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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe **PART** 5
Justice

Index Number : 116698/2008
ALLEN, NORMA MILLER
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
RENEWAL CAL. #3

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7 **, were read on this motion to/for** leave to renew/reargue

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

Answering Affidavits — Exhibits _____ **No(s).** 2, 3, 7

Replying Affidavits _____ **No(s).** 4, 5, 6

Upon the foregoing papers, it is ordered that this motion is

FILED
NOV 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11/13/12
NOV 13 2012

_____, **J.S.C.**
BARBARA JAFFE

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 : PART 5

----------x

NORMA MILLER ALLEN,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, CONSOLIDATED EDISON CO. OF NEW YORK INC., PROCIDA CONSTRUCTION CORP., and TRIUMPH CONSTRUCTION CORP.,

Defendants.

----------x

Index No. 116698/08

Argued: 8/14/12
Motion Seq. No.: 003
Motion Cal. No.: 003

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

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For City:
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Michael A. Cardozo
Corporation Counsel
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By notice of motion dated March 14, 2012, defendant Triumph Construction Corporation (Triumph) moves pursuant to CPLR 2221 for an order granting it leave to reargue and/or renew that portion of my decision and order dated February 10, 2012 denying its motion for summary judgment on defendants City and New York City Housing Authority's (collectively City) cross-claim for contractual indemnification, and upon reargument, granting it summary judgment on that claim.

City opposes, and by notice of cross-motion dated May 11, 2012, moves for an order granting it summary judgment on plaintiff's claims if, upon reargument, Triumph is granted summary judgment on its cross-claim for contractual indemnification. Plaintiff and defendant Consolidated Edison Company of New York oppose.

A motion for leave to reargue "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]). In contrast, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination[, and] shall contain a reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). As Triumph asserts only that I overlooked or misapprehended the law, its motion is deemed a motion to reargue.

Triumph contends that the facts of the instant matter are analogous to those of *Brown v Two Exchange Plaza Partners*, 146 AD2d 129 (1st Dept 1989), and thus, that I misapprehended the law in denying its motion for summary judgment on City's cross-claim for contractual indemnification. In *Brown*, a contractor inspected and accepted a scaffold erected by a subcontractor, and the subcontractor was not contractually required to perform any additional work on the scaffold aside from dismantling it upon completion of construction. A week after the scaffold was accepted, it collapsed, injuring a construction worker. In denying the contractor's post-trial motion for judgment on its contractual indemnification claim against the subcontractor, the court held that plaintiff's accident did not arise out of the subcontractor's work absent "any showing of a particular act or omission in the performance of such work causally related to the incident." (*Id.* at 136). The court noted that requiring the subcontractor to indemnify the contractor "would be to make [it] a virtual insurer of the scaffold," as the collapse was unexplained, and the subcontractor "had no control over its use or responsibility for its maintenance." (*Id.*).

Here, the facts are similar to those in *Brown* in that City approved of and accepted Triumph's work before the accident occurred. However, in contrast to *Brown*, there was no intervening, unexplained change in the sidewalk that resulted in plaintiff's injury. Rather, it is uncontroverted that she tripped on a joint that Triumph installed, and in moving for summary judgment, Triumph was required to demonstrate that the installation, regardless of whether it was performed with due care, was not causally related to the accident. (*See Keena v Gucci Shops, Inc.*, 300 AD2d 82 [1st Dept 2002] [where contractor required to indemnify premises owner for "'all claims . . . arising in whole or in part or in any manner' from [contractor's] 'acts, omissions, breach or default' in connection with 'any work' performed pursuant to contract, its obligation to indemnify not contingent on its own negligence]; *see also De La Rosa v Philip Morris Mgmt. Corp.*, 303 AD2d 190 [1st Dept 2004] [in contractual indemnification, "[w]hether or not the proposed indemnitor was negligent is a non-issue and is irrelevant"]; *Correia v Professional Data Mgmt.*, 259 AD2d 60 [1st Dept 1999] [same]; *Brown*, 146 AD2d 129 [parties may contract to require indemnification even when indemnitor not negligent]). As Triumph solely relies on City's acceptance of its work, and thus, on its performance of the work with due care, it has failed to demonstrate that its installation of the expansion joint was not causally related to plaintiff's injury.

And, as Triumph addresses neither the meaning of "operations" as it is used in the indemnification clause nor whether the clause violates General Obligations Law § 5-322.1, it provides no basis for granting it leave to reargue. (*See People v D'Alessandro*, 13 NY3d 216, 219 [2009] [arguments not advanced on previous motion could not have been overlooked or misapprehended]).

As Triumph has failed to demonstrate entitlement to leave to reargue, City's cross-motion need not be addressed.

Accordingly, it is hereby

ORDERED, that defendant Triumph Construction Corporation's motion for leave to reargue that portion of my decision and order dated February 10, 2012 denying its motion for summary judgment on City's cross-claim for contractual indemnification is denied.

ENTER:

Barbara Jaffe, JSC

DATED: November 13, 2012
New York, New York

NOV 13 2012

BARBARA JAFFE
J.S.C.

FILED
NOV 16 2012
NEW YORK
COUNTY CLERK'S OFFICE