SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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VENUS MORALES,

Plaintiff,

- v -

CSH HUNGRY HARBOR LP, CSH-ILF BURMAN LLC,HSRE-EB I TRS, LLC,HSRE-EB I, LLC,HSRE-EB NORTH WOODMERE, LLC,HUNGRY HARBOR LLC,BRISTAL HUNGRY HARBOR OPERATOR LLC,THE BRISTAL CONSTRUCTION CORP. I, THE BRISTAL AT NORTH WOODMERE, ENGEL BURMAN SENIOR HOUSING AT NORTH WOODMERE, LLC,ENGEL BURMAN GROUP, ULTIMATE CARE ASSISTED LIVING MANAGEMENT LLC,ULTIMATE CARE NEW YORK, LLC,ULTIMATE CARE REALTY, LLC,JOHN DOE

Defendant.

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INDEX NO. 159652/2014

MOTION DATE 03/04/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 120, 121, 122, 123, 124, 125, 126, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, it is

ORDERED that the application of Defendants CSH Hungry Harbor LP and Ultimate Care New York LLC for an order extending Defendants' time to move for summary judgment to sixty (60) days after the completion of all parties' depositions (Motion Seq. 003) is granted to the extent that Defendants are directed to re-file their summary judgment motion within sixty (60) days after the last date of discovery ordered herein; and it is further

ORDERED that Defendants' motion for summary judgment dismissing the Complaint against them pursuant to CPLR § 3212 is denied without prejudice; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking leave pursuant to CPLR § 2221 to reargue or renew Plaintiff's prior cross-motion under Motion Seq. 002 is granted, and upon reargument, the Court denies Plaintiff's application as moot; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking leave pursuant to CPLR § 2221 to reargue or renew this Court's February 13, 2020 Decision and Order (as expressed in a hearing transcript) is granted, and upon reargument, this Court modifies its February 13, 2020

Decision and Order to allow Plaintiff to pursue certain limited discovery in this matter; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking either denial of Defendants' present summary judgment motion pursuant to CPLR § 3212 or a stay of said motion pursuant to CPLR § 2201 is granted to the extent that Defendants' motion is denied without prejudice; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking an order pursuant to CPLR § 3124 compelling Defendants to comply with the discovery demands served by Plaintiff is granted to the extent that the Court is ordering the following limited discovery schedule in this proceeding:

a. With respect to Plaintiff's notice for discovery and inspection of a "certain Administration Agreement and a certain Lease Agreement," the Court is directing that, to the extent neither agreement is within Defendants' possession or control, Defendants shall, within 30 days, produce a *Jackson* affidavit for each respective agreement.
b. With respect to Plaintiff's notice to take a deposition of a witness with actual knowledge of the accident on behalf of both Defendants, the Court is directing that within 30 days, each Defendant must produce *Jackson* affidavits attesting that there is no witness from either Defendant company that can testify with actual knowledge about the circumstances surrounding Plaintiff's accident.
c. With respect to Plaintiff's post-EBT demands related to prior conducted depositions, the Court is directing that Plaintiff serve all demands within 45 days and Defendants shall respond 30 days thereafter. Any post-EBT demands not served in this period are deemed waived; and it is further

ORDERED that there will be no adjournments or extensions of the timeframe under which Plaintiff may seek further discovery pursuant to this Order without prior written consent of this Court; and it is further

ORDERED that no further discovery or depositions shall be granted in this matter beyond what is detailed in this Order; and it is further

ORDERED that the parties are directed to appear for a Microsoft Teams conference before the Court on Tuesday, July 13, 2021 at 10:00 AM.

MEMORANDUM DECISION

In this personal injury action, Defendants CSH Hungry Harbor LP ("CSH") and Ultimate Care New York LLC ("Ultimate Care NY") move for an order extending Defendants' time to move for summary judgment to sixty (60) days after the completion of all parties' depositions, and, upon granting such relief, dismissing the complaint as against Defendants pursuant to CPLR § 3212 (Motion Seq. 003).

Plaintiff Venus Morales opposes Defendants' motion in its entirety and cross-moves for an order granting the following relief:

i) pursuant to CPLR § 2221 (a) and (d), granting Plaintiff leave to reargue her prior cross-motion (Mot. Seq. No. 002) and granting Plaintiff leave to reargue the Court's February 13, 2020 Decision and Order (as expressed in a hearing transcript), which reversed this Court's prior two decisions dated November 19, 2019 (a hearing transcript) and November 20, 2019; and upon granting leave reargument, vacating, reversing and/or modifying the February 13, 2020 order so as to adhere to the prior orders, thus reinstating the Court's grant of leave for Plaintiff to pursue certain discovery; or, alternatively

ii) pursuant to CPLR § 2221 (a) and (e), granting Plaintiff to renew her prior cross motion and granting leave to renew the February 13, 2020 order, premised upon new and previously unavailable facts and evident not offered on the prior motion that would change the prior determination; and upon granting leave to renew, vacating, reversing, and or/modifying the February 13, 2020 order;

iii) pursuant to CPLR § 3212 (f), denying Defendants' motion for summary judgment, or ordering a continuance of said motion, so as to permit affidavits to be obtained, or disclosure to be had, on the ground that facts essential to justify opposition to the motion exist but cannot now be stated; or in the alternative, pursuant to CPLR § 2201, staying Defendants' motion for summary judgment until such time as discovery is complete;

iv) pursuant to CPLR § 3124, the relevant provisions of Article 31 of the CPLR, and this Court's February 13, 2020 order, compelling Defendants to both appear for deposition via a proper witness who has relevant knowledge; and

v) pursuant to CPLR § 3124, the relevant provisions of Article 31 of the CPLR, and this Court's February 13, 2020 order, compelling Defendants to comply with the discovery demands served by Plaintiff.

BACKGROUND FACTS

On October 16, 2011, Plaintiff was employed as a housekeeper by non-party Hungry Harbor Care LLC ("HHC") and working at an assisted living facility operated by HHC, located at 477 Hungry Harbor Road, North Woodmere, New York, also known as The Bristal of North Woodmere ("the subject premises") (NYSCEF doc No. 118, ¶ 18).

Plaintiff was working in Room 122, a patient's room, when she attempted to open a window on the front left side of the room that she had regularly opened while working in that room for the past year (*id.* at ¶ 19). Plaintiff unlatched the window and put her hands at the bottom of the windowsill to raise it, and while she was halfway through raising it, the window allegedly came out of the frame and hit Plaintiff on top of her head (*id.* at ¶ 21).

Plaintiff testified in deposition that she had never had any issues with the window prior to this date, and never made any complaints to her employer prior to the accident (*id.* at ¶ 22). Plaintiff stated that she heard a coworker had previously had issues with the exact same window; however, she was unaware if the coworker made any complaints to their employer (*id.*).

At the time of the alleged accident, CSH was the owner of the subject premises and had leased the subject premises to Plaintiff's employer, HHC (*id.* at ¶ 5)[1]. CSH in turn was owned by a parent company, Chartwell Retirement Services ("Chartwell"), the owner of a number of assisted living and retirement facilities (NYSCEF doc No. 124). Defendant Ultimate Care NY was the management company for the subject premises, along with the other Bristal assisted living facilities (*id.* at ¶ 33). Ultimate Care NY's scope of work included hiring professional and administrative personnel and overseeing human resources for the various Bristal communities (*id.*).

[1] Plaintiff is precluded from naming her employer as party to this action on account of the Worker's Compensation bar (NYSCEF doc No. 155, ¶ 57).

Procedural History and Discovery Timeline

Plaintiff commenced this action in October 2014 by the filing of a Summons and Complaint upon, *inter alia,* Defendants CSH and Ultimate Care NY.[2] Plaintiff alleges in her complaint that Defendants were negligent in the maintenance, control, and supervision of the window and allowed the window to remain in a dangerous and unsafe condition.

On November 3, 2016, Plaintiff appeared for deposition (NYSCEF doc No. 123). The same day, Ultimate Care NY produced Erik Anderson, Vice President of Human Resources of Ultimate Care Assisted Management, LLC, as its witness for deposition (*id.*). Ultimate Care Assisted Living Management, LLC was formed in 2012, the year after Plaintiff's accident, and is essentially the successor company to Ultimate Care NY (*id.* at ¶ 32).

On August 15, 2017, the parties appeared for a compliance conference wherein Plaintiff reserved the right to additional depositions but warranted that she was not looking to depose anyone from CSH (NYSCEF doc No. 124). Pursuant to the August 2017 conference order, CSH produced an affidavit from Vlad Volodarski, Chief Financial Officer for Chartwell. Mr. Volodarski confirmed that CSH, a subsidiary of Chartwell, was the owner of the subject premises at the time of Plaintiff's accident (*id.*).

The parties appeared for follow-up compliance conferences on November 22, 2017, January 12, 2018, and March 16, 2018. At the November 2017 and January 2018 conferences,

[2] This proceeding was dismissed as against Defendants CHS-ILF Burman LLC, HSRE-EB I TRLS, LLC, "HSRE-EB I, LLC," HSRE-EB North Woodmere, LLC, Hungry Harbor LLC, Bristal Hungry Harbor Operator LLC, The Bristal Construction Corp. I, "The Bristal at North Woodmere," Engel Burman Senior Housing at North Woodmere, LLC, "Engel Burman Group," Ultimate Care Assisted Living Management LLC and Ultimate Care Realty, LLC by stipulation dated August 28, 2018 (NYSCEF doc No. 80).

Plaintiff reversed her prior stance and reserved the right to conduct a deposition of a witness on behalf of CSH but did not notice the deposition after either conference (*id.* at ¶ 13).[3]

On October 17, 2018, the parties again appeared for a compliance conference where Plaintiff requested the deposition of someone from CSH, as well as an additional witness from Ultimate Care NY (NYSCEF doc No. 82).

On January 18, 2019, Maryellen McKeon, Vice President of Operations for Ultimate Care Assisted Living Management, LLC, appeared for deposition as Ultimate Care NY's second witness (NYSCEF doc No. 121 at ¶ 14). Ms. McKeon stated that Ultimate Care NY mainly handled administrative services and that HHC was responsible for repairs to the subject premises (NYSCEF doc No. 155 at ¶ 13).

On February 8, 2019, Plaintiff filed the Note of Issue, but affirmed in the Note that this matter was not ready for trial as outstanding discovery was not completed, namely the deposition of a CSH witness (NYSCEF doc No. 84).

On May 2, 2019, CSH produced Vlad Volodarski, the Chief Financial Officer of Chartwell who had previously submitted an affidavit in August 2017, for a virtual deposition via video as he resides in Canada (NYSCEF doc No. 121 at ¶ 16). Mr. Volodarksi confirmed at the May 2019 deposition that Chartwell no longer owned an interest in CSH but was the company's owner in 2011 when Plaintiff's accident occurred (NYSCEF doc No. 93 at 12). Mr. Volodarski stated that no one from either Chartwell or CSH had any involvement in the day-to-day operations of the property (NYSCEF doc No. 155 at ¶ 14).

[3] No depositions were scheduled at the March 2018 conference (NYSCEF doc No. 64).

On May 28, 2019, a final compliance conference was held wherein the parties agreed to serve post-EBT demands within thirty days (NYSCEF doc No. 85).

Defendants' Prior Motion for Summary Judgment

On June 28, 2019, Defendants moved for summary judgment pursuant to CPLR § 3212 on the grounds that the discovery completed has established that neither CSH or Ultimate Care NY were liable for the condition of the subject premises or breached a duty of care to Plaintiff (Motion Seq. 002). Plaintiff opposed the motion and cross-moved for an order staying Defendants' motion on the grounds that discovery was still incomplete (NYSCEF doc No. 110). Namely, Plaintiff contended that the witnesses produced on behalf of CSH and Ultimate Care NY had no relevant knowledge of the accident (*id.*). Plaintiff thus sought an order staying the motion and compelling Defendants to produce a witness with relevant knowledge pursuant to CPLR § 3124.

The November 2019 Conference and Order

On November 19, 2019, the parties appeared before this Court for a conference on the issue of whether Plaintiff was entitled to certain additional discovery. At the conference, Plaintiff represented that neither Defendant produced a witness with actual knowledge of the accident, given that Mr. Voldarski was an employee of CSH's parent company with no knowledge of the subject premises' day-to-day operations, and Ultimate Care NY's witnesses testified that they were mainly involved with personnel matters as opposed to maintenance of the conditions of the facilities (NYSCEF doc No. 139 at 4-5).

This Court found that Plaintiff was "derelict" in failing to serve a demand for a witness with actual knowledge immediately after the second deposition of an Ultimate Care NY witness in January 2019 and the virtual deposition of Mr. Voldarski in May 2019 (*id.* at 14, l: 16). Notwithstanding Plaintiff's delay, the Court noted that Plaintiff should be afforded the opportunity to demonstrate why further discovery was necessary prior to the Court's determination of whether Defendants were entitled to summary judgment ("I'm inclined to deny the summary judgment without prejudice and to direct the plaintiff within 20 days to make any further demands for discovery or depositions with support for such demands with cites from the depositions that show you have a right to further depositions….not just further depositions, but support one by one as to what in the old testimony results in you not having what you need (*id.* at 14, l: 4-12). The Court cautioned that Plaintiff had the burden of establishing that further discovery was needed, and that if Plaintiff could not "support it from the old depositions that were taken," the Court would deny Plaintiff further discovery and order Defendants to re-file their summary judgment motion (*id.* at 15, l: 1).

The Court issued an order following the conference holding that Defendants' motion for summary judgment was denied without prejudice and directing Plaintiffs to make demands for additional discovery with detailed citations to depositions within 30 days, with the proviso that any discovery not sought in this period would be deemed waived (NYSCEF doc No. 116).

On December 18, 2019, in compliance with the November 2019 order, Plaintiff served the following four discovery demands on Defendants:

(i) A "Notice to Take Deposition Upon Oral Examination" (referable to defendant, CSH Hungry Harbor LLP);

(ii) A "Notice to Take Deposition Upon Oral Examination" (referable to defendant, Ultimate Care New York LLC);

(iii) A "Notice for Discovery and Inspection" (referable to a certain Administration Agreement and a certain Lease Agreement); and;

(iv) A "Post-EBT Demand and Notice for Discovery and Inspection"

(NYSCEF doc No. 119).

By Letter to the Court dated February 5, 2020, Defendants raised their objections to Plaintiff's demands, arguing they should be denied as untimely, unduly burdensome, and "nothing more than a fishing expedition" (NYSCEF doc No. 118). Defendants contended they produced the witnesses available to them and argued that Plaintiff was ultimately seeking witnesses they were incapable of producing, as neither Defendant company was involved in the day-to-day operations of the subject premises; rather, such operations were only within the purview of Plaintiff's employer HHC, a non-party (*id.*). Defendants further contended that the documentary post-EBT demands served by Plaintiff "sought information that could have been and should have been requested at the commencement of this action, information that has already been provided, and information that was provided, and information that is wholly irrelevant to this matter" (*id.*).

The February 2020 Conference

On February 13, 2020, the parties appeared for another conference before this Court to discuss Plaintiff's application for further discovery (NYSCEF doc No. 127).

The first discovery demand discussed at the February conference was Plaintiff's demand for a copy of the "administration agreement" between Defendants, as well as a copy of a lease agreement between Defendants. Defendants represented that neither document exists (*id.* at 7, l: 5). The Court asked Plaintiff to provide citations to the deposition transcripts indicating the existence of the documents.

Plaintiff cited to the testimony of Ultimate Care NY's second witness, Maryellen McKeon, who stated that she "believed" there was an administrative agreement between Defendants in addition to the administrative agreement between Ultimate Care NY and HHC, which had already been produced (*id.* at 8, l: 12-13). The Court noted that as the only evidence pointing to the possible existence of this alleged second administrative agreement was the witness's "equivocal" answer of "I believe so," the Court would not require Defendants to produce a *Jackson* affidavit for the administrative agreement but cautioned Defendants that they may be subject to a negative inference at trial (*id.* at 18, l: 13:19).

The next demand discussed was Plaintiff's demand for a "lease agreement" between Defendants. As with the alleged administrative agreement, a lease between CSH and HHC had already been produced, but Plaintiff maintained that there was a separate lease agreement between CSH and Ultimate Care NY based on testimony provided by Erik Anderson, Ultimate Care NY's first witness (*id.* at 30, l: 25). Once again, the Court held that no *Jackson* affidavit would be required but Defendants may be subject to a negative inference at trial. The Court additionally noted that the alleged second administrative agreement should have been sought immediately following Mr. Anderson's deposition in 2016 "if it was important or relevant" to Plaintiff's theory of liability against Defendants (*id.* at 29, l: 2).

The next demand discussed was Plaintiff's demand for additional depositions from witnesses with actual knowledge of the accident on behalf of both Defendants. The Court held that Plaintiff should have served a demand for a witness with actual knowledge of the accident immediately after each deposition, and prior to the filing of the Note of Issue, and therefore Plaintiff was not entitled to additional depositions absent some other basis for why further depositions were needed ("If you didn't make a follow-up demand you had no right to a follow-up deposition….you can't tell me now after note of issue that no one asked for follow-up when someone was produced, even if they didn't have sufficient knowledge, that you now want these depositions . . .Tell me something else because that answer is no") (*id.* at 33-34, l: 23-24; 3-9).

In response, Plaintiff argued that at the November 2019 conference, the Court was already aware that discovery was being sought post-Note of Issue and nevertheless allowed for further depositions ("But that's exactly what Your Honor said on the record. We shouldn't be doing this discovery at this late stage. But you know what? I'm going to allow you it. And Your Honor did allow it") (*id.* at 37, l: 16-19). The Court clarified that its ruling at the November 2019 conference only granted Plaintiff an *opportunity* to establish a basis for additional discovery ("I said I'm going to allow you to establish a basis. And I don't think it's adequate, it's just not") (*id.*, l: 20-22).

The final matter discussed was Plaintiff's post-EBT demands from the depositions previously conducted in 2016 and 2019. The Court held that in light of the dates of the prior depositions, post-EBT demands should not have been included even in the potential discovery Plaintiff was allowed to seek after the November 2019 conference ("Let me say if I said that I was a hundred percent in error. It was a judicial error to even consider giving you this kind of discovery at this point. I was wrong") (*id.* at 39, l: 14-17).

Having found Plaintiff failed to establish a basis for any of the belated discovery demands, the Court concluded the conference by directing Defendants to resubmit their summary judgment motion within 20 days (*id.* at 41, l: 1).

The Instant Summary Judgment Motion

On March 4, 2020, in accordance with the Court's directive, Defendants re-filed their motion for summary judgment, [4] advancing arguments largely similar to those relied on in their prior motion. Defendants argue that although CSH owned the subject premises, it was an out-of-possession landlord that owed no duty to Plaintiff, and Plaintiff's employer, HHC, retained all responsibility under its lease agreement with CSH to maintain and repair the subject premises as the tenant, including all structural and nonstructural aspects, which would encompass the window that injured Plaintiff (NYSCEF doc No. 121 at 8).

Defendants similarly contend that Ultimate Care NY has no liability for Plaintiff's accident. Although Ultimate Care NY is a "management" company, Defendants argue that pursuant to the Administration Agreement between HHC and Ultimate Care NY, Ultimate Care NY's scope of work was limited to selecting and hiring personnel for the facility along with various other administrative support services (*id.* at 10).

Plaintiff's Cross-Motion

On September 11, 2020, Plaintiff cross-moved in opposition to Defendants' motion for summary judgment. Plaintiff disputes Defendants' contentions that CSH's duty to maintain the subject premises was displaced by its lease with HHC and that Ultimate Care NY was not in any way responsible for the condition of the subject premises. Plaintiff also argues that both Defendants had either actual or constructive notice of the dangerous condition of the window on

[4] Defendants also seek an order extending their time to move for summary judgment to sixty (60) days after the completion of all parties' depositions.

the subject premises, and additionally contends that the doctrine of *res ipsa loquitor* is applicable here as Plaintiff's accident is not the type that occurs in the absence of negligence, did not involve any act by Plaintiff, and was caused by the malfunctioning, falling window, a device that Plaintiff maintains was within the control of Defendants (NYSCEF doc No. 147).

In addition to opposing Defendants' summary judgment motion on the merits, Plaintiff's cross-motion also seeks an order pursuant to CPLR § 2221 granting Plaintiff leave to reargue or renew both her prior cross-motion under Defendants' previous summary judgment motion and this Court's February 13, 2020 decision as expressed in the "So-Ordered" transcript of said conference ("the February 2020 order"). Upon granting leave for reargument or renewal, Plaintiff seeks an order vacating, reversing and/or modifying the February 2020 order so as to adhere to the prior November 2019 order, thus reinstating the Court's grant of leave for Plaintiff to demonstrate entitlement to additional discovery; or in the alternative, an order pursuant to CPLR § 3124 directing Defendants to comply with the outstanding discovery Plaintiff sought pursuant to the Court's November 2019 order.

Finally, Plaintiff seeks an order either denying Defendants' motion for summary judgment or ordering a continuance of said motion pursuant to CPLR § 3212(f) to permit additional affidavits or disclosure as facts essential to justify opposition exist but cannot now be stated, or alternatively, an order pursuant to CPLR § 2201 staying Defendants' motion until discovery is complete.

Plaintiff's application for reargument or renewal is premised on the theory that the November 2019 conference transcript, which was not before the Court during the February 2020 conference, constitutes "new facts not offered on the prior motion that would change the prior determination" under CPLR § 2221. Plaintiff contends that Defendants "improperly raised

timeliness as an issue, as opposed to the merit of the demands" at the February 2020 conference, and essentially caused the Court to reverse its stance on the matter of whether Plaintiff was entitled to at least demonstrate entitlement to discovery notwithstanding the delay (NYSCEF doc No. 156 at 4). Plaintiff concludes that had the November 2019 transcript been available, the Court would not have focused on the issue of timeliness but instead would have allowed Plaintiff to proceed to demonstrate why she was entitled to additional depositions by citing specifically to the transcripts of the prior depositions, as directed in the Court's November 2019 order.

Defendants oppose Plaintiff's cross-motion and argue that Plaintiff is essentially seeking a second bite at the proverbial apple by attempting to relitigate an unsatisfactory ruling under the guise of an application for renewal/reargument (NYSCEF doc No. 155 at 11). Plaintiff reiterates that the Court's November 2019 order only extended Plaintiff an opportunity to demonstrate entitlement to additional discovery, and thus the ruling at the February 2020 conference was not a reversal but rather one single ruling made based on the extensive history of discovery in this proceeding. Defendants also note that Plaintiff had the opportunity to present the November 2019 transcript at the February 2020 conference but failed to do so. Defendants contend that even *assuming arguendo* the Court had the transcript in hand at the February 2020 conference, it would not have altered the Court's conclusion that Plaintiff failed to demonstrate a basis for discovery and the Court was mistaken to previously allow otherwise.

DISCUSSION

Defendants' Motion for Summary Judgment (Motion Seq. 003)

As a preliminary matter, the Court writes to address Defendants' application for an extension of time to move for summary judgment until sixty days after the last completed

deposition. In light of the determinations discussed *infra*, the Court grants Defendants' application for an extension of time to move for summary judgment until sixty days after the date of the last ordered discovery herein.

Given that the Court is ordering further discovery in this proceeding, Defendants' instant motion for summary judgment is denied without prejudice, to be renewed within sixty days after the last ordered discovery herein.

Plaintiff's Cross-Motion for Reargument or Renewal

As discussed *supra,* Plaintiff seeks an order granting Plaintiff leave to reargue or renew[5] both her prior cross-motion under Defendants' previous summary judgment motion and this Court's February 13, 2020 decision as expressed in the "So-Ordered" transcript of said conference ("the February 2020 order").

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 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, [1992], *rearg. denied* 81 NY2d 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 AD2d 971) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument, the court's attention

[5] The Court notes that as Plaintiff's application is premised on the theory that the Court overlooked or misapprehended its November 2019 determination at the February 2020 conference, the application is essentially one for solely reargument and not renewal. Nevertheless, the Court discusses both forms of relief as both are sought in Plaintiff's cross-motion.

must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790 1st Dept 1981).

A motion for leave to renew pursuant to CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc.2d at 133; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." (*Beiny v Wynyard*, 132 AD2d 190, *lv. dismissed* 71 NY2d 994).

Plaintiff's Prior Cross-Motion Under Motion Seq. 002

With respect to Plaintiff's application to reargue or renew her prior cross-motion under Defendant's prior summary judgment motion (Motion Seq. 002), the Court grants Plaintiff's application for leave to reargue. Upon reargument, the Court adheres to its prior ruling. The Court makes this determination given that Defendants have been directed in this decision to refile their summary judgment, which Plaintiff will have the opportunity to oppose with any and all arguments that were advanced in Plaintiff's prior cross-motion under Motion Seq. 002. The Court will consider these arguments when it evaluates Defendants' re-filed summary judgment motion seeking dismissal of the complaint, rendering a reargument of Plaintiff's cross-motion moot at this

juncture.

The February 2020 Order

With respect to Plaintiff's application to reargue or renew the Court's February 2020 order the Court grants Plaintiff's application for leave to argue. Upon reargument, the Court modifies the aforesaid February 2020 order to allow Plaintiff to pursue certain limited discovery in this proceeding. Plaintiff's application is thus granted in accordance with the further discovery ordered *infra* herein. Accordingly, the Court directs Defendants to comply with the following directives with respect to the four demands Plaintiff served upon Defendants following the November 2019 conference (NYSCEF doc No. 119).

With respect to Plaintiff's notice for discovery and inspection of a "certain Administration Agreement and a certain Lease Agreement," the Court is directing that, to the extent neither agreement is within Defendants' possession or control, Defendants shall, within 30 days, produce a *Jackson* affidavit attesting to "where the subject records [responsive to Plaintiff's requests] were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]).

With respect to Plaintiff's notice to take a deposition of a witness with actual knowledge of the accident on behalf of both Defendants, the Court is directing that within 30 days, Defendants must produce *Jackson* affidavits from representatives from both CSH and Ultimate Care NY. In the affidavits, representatives must attest that they are direct employees of each Defendant company, not a parent company or subsidiary and must certify that they have conducted a thorough examination of all employment records dating back to the time of Plaintiff's accident in 2011 and have come to a final determination that there is not a single present or former employee from either

company with actual knowledge surrounding the circumstances of Plaintiff's accident that can appear for deposition.

Finally, the Court grants leave for Plaintiff to notice any post-EBT demands stemming from the prior conducted depositions in this proceeding. All demands shall be made within 45 days and any demands not sought in this period will be deemed waived. Defendants shall respond to all post-EBT demands 30 days thereafter.

There will be no adjournments or extensions of the timeframe under which Plaintiff may seek further discovery pursuant to this order without prior written consent of this Court, and no further discovery or depositions shall be granted in this matter beyond what is detailed in this decision.

Finally, the Court directs that following the completion of the discovery outlined herein, the parties shall appear for a Microsoft Teams conference before the Court on Tuesday, July 13, 2021 at 10:00 AM.

CONCLUSION

Accordingly, it is hereby

ORDERED that the application of Defendants CSH Hungry Harbor LP and Ultimate Care New York LLC for an order extending Defendants' time to move for summary judgment to sixty (60) days after the completion of all parties' depositions (Motion Seq. 003) is granted to the extent that Defendants are directed to re-file their summary judgment motion within sixty (60) days after the last date of discovery ordered herein; and it is further

ORDERED that Defendants' motion for summary judgment dismissing the Complaint against them pursuant to CPLR § 3212 is denied without prejudice; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking leave pursuant to CPLR § 2221 to reargue or renew Plaintiff's prior cross-motion under Motion Seq. 002 is granted, and upon reargument, the Court denies Plaintiff's application as moot; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking leave pursuant to CPLR § 2221 to reargue or renew this Court's February 13, 2020 Decision and Order (as expressed in a hearing transcript) is granted, and upon reargument, this Court modifies its February 13, 2020

Decision and Order to allow Plaintiff to pursue certain limited discovery in this matter; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking either denial of Defendants' present summary judgment motion pursuant to CPLR § 3212 or a stay of said motion pursuant to CPLR § 2201 is granted to the extent that Defendants' motion is denied without prejudice; and it is further

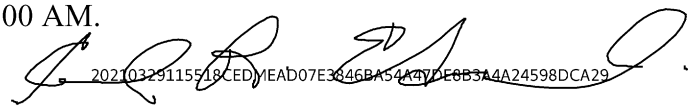
ORDERED that the branch of Plaintiff's cross-motion seeking an order pursuant to CPLR § 3124 compelling Defendants to comply with the discovery demands served by Plaintiff is granted to the extent that the Court is ordering the following limited discovery schedule in this proceeding:

a. With respect to Plaintiff's notice for discovery and inspection of a "certain Administration Agreement and a certain Lease Agreement," the Court is directing that, to the extent neither agreement is within Defendants' possession or control, Defendants shall, within 30 days, produce a *Jackson* affidavit for each respective agreement.
b. With respect to Plaintiff's notice to take a deposition of a witness with actual knowledge of the accident on behalf of both Defendants, the Court is directing that within 30 days, each Defendant must produce *Jackson* affidavits attesting that there is no witness from either Defendant company that can testify with actual knowledge about the circumstances surrounding Plaintiff's accident.
c. With respect to Plaintiff's post-EBT demands related to prior conducted depositions, the Court is directing that Plaintiff serve all demands within 45 days and Defendants shall respond 30 days thereafter. Any post-EBT demands not served in this period are deemed waived; and it is further

ORDERED that there will be no adjournments or extensions of the timeframe under which Plaintiff may seek further discovery pursuant to this Order without prior written consent of this Court; and it is further

ORDERED that no further discovery or depositions shall be granted in this matter beyond what is detailed in this Order; and it is further

ORDERED that the parties are directed to appear for a Microsoft Teams conference before the Court on Tuesday, July 13, 2021 at 10:00 AM.



3/29/2021
DATE

CAROL R. EDMEAD, J.S.C.

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