SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **35**

Justice

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INDEX NO. 155291/2013

THOMAS HEANEY, HEATHER HEANEY

MOTION SEQ. NO. 010

Plaintiff

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, YONKERS CONTRACTING COMPANY, INC., NY LIMO EXPRESS, INC., MOHAMMAD SHAHID,

DECISION AND ORDER ON MOTION

Defendants

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METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, YONKERS CONTRACTING COMPANY, INC.

Third-Party
Index No. 595611/2014

Third-Party Plaintiffs

-against-

FMB, INC.

Third-Party Defendant

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 325, 326, 327, 328, 329

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

For the reasons that follow, the motion to reargue pursuant to CPLR 2221 by Defendant and Third-Party Plaintiff, Yonkers Contracting Company, Inc. (YONKERS), is denied.

Background

This personal injury and labor law action arises out of an accident at a construction site on December 4, 2012, near or at 11th Avenue, between 33rd Street and 34th Street, in New York County. Defendant and Third-Party Plaintiffs Metropolitan Transportation Authority and New York City Transit Authority (TRANSIT) retained YONKERS as their general contractor for a

construction project to extend the #7 subway line. Plaintiff Thomas Heaney[1], an employee of FMB, INC. (FMB), a subcontractor to YONKERS, alleges that on the day of the accident he was working as the foreperson and was inside the basket of an ariel lift boom approximately nine feet above the ground, wearing his harness and restocking bolts, when the basket was struck by a vehicle operated by Defendant, Mohamed Shahid (SHAHID) and owned by Defendant NY Limo Express Inc. (NY LIMO). Based on the bill of particulars, Plaintiff suffered herniated discs near the top and middle of his spine and alleges severe pain, sprain, tenderness, swelling, restriction of movement, nerve damage, loss of flexion, and stiffness.

Approximately six months after the accident, on June 10, 2013, Plaintiff commenced a negligence action against Defendants NY LIMO, SHAHID, YONKERS AND TRANSIT. On December 8, 2014, Defendants YONKERS and TRANSIT commenced a third-party action against subcontractor FMB asserting common law indemnification, contribution, contractual indemnification, and breach of contract claims.

Post note of issue, approximately seven (7) years after the action was commenced, YONKERS moved for summary judgment (Motion Seq. 7)[2] and the motion was denied (NYSCEF Doc. 302).[3] YONKERS now moves to reargue and upon reargument, seeks an order dismissing Plaintiff's Labor Law §200 and common law negligence claims and dismissal against FMB for contractual indemnification.

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[1] Any reference to "Plaintiff" shall refer only to THOMAS HEANEY.

[2] FBM's summary judgment motion as to the claims of indemnification and contribution was granted by Order dated December 22, 2021, by Order (Adams, J). (NYSCEF Doc. 196).

[3] By Order of this Court dated May 31, 2023 (NYSCEF Doc. 305), Plaintiffs' motion for summary judgment as to the Labor Law §240 claims was denied. TRANSIT's cross-motion for summary judgment as to Plaintiff's Labor Law §240 and §200 claims was granted and TRANSIT's motion for summary judgment as to §241(6) was granted as to 12 NYCRR 23-1.5 and 1.7 only. (Motion Seq. 8). By Order of this Court dated May 12, 2023 (NYSCEF Doc. 304), TRANSIT's motion for contractual indemnification from FMB was granted. (Motion Seq. 9).

Discussion

Pursuant to CPLR 2221 a party may move to reargue a court's decision on a prior motion (CPLR 2221[d][2]). To succeed, the movant must make a showing that the court in the prior decision overlooked or misapprehended the facts or the law (CPLR 2221[d][2]). Yet, CPLR 2221 is not an avenue for an unsuccessful party to reargue issues previously decided or to present arguments different from those originally asserted (*see Simpson v. Loehmann*, 21 NY2d 990 [1968]; *Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]; *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992]; *DeSoignies v. Cornasesk House Tenant' Corp.*, 21 AD3d 715 [1st Dept 2005]; *People v. D'Alessandro*, 13 NY3d 216 [2009]).

In the initial motion, YONKERS sought dismissal of Plaintiff's Labor Law § 200 and common law negligence. YONKERS argued that it was not liable for Plaintiff's injuries under the means and manner theory of liability pursuant to Labor Law § 200 (NYSCEF Doc. 147) In support, YONKERS relied primarily on the testimony of Plaintiff's examination before trial and statutory hearing testimony to argue that it did not exercise supervision over the manner or method of Plaintiff's work, an FMB employee. YONKERS also relying primarily on its expert's affidavit to argue that the lane closure on the date of the accident was performed in accordance with Federal, State and City standards. YONKERS's expert also opined that YONKERS decision to close the street with cones and a flagger was proper.

As this Court previously stated, Labor Law § 200 codifies an owner's or a general contractor's common-law duties of care, into two broad categories of personal injury claims (*Rosa v 47 East 34th Street (NY), L.P.*, 208 AD3d 1075 [1st Dept 2022]). Claims arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed *(id.)*.

Under the first category, an owner or contractor may be liable if it created the condition or had actual or constructive notice of the defect or dangerous condition (*Cappabianca*, 99 AD3d 139). Under the second category, the manner and means category, including the equipment used, the owner and/or general contractor may be liable if it actually exercised supervisory control over the injury-producing work (*Cappabianca*_99 AD3d at 144); *see Villanueva v. 114 Fifth Ave. Assocs. LLC*, 162 A.D.3d 404 [1st Dept 2018]).

Furthermore, pursuant to CPLR 3212, the standard for granting a summary judgment motion requires a movant to establish the high burden of entitlement to judgment as a matter of law with admissible evidence that eliminates material questions of fact requiring a trial (CPLR 3212 [b], *Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014], *Giuffrida* v *Citibank Corp.*, 100 NY2d 72 [2003], *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], *Zuckerman* v *City of New York*, 49 NY2d 557 [1980]). Only when the movant meets this burden does the burden shift and opposing papers are considered (*Alvarez* 68 NY2d 320). Thus, if a movant does not establish its *prima facia* case, the sufficiency of any opposing papers is immaterial to the decision.

In support of its initial motion, YONKERS submitted the following evidence, the pleadings, Plaintiff's bill of particulars, Plaintiff's statutory hearing transcript, the parties' respective deposition transcripts, expert affidavit of Kristopher Seluga (Seluga Aff.), safety plan and various contracts (NYSCEF Doc. 148- 151, 153, 154, 156-165, 195, 272, 273, 274).

In the prior decision, this Court agreed in part with YONKERS and found that the facts of this case fell under the means and methods category of theory of liability under Labor Law § 200 (NYSCEF Doc 302). However, the motion was denied finding that YONKERS's evidence did not meet the high burden of entitlement to judgement as a matter of law since material questions of fact existed. The evidence submitted established that YONKERS was solely responsible and

had exclusive supervisory control for the equipment used for the street closure. In addition, the evidence showed significant contradictions between YONKER's expert affidavit and Plaintiff's testimony. Thus, creating questions of fact as to whether YONKERS's decision to use cones and flaggers rather than other barriers for the street closure on the date of the accident contributed to Plaintiff's accident.

The evidence submitted undisputedly established that YONKERS was solely responsible for obtaining the permits for street closures and was solely responsible for deciding and installing the type of roadway barriers to use. The testimony of Michael Lloyd, YONKERS' general superintendent for the project, confirmed that YONKERS determined what kind equipment to use at the site for street closures (NYSCEF Doc. 161). The testimony of Kevin McMurry, an FMB employee and flagger on the day of the accident, confirmed that FMB did not place the traffic cones and that he was not responsible for street closures (NYSCEF Doc. 162). Significantly, the testimony of Plaintiff also established that barriers had been removed and replaced with traffic cones by YONKERS at least one month before the accident and that the cones were already set up on the date of the accident (NYCSEF Doc. 159, 287). Plaintiff in his statutory hearing also testified that in his opinion as an experience iron union member, vehicles in traffic often disregard cones and flagmen and that he would not have been injured if the street closure was done with other barriers such as drums, garbage cans, or jersey barriers (NYSCEF Doc. 223). In addition, Plaintiff also testified that after his accident, YONKERS safety procedures were followed more strictly and he described the work prior to his accident done in a loosely and "cowboyish" (NYSCEF Doc. 223, Pg. 23). Thus, the opinion of YONKERS's expert prepared many years after the accident, without actual knowledge of the conditions on the date of the accident was insufficient to eliminate material questions of fact as to any liability by YONKERS.

In this motion to reargue, YONKERS now for the first time argues that it is not negligent under the defect and dangerous condition category of liability under Labor Law § 200. YONKERS specifically argues that this Court overlooked or misapprehended both the facts and law regarding whether YONKERS created a dangerous condition at the work site. However, this argument was not raised in YONKERS' initial motion and may not be raised now. As a motion to reargue pursuant to CPLR 2221 may not be used to serve an unsuccessful party an opportunity to advance a new argument (*Foley,* 68 AD2d 558; see *Simpson*, 21 NY2d 990; *William P. Pahl Equip. Corp.*, 182 AD2d 22; *DeSoignies*, 21 AD3d 715).

YONKERS also argues that it cannot be found negligent because its barriers/protections were in compliance with all relevant codes/requirements and that this Court misunderstood the testimony regarding the use of barriers and its expert's affidavit. Yet, it is well settled that compliance with statutory or regulatory enactments does not preclude a finding that a defendant violated a common-law duty (*Kelly v. Metro. Ins. & Annuity Co.*, 82 AD3d 16 [1st Dept 2011]). Furthermore, the Seluga affidavit was not enough for purposes of a summary judgment motion to establish that on the date of the accident, YONKERS, in its capacity as a general contractor and the sole decision maker exercising supervisory control on the type of equipment to use for street closures was free of any liability. First, the affidavit was prepared nearly nine (9) years after the accident. While the expert made references to guidelines, the guidelines were not attached, and this Court could not determine if it was based on guidelines in existence in 2014 or when the affidavit was prepared in 2021. Further, the guiding principle to an expert opinion is to help clarify an issue calling for his or her professional or technical knowledge (*see e.g. De Long v. Erie Cnty.*, 60 NY2d 296 [1983]; *Viruet v. Purvis Holdings LLC,* 198 AD3d 587 [1st Dept 2021]; see also CPLR 3212 [b], *Alvarez v Prospect Hosp.,* 68 NY2d 320). Here the expert is not rendering a

medical opinion, the expert is an engineer hired by YONKERS who upon reviewing documents opines that YONKERS's action were proper. Yet this affidavit alone, prepared remote in time from the occurrence and contrary to Plaintiff's testimony, without cross-examination, does not suffice to warrant summary judgment in this action. While YONKERS may at trial establish that it did not contribute to Plaintiff's accident, at this time questions of material facts remain as to whether Defendant SHAHID's driving was the sole cause of Plaintiff's accident.

As YONKERS did not show that it was free of negligence, it is also not entitled to summary judgment as to its contractual indemnification claim against FMB (*see Arias v. Recife Realty Co.*, 172 AD3d 631[1st Dept 2019]; *Cackett v. Gladden Propt, LLC*, 183 AD3d 419 [1st Dept 2020]).

Accordingly, it is hereby,

ORDERED that YONKERS' motion to reargue pursuant to CPLR 2221 is denied; and it is further

ORDERED that within 20 days from the entry of this Order, Defendant YONKERS shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court.

8/6/2024
DATE

DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☐	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE