

Mikeshina v Tishman Constr. Corp.

2020 NY Slip Op 30091(U)

January 8, 2020

Supreme Court, New York County

Docket Number: 155373/2012

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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OLGA MIKESHINA,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION, ATLANTIC
HOISTING & SCAFFOLDING, LLC, NEW YORK
CONVENTION CENTER DEVELOPMENT CORPORATION,
NEW YORK CONVENTION CENTER OPERATING
CORPORATION, THE JACOB K. JAVITS CONVENTION
CENTER, NEW YORK STATE ECONOMIC
DEVELOPMENT CORPORATION, NEW YORK STATE
URBAN DEVELOPMENT CORPORATION, EMPIRE STATE
DEVELOPMENT CORPORATION, NEWPORT PAINTING &
DECORATING. CO., INC (3RD PARTY DEFT.)

Defendant.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 182, 183, 184, 185, 186, 187, 188, 189

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

Plaintiff Olga Mikeshina moves, pursuant to CPLR 2221 (d), for leave to reargue this court's April 9, 2019 decision resolving motion sequence numbers 002 and 004 which granted summary judgment to Atlantic Hoist & Scaffolding, LLC, (Atlantic), Tishman Construction Corporation (Tishman), New York Convention Center Development Corporation, New York Convention Operating Corporation, The Jacob K. Javitz Convention Center, New York State Economic Development Corporation, and New York State Urban Development Corporation d/b/a Empire State Development Corporation (hereinafter collectively known as "the Convention Center defendants").

155373/2012 MIKESHINA, OLGA vs. TISHMAN CONSTRUCTION
Motion No. 005

PROCEDURAL HISTORY

On May 23, 2012, plaintiff, an employee of Newport Painting & Decorating Co., Inc. (Newport), was working at the Jacob Javitz Center, located at 655 West 34th Street, New York, New York. Plaintiff was utilizing a scaffolding erected by Atlantic to assist in painting elevated parts of the structure. At the time of her accident, plaintiff was wearing a harness and a lanyard, which became looped on a scaffold's stairway railing. Plaintiff alleged that upon getting caught on the railing, the lanyard stopped her forward movement and caused her to lose her balance and fall.

An amended verified complaint was filed by plaintiff on September 25, 2012, alleging causes of action for negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) as against Atlantic, Tishman, and the Convention Center defendants.

MOTION SEQUENCE NUMBERS 002 and 004

In motion sequence number 002, defendants Tishman and the Convention Center defendants moved, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims. In motion sequence number 004, Atlantic moved, pursuant to CPLR 2004, for leave to file a late motion for summary judgment. Upon the granting of such leave, Atlantic also moved, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

Tishman, the Convention Center defendants, and Atlantic argued that plaintiff's claims for common law negligence and a violation of Labor Law § 200 must be dismissed. Tishman and the Convention Center defendants argued that they did not have any notice of defective or hazardous conditions, nor did they have any control over the injury producing work. Atlantic

argued that Newport, plaintiff's employer, controlled the activities which gave rise to plaintiff's accident, and that while it erected the scaffolding, it had received no complaints regarding the scaffold and that it was compliant with all codes and regulations.

In opposition, plaintiff argued that pursuant to an OSHA standard, the ends of top rails and mid rails were not to overhang the terminal posts except where such overhang does not constitute a projection hazard for employees. Plaintiff argued that not only did the handrails project beyond their termination points in violation of OSHA regulations, but that they posed a particular hazard to workers walking up and down the stairs.

On April 9, 2019, this court granted summary judgment to Tishman, the Convention Center defendants, and Atlantic. The court held that Labor Law § 200 (1) states, in pertinent part:

[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . .

The court noted that for claims arising out of an alleged dangerous premises condition, such as the railing's condition alleged by plaintiff, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

The court held that defendants met their burden and demonstrated that they did not have actual or constructive notice of a dangerous condition. The court noted that Tan, who testified on behalf of Tishman, testified that he never received any complaints about the construction of

the staircase, and was not provided notice that anything had gotten caught in the handrails. The court discussed how Rivera, who testified on behalf of Atlantic, testified that he never received any complaints regarding the subject handrail from the time of installation to the time of the subject accident and that Atlantic did not receive any violations from the Fire Department of the City of New York, OSHA, or the Department of Buildings. The court noted that Atlantic submitted an affidavit from David H. Glabe, a professional engineer, who concluded that the subject stairwell complied with all applicable federal and New York regulations and that it did not constitute a projection hazard.

The court held that because plaintiff failed to meet her burden to demonstrate that Tishman, the Convention Center defendants, or Atlantic, created a dangerous condition or had constructive or actual notice of such condition, the part of plaintiff's complaint alleging negligence and a violation of Labor Law § 200 must be dismissed.

Plaintiff Olga Mikeshina now moves, pursuant to CPLR 2221 (d), for leave to reargue this court's April 9, 2019 decision. Plaintiff contends that the court should not have dismissed plaintiff's claims of common law negligence and a violation of Labor Law § 200.

CPLR 2221 (d) states, in pertinent part:

(d) A motion for leave to reargue:

* * *

2. 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 . . .

Motions to reargue are addressed to the discretion of the court which decided the prior motion and can be granted only after a showing that the court overlooked or misapprehended facts or law or which were mistakenly determined in its earlier decision. *Marini v Lombardo*, 17

AD3d 545, 546 (2d Dept 2005); *Carrillo v PM Realty Group*, 16 AD3d 611, 611 (2d Dept 2005).

New questions which were not previously advanced may not be raised on a motion to reargue.

See DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715, 718 (1st Dept 2005); *Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 (1st Dept 2004).

Here, plaintiff's motion to reargue the order of this court dated April 9, 2019 must be denied. The court did not overlook or misapprehend any matters of fact or law when making its determination that the claims for common law negligence and a violation of Labor Law § 200 must be dismissed. In support of their motions, defendants cited to witness testimony as well as an expert report. Plaintiff failed to demonstrate that defendants had actual or constructive notice of a dangerous condition or that the subject railing did not provide reasonable and adequate protection for workers.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion sequence number 005, for leave to reargue this court's April 9, 2019 decision resolving motion sequence numbers 002 and 004, is denied.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.


1/8/2020
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:


W. FRANC PERRY, J.S.C.
HON. W. FRANC PERRY, III
J.S.C.

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		