# Supreme Court of the State of New York
# Appellate Division: Second Judicial Department

D33551
N/kmb

_____AD3d_____ Argued - November 1, 2011

MARK C. DILLON, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

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2011-04028 DECISION & ORDER

Jason Yearwood, respondent, v Post Park, LLC, et al., defendants, Dekalb Development Corp., appellant.

(Index No. 12896/06)

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MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, N.Y. (William K. Kerrigan and Catherine H. Friesen of counsel), for appellant.

Dinkes & Schwitzer, P.C., New York, N.Y. (Joelle Tantalo Jensen of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Dekalb Development Corp. appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (O. Bellantoni, J.), dated November 5, 2010, as denied that branch of its motion which was for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In moving for summary judgment dismissing the complaint insofar as asserted against it, the defendant Dekalb Development Corp. (hereinafter Dekalb) failed to meet its initial burden of demonstrating, prima facie, its entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The deposition testimony of Dekalb's president, who is also a member of the defendant Post Park, LLC (hereinafter Post Park), and a corporate officer of the defendant Corato Contracting Corp. (hereinafter Corato), indicated that Dekalb shared responsibilities and finances with the other defendants so as to present a triable issue of fact as to whether Dekalb was a general contractor or agent of the owner (*see Nienajadlo v Infomart N.Y., LLC*, 19 AD3d 384), or whether it shared responsibility for supervision and safety of the subject construction project (*see*

*Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940). Since Dekalb failed to meet its prima facie burden, we need not address the sufficiency of the plaintiff's opposing papers (*see Healy v Bartolomei*, 87 AD3d 1112; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52). Accordingly, Dekalb was not entitled to summary judgment dismissing the complaint insofar as asserted against it.

DILLON, J.P., BALKIN, LEVENTHAL and BELEN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court