SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 43

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ROBERT ROSSI,

Plaintiff,

-against- Index No. 160467/2015

140 WEST JV MANAGER LLC, J.T. MAGEN & COMPANY INC. and VANQUISH CONTRACTING CORP. and 140 WEST STREET (NY), LLC,

Defendants.

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140 WEST JV MANAGER LLC, and
140 WEST STREET (NY), LLC,

Third-Party Plaintiffs,

-against-

H & L ELECTRIC, INC.,

Third-Party Defendant.

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J.T. MAGEN & COMPANY INC.,

Second Third-Party Plaintiff,

-against-

H & L ELECTRIC, INC.,

Second Third-Party Defendant.

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ROBERT R. REED, J.

Defendant Vanquish Contracting Corp. (Vanquish) moves, pursuant to CPLR 2221

(d) for an order granting leave to renew and reargue plaintiff Robert Rossi's motion for summary judgment (prior motion), and, upon renewal and reargument, vacating and modifying this court's decision and order dated January 30, 2018 (prior order) granting the prior motion in part. Vanquish also seeks to preserve the issue of Rossi's comparative negligence for trial on the Labor Law § 241 (6) claim. Defendants/third-party plaintiffs 140 West JV Manager LLC (140 West Street JV) and 140 West Street (NY) LLC (140 West Street NY) (both, 140 West Street) cross-move for similar relief.

The relevant substantive and procedural history of this action has been fully set forth in the prior order, and will not be repeated here, except as is necessary for clarification.

In this negligence action, Rossi alleges that he sustained personal injury on November 25, 2014, when he tripped and fell on construction debris in a sub-basement elevator lobby of the building located at 140 West Street in Manhattan (premises), while in the course of his duties as an apprentice for third-party defendant/second third-party defendant H & L Electric, Inc. (H&L). Rossi alleges that he sustained serious and permanent injuries to his left shoulder, lumbar spine, and right knee, as a result of the accident.

Following joinder of issue, Rossi moved for summary judgment on the complaint. In the prior order, this court granted that part of the motion for summary judgment in Rossi's favor and against Vanquish and 140 West Street NY solely as to liability on that

part of the Labor Law § 241 (6) cause of action arising out of violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2), which require that passageways and working areas be kept free from accumulations of dirt, debris, or any trip hazards.

Defendants now seek to renew and reargue the prior motion, contending that the court overlooked, misinterpreted, and misapplied the relevant law. Specifically, defendants contend that the holding in *Luciano v New York City Housing Authority* (157 AD3d 617 [1st Dept 2018]), decided after submission of the prior motion, requires this court to consider a plaintiff's comparative negligence, before ruling on summary judgment as to liability on a Labor Law § 241 (6) claim.

In opposition, Rossi contends, first, that 140 West Street's cross motion is procedurally improper and, therefore, cannot be considered by the court.

The cross motion, although filed more than 30 days after service of the prior order with notice of entry, is deemed timely filed. It is well established that a late cross motion may be heard where, as here, a timely motion was made seeking relief nearly identical to that sought by the cross-moving party (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]).

Next, Rossi opposes the motion and cross motion on the grounds that, in the prior motion, the court properly assessed the relevant underlying facts and applied the controlling case law.

Leave to renew and reargue is denied.

> "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided"

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see* CPLR 2221 [d]).

"An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (*Foley v Roche*, 68 AD2d at 568; *see* CPLR 2221 [e]).

Contrary to defendants' contentions, in the prior order, this court did not overlook controlling legal precedent regarding comparative fault and the relevant underlying facts. Defendants' reliance on *Luciano v New York City Housing Authority* (157 AD3d 617 [1st Dept 2018]) for the proposition that a plaintiff's contributory negligence is relevant on a motion for partial summary judgment as to liability is misplaced.

Two months after issuance of the *Luciano* decision (*see id.*), on April 3, 2018, the Court of Appeals held that, in a negligence action, "[t]o be entitled to partial summary judgment, a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]). The Court of Appeals explained that, in 1975, when "New York adopted a system of pure comparative negligence . . . [it]

directed courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to plaintiff" (*id.* at 319; *see* CPLR 1411, 1412).

Therefore, Rossi's contributory negligence, if any, is relevant only to the issue of damages, and not to liability.

Contrary to defendants' contention, this court did not overlook any triable issues regarding Vanquish's control over the site of the accident and responsibility for the removal of the debris over which Rossi tripped, in finding summary judgment as to liability against 140 West Street NY and Vanquish. There is no dispute that 140 West Street was the project owner and that Vanquish was a contractor at the project site. Therefore, both are statutorily liable under Labor Law § 241 (6), which applies to all contractors, owners, and their agents. In addition, Vanquish admits that it created the hazard, consisting of a pile of elevator debris in the subbasement lobby, and that no other contractors were permitted to move Vanquish's debris (*see* Carlo Bordone Jan. 27, 2017 dep tr at 51, line 23 to 52, line 3, at 53, lines 9-10, at 86, lines 4-8). The other subcontractors, defendant/second third-party plaintiff J.T. Magen & Company, Inc. and H&L, similarly testified that they were prohibited from touching Vanquish's debris (*see* Joseph Hennessy Feb. 23, 2017 dep tr at 24, line 19 to 25, line 3; Anthony Ranieri Mar. 24, 2017 dep tr at 66, lines 11-15).

Last, this court has considered defendants' remaining contentions and found them to be without merit.

Accordingly, it is

ORDERED that the motion is denied in all respects; and it is further

ORDERED that the cross motion is denied in all respects.

Dated: September 14, 2018

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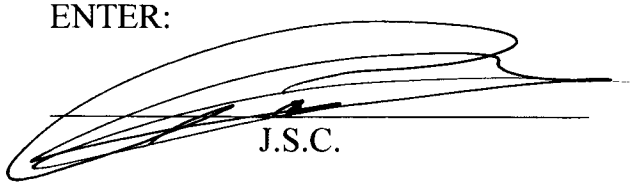

J.S.C.