Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

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ROBERTO FERNANDEZ,

Index No.706967/2018

Plaintiff,

Motion
Date: July 21, 2021

-against-

THE CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, EXPRESSWAY SHOPPING LIMITED PARTNERSHIP and INDEPENDENCE CARTING INC.,

Motion Sequence No. **8** and **9**

Defendants.

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The following papers numbered EF 228-236, 239, 256, 262, 268-278 submitted and/or considered on this **motion sequence number 8** by defendant Expressway Shopping Limited Partnership ("Expressway") for leave to reargue this Court's denial of its motion which sought an order of indemnity as against the defendant New York City School Construction Authority ("SCA") and granting same, setting the matter down for a hearing as to the reimbursement of Expressway's reasonable attorney's fees and costs in defending this matter and awarding same to Expressway as against SCA; the following papers numbered EF 240–255, 257-261, 263-267, 279-283 submitted and/or considered on this **motion sequence number 9** by defendants CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY(collectively referred to as "City Defendants") seeking an order denying Plaintiff's motion for summary judgment on Labor Law § 240(1), vacating the portions of the Court's Order of March 28, 2022 that granted the motion for summary judgment made by defendant Independence Carting, Inc. ("Independence") and dismissing the common-law negligence, Labor Law § 200 and all cross claims asserted against it, denying Independence's motion for summary judgment and reinstating the common-law negligence, Labor Law § 200 and all cross-claims asserted against it including City Defendant's claim for common law indemnification both seeking such other and further relief as this court deems just and proper.

	Paper s Numbered
Notices of Motion - Affidavits - Exhibits	EF228-236 EF 240-255
Answering Affidavits - Exhibits	EF 268-277

	EF258-261, 264-267
Reply Affidavits	EF 279-282
Motion Submission Forms	EF 276 and 283

Reargument

CPLR § 2221 states:

> (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:
>
> (d) A motion for leave to reargue:
> 1. shall be identified specifically as such;
> 2. 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; and
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

The branch of Expressway's leave to reargue is granted and upon reargument the motion is determined as follows:

Expressway argues that this Court's determination that Plaintiff's injury was caused by either an improperly hoisted or secured garbage container was sufficient to grant their motion because that action could have only been undertaken by SCA's agents or contractors. Thus, in accordance with the indemnification clause Expressway argues it is entitled to indemnification.

SCA argues that this Court's finding of statutory liability was not tantamount to a finding of negligence or misconduct by SCA or any of its employees, agents or contractors. SCA points to *Brown v. Two Exchange Plaza Partners* (146 AD2d 129, 133 [1ST Dept 1989]) in which an owner hired a general contractor (Fuller) to complete work on the lobby of the premises. Fuller hired two subcontractors Heydt to construct a scaffolding and A &M to erect walls and ceilings (*id*). A&M hired a sub subcontractor, Furring a drywall company which was plaintiff's employer (*id).* Plaintiff was injured when the scaffolding collapsed *(id*). At trial no one could establish why the scaffolding collapsed (*id*). A directed verdict was entered against Fuller, he in turn moved for directed verdict against Heydt and A&M arguing that each was liable to it by virtue of an indemnification clause in their subcontracts and that each were its statutory agent under Labor Law §240 (1) (*id*). Due to the absolute penalty imposed by Labor Law §240(1) with no regard to whether due care was exercised the trial court did not allow the jury to apportion liability and Fuller was found liable under Labor Law §240(1) (*id* at 134). Fuller appealed arguing it should be indemnified due to the indemnification clauses in the subcontracts and that Heydt is liable as its statutory agent under Labor Law §240(1) (*id* at 135). The First Department held plaintiff's accident did not arise out of, in connection with or as a consequence of the performance of Heydt's work therefore the indemnification clause within Heydt's contract was not triggered (*id*). Furthermore, Heydt would only be liable under Labor Law §240(1) as a statutory agent if at the time of the incident it had the authority to supervise and control the work (*id* at 136). The First Department held Heydt no longer had control over the scaffold and was not a statutory agent when the incident occurred (*id*). Regarding A&M, the First Department found a close reading of A&M's

performance obligations revealed that the indemnification clause was triggered. A&M was required to indemnify Fuller (*id* at 137).

A&M argued such a clause violated GOL § 5-322.1 because Fuller was found liable under Labor Law §240(1) (*id*). The First Department confirmed that "a general contractor who is 1% responsible for an accident is, by reason of the statute, barred from enforcing an indemnification agreement and is limited instead to 99% contribution from his co-tortfeasors; a general contractor free of negligence, on the other hand, may enforce his subcontractor's agreement to indemnify, the latter's freedom from negligence notwithstanding" (*id*). However, the First Department states liability under Labor Law §240(1) does not automatically translate to negligence (*id* at 138). As stated earlier, no one could establish why the scaffolding collapsed, the record did not indicate what Fuller did or did not do to make the workplace unsafe for plaintiff. The burden is on the subcontractor to submit evidence to establish negligence (*id*). Therefore, the First Department held in the absence of proof of negligence, regardless of whether or not the party was found liable under Labor Law §240(1), the limitation of the force of the parties' indemnification agreement which results from application of GOL § 5-322.1 is inapplicable (*id*). The Court of Appeals affirmed the decision (*see Paul Brown et al. v. Two Exchange Plaza Partners,* 76 NY2d 172 [1990]).

This Court has not made a finding of negligence. Thus, Expressway's request is premature.

The branch of City Defendants leave to reargue is granted and upon reargument is determined as follows:

City Defendants claim the incident report and its contents are admissible and disputes this Court's finding that it is inadmissible. According to City Defendants, the incident report was admissible as a business record. However, City Defendants fail to address the two levels of hearsay that must be cleared in order for the entire record to be admitted. The Second Department addressed this issue in *Jehad Yassin v Lyndon Blackman* (188 AD3d 62, 63 [2d Dept 2020]) where the court addressed the admissibility of an uncertified police report and the statements contained therein. The court explained the there were two levels of hearsay at play (*id* at 65). The first level involved the admissibility of the report itself, certified police reports satisfy CPLR 4518 where "the report is made based upon the officer's personal observations and while carrying out police duties" (*id* citing *Memenza v Cole,* 131 AD3d 1020, 1021 [2d Dept 2015]). Alternatively, an uncertified police report can be admissible if a foundation is laid in accordance with CPLR 4518 (c). Once the report itself is deemed admissible the statements contained within the report from unknown sources or non-parties must also satisfy a hearsay exception (*id* at 66). The report in *Yassin* failed to establish a proper foundation to satisfy the first level of hearsay and its contents failed to satisfy the second level of hearsay thus, the report along with its contents constituted inadmissible hearsay (*id* at 66).

Here, City Defendants claim that a proper foundation was laid in accordance with CPLR 4518. However, it is the position of this Court that City Defendants failed to establish that "it was the regular course of such business to make [the incident report], at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" despite their reference to the testimony of Dorel Serban on page 42 lines 9-12 . Nonetheless, even assuming *arguendo* that the incident report itself is admissible under CPLR 4518, City Defendants have failed to establish that its contents constitute admissible hearsay. The uncertified statements were made by non-parties, with no established business duty to report, outside of court and are being offered for their truth (*see DeBendetto v Kingswood Partners, LLC,* 206 AD3d 616 [2d Dept 2022]). Thus, the uncertified statements contained therein asserting an account of the incident constitute inadmissible hearsay. Notably, City Defendants attempt to put forth new evidence in their reply papers despite failing to

label the motion as a motion to renew and foreclosing any opportunity for opposing parties to submit opposition. This is improper, inappropriate and will NOT be considered. All remaining contentions are without merit. Therefore it is,

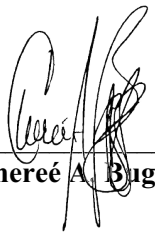
ORDERED, that the branches of motion sequence numbers 8 and 9 seeking leave to reargue are granted; and it is further

ORDERED, that upon reargument motion sequence number 8 is denied as premature; and it is further

ORDERED, that upon reargument motion sequence number 9 is denied.

This constitutes the Decision and Order of this Court.

Dated: July 27, 2022



Hon. Chereé A. Buggs, JSC