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JCC
10/17/16*

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 113941/2011

PART 7

MOREO, VINCENT

vs

BLR MADISON, LLC

INDEX NO. _____

Sequence Number : 006

MOTION DATE _____

REARGUMENT/RECONSIDERATION

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

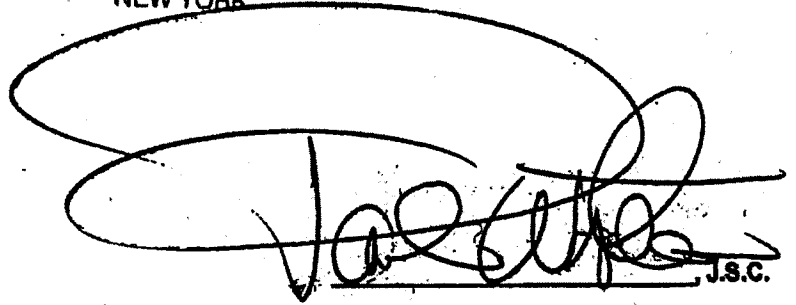
*motion is decided in accordance with the
memorandum decision in motion sequence
005.*

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OCT 18 2016
NYS SUPREME COURT - CIVIL
GENERAL CLERK'S OFFICE

FILED

OCT 18 2016

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 10/13/16

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

E
10/17/16

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

VINCENT MOREO,

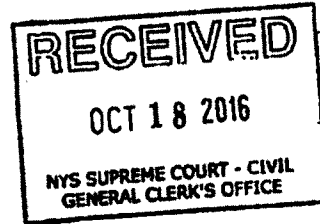
Plaintiff,

INDEX NO. 113941/11

-against-

MOTION SEQ. NO. 005

**BLR MADISON, LLC, ANN INC.,
ANN TAYLOR, INC., ANN TAYLOR
RETAIL, INC., ANNT AYLOR INC.,
MAINTENANCE ETC. SERVICES, INC. and
RESPONSIVE SERVICES MAINTENANCE,**



Defendants.

The following papers were read on this motion by defendant for leave to reargue pursuant to CPLR 2221.

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Answering Affidavits — Exhibits (Memo) _____
- Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
OCT 18 2016
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 005 and 006 are consolidated for disposition.

In motion sequence 005, Maintenance Etc. Services, Inc. (Maintenance) moves, pursuant to CPLR 2221, to reargue the part of this Court's decision dated January 27, 2016 (January Decision), which denied Maintenance's motion for summary judgment as to plaintiff Vincent Moreo's claim of a violation of Labor Law § 241(6). Maintenance also seeks to reargue the January Decision to the extent that it denied the part of its motion requesting dismissal of BLR Madison LLC, Ann Inc., Ann Taylor, Inc., and Ann Taylor Retail, Inc.'s cross-claims for contractual indemnification, breach of insurance contract, and breach of contract.

In motion sequence 006, Responsive Services and Maintenance Company i/s/h/a Responsive Services Maintenance (Responsive) moves, pursuant to CPLR 2221, to reargue

the part of Responsive's motion for summary judgment which requested dismissal of plaintiff's claim of a violation of Labor Law § 241(6).

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, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *see Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and 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"]; *see also Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). "A motion for reargument . . . is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or]. . . to provide a party an opportunity to advance arguments different from those tendered on the original application" (*id.* at 567-568; *see also Mariani v Dyer*, 193 AD2d 456 [1st Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

The Court grants reargument only as to the parts of Maintenance and Responsive's motions which seek to dismiss plaintiff's claims made pursuant to Labor Law § 241(6).

Plaintiff testified that he worked for Lane Associates as an air conditioning service technician. Maintenance is a facilities maintenance company which supplies vendors to perform services, and Responsive is an administrative company which contacts contractors for work. Maintenance arranged for Responsive to hire Lane Associates to perform work at an Ann Taylor store located at 645 Madison Avenue in Manhattan, New York. Plaintiff maintains that he was injured on September 10, 2010, at the subject store. At the time of his accident, plaintiff was leaving an area in the back of the store following work in which he repaired an air conditioning unit. As he was leaving the area, he tripped on shelving which had fallen in a

hallway.

"The Industrial Code definition of 'construction work,' . . . must be construed consistently with this Court's understanding that section 241 (6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]; *see also Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003] [holding that Labor Law § 241(6) is inapplicable outside the construction, demolition or excavation contexts]; *Melski v Fitzpatrick & Weller, Inc.*, 107 AD3d 1447, 1448 [4th Dept 2013] ("[w]ith respect to section 241(6), defendant and third-party defendant met their burden of establishing that decedent did not perform his work in the context of construction, demolition or excavation").

"Although the Code defines construction work to include "work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" in the definition of construction work (12 NYCRR 23-1.4 [b] [13]), the Court of Appeals has held that the protections afforded under Labor Law § 241(6) are available only to those workers injured while involved in "construction' or 'excavation' work" (*Acosta v Banco Popular*, 308 AD2d 48, 51 [1st Dept 2003]).

Here, as plaintiff completed the repairs on the air conditioning unit and was exiting the location which was not in the process of being constructed, excavated, or demolished, plaintiff's work did not constitute "construction, demolition, or excavation" pursuant to the statute. Therefore, plaintiff's claims made pursuant to Labor Law § 241(6), as against Maintenance and Responsive, must be dismissed (*see Gleason v Gottlieb*, 35 AD3d 355, 356 [2d Dept 2006]).

With respect to BLR Madison LLC, Ann Inc., Ann Taylor, Inc., and AnnTaylor Retail, Inc.'s cross-claims for contractual indemnification, breach of contract, and breach of an insurance contract, the Court adheres to its earlier decision.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the part of Maintenance Etc. Services, Inc.'s motion for leave to reargue is granted and the part of its motion for summary judgment seeking to dismiss plaintiff Vincent Moreo's cause of action for a violation of Labor Law § 241(6) is granted; and it is further,

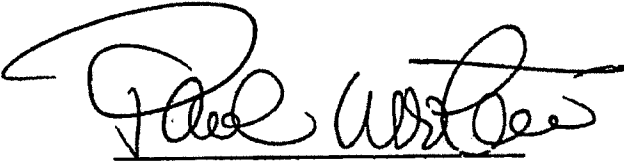
ORDERED that the Court adheres to its decision dated January 27, 2016 as to the cross-claims for breach of contract, breach of an insurance contract, and contractual indemnification; and it is further,

ORDERED that the part of Responsive Services and Maintenance Company i/s/h/a Responsive Services Maintenance's motion for leave to reargue is granted and Responsive's motion for summary judgment seeking to dismiss plaintiff's cause of action for a violation of Labor Law § 241(6) is granted; and it is further,

ORDERED that counsel for Maintenance Etc. Services, LLC s/h/a Maintenance Etc. Services, Inc.'s shall serve a copy of this Order with Notice of Entry upon all parties, and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-6-16


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

FILED

OCT 18 2016

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NEW YORK