[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler *Justice* PART: 17

KEITH LUEBKE,

Plaintiff,

- against -

MBI GROUP, PINNACLE CONTRACTORS OF NY, INC., DUNHAM PIPING & HEATING CORP., HUDSON STREET OWNERS CORP., PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Defendants.

INDEX NO.: 114861/2008

MOTION SEQ. NO.: 003

DECISION and ORDER

Motion by Plaintiff to Reargue this Court's Prior Decision & Order (MS#002), dated July 20, 2013.

	Papers Numbered
Notice of Motion with Plaintiff's Counsel's Affirmation & Exhibits "A" through "F"	1, 2, 3
Affirmation of Defendants' Counsel in Opposition to Motion with Exhibit "A"	4, 5
Reply Affirmation of Plaintiff's Counsel in Further Support of Plaintiff's Motion	6
Transcript of Oral Argument of June 17, 2013	7

Cross-Motion: ☑ No ☐ Yes **Number of Cross-Motions:** 0

Upon the foregoing papers, it is hereby ordered that this Motion for Reargument is granted and upon reargument, it is hereby

ORDERED that this Court's Prior Decision and Order on motion sequence number 002, dated July 20, 2012 is hereby vacated and modified to the extent that the motion (motion sequence number 002) of defendants Pinnacle Contractors of NY, Inc. and Prudential Douglas Elliman Real Estate for summary judgment dismissing plaintiff Keith Luebke's causes of action under Labor Law § 241(6), Labor Law § 200 and common law negligence is hereby denied as set forth in the attached separate written Decision and Order.

The foregoing constitutes the decision and order of this Court.

Dated: January 21, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ☐ **Final Disposition** ☑ **Non-Final Disposition**

Motion is: ☑ Granted ☐ Denied ☐ Granted in Part ☐ Other

Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

----------X

KEITH LUEBKE,

Plaintiff,

- against -

MBI GROUP, PINNACLE CONTRACTORS OF NY, INC., DUNHAM PIPING & HEATING CORP., HUDSON STREET OWNERS CORP., and PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Defendants.

----------X

Index No.: 114861/08

Motion Sequence No.: 003

DECISION AND ORDER

Hon. Shlomo S. Hagler, J.S.C.:

Plaintiff Keith Luebke ("plaintiff" or "Luebke") moves to reargue this Court's decision and order dated July 20, 2012 ("Prior Decision and Order") which granted motion sequence number 002 for summary judgment brought by defendants Pinnacle Contractors of NY, Inc. ("Pinnacle"), Hudson Street Owners Corp. ("Hudson"), and Prudential Douglas Elliman Real Estate ("Prudential"), (collectively "the defendants"), and dismissed plaintiff's Labor Law §§ 241(6) and 200 causes of action as well as plaintiff's common law negligence claim against the defendants for personal injuries plaintiff sustained when a door fell upon him at a work site located at 4 Leonard Street, New York, New York ("the premises"). Defendants oppose plaintiff's motion.[1]

STATEMENT OF FACTS

A statement of the facts was recited in this Court's Prior Decision and Order and are incorporated for this motion. Any facts relevant to this motion will be referenced in the discussion

---

1. Defendant Hudson was granted dismissal of the complaint in the Prior Decision and Order as plaintiff proffered no argument against dismissal of that defendant. Consequently, the dismissal of the claims against defendant Hudson is not at issue here and that portion of the Prior Decision and Order still stands.

below. In addition, any additional facts not set forth in the Prior Decision and Order and which are necessary for this decision and order will be introduced as required in the discussion.

BACKGROUND

This Court's Prior Decision and Order granted summary judgment to the defendants and dismissed plaintiff's Labor Law § 241(6) and § 200 causes of action as well as plaintiff's common law negligence claim. Plaintiff's Labor Law § 241(6) cause of action was dismissed on the ground that the work being done at the premises was not covered by Industrial Code Section 23-3.3 because it was not "demolition work" as defined in section 23-1.4(b)(16). Plaintiff's Labor Law § 200 and common law negligence claims were dismissed on the ground that the defendants did not have actual or constructive notice of the dangerous condition which caused plaintiff's injuries.

DISCUSSION

Motion for Reargument

To succeed on a motion for reargument, plaintiff must establish that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). Here, the plaintiff claims that this Court overlooked or misapprehended certain relevant facts and law in its Prior Decision and Order.

Labor Law § 200 and Common Law Negligence Claims

In its Prior Decision and Order, this Court had granted defendants' summary judgment motion and dismissed plaintiff's Labor Law § 200 and common Law negligence causes of action on the ground that defendants claimed that they did not have notice of the defective condition, namely

the broken pins of the door which fell on the plaintiff. This was based on the deposition testimony of Vincent Manciameli ("Manciameli"), Pinnacles' project manager on this project, who testified that he never saw, experienced or was told of any problem with the door that fell upon the plaintiff (Manciameli EBT, at pp. 70-72). However, there are two items which create enough of a question of fact regarding whether the defendants had prior notice of the damaged door.

First, when asked how he came to learn of the broken front door, Manciameli testified that " I don't recall. I guess on one of my visits, whenever I went there, I noticed the door was damaged and advised the tenant about – the client about it" (Manciameli EBT, at p. 83). Furthermore, Denise Cannavina ("Cannavina"), facilities director for Prudential who oversaw this project along with her other facilities, testified at her deposition that at a project meeting, Manciameli informed her that there was a problem with the pivot of the lower hinge of the glass entrance door at the Leonard Street project (Cannavina EBT, at pp. 77-78). However, Cannavina also testified that she did not recall the date of that meeting (*id.*, at p. 78) and that while she did not recall if she was told when this condition was first observed, she did understand that the damage to the door was first observed the same day as the meeting (*id.*, at p. 79). Cannavina testified that she was told of the issue with the door by Manciameli who learned of the condition from people entering in and out of the door (*id.*, at p. 80). Also, Michael Dinsmore ("Dinsmore"), plaintiff's foreman on the project, stated that he observed the damaged door actually come off its lower hinge a few times when opened wide by Pinnacle employees (Dinsmore Affidavit, at ¶ 18). This raises a question of fact whether Pinnacle had prior notice of the defective door.

There is also a question of whether Pinnacle was responsible for safety on the project. While Manciameli testified that he did not have any safety responsibilities with regard to the project

(Manciameli EBT, at p. 56), but Cannavina testified that, as general contractor, Pinnacle was responsible for every aspect of the project including safety (Cannavina EBT, at p. 68). If Pinnacle was responsible for safety at the project, it would be required to carry out periodic inspections to insure the safety of the workers at the project site if such an inspection would have disclosed the dangerous or defective condition (*Colon v. Bet Torah*, 66 AD3d 731 [2d Dept 2009]). However, as Manciameli testified, while he would observe the nature and quality of the work being done by the various subcontractors and if he saw any unsafe practices, he would say something (Manciameli EBT, at p. 69), he neither made any specific inspections of the entrances and exits at the project for safety or problems (*id.* at pp. 69-70) nor inspected the entrance door to the project to determine if the hinges were intact (*id.*, at p. 72).

In addition, there is a question of fact created by the discrepancy between the dates of the Change Order, which was dated May 1, 2007, and the date of the Change Order Log, which was dated April 3, 2007 and which is also the date of the accident. Both Manciameli and Cannavina testified that the Change Order Log was generated or updated **after** a Change Order was done (Manciameli EBT, at p. 99; Cannavina EBT, at p. 89). Moreover, there was no testimony or affidavit from the person or persons at Pinnacle who prepared the Change Orders and the Change Order Logs to explain the discrepancy in the dates or when the problem with the door was first reported to Pinnacle resulting in the Change Order. Therefore, this issue is also a question to be resolved by the trier of fact.

Based on these triable issues of fact regarding whether and when defendants had notice of the defective door, summary judgment for the defendants is not appropriate.

Labor Law §241(6) Claim

In this Court's Prior Decision and Order, plaintiff's Labor Law § 241(6) cause of action was dismissed on the ground that the work being done at the premises was not covered by Industrial Code Section 23-3.3 because it was not "demolition work" as defined in section 23-1.4(b)(16). However, upon further research and reconsideration, this Court finds that both the Industrial Code and Labor Law § 241(6) provision do apply in this action.

As noted in the Prior Decision and Order, Labor Law § 241(6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241(6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 (1998). Plaintiff is alleging that Section 23-3.3 of the Industrial Code was violated. Section 23-3.3(f) states, in relevant part, the following:

> Access to floors. There shall be provided at all times safe access to and egress from every building or structure in the course of demolition. Such safe means of access and egress shall consist of entrances, hallways, stairways or

> ladder runs so protected as to safeguard the persons using such means from hazards of falling debris or materials.

For Section 23-3.3(f) to be applicable, there must have been on-going demolition work consistent with the Industrial Code definition. Section 23-1.4(b)(16) defines "demolition work" as follows:

> The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.

The project in the instant case was to combine a former hair salon with an existing real estate office, including the removal of the entire contents of the hair salon and its partitions. Cannavina testified that the project at 4 Leonard Street involved combining spaces at that location to make the space contiguous (Cannavina EBT, at p. 42) and described the extensive demolition work there (*id.*, at pp. 38-41) which was being performed by Pinnacle as general contractor (*id.*, at p. 41). Part of the work also involved the removal and replacement of electrical fixtures, outlets and power boxes (*id.*, at pp. 44-45) and plaintiff was involved in that aspect of the work at the time he was injured.

As was noted in the Prior Decision and Order, the demolition and construction work involved in this case amounted what could be considered a "gut renovation" of the premises. The case law discussing whether the construction, excavation and demolition work at issue was covered by Labor Law § 241(6) is very fact specific. However, two First Department cases seem most analogous to the instant case.

In *Picchione v Sweet Constr. Corp.*, (60 AD3d 510, 511-512 [1st Dept 2009]), the Appellate Division held that Labor Law § 241(6) covered an employee of a subcontractor "working on the gut renovation and build out of office space" in a building. Similarly, in *Gherardi v City of New York*, (49 AD3d 280 [1st Dept 2008]), the court held that an electrician injured on an entrance ramp used

for worker ingress and for bringing in materials on an extensive project for the installation of wiring on four floors of a public high school building, which thereby "effected a significant physical change," was covered by the protection of Labor Law § 241(6), even though the electrician was not injured in the area where the work was being done.

Based on these First Department appellate decisions, this Court finds that the plaintiff herein, who was working on a project which involved construction (and possible demolition) work which was resulting in a significant physical change to the premises at 4 Leonard Street, was covered by the protection of Labor Law § 241(6) and Industrial Code section 23-3.3(f). Therefore, plaintiff's claims under those statutes should not be dismissed.

Conclusion

Accordingly, this Court grants plaintiff's motion for reargument, and upon reargument, it is:

ORDERED that this Court's Prior Decision and Order on motion sequence number 002, dated July 20, 2012 is hereby vacated and modified to the extent that the motion (motion sequence number 002) of defendants Pinnacle Contractors of NY, Inc. and Prudential Douglas Elliman Real Estate for summary judgment dismissing plaintiff Keith Luebke's causes of action under Labor Law § 241(6), Labor Law § 200 and common law negligence is hereby denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: January 21, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.