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At an IAS Term, Part 30 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of July, 2002

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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IVO STEJSKAL and PAVLINA STEJSKALOVA,

Plaintiffs,

- against - Index No. 28058/00

ALBERT SIMONS III, THEODORA SIMONS and IRVINE REALTY GROUP, INC.,

Defendants.

. . . . . -X

ALBERT SIMONS III, THEODORA SIMONS and IRVINE REALTY GROUP, INC.,

Third-party Plaintiffs,

-against-

ZEN GENERAL CONSTRUCTION & RENOVATION CORP.,

Third-party Defendant.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants move for leave to file a late motion for summary judgment and, if granted, for summary judgment dismissing the causes of action based on Labor Law § 240 (1) and § 241 (6). Plaintiffs consent to the dismissal of all claims against defendant Irvine Realty Group and to the dismissal of the claims based on common law negligence and Labor Law § 200 insofar as asserted against the Simons defendants. Plaintiffs cross-move for partial summary judgment as to liability on the cause of action based on Labor Law § 240 (1).

The first branch of defendants' motion is for leave to file a late motion for summary judgment beyond the 60-day period specified under the rules of this court, but within the 120-day period specified for the filing of such motions under CPLR 3212(a).

Patterned after CPLR 3212(a), Part 13 of the Uniform Rules of the Civil Term, Supreme Court, Second Judicial District, Kings County, states that a party may not move for summary judgment more than 60 days after the filing of a note of issue, unless it obtains "leave of the court on good cause shown." A trial court is afforded "wide latitude" in exercising its discretion to entertain a late motion for summary judgment (*Samuel v A.T.P. Development Corp.*, 276 AD2d 685, 686, *lv denied* 96 NY2d 708) and this court has the discretion to waive its own procedural rules (*see, Durby v Avis Rent A Cur System, Inc.*, 289 AD2d 191; *Chambers v Maury Povich Show,* 285 AD2d 440) provided the moving party establishes "good cause" for the delay and there is no prejudice to the opposing party.

In contrast to the "vague and conclusory claims" rejected in ***Neves v Port Authority of New York and New Jersey*** (265 AD2d 393, 394), defendants herein have set forth "good cause" for missing this court's 60-day deadline. Accordingly, defendants' motion for leave to file a late motion for summary judgment **is** granted, *without* **opposition.**

The plaintiff Ivo Stejskal[1], a carpenter, was injured, while doing construction work at a building located at 48 East 68* Street, in Manhattan. Plaintiff was standing near the top of an A-frame ladder, sanding the crown molding under the thirteen foot ceiling, when the ladder suddenly collapsed, causing him to fall to the ground .

Plaintiff commenced the present action against the defendants, alleging causes of action based on common-law negligence, Labor Law § 200, as well as Labor Law § 240 **(1)** and § 241 (6). After serving an answer, defendants moved for summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) causes of action, asserting that as an owner of a one- or two-family dwelling, they were exempt from the strict liability duties imposed by these statutes. Plaintiff, in turn, has cross-moved for partial summary judgment as to liability with respect to his Labor Law 240 § (1) claim, on the ground that the homeowner exemption is unavailable to the defendants because of their commercial use of the property.

Labor Law § 240 **(1)** imposes absolute liability for any breach thereof which is the proximate cause of an injury ***(see, Rocovich v Consolidated Edison Co.,*** 78 NY2d 509, 512;

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[1] Plaintiff Pavlina Stejskalova has filed a derivative action for loss of consortium. Such action is properly joined with her husband's underlying claim **for** personal injuries (*Buckley v **National Freight, Znc.,*** 220 AD2d 155, ***affd*** 90 NY2d 210). For purposes of this decision, however, the court will refer only to the plaintiff, Ivo Stejskal.

Bland v ***Manocherian,*** 66 NY2d 452,459; ***Zimmer*** v ***Chemung County Performing Arts, Inc.***, 65 NY2d 513,524, ***rearg denied*** 65 NY2d 1054). This is an absolute liability **statute,** imposing a nondelegable duty upon property owners and general contractors for covered elevation-relatedinjuries to **workers** at construction ***or*** demolition sires, independent of actual supervision or control over the work site ***(see, Gordon v Eastern Ry. Supply, Inc.***, 82 NY2d 555,560; ***Ross*** v ***Curtis-Palmer Hydro-Electric Co.***, 81 NY2d 494,500; ***Zimmer*** v ***Chemung*** *County* ***Performing Arts, supra, 65*** NY2d at 521).

By statute, owners of "one and two family dwellings" who contract for work but who do not control or direct a contractor's work are specifically exempted from strict liability of the Labor Law.[2] The Legislature determined that the strict liability provisions of the statutes in question should not apply to owners of one and two family homes who are not in a position to know about, or provide for the responsibilities of absolute liability ***(Cannon*** v ***Putnam,*** 76 NY2d 644,649). The Legislature determined that it was "'unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon him'" ***(Cannon*** v ***Putnam, supra,*** 76 NY2d at 649-650, quoting Mem of NY Law Rev Commn, 1980 McKinney's Session Laws of NY, at 1657).

The statute, however, does not specify under what circumstances a one- or two-family dwelling with mixed commercial/residential usage qualifies under the exemption and the

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[2] No claim has been made that the defendants directed or controlled the plaintiffs **work.**

courts have decided this issue on a case-by-case basis. "At one end of the spectrum, where it is clear that the property is used solely as a one- or two-family dwelling, and the homeowner does not direct or control the work, the exemption will apply * * * At the other end of the spectrum, where a one- or two-family dwelling is used 'entirely and solely for commercial purposes', the owners cannot benefit from the dwelling exception * * * In determining whether to apply the dwelling exemption to those situations which fall somewhere between these two extremes, the courts have applied a 'site and purpose of the work' test" (*Putnam* v *Karaco Industries Corp.*, 253 AD2d 457,458, quoting *VanAmerogen* v *Donnini*, 78 NY2d 880,882 and *Cannon* v *Putnam*, *supra*, at 650). The Court of Appeals has "avoided an overly rigid interpretation of the homeowner exemption" and has employed a "flexible" standard (*Bartoo* v *BueZZ*, 87 NY2d 362,367-368). Accordingly, "the existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exemption" (*Cannon* v *Putnam, supra*, 76 NY2d at 650).

In the instant case, the defendants, a husband and wife, purchased a multi-family dwelling with thirteen rental units, to convert it to a single family residence for their personal use. At the time they purchased the building, nine apartments were vacant but four tenants remained living in four individual rent stabilized apartments.[3] An architect drew up plans to transform the building into a single family residence. All the reconstruction work,

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[3] The building currently constitutes the residence of the defendants and one holdover tenant, whose apartment is on the ground floor. During the course of the renovation, a second tenant who occupied another ground floor apartment vacated his apartment and this area was converted into part of the defendants' residence.

including the work being done by the plaintiff at the time of the accident, was done only to that portion of the building where the defendants intended to live.

Plaintiff contends the defendants, because of their wealth and legal acumen, are not members of the class of individuals that the homeowner exemption was designed to protect." Plaintiff argues that the exemption should not be "expanded to encompass homeowners * * * who hardly are lacking in sophistication or business acumen such that they would fail to recognize the necessity to insure against the strict liability imposed by the statute" *(Van Amerogen* v *Donnini*, 78 NY2d 880, 882). Plaintiff also maintains that all doubts as to the applicability of the exemption "should be resolved in favor of the general provision rather than the exception" *(VanAmerogen* v *Donnini*, 78 NY2d at 882; McKinney's Cons. Laws of NY, **Book 1,** Statutes § 213).

Although plaintiff relies on the quoted language contained within *VanAmerogen*, the case itself turns on the "site and purpose of the work" test set forth in *Cannon*. In *Van Amerogen,* the defendant/owner of a single family four bedroom dwelling had always used the building exclusively for a commercial purpose, i.e. as an income-producing rooming house for college students. Consequently, the owner was unable to claim the single or two family dwelling exemption despite the fact that the injured roofer fell from the porch roof of a four bedroom house.

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[4] **Defendants do not contest the fact that they are wealthy and knowledgeable individuals who are well aware of the absolute liability provisions of the Labor Law and of the need to insure against such accidents during the renovation of multiple family dwellings.**

In other cases, as well, the courts have applied the "site and purpose of the work" rule, irrespective of the economic status of the defendants.'

In ***Bartoo v BueZZ*** (87 NY2d 362), a worker was injured when a scaffold platform, upon which he was standing to repair the roof of a barn, **collapsed.** He sued the **owner** of the one family dwelling upon which property the barn was located, under Labor Law $240 (1) and § 241 (6). Although the barn that the injured plaintiff was working on stored the owner's personal belongings, the owner of the barn also leased space within the barn for individuals to store their golf carts. In affirming the granting of the one-family dwelling exemption to the defendant, the court held that "when an owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240 and 241" ***(Bartoo v BueZZ, supra,*** 87 NY2d at 368). Although the repair work on the barn "served the commercial purpose of protecting the stored golf carts from weather damage, any commercial benefit was ancillary to the substantial residential purpose served by fixing the leaking barn roof' ***(Bartoo v BueZZ, supra,*** 87 NY2d at 369)

In ***Krukowski v Steffensen*** (194 AD2d 179), a worker was injured while doing repairs to the roof of a one-family house. Although the owners lived in portions of the upper level

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[5] No case has been presented to this court in which the economic status of the party seeking the exemption was a determinative factor in the court's decision. However, in ***Yurkovich v Kvamer Woodworking, Znc.*** (289 AD2d 183), the Appellate Division, First Department, in denying defendant/owner summary judgment, held that in addition to directing and controlling the work, defendant intended to convert a multiple-dwelling into a single-family dwelling.

of the home, the remainder of the building was used for their photography business. In applying the "site and purpose of the work" test, the court held that despite the fact that the site of the accident was the owners' principal place of residence, the evidence was clear that "the same building was also utilized for regular commercial activity which was not merely incidental to the building's purpose" (*Krukowski* v *Steffensen, supra,* 194 AD2d at 183-184). The evidence established that the owners employed one part-time and two full-time employees who utilized not only the lower level of the building but also the kitchen and bathroom in the upper level. The owners had also obtained commercial insurance on the building and were aggressively depreciating the building for tax purposes. As a result, the court held that the primary purpose of the repairs was commercial and that the owners did not qualify for the single family homeowner exemption.

In *Milan* v *Goldman* (254 AD2d 263), a worker was injured doing repairs to a coach house. The upper level of the coach house was rented to tenants and the lower level was used as a place of storage for the main house. Despite the fact that the coach house itself had a mixed commercial/residential use and was the source of significantrental income, the court upheld the granting of the single family exemption to the owner of the property.

In *Moran* v *Janowski* (276 AD2d 605), a worker was injured while installing fascia board on the exterior of a single family residence. In granting the owner the single family exemption, the court held that "the extent to which the defendant's husband later utilized the premises for his business is minimal" and that "the principal use of the house is as a single-family residence" (*Moran* v *Janowski, supra,* 276 AD2d at 606).

In *Lawless v Kera* (259 AD2d 596), however, the owner of a one family dwelling was unable to claim the exemption because the evidence clearly established that he was building the house solely for the purpose of selling it.

Here, the fact that the defendants in this case were converting a multiple family dwelling, containing numerous rental units, into a single family residence, with a singular rental unit, does not remove them from the benefits of the single family ownership exemption.

In *Khela v Neiger* (85 NY2d 333), a worker was injured while performing renovation work to convert a three story multiple dwelling unit into a two-family residence.[6] The building was covered by a multiple dwelling certificate of occupancy. Prior to moving in, the owner obtained approval to convert the building into a two-family dwelling. The owner planned to reside on the upper two floors of the building while renting the ground floor to a tenant. In discussing whether the owner was entitled to the two-family dwelling exemption from the absolute liability provision of Labor Law § 241-a, the Court of Appeals held that "the site and purpose of the construction was solely connected with remodeling the building into a residential and single tenant space, not creating or enhancing a commercial usage" (*Khela v Neiger, supra,* 85 NY2d at 338). Consequently, the owner of the dwelling was granted the exemption of the two-family dwelling.

[6] Prior to the renovation, the building contained three apartment units.

In the present case, the owners of the building where the plaintiff was injured not only planned ***for,*** but actually converted, the multiple dwelling unit into a single family residence, with a separate apartment for the holdover tenant. The defendants presented the court with their architectural plans **for** the **building.** The **defendants** also **submitted the** contract **and** work order they entered into with their general contractor. None of the renovation work went into the commercial, rental **unit.**[7] The plaintiff was injured while working on the defendants' residential portion of the building. Little, or no, commercial gain could be anticipated as a result of the residential renovations.

Under this court's interpretation of the "site and purpose of the work" test, defendants are entitled to the one- or two-family homeowner exception and to dismissal of the underlying claims under the Labor Law *(Cannon* v ***Putnam, supra,*** 76 NY2d at 650).

Accordingly, the defendants' motion for summary judgment dismissing the claims based on violations of Labor Law §§ 240 and 241is granted, and those claims are dismissed. The plaintiffs' cross motion is denied.

This constitutes the decision and order of the ~ o u r ~ .

E N T E R,

[7] Defendants' goal was to have no tenants remaining after converting the building. Thus, their assertion that the repair work was not for the benefit of improving the holdover tenant's apartment is credible.