SHORT FORM ORDER

INDEX No. 5201-06

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/11/12
ADJ. DATES 7/13/12
Mot. Seq. # 009 - Mot D
CASE RESTORED TO ACTIVE
Compl. Conf. Scheduled: 9/11/12
CASEDISP: No

JOHN MORRIS and TERESA MORRIS, Plaintiffs, -against- HOME DEPOT USA, Defendant.	BRODY, O'CONNOR & O'CONNOR Attys. For Plaintiffs 7 Bayview Ave. Northport, NY 11768 SIMMONS, JANNACE & STAGG Attys. For Def/Third-Party Plaintiff 75 Jackson Ave. Syosset, NY 11791
HOME DEPOT USA, Third-Party Plaintiff, -against- J&J BUILDING MAINTENANCE, INC., Third-Party Defendant.	MAZZARA & SMALL, PC Attys. For Third-Party Defendant 800 Veterans Memorial Hwy. Hauppauge, NY 11788

Upon the following papers numbered 1 to 11 read on this motion for leave to renew and/or reargue ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-6; 7-8; 9-10; 11 ; Replying Affidavits and supporting papers ; Other prior order dated May 11, 2012 ; and after hearing counsel in support and opposed to the motion on July 13, 2012 it is,

ORDERED that this motion (#009) by the plaintiffs for leave to renew and/or reargue prior applications which culminated in an order dated May 11, 2012, which denied the plaintiffs' application fora protective order against any and all appearances in New York by the injured plaintiff due to his alleged inability to travel here and granted motions by the defendant and third party for dismissal of the plaintiffs' complaint pursuant to CPLR 3126, is granted to the extent that reargument is permitted; and it is further

ORDERED that upon reargument the court: 1) adheres to its prior determination denying the plaintiffs' application for a protective order; 2) vacates those portions of the May 11, 2012 order which granted the dismissal of the plaintiffs' complaint pursuant to CPLR 3126, and denies the prior motions by the defendant and third party for such dismissal; and 3) grants the defendant's and third party defendant's alternative demands for relief pursuant to CPLR 3124 to the extent set forth below; and it is further

ORDERED that upon receipt of copy of this order, the Clerk of the Calendar Department shall: 1) remove the marking of this action indicating "disposed" entered upon entry of the May 11, 2012 order and thereafter on June 19, 2012 in the appearance screens of the court's electronic filing system; 2) restore this action to active status; and 3) schedule a compliance conference herein for Tuesday, **September 11, 2012.**

This personal injury action arises out of fall in front of a Home Depot store that was in the final stages of its construction n January 19, 2004. The injured plaintiff was working as an electrician at the site and fell on ice in the parking lot under construction. Although the preliminary conference order of May 22, 2006 stated that the depositions of all parties were to be conducted in September of 2006, with the physical examination of the plaintiff to follow within 45 days of his deposition, this schedule was not adhered to by the parties. The nature of the accident, the commencement of the third party action, the plaintiffs' residence in Florida and the physical condition of the injured plaintiff and the defendant's inability to produce an agent with knowledge have all contributed to the delay in the prosecution of the claims interposed herein.

On March 14, 2008, a further discovery order was issued at a compliance conference in which issues presented in one or more then pending discovery motions were resolved by a stipulation of counsel. Therein, the court directed that the deposition of the injured plaintiff be held in Florida on June 13, 2008, with the costs of such deposition to be born by the plaintiffs. The defendant and third party defendants' rights to conduct a physical examination of the injured plaintiff in New York, not less than 90 days prior to trial, were expressly reserved in the March 14, 2008 so-ordered stipulation.

The deposition of the injured plaintiff in Florida, as contemplated by the March 14, 2008 so-ordered stipulation, took place in April of 2008. Delays engendered by the defendant's inability to produce a witness having knowledge of facts relevant to the issues raised by the pleadings prolonged the pace of other pre-trial proceedings.

At a compliance conference held in September of 2011, counsel again stipulated in writing to resolve pending discovery applications and further stipulated to complete the defendants' depositions by December 6, 2011. Defense counsel therein reiterated their reserved their rights to conduct the physical examination of the plaintiff in New York. In or about October of 2011, the plaintiffs served a "supplemental" bill of particulars that contained no claims of "continuing special damages and disabilities" (*see* CPLR 3043). Instead, this bill alleged an additional claimed violation of the Industrial Code Regulations upon which the plaintiffs rely to establish one of the several Labor Law claims for damages advanced in their complaint and/or original bill of particulars. By letter dated December 1, 2011, counsel for the defendant acknowledged receipt of said bill and echoed the claim of third party defendant's counsel that the assertion of the new liability claim set forth in the "supplemental" bill entitled the defendants to a further deposition of the injured plaintiff. In addition, defendant's counsel

objected to the limited medical authorizations received from the plaintiffs and sought input from plaintiffs' counsel regarding the scheduling of the physical examination of the injured plaintiff here in New York. A follow-up letter dated December 28, 2011 issued by defendant's counsel regarding the scheduling of the physical examinations of the injured plaintiff apparently went unanswered.

By notice of motion dated January 25, 2912, the defendant moved (#006) for the dismissal of the plaintiffs' complaint pursuant to CPLR 3126 or for an order compelling the further deposition of and appearance by the injured plaintiff at the physical examination referred to in counsel's prior correspondence. The third party defendant likewise moved (#007) by the interposition of a notice of cross motion dated February 14, 2012. The plaintiffs' opposition to these applications were set forth in cross moving papers (#008) in which they sought a protective order against any and all appearances in New York by the injured plaintiff due to his alleged inability to travel here because of serious physical conditions affecting his back, neck and/or extemeities.

By order dated May 11, 2012, this court granted the dismissal of the plaintiffs' complaint as demanded by the defendant and thir d party defendant in their motions. The court denied the plaintiffs'cross motion for a protective order and other relief. Said denial was based upon a finding of insufficient medical proof to support the injured plaintiff's claim that due to his physical condition, travel here to New York for purposes of participating in the physical examination contemplated by the prior orders entered herein and participation in the trial itself were not possible without an exposure to a high risk of harm. The instant motion (#009) for renewal and/or reargument was interposed shortly after the issuance of said order. Such motion was marked submitted on July 13, 2012, after hearing counsel at oral argument thereon.

Those portions of this motion wherein the plaintiffs seek renewal of their prior motion and those of the defendants are denied. Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Siegel v Morsey New Sq. Trails Corp.***, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]).

Here, the plaintiffs submit as an attachment to their moving papers,[1] a signed affidavit of a Florida physician whose unsigned affirmation was attached to the plaintiffs' original moving papers. To the extent that this evidentiary material now presented constitutes a presentation of "new facts" within the contemplation of CPLR 2221(e), it does not warrant any change in the court's prior determination (*see* ***Peycke v Newport Media Acquisition II, Inc.***, 40 AD3d 722, 837 NYS2d 167 [2d Dept 2007]; ***Siegel v Morsey New Sq. Trails, Corp.***, 40 AD3d 960, *supra*; ***Williams v Nassau Med. Ctr.***, 37 AD3d 594, 829 NYS2d 645 [2d Dept 2007]; ***Giovanni v Moran***, 34 AD3d 733, 823 NYS2d 911 [2d Dept 2006]). In both the new affidavit and the prior affirmation of the Florida physician, said

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[1] The court declines to consider the voluminous evidentiary submissions and other material attached to the reply papers of plaintiffs (*see* ***Maurischat v County of Nassau***, 81 AD3d 793, 916 NYS2d 235 [2d Dept 2011]; ***Allstate Ins. Co. v Dawkins***, 52 AD3d 826, 861 NYS2d 391 [2d Dept 2008]; ***Jefferson v Netusil***, 44 AD3d 621, 843 NYS2d 158 [2d Dept 2007]).

physician admits that the injured plaintiff's restriction on travel is limited to an inability to "endure the conditions involved with either air turbulence or prolonged road way conditions". Contrary to the contentions of the plaintiffs, the affidavit, like the prior unsigned affirmation before the court, contains no medical proscription against travel by the injured plaintiff by modes of transport not stated therein by the physician. No change in the court's prior determination regarding the insufficiency of proof on the issue of the injured's plaintiff's inability to travel to New York to engage in pre-trial proceedings and/or to give trial testimony is warranted by virtue of the plaintiff's submission of the June 4, 2012 affidavit of Marc. H. Feinberg, MD. The plaintiffs' demands for renewal of the prior applications determined in the court's May 11, 2012 order are thus denied.

Also denied are the plaintiffs' demands for reargument of their prior motion for a protective order against any appearances here in New York by the injured plaintiff. It is well settled law that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason, mistakenly arrived at its determination (*see* ***McDonald v Stroh***, 44 AD3d 720, 842 NYS2d 727 [2d Dept 2007]; *see also* ***Everhart v County of Nassau***, 65 AD3d 1277, 885 NYS2d 765 [2d Dept 2009]; ***Pryor v Commonwealth Land Title Ins., Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]). CPLR 2221 provides that 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]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced. Nor is it one that provides a platform for the presentation of arguments different from those already presented (*see* ***V. Veeraswamy Realty v Yenom Corp.***, 71AD3d 874, 895 NYS2d 860 [2d Dept 2010]); ***Woody's Lumber Co., Inc. v Jayram Realty Corp.***, 30 AD3d 590, 817 NYS2d 391 [2d Dept 2006]; ***Williams v Board of Educ. of City School Dist. of New York City***, 24 AD3d 458, 805 NYS2d 126 [2d Dept 2005]; ***Simon v Mehryari***, 16 AD3d 543, 792 NYS2d 543 [2d Dept 2005]).

The plaintiffs' request for a protective order was described at oral argument by plaintiffs' counsel as a request for a judicial "accommodation" by which Florida would be effectively designated as the venue of all outstanding pre-trial proceedings, including the physical examination of the injured plaintiff, and the venue of his trial testimony. Like the prior application, the instant application rests entirely upon claims that the debilitating physical condition of the injured plaintiff renders his travel to New York, by any mode of transportation, contrary to the orders of his physician and thus potentially harmful to the injured plaintiff's condition. As indicated above, however, these claims are not supported by sufficient medical proof that the injured plaintiff cannot withstand any mode of travel to New York. The plaintiffs thus failed to demonstrate that the court mistakenly arrived at its previous determination to deny the application. Reargument of the plaintiffs' prior motion for a protective order is thus denied

However, the court finds that the plaintiffs are entitled to reargument regarding those portions of the defendants' prior motions wherein they sought the dismissal of the plaintiffs' complaint pursuant to CPLR 3126. From the record adduced on this motion, it appears that the court misunderstood that the deposition of the third party defendant had not been completed; that no written notice scheduling the physical examination of the plaintiff before physicians designated by the defendants had issued

and thus no default in appearing at a scheduled examination on the part of the injured plaintiff had occurred. There was a similar absence of any statutory notice, stipulation or order in which the further deposition of the injured plaintiff was properly scheduled in by the defendants following their receipt of the plaintiffs' "supplemental" bill of particulars in October of 2011. These circumstances warrant the granting of reargument limited to those portions of the defendants' prior motions for dismissal of the plaintiffs' complaint pursuant to CLR 3126 that were granted by the order of this court dated May 11, 2012 and the defendants' alternative demands for relief pursuant to CPLR 3124 which were not addressed in said order.

Upon the limited reargument granted, the court hereby vacates the dismissal of the plaintiffs' complaint set forth in its May 11, 2012 order and recalls the marking of this action as "disposed/result of motion". The defendants' prior applications for relief pursuant to CPLR 3126 are hereby denied, as the plaintiffs sufficiently rebutted the defendants' showing of a willful default on the part of the injured plaintiff in appearing for the physical examination directed by the prior orders of the court (*see* ***Bernardis v Town of Islip***, 95 AD3d 1050, 944 NYS2d 626 [2 Dept 2012]).

Also denied are the defendants' requests for an order directing the injured plaintiff to appear for a further deposition here in New York. The record adduced on this motion reveal that the defendants' original submissions failed to sufficiently demonstrate an entitlement to a further deposition of the injured plaintiff since service of an amended or supplemental bill of particulars does not necessarily give rise to a right to further discovery (*see* CPLR 3042; 3043). Although it is labeled a "supplemental" bill of particulars, the true nature of the October 6, 2011 bill served by the plaintiffs is that of an amended bill of particulars as it does not contain any updated claims of "continuing special damages and disabilities" (*see* CPLR 3043; ***Kraycar v Monahan***, 49 AD3d 507, 856 NYS2d 123 [2d Dept 2008]). Instead, the subject bill sets forth an additional theory of liability in support of the plaintiffs' claims for recovery under Labor Law § 241(6) that is predicated upon a violation §23–1.7(d) of the Industrial Code (*see* ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [Dept 2007]). Although the failure to identify any violation of a specific provision of the State Industrial Code in the plaintiffs' complaint or bill of particulars precludes the attachment of liability under Labor Law § 241(6), a belated assertion of an Industrial Code violation not involving new factual allegations or foreign theories which is not prejudicial to the defendants due to their possession of sufficient prior notice of the claim is not fatal to a Labor Law § 241(6) claim (*see* ***Kowalik v Lipshutz***, 81 AD3d 782, 917 NYS2d 251 [2d Dept 2011]).

Here the plaintiffs' claims for recovery are premised upon a fall attributable to an accumulation of snow or ice outside the Home Depot store that was in the last stages of construction just prior to its opening. Plaintiffs' original bill asserted two violations of two sections of 12 NYCRR 23 in support of the injured plaintiff's pleaded claims for recovery of damages under Labor Law § 241(6). The plaintiffs' amended bill includes a new claim of a purported violation of § 23–1.7(d) of the Industrial Code, which is entitled "Slipping Hazards" and requires, among other things, employers to remove ice, snow, water, grease or other foreign substances from floors, passageways, walkways and elevated working surfaces so as to provide safe footing for workers. In light of the prior pleadings and amplification thereof, the assertion of this additional section of the Industrial Code has not been shown by the defendant or third party defendant to have surprised or prejudiced them in any way as to warrant a further deposition of the injured plaintiff. Those portions of the defendants' prior motions for an order directing a further

deposition of the injured plaintiff due to plaintiffs' service of its October 6, 2011 "supplemental" bill of particulars are thus denied.

In contrast, the defendants' alternative demands for an order compelling the injured plaintiff to appear in New York for a physical examination conducted by the defendants' duly designated physicians are granted pursuant to CPLR 3124. The injured plaintiff's appearance at a physical examination in this State has long been the subject of prior orders of this court and of continuing demands therefor by the defendant and third party defendant. The plaintiffs failed to demonstrate an entitlement to an order providing a different venue for such examination. The designation of the defendants' examining physicians shall be made on or before ***September 7, 2012***,as the scheduling of such examination shall be the subject of a further order that shall issue at the next compliance conference date herein scheduled for **September 11, 2012** at 9:30 am.

Upon receipt of a copy of this order, the Clerk of the Calendar Department shall remove the "disposed" marking previously entered in the motion and appearance screen of the court's electronic filing system, upon doing so, shall restore this action to active status. The clerk shall further schedule a compliance conference herein for the date of **September 11, 2012.** Counsel are directed to appear on that date ready for such conference.

DATED: 8/9/12

THOMAS F. WHELAN, J.S.C.