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SHORT FORM ORDER

INDEX No. 07-10131
CAL No. 12-01285OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 10-30-12 (#012 & #014)
MOTION DATE 10-31-12 (#013)
ADJ. DATE 12-11-12
Mot. Seq. # 012 - MG
013 - MD
014 - XMD

---X

JOSEPH BENNETT, as Guardian of JAMES BENNETT, an incapacitated person, and TRACY BENNETT,

Plaintiffs,

- against -

MICHAEL HUCKE, CINDY HUCKE, ALAN KIRK, ALAN H. KIRK, INC., ALAN KIRK CUSTOM HOMES, INC., A & LP CONSTRUCTION CO., INC. and ANDREW PERCOCO,

Defendants.

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Upon the following papers numbered 1 to 38 read on this motion and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers 21 - 24; 25 - 28; Answering Affidavits and supporting papers 29 - 30; 31 - 32; Replying Affidavits and supporting papers 33 - 36; 37 - 38; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (012) by defendants Alan Kirk and Alan H. Kirk, Inc., the cross motion (013) by plaintiffs, and the cross motion (014) by defendants A&LP Construction Co., Inc., and Andrew Percoco are consolidated for the purpose this determination; and it is

ORDERED that the motion by defendants Alan Kirk and Alan H. Kirk, Inc., for summary judgment dismissing the complaint and all cross claims and counterclaims against them is granted; and it is

ORDERED that the cross motion by plaintiffs for partial summary judgment in their favor on the issue of liability as against defendant A&LP is denied without prejudice to renewal within 20 days of the entry of this order; and it is

ORDERED that the cross motion by defendants A&LP Construction Co., Inc., and Andrew Percoco for summary judgment dismissing the complaint and all cross claims and counterclaims against them is denied without prejudice to renewal within 20 days of the entry of this order.

On December 19, 2003, plaintiff James Bennett ("Bennett ") fell from a scaffold while working at the residence of defendants Michael Hucke and Cindy Hucke (hereinafter collectively known as "the Huckes"). The accident occurred during the framing phase of the project. Bennett, who was helping to secure the scaffold, allegedly lost his grip and fell approximately 30 feet to the first floor of the building. He allegedly sustained severe brain injuries as a result of the fall. By order of this Court, dated April 15, 2004 (Leis, J), Bennett was adjudicated an incompetent person and his wife, Tracey Bennett, was appointed his guardian. The Bennetts subsequently commenced a personal injury action, assigned index no. 05-1872, against the Huckes alleging causes of action for negligence, violation of the Labor Law, and loss of services. The complaint also lists a number of contractors at the worksite, including Alan Kirk, Alan H. Kirk, Inc., Alan Kirk Custom Homes, Inc., A&LP Construction Co., Inc., and Andrew Percoco as defendants to the action. The defendants joined issue, and the Huckes and the Kirk defendants asserted cross claims against each other for contribution and indemnification. In April 2005, the Kirk defendants commenced a third-party action seeking indemnification and contribution from "Bennett Building, Inc." and "J. Bennett Building, Inc.," Bennett's alleged employers at the time of the accident. By order dated March 13, 2006 this Court granted a default judgment against the third-party defendants on the issue of liability.

On September 14, 2006, the injured plaintiff's brother, Joseph Bennett, was appointed plaintiff's interim guardian for a period of ninety days (Leis, J.). In October 2006, the Court permitted Joseph Bennett to continue as the injured plaintiff's interim guardian, and to retain counsel on his behalf. Shortly thereafter, the incoming counsel commenced the instant action assigned index no. 07-10131. The action names all the defendants identified in the 2005 action, and asserts the same causes of action raised in the earlier complaint, as well as a cause of action based upon defendants' purported failure to secure workers' compensation insurance on behalf of Bennett. The defendants joined issue in the second action and asserted cross claims against each other for, inter alia, contribution, indemnification and failure to procure insurance. By order dated March 18, 2008 (Tanenbaum, J.), the court granted a motion by the Kirks, pursuant to CPLR 3211, seeking dismissal of the 2007 action on the ground that an action seeking identical relief already was pending before the court. The

plaintiffs appealed the court's ruling.

On July 7, 2009, the Appellate Division, Second Department, reversed the trial court's determination on the basis that the motion, made pursuant to CPLR 3211, was untimely (*see* ***Bennett v Hucke***, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]). However, the Court noted that the Kirks could still pursue any appropriate relief by way of a summary judgment motion in the normal course of litigation. As a result, the Kirks moved, pursuant to CPLR 3212, for summary judgment dismissing the 2007 complaint, arguing that another action seeking identical relief was pending before the court, and that the additional Workers' Compensation claim contained in the complaint was barred by the doctrines of res judicata and collateral estoppel. The motion was denied by Justice Tanenbaum by order dated July 22, 2010, as the 2007 action was deemed necessary on behalf of the incapacitated plaintiff. The Court also found that the March 2006 default judgment against the third-party defendants did not preclude recovery against the Kirk defendants in the underlying action, and that the 2007 complaint stated a viable claim under the Workers' Compensation Law, since Bennett may have been employed as a "special employee" when he was injured at the worksite. The Court further joined the two actions for the sole purpose of conducting a joint trial.

Defendants Alan Kirk and Alan H. Kirk, Inc., now move for summary judgment dismissing all claims, cross claims and counterclaims asserted against them, arguing that Alan Kirk did not participate in the renovation project in his individual capacity, and that Alan Kirk, Inc., cannot be held liable for James Bennett's injuries since it was not the general contractor and did not possess the supervisory authority to control Bennett's work at the time of the accident. Defendants A&LP Construction Co., Inc., and Andrew Percoco (herein collectively referred to as " A&LP") also move for summary judgment in their favor dismissing the complaint and all cross claims and counterclaims against them on the ground they neither controlled or supervised Bennett's work, as he was employed by Bennett Building Inc. at the time of the alleged accident. A&LP asserts that while it partnered with Bennett Building for the purpose of completing the framing work on the project, Bennett Building was responsible for paying and directing its own employees, including Bennett, and securing Workers' Compensation insurance on their behalf. A&LP further argues that plaintiffs should be precluded from offering any evidence against it, since they failed to serve a timely response to A&LP's request for a bill of particulars

Plaintiffs oppose both motions, arguing triable issues exist as to whether Alan Kirk, Inc., was the general contractor for the project, and if so, whether Alan Kirk participated in the project in his individual or corporate capacity. In opposition to A&LP's motion, plaintiffs assert that triable issues exist as to whether A&LP was a statutory agent or general contractor for the project, whether it engaged in a joint venture with Bennett Building, Inc., and, if so, whether as Bennett's special employer A&LP was required to secure Workers' Compensation insurance on his behalf. Plaintiffs also cross-move for partial summary judgment in their favor on the issue of liability as against A&LP.

Initially, the Court notes that the branches of defendants' motions seeking summary judgment dismissing the complaint and any counterclaims or cross claims filed against them in the action assigned index number 05-1872 are denied. Since the actions assigned index number 05-1872 and 07-10131 have been joined for the purpose of a joint trial only, the integrity and identity of each action is preserved, and any application for relief in the former action must be made under the index number which corresponds to such action (*see* CPLR 602[b]; ***Inspiration Enters. v Inland Credit Corp.***, 57 AD2d 800, 394 NYS2d 701 [1st Dept 1977]). It is further noted that the Kirk defendants already have unsuccessfully moved for summary judgment

dismissing the 2007 action against them. The Court will, nevertheless, entertain their instant motion for summary judgment. While parties are generally discouraged from making successive summary judgment motions in the absence of a showing of newly discovered evidence or other sufficient cause (*see* ***Tolpygina v Teper***, 63 AD3d 722 , 880 NYS2d 326 [2d Dept 2009]), a court may entertain a subsequent summary judgment motion, where, as here, "it is substantively valid and the granting of the motion will further the ends of justice [by] eliminating an unnecessary burden on the resources of the courts" (***Detko v McDonald's Rests. of N.Y.***, 198 AD2d 208, 209, 603 NYS2d 2d 496, 497 [2d Dept 1993], *lv denied* 83 NY2d 752, 611 NYS2d 134 [1994]; *see also* ***Valley Natl. Bank v INI Holding, LLC***, 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise such triable issues (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

"A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351[2005]). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see* ***Walls v Turner Constr. Co.***, *supra*; ***Linkowski v City of New York***, *supra*; ***Armentano v Broadway Mall Props., Inc.***, 30 AD3d 450, 817 NYS2d 132 [2d Dept 2006]; ***Damiani v Federated Dept. Stores, Inc.***, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally* ***Walls v Turner Constr. Co.***, *supra*; *see also* ***Aranda v Park E. Constr.***, 4 AD3d 315, 316, 772 NYS2d 70 [2d Dept 2004]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]). Moreover, the existence of an employer/employee relationship between the injured worker and the purported employer is an essential requirement for protection under the Workers' Compensation Law (Workers' Compensation Law §§ 10 and 11; *see generally* ***O'Rourke v Long***, 41 NY2d 219, 214, 391 NYS2d 553 [1976]). Pursuant to section 11 of the Workers' Compensation Law, where an employer fails to obtain workers' compensation insurance on behalf of his/or her employees, such employee possesses the option to sue for damages sustained as a result of his or her injury (*see* ***Matter of Zatz v Moscovici***, 258 AD2d 850, 686 NYS2d 167 [3d Dept 1999]). The employee must prove the employer did not maintain coverage as required by sections 10 and 50 of the Workers' Compensation Law (*see* Martin Minkowitz, Practice Commentaries, McKinney's Workers' Compensation Law § 11), and that its negligence was a proximate cause of the accident (*see* ***Morgan v Robacker***, 2 AD2d 637, 151 NYS2d 836 [1956]).

Here, Alan Kirk, Inc., established its prima facie entitlement to summary judgment dismissing the claims, counterclaims and cross claims against it by demonstrating that it was not Bennett's general or special employer at the time of the alleged accident (*see* ***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 578 NYS2d 106 [1991]; ***Schweitzer v Thompson & Norris Co.***, 229 NY 97, 127 NE 904 [1920]; ***Gonzalez v Woodbourne Arboretum, Inc.***,100 AD3d 694, 954 NYS2d 113 [2d Dept 2012]; *compare* ***Charlebois v***

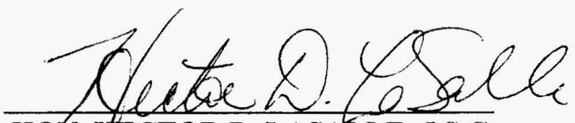
Brockway, 209 AD2d 798, 618 NYS2d 478 [3d Dept 1994]), and that it did not have supervisory control and authority over his work such that it could have avoided or corrected any alleged unsafe condition (*see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; ***Herrel v West***, 82 AD3d 933, 919 NYS2d 83 [2d Dept 2011]; ***Florez v Conlon***, 82 AD3d 831, 918 NYS2d 369 [2d Dept 2011]; ***Domino v Professional Consulting, Inc.***, 57 AD3d 713, 869 NYS2d 224 [2d Dept 2008]). Significantly, the Huckes, Percoco and Alan Kirk all testified that the subcontractors on the project were in charge of their own work and safety procedures, and that Alan Kirk, Inc., basically served as a construction manager with its supervisory role being limited to the coordination of work schedules, performing administrative tasks, and liaising between the subcontractors and the homeowners. It also is undisputed that "J. Bennett Building, Inc." was Bennett's general employer at the time of the accident, and that Alan Kirk, Inc., never assumed control of the manner, details and ultimate result of his work. Alan Kirk also established his prima facie entitlement to summary judgment dismissing the claims, counterclaims and cross claims against him personally by submitting evidence that he entered the agreement with the Huckes in his corporate capacity, and that his conduct at the worksite was undertaken as Alan Kirk, Inc.'s president and sole shareholder (*see* ***Rosen v Watermill Dev. Corp.***, 1 AD3d 424, 768 NYS2d 474 [2d Dept 2003]; ***Namrod Constr. Co. v F.V.B. Contr. Corp.***, 116 AD2d 556, 497 NYS2d 411 [2d Dept 1986]; ***Gold v Royal Cigar Co.***, 105 AD2d 831, 482 NYS2d 32 [2d Dept 1984]).

In opposition, plaintiffs' conclusory assertions regarding the final cost of the project, the presence of the letters "GC" on checks the Huckes paid to Alan Kirk, and the alleged supervisory role he played on previous unrelated projects are insufficient for the purpose of raising a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*; *see also* ***Walls v Turner Constr. Co.***, *supra*). The deposition testimony of the Huckes' architect also fails to raise a triable issue as to the scope of Alan Kirks' supervisory authority or control, as he testified that he was unaware of the details of the agreement Alan Kirk entered with the Huckes, and that he did not personally observe Alan Kirk's interaction with the subcontractors at the worksite. The Kirk defendants, therefore, are entitled to summary judgment dismissing the complaint and all cross claims and counterclaims against them.

As for the cross motions seeking summary judgment, neither plaintiffs nor AL& P have included a complete set of the pleadings in support of their respective motions as required by CPLR 3212 (b) (*see* ***Ahern v Shepherd***, 89 AD3d 1046, 933 NYS2d 597 [2d Dept 2011]; ***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]; ***Thompson v Foreign Cars Ctr., Inc.***, 40 AD3d 965, 837 NYS2d 673 [2007]; ***Matsyuk v Konkalipos***, 35 AD3d 675, 824 NYS2d 918 [2006]; ***Wider v Heller***, 24 AD3d 433, 434, 805 NYS2d 130 [2005]). The Court, therefore, is constrained to deny the cross motions without prejudice to renewal upon submission of proper papers within 20 days of the entry of this order.

The foregoing constitutes the Order of this Court.

Dated: April 5, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION