SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ANDREW SUSSMAN,

Plaintiff,

–against–

MK LCP RYE LLC, and HILTON MANAGEMENT, LLC,

Defendants.

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Index No. 156066/14
Motion Seq. Nos. 005

DECISION AND ORDER

**CAROL R. EDMEAD, J.S.C.:**

Defendants MK LCP Rye LLC and Hilton Management, LLC move, pursuant to CPLR 2221, for reargument of the court's order dated July 24, 2017 (the underlying decision), which denied defendants' application for summary judgment dismissing plaintiff's amended complaint (motion seq. No. 004).

**BACKGROUND**

This action arises from plaintiff's fall from hotel stairwell. For a fuller discussion of the factual background, see the underlying decision.[1]

**DISCUSSION**

CPLR 2221 (d) (2) 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." A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts

[1] Defendants point out, in paragraph 5 of their affirmation in support, that the underlying decision suggested that a wedding had taken place at the subject hotel, while, actually, the wedding took place at the Coveleigh Country Club, and members of the wedding party merely stayed at the subject hotel. This misapprehension had no bearing on the disposition of defendants' motion for summary judgment.

or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*,80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As defendants rehash, at length, arguments that were considered and rejected in the underlying decision on issues such as proximate causation, constructive notice, and whether the opinions of plaintiff's experts should be accepted,[2] the court declines to grant reargument, except as to the narrow issue of whether the case of *Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427 [1st Dept 2017]) highlights an error in the court's reasoning. *Schmidt* was entered after the underlying decision and is discussed extensively throughout defendants' moving papers. Although *Schmidt* was issued recently, defendants' arguments surrounding it are for an argument for reargument, rather than renewal, as defendants contend not that *Schmidt* announced a new principle of law, but that it reflects the court's misapprehension of existing law.

In *Schmidt*, the plaintiff, along with his bomb sniffing dog, was descending a ramp attached to a delivery truck, while a delivery person was ascending the ramp carrying a pallet (*id.* at 427). The plaintiff turned to make sure his dog did not inspect the pallet, and, as he turned

[2] The court assures defendants that their reply papers were fully considered.

forward again, he stepped on the outer edge of the ramp and fell off of it backwards (*id.* at 428). The defendants, in moving for summary judgment, submitted an expert report from an architect, who stated that the ramp did not violate the New York City Building Code (Building Code) or any other industry-wide standard. Plaintiff, in opposition, "averred that [his] expert would testify that the service ramp was defective and that the defects were in violation of 'good, proper and accepted building and engineering standards' for ramps and equivalent buildings and were in violation of [Building Code] and industry standards at the time of construction" (*id.*).

The trial court had held that the defendants failed to make a *prima facie* showing of entitlement to summary judgment, as defendants' expert only referred to the Building Code and Occupational Safety and Health Administration (OSHA) standards, but failed to address other types of industry wide standards. The First Department came to the opposite conclusion, finding, after closely examining the report of the defense expert, that the defendants had made a *prima facie* showing of entitlement to judgment (*id.* at 429-430). The First Department found that the defense expert analyzed specific provisions of not only the Building Code and OSHA, but also the "Life Safety Code" of the National Fire Protection Agency, and explained why each was inapplicable (*id*).

Here, in contrast to *Schmidt*, the underlying decision found that defendants did, indeed, make a *prima facie* showing of entitlement to judgment. *Schmidt* also found that the plaintiff failed to raise an issue of fact as to any negligence on the part of the defendants (*id.* at 429). The First Department reasoned that the plaintiff "failed to raise a triable issue of fact as to any violation of an industry-wide standard at the time of construction" and "failed to point to any industry-wide standards that may be applicable" (*id.* at 430). The Court relied on *Hotaling v City*

*of New York* (55 AD3d 396 [1st Dept 2008]),[3] a negligent-design case, for the proposition that plaintiffs must "offer concrete proof of existence of the relied upon standard as of the relevant time, such as industry standards or evidence that such a practice had been generally accepted in the relevant industry at the relevant time" (*id.* at 398 citing *Jones v City of New York*, 32 AD3d 706, 707).

Here, in contrast to *Schmidt* and its predecessors, and as the underlying decision notes, plaintiff raised an issue of fact as to whether defendants violated industry-wide standards that were in place at the time the subject stairwell was built. Specifically, while discussing the report of plaintiff's expert Brad Avrit (Avrit), the court stated:

> "Avrit . . . affirmed that the lack of adequate guardrail posed a falling hazard on the subject stairway. Avrit additionally establishes that the subject stairway violated standards calling for the implementation of guardrails not less than 42 inches high. Avrit affirmed that the "Generally Accepted Standards Applicable to the State Building Construction Code" issued in 1968 and 1971 ("Generally Accepted Standards"), identifies the then-current National Fire Protection Association No. 101 ("NFPA") as a generally accepted standard[1] (¶¶23-24; Schlosser Aff., Exs. 8, 9). Section 5-3161 of the NFPA indicates that "[e]ach new stair, . . . and stairs leading from mezzanines which form part of a path of travel to such exits, shall be guarded against falls over the open edge and shall have handrails on both sides except that handrails shall not be required on level landings or balconies." Further, "[g]uards shall be not less than 42 inches high" (NFPA 5-3165[c]), and to be measured "from a point on the tread one inch back from the leading edge or from the floor of landings or balconies" (*id.*, § 5-3165[a]). Avrit indicates that he personally inspected the Hotel on June 2 and 3, 2014, including the subject stairway (Avrit Aff., ¶4). He further affirms that the Hotel (and subject stairway) was constructed in 1971. According to his measurements, the "handrails adjacent to this unprotected stairwell opening ranges between 30-3/8 inches and 30-1/2 inches"

(underlying decision at 13-14 [footnote omitted]).

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[3] Defendants cite *Hotaling* extensively in their reargument papers, but did not cite it in their papers in the underlying motion.

Thus, as plaintiff's expert referred to violations of industry standards that existed when the hotel was built, *e.g.*, the NFPA guardrail requirements, plaintiff meets the requirements of *Schmidt* and its predecessors. Here, the murkier question is whether plaintiff's claims are subject to those requirements, since *Schmidt* and *Hotaling* involved pure negligent design claims.[4] However, it is not necessary for present purposes to resolve that question, as, in any event, plaintiff's showing satisfies the requirements of those negligent-design cases. Thus, the *Schmidt* decision does not highlight a misapprehension the court had about the law, and the court adheres to the underlying decision.

**CONCLUSION**

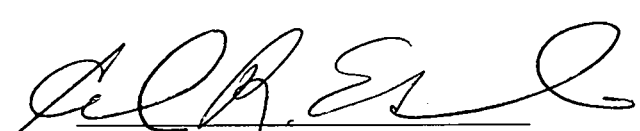
Accordingly, it is

ORDERED that Defendants MK LCP Rye LLC and Hilton Management, LLC's motion for reargument of the court's order dated July 24, 2017 is granted, in part. And, upon reargument, the court adheres to its original decision; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: February 8, 2018

ENTER:



Hon. Carol Robinson Edmead, JSC
**HON. CAROL R. EDMEAD**
**J.S.C.**

[4] The present case, while it involves allegations that the subject stairwell was negligently designed, is not brought against entities that designed and constructed the stairwell. Instead, this case hinges on the claim that an open defect, stemming from a negligent design that was open and obvious for years, caused plaintiff's accident.