SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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ASHTON GOUNDAN, LATCHMANI GOUNDAN,

Plaintiffs,

- v -

PAV-LAK CONTRACTING INC., PAV-LAK INDUSTRIES, INC.,237 WEST 54 OWNER, L.L.C.,

Defendants.

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INDEX NO. 155989/2014

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143-147 were read on this motion to/for reargument.

By notice of motion, plaintiffs move pursuant to CPLR 2221 for an order granting leave to reargue, and upon reargument, vacating the denial of their cross motion seeking partial summary judgment on liability against defendants pursuant to Labor Law § 240(1).

Given testimony that plaintiff Goundan had access to a harness and tie-off lines, and the permissible inference arising from that testimony that for no good reason he chose not to use them, plaintiffs' motion for partial summary judgment was denied. (NYSCEF 138).

A motion for leave to reargue "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." (CPLR 2221[d][2]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

Plaintiffs argue that the absence of evidence that Goundan knew that protective devices were available to him or that he was instructed to use them, was overlooked or misapprehended in denying his motion. Goundan's foreperson, however, testified that harnesses and tie-off lines were available to D&D employees in the work shanty (NYSCEF 101), and that he or the other foreperson held weekly meetings with D&D employees at which they discussed wearing harnesses (NYSCEF 101). D&D's project manager also testified that harnesses and safety lines were available in the shanty. (NYSCEF 104).

Thus, while Goundan could not remember if harnesses and tie-off lines were available to him, the testimony of his foreperson and project manager raised an issue of fact for trial as to whether, by failing to use a harness and safety line, he was the sole proximate cause of his accident. Plaintiffs thus fail to establish that any issue of law or fact was overlooked or misapprehend, and instead advance the same arguments that had been considered and rejected in the original decision. (*See e.g., Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, AD3d , 2019 NY Slip Op 06142 [1st Dept 2019] [plaintiff was sole proximate cause of accident where adequate safety devices were available for use at job site and his own actions in unhooking safety line and climbing through window caused accident]; *see also Robinson v E. Med. Ctr., LP*, 6 NY3d 550 [2006] [Labor Law § 240(1) not violated if adequate safety devices available at job site and worker does not use or misuses them]).

There is no requirement that a worker know that safety devices are available and also be instructed to use them. Rather, a worker may be the sole proximate cause of his or her accident if "adequate safety devices are available at the job site, but the worker either does not use or misuses them." (*Robinson v E. Med. Ctr., LP*, 6 NY3d 550 [2006]; *cf Tuzzolino v Consol. Edison Co. of New York*, 160 AD3d 568 [1st Dept 2018] [no triable issue raised as to whether plaintiff

was sole proximate cause of accident absent evidence that there were readily available safety devices that would have been adequate for his work]). The failure to follow a specific instruction to use an available safety device is an element of the recalcitrant worker defense, which is not alleged here. (*See e.g., Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35 [2004] [worker is recalcitrant when she receives specific instructions to use safety devices and chooses to disregard them]; *Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418 [1st Dept 2017] [no triable issue raised as to whether plaintiff was recalcitrant as no evidence that plaintiff instructed to use safety device; and also no triable issue as to sole proximate cause as plaintiff not provided with adequate safety device]).

Moreover, plaintiffs had not established that a harness and tie-off lines were required for the task that Goundan was performing at the time, and whether the scaffold, which Goundan admitted was not defective, failed to provide protection. (*See e.g., Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016] [affirming denial of plaintiff's motion for summary judgment on Labor Law § 240(1) claim, as, while plaintiff fell from ladder after receiving electrical shock, factual questions existed as to whether ladder failed to provide proper protection and whether plaintiff should have been given additional safety devices]; *Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376 [1st Dept 1998] [same]).

Thus, even if any matters of fact or law were overlooked or misapprehended in the decision as to the availability of required safety devices, they would not have changed the ultimate determination that plaintiffs had not established their entitlement to summary judgment on liability.

There was no finding that that the shut-off switch was a safety device. Rather, the procedure for shutting off the electricity was addressed "to the extent" it was an issue. As plaintiffs maintain that it is not an issue, their argument need not be addressed.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to reargue is denied.

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9/24/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE