At an IAS Term, Part 70 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 3rd of January, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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BRITTANY HOSTMAN,
Plaintiffs,

- against -

Index No. 521165/2017

JPW INDUSTRIES, INC. D/B/A POWERMATIC TOOL, PRATT INSTITUTE, ROBYN MIERZWA D/B/A MAKEVILLE STUDIO, LLC AND MAKEVILLE STUDIO, LLC.
Defendants.

Mot. Seq. 004

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	82 – 88
Opposing Affidavits (Affirmations)	93
Reply Affidavits (Affirmations)	95, 96

Upon the foregoing e-filed papers, defendant Pratt Institute (Pratt) moves, in motion sequence 004, for leave to renew and reargue that portion of this court's February 5, 2021 decision denying Pratt summary judgment and, upon renewal and/or reargument, seeks an order granting Pratt summary judgment dismissing plaintiff's complaint.

Background Facts and Procedural History[1]

This is a lawsuit for personal injuries arising out of an incident that occurred on March 31, 2017, when Brittany Hostman ("plaintiff)", a 22-year-old Pratt student, sustained three amputated fingers while using a Powermatic HH jointer, a woodworking power machine used to make pieces of wood perfectly flat. The incident occurred while plaintiff was taking an independent study course in woodworking at defendant Makeville Studio, LLC ("Makeville" or "the studio"), a woodworking studio located in Brooklyn, New York, in connection with the degree she was pursuing at Pratt. Defendant Robyn Mierzwa ("Mierzwa") is Makeville's owner.

By way of background, in April 2016, a dispute arose between plaintiff and Pratt due to an incident involving plaintiff' service dog biting a fellow Pratt student on-campus, which resulted in plaintiff's service dog no longer being allowed on-campus. As a result, plaintiff filed a complaint with the United States Department of Education, Office for Civil Rights ("OCR") against Pratt. Thereafter, plaintiff and Pratt entered into an Early Complaint Resolution Agreement ("OCR Agreement") to resolve plaintiff's complaint (see NYSCEF Doc. No. 25).

The OCR Agreement provided, in relevant part, that for the academic year 2016-2017, Pratt would "identify an off-campus studio space(s) in order for [plaintiff] to

[1] The facts recited herein relate solely to the motion before this Court. For a full recitation of the factual background in this action, see this court's decision dated February 5, 2021 (NYSCEF Doc. No. 67).

complete . . . an independent study course in woodworking during the fall 2016 semester" (NYSCEF Doc. No. 25, OCR Agreement, ¶ 3), and that Pratt would provide plaintiff "with comparable classroom instruction such as that provided to students working in the on-campus studios, and evaluate her artwork, notwithstanding her participation at an off-campus studio" (*id.* at ¶ 4). The off-campus studio space Pratt identified for plaintiff would provide her "with the appropriate equipment and available amenities necessary to complete any assignments for her studio courses and/or independent study courses" (*id.* at ¶ 3). Pratt also agreed to pay for plaintiff's use of the off-campus studio space for the Fall 2016 and Spring 2017 semesters (*id.*). In the event that plaintiff independently identified and secured off-campus studio space possessing the appropriate equipment that was preferable to the off-campus studio space identified by Pratt, Pratt agreed to pay for such studio space (*see id.*).

Pursuant to the OCR Agreement, Marie McLaughlin ("McLaughlin"), Assistant to the Director of the Learning Access Center at Pratt, provided plaintiff with Makeville's contact information and the information for another wood shop (NYSCEF Doc. No. 31, McLaughlin EBT, 19). In December of 2016, plaintiff visited Makeville and inquired with Mierzwa about becoming a member of the studio (NYSCEF Doc. No. 29, Mierzwa EBT, 24-25). To become a member and use the studio, plaintiff was required by Makeville to pass a workshop certification, which was a safety and skills assessment (*id.* at 16-17, 25-26). The workshop certification testing was done on all large stationary

machines, which included the jointer, the planer, the drill press, the table saw, the band saw and routers, and the router table (*id.* at 102).

Plaintiff ultimately chose Makeville as her wheelchair accessible off-campus woodshop (NYSCEF Doc. No. 31 at 22). Plaintiff passed all portions of the workshop certification and became a member of the studio (NYSCEF Doc. No. 29 at 31, 100-101). Pratt paid Mierzwa the $100.00 certification fee, and Mierzwa then set up the monthly membership fee payment ($400) for plaintiff's use of the studio (*id.* at 29). Other than the payment of the membership fee there was no other agreement between the studio and Pratt with respect to plaintiff's use of the studio (*id.* at 124), nor did Pratt have any additional contact with Mierzwa (*id.* at 26-27).

Once plaintiff began her course work at the studio, she met with her professor, Yasu, once a week or every two weeks (NYSCEF Doc. No. 28, plaintiff's EBT, 81-82), or approximately three to four times before her accident (*id.* at 146). When plaintiff met with Yasu, she would have specific questions about the pieces that she was working on and Yasu would give her guidance on making an element (*id.* at 144-145). However, plaintiff was solely responsible for fabricating the pieces (*id.* at 147). Yasu was never present when plaintiff fabricated her pieces because during his meetings with plaintiff, he only stayed at the studio for an hour or so (*id.*). Further, before she began her independent study at the studio, Yasu did not give plaintiff any safety instruction, nor did Pratt give her a shop orientation (*id.* at 82).

As part of plaintiff's independent study at the studio, she used a jointer (see NYSCEF Doc. No. 28, 29-30). Plaintiff had used the jointer at the studio four to six times before the accident (*id.* at 30). Plaintiff had taken shop classes at Pratt when she was enrolled in Woodworking I in 2014 or 2015 (*id.* at 32-33). That class included a unit on shop safety where plaintiff was trained to use the jointer (*id.* at 34, 39). However, the shop safety unit covered jointers only partially as students were not permitted to use them (*id.* at 36). If the students needed to use the jointer, they had to find a Pratt employee to use it for them (*id.* at 37). Instead of actually using a jointer, the students were trained by using a checklist (*id.* at 39-40). The class made clear that machines, including jointers, were dangerous when they were used carelessly, and that lack of care and attention while using them could cause serious injury (*id.* at 40-41). Plaintiff understood that serious injury while using these machines could include injury to hands or limbs including amputations (*id.* at 41).

On the day of the incident, plaintiff was milling a piece of white oak approximately four to five feet long, six to eight inches wide and over an inch thick (*id.* at 95-96). After making at least two or three passes of the wood on the jointer (*id.* at 97), plaintiff's hand came in contact with the "blades" of the jointer (*id.* at 100). According to plaintiff, her hand came into contact with the blades of the jointer because "[t]he guard for the cutterhead had tilted out of axis and was stopped by the infeed near the outfeed table, so [she] had to lift it so that it would go back over the blade" (*id.* at 100-101). As plaintiff lifted the cutterguard on the jointer, the spring that was designed to self-close the cutterguard was

stronger than she had anticipated, and the spring pulled her hand into the cutterhead (*id.* at 108), which pulverized and immediately amputated three of her fingers on her left hand (*id.* at 112-113).

On or about March 31, 2017, plaintiff commenced this action naming as defendants JPW Industries, Inc., the manufacturer of the jointer, Mierzwa, Makeville and Pratt. After the completion of discovery, Pratt and Makeville/Mierzwa filed separate motions for summary judgment dismissing the complaint.

In its motion for summary judgment, Pratt argued that it did not owe plaintiff a duty of care because it did not own or operate the studio where the accident occurred, the accident was not caused by its staff or equipment, and it was "not involved in plaintiff's accident, in any way" (NYSCEF Doc. No. 21, Affirmation in Support of Motion for Summary Judgment, ¶ 51) except for paying the studio for the certification workshop and the monthly membership fee. In addition, Pratt asserted that it could not be held liable for plaintiff's accident because Pratt did not have any special relationship with Makeville, such that it had a duty to control Makeville's conduct. Pratt also argued that, given plaintiff's age of majority and appreciation of potential harm from the jointer, under the doctrine of *in loco parentis*, it had no duty to supervise plaintiff while she was at the studio.

In opposition to Pratt's motion, plaintiff argued that Pratt owed her a duty to take reasonable precautions to ensure her safety at the studio because it not only encouraged but mandated that she participate in required course work over which it had sufficient control. Plaintiff also asserted Pratt breached its duty to provide her with an off-campus

woodworking facility that was free from unreasonable risk of harm and that was comparable to its "on-campus woodworking facilities that were approved and sanctioned by Pratt as part of its formal degree curriculum" (NYSCEF Doc. No. 41, Affirmation in Opposition, ¶ 55). In particular, plaintiff argued that Pratt breached its duty to train, supervise and instruct her by identifying an off-campus facility that had different standards than Pratt's own facilities, namely it allowed her to use the jointer that caused her accident; it failed to provide a Pratt instructor who regularly supervised her and gave her safety instructions before she started her independent study; it failed to communicate with the studio except with respect to payment; and it permitted coordination with the studio by Pratt personnel who had no experience with the inherently dangerous field of woodworking. Plaintiff also proffered an affidavit from her expert, Edward Dragan, and a report from plaintiff's expert engineer, Les Winter, opining, in sum and substance, that Pratt breached its duty to provide plaintiff with an off-campus woodworking facility that was free from unreasonable risk of harm which ultimately led to plaintiff's injuries (*see id.* at ¶¶ 55-57).

In reply, Pratt reiterated that it did not undertake a sufficient level of control over plaintiff's participation at the studio to create a legal duty to ensure her safety. Specifically, that Pratt neither encouraged nor required plaintiff to participate in an independent study course using an off-campus woodworking studio because plaintiff's participation was based upon the mutually-agreed terms of the OCR Agreement under which plaintiff had ultimate decision-making power to choose the workshop. Further, that

having only paid for the certification workshop and monthly membership fee, Pratt had no legal relationship with the studio and no duty to control the studio's conduct.

Pratt's reply also asserted that, based on plaintiff's description of the accident (i.e. that it was caused by a defect in the jointer over which it had no control), plaintiff's placement at the studio and the purported "requirement" for her to perform her course work there cannot be considered acts or omissions which caused her to become injured. In other words, Pratt argued that any acts or omissions by it could not have proximately caused plaintiff's accident.

By decision dated February 5, 2021, this court, among other things, denied Pratt's motion for summary judgment without consideration of plaintiff's opposition finding that Pratt "failed to make a prima facie showing that it did not possess a sufficient degree of control over plaintiff's performance of the subject woodworking class at the studio to be charged with a duty of care to plaintiff" (NYSCEF Doc. No. 67, February 5, 2021 Decision, 22). Based on the terms of the OCR Agreement, including, among other things, Pratt's agreement to identify an off-campus studio where plaintiff could complete her woodworking class to obtain her degree and which would provide plaintiff "with comparable classroom instruction such as that provided to students working in the on-campus studios," the court determined that "Pratt took affirmative steps to supervise and control the [plaintiff's] activity at the studio" (*id.* at 22-24).

Instant Motion to Renew and Reargue

Now, by way of its motion to renew and reargue, Pratt contends that while the court acknowledged and enumerated Pratt's proximate causation arguments, it was error for the court not to analyze and rule on said arguments. Pratt argues that it established that any alleged failure to supervise plaintiff or the studio on its part could not have proximately caused plaintiff's accident given the sudden and spontaneous nature of how plaintiff's accident occurred. Pratt additionally contends that while the court found that Pratt may have owed plaintiff some duty, it failed to address the scope and limits of any such duty under New York law and whether there was any evidence to support the contention that Pratt breached its limited duty to plaintiff.

Pratt also seeks renewal of this court's previous decision on the grounds that the court misunderstood the reasons why plaintiff needed to complete her work off-campus when it concluded that "it is undisputed that plaintiff had to complete the course at an off-campus facility because she was not permitted to take classes on campus due to an issue with her dog – a fact Pratt fails to address or rebut" (NYSCEF Doc. No. 67, 23). In this regard, Pratt explains that plaintiff was permitted to be on campus but that her service dog could not be and proffers clarifying evidence in the form of its Offense Incident Report dated April 13, 2016 (Report). The Report states that "a dog identified as a white dog named 'Blizzard' who is a registered service dog for Pratt Student, Brittany Hostman," injured a student who was bitten on the left calf (NYSCEF Doc. No. 88, Report). A Pratt nurse observed two puncture holes in the injured student's skin (*id.*). In response to the

attack, Pratt made a determination that the dog was no longer permitted to be on campus. Pratt thus argues that the cases cited by the court in finding an issue of fact as to whether Pratt owed a duty to plaintiff are distinguishable because plaintiff was not performing an activity because she had been encouraged by Pratt to do so, but because she had failed to prevent her dog from attacking another student and that dog could no longer be allowed on campus.

In opposition to Pratt's motion to renew and reargue, plaintiff contends that Pratt's argument for summary judgment rested solely on its contention that Pratt had no duty of care towards plaintiff and that Pratt's motion failed to mention breach of duty or proximate cause in any manner whatsoever. Further, that it was only by way of reply, when plaintiff asserted that breach and proximate cause were jury issues, that Pratt made any arguments as to same. Plaintiff argues that the court should not consider Pratt's new, belated arguments, but that if the court were inclined to consider same, such arguments are unpersuasive and should not cause the court to disturb its prior decision. Moreover, Pratt's argument as to causation and the line of cases that Pratt proffers in support where one student spontaneously injures another student has no bearing on the instant case and are wholly distinguishable.

With regards to that portion of Pratt's motion seeking renewal, plaintiff argues that Pratt fails to provide a justification for not producing the Report previously, and that, in any case, the Report does not offer any new facts and is in fact silent as to who was banned from campus. Moreover, plaintiff posits that the reason for plaintiff being barred from

campus is irrelevant as the OCR Agreement is a contract between Pratt and plaintiff that lays out what responsibilities and obligations Pratt agreed to, regardless of the reason for the OCR complaint in the first place.

In reply, Pratt reiterates that the court misapprehended and overlooked the fact that Pratt's purported failure to supervise could not have been the proximate cause of plaintiff's fingers being amputated given the undisputed cause of plaintiff's injury, the sudden nature of the injury causing event and the fact that Pratt had no specific knowledge or notice of the purported malfunctioned jointer which caused plaintiff's injury. Secondly, that contrary to plaintiff's arguments, renewal is warranted insofar as the reason why plaintiff could not be on campus is relevant since the court used that analysis to infer a mandate or requirement on the part of Pratt with regard to plaintiff's completion of her coursework, as was asserted and argued by plaintiff. Further, contrary to plaintiff's assertions, plaintiff was not required or encouraged to work at on off-campus studio space, but rather plaintiff chose to do so and also chose the off-campus location that suited her needs in accordance with the OCR Agreement she entered into with Pratt.

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]).

First, the court did not overlook Pratt's arguments as to whether Pratt breached its duty to plaintiff or whether any such breach proximately caused plaintiff's injury since, as contended by plaintiff, Pratt failed to raise these arguments in its initial motion for summary judgment. Thus, it would have been error for the court to consider these arguments which were raised for the first time in Pratt's reply papers (*see O'Neil v Environmental Prods. Corp.*, 187 AD3d 771, 772 [2d Dept 2020] [citation omitted]). However, even if the court were to grant reargument for the reasons stated by Pratt, the court would adhere to its original determination.

Generally, the issues of proximate cause and whether a defendant has breached a duty of care are for the fact finder to resolve (*see Gray v Amerada Hess Corp.*, 48 AD3d 747, 748 [2d Dept 2008]; *see also Gordon v Muchnick*, 180 AD2d 715, 715 [2d Dept 1992]). While Pratt emphasizes the spontaneous nature of the subject incident and posits that no amount of supervision would have prevented plaintiff's injuries given the way plaintiff sustained them, plaintiff's claims against Pratt are not so narrowly drawn. Plaintiff alleges, not only a failure of adequate supervision, but, among other things, a

failure to identify an off-campus woodworking facility that was free from unreasonable risk of harm, i.e., one that did not allow her to use the jointer that caused her accident. Although Pratt emphasizes its lack of control or involvement with the studio as a basis for its argument that it had no duty to plaintiff, the crux of the issue is whether, given Pratt's "limited" duty to plaintiff, whether Pratt breached said duty by not being more involved in the ways alleged by plaintiff. Pratt failed to address these issues in its motion for summary judgment.

With regard to that portion of Pratt's motion to renew, Pratt fails to provide a reasonable justification for not producing the Report earlier on its initial motion for summary judgment and renewal must be denied on this basis. Even if the court were to consider the Report, the Report would not change this court's previous decision. The fact that plaintiff would have been permitted to complete the course on campus or could have chosen to do so, albeit without her service dog, does not alter the court's finding that Pratt failed to show "that it did not possess a sufficient degree of control over plaintiff's performance of the subject woodworking class at the studio to be charged with a duty of care to plaintiff" (NYSCEF Doc. No. 67, 22). The precise reason why plaintiff was completing the course off-campus is irrelevant, especially where Pratt agreed, by way of the OCR Agreement, to provide plaintiff with suitable and comparable off-campus studio instruction and appropriate equipment and amenities as that provided to students working on-campus.

Conclusion

For the reasons set forth above, Pratt's motion for leave to renew and reargue is denied. The court, having considered the parties' remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT