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

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WALTER MOLINA,

Plaintiff,

-against-

17 WEST 125 HOLDINGS, LLC,

Defendant.

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17 WEST 125 HOLDINGS. LLC,

Third-Party Plaintiff,

-against-

M&J IRON WORK, FRANKLIN DEL ROSARIO and PREFERRED CONTRACTORS INSURANCE COMPANY RRG,

Third-Party Defendants.

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DECISION/ORDER

Index No.: 154284/2014

Mot. Seq. 004

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

MEMORANDUM DECISION

In this Labor Law action, Defendant, 17 West 125 Holdings, LLC ("Defendant"), moves pursuant to CPLR 2221(d)(2) for leave to reargue this Court's order dated May 25, 2017, in which the Court denied Defendant's motion for summary dismissal of the amended complaint ("Complaint") of plaintiff, Walter Molina ("Plaintiff") and all cross-claims against it. Plaintiff alleges that he was working on an "A" frame ladder on the premises owned by Defendant, when he was struck by part of an awning and fell to the ground.[1]

[1] The Court's May 25, 2017 decision discusses the factual background of this matter in further detail.

Defendant's Motion

Defendant first argues that Plaintiff's Labor Law 241(6) claim, asserting a violation of 12 NYCRR 23-1.21(b)(4)(i), should have been dismissed, since Plaintiff was not using the subject ladder to traverse levels in a building. Next, Defendant argues that Plaintiff's claim under 12 NYCRR 23-1.21(e)(3) likewise should have been dismissed, as Plaintiff was working no more than eight feet from the bottom of the ladder at the time of his accident. Moreover, Defendant argues that Plaintiff's Labor Law 240(1) claim should have been dismissed, since Plaintiff fell off the ladder when the awning was released and that there is no evidence that the ladder itself moved.

Plaintiff's Opposition

In opposition, Plaintiff argues that Defendant's moving papers in the original motion did not argue that there was no evidence that the ladder fell as a result of the awning coming into contact with the ladder. Plaintiff further argues that even if that argument was included in the original moving papers, Plaintiff's affidavit in opposition to the original motion indicates that the awning struck him and the ladder, causing them both to fall to the ground. Moreover, Plaintiff argues that he was working approximately ten feet above the ground at the time of his accident.

Defendant's Reply

In reply, Defendant argues that the Court did not rely on 12 NYCRR23-1.21(e)(3) in its decision. Defendant further reasserts that Plaintiff was not using the subject ladder as a means of access between floors at the time of his accident and that Plaintiff was working less than ten feet from the ground at the time of his accident. Defendant next argues that the original motion did argue that Plaintiff fell from the ladder with no evidence that the ladder moved. Further,

defendant contends that Plaintiff's affidavit submitted in support of his opposition to Defendant's motion contradicted his deposition testimony.

Discussion

A motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. 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 or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 [1st Dept 1992], *lv denied and dismissed* 80 N.Y.2d 1005 [1992], *rearg. denied* 81 N.Y.2d 782 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558, [1979]; *Pahl Equip. Corp.*, 182 A.D.2d 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 A.D.2d 790 [1st Dept 1981]).

As to the Labor Law 240(1) claim, Defendant has failed to make a "showing that the court overlooked or misapprehended relevant facts or misapplied controlling law in the prior decision" (*Spinale v. 10 West 66th Street Corporation*, 193 A.D.2d 431 [1st Dept 1993]). Here, Defendant seeks to argue the same questions addressed in the Court's May 25, 2017 decision. Further, the record reveals that the facts asserted to support arguments made in support of reargument were not made in Defendant's motion for summary dismissal. As to Defendant's argument that the Labor Law 240(1) claim should be dismissed, Defendant cites to Paragraph 4 of the affidavit in support of its original motion for summary dismissal, which recites Plaintiff's

allegations and deposition testimony, but fails to argue what it now asserts for the first time in its motion to reargue—that the awning only hit Plaintiff, and not the ladder as well (Sklar Aff., Motion to Dismiss, E-File Doc. No. 63, ¶4). Even if Defendant's application for leave to reargue was granted as to the Labor Law 240(1) claim, as addressed in the Court's May 25, 2017 decision, it cannot be said, as a matter of law, that Plaintiff was provided with a properly secure ladder as required under Labor Law 240(1).

The Court also notes that Defendant's argument that Plaintiff's affidavit submitted in opposition to the motion for summary dismissal contradicted his prior testimony was submitted for the first time on reply to the opposition to the motion to reargue, and is thus not properly before the Court (*see Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562, 582 N.Y.S.2d 712 [1992] ["the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]; *see also Gonzalez v. Sun Moon Enterprises Corp.*, 53 A.D.3d 526, 526–27 [2d Dept 2008]).

However, the portion of Defendant's motion for leave to reargue the portion of the May 25, 2017 decision addressing the Labor Law 241(6) claim is granted.

Plaintiff's Labor Law 241(6) claim should have been dismissed, since neither regulation cited by Plaintiff are applicable to the facts of this matter. Regulation 12 NYCRR 23-1.21(e)(3) requires that,

> "When work is being performed from a *step of a stepladder 10 feet or more above the footing*, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means" (emphasis added).

Here, the record is clear that Plaintiff was performing work on a ladder which was ten feet tall, and Plaintiff was standing two rungs down from the top. Thus, Plaintiff could not have

been performing work from a step that was ten feet or more above the subject ladder's footing (*see Vega v. Renaissance 632 Broadway, LLC*, 103 A.D.3d 883, 885 [2d Dept 2013] [holding that the 23-1.21(e)(3) was inapplicable, "as the step the plaintiff was standing on was less than 10 feet above the footing"]). With regard to Plaintiff's claim under 12 NYCRR 23-1.21(b)(4)(i), the record reveals—and Plaintiff's opposition does not dispute with facts—that the subject ladder was used to remove an awning from a storefront, and not to traverse different levels of a structure or building.

CONCLUSION

Accordingly, it is hereby,

ORDERED that Defendant's motion for leave to reargue the Order of this Court dated May 25, 2017, is granted, only to the extent of the Labor Law 241(6) claims, and upon reargument, the Court grants Defendant's motion for summary dismissal of Plaintiff's Labor Law 241(6) claim. It is further

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

This constitutes the decision and order of the Court.

Dated: January 2, 2018

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.