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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. DORIS LING-COHAN

PRESENT: _____ PART 36

Justice

Index Number : 111466/2008
WRACLAWEK, TADEUSZ
vs.
JNK-GRAND
SEQUENCE NUMBER : 006
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is to reargue by defendant/third-party plaintiff JNK Grand LLC is denied in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-16-2012

_____, J.S.C.

HON. DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

TADEUSZ WRACLAWEK,

Plaintiff,

Index No.: 111466/08
DECISION/ORDER

-against-

Motion Seq. No.: 006

JNK-GRAND LLC and
BREND RENOVATION CORPORATION,

Defendants.

----------X

JNK-GRAND LLC,

Third-Party Plaintiff,

-against-

Index No.: 590472/09

BREND RENOVATION CORPORATION,

Third-Party Defendant.

----------X

JNK-GRAND LLC,

Second Third-Party Plaintiff,

-against-

Index No.: 590403/09

FALCON BUILDING SERVICES CORPORATION,

Second Third-Party Defendant.

----------X

BREND RENOVATION CORPORATION,

Third Third-Party Plaintiff,

-against-

Index No.: 590529/10

FALCON BUILDING SERVICES CORPORATION,

Third Third-Party Defendant.

----------X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, defendant/third-party plaintiff/second third-party plaintiff JNK-Grand LLC (JNK-Grand) moves, pursuant to CLPR 2221 (d), for leave to reargue the portion of the court's October 5, 2011 decision that denied JNK-Grand's earlier motion for partial summary judgment (motion sequence numbers 004, 005) to dismiss so much of plaintiff Tadeusz Wraclawek's (Wraclawek) cause of action based on Labor Law § 200 and principles of common-law negligence (motion sequence number 006). For the following reasons, this motion is denied.

BACKGROUND

The court discussed the facts of this case at length in its earlier decision, and will only be briefly provide them herein. As indicated in this court's October 5, 2011 decision:

> "On June 20, 2008, plaintiff Tadeusz Wraclawek (Wraclawek) injured his head and right wrist when he fell from a ladder while he was engaged in pointing a hatchway opening in the ceiling of a building (the building) located at 125 Grand Street in the County, City and State of New York...JNK-Grand is the owner of the building... Defendant Brend Renovation Corporation (Brend) is the general contractor that JNK-Grand had retained to perform renovation work at the building...Third-party defendant Falcon Building Services Corporation (Falcon), Wraclawek's employer, was a subcontractor that Brend had subsequently hired to perform a portion of that work"

See Notice of Motion, Exhibit A, at 2.

The relevant portion of this court's October 5, 2011 decision determined as follows:

> "In the first branch of its motion, JNK-Grand requests partial summary judgment to dismiss Wraclawek's first and second causes of action, which plead common-law negligence and violation of Labor Law § 200, respectively. It is well settled that Labor Law § 200 is the statutory codification of the common-law duty that is imposed on owners and/or general contractors to provide construction workers with a safe work site. *See e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 (1st Dept 2008), citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). In *Ortega v Puccia* (57 AD3d 54, 61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the governing law as follows:
>
> > Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
> >
> > Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
> >
> > Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had

actual or constructive notice of the dangerous condition that caused the accident.

By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, JNK-Grand argues that Wraclawek's claims must fail because there is no evidence either that "[JNK-Grand] exercised any supervision or control over the work being performed," or that JNK-Grand had "any notice of any allegedly defective condition." *See* Notice of Motion (motion sequence number 004), Bethmann Affirmation, ¶¶ 28-29. Wraclawek argues that the former assertion is irrelevant because his claims are based on "premises condition" and not "means and manner" of the work performed. *See* Rigelhaupt Affirmation in Opposition, ¶ 8. Both parties' arguments, however, improperly mix the theories of liability enunciated in the holding in *Ortega v Puccia* (57 AD3d 54, *supra*). It is, thus, necessary to review each theory separately.

Pursuant to a ''hazardous condition" analysis, Wraclawek is obligated to demonstrate that JNK-Grand either created the dangerous condition that caused his accident or that had actual or constructive notice of that condition. JNK-Grand does not address any of these points squarely in its motion. However, Wraclawek argues that there is an issue of fact presented by Jaworski's deposition testimony that "someone had removed the fixed steel ladder that had been attached to the wall," and, therefore, that "the possibility exists that [JNK-Grand] created a dangerous condition by removing the fixed ladder, which ... resulted in plaintiff having to use a different ladder that was not fixed to the wall or otherwise braced or secured." *See* Rigelhaupt Affirmation in Opposition, ¶¶ 5 -6. JNK-Grand replies that Wraclawek's "conclusions are unsubstantiated." *See* Bethmann Reply Affirmation, ¶ 15. The court notes that Korn acknowledged that a fixed-wall ladder had been detached from the area of the building where Wraclawek was injured at some point prior to the start of work there, and that he himself had inspected the progress of the work, every one to three months. *See* Notice of Motion (motion sequence number 004), Exhibit K, at 13- 16. The court also notes that Jaworski stated that he had observed Korn ascend the unsecured ladder to the hatchway at the site where Wraclawek was injured, although he did not give a time frame for this observation. *See* Notice of Motion (motion sequence number 004), Exhibit K, at 61- 62. Under these facts, the

court cannot find that the foregoing deposition testimony justifies the conclusion that JNK-Grand either "created" or had "actual knowledge" of the allegedly hazardous condition that Wraclawek complains of.

With respect to "constructive notice," the Court of Appeals holds that "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). The Court also ruled that "neither a general awareness that ... some ... dangerous condition may be present nor the fact that plaintiff observed [such a condition shortly] before his fall is legally sufficient to charge defendant with constructive notice." *Id.* at 838. Further, the Appellate Division, First Department, held in *Santiago v New York City Health and Hospitals Corp.* (66 AD3d 435, 435 [1st Dept 2009]) that constructive notice may be found to exist where the allegedly dangerous condition is of a type that a "[defendant] is presumed to have seen it, or to have been negligent in failing to see it." Here, as previously discussed, Jaworski's deposition testimony indicates that Kom himself had used the ladder that Wraclawek fell from. Assuming this to be true, it can be reasonably inferred that Korn would have had to notice the necessity of placing the bottom of that straight, non-A-frame-type ladder on top of the unsecured plywood platform and leaning the top of the ladder into the hatchway entrance in the ceiling in order to ascend it. Pursuant to the legal standards discussed above, this inference gives rise to the presumption that Korn may have seen the purportedly hazardous condition that Wraclawek complains of, or may have been negligent in failing to see it. Thus, there is sufficient evidence to raise a factual issue as to whether JNK-Grand - through Korn - had "constructive notice" of the allegedly hazardous condition. That does not end the present inquiry, however.

JNK-Grand asserts that there was no actual "hazardous condition'' present upon which to base a common-law negligence/Labor Law § 200 claim, because Wraclawek had "testified that the ladder ... had rubber footings and [that] ... he had ascended and descended it several times on that day with no movement." *See* Memorandum of Law in Support of Motion (motion sequence number 004), at 5. JNK-Grand also argues that "no complaints were ever made by plaintiff, " and that "witnesses for the defendants all testified that they were not aware of any complaints about any ladders at the site." *Id.* Wraclawek responds that "a dangerous condition was created by the removal of the fixed ladder." *See* Rigelhaupt Affirmation in Opposition, ¶ 8. JNK-Grand responds that "this conclusory assertion is not substantiated in any manner." *See* Bethmann Reply Affirmation, ¶ 15. The court disagrees. There is no strict legal definition of what

> constitutes a "hazardous condition" - a truth that the parties both implicitly acknowledge by their failure to cite any case law to support their respective arguments. That inquiry is, by its nature, a factual one. Here, Wraclawek' s deposition testimony indicates that, given the dimensions of the space that he was working in, the only possible way to place a freestanding ladder so as to reach the hatchway in the ceiling that he was closing off was to stand that ladder on top of the unsecured plywood platform on the floor. Although this may or may not be true, JNK-Grand has not presented any evidence to refute it. Under these circumstances, there is indeed a question of fact as to whether the use of a free-standing ladder that had to be placed on an unsecured plywood platform (which may be prone to sliding) constituted an inherently "hazardous condition;" such a question of fact is appropriately committed to a jury for resolution. As a result, Wraclawek's common-law negligence and Labor Law § 200 claims may be sustained under "hazardous condition" analysis.
>
> Even if the condition that Wraclawek complains of is ultimately not found to be "hazardous," his claims may still survive pursuant to the "means and manner" analysis, under which Wraclawek is obligated to demonstrate only that JNK-Grand had the authority to supervise or control the performance of his work. *Ortega v Puccia*, 57 AD3d at 61. JNK-Grand argues that "the record is totally devoid of any evidence" that it had such authority. *See* Memorandum of Law in Support of Motion, at 3. The court, however, notes that Witold Brend testified that JNK-Grand's architect, Nakrosis, had the authority to oversee and direct the work of Brend's and Falcon's employees at the building. *See* Notice of Motion (motion sequence number 004), Exhibit J, at 56-59. Thus, there is an issue of fact as to whether JNK-Grand did "supervise or control" Wraclawek in the performance of his work. As a result, Wraclawek's common-law negligence and Labor Law § 200 claims may also be sustained under a "means and manner" analysis. Accordingly, the court finds that JNK-Grand has failed to meet its burden of proving that it is entitled to summary judgment dismissing those claims, and concludes that the first branch of JNK-Grand's motion should be denied."

See Notice of Motion, Exhibit A, at 8-13. JNK now moves for leave to reargue the above portion of the court's October 5, 2011 decision, and asks that the court grant the portion of its earlier motion that sought dismissal of Wraclawek's Labor Law § 200 claim.

DISCUSSION

Pursuant to CPLR 2221 (d), a motion for leave to reargue 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), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d at 27, citing *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984). Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" *Rubinstein v Goldman*, 225 AD2d 328, 328 (1st Dept 1996), quoting *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979).

Here, JNK-Grand argues that the court misapprehended the facts and/or the law in making the findings that: 1) an issue of fact exists as to whether JNK-Grand had constructive notice of the dangerous condition on the premises that caused Wraclawek's injury; 2) an issue of fact exists as to whether the condition that caused Wraclawek's injury was "hazardous;" and 3) an issue of fact exists as to whether JNK-Grand exercised supervision and control over Wraclawek's work. The court will review each contention in turn.

With respect to constructive notice, JNK-Grand argues that the court arrived at its conclusion mistakenly, because the fact that its manager, Nathan Korn, had himself climbed up the unsecured ladder that Wraclawek fell from at some point prior to Wraclawek's injury would only constitute a "general awareness" of that hazardous condition, which, as a matter of law does not rise to the level of "constructive notice." *See* Notice of Motion, Bethmann Affirmation, ¶ 14. Wraclawek responds that this is an inaccurate and incomplete characterization of the court's finding, which was *not* based solely on Korn's having used the unsecured ladder, but also on Korn's and Brend vice-president Matthew Jaworski's testimony that they had initially observed a fixed ladder at the accident site that had been removed prior to Wraclawek's injury. Wraclawek concludes that the court's finding was legally warranted, because the deposition testimony - as a whole - shows that defendants either were aware, or should have been aware, that an unsecured

ladder had replaced a secured ladder. *See* Romano Affirmation in Opposition, ¶ 6. The court agrees that JNK-Grand's argument inaccurately and incompletely describes the deposition testimony that the court relied on its October 5, 2011 decision. The court also notes that JNK-Grand has failed to explain how the court's decision erred in applying the governing law that was set forth in the Appellate Division, First Department's, decision in *Santiago v New York City Health and Hospitals Corp.*, 66 AD3d 435 (1st Dept 2009). Therefore, JNK-Grand's first argument fails to meet the standards for reargument set forth in CPLR 2221 (d), and rejects it.

With respect to the "hazardous condition" issue, JNK-Grand argues that the court's finding was in error because the evidence that Wraclawek submitted on this point was "unsubstantiated and conclusory." *See* Notice of Motion, Bethmann Affirmation, ¶ 17. Wraclawek responds that this argument is improper in the context of the instant reargument motion, because the court previously considered and rejected it in JNK-Grand's earlier summary judgment motion. *See* Romano Affirmation in Opposition, ¶ 5. Wraclawek is correct. It is apparent from both the text of the court's October 5, 2011 decision, and from the reply papers that JNK-Grand submitted in further support of its earlier summary judgment motion that JNK-Grand previously raised, that the court previously rejected, this exact same argument. As was mentioned above, however, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d at 27, *supra*. Therefore, the court rejects JNK-Grand's second argument as violative of CPLR 2221 (d).

With respect to the issue of supervision and control, JNK-Grand argues that the court erred in relying on the deposition testimony of Brend Renovation Corporation (Brend) president Witold Brend that defendants' architect, John Nakrosis, had the authority to oversee and direct the work of Brend and its subcontractors, because Brend's testimony contained no such statement. *See* Notice of Motion, Bethmann Affirmation, ¶ 26. Wraclawek responds that JNK-

Grand's argument mischaracterizes the court's finding, which was merely that Brend's testimony created an issue of fact as to whether defendants might have retained authority to supervise and control Wraclawek's work. *See* Romano Affirmation in Opposition, ¶ 9. Wraclawek is correct. The court's October 5, 2011 decision does not contain a definitive factual finding. It merely notes that Brend's ambiguous testimony gave rise to an issue of fact. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Indus., Inc.*, 295 AD2d 218, 218-19 (1st Dept 2002). JNK-Grand's argument does not address this established legal principle. Therefore, the court rejects JNK-Grand's final argument. Accordingly, the court denies JNK-Grand's motion for reargument.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221 (d), of defendant/third-party plaintiff/second third-party plaintiff JNK-Grand LLC (motion sequence number 006) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

FILED

JUL 18 2012

COUNTY CLERK'S OFFICE

Dated: New York, New York
July 16 , 2012

Hon. Doris Ling-Cohan, J.S.C.

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