SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 152501/2016

JIANLAN XIE,

Plaintiff,

MOTION SEQ. NO. 002

- v -

SKANSKA USA CIVIL, INC., SKANSKA USA CIVIL NORTHEAST, INC., STV GROUP, INC., and TISHMAN CONSTRUCTION CORPORATION,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this personal injury action, plaintiff Jianlan Xie ("plaintiff") moves for leave to renew and reargue her motion for partial summary judgment against defendants Skanska USA Civil, Inc. ("Skanska USA Civil"), Skanska USA Civil Northeast, Inc. ("Skanska Northeast"), STV Group, Inc. ("STV Group"), and Tishman Construction Corporation ("Tishman Construction"). In a prior decision and order dated August 11, 2017, this Court denied plaintiff's motion for partial summary judgment on the issue of defendants' liability. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion for renewal and reargument is granted and, upon renewal and reargument, this Court adheres to its original determination.

FACTUAL AND PROCEDURAL BACKGROUND:

On January 6, 2016, at around 12:30 pm, plaintiff was working at the James A. Farley post office ("the post office") in Manhattan when she was struck in the head by a metal tool known as a "level." (Doc. 41 at 2.) As a result, plaintiff suffered a head concussion, among other injuries. (*Id.*) At the time of the accident, Skanska USA Civil, Skanska Northeast, STV Group, and Tishman Construction (collectively "defendants") were engaged in construction and consulting work at the building in order to renovate it into the new Pennsylvania Station. (Doc. 43 at 10–19.)

On March 23, 2016, plaintiff commenced this personal injury action. (*Id.* at 8–23.) She alleged that defendants were negligent and that they violated New York Labor Law §§ 200 and 241(6), as well as Industrial Code §§ 23-1.2, 23-1.5, and 23-1.7. (*Id.*) On October 20, 2016, plaintiff moved for partial summary judgment pursuant to CPLR 3212 on the issue of liability against defendants. (*Id.* at 1–6.) In her supporting papers, plaintiff argued that the motion should be granted based on the evidence contained in her exhibits, which included plaintiff's summons and verified complaint, defendants' answers, plaintiff's own affidavit describing the incident, and a copy of an accident report that was prepared by the United States Postal Service ("USPS"). (*Id.* at 4–5.) Although she acknowledged that party depositions had not yet been conducted, she maintained that such further discovery would not reveal any material facts sufficient to defeat her entitlement to summary judgment. (*Id.* at 5–6.)

In opposition, defendants contended that the motion was premature due to questions of fact that needed to be resolved through the discovery process. (Doc. 44 at 1–2.) Defendants' papers included the affidavits of Thomas Smith ("Smith"), Raphael Stewart ("Stewart"), and Anthony Rosano ("Rosano"), all of whom were employees of either defendants or their

subcontractors. (*Id.* at 20–31.) These individuals stated in their respective affidavits that defendants were assured several times by representatives of the USPS, as well as the Port Authority of New York and New Jersey ("Port Authority"), that the room under construction, in which plaintiff was injured, was going to be locked and that nobody would be using it on the day of the incident. (*Id.*) Given these multiple assurances, defendants argued that there were material questions of fact precluding summary judgment, including how plaintiff was able to access the room, who was in charge of keeping the room locked, and whether defendants had adequate notice that a postal office employee would be using it. (*Id.* at 7–10.) Defendants further asserted that the Labor Law provisions which plaintiff relied on were inapposite because she was not a construction worker. (*Id.* at 2.)

On August 11, 2017, this Court issued an order denying plaintiff's motion for partial summary judgment. (Doc. 42.) In so holding, this Court reasoned that the unsworn accident report provided no indication as to who drafted it or whether it was based on personal knowledge. (*Id.* at 2–3.) Thus, the report was deemed inadmissible hearsay. (*Id.*) In the order, this Court stated that plaintiff failed to meet her burden on the motion, and therefore did not address the issues raised by defendants. (*Id.*)

Plaintiff thereafter filed this motion for leave to renew and reargue the partial summary judgment motion. (Docs. 40, 41.)

POSITIONS OF THE PARTIES:

In support of her motion for leave to reargue, plaintiff claims that this Court overlooked the reliability of the accident report. She asserts that, contrary to this Court's finding, the report mentions the name and title of the person who prepared it, specifically S. Lynne Watson

("Watson"), a supervisor of customer services for the USPS. (Doc. 41 at 3–4.) Due to the claimed trustworthiness of the report, plaintiff also alleges that this Court misapprehended the law by ruling that the accident report constitutes hearsay. (*Id.* at 4–5.) According to plaintiff, the report should have been admitted under the business records exception to the hearsay rule because the USPS was required to create a record regarding the accident and plaintiff was required to report the accident pursuant to the internal rules of the USPS. (*Id.*)

In support of her motion for leave to renew, plaintiff argues that new information contained in defendants' supplemental response to her discovery demands warrants the granting of her motion for partial summary judgment. (*Id.* at 5–8.) In particular, plaintiff states that a safety incident report contained in the supplemental response conclusively establishes the underlying facts as well as defendants' negligence. (*Id.* at 7–8.) In the incident report, Smith acknowledges that the level accidentally slipped out of his hand during construction work and fell into the adjacent room. (*Id.* at 6.) Because the supplemental response was submitted by defendants in January of 2017, this information was not in plaintiff's possession when she first submitted her summary judgment motion in October of 2016. (*Id.*)

Defendants argue that plaintiff's motion for leave to reargue and renew should be denied on the basis that plaintiff has not authenticated the accident report. (Doc. 50 at 4.) Thus, they claim that it is hearsay. (*Id.* at 4–5.) Even if this Court were to accept the report as admissible evidence, they contend that plaintiff still fails to rebut the factual issues raised by the affidavits of Smith, Stewart, and Rosano, particularly with respect to how the accident occurred and whether plaintiff contributed to the incident in any way. (*Id.* at 2.) Defendants further assert that both the accident and safety incident reports raise their own factual questions precluding reargument or renewal of plaintiff's summary judgment motion. (*Id.* at 3–4.) Finally, defendants

again challenge the applicability of the New York Labor Law and Industrial Code to this matter. (*Id.* at 3, 6.)

LEGAL CONCLUSIONS:

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

On a motion for leave for renewal pursuant to CPLR 2221(e), however, a court may consider "new facts not offered on the prior motion that would change the prior determination . . . ." (CPLR 2221[e][2].) The motion to renew is "intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention." (*Garner v Latimer*, 306 AD2d 209, 209 [1st Dept 2003].) A party moving for renewal must present the court with justification for failing to submit the new evidence with the initial motion. (*See Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543, 544 [1st Dept 2013].) Although renewal is granted sparingly, (*see Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] (citations

omitted)), a court may nonetheless grant such relief so as not to defeat substantive fairness (*see Garner*, 306 AD2d at 210 (citations omitted)).

a. Plaintiff's Motion for Reargument

The business records exception to the rule against hearsay is set forth in CPLR 4518(a). This provision allows a court to admit into evidence a writing or record if the judge finds that it "was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." (CPLR 4518[a].) Adding to these three requirements, the Court of Appeals has expressly stated that the source of the information recorded must be a person with personal knowledge thereof, and that such person be part of the regular business practice in reporting and recording the information. (*See Johnson v Lutz*, 253 NY 124, 128 [1930].) The business records exception thus gives evidentiary credit to writings upon which reliance is placed in the systematic conduct of businesses' undertakings. (*See Senn v Scudieri*, 165 AD2d 346, 353–54 [1st Dept 1991].)

Plaintiff's prayer for reargument in this case rests upon her assertion that the accident report is a business record. She argues that, contrary to this Court's prior order, the report actually indicates who drafted it. A review of this document indeed reveals that Watson conducted the investigation and drafted the report. (Doc. 43 at 55–57.)

Leave to reargue is granted because this Court overlooked the fact that the name and title of the person who prepared the accident report were on that document. Upon reargument, however, this Court adheres to its original determination and declines the relief sought by

plaintiff since the accident report fails to meet all of the requirements of CPLR 4518. First, the evidence considered in connection with the original motion fails to establish that the accident report was made in the regular course of business. While plaintiff has submitted evidence of an internal rule of the United States Postal Service mandating that an investigation and report be conducted after an on-site accident, (Doc. 46), plaintiff did not mention that rule in her original summary judgment motion. It is therefore inappropriate for this Court to consider that rule as proof of the regular course of business of the USPS. (*See James v Nestor*, 120 AD2d 442, 443 [1st Dept 1986] (reargument motions involve only the papers presented on the original application and do not involve new facts).)[1] Moreover, even though plaintiff stated in her affidavit that she was required by her employer to report the incident (Doc. 43 at 53–54), the accident report itself is unsworn. Thus, plaintiff has failed to tender the report in admissible form. (*See Kristo v Bd. of Educ. of City of New York*, 134 AD3d 550, 551 [1st Dept 2015] (unsworn accident report is hearsay); *Perez v Brux Cab Corp.*, 215 AD2d 157, 159 [1st Dept 1998] (same).)

In accordance with the foregoing, plaintiff's motion for leave to reargue is granted because, in granting its prior order, this Court overlooked the fact that Watson's name and title appeared on the accident report. Upon reargument, however, this Court adheres to its original decision because, even considering this overlooked fact, plaintiff has still failed to establish her entitlement to judgment as a matter of law on her common law negligence claim and her claims pursuant to Labor Law §§ 200 and 241(6).

[1] Plaintiff has not submitted a reasonable justification to this Court for not including the USPS regulation in her original summary judgment papers. Thus, the submission of the regulation would not warrant renewal, either. (*See* CPLR 2221[e][3].)

b. Plaintiff's Motion for Renewal

It is well-settled that one moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In so doing, the moving party must produce sufficient evidence to eliminate any issues of material fact. (*Id.*)

New York Labor Law §§ 200 and 241(6) protect laborers and employees at construction sites. With respect to causes of action based on Labor Law § 200, a plaintiff must prove to the court that the defendant had the authority to control the activity if the injury resulted from the means and methods of the construction work. (*See McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981].) With respect to causes of action predicated on Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and which sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501–02 [1993].)

Here, in her motion for leave for renewal, plaintiff submits defendants' supplemental discovery responses and argues that, in particular, the incident report contained therein warrants a different outcome from this Court's prior order. (Doc. 41 at 5–8.) Specifically, the incident report contains a handwritten statement by Smith, which states:

> I was working in C.C.TV RM in postoffice (sic) and while I was leveling a piece of angle the level that was on it slid across the

> ceiling into the next room and struck a women (sic) in the face. When I started the work I was unaware the room had become occupied.

(Doc. 47 at 8.) Because plaintiff received this new information from defendants in January of 2017, the incident report was not in plaintiff's possession when she submitted her initial summary judgment motion in October of 2016. (Doc. 41 at 6.) Given plaintiff's justification for failing to include the incident report with her initial motion, renewal is thus granted.

After reviewing the papers on the instant motion, including the newly submitted incident report, this Court nevertheless concludes that the proffered report does not change its conclusion in the prior order denying her summary judgment. Although the supplemental responses provide some additional detail into the circumstances surrounding plaintiff's accident, such as Smith's own account of what transpired, they do not eliminate the material issues of fact raised by the affidavits of Smith, Stewart, and Rosano. All three were employees of either defendants' or their contractors, and each of them represented in their statements that defendants received multiple assurances from USPS officials and the Port Authority that nobody would be using the room where plaintiff was injured at the time of the construction. (Doc. 44 at 20–31.) Specifically, Stewart and Rosano both state that they were advised that only plaintiff's supervisor, Watson, had access to the room and that no employees of the post office would be working in the room during renovation (*id.* at 26–27, 30–31), and Smith claims that he made sure the room was locked before he began his work (*id.* at 22).

To the extent that plaintiff relies on the Industrial Code to establish her Labor Law § 241(6) claim, the new information in defendants' supplemental response does not warrant a change from this Court's decision. Plaintiff merely alleges in her complaint that defendants violated Industrial Code §§ 23-1.2, 23-1.5, and 23-1.7. (Doc. 43 at 22.) However, to establish

liability under § 241(6), a plaintiff "must specifically plead and prove the violation of an applicable Industrial Code regulation." (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012].) The specific Industrial Code provision relied on must mandate compliance with concrete specifications. (*See Capuano v Tishman Constr. Corp.*, 950 NYS2d 517, 518 [1st Dept 2012]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 218 [1st Dept 2003].) Although plaintiff pleaded violations of certain sections of the Industrial Code, she does not address these sections in the instant motion and thus fails to prove if and how those violations occurred.

With respect to plaintiff's Labor Law § 200 cause of action, this Court finds that its original decision to deny summary judgment was correct even in light of defendants' supplemental response and Smith's admission that the level slipped from his hand during construction work. To impose liability under section 200, it is necessary to show authority and control over the plaintiff's work if the injury arose from the means and methods of construction. (*See McCullough*, 132 AD3d at 492; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [1st Dept. 2007].) In this case, however, the supplemental response shows that defendants took precautions to ensure that the area was not occupied and that Smith checked to see that the door was locked before he began his work. Therefore, there is a question of fact regarding whether defendants had any control over plaintiff's work when they were not even aware of her presence in the room. For the same reasons, this Court finds that summary judgment on plaintiff's common law negligence claim was also properly denied because Labor Law § 200 is a codification of common law negligence principles. (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998].)

Thus, this Court grants plaintiff renewal based on her justification for failing to include the incident report with her initial summary judgment motion and, upon renewal, adheres to its original determination.

Given plaintiff's failure to establish her entitlement to judgment as a matter of law, this Court concludes that there is no need to address defendants' contention concerning plaintiff's comparative negligence.

For the foregoing reasons, it is hereby:

ORDERED that plaintiff's motion for leave for reargument on her partial summary judgment motion against defendants on the issue of liability is granted and, upon reargument, this Court adheres to its original decision; and it is further

ORDERED that plaintiff's motion for leave to renew her partial summary judgment motion against defendants on the issue of liability is granted and, upon renewal, this Court adheres to its original decision; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that this constitutes the decision and order of this Court.

7/30/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

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