SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

GEORGIOS GEORGIADIS,	INDEX NO. 21387/2006
Plaintiff,	MOTION DATE August 28, 2007
- against -	
GIOVANNI B. SCUDERI and DAVID RAMOS,	MOTION CAL. NO. 21
Defendants.	MOT. SEQ. NUMBER

The following papers numbered 1 to 18 read on this motion by the plaintiff for leave to serve an amended complaint. The defendant Giovanni B. Scuderi cross-moves for summary judgment dismissing the plaintiff's complaint and all cross-claims. The defendant David Ramos cross-moves for summary judgment dismissing the plaintiff's complaint and all cross-claims.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	5 - 8
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	9 - 12
Affid(s) in Opp.....	13
Affid(s) in Opp.....	14
Replying Affirmation.....	15
Replying Affirmation.....	16
Replying Affirmation.....	17
Replying Affirmation.....	18

Upon the foregoing papers the motion and cross-motions are determined as follows:

This action arises out of a construction related accident that occurred on August 18, 2006 at a residence located at 13-39 209th Street, Bayside, New York. The premises at issue was a one-family residence that was owned by the defendant Giovanni B. Scuderi ("Scuderi"), but leased and occupied by the Scuderi's daughter, a non-party, and her husband, the defendant David Ramos ("Ramos"). The plaintiff and Ramos, who were the only parties who witnessed the accident, offered divergent testimony at their depositions as to how the accident happened.

The plaintiff testified that he was assisting Ramos who was cutting lengths of wood 2x4's that were to be used in creating a substructure

for a floor in a bathroom that Ramos was remodeling. The plaintiff avers that while facing Ramos he held two or three foot long pieces of 2x4 in front of him with a hand on each end and that Ramos cut the pieces of wood approximately in the middle with a hand held electric powered circular saw. The plaintiff claims that he, not Ramos, held the sections of 2x4 in the air and Ramos cut the wood by pushing the circular saw towards him. The plaintiff testified that two pieces were cut without incident, but on the third attempt his right thumb was cut by the saw before the third piece of wood was severed.

Ramos testified that he was cutting wood while it was resting on top of an upright grey garbage pail. Ramos averred that he placed the wood across the opening of the can and, while bracing it with his left hand, he operated the saw with his right hand. Ramos claims that after he placed a 2x4 across the pail, the plaintiff "grabbed the two-by-four and said, just cut it". Ramos asserts he repeatedly told the plaintiff he would not cut the wood while he was holding it, but that the plaintiff insisted he make the cut. Ramos relented and asserts he warned the plaintiff to "watch [his] fingers". While cutting the wood, Ramos avers that the saw jumped and cut the plaintiff's thumb.

Generally, leave to amend a pleading must be liberally granted (See e.g., CPLR §3025[b]; Lang v Dachs, 303 AD2d 645). However, leave is properly denied where the "proposed amendments are devoid of merit and are legally insufficient" (Duffy v Wetzler, 260 AD2d 596, 597).

Here, the plaintiff seeks leave to amend his pleading to add a cause of action pursuant to Labor Law §241[6]. As this action was commenced little more than one year ago, the parties' depositions were conducted less than five months ago, a compliance conference was held approximately one week ago, the note of issue is not due to be filed until February 22, 2008 and in light of the absence of any demonstrable prejudice to the defendants, the court finds that the proper exercise of discretion in this case requires permitting the amendment.

The plaintiff's failure to specify in the amended complaint the particular sections of the Industrial Code upon which he intends to rely is not fatal to the motion to amend (See generally, Dowd v City of New York, 40 AD3d 908, 911; Latino v Nolan & Taylor-Howe Funeral Home, Inc., 300 AD2d 631). The defendants may serve whatever supplemental discovery demands they feel are warranted based upon this amendment in accordance with the requisites the Civil Practice Law and Rules.

The defendants' assertion that the proposed cause of action lacks merit based upon the applicability of the statutory homeowners' exemption under Labor Law §241 is misplaced. The court can not, on the information adduced during discovery so far and raised in the context of a motion to amend where legal arguments are not sufficiently developed on this point, determine whether the defendant Scuderi, the record owner of the premises and experienced contractor who did not reside at the premises, but rather leased it to his family, and/or the defendant Ramos, the lessee, but not owner of the premises who was apparently performing part of the renovations himself and was actually involved in

causing the plaintiff's injuries, are entitled to rely on the homeowners' exemption. The determination of that issue must await the completion of any further discovery necessitated by the amendment and be raised subsequently in a motion for accelerated judgment or at trial.

As to the defendants cross-motions to dismiss the sole negligence cause of action in the original complaint, although the plaintiff has pleaded this cause of action without reference to section 200 of the Labor Law, his claim is controlled by the authority interpreting that statute as this was clearly a workplace accident and that statute "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Comes v New York State Elec & Gas Corp, 82 N.Y.2d 876, 877).

In this context, where an accident is the result of a dangerous or defective condition in the workplace, liability is predicated upon the party at issue either creating the condition or having actual or constructive notice of the condition (See, Gambino v Mass. Mut. Life Ins. Co., 8 AD3d 337; DeBlase v Herbert Constr. Co., 5 AD3d 624; Paladino v Soc'y of the N.Y. Hosp., 307 AD2d 343, 345). Here, however, the theory of liability is based upon the manner in which certain work was being performed, specifically cutting the wood two-by-fours, liability will attach only if the party to be charged exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, supra). Thus, the defendant Scuderi's reliance on Basso v Miller, 40 NY2d 233 for authority is inapposite as that case deals with the very general duty of a landowner to keep its premises reasonably safe, not a workplace accident arising out of the methods of construction.

While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557). Here, the defendant Ramos failed to establish prima facie entitlement to summary judgment dismissing the plaintiff's Labor Law §200 claim. Ramos acknowledged at his deposition that the mechanism of the plaintiff's injury, being cut by a circular saw, was not merely controlled by, but actually executed by Ramos himself.

On the other hand, there is no proof in the record that Scuderi exercised any control over how the plaintiff or Ramos accomplished their tasks during the bathroom renovation. Ramos' testimony that, in connection with other unrelated jobs, Scuderi trained him generally in the use of a circular saw does not translate to Scuderi having the requite control over the parties at the time of the accident. That Scuderi financed and approved of the project does not distinguish him from any other owner of property who hires a contractor. Scuderi's mere presence at the work site on occasions other than the day of the accident is insufficient to establish an issue of fact (See, Putnam v Karaco Industries Corporation, 253 AD2d 457) nor does the fact that he

may have checked the progress and quality of the work performed establish control (See, Alexandre v City of New York, 300 AD2d 263; Jacobsen v Grossman, 206 AD2d 405). At best, the evidence establishes Scuderi exercised general supervisory duties over the project not giving rise to liability under Labor Law §200, as there was no proof adduced of his "actual authority to control the activity [that brought] about the injury" (Reilly v Newireen Associates, 303 AD2d 214; see also, Martin v Paisner, 253 AD2d 796; Putnam v Karaco Industries Corporation, supra).

Accordingly, the plaintiff's motion is granted and the plaintiff may file and serve an amended complaint in the form annexed to the moving papers within thirty days of service of a copy of this order (See, CPLR §3025[b]). The defendant Ramos' cross-motion to dismiss the plaintiff's cause of action based in common-law negligence is denied. However, the defendant Scuderi's cross-motion to dismiss the plaintiff's cause of action based in common-law negligence is granted.

Dated: October 30, 2007

Peter J. Kelly, J.S.C.