Ahmad v 540 W. 26th St. Prop. Invs. IIA, LLC
2020 NY Slip Op 33450(U)
October 20, 2020
Supreme Court, Kings County
Docket Number: 505130/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of October, 2020.

PRESENT:

HON. LAWRENCE KNIPEL

Justice.

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HUSSAIN AHMAD,

Plaintiff,

- against -

540 WEST 26TH STREET PROPERTY INVESTORS IIA, LLC, AND TRITON CONSTRUCTION COMPANY, LLC,

Defendants.

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Index No. 505130/17

The following e-filed papers read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	220-230, 232-238
Opposing Affidavits (Affirmations)	241-242, 248-249
Reply Affidavits (Affirmations)	244-246, 252-253
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants 540 West 26th Street Property Investors IIA, LLC (540 West) and Triton Construction Company, LLC (Triton) move (in motion sequence No. 8) for an order, pursuant to CPLR 2221 (d), granting leave to reargue their prior motion for summary judgment, which resulted in the order of this court dated June 4, 2020, and upon reargument, requesting that the court issue an order, pursuant to CPLR 3212, granting summary judgment in favor of the defendants dismissing plaintiff's Labor Law § 241 (6) claim as based

upon the alleged violations of 12 NYCRR 23-2.2 (a) and 23-2.2 (b). Plaintiff Hussain Ahmad (plaintiff) moves (in motion sequence No. 9) for an order, pursuant to CPLR 2221 (d), granting reargument of this court's order dated June 4, 2020, insofar as it denied plaintiff's motion for partial summary judgment on the issue of liability as to his Labor Law § 240 (1) claim against the defendants.

Factual Background

Briefly stated, this action arises out of an accident which occurred on September 26, 2016, while the plaintiff was working at a construction site located at 540 West 26th Street in New York City. 540 West was the owner of the premises and Triton was the construction manager for the project. The plaintiff was employed by a subcontractor responsible for performing rebar installation work related to the concrete superstructure of the premises. The premises had a main staircase located in the middle of the building, and two construction ladders, one on the west side of the building and the other on the east side. On the date of the accident, plaintiff used the west side ladder in order to access the fourth floor of the premises where he was going to work. At some point, during his ascent up the ladder, between the third and second floors, a piece of plywood fell and struck the plaintiff on his head, causing him to fall off the ladder and land on the second floor. The plywood that fell, which measured four feet by eight feet, was used as a "form" for the deck cement work taking place on an upper floor.

By decision and order dated June 4, 2020 (the prior order), this court denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim, denied that branch of defendants' summary judgment motion seeking to dismiss plaintiff's Labor Law § 240 (1) claim, and granted that branch of defendants' motion dismissing plaintiff's Labor Law § 200 and common-law negligence claims, as well as his Labor Law § 241 (6) claim except to

the extent it is predicated upon 12 NYCRR 23-1.7 (a) (1), 23-1.7 (a) (2), 23-2.2 (a) and 23-2.2 (b).

Plaintiff's Motion to Reargue

Plaintiff seeks leave to reargue that portion of this court's prior order which denied his motion for partial summary judgment on his Labor Law § 240 (1) claim, and upon reargument, seeks an order granting summary judgment in his favor on said claim. In the prior order, this court held that questions of fact existed in the record as to whether the plaintiff's actions were the sole proximate cause of the accident, thereby precluding summary judgment in his favor under Labor Law § 240 (1).

A motion for leave to reargue is addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (CPLR 2221 [d] [2]; *see Barnett v Smith*, 64 AD3d 669, 670-671 [2d Dept 2009]; *Ito v 324 E. 9th St. Corp.*, 49 AD3d 816 [2d Dept 2008]; *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653 [2d Dept 2007]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*see Sheldrake Riv. Realty, LLC v Village of Mamaroneck*, 106 AD3d 1075 [2d Dept 2013]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]; *McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]).

Here, plaintiff's moving papers primarily present the same arguments already considered by the court in arriving at its prior determination on the issue of liability under Labor Law § 240 (1). In this regard, plaintiff's contention that there are no issues of fact as to (1) whether the subject area was cordoned off by caution tape to prevent entry and usage of the west side ladder, or (2) whether he received instructions not to use the west side ladder, and to instead use the

other stairway/ladder, is not supported by the record. Indeed, conflicting evidence in the record regarding these issues, which were set forth in detail in this court's prior June 4, 2020 order, preclude summary judgment in the plaintiff's favor (*see Godoy v Neighborhood P'ship Hous. Dev. Fund Co.*, 104 AD3d 646, 647 [2d Dept 2013]; *Serrano v Popovic*, 91 AD3d 626, 627-628 [2012]). To the extent plaintiff attempts to raise new arguments that were not raised in his prior motion, they are not properly before this court (*see McGill v Goldman*, 261 AD2d 593 [2d Dept. 1999]). Thus, the plaintiff has failed to demonstrate that this court overlooked or misapprehended any matters of law or fact applicable to this action in determining his original motion (*see Amato v Lord & Taylor*, 10 AD3d 374 [2d Dept 2004]). Accordingly, plaintiff's motion seeking leave to reargue is denied.

Defendants' Motion to Reargue

Defendants seek leave to reargue that portion of this court's prior June 4, 2020 order which denied that branch of their summary judgment motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim as based upon 12 NYCRR 23-2.2 (a) and 23-2.2 (b). Upon reargument, defendants seek summary judgment in their favor dismissing plaintiff's Labor Law § 241 (6) claim to the extent it is predicated upon these two provisions.

Section 23-2.2 (a), entitled "Concrete Work," states that "[f]orms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape" (12 NYCRR 23-2.2 [a]). In their prior motion, defendants argued that section 23-2.2 (a) is not applicable to the facts herein because the form that fell on plaintiff was in the process of being stripped in an area that had been designated a controlled access zone, and therefore the form did not require securing. In addition, defendants argued that section 23-2.2 (b) is also not applicable to the facts herein. That provision, entitled "Inspection," states that "[d]esignated persons shall continuously inspect the stability of all forms, shores and reshores

including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately." (12 NYCRR 23-2.2 [b]). Defendants argued that section 23-2.2 (b) only pertains to the inspection of forms "during the placing of concrete" and not, as here, during the stripping process (NYSCEF Doc. No. 223). In opposition to defendants' motion, the plaintiff argued that the forms should have been secured and inspected during the placing of concrete, as well as during the stripping process, and that defendants' failure to do so was in violation of both sections 23-2.2 (a) and 23-2.2 (b). In their reply papers, the defendants submitted the expert affidavit of Bernard P. Lorenz, P.E., in which he opined, *inter alia*, as to the inapplicability of sections 23-2.2 (a) and 23-2.2 (b). This court, citing *Ross v DD 11th Ave., LLC*, (109 AD3d 604, 606 [2d Dept 2013]), held that the defendants, as the proponents of the motion, failed to meet their prima facie burden in establishing that sections 23-2.2 (a) and 23-2.2(b) are not applicable. Defendants now seek leave to reargue this portion of the court's prior order.

As noted above, a party seeking reargument must show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principal of law (*see* CPLR 2221 [d] [2]; *see Barnett v Smith*, 64 AD3d at 670-671). Defendants have failed to make such a showing. In seeking leave to reargue, the defendants contend that the court erroneously overlooked and failed to consider Mr. Lorenz's expert affidavit, which they claim sufficiently addressed why sections 23-2.2 (a) and 23-2.2 (b) are not applicable to the facts on this record. Although defendants' expert affidavit addressed the code provisions at issue, such evidence was submitted for the first time in their reply papers, and therefore not considered by the court. It is well settled that "a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, such evidence submitted for the first time in reply papers should be disregarded by the court "(*Henriquez v Grant*, 186 AD3d

577 [2d Dept 2020]; *Nationstar Mtge., LLC v Tamargo*, 177 AD3d 750, 753 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943–944 [2d Dept 2017]). Thus, contrary to defendants' contention, they could not rely on the Lorenz expert affidavit to correct the deficiencies in their moving papers insofar as it related to sections 23-2.2 (a) and 23-2.2 (b) (*see Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Osias*, 156 AD3d at 943; *L'Aquila Realty, LLC v Japing Food Corp.*, 103 AD3d 692 [2d Dept 2013]; *David v Bryon*, 56 AD3d 413, 414-415 [2d Dept 2008]; *Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013] [court did not abuse its discretion in declining to consider the affidavit of defendants' expert opining that Industrial Code provision was inapplicable or not violated, which was submitted for the first time in reply]). The court, however, notes that it properly considered Mr. Lorenz's affidavit as it pertained to 12 NYCRR 23-2.7 (e) since the plaintiff raised the allegation that defendants violated that provision for the first time in his opposition papers (*see Cent. Mortg. Co. v. Jahnsen*, 150 AD3d 661, 664 [2d Dept 2017]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]). Based upon the forging, the court finds that the defendants have failed to show that this court misapprehended relevant facts or misapplied any controlling principal of law in its prior determination of their motion (*see* CPLR 2221 [d] [2]; *see Barnett v Smith*, 64 AD3d at 670-671).

Accordingly, defendants' motion seeking leave to reargue is denied, and the plaintiff's motion seeking leave to reargue is also denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

Justice Lawrence Knipel