At an IAS Term, Part NJTRP 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 18th day of October, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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ROSA TORRES,

Plaintiff,

- against -

502/12 86TH STREET LLC, GINDISONS LLC, CENTURY REALTY INC., THE CITY OF NEW YORK, THE BROOKLYN UNION GAS COMPANY, and CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,

Defendants.

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502/12 86TH STREET LLC, GINDISONS LLC AND CENTURY REALTY INC.,

Third-Party Plaintiffs,

- against –

TIME WARNER CABLE NEW YORK CITY LLC,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 9821/2011

Mot. Seq. 15

The following e-filed papers read herein:	NYSCEF Doc Nos:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	9 - 22
Affirmation (Affidavit) in Opposition and Exhibits Annexed	23 - 28

Defendant, THE CITY OF NEW YORK (City), moves to renew and reargue this court's decision dated March 1, 2021 compelling the City to produce the discovery enumerated in paragraph nine of plaintiff's affirmation in support of the underlying motion, and upon reargument, vacating said order and denying plaintiff's motion to strike the City's answer in its entirety.

Background

Plaintiff commenced this action to recover for personal injuries sustained as a result of a trip and fall that occurred on April 1, 2010, in front of or near the premises located at 502-12 86th Street in Brooklyn, New York (Premises).

By notice of motion dated December 26, 2019, plaintiff moved for an order striking the City's answer for its failure to respond to plaintiff's discovery demands and extending the time to file her note of issue (hereinafter referred to as the "Underlying Motion"). Plaintiff sought responses to her Demand for Discovery and Inspection dated June 29, 2018 which requested the following (and is identical to paragraph nine of plaintiff s affirmation in support of the Underlying Motion):

1. Copies of written directives from the Construction Department of Time Warner Cable of New York City, LLC, to its Contractor(s) concerning the replacement of the metal plates covering the "Sidewalk Box" at the location of Fifth Avenue, between 86th and 87th Streets in Brooklyn, New York, subsequent to April, 2010 as testified to at the examination before trial of third-party defendant Time Warner Cable of New York, LLC, now known as "Charter Spectrum," as testified to by Time Warner witness, John Piazza, on January 17, 2018;

2. Copies of work orders issued by the Construction Department of Time Warner Cable of New York City LLC, hereinafter referred to as "Time Warner" and now known as Charter Spectrum, to its contractor(s) concerning the replacement of metal plates covering the "Sidewalk Box" at the location of Fifth Avenue, between 86th and 87th Streets in Brooklyn, New York subsequent to April 1, 2010, as testified to at the Examination before Trial of Third-Party Defendant, Time Warner witness, John Piazza, on January 17, 2018;

3. Copies of records including work orders, billing statements and/or invoices for excavation and sidewalk restoration maintained by the Construction Department concerning work undertaken by Time Warner subcontractor(s) in connection with replacement of metal plates covering the "Sidewalk Box" at the location of Fifth Avenue, between 86th and 87th Streets in Brooklyn, New York....

4. Records transmitted to Time Warner by its Contractor(s) concerning movement of metal plates covering the "Sidewalk Box" at the subject location for the purposes of gaining access to the Sidewalk Box for the repair of Time Warner equipment for power supplies, and/or to pull cable or upgrade cable systems, beneath the surface of the sidewalk at the subject location, subsequent to April 1, 2010;

5. Copy of the Franchise Agreement between The City of New York and Time Warner in effect on April 1, 2010, covering the area of 5th Avenue, between 86th and 87th Streets in Brooklyn, New York;

6. Records in the possession of The City of New York and its Department of Transportation and/or Time Warner concerning written communications and/or correspondence, including emails, between The City of New York and its Department of Transportation and Time Warner, concerning New York City projects at or about 5th Avenue, between 86th and 87th Streets, including but not limited to, "scope of work" as testified to...by Time Warner witness, John Piazza, on January 17, 2018, for a six (6) year period up to and including April 1, 2010;

7. "Interference Package" records in the possession of Time Warner, now Charter Spectrum, and/or The City of New York in connection with "City Projects" and the "scope of work" as testified to...by John Piazza of Time Warner on January 17, 2018, in connection with the aforesaid subject location (5th Avenue, between 86th Street and 87th Street), for a six (6) year period up to and including April 1, 2010;

8. Records of "Mark Out" requests and permit filings and consent records in the possession of Time Warner and The City of New York and its

Department of Transportation as testified to by John Piazza of Time Warner, on January 17, 2018 in connection with the subject location for a six (6) year period up to and including April 1, 2010;

9. Records of "Mark Out" requests and permit filings and consent records in the possession of Time Warner, now Charter Spectrum, and The City of New York, and its Department of Transportation as testified to by John Piazza of Time Warner on January 17, 2018, in connection with the subject location for the period from April 1, 2010 to April 1, 2016;

10. The names and addresses of Time Warner contractor(s) that "manage the tickets, the mark outs" for the time period of six (6) years prior to and including April 1, 2010, as testified to by John Piazza…

11. "Mark Out" requests made to Time Warner by any and all utilities for the aforesaid subject location (5th Avenue between 86th and 87th Streets in Brooklyn) for the period of six (6) years prior to and including April 1, 2010;

12. "Mark out" requests made by Time Warner or Time Warner's contractor(s) performing the replacement of the metal plates and/or sidewalk restoration at the location of 5th Avenue, between 86th and 87th Street in Brooklyn, New York, for the period of April 1, 2010 up to and including April 1, 2016;

13. Copies of the Master Agreements and the list of Contractors replacing metal plates and restoring the sidewalk at the location of 5th Avenue, between 86th and 87th Street in Brooklyn, New York, for the period of April 1, 2010 up to and including April 1, 2016;

14. Photographs in the possession of Time Warner referred to by the witness John Piazza, at his January 17, 2018 Examination Before Trial, as part of the "work package" for the aforesaid subject location for the replacement of metal plates and sidewalk restoration starting from the period of time of six (6) years prior to and including April 1, 2010;

15. Photographs in the possession of Time Warner referred to by the witness John Piazza, at his January 17, 2018 Examination Before Trial, as part of the "work package" for the aforesaid subject location for the replacement of metal plates and sidewalk restoration starting April 1, 2010 up to and including April 1, 2016;

16. Complaints made to Time Warner by any of its own personnel or any third party person in connection with the conditions existing at the subject location, specifically pertaining to metal plates covering sidewalk boxes and the sidewalk(s) in or about the subject location adjacent to the Metal Plates, Sidewalk Box and Pedestal Box configuration owned and maintained by Time Warner from April 1, 2010 up to and including April 1, 2016.

The City's response to the above demands was that "[t]he City objects to these requests as lacking foundation, overbroad, vague, palpably improper, and duplicative of previous demands and responses."

In the Underlying Motion, plaintiff emphasized that no defendant had admitted or ceded ownership, management, maintenance and control of the area encompassing the hazard that caused plaintiff's fall. But that it was clear, in a subsequent photo taken well after the incident date, that the sunken brick work and areas surrounding the metal plate had since been repaired, and further, that work like this could not have been done without City approval.

The court, by order dated March 1, 2021 (hereinafter the "Discovery Order"), granted plaintiff's motion to the extent that, among other things, the City was ordered to "provide the documents identified in paragraph 9 (but limited to the time period of April 1, 2014 to April 1, 2016) of plaintiff's affidavit in support of the instant motion, or an

affidavit from a record keeper (a so-called *Jackson* affidavit) indicating that a search was done for the respective documents but no responsive items were found."

Now, by way of its motion to renew and reargue, the City seeks to vacate the portion of the Discovery Order which directs the City to conduct the searches in paragraph nine of plaintiff's affirmation in support of the Underlying Motion on the basis that the court's directive requires the City to engage in the impossible task of searching for and producing records that are in the possession of an entirely separate entity, Time Warner Cable (TWC).[1] The city also submits that the court overlooked the fact that the City had already conducted a relevant search of contracts for two years prior to the date of incident, and that none were found with TWC. The City also contends that the court overlooked that its directive requires the City to produce records from April 1, 2014 to April 1, 2016, which is four to six years post-incident and thus irrelevant to prosecution of this case as against the City.

The City also seeks renewal of the Discovery Order. According to the City, as the only remaining defendant in this case, the sole basis for liability centers on whether the City caused or created the alleged defective condition prior to plaintiff's fall because, pursuant to NYC Administrative Code § 7-210, the adjacent property owner is responsible

[1] TWC was granted dismissal of plaintiff's Second Amended Complaint by short form order dated August 12, 2016 due to the expiration of the statute of limitations. Thereafter, by order dated September 6, 2019, the court granted third-party plaintiffs, who are the adjacent property owners, summary judgment dismissing plaintiff's claims, which resulted in the dismissal of the third-party claims against third-party defendant TWC.

for repair and maintenance of the sidewalk abutting its property, not the City. And that none of the discovery required to be produced pursuant to the Discovery Order will shed light on whether the City caused or created the alleged defective condition prior to plaintiff's accident. The City also argues that plaintiff's assertion that repairs cannot be done without the City's approval is meritless as it assumes that everyone conducts work with permission. The City explains that it failed to proffer these arguments in opposition to the Underlying Motion because it did not anticipate, at this stage in litigation and considering the remaining causes of action, that the court would order the City to turn over post-incident records that are irrelevant to any cause of action against the City.

In opposition to the City's motion to renew and reargue, plaintiff submits that her demands were based on the deposition testimony of TWC's witness, John Piazza, who testified to, among other things, (1) the existence of a franchise agreement between the City and TWC to pay the City to do work around Time Warner equipment; (2) the generation of a work order (usually) for the kind of defect at issue in this case; and (3) the generation of a "mark out" request by the sub-contractor for (generally) a repair of this nature.

In addition, plaintiff contends that although none of the defendants have provided a scintilla of evidence during exhaustive discovery proceedings admitting, confirming, or adopting the repair as its own, it is obvious that a repair was made to the previously defective area. Plaintiff again posits that no repair could have been undertaken on a sidewalk where an artificial condition (metal plate) was in place without the consent,

inspection, input, approval and appropriate written documentation of same by the City. Finally, that an appeal of the summary judgment decision in favor of the owner of the adjacent property is pending and that this discovery would be relevant to the issues of maintenance and control.[2]

Discussion

"A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court" (*Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2d Dept 2014] [citations omitted]). A motion for leave to renew must "be based upon new facts not offered on the prior motion that would change the prior determination" and must "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]). A motion for leave to reargue must 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]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Flanagan v Delaney*, 194 AD3d 694, 698 [2d Dept 2021] [citations omitted]).

[2] The appeal has since been decided by the Appellate Division, Second Department by decision dated August 18, 2021 which reversed the trial court's decision granting summary judgment to the property owner (see NYSCEF Doc. No. 29). Thus, defendant property owners, 502/12 86th Street LLC, Gindisons LLC, and Century Realty Inc. are still defendants in this matter and their third-party action against TWC is revived.

The CPLR provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). The phrase "material and necessary" should be interpreted liberally, and the test is one of "usefulness and reason" (*Kooper v Kooper*, 74 AD3d 6, 10 [2d Dept 2010] [internal quotation marks omitted]).

Here, the City's motion to renew and reargue the Discovery Order must be denied. The court did not overlook any matter of fact or law when determining the Underlying Motion. And the new arguments proffered by the City are improper attempts at a second bite of the apple.

Even if the court considered the City's new arguments or granted reargument, the court would adhere to its original determination. The City's characterization of the Discovery Order as directing the City to produce records that are in TWC's possession is nonsensical. Clearly, the City can only produce records that are in its possession and plaintiff's demand does not request anything more. In addition, contrary to the City's assertion, post-incident records are not irrelevant here, since any records pertaining to repairs conducted in the subject area would bear on the issue of who may be responsible for the ownership and maintenance of the allegedly defective/hazardous area. While the City argues that such records would not be relevant insofar as establishing liability as against the City, even presuming the merit of this assertion, the standard as to the discoverability of information is not so narrow (*see Kooper v Kooper*, *supra*).

For the reasons set forth above, the City's motion is denied.

This constitutes the decision and order of the court.

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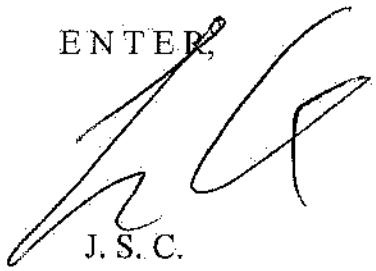

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE