SHORT FORM ORDER

INDEX # 17406-05
RETURN DATE: **3-12-08**
MOT. SEQ. # **005 & 006**

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

PRESENT:
Hon. PETER FOX COHALAN

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ABRAHAM G. ALEJANDRO,

Plaintiff,

-against-

WEST PARK BUILDERS, INC., W. PARK ASSOCIATES, INC., R.A.C. DRYWALL, INC., DONALD J. REHILL, JR. and APOLONIA REHILL,

Defendants.

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CALENDAR DATE: September 3, 2008
MNEMONIC: MD; MG

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Upon the following papers numbered 1 to 53 read on these motions for summary judgmen ; Notice of Motion/Order to Show Cause and supporting papers 1-19; 35-45 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 20-31; 46-50 ; Replying Affidavits and supporting papers 32-34; 51-53 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

**ORDERED** that this motion by the defendant/third party plaintiff, R.A.C. Drywall, Inc. (hereinafter RAC), for summary judgment and dismissal of plaintiff's complaint alleging an construction elevation accident pursuant to CPLR §3212 is hereby denied and the cross-motion by the defendants Donald J. Rehill, Jr., and Apolonia Rehill (hereinafter Rehills) for summary judgment and dismissal of the plaintiff's action and defendant's cross-claims pursuant to CPLR §3212 as exempt homeowners in this construction accident is hereby granted and the plaintiff's action and any cross-claims asserted by the defendants against the homeowners/ Rehills are hereby dismissed.

Abraham G. Alejandro (hereinafter plaintiff) instituted this action for personal injuries allegedly sustained in a construction accident on March 2, 2005 at 14 Commonwealth Boulevard in Bellerose, Nassau County on Long Island, New York. The plaintiff, an employee working with a temporary employment agency, Labor Temp, was assigned and working with Allied Building Products Corp. (third party dependant, hereinafter Allied) delivering Sheetrock to the construction site. The Rehills owned the home in Bellerose and after a fire at the premises the Rehills hired co-defendant, West Park Builders, Inc. (hereinafter West Park) as general contractor to rebuild the residence at that location. West Park hired co-defendant/ third party plaintiff RAC to install the Sheetrock on the premises. RAC visited the site in

mid- February 2005 to measure the site and ordered the Sheetrock from Allied to be delivered to the job site on Tuesday March 1, 2005 with certain of the Sheetrock to be placed up on the second floor of the structure.

The plaintiff, along with two others, delivered the Sheetrock from Allied to the job site on Wednesday, March 2, 2005 and proceeded to place the material at the site. The plaintiff, while moving Sheetrock to the second floor using a ladder which was set up on the plywood floor of the structure, fell into the basement. The plaintiff claims the plywood floor gave way and he, the ladder and the plywood fell into the basement where he was injured. The plaintiff thereafter commenced the instant action for violation of, inter alia, common law negligence and violations of the Labor Law §240 and §200.

RAC now moves for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 arguing that it is not responsible as a matter of law because it was not on site until the day after the accident and did not supervise or control the plaintiff's action. The Rehills also cross-move for the same relief arguing that as homeowners who contracted with a general contractor, West Park, to re-build their home, they are not responsible as a matter of law as they are exempt homeowners of a residence who did not direct, supervise or control the work being done. The plaintiff opposes the requested relief arguing there are questions of fact which require denial of summary disposition.

For the following reasons, RAC's motion for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 as against it is denied as there are material issues of fact which require resolution by a trier of fact. The cross-motion by the Rehills for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 as against them is hereby granted in its entirety and the plaintiff's action against the Rehills is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue

determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

On a motion for summary judgment the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact as to RAC's liability for the happening of this accident. While RAC argues that no liability should flow to it for negligence as a result of the plaintiff's injuries because it was not on site at the time of the accident, there are readily identifiable issues of fact on the question of supervision and control of the work. RAC does not deny that it hired Allied as a subcontractor to provide and deliver onto the job site the materials requested to Sheetrock and tape the residence being constructed. Also as part of the order RAC requested that one half (½) of the 94 pieces of the Sheetrock be placed on the second floor of the house. It was during the delivery of those pieces onto the second floor while the plaintiff was using a ladder on site that resulted in his fall and subsequent injury. The fact that RAC allegedly was not on site to supervise the delivery does not translate to no control over the job site since triers of the fact, depending on their view of the evidence presented, could infer that RAC's instructions to have the Sheetrock placed on the second floor evidenced some control and/or supervision on the placement of its materials for work it was to do the next day. RAC had Allied bring a boom for placement of Sheetrock on the second floor as instructed and from such instructions it could be inferred that RAC maintained some control on the job site.

The plaintiff also argues that RAC has no documentary evidence or factual evidence from a witness to support its claim that it was not there on site on the delivery date of the materials ordered. Its supporting documentation says March 4 or March 5, 2005 but there is testimony adduced by a fact witness and plaintiff argues that three (3) additional witnesses present on March 2, 2005 when the plaintiff's accident occurred, *i.e.* Bill Fischer, Joseph Finocchio and Robert Wurtz who were working on site for West Park are still to be deposed. While unnecessary to a dispositive finding on this motion where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge of a party making the motion and the opposing party did not have a reasonable opportunity for disclosure prior to the motion for summary judgment, the motion should be denied. ***Stevens v. Grody***, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); ***Urcan v. Cocarelli***, 234 AD2nd 537, 651 NYS2d 611 (2nd Dept. 1996); ***Campbell v. City of New York***, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); ***Baron v. Incorporated Village of Freeport***, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). Here, plaintiff has established three (3) additional witnesses to

be deposed who could shed additional light and raise additional issues of fact on the question of control and supervision of the work being done by the plaintiff.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in Court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, the motion by RAC for summary judgment and dismissal of plaintiff's action pursuant to CPLR §3212 is denied as there are readily identifiable issues of fact on the question of supervision and control to warrant denial of summary disposition as a matter of law.

The Rehills also cross-move for summary judgment pursuant to CPLR §3212 because, as homeowners of a one-family home who exercised no supervision, control, direction or provided any materials to be used on the job site they are entitled to the homeowner's exemption available under Labor § 240 and §241. The plaintiff opposes the cross-motion claiming that the Rehills visited the site on many occasions and therefore allegedly "supervised" the re-building of their residence and that their residence also had a commercial purpose because Apolonia Rehill was an attorney and conducted some "legal business" in her home office. Both arguments are without merit and the cross-motion is granted and the plaintiff's action against the Rehills is dismissed pursuant to CPLR §3212.

The evidence presented demonstrates that the Rehills suffered a catastrophic fire at their home and hired West Park to rebuild their home. Thus they are entitled to the homeowners exemption from labor accidents on site as provided within the Labor Law §240 and §241. The mere fact that as interested and curious homeowners they would visit the site to see the progress being made on rebuilding their home does not allow for a "forced" interpretation of supervision, direction or control. There is nothing within the record to suggest that the Rehills had any authority over the workmen, the equipment or the manner in which the work was being done. The plaintiff has failed to establish direction, control or supervision to warrant further inquiry and the cases cited [***Chura v. Baruzzi***, 192 AD2d 918, 596 NYS2d 592 (3rd Dept. 1993); ***Valentin v. 30-4 Square Corporation***, 227 AD2d 467, 643 NYS2d 157 (2nd Dept. 1996); ***Smolski v. Middleton***, 166 AD2d 521, 560 NYS2d 802 (2nd Dept. 1990); and ***Gambee v. Dunford***, 270 AD2d 809, 705 NYS2d 755 (4th Dept. 2000)] are inapposite and fail to support the plaintiff's claims to raise an issue of fact to warrant denial of the homeowners exemption in this case. In fact, ***Valentin v. 30-4 Square Corporation***, supra, does not support the plaintiff's position and specifically states "the record reveals that neither [of the homeowners] directed or controlled the plaintiff's activities" and dismissed as against the homeowners finding that the terms direction and control are to be "strictly construed." See, ***Rodas v. Weissberg***, 261 AD2d 465, 690 NYS2d 116 (2nd Dept. 1999).

The plaintiff's additional argument that the Rehills' use of their residence to conduct some business by computer e-mail, legal research, or even as a home office, somehow converts the residence into a commercial use and therefore raises an issue of fact

on the applicability of the homeowners exemption is, as stated above, without merit. See, ***DeSabato v. 674 Carroll Street Corp.***, 55 AD3d 656, 868 NYS2d 209 (2nd Dept. 2008). The cases cited are inapplicable to the present circumstances before the Court and raise no issues of fact other than mere conjecture and surmise in an effort to avoid summary dismissal of the plaintiff's action as against the Rehills in this action.

Accordingly, the cross-motion by the Rehills for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 is granted in its entirety and the plaintiff's action against the Rehills only, is dismissed and the action is severed and continued against the remaining defendants.

The foregoing constitutes the decision of the Court.

Dated: April 20, 2009

J.S.C.