At Part IA 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, thereof, at 360 Adams Street, Brooklyn, New York, on the 10th day of May, 2021.

P R E S E N T:
HON. DAWN JIMENEZ-SALTA,
Justice.

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JEAN FERJUSTE,

Plaintiff,

- against -

SENATOR STREET ENTERPRISES INC. AND MERIDIAN PROPERTIES LLC,

Defendants.

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DECISION/ORDER

Index No. 519683/2018

Mot. Seq. 3

The following e-filed papers read herein: NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause
Petition/Cross Motion and
Affidavits (Affirmations) Annexed 65-71
Opposing Affidavits (Affirmations) 76
Reply Affidavits (Affirmations) 77-78

Plaintiff Ferjuste's ("Plaintiff") motion to reargue this Court's decision, dated December 10, 2020 regarding the issue of liability is denied pursuant to CPLR 2221. This Court did not overlook any facts or misapprehend the law regarding Plaintiff's motion for summary judgment on liability pursuant to CPLR 3212 against Defendant Senator Street Enterprises Inc. and Defendant Meridian Properties LLC's (collectively "Defendants"). Based upon the Examinations Before Trial ("EBT") of Plaintiff and Defendants' superintendent Guy Bernard ("Bernard"), there are questions of fact regarding any allegedly ongoing unrepaired water conditions pursuant to New York State Multiple Dwelling Law Section 78(1) and New York City Administrative Code Section 27-2005 as the cause of Plaintiff's bathroom ceiling to collapse on him while he was in the shower on July 24, 2018 at 301 Sterling Street, Apt. 2 J, Brooklyn, New York in the property owned and managed by Defendants.

Two (2) to three (3) years prior to the July 24, 2018 incident, Plaintiff testified at his EBT that there was "not really any water dripping down" from the bathroom ceiling above the bathtub. While there was "some bubbling coming out" from there, the bubbles would be powdery dry depending on whether the

shower had been used. Plaintiff never knew the cause of the dry bubbling above the shower. Each time it occurred, "it would be a little different". Two (2) or three (3) times a year for approximately two (2) to three (3) years, Plaintiff would call Defendant superintendent Bernard who would plaster and paint. There was no EBT testimony regarding any water conditions on the previous occasions. Plaintiff was in the shower on July 24, 2018 when he heard a noise and felt something on his "whole back" and head because the ceiling collapsed. He ran out of the tub and hit his left leg on the sink. He slid and fell on the ground because he was wet and had no control. He remained conscious.

Defendants' superintendent Bernard testified at his EBT that he previously corrected dry (mildew type) conditions in Plaintiff's apartment which occur as a result of keeping the door closed when taking a shower. There was no water condition but instead there were dry conditions in Plaintiff's shower over the three (3) years of repairing. He never received any complaints about water leaking in Plaintiff's bathroom. When he repaired the ceiling in the area above Plaintiff's shower in June 2018, he plastered and painted. There was no water leaking and nothing indicated that the ceiling would fall. If water is falling, he cannot plaster. He further testified that a leak from Plaintiff's apartment arose at 2:00 p.m. or 3:00 p.m. on July 24, 2018. He immediately responded and determined that the water was coming from the apartment above. When he went to check, the tenant above was not home. He turned off the water to the entire line of apartments. When he then returned to Plaintiff's bathroom, he saw that the crack in the ceiling was bigger. Consequently, he punctured the ceiling to allow accumulated water to drain out. When the tenant above arrived home within a few hours, Defendants' superintendent Bernard testified that the tenant above "apologized" for leaving the tub running. Defendants' superintendent Bernard restored water service to the line of apartments after 6:00 p.m. After restoring water service, he returned to Plaintiff's apartment and observed for 10 to 15 minutes when he determined that the condition was sufficiently stable to be repaired the following morning. When there is a drip from the ceiling, he testified that it could take two (2) to three (3) hours to completely dry. Consequently, he departed. He did not call a plumber since it was not a "big" emergency because he could fix it the next day. He would have taken the ceiling down if it were bad. At approximately 9:00 p.m. to 9:30 p.m., he was informed by the first floor tenant that the Fire Department was there because the ceiling fell in Plaintiff's apartment. When he rushed to Plaintiff's apartment, he was told by Plaintiff that he fell while taking a shower because the ceiling collapsed.

A motion to renew or reargue is addressed to the sound discretion of the Court. When the moving party demonstrates that the Court overlooked or misapprehended the law or facts of the case, it is proper to grant leave to reargue. See Pro Brokerage v. Home Insurance Co., 99 AD2d 971 (1st Dept., 1984); Hoey-Kennedy v. Kennedy, 294 AD2d 573 (2nd Dept., 2002); Bastien v. Motor Vehicle Accident Indemnification Corp., 62 AD3d 791 (2nd Dept., 2009).

New York State Multiple Dwelling Law Section 78(1) states that "Every multiple dwelling . . . shall be kept in good repair. The owner shall be responsible for compliance with provisions of this section; but the tenant shall also be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest."

New York City Administrative Code Section 27-2005 states that there shall be no interruption of essential service to impair the habitability of the dwelling unit.

The Appellate Division, Second Department ruled in Toussaint v. Ocean Avenue Apartment Associates, LLC, 144 AD3d 664 (2nd Dept., 2016) that in general, to impose liability for an injury caused by a ceiling collapsing because of a leak, a plaintiff must show that the defendant had prior notice, actual or constructive, of the leak and that the leak was never repaired. It further held that a defendant has constructive notice of a defect in premises liability case when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected. In addition, a defendant who has actual knowledge of a particular ongoing and recurring hazardous condition may be charged with constructive notice of each specific reoccurrence of that condition. Mere notice of a general or unrelated condition is insufficient to constitute constructive notice of the specific condition that caused the plaintiff's injuries in a premises liability case. The Second Department found in Toussaint v. Ocean Avenue Apartment Associates, LLC, supra that the owner and manager of the apartment building had actual notice of a recurring leak in the resident's bathroom ceiling and thus were liable for injuries allegedly sustained by the resident when a portion of the ceiling fell on her. Over a period of two (2) to three (3) years prior to the incident, the resident's family had made numerous complaints about the bathroom ceiling leaking and repairs were performed on the ceiling on four (4) to five (5) occasions. About three (3) days prior to the incident, complaints were made to the building superintendent that the ceiling was leaking again and that a hole had developed.

Unlike the situation in Toussaint v. Ocean Avenue Apartment Associates, LLC, supra, Plaintiff did not testify about any water conditions in his shower on the previous times that Defendants' superintendent Bernard came to plaster and paint. Consequently, he fails to address anything occurring before the date of loss of July 24, 2018. Thus, there are questions of fact about whether Defendants had actual and/or constructive notice regarding any allegedly unrepaired water conditions or whether they created the condition by the actions of Defendants' superintendent Bernard. See also Ellisy v. Eklecco, LLC, 56 AD3d 517 (2nd Dept., 2008) where the Appellate Division, Second Department maintained that in general, to impose liability for an injury caused by a ceiling collapsing because of a leak, a plaintiff must show that the defendant had prior notice, actual or constructive, of the leak and that the leak was never repaired. A general awareness that ceiling leaks may be present is legally insufficient to constitute notice of a particular ceiling leak for purposes of a personal injury action resulting from a collapsed ceiling. Consequently, the Appellate Division found in Ellisy v. Eklecco, supra that the injured plaintiff failed to raise a triable issue of fact as to whether the ceiling leak existed for a sufficient length of time prior to the accident to permit the defendants to remedy it.

WHEREFORE, it is ORDERED that Plaintiff Ferjuste's motion to reargue this Court's decision, dated December 10, 2020 regarding the issue of liability is DENIED pursuant to CPLR 2221 and Plaintiff's

request to strike the First Affirmative Defense of Comparative Negligence is DENIED.

This constitutes the Decision and Order of the Court.

Dated: May 10, 2021
Brooklyn, New York

E N T E R,

Dawn Jimenez-Salta J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court