Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

BALDASSARE MOSCHITTA and
KATHY MOSCHITTA,

Plaintiffs,

-against-

LEND LEASE (US) CONSTRUCTION LMB INC., BROADWAY TRIO, LLC, EMPIRE TRANSIT MIX, INC., PINNACLE INDUSTRIES INC., PINNACLE INDUSTRIES II, LLC, PINNACLE INDUSTRIES III, LLC and SMITELL LLC,

Defendants.

IAS Part - 42

Index No.: 703905/2017

Motion Date: 10/7/20

Motion Seq. Nos.: 7 & 8

The following papers numbered EF180 to EF221 read on this motion by defendants to reargue the branches of the court's prior Order dated June 16, 2020, which denied defendants' motion for summary judgment seeking dismissal of the plaintiff's Labor Law §§ 240(1) and 241(6) causes of action, and upon re-argument, to dismiss plaintiffs' Labor Law §§ 240(1) and 241(6) causes of action; and motion by plaintiffs to reargue the branches of the court's June 16, 2020 Order, which denied their motion for summary judgment pursuant to CPLR § 3212 on their claims pursuant to Labor Law §§ 200 and 241(6).

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF180 - EF214
Answering Affidavits - Exhibits	EF215 - EF218
Reply Affidavits	EF219 - EF221

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Baldassare Moschitta ("Mr. Moschitta") in this labor law action seeks damages for personal injuries sustained on July 19, 2016 at a construction site located at 217 West 57th Street, New York, New York ("job site"); and Kathy Moschitta ("Ms. Mischiita ") is suing derivatively (collectively, the "plaintiffs"). At the time of the accident, plaintiff was in the course of his employment with Empire Transit Mix, Inc. ("Empire"), and was delivering and unloading cement at the job site. The property where the accident occurred was owned by the Smitell, LLC ("Smitell, LLC"); Lend Lease US Construction LMB ("Lend Lease") was the general contractor for this construction project; and Pinnacle Industries Inc. ("Pinnacle") was the contractor responsible for all of the cement and concrete work at the site (collectively, the "defendants").

From the onset, it should be noted that the Honorable Maureen Healy no longer sits in the Supreme Court, Queens County. As a result, this motion has been reassigned to the undersigned. (*see,* CPLR § 2221; 22 NYCCR § 202.8(a); *Dalrymple v. Martin Luther King Community Health Ctr.,* 127 AD2d 69 [2d Dept 1987]; *Fernandez v. Eleman*, 25 AD3d 752 [2d Dept 2006]; *Totaram v. Gibson*, 179 AD3d 451 [1st Dept 2020]; *Pettus v. Board of Directors,* 155 AD3d 485, 486 [1st Dept 2017]). Now, in a prior Order, dated June 16, 2020, Justice Healy held:

> (1) granted that branch of defendants' motion which sought summary dismissal of plaintiffs' claims pursuant to labor law 241(6), with respect to all regulations alleged, except with regards to 23-1.7(b)(1)(i) and 23-1.7(f). The court found that plaintiffs raised issues of fact with regards to the causes of action under 23-1.7(b)(1)(i), and 23-1.7(f);
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> (2) denied that branch of defendants' motion which sought to dismiss plaintiffs' Labor Law § 240(1) claim;
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> (3) granted the branches of defendants' motion which sought summary dismissal of plaintiffs' Labor Law § 200 and common law negligence claims against Smitell and Lend Lease;
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> (4) denied that branch of defendants' motion which sought summary dismissal of plaintiffs' Labor Law § 200 and common law negligence claims against Pinnacle;
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> (5) dismissed all claims as to Broadway Trio, LLC;
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> (6) granted plaintiffs' motion for summary judgment on their Labor Law § 240(1) claim; and
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> (7) denied the branches of plaintiffs' motion which sought summary judgment in plaintiffs' favor on their Labor Law §§ 241(6) and 200 and common law negligence claims.

By the instant motions, plaintiffs and defendants separately move to re-argue the branches of the court's decision which denied parts of their prior motions, as noted above. The motions to re-argue are opposed by the respective parties. It is well established that motions for re-argument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its determination (*see* CPLR § 2221[d]; *Fuessel v. Chin*, 179 AD3d 899 [2d Dept 2020]; *Deutsche Bank Nat. Trust Co. v. Ramirez*, 117 AD3d 674 [2d Dept 2014]; *Everhart v County of Nassau,* 65 AD3d 1277 [2d Dept 2009]). CPLR § 2221 provides that a motion for leave to reargue "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" (CPLR § 2221[d][2]; *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2012]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced or which could have been advanced (*see Veeraswamy Realty v. Yenom Corp.* 71 AD3d 875 [2d Dept 2010]; *Woodys Lumber Co., Inc. v. Jay Ram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]; *Williams v. Board of Educ. of City School Dist. of New York City,* 24 AD3d 458 [2d Dept 2005]; *Simorz v. Mekryari,* 16 AD3d 543, [2d Dept 2005]). Nor is it one that provides a platform for the presentation of arguments different from those already presented (*see V. Veeraswamy Realty v. Yenom Corp.,* 71AD3d 874 [2d Dept 2010]; *Woody's Lumber Co., Inc. v. Jayram Realty Corp.,* 30 AD3d 590 [2d Dept 2006]; *Williams v. Board of Educ. of City School Dist. of New York City,* 24 AD3d 458 [2d Dept 2005]; *Simon v. Mehryari,* 16 AD3d 543 [2d Dept 2005]). Here this court finds that, except with regards to the one section of the Labor Law noted below, the movants' papers fail to establish that the court overlooked, misapprehended either the facts or law or otherwise mistakenly arrived at its prior determination.

Plaintiffs' Motion to Re-argue

Upon re-argument, plaintiffs contend that after finding that 12 NYCRR 23-1.7(b)(1)(i) and 23-1.7(f) are applicable to the facts at hand, the Court failed to take the next step and grant summary judgment with regards to these regulations. Plaintiffs argue that the facts in this action are not in dispute, and a finding of applicability should have resulted in summary judgment in plaintiffs' favor. The court found, however, that there were issues of fact with respect to these regulations. Upon re-argument, this court grants that branch of plaintiffs' motion which seeks summary judgment on their claim based upon 12 NYCRR 23-1.7(b)(1)(i). Plaintiffs established, *prima facie*, that Mr. Moschitta was not provided with proper protection under Labor Law § 240 (1), that the failure to provide such protection *also* violated a specific and applicable provision of the Industrial Code (*see* 12 NYCRR 23-1.7(b)(1)(i)), and that this failure was the proximate cause of his alleged injuries (*see Norero v. 99-105 Third Avenue Realty, LLC,* 99 AD3d 727 [2d Dept 2012] (emphasis added); *Ortiz v. 164 Atl. Ave., LLC*, 77 AD3d 807, 808-810 [2d Dept 2010]).

Plaintiffs also submit with respect to 12 NYCRR 23-1.7(e)(1) and (2), that the Court improperly dismissed these regulations as "inapplicable" despite the testimony indicating that the concrete block was being utilized as both a working area and passageway. The court noted that 12 NYCRR 23-1.7(e)(1) is inapplicable as the accident did not involve a "passageway;" and that 12 NYCRR 23-1.7(e)(2) was also inapplicable as the concrete block was not part of a "floor," "platform" or similar area, and there was no evidence of accumulations of debris or scattered tools or sharp projections. The court noted that the term "passageway" pertains to an interior or internal way of passage inside a building (*see Quigley v. Port Authority of N.Y. and N.J.,* 168 AD3d 65 [1st Dept 2018]). Plaintiff's accident, which occurred in an outdoor area, is entirely distinguishable from an accident occurring in an internal hallway or interior side of a doorway.

Therefore, the court adheres to that branch of its prior Order which found that section 12 NYCRR 23-1.7(e)(1) is inapplicable to the subject accident.

Defendants Motion to Reargue

In moving to reargue, defendants submit that the Court overlooked facts and the law when it denied its motion to dismiss plaintiffs' Labor Law §§ 240(1) and 241(6) causes of action, the latter with regards to the Industrial Code sections 23-1.7(b) and 23-1.7(f): Defendants argue that the court should also have dismissed the claims based upon 12 NYCRR 23-1.7(b) and 12 NYCRR 23-1.7(f). In previously moving for dismissal, defendants argued that 23-1.7(f) of the Industrial Code governs vertical passages and does not apply under the facts of this case. Defendants noted that because there was no allegation that there was a ramp or runaway to ascend and descend the concrete block; that the area where Mr. Moschitta stood prior to his fall was not supposed to be stood on and would have prevented the alleged incident. In opposition, however, plaintiffs argued that, based on how he was instructed to back his truck in, he could not access the hopper and perform his job without standing on the concrete block (*see Gonzalez v. Pon Lin Realty Corp.*, 34 AD3d 638 [2d Dept. 2006]; *O'Hare v. City of New York*, 280 AD2d 458 [2d Dept. 2001]). In doing so, the court found that plaintiff raised an issue of fact regarding the applicability of 12 NYCRR 23–1.7(f), and thereby denied that branch of defendants' motion which sought to dismiss the Labor Law § 241(6) claim altogether. The court hereby adheres to its finding that an issue of fact is raised as to the applicability of 12 NYCRR § 23-1.7(f), and thus summary dismissal of plaintiffs' claims under this provision is not warranted.

Furthermore, in the prior Order, the court also held that whether the two-foot hole into which the injured plaintiff stepped was a "hazardous opening" within the meaning of 12 NYCRR § 23-1.7(b)(1) of the Industrial Code (12 NYCRR) -- and, thus, a violation of section Labor Law § 241(6) -- was a question of fact for the jury's determination, making summary judgment on the

section 241 (6) claim inappropriate. For reasons provided *supra*, the court has reconsidered this claim, and hereby grants the branch of plaintiffs' motion for summary judgment on their Labor Law § 241(6) claim premised upon a violation of 12 NYCRR § 23-1.7(b)(1)(i).

Conclusion

Upon re-argument, this court grants the branch of plaintiffs' motion which seeks summary judgment on their claim based upon 12 NYCRR § 23-1.7(b)(1)(i).

With regards to the remaining claims and assertions by plaintiffs and defendants, this court finds that the movants' papers fail to establish that the court overlooked, misapprehended either the facts or law or otherwise mistakenly arrived at its prior determination. The movants merely reiterate their previous positions, and proffer new arguments not previously advanced. Accordingly, the motions for leave to reargue are denied, except as provided above.

Dated: February 18, 2021
Long Island City, New York

Maurice E. Muir

MAURICE E. MUIR, J.S.C.

FILED

2/22/2021
10:23 AM

COUNTY CLERK
QUEENS COUNTY