SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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KARINA LAXMI MAHTANI,

Plaintiff,

- v -

96TH STREET LOFTS LLC, ROCK BUILDERS INC, RENT A UNIT NY INC., SPRING SCAFFOLDING LLC,

Defendants.

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INDEX NO. 158613/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 118, 119, 120, 123, 124, 125, 130

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this premises liability action, plaintiff moves, pursuant to CPLR 2221(d), for leave to reargue the motion for summary judgment dismissing the complaint and all cross-claims as against it made by defendant Spring Scaffolding LLC (Spring); and, upon reargument, for an order denying the motion. Spring opposes.

Factual and Procedural Background

As set forth in this Court's December 12, 2022 order (NYSCEF Doc No. 83), plaintiff commenced this action in September 2021 after she was allegedly injured when she tripped and fell on "an industrial nut and bolt" that was "partially embedded into and jutting out from the asphalt" of the roadway located in front of 223 East 96th Street in Manhattan (the premises) (Doc No. 1). She asserted causes of action for negligence against defendants, alleging that Spring was hired to work on the premises by defendant 96th Street Lofts LLC (96th Street), the purported owner/manager of the premises (Doc No. 1). Following joinder of issue (Doc No. 14), Spring moved (Seq. 002) for summary dismissal of the complaint and all cross-claims as against it,

arguing that it could not be liable for plaintiff's injuries because it was not involved in any work done on the premises (Doc Nos. 50-52). In support of its motion, it submitted an affidavit from its vice president and a statement of material facts asserting that it previously constructed a sidewalk bridge across the street from the premises that was removed roughly four months prior to plaintiff's incident, was not involved with any construction work performed on the premises, and did not use the type of bolt upon which plaintiff tripped (Doc No. 51). In opposition, plaintiff submitted an affirmation setting forth its legal arguments; however, she failed to include a counterstatement of material facts responding to Spring's assertions (Doc No. 68).

By decision and order of December 12, 2022, Spring's motion was granted (Doc No. 83). It was determined that Spring made a prima facie showing that it did not perform any work on the premises and that both plaintiff and defendant Rent A Unit NY Inc. (RAU) failed to demonstrate the existence of triable questions of fact (Doc No. 83). That determination relied, in part, on Spring's assertion in its statement of material facts that it had no involvement at the premises, and this Court deemed that assertion admitted because it was not disputed by plaintiff or RAU with any counterstatement of material facts (Doc No. 83).

Plaintiff moves for leave to reargue Spring's summary judgment motion, and, upon reargument, for an order denying the motion (Doc Nos. 112-113).

Legal Analysis and Conclusions

Plaintiff contends that this Court misapprehended the law when it concluded that her failure to directly respond to Spring's statement of material facts resulted in a factual assertion being deemed admitted. She also contends that such result was not "just or appropriate" under 22 NYCRR 202.8-g.[1]

[1] In her reply papers, plaintiff asserts that this case is "factually indistinguishable" from the First Department's decision in *Lyon v New York City Economic Dev. Corp.*, 182 AD3d 499 (1st Dept 2020), in arguing

Spring maintains that this Court did not overlook any facts or misapprehend the law in deciding its initial summary judgment motion. It contends that the language of 22 NYCRR 202.8-g allows a court to exercise its discretion in handling issues regarding compliance with the statute's requirements.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [citations omitted]; *accord Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

Here, plaintiff fails to establish that this Court misapprehended the law by deeming an assertion in Spring's statement of material facts admitted after she failed to provide a counterstatement of material facts controverting the assertion in response, as she fails to cite any authority contradicting the caselaw cited by this Court in reaching that conclusion. In any event, it is well-established that a motion court "ha[s] discretion under [22 NYCRR 202.8-g] to deem the assertions in [a movant's] statement of material facts admitted" (*On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022]; *see Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]), and plaintiff cites no authority to support her contention that this Court's decision to do so was not just or appropriate (*see BCMB1 Trust v Rubio*, 75 Misc 3d 1238[A], 2022 NY Slip Op 50760[U], *2 [Sup Ct, Suffolk County 2022] [deeming assertion in

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that summary judgment was inappropriate because no discovery had been conducted and no depositions had taken place when Spring moved for summary judgment. However, she failed to make that argument in her affirmation in support of this motion. Therefore, it must be disregarded (*see Tadesse v Degnich*, 81 AD3d 570, 570 [1st Dept 2011] [holding that Supreme Court erred in relying on argument raised for first time in reply papers]; *McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005] ["Matter improperly raised for the first time in a reply should be disregarded" (citations omitted)]).

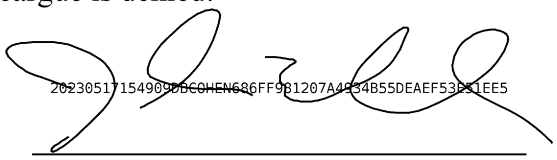
statement of material facts admitted after opposing party failed to submit counterstatement in response]).

To the extent that plaintiff argues the Court improperly relied on *Vachris v City of New York*, 2022 NY Slip Op 31768(U) (Sup Ct, NY County 2022), because it was decided prior to the amendment of 22 NYCRR 202.8 on July 1, 2022, her argument is unpersuasive. Prior to the amendment, the rule required a motion court to deem admitted an assertion contained in a statement of material facts that was uncontroverted by the party opposing summary judgment (*see Reus v ETC Hous. Corp.*, 72 Misc 3d 479, 483-484 [Sup Ct, Clinton County 2021] [explaining, under prior version of 22 NYCRR 202.8-g, that court was "mandate[d]" to deem admitted uncontroverted statements in movant's statement of material facts]). The July 2022 amendment gave a motion court discretion in resolving instances where assertions were uncontroverted (*see* 22 NYCRR 202.8-g [c] [providing that an uncontroverted assertion in a statement of material facts "*may* be deemed to be admitted for purposes of the motion" (emphasis added)]; 22 NYCRR 202.8-g [e] ["In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court *may* order compliance and adjourn the motion, *may*, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or *may* take such other action as may be just and appropriate" (emphasis added)]).

The underlying principle of uncontroverted assertions in a movant's statement of material facts being deemed admitted was unaltered by the amendment of 22 NYCRR 202.8-g, and plaintiff cites no authority to support her contention that this Court erred by relying on *Vachris*. Therefore, her motion for leave to reargue is denied.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for leave to reargue is denied.



5/17/2023
DATE

DAVID B. COHEN, J.S.C.

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