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

**PRESENT:** HON. DAVID B. COHEN **PART** 58

*Justice*

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FREDERICO MENDONCA,

Plaintiff,

- v -

PLAZA CONSTRUCTION LLC, and YONKERS WATERFRONT PROPERTIES, LLC,

Defendants.

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**INDEX NO.** 155011/2019

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this personal injury action arising from an alleged workplace accident, Plaintiff Frederico Mendonca moves for an order pursuant to CPLR Rule 2221(d), granting leave to reargue his motion for summary judgment on liability pursuant to Labor Law § 240(1), which was denied by the Decision and Order of this Court dated June 10, 2021 ("the Underlying Decision"), on the grounds that this Court misapprehended material facts and/or misapplied the relevant law; and upon reargument, granting him summary judgment on liability pursuant to Labor Law § 240(1). Defendants Plaza Construction LLC and Yonkers Waterfront Properties, LLC (collectively "Defendants") oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is denied.

## I. Procedural Background

In the Underlying Decision,[1] this Court denied Plaintiff's motion for an order, pursuant to CPLR 3212, seeking summary judgment on liability pursuant to Labor Law § 240(1) reasoning

[1] The Underlying Decision sets forth a detailed factual background.

that, although Plaintiff established prima facie entitlement to summary judgment on his Labor Law § 240(1) claim since he was injured as the result of a gravity-related risk when an unsecured object fell on him from above, Defendants raised an issue of fact since one of the versions of Plaintiff's accounts of the alleged accident, that Plaintiff was injured while lifting or carrying something heavy, suggested that the accident did not occur as a result of a violation of the statute (Doc 70).

In rendering its decision, this Court relied, in part, on a report by Dr. Jonathan Glassman ("Dr. Glassman") dated November 20, 2017, reflecting, inter alia, that plaintiff was injured on June 29, 2017 "when he lifted a panel" while performing construction work (Doc 70, citing Doc 38). This Court determined that Dr. Glassman's report was admissible, considering, inter alia, that the report was sworn, and that the notation that Plaintiff lifted heavy panels was germane to his treatment and diagnosis and/or such notation was an admission against interest (id., citing *Pina v Arthur Clinton Hous. Dev. Fund Corp.*, 188 AD3d 614 [1st Dept 2020]). This Court also noted that "Dr. Glassman … had a Portuguese translator in his office" (Doc 70, see also Plaintiff's EBT, Doc 27 at 93, 137 ["Whenever I went to [Dr. Glassman], there was … a lady, a girl, that spoke Portuguese and she would translate"), and that at his deposition, Plaintiff acknowledged the examination with Dr. Glassman on November 20, 2017 (Doc 27 at 93:25-94:04) and confirmed that he told the doctor a made-up story of how the incident occurred (id. at 94:14-19 ["I kept and I stayed onto my version that was made up because … I couldn't change it at that point"]).

Additionally, this Court considered, inter alia, that Plaintiff "also told a Dr. Capiola that he was injured carrying heavy materials" (Doc 70, citing Doc 27 at 96, Doc 39), and "[a]t an

examination by Dr. [Anson] Moise, who also had an interpreter who assisted Plaintiff, Plaintiff again represented that he was injured lifting something" (id., citing Doc 27 at 97-98, Doc 40).

## II. The Parties' Contentions

Plaintiff argues, inter alia, that the statements attributed to him in Dr. Glassman's report —even if considered party admissions or prior inconsistent statements—were nevertheless inadmissible because (1) they were not germane to his diagnosis or treatment, (2) the notation that he "lifted a panel" could not possibly have had any bearing on his diagnosis or aided in determining his course of Dr. Glassman's business, and (3) were not sufficiently connected to Plaintiff as the source of the information recorded. Plaintiff further argues that the other medical records and/or his C-3 form were inadmissible since none were accompanied by a certified translation.

In opposition, Defendants argue, inter alia, that (1) Plaintiff's certified medical records submitted in Defendants' opposition were admissible since the descriptions of how the accident occurred were confirmed by Plaintiff at his deposition and, thus, can be considered as party admissions and, thus, fall within an an exception to the hearsay rule; (2) the C-3 form was signed under penalty of perjury by Plaintiff's attorney and Plaintiff; (3) Plaintiff also confirmed at deposition that he made the representation about how the accident occurred to his attorney through a translator; and (4) finally, the remaining hearsay medical records can be considered in opposition to a motion for summary judgment as they are not the only evidence upon which the opposition is based. Defendants particularly argue that "Plaintiff's motion can be denied in its entirety for the simple reason that Plaintiff confirmed at his deposition that he made false statements concerning how his accident occurred to his treating providers, his foreman, and his workers' compensation attorney" (Doc 71).

In further support of his motion, Plaintiff argues that (1) at his deposition, Plaintiff at all times consistently testified that the incident occurred as a result of an object falling and that Plaintiff's co-worker witnessed the incident and separately attested that an object fell onto Plaintiff; (2) Plaintiff stated at his deposition that he lied to the doctors about how the incident occurred because he was scared that he would be fired; (3) he denied making the statements in the hospital and/or medical records; and (4) medical records and the C-3 form are further inadmissible since they were never translated by an objective interpreter whose translation was accurate.

## III. Legal Conclusions

A motion for leave to reargue, pursuant to CPLR 2221 (d), "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]). A motion for leave to reargue "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv denied in part, dismissed in part*, 80 NY2d 1005 [1992], *rearg. denied*, 81 NY2d 782 [1993]).

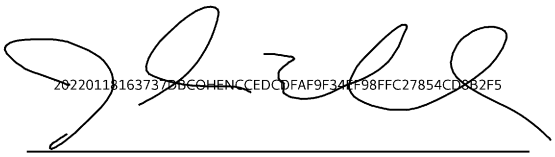
"While hearsay statements may be used to oppose motions for summary judgment, they cannot … be the only evidence submitted to raise a triable issue of fact" (*Gomez v Kitchen & Bath by Linda Burkhardt, Inc.*, 170 AD3d 967, 969 [2d Dept 2019] [internal citations omitted]). "Hearsay entries regarding the cause of an injury contained in a medical record come into evidence under the business records exception if they are germane to the treatment or diagnosis of plaintiff's injuries (*Benavides v City of New York*, 115 AD3d 518, 519 [1st Dept 2014]

[internal citations omitted]). "Alternatively, the entry may be admissible as an admission, but only if there is evidence that connects the party to the entry" (*Benavides*, 115 AD3d at 519; see also *Greca v Choice Assoc. LLC*, 154 NYS3d 780 [1st Dept 2021]).

Here, the notation in Dr. Glassman's report dated November 20, 2017 that Plaintiff was injured carrying heavy panels constitutes an admission by Plaintiff (see *Pina*, 188 AD3d at 614). At his deposition, Plaintiff did not deny that he told Dr. Glassman a different version of how the incident occurred on November 20, 2017 (Doc 27 at 94:14-19). Also, in his sworn report, Dr. Glassman connected Plaintiff to the statement (Doc 38). This Court finds no basis to conclude that the information contained within Dr. Glassman's report was inadmissible, and therefore, along with other medical records and testimony, properly served a basis to deny Plaintiff's prior motion for summary judgment. Plaintiff failed to establish that this Court had overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. Therefore, Plaintiff's motion for leave to reargue this Court's June 10, 2021 Decision and Order is denied (see CPLR 2221 [d]).

Accordingly, it is hereby:

ORDERED that Plaintiff's motion pursuant to CPLR Rule 2221 for reargument of his motion for summary judgment is denied.




1/18/2022
DATE

DAVID B. COHEN, J.S.C.

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| 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 |