract").

Mr. Barksdale commenced this personal injury action by a Third Amended Summons and Complaint on September 11, 2013, against BP, The Lenox Condominium (herein "Lenox"), Board of Managers of The Lenox Condominium (herein "Board of Managers"), Kyrous Realty Group, Inc. (herein "Kyrous"), and Car Park (collectively herein the "Defendants"). The

Defendants answered, and the parties proceeded with discovery.

By a cross-motion dated April 28, 2016, the Lenox Condominium sought (1) summary judgment dismissing Plaintiff's Complaint against it and all other cross-claims, and (2) denial of Defendant Car Park Systems of New York, Inc.'s (herein "Car Park") motion for summary judgment as to the cross-claims asserted against it.

By Order dated August 24, 2016, this Court denied Lenox Condominium's cross-motion for summary judgment and granted Car Park's summary judgment motion dismissing Plaintiff's Complaint and all cross-claims against it, including Lenox Condominium's cross-claims.

Lenox Condominium (herein "Movants") now move for leave to clarify and re-argue this Court's August 24, 2016 Decision, and upon re-argument, (I) grant summary judgment dismissing all claims against it including cross-claims, and (ii) deny Car Park's summary judgment as to the Movants cross-claims asserted against it. Plaintiff and Defendant Car Park oppose the motion.

Movants contend that the court overlooked evidence that establishes Lenox Condominium was responsible for maintaining only the common elements of the condominium and therefore not responsible for maintaining the Elevator or in the alternative, did not have any actual notice or constructive notice of any alleged defect that caused the accident.

Movants also contend the court overlooked the fact that Worker's Compensation Law Section 11 requirement for a signed contract applies only to claims for indemnity or contribution, and not claims for breach of contract.

The Plaintiff opposes the motion arguing that the Movants have attempted to make a new argument and attach documents not previously attached without providing the court any reasonable justification for the failure to provide them in the original cross-motion. Car Park opposes the motion in regards to the Movants cross-claims against it arguing that the Movants failed to submit any new evidence or facts that this court did not previously consider. Car Park further contends that Movants failed to submit a written contract signed by Car Park as the "Condominium Declaration" is not a contract, nor was it signed by Car Park. Furthermore, the declaration was not an agreement between the Board of Managers and Car Park as Car Park was not mentioned anywhere in the agreement so it must fail to meet the definition of a written indemnity agreement under the Workers' Compensation Law.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (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, and (3) shall be made

within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law "(Kent v. 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010] citing to Foley v Roche, 68 AD 2d 558, 418 NYS2d 588 [NYAD 1st Dept. 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent v. 534 East 11th Street, 80 AD3d 106, supra and Ul Haque v Daddazio, 84 AD3d 940, 922 NYS2d 548 [App Div. 2011]).

While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the original motion (Empire State Conglomerates v Mashbur, 105 AD3d 898, 963 NYS2d 330 [App. Div. 2013]). A motion must be denied where movant does not provide any excuse for their failure to present the relevant new facts on their original motion (Eddine v Federated Dept. Stores, Inc., 72 AD3d 487, 899 NYS2d 164 [App. Div. 2010]).

Upon review of the Movants' prior cross-motion for summary judgment, and the subsequent Decision and Order dated August 24, 2016, Movants motion for reargument/renewal is denied.

The Movants originally relied on the By-Laws and Declarations in the cross-motion to make a prima facie showing of entitlement to summary judgment. The Order dated August 24, 2016 acknowledged the By-Laws and Declarations and held "[t]he only proof [Movants] point to is the parties' deposition testimony, and Car Park's indication in its moving papers that it managed the garage. The [Movants] fail to provide sufficient proof that Car Park was solely responsible for the maintenance of the garage unit, such as proof of a lease or ownership of the unit by Car Park. The By-Laws and Declaration of the Condominium do not assert that Car Park is the party responsible for such maintenance. There is only a general assertion that unit owners or occupants are responsible for their individual units"(Movants' Papers Ex. P). As to Movants' argument regarding the dismissal of Movants' cross-claims against Car Park, the court held "the [Movants] provide[d] no lease, or any other proof, that Car Park entered into a written contract where it expressly agreed to contribution or indemnification of the [Movants]" raising material questions of fact for the court to deny Car Park's motion to dismiss the cross-movants' cross-claims (id). The Movants fail to show how the court overlooked or misapprehended these documents, as the Order held these documents and deposition transcripts alone were insufficient proof for a prima facie showing of entitlement to summary judgment and on their own, still remain so.

In an attempt to demonstrate sufficient proof, Movants attached a lease between Movants and Car Park (Movants' Moving Papers Ex. Q, R). However, Movants failed to offer any reasonable justification in their Moving Papers for their failure to attach the lease in the original cross-motion papers. A failure to show that the new evidence "could not with due diligence have been presented on the original motion" can result in the denial of a motion to renew (204 Columbia Hgts., LLC v Manheim, 45 NYS3d 84 [App. Div. 2017]). Movants have offered no justification in their Moving Papers for their failure to proffer the lease, a public record, in the original cross-motion.

Movants attempt to offer a justifiable excuse for their failure to proffer the lease, a public record, in the original cross-motion in their Reply Papers is unavailing. It has long been held that an argument advanced for the first time in the reply are entitled to no consideration by the court in a motion to renew (Rhodes v City of NY, 88 AD3d 614, 931 NYS2d 595 [App. Div. 2011]).

Accordingly, it is ORDERED that Defendants The Lenox Condominium, Board of Managers of the Lenox Condomonium and Kyrous Realty Group, Inc.'s (collectively the "Lenox Condominium") motion to reargue pursuant to CPLR §2221 is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 18, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE