SHORT FORM ORDER

COPY

INDEX No. 01-10230

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-7-04 (#004 & 005)
7-22-04 (#006,007,008)
ADJ. DATE 9-23-04
Mot. Seq. # 004 - MG
005 - XMG
006 - MD
007 - MD
008 - XMD

JACK BEAULIEU and NANCY BEAULIEU,

Plaintiffs,

- against -

S.B.J. ASSOCIATES, LLC, BENJAMIN DEVELOPMENT CORP., JOBCO ORGANIZATION, MELVILLE FIRE DISTRICT and THE TOWN OF HUNTINGTON,

Defendants.

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.
Attorneys for the Plaintiffs
120 Broadway
New York, New York 10271

MARSHALL, CONWAY & WRIGHT, P.C.
Attorneys for Deft./3rd Pty. Pltfs.
116 John Street
New York, New York 10038

MORRIS, DUFFY, ALONZO & FALEY
Attorneys for Deft Melville Fire District
Two Rector Street
New York, New York 10006

S.B.J. ASSOCIATES, LLC, and BENJAMIN DEVELOPMENT CORP.,

Third-Party Plaintiffs,

- against -

McCLEAN CONTRACTING, INC.,

Third-Party Defendant.

JOHN J. LEO, Town Attorney
Town of Huntington
Town Hall, 100 Main Street
Huntington, New York 11743

JAMES D. BUTLER, P.A.
Attorney for 3rd Party Defendant
111 John Street, Suite 800
New York, New York 10038

MORRIS, DUFFY, ALONSO & FALEY
Attorneys for Deft. Melville Fire District
Two Rector Street
New York, New York 10006

Upon the following papers numbered 1 to 21 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-2; 5-6; 7-8 ; Notice of Cross Motion and supporting papers 3-4; 9-10 ; Answering Affidavits and supporting papers 11; 12 ; 13; 14 ; Replying Affidavits and supporting papers 15; 16; 17; 18 Other: memoranda of law 19; 20; 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendant The Town of Huntington for an Order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint, is granted; and it is further

ORDERED that the cross motion (#005) by defendant Melville Fire District for an Order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint, is granted; and it is further

ORDERED that the motion (#006) by defendants/third-party plaintiffs, S.B.J. Associates, LLC and Benjamin Development Corp., for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and for conditional summary judgment on their claim for indemnification from third-party defendant McLean Contracting, is denied; and it is further

ORDERED that the motion (#007) by third-party defendant McLean Contracting, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and the third-party complaint, is denied; and it is further

ORDERED that the cross motion (#008) by plaintiffs for an Order pursuant to CPLR 3212 granting partial summary judgment as to the liability of defendants/third-party plaintiffs, S.B.J. Associates, LLC and Benjamin Development Corp.; for leave to serve an amended complaint; and for leave to serve a supplemental demand seeking $5 million in punitive damages from defendants/third-party plaintiffs, S.B.J. Associates, LLC and Benjamin Development Corp., is denied.

Plaintiff Jack Beaulieu commenced this action to recover damages, pursuant to Labor Law §200, §240(1) and §241(6), for injuries he sustained in an accident at a demolition site on August 18, 2000. The demolition project, which encompassed the former grounds of the Long Island Developmental Center located in Melville, was located on property owned by defendant S.B.J. Associates, LLC. Defendant Benjamin Development Corp. acted as property manager and general contractor, and hired third-party defendant McLean Contracting[1] to perform the demolition of multiple buildings on the property. A fire on July 12, 2000, severally damaged building #9, a steel framed former gymnasium. The fire department extinguished the fire[2], and

---

[1] The third-party defendant states that it is incorrectly sued here as McClean.

[2] It also appears that plaintiff assisted in extinguishing the fire by the use of heavy equipment.

after inspecting the building, the Town informed Benjamin that the building should be demolished.[3]

Plaintiff testified at his examination before trial that he was an experienced operating engineer and diesel mechanic, a member of the operating engineers union since 1964, and had also bought, sold, and repaired heavy equipment but that, prior to this project, he had no experience with demolishing steel framed buildings[4] or operating a grapple. He went to work for third-party defendant McLean in 1996 and was involved in purchasing the excavator and the grapple involved in his accident.[5] He testified that he was directed by McLean to demolish the building and remove the debris, and that no one directed how he was to perform his work. Although 95% of the gym had already been demolished, the two ends of the building, which were the height of a two-story building and contained 'I' beams and trusses, remained. What did remain standing was a "mangle" of steel beams, cement, and roofing material. Some of the beams were no longer firmly attached and could be readily removed to the parking lot where they would be cut up to fit the dumpsters. To free other beams or trusses, the grapple would need to grab it and move up and/or down to free it.[6] The grapple containing the steel could then be swung to the right, to piles of debris in the parking lot area. Plaintiff recalled that the subject beam was 20-25 feet long, 25 feet up, and at a 45 degree angle, and that he could not tell whether it had originally been vertical or horizontal. He testified that the grapple had hold of the beam and that he began to swing it to the right. Apparently, at that point plaintiff lost consciousness. He awoke to find that the beam had fallen into the cab and amputated the lower portion of both of his legs.

Initially, the Court determines that the defendants Melville Fire District and The Town of Huntington have established their right to summary judgment dismissing plaintiffs' complaint, and the plaintiffs and the remaining defendants have not opposed same. The Court finds the opposing arguments by third-party defendant McLean to be unpersuasive. Accordingly, the motion and cross motion to dismiss the complaint as to the Melville Fire District and The Town of Huntington, are granted.

Labor Law §240(1), commonly known as the "scaffold law", creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work

---

[3] The demolition permit was not issued by the Town until October, 31, 2000, after plaintiff's accident. A fact without any particular significance for the purposes of the instant motions.

[4] Plaintiff did have experience demolishing wood framed buildings.

[5] Plaintiff testified that he continued buying and maintaining heavy equipment with McLean.

[6] The movant would then break the rivets holding the steel beams or trusses together.

(*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by §240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). The legislative purpose behind §240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor instead of on workers, who are "scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison***, *supra*; ***Koenig v Patrick Construction Co.***, 298 NY 313 [1948]). While it is true that the "special hazards" contemplated "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*; ***Rodriguez v Tietz Center for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]), it is also true that the statute's purpose of protecting workers "is to be liberally construed" (***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*, at 500). In order to prevail upon a claim pursuant to Labor Law §240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see*, ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]). Contributory negligence will not exonerate a defendant who has violated §240(1) (*see*, ***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under §240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (***Blake v Neighborhood Hous. Serv. of N.Y. City***, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

The gravamen of defendants' motions to dismiss plaintiff's §240(1) claim is that plaintiff was working at ground level, that the beam that fell into the cab was an integral part of the ground-level structure that he was involved in demolishing and, consequently, the height from which the beam fell is irrelevant (***Amato v State of New York***, 241 AD2d 400, 401, 660 NYS2d 576 [1997]). Defendants argue that a steel beam which slips and falls while being moved to a pile of debris is not the type of risk contemplated by the statute (*see*, ***Ruiz v 8600 Roll Rd.***, 190 AD2d 1030, 594 NYS2d 474 [1993], wherein §240[1] protection held to be inapplicable to plaintiff killed by a beam falling from a crane). With all due respect to the holdings relied upon by movants, the Court does not find them dispositive as to the instant scenario.

Much litigation has been had in applying §240(1) to workers injured by falling objects, and to succeed the plaintiff must show that the object fell "while being hoisted or secured *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 268, 727 NYS2d 37 [2001]; ***Tylutki v Tishman Technologies***, 7 AD3d 696, 777 NYS2d 514 [2004]; ***Salinas v Barney Skanska Constr. Co.***, 2 AD3d 619, 769 NYS2d 559 [2003]; ***Thomas v 2 Overhill Rd. Assoc.***, 1 AD3d 174, 766 NYS2d 563 [2003]); ***Jiron v China Buddhist Assn.***, 266 AD2d 347, 698 NYS2d 315

[1999]). In two recent cases, the Appellate Division has held that, in light of the nature and purpose of the work being performed at the time of the accident, there was a significant risk that an unsecured steel beam would fall causing injury and, therefore, the owner and contractor were obligated under Labor Law §240(1) to use appropriate safety devices (*see*, ***Costa v Piermont Plaza Realty, Inc.,*** 10 AD3d 442, 781 NYS2d 372 [2004]; ***Borschein v Schuman,*** 7 AD3d 476, 776 NYS2d 307 [2004]).

It is well settled that on a motion for summary judgment, movant has the initial burden of setting forth evidentiary facts sufficient to establish its entitlement to judgment as a matter of law (***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]; ***Fabbricatore v Lindenhurst Union Free School District,*** 259 AD2d 659, 686 NYS2d 822 [1999]). Only then does the burden shift to the opposing party to come forward with proof (*see,* ***Piccolo v DeCarlo,*** 90 AD2d 609, 456 NYS2d 171 [1982]). Further, due to plaintiff's amnesia, he will be held to a lesser standard of proof in establishing the precise manner in which the accident occurred and the statute was violated (*see generally,* ***Sawyer v Dreis & Krump Mfg. Co.,*** 67 NY2d 328, 333-334, 502 NYS2d 696 [1986]; ***Saldana v Saratoga Realty Assoc.,*** 235 AD2d 744, 652 NYS2d 374 [1997]). The Court finds that the evidence submitted in support of defendants' motions is insufficient to meet their initial burden entitling them to summary judgment relief as a matter of law (***Narducci v Manhasset Bay Assoc.***, *supra*; ***Costa v Piermont Plaza Realty, Inc.,*** *supra* ; ***Borschein v Schuman,*** *supra*; ***Thomas v 2 Overhill Rd. Assoc***, *supra*). Accordingly, those portions of defendants' motions for summary judgment seeking to dismiss plaintiffs' Labor Law §240(1) cause of action, are denied.

Labor Law §241(6) requires owners and contractors, or their agents, to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law §240(1), the duty to comply with the Commissioner's regulations imposed by §241(6) is nondelegable (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.,*** *supra;* ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under §241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Ross v Curtiss-Palmer Hydro-Electric Co.,*** *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiffs' opposition and reply to the motions for summary judgment rely upon alleged violations of the Industrial Code at 12 NYCRR §23-3.4 and plaintiffs have apparently abandoned the sections previously relied upon. Therefore, the Court shall not address them and they are dismissed. Further, plaintiffs' failure to previously identify the precise provision is not fatal to the §241(6) claim where, as here, it involved no new factual allegations, raised no new theories of liability, and caused no prejudice to defendants (***Harris v Rochester Gas & Electric Corp.,*** __

AD3d __, 2004 NY App Div LEXIS 11367; ***Kelleir v Supreme Industrial Park, LLC,*** 293 AD2d 513, 740 NYS2d 398 [2002]; ***Latino v Nolan and Taylor-Howe Funeral Home, Inc.,*** 300 AD2d 631, 754 NYS2d 289 [2002]).

12 NYCRR §23-3.4, Mechanical methods of demolition, at subsections (b) and (c)(6), provides, in pertinent part:

> (b) Structural stability. Walls, chimneys and other parts of any building or other structure shall not be left unsupported or unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.
> (c)
> (6) The controls of any mechanical device or equipment used in demolition operations shall be located and operated a safe and reasonable distance from the point of demolition.

The parties here have submitted conflicting expert affidavits and testimony from the examinations before trial in support of their respective positions as to how the accident occurred and the applicability of 12 NYCRR §23-3.4 (b) and (c)(6). However, in considering motions for summary judgment, it is not the Court's function to assess credibility (*see*, ***Ferrante v American Lung Association,*** 90 NYS2d 623, 665 NYS2d 25 [1997]). Moreover, the Court finds that plaintiffs' argument that these sections are applicable to the accident (***Docteur v Belleville-Henderson Cent. School Dist.,*** 307 AD2d 751, 762 NYS2d 853 [2003]; ***Terry v Mutual Life Ins. Co. of N.Y.,*** 265 AD2d 929, 625 NYS2d 808 [1999]) and that they contain specific positive commands sufficient to satisfy the requirements of Labor Law §241(6) (***Murtha v Integral Constr. Corp.,*** 253 AD2d 637, 639, 677 NYS2d 338 [1998]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*), at least arguably, raise questions of fact sufficient to withstand the motions for summary judgment. The Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (*see*, ***Rizzuto v L. A. Wenger,*** *supra*; ***Herman v St. John's Episcopal Hosp.,*** 242 AD2d 316, 678 NYS2d 635 [1997]). Plaintiffs must still establish that the Code was violated and that this violation was a proximate cause of his injuries (*see*, ***Bland v Manocherian,*** *supra*; ***Sprague v Peckham Materials Corp.,*** *supra*). Accordingly, those portions of defendants' motions for summary judgment which seeks to dismiss plaintiffs' Labor Law §241(6) cause of action, are denied.

The protection provided by Labor Law §200 codifies the common-law duty of an owner or employer to provide employees a safe place to work (*see*, ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see*, ***Russin v Louis N. Piccano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]), who exercise control or supervision

over the work, and either created an allegedly dangerous condition or had actual or constructive notice of it (*see*, ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). S.B.J. and Benjamin have established that they did not supervise or direct plaintiff's work and that it was McLean who directed and controlled plaintiff's work. Plaintiff argues in opposition that there was a joint decision made by Benjamin and McLean that they would purchase the machine together, that McClean would operate and maintain the excavator, and they were aware that, while he was an experienced mechanic and heavy equipment operator, he had no experience with demolishing a steel frame building. He argues that demolition of steel structures is a specialized expertise and that Benjamin made a decision to purchase the equipment as a cost saving measure, knowing that plaintiff had no experience with a steel structure. Plaintiff states that spotters were necessary to alert him to the fact that the beam was not firmly within the grapple arms and that his inexperience led to incorrect placement of the excavator and its controls, which enabled the machine to move forward into the falling beam. Defendants argue that plaintiff cannot oppose the motion with hearsay statements made at the examination before trial of a non-party.[7] However, hearsay evidence may be used to oppose a summary judgment, although it is insufficient to withstand the motion where it is the only evidence submitted (***Candela v City of New York,*** 8 AD3d 45, 778 NYS2d 31 [2004]; ***Narvaez v NYRAC,*** 290 AD2d 400, 400-401, 737 NYS2d 76 [2002]). Here, McLean also testified at his examination before trial that the decision to purchase the excavator and grapple was made with Benjamin and that Benjamin paid for the machinery. Therefore, the plaintiff has sufficiently raised questions of fact as to the purchasing of the equipment and the knowledge that movants may have had about plaintiff's level of expertise in safely operating it (***Winegrad v New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Piccolo v DeCarlo,*** *supra*). Accordingly, those portions of the defendants' motions to dismiss the Labor Law §200 cause of action, are also denied.

As a general rule, an owner or general contractor held vicariously liable for a plaintiff's injuries pursuant to Labor Law §240(1) or §241(6) is entitled to full common-law indemnification from the "actor who caused the accident" (*see*, ***Chapel v Mitchell,*** 84 NY2d 345, 618 NYS2d 626 [1994]; ***Young v Casabonne Bros. Inc.,*** 145 AD2d 244, 538 NYS2d 348 [1989]) and they may be granted an order of conditional summary judgment against plaintiff's employer (*see*, ***Rivera v D'Alessandro,*** 248 AD2d 522, 669 NYS2d 877 [1998]; ***Werner v East Meadow Union Free School Dist.,*** 245 AD2d 367, 667 NYS2d 386 [1997]) where, as here, plaintiff suffered a "grave injury" (*see, **Majewski v Broadalbin-Perth Central School District,*** 91 NY2d 577, 673 NYS2d 966 [1998]). However, S.B.J. and Benjamin's liability, if any, pursuant to Labor Law §200 remains unresolved and, therefore, they have not established that they were free from negligence as a matter of law (*see, **Itri Brick & Concrete Corp. v Aetna Casualty & Surety Co.,*** 89 NY2d 786, 658 NYS2d 903 [1997]; GOL § 5-322.1). Accordingly,

---

[7] Defendants' argument as to the non-party's motivation cannot be resolved in a motion for summary judgment and must be addressed at trial.

that portion of defendants' motion seeking an order of conditional summary judgment on their claim for common-law indemnification from McLean, is denied.

As to plaintiffs' cross motion, the Court notes that so much of the motion which seeks summary judgment is procedurally defective in that it was not interposed within the time limitation prescribed by the amendments to CPLR §3212(a)(L. 1996 Ch. 492) which states, *inter alia,* "such motion shall be made no later than one hundred twenty (120) days after the filing of the note of issue, except with leave of court on good cause shown." Here, plaintiffs' note of issue was filed on March 1, 2004, and their cross motion was made on August 13, 2004, more than one hundred twenty days later. In a recent decision, ***Miceli v State Farm Mutual Automobile Ins. Co.,*** __ NY3d __, 2004 NY LEXIS 2444 (Oct. 21, 2004), the Court of Appeals underscored its holding in ***Brill v City of New York,*** 2 NY3d 648, 2004 NY LEXIS 1526 (June 10, 2004), and made clear "that statutory time frames" (of CPLR 3212) are "not options, they are requirements, to be taken seriously by the parties." Here, plaintiffs have offered no cause, "good" or otherwise, for making an untimely motion. Accordingly, that portion of plaintiffs' cross motion which seeks partial summary judgment was not considered and is hereby denied.[8]

Lastly, plaintiffs seek leave to serve an amended complaint seeking punitive damages and to amend the ad damnum clause by seeking recovery of five million dollars in punitive damages from SBJ and Benjamin. As a general rule, absent prejudice or unfair surprise to the defendant, leave to amend a pleading should be freely given (*see*, ***Edenwald Contracting Co. v New York,*** 60 NY2d 957, 471 NYS2d 55 [1983], ***Scheuerman v Health & Hosps. Corp.,*** 243 AD2d 553, 663 NYS2d 123 [1997]; ***Volpe v Good Samaritan Hosp.***, 213 AD2d 398, 623 NYS2d 330 [1995]). When, as here, leave to amend is sought after the note of issue is filed judicial discretion should be exercised in a "discreet, circumspect, prudent and cautious" manner (***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [1997], quoting ***Volpe v Good Samaritan Hosp.*** *supra*).

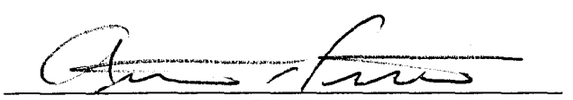
Unlike a claim for negligence, to establish a claim for punitive damages, plaintiff must "demonstrate that the wrong to [him] rose to the level of 'such wanton dishonesty as to imply a criminal indifference to civil obligations' " (***Zimmerman v Tarshis***, 289 AD2d 230, 231, 734 NYS2d 462, quoting ***Walker v Sheldon***, 10 NY2d 401, 405, 223 NYS2d 488). Although defendant's conduct need not be intentional, it must be so flagrant as to transcend mere carelessness (*see,* ***Rahn v Carkner,*** 241 AD2d 585, 659 NYS2d 143 [1997]; ***Rinaldo v Mashayekhi***, 185 AD2d 435, 585 NYS2d 615 [1992]). The purpose of punitive damages, is to "punish and deter others from acting similarly" (***Zurich Ins. v Shearson Lehman Hutton***, 84 NY2d 309, 316, 618 NYS2d 609 [1994]; ***Home Ins. Co. v American Home Prods. Corp.***, 75 NY2d 196, 200, 551 NYS2d 481 [1990]). However, plaintiffs' allegations as to defendants' negligence do not evince "a conscious disregard of the rights of others" (***Harrell v Champlain***

---

[8] The Court also notes that, contrary to plaintiffs' calculations, the motions made by S.B.J. and McLean, were made on June 28th and June 29th, respectively, and therefore were timely.

defendant's conduct need not be intentional, it must be so flagrant as to transcend mere carelessness (*see,* ***Rahn v Carkner,*** 241 AD2d 585, 659 NYS2d 143 [1997]; ***Rinaldo v Mashayekhi,*** 185 AD2d 435, 585 NYS2d 615 [1992]). The purpose of punitive damages, is to "punish and deter others from acting similarly" (***Zurich Ins. v Shearson Lehman Hutton***, 84 NY2d 309, 316, 618 NYS2d 609 [1994]; ***Home Ins. Co. v American Home Prods. Corp.***, 75 NY2d 196, 200, 551 NYS2d 481 [1990]). However, plaintiffs' allegations as to defendants' negligence do not evince "a conscious disregard of the rights of others" (***Harrell v Champlain Enters.***, 222 AD2d 876, 634 NYS2d 880 [1995]) or "wanton dishonesty as to imply a criminal indifference to civil obligations" (***Zimmerman v Tarshis***, *supra*; *see also,* ***Benton v. Brookfield Props. Corp.,*** 2004 U.S. Dist. LEXIS 10843 [SDNY June 8, 2004]). Where, as here, the proposed amendment is devoid of merit and is legally insufficient, leave to amend should be denied (***Heller v Provenzano,*** 303 AD2d 20, 30, 756 NYS2d 26 [2003]; ***Zabas v Kard,*** 194 AD2d 784, 599 NYS2d 832 [1993]). Moreover, the papers in support of plaintiffs' cross motion are insufficient in that they do not contain a copy of the proposed amended complaint (***Haller v Lopane,*** 305 AD2d 370, 759 NYS2d 504 [2003]; ***Branch v Abraham & Strauss Department Store,*** 220 AD2d 474, 632 NYS2d 168 [1995]). Accordingly, plaintiffs' request for leave is also denied.

Dated: October 29, 2004



J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION