At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of December, 2021.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

----------X DECISION / ORDER

ONEIL CAMPBELL, Index No.: 509047/2018

Plaintiff, Mot. Seq. 6
Date Sub: 9/30/21

-against-

NA BROADWAY REALTY LLC and ANIA PROPERTY MANAGEMENT, INC.,

Defendants.
----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations)	72-81, 43-56, 60-68
Opposing Affidavits (Affirmations)	84
Reply Affidavits (Affirmations)	85-86

Upon the foregoing papers, plaintiff Oneil Campbell (plaintiff), moves (in motion sequence six) for an order, pursuant to CPLR 2221 (d), granting him leave to reargue his prior motion dated December 22, 2020 and upon such reargument, vacating that portion of the court's June 9, 2021 decision and order that denied his motion for partial summary judgment and to grant him partial summary judgment on the issue of liability. For the reasons which follow, plaintiff is granted leave to reargue, and, upon reargument, the court adheres to its prior decision.

Background

Plaintiff commenced this action against NA Broadway Realty LLC and Ania Property Management, Inc. (collectively defendants) for personal injuries he sustained on May 2, 2017 while employed as a laborer with Roc Jam Installers Inc. (Roc Jam). His tasks involved sanding and refinishing the wooden floors inside of three apartments in a large apartment building. Plaintiff contends that he was injured when the polyurethane that he was applying to the floor spontaneously ignited and caught fire. The complaint asserts causes of action against defendants, the owner and managing agent of the subject apartment building, respectively, for common law negligence, Labor Law § 200 and Labor Law § 241 (6). Defendants answered the complaint. A Note of Issue was filed on October 28, 2020. The case is on the trial calendar.

The Prior Summary Judgment Motions

On December 22, 2020, plaintiff moved (mot. seq. four) for partial summary judgment on the issue of liability on his Labor Law § 200 and common law negligence causes of action. Plaintiff proffered that his injuries arose from dangerous premises conditions, specifically, that the windows in the apartment did not open, the apartment door got stuck and he could not exit, and that the gas pilot light to the stove was not turned off.

In support of his contentions, plaintiff submitted his deposition transcript, in which he testified that after his co-worker screamed and ran out of the apartment, he observed the flames, and attempted to open the two living room windows that provided access to the fire escape, but both windows failed - one of the windows was painted shut, and the second window, which he had previously been able to open slightly, would not open any further.

Plaintiff had noticed the condition of the windows prior to the fire when he tried opening them before commencing his work but testified that he did not recall whether he complained to anyone about the problem. Plaintiff testified that as he could not open the windows, he was forced to run across the apartment to the exit door. He could not open the door because it too was initially stuck, however, he eventually managed to escape into the public hallway, where he sought assistance. During the time that he was trapped in the apartment, plaintiff sustained significant burns to his body.

Plaintiff also submitted the deposition transcript of the managing agent's vice president, Iraklis Anagnostopoulos (Anagnostopoulos). Anagnostopoulos testified that none of defendants' representatives made sure that the subject apartment was free from any hazards or conditions that could facilitate the combustibility of the polyurethane prior to plaintiff and his co-workers beginning the work. When asked whether defendants did anything to make the apartment safe for the application of polyurethane, Anagnostopoulos testified, "I wouldn't know why it wouldn't be safe." He also testified (erroneously) that only National Grid could shut off the gas to the stove. According to Anagnostopoulos, it never crossed his mind whether or not the pilot light in a gas stove should be turned off while polyurethane was being applied to the floors in an apartment. Anagnostopoulos contends that he was unaware of any New York City or State laws, rules or regulations that apply to the application of combustible materials or products, and he testified that he believed that it was Roc Jam's responsibility to turn off the gas to the stove.

With respect to the purportedly defective apartment windows, Anagnostopoulos did not recall whether he or any of defendants' representatives inspected the windows to see if

they were dirty or broken. Anagnostopoulos testified that if someone were to exit from either one or both of those windows, they would have had access to the fire escape. He did not recall ever opening or closing those windows, admitting, though, that window replacement was part of the work that was going to be done in the apartment where plaintiff was working on the day of the accident. The apartment had very recently been painted, and the photos provided indicate that metal framed windows were installed after the fire. Anagnostopoulos claimed that prior to the incident, no one from Roc Jam, nor anyone else for that matter, complained to him that the windows in the apartment could not be opened. He could not say if anyone had inspected the paint job in the three vacant apartments after it was completed and before the floor refinishing started.

Plaintiff also submitted an affidavit from his expert witness, Eugene J. West (West), a purported expert in fire causation and scene reconstruction, and the FDNY investigation and incident report. West reviewed the FDNY investigation report and noted that the report concluded that the fire originated with an open flame from the pilot light in the apartment's stove, which was not shut off, which in turn spontaneously ignited the vapors of the polyurethane. West stated that the building did not have a centrally monitored fire alarm system and there were no sprinklers in the building. West stated that due to the volatility of polyurethane vapors, the New York City Fire Code requires that all sources of ignition be shut off before the product is applied. West noted that New York City Fire Code (of 2014, Article 15), section 1510.1.2, subsections 5 and 6, require that gas burners, pilot lights and other sources of ignition in "flammable vapor areas" be shut off prior to commencing work. West further noted that New York City Fire Code Section 1510.5

requires appropriate mechanical ventilation, at a minimum rate of one cubic foot per minute per square foot in the area being refinished, to be exhausted to the outdoors while floors are being refinished.

In addition, West asserted that, contrary to Anagnostopoulos's contention, gas service to an individual apartment stove could be shut off by a building superintendent, a plumber or even an apartment resident, by closing the valve located on the gas supply line behind the stove. West stated that this is a relatively common action that occurs every time a kitchen stove is installed, repaired or removed, and can be accomplished in less than sixty seconds.

West concluded that, due to the fact that one of the two living room windows could not be opened and the second could only be opened a little bit, ventilation in the subject apartment was extremely limited, which allowed for a high concentration of vapors inside the apartment. Air entering into the apartment from the partially opened window then caused the vapors from the polyurethane to move away from the window and toward the kitchen stove at the opposite end of the apartment, causing the vapors to make contact with the gas coming from the stove's pilot light and ignite. West concluded that failing to shut off the gas to the stove's pilot light prior to the work commencing, as required by the New York City Fire Code, was the cause of the fire and was directly attributable to a lack of supervisory oversight or a lack of due diligence on defendants' part, who had to make sure there were code compliant protocols in place during the floor refinishing process. West concluded that, therefore, defendants' violations of the Fire Code, in particular, the failure to shut off the pilot light, was a substantial factor in causing plaintiff's injuries. West also

concluded that defendants' failure to provide adequate mechanical ventilation (i.e., fans) and failure to ensure that the windows opened for access to the fire escape, further contributed to plaintiff's injuries.

On April 13, 2021, defendants opposed plaintiff's motion, and argued that plaintiff's accident was caused by his misuse of polyurethane in violation of New York City Fire Code § 1510 and by Roc Jam's negligence. In that regard, defendants argued that plaintiff was aware of the risks of using polyurethane - - he testified that he had three years of experience applying polyurethane and had completed OSHA training specific to floor refinishing and use of polyurethane - - but consciously disregarded the risks. Defendants noted that when plaintiff was unable to open the windows in the apartment, he did not report the lack of proper ventilation (and lack of a second means of egress) to anyone, but instead proceeded to apply the polyurethane. Plaintiff also did not check to ensure that there were no open flames in the apartment, testifying that it was not his job to inspect for open flames, despite his alleged awareness that there was a stove in the apartment with a pilot light.

Defendants also maintained that they did not supervise plaintiff's work and had no notice of any dangerous condition. Defendants argued that they did not violate the Fire Code because they did not use polyurethane improperly, and all other purported code violations were not the proximate cause of plaintiff's accident and thus are irrelevant. To that end, defendants argued that West's affidavit should be disregarded to the extent that he opined, without any basis in fact or law, that it was defendants' responsibility to ensure

that conditions on the premises were safe for the application of polyurethane before the work commenced.

On April 13, 2021, defendants also cross-moved (mot. seq. five) for summary judgment, seeking an order dismissing all claims against them on the grounds that they did not control the means and methods of plaintiff's work, and because plaintiff was aware of the risks of polyurethane but consciously disregarded them, thus causing his accident. Defendants filed a statement of undisputed material facts pursuant to the Uniform Rules for the Supreme Court, 22 NYCRR § 202.8-g.

On April 20, 2021, plaintiff filed a reply in support of his motion and also opposed defendants' cross motion. Plaintiff also filed a response to defendants' statement of undisputed material facts. Within his response, plaintiff admitted the following of defendants' statements:

> (1) "It is undisputed that on May 2, 2017, the plaintiff was performing floor refinishing work at the subject premises. While performing said work in a one-bedroom apartment at the premises, the polyurethane that was being used by the plaintiff ignited, causing a fire in the apartment that resulted in plaintiff's injuries;"
>
> (2) "The cause and origin report prepared by the FDNY determined that the polyurethane was ignited by a pilot light;"
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> (3) "The plaintiff had been working in floor finishing and with polyurethane for three (3) years prior to the accident. The plaintiff underwent OSHA training with respect to floor finishing;" and
>
> (4) The defendants NA BROADWAY REALTY LLC and ANIA PROPERTY MANAGEMENT INC. did not direct or control the plaintiff's work, or the work of plaintiff's employer in general."

On April 22, 2021, the court heard virtual oral argument and the motions were fully submitted.

The Court's June 9, 2021 Decision and Order

By decision and order dated June 9, 2021 (the Order), the court denied plaintiff's summary judgment motion in its entirety, denied defendants' motion with respect to the common law negligence and Labor Law § 200 causes of action, and granted defendants summary judgment on the plaintiff's Labor Law § 241 (6) cause of action.

In the Order, the court found that plaintiff's accident and resulting injuring were caused by a combination of both the means and methods of the work and dangerous premises conditions which prevented plaintiff from exiting the apartment in a timely manner. In that regard, the court found that the fire was caused by plaintiff's supervisor's failure to check that the gas had been turned off and to provide him with a fan and a fire extinguisher, but that the plaintiff's injuries were caused in large part by the dangerous premises conditions which did not enable him to quickly exit the apartment.

The court found that while plaintiff was not the sole proximate cause of his accident and injuries, he nevertheless was not entitled to summary judgment because he did not provide any corroboration, as required by case law, for his version of how the accident occurred. To that end, the court found that West was not present during the accident and only based his opinion on plaintiff's deposition testimony and the FDNY report. Also, the court may not assess a plaintiff's credibility on a motion for summary judgment. The court noted that none of plaintiff's co-workers who were present at the time of the accident were deposed, that plaintiff did not see the fire begin, and did not know what caused the fire to

start. The court further noted that while West concluded that the windows were not adequately open to provide proper ventilation, the record did not indicate how much the partially functional window was open. Thus, the court held that plaintiff had failed to establish, as a matter of law, the manner in which the accident occurred or his claims that the second window did not open at all and that the door was initially stuck, preventing him from exiting the apartment.

With respect to defendants' motion, the court determined that defendants were not entitled to summary judgment on the common law negligence and Labor Law § 200 claims, since defendants had not established that they had inspected the apartment before the floor refinishing work began, or after it was painted. Defendants thus failed to establish a prima facie case that the subject apartment was safe for the work to start. However, the court granted defendants summary judgment on the Labor Law § 241 (6) cause of action, as plaintiff did not oppose this branch of defendants' motion and as the sections of the Industrial Code cited in plaintiff's Bill of Particulars were either too general or are inapplicable.

Plaintiff's Instant Motion to Reargue

On July 15, 2021, plaintiff filed a notice of entry of the Order and also filed the instant motion to reargue. Plaintiff contends that the court erred when it held that plaintiff's version of events required corroboration of the facts and that factual issues remained as to whether the fire was started because of an open pilot light (which required the court to make an impermissible credibility determination) and not a co-worker's (improper) use of the stove, or something else. The court noted in footnote 2 on Page 10 that stoves with

open pilot lights were banned in New York City in 1980 unless they had already been installed. A stove with an electric ignition would not have spontaneously ignited the vapors. The FDNY report stated that this was the type of stove that was in the apartment. Whether plaintiff was aware that stoves could have open pilot lights was not explored in his deposition.

Plaintiff argues that the court misapprehended the fact that there is no dispute that the plaintiff was injured by the fire caused when the stove's pilot light ignited the polyurethane vapors. In support of this contention, plaintiff points out that he admitted these factual statements which were made in defendants' statement of undisputed facts. Plaintiff states he also admitted to the defendants' statement that the FDNY determined that the polyurethane was ignited by gas from an open pilot light. Plaintiff contends that the pre-*Rodriguez v City of New York*, 31 NY3d 312 (2018) and pre-Rule 202.8-g precedents cited by the court in support of the "corroboration" requirement are readily distinguishable, as this case involves factual determinations that are either stipulated to or admitted. Specifically, plaintiff argues that the determination that the fire was started by an open pilot light is not based on plaintiff's uncorroborated testimony, but on the FDNY report and defendants' own admissions in their statement of undisputed facts. Plaintiff also contends that First and Second Department precedents which address the analogous requirements of the Rules of the Commercial Division of the Supreme Court, 22 NYCRR § 202.70 (g) rule 19-a (c), regarding the submission of statements of undisputed material facts, provide motion courts with discretion whether undisputed facts may be deemed admitted, but 202.8-g does not, support his argument.

Plaintiff contends that since there is no question of fact that the polyurethane was ignited by an open pilot light, the only remaining determination is a question of law - i.e., whether defendants, as building owners, are responsible for compliance with the New York City Fire Code, specifically section 1510.1.2 (5), which requires that gas burners, pilot lights, electrical devices and other sources of ignition be shut off prior to the commencement of work with flammable materials. Plaintiff argues that since defendants are subject to a non-delegable duty to comply with the New York City Fire Code, including that section, plaintiff's motion for partial summary judgment on liability must be granted.

Plaintiff further argues that the accident was witnessed by plaintiff's co-worker, Kevin, and that defendants' painting crew and building superintendent were in a position to controvert plaintiff's testimony about the inoperability of the windows and access to the fire escape, but they did not. In addition, plaintiff contends that precedent from all four Appellate Divisions recognize that in order to defeat a summary judgment motion brought under Labor Law §§ 240 (1), 241 (6) and 200 causes of action due to issues of credibility, a defendant must demonstrate a bona fide issue regarding plaintiff's credibility as a material fact, something that defendants here cannot do, since they admitted as material facts that the fire was caused by an open pilot light and the absence of adequate ventilation. Moreover, plaintiff argues that the case law holds that if a plaintiff was the sole witness to the accident it does not preclude summary judgment in his favor. Plaintiff argues that defendants cannot point to any bona fide issue regarding plaintiff's credibility as a material fact.

Finally, plaintiff contends that since defendants had a nondelegable duty to comply with the New York City Fire Code (as the responsibility for turning off the gas pursuant to the Fire Code falls squarely on the building owner), it was defendants' responsibility to comply with it, and therefore, the court should grant plaintiff partial summary judgment on the issue of liability on his Labor Law § 200 and negligence causes of action.

Defendants' Opposition

On September 23, 2021, defendants filed their opposition to plaintiff's motion, wherein they contend that the court properly applied the law to the facts of the case in rendering its underlying decision. Defendants aver that plaintiff failed to establish the manner in which his injuries occurred and failed to seek depositions of his co-workers or any eyewitnesses. In addition, defendants aver that West's conclusions lack a proper foundation in science, including an explanation of how an allegedly malfunctioning window caused the fumes to "vector" toward the stove and contributed to the ignition of the vapors from the polyurethane.

Defendants contend that even if the court deems certain facts to be admitted, thus supporting plaintiff's underlying motion for summary judgment, at the very least, triable issues of fact they raise overcome the motion and preclude granting summary judgment to plaintiff. In that regard, defendants argue that even if the court finds that the subject incident was caused by an open pilot light, plaintiff has still failed to make a prima facie showing of his entitlement to summary judgment by eliminating all material issues of fact.

To that end, defendants contend that plaintiff was the sole proximate cause of his accident, as he was aware of the risks of using polyurethane and consciously disregarded

the risks. They point out that despite being aware that the windows did not open properly, that he was not provided with a fan, and despite his failure to verify that there were no open pilot lights, plaintiff commenced the application of the polyurethane. Defendants argue that it was plaintiff's negligent use of the polyurethane that was the sole proximate cause of the accident.

Further, defendants submit that it is undisputed that they did not supervise the means or the methods of plaintiff's work, and they note that the Court of Appeals has held that liability may not attach on a Labor Law § 200 claim where defendants did not supervise or control the plaintiff's work, or where defendants did not have notice of any hazardous or defective condition. Moreover, defendants argue that plaintiff's reliance on the NYC Fire Code is misguided, as a plain reading of New York City Fire Code §1510 applies to the person actually applying the combustible flooring material, and not to the property owner.

Finally, defendants point out that plaintiff does not seek to reargue that portion of the court's decision which granted defendants partial summary judgment on his Labor Law 241 (6) cause of action, and therefore, that determination should not be disturbed.

Plaintiff's Reply

On September 28, 2021, plaintiff filed his reply, in which he reiterates his argument that the statements that he admitted to in defendants' statement of undisputed facts should be deemed admitted by the court. To defendants' alternative argument, that plaintiff should not be granted summary judgment because triable issues of fact remain, plaintiff contends that the "laundry list" of issues raised by defendants have already been addressed by the court, against defendants, and since defendants have not moved to reargue the prior

decision, these issues cannot now form the basis for their argument. Finally, plaintiff points out that defendants' contention that plaintiff's co-worker, Kevin, did not witness the accident is factually inaccurate.

Discussion

"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" (CPLR 2221 [d] [2]). A motion for reargument is addressed to the sound discretion of the court that decided the original motion (*see Fuessel v Chin*, 179 AD3d 899, 900 [2d Dept 2020]; *Bueno v Allam* 170 AD3d 939, 940 [2d Dept 2020]). A court providently exercises its discretion in granting a party's motion for leave to reargue when the party has satisfactorily demonstrated the manner in which the court overlooked or misapprehended matters of fact or law in its original decision (*see Barrett v Jeannot*, 18 AD3d 679, 680 [2d Dept 2005]; *Matter of Progressive Northeastern Ins. Co. v Cipolla*, 119 AD3d 946, 947 [2d Dept 2014]).

Here, the court grants plaintiff leave to reargue his motion for partial summary judgment and the court's Order, pursuant to CPLR 2221 (d) (2), and upon same, adheres to its original decision.

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]).

Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

"[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff" (*Gordon v Muchnick*, 180

AD2d 715 [2d Dept 1992]; *see also Zhili Wang v Barr & Barr, Inc.*, 127 AD3d 964, 965 [2d Dept 2015]).

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *see also Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Comes*, 82 NY2d at 877). "This duty may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control" (*Casanova v Construction by Design NYC LLC*, 2015 NY Slip Op 30447(U), * [Sup Ct, Queens County 2015], citing *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384 [4th Dept 2013]; *Clavijo v Universal Baptist Church*, 76 AD3d 990 [2d Dept 2010]; *see also LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 972 [2d Dept 2009]).

"Where a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*LaGiudice*, 67 AD3d at 972; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes*, 82 NY2d at 877; *see also Lombardi v Stout*, 80 NY2d 290, 295 [1992]). However,

unlike injuries arising from the means and methods of the work, it is not necessary to prove supervision and control over the worker where the injury arises from a premises condition at the job site (*see Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004]).

In the instant matter, plaintiff has failed to meet his burden of establishing his prima facie entitlement to summary judgment as a matter of law with respect to his common law negligence and Labor Law § 200 causes of action (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). While plaintiff has established that defendants, as the owner and managing agent of the apartment building, had a duty to maintain the apartment and building so as to provide plaintiff with a safe place to work (see *Comes*, 82 NY2d at 877), he has failed to establish that defendants breached that duty or that defendants' breach was the proximate cause of his injury (see *Zhili Wang*, 127 AD3d at 965; *Gordon*, 180 AD2d at 715).

Here, there are several conditions that may have contributed to plaintiff's injuries: the open pilot light which purportedly caused the polyurethane vapors to ignite, the windows that were either painted shut or would not fully open, and the door that was recently painted and became stuck. Even if the court deems the statements of fact regarding how the fire started as undisputed, there is still the issue of whether the plaintiff would have sustained his injuries but for the windows being inoperable and the door having become "stuck" after his co-worker exited the apartment. While plaintiff testified that he could not open the two windows sufficiently to escape onto the fire escape, plaintiff has not shown that defendants created that condition or had actual or constructive notice of the windows' failure to fully open (*see LaGiudice*, 67 AD3d at 972; *Chowdhury*, 57 AD3d at

128). Plaintiff has not submitted any evidence demonstrating that defendants knew or had reason to know of the windows' condition (*see Ford v Luigi Caliendo & Sons, Inc.*, 305 AD2d 368, 369 [2d Dept 2003] [where plaintiff laborer was injured when vapors of a floor sealant which he used ignited, court reversed lower courts grant of summary judgment in favor of defendant general contractor where issues of fact existed as to whether defendant knew or should have known of the alleged dangerous condition which caused plaintiff's injuries]). At his deposition, plaintiff admitted that he did not inform Anagnostopoulos or defendants' representatives (i.e., the super) about the windows' purported failure to fully open, and Anagnostopoulos confirmed that no one from Roc Jam ever informed him of their condition. Anagnostopoulos could also not recall any other complaints about the windows, and he did not recall having inspected the windows. Nor does Anagnostopolous' testimony that the windows were going to be replaced suggest that defendants knew or had reason to know that they were inoperable on the day of the plaintiff's accident.

In addition, West's report, including his conclusion regarding inadequate ventilation in the apartment due to the inoperable windows and their failure to provide access to the fire escape, is conclusory and does not establish, for the purpose of making out plaintiff's prima facie summary judgment burden, that defendant's purported negligence was the proximate cause of his injuries (*see Carrasco v Weissman*, 120 AD3d 531 [2d Dept 2014] [expert's conclusory and unsubstantiated report failed to raise triable issue of fact in opposition to summary judgment motion]). Plaintiff's expert did not examine the location, which was substantially burned and remodeled after the fire, but relied upon EBT testimony and the FDNY report, and therefore, his report is insufficient to meet plaintiff's

burden (*see Arrendondo v Valente*, 94 AD3d 920, 922 [2d Dept 2012]; *Kretowski v Barender Condominium*, 57 AD3d 950, 952 [2d Dept 2008]). Furthermore, the New York City Fire Code is not a statute, and its violation is not negligence *per se*, but only some evidence of negligence, which is insufficient as a basis for summary judgment. *Elliott v. City of New York*, 95 NY2d 730 [2001].

With respect to the open pilot light and the fire, even if the court deems the defendants' statement of undisputed facts to be admitted by plaintiff, these "facts" are not dispositive in determining who was actually responsible for causing the fire, since it is disputed whether plaintiff, his employer, or defendants, were responsible for ensuring that the pilot light was off prior to his commencing the work[1]. Further, the mere presence of a stove with a pilot light and not an electric ignition, in and of itself, does not constitute a defective condition at the premises (*see Fiallos v Vin's Crown Realty Associates*, 70 AD3d 630, 630 [1st Dept 2010]).

Moreover, as the court determined in the prior Order, even if plaintiff's testimony is completely true and accurate, issues of fact exist as to whether plaintiff's injuries occurred from the means and methods of his work (i.e., in his failure to use a fan or a fire extinguisher, his failure to check that the pilot light was turned off, his proceeding with the work despite the lack of ventilation) versus the extent that his injuries would have been prevented had conditions at the premises been safe (i.e., had the windows opened properly)

[1] The only facts that could be admitted pertinent to how the fire started would be that: (1) the polyurethane ignited causing a fire that resulted in plaintiff's injuries; (2) that the FDNY determined that the polyurethane was ignited by a flame from an open pilot light; (3) that defendants did not control or supervise plaintiff's work; and (4) that plaintiff was experienced in applying polyurethane and received OSHA training.

(*see Fiallos v Vin's Crown Realty Assoc,* 70 AD3d 630 [2d Dept 2010] [where plaintiff was injured when a fire erupted while he was sanding and applying lacquer to wooden floors, questions of fact existed that precluded granting defendant building owner summary judgment]).

Accordingly, on this record, summary judgment in favor of plaintiff is not warranted. The court has considered the remaining contentions of the parties and finds them to be without merit. It is therefore,

ORDERED that plaintiff's motion (mot. seq. six) for leave to reargue the court's decision denying his prior motion for partial summary judgment is granted, and, upon reargument, the court adheres to its original decision.

All relief not granted herein is denied.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.