SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART** **IAS MOTION 43EFM**

Justice

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CHRISTOPHER HAVISON, MICHELLE HAVISON,

Plaintiff,

- v -

PORT AUTHORITY OF NEW YORK & NEW JERSEY, PORT AUTHORITY TRANS HUDSON CORPORATION, SIEMENS INDUSTRY, INC., ALDRIDGE ELECTRIC, INC., CH2M HILL NEW YORK, INC., TUV RHEINLAND MOBILITY, INC., D/A BUILDERS, LLC

Defendant.

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INDEX NO. 158983/2015

MOTION DATE 02/27/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 148, 149, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to REARGUMENT/RECONSIDERATION.

Robert R. Reed, J.,

By the instant motion (sequence number 005; NYSCEF Doc. No. 148), defendants Port Authority of New York & New Jersey, Port Authority Trans Hudson Corporation, Siemens Industry, Inc., Aldridge Electric Inc. and D/A Builders, LLC (collectively, Defendants; five of the seven named defendants in this action) seek an order, pursuant to CPLR 2221 (d), to allow their reargument of the prior motion for discovery pursuant to CPLR 3126 (sequence number 004) by plaintiffs Christopher Havison and Michelle Havison (collectively, Plaintiff; husband was physically injured while working at the jobsite and wife claims loss of society and consortium due to husband's injury), which resulted in the prior order and decision of this court dated December 20, 2019 (Prior Decision; NYSCEF Doc. No. 145), granting in part and denying in part Plaintiff's prior motion. Specifically, in the Prior Decision, this court granted that portion of Plaintiff's motion seeking to compel Defendants' responses to Plaintiff's supplemental

demand dated August 5, 2019 and directed Defendants to provide specific responsive documents, as well as denied that portion of Plaintiff's motion seeking to strike Defendants' answer or to preclude them from offering evidence at trial relative to their liability in this action.

On a motion to reargue, the motion must 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" (CPLR 2221 [d]). The motion to reargue is addressed to the court's sound discretion, and reargument is neither designed to afford the unsuccessful party a new opportunity to reargue issues previously decided nor to present arguments different from those originally asserted by such party (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 26-27 [1st Dept 1992] [hereinafter, *Kassis*]).

In the instant motion, the two documents at issue are: (1) the post-accident root cause analysis prepared by Defendants' safety director of the events surrounding Plaintiff's injury at the construction jobsite; and (2) the post-accident safety meeting notes following the "Daidone Aldridge root cause investigation" into Plaintiff's injury. In their moving brief in support of the motion (Def. Brief; NYSCEF Doc. No. 149), Defendants argue that this court, in the Prior Decision, "overlooked and misapprehended matters of law by ordering Defendants to disclose post-accident investigative materials" (Def. Brief, ¶ 8). They also argue that it is "well settled as a matter of public policy that evidence of subsequent remedial measures are not discoverable or admissible in a negligence case" (*id.*, ¶ ¶ 12-13; citing various cases).

A relatively recent decision analyzing the discoverability or admissibility of records of post-accident repairs or remedial measures was discussed in *Cochin v Metropolitan Transit Auth.* (2015 WL 6166977 [Sup Ct, NY County 2015], *affd* 140 AD3d 557 [1st Dept 2016]). In *Cochin*, plaintiff sought discovery of defendant's records of maintenance and repair of the subject bus

doors not only for the pre-accident period, but also for the six-month period after the accident (*id.* at *1). Defendants objected, arguing that the post-accident records were irrelevant and not discoverable (*id.*). The trial court stated that, while evidence of subsequent repairs is generally not discoverable or admissible, there are several exceptions: (1) where there is "an issue of maintenance or control;" (2) where the discovery sought is to "show that a particular condition was dangerous;" (3) where the "defective condition on the date of the alleged occurrence could not otherwise be proven;" and (4) where the discovery sought is to "ascertain the condition of the instrumentality that allegedly caused the plaintiff's injuries, prior to any admitted subsequent modifications" (*id.*; internal citations omitted). Observing that the last two exceptions applied to the case and the existence of a mechanical defect in the bus doors might only be discovered after their post-accident repair, the court concluded that "the discovery sought [by plaintiff] is therefore reasonably calculated to lead to admissible evidence that could either prove or rule out the existence of a mechanical defect" (*id.* at *2). Thus, the trial court granted plaintiff's motion to compel the production of post-accident records (*id.*). On appeal, the First Department affirmed, "for the reasons stated" in the trial court decision (140 AD3d at 557). *See also Francklin v New York El. Co., Inc.* (38 AD3d 329, 329 [1st Dept 2007] [appellate court upheld trial court's decision made after an in camera inspection of the relevant records, which directed defendants to produce records of post-accident repair, "subject to the proviso that they are not to be introduced at trial except upon a showing of relevance to the condition of the elevator at the time of the accident, and only if introduced in a way that does not reveal that repairs were made"]); *Longo v Armor El. Co., Inc.* (278 AD2d 127, 129 [1st Dept 2000] [defendant directed to produce documents related to prior and subsequent "similar accidents," as well as post-accident repairs or modifications]).

Notably, the words "material and necessary" used in CPLR 3101 must be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Matter of Kapon v. Koch* (23 NY3d 32, 38 [2014] [internal quotation marks and citation omitted]). Also, CPLR 3101 (g) states, in relevant part, that "there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm . . . or other public or private entity" (CPLR 3101 [g] [titled "accident reports"]).

In their reply (Def. Reply; NYSCEF Doc. No. 157), Defendants assert that they have given to Plaintiff the accident report at the outset of the case, as required by CPLR 3101 (g); but because the subject two documents sought by Plaintiff are records that were prepared after his injury "for the purpose of investigation, root cause analysis and remediation of means and measures," these documents are not discoverable under "well-established caselaw" (Def. Reply, ¶ 5). The argument is unavailing, as shown in the First Department decisions discussed above. Also, without analyzing the exceptions enumerated in *Cochin* and why such exceptions do not apply in the instant action, Defendants flatly assert in a conclusory manner that "none of these exceptions apply to the present case, as there is no dispute concerning the accident or how it occurred" (*id.*, ¶ 11). While the parties do not point to any caselaw discussing who bears the burden of proof for the absence of any applicable exception, it is well-established that, for a motion seeking leave to reargue pursuant to CPLR 2221 (d), the burden rests upon the movant to show that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*Kassis*, 182 AD2d at 27). Here, Defendants have not sustained their burden of proof in showing that this court overlooked or misapprehended the law in the Prior Decision, as they also concede that, in the event this court determines that the subject

documents are discoverable, they "respectfully request an in camera review of same before any records pursuant to this requested are disclosed" (Def. Reply, ¶ 15).

In light of the foregoing, it is hereby

ORDERED that Defendants' motion seeking leave for reargument (motion sequence number 005) is denied, and Defendants are directed to submit the documents at issue to this court for an in camera review [along with redacted versions of the same to Plaintiff for the time being], within 15 (fifteen) business days after entry of this order and decision.

7/28/2020
DATE

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