SHORT FORM ORDER

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

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

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 5-30-13 (#016)
MOTION DATE 6-20-13 (#017)
ADJ. DATE 8-6-13
Mot. Seq. # 016 - MD
Mot. Seq. # 017 - MotD

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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 61 read on these motions for reargument and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; 29 - 39; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 40 - 52; 53 - 54; Replying Affidavits and supporting papers 55 - 56; 57 - 61; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (016) by plaintiff Joseph Bennett and the motion (017) by defendants A&LP Construction Co. Inc. and Andrew Percoco are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Joseph Bennett for leave to renew and reargue a prior motion by defendants Alan Kirk and Alan H. Kirk, Inc. for summary judgment dismissing the complaint against them, which was granted by order of this court dated April 05, 2013, is denied; and it is

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ORDERED that the motion by defendants A&LP Construction Co. Inc. and Andrew Percoco for summary judgment dismissing the complaint against them is granted to the extent indicated herein and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff James Bennett when he fell from a scaffold while working at the residence of defendants Michael Hucke and Cindy Hucke on December 19, 2003. The events precipitating this lawsuit and the parties' legal claims are detailed in numerous orders issued by this Court and will not be repeated herein, as the parties' familiarity with the same is assumed.

Plaintiff Joseph Bennett now moves for leave to renew and reargue a prior motion by defendants Alan Kirk and Alan H. Kirk, Inc. for summary judgment dismissing the complaint against them, which was granted by order of this court dated April 05, 2013. A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][2], [3]; *see* ***Ramirez v Khan***, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]; ***Lardo v Rivlab Transp. Corp.***, 46 AD3d 759, 848 NYS2d 337 [2d Dept 2007]). While a court may grant renewal upon facts known at the time of the original motion, leave to renew should be denied when the moving party fails to offer a reasonable excuse for not submitting such new facts on the prior motion (*see* ***Sobin v Tylutki***, 59 AD3d 701, 873 NYS2d 743 [2d Dept 2009]; ***Boakye-Yiadom v Roosevelt Union Free School Dist.***, 57 AD3d 929, 871 NYS2d 314 [2d Dept 2008]; ***Worrell v Parkway Estates, LLC***, 43 AD3d 436, 840 NYS2d 817 [2d Dept 2007]; ***Gohrig v Porcelli***, 17 AD3d 314, 791 NYS2d 835 [2d Dept 2005]; ***Hart v City of New York***, 5 AD3d 438, 772 NYS2d 574 [2d Dept], *lv denied* 3 NY3d 601, 782 NYS2d 404 [2004]), as it is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" or who failed to assert a legal theory due to a mistaken "assumption that what was submitted was adequate" (***Matter of Beiny***, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; *see* ***Castillo v 711 Group, Inc.***, 55 AD3d 773, 866 NYS2d 321 [2d Dept 2008]; ***Hlenski v City of New York***, 51 AD3d 974, 858 NYS2d 789 [2d Dept 2008]; ***Hart v City of New York***, *supra*). Conversely, a motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and may not be used to advance arguments different than those presented on the prior motion (CPLR 2221 [d][2]; *see* ***Pryor v Commonwealth Land Title Ins. Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]).

Here, plaintiff failed to include, or even assert, that his motion contains any new evidence unavailable at the time of the original motion. Plaintiff's motion, therefore, in fact, seeks reargument (*see* ***Tokio Mar. & Fire Ins. Co., Ltd. v Borgia***, 11 AD3d 603, 783 NYS2d 629 [2d Dept 2004], *lv dismissed in part, denied in part* 4 NY3d 793, 795 NYS2d 165 [2005]; ***Ruddock v Boland Rentals***, 5 AD3d 368, 774 NYS2d 50 [2d Dept 2004]), which is denied, as plaintiff failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (*see* CPLR 2212(d); ***Saccomagno v City of New York***, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; ***Pryor v Commonwealth Land Tit. Ins. Co.***, *supra*; ***Foley v Roche***, *supra*).

As for the motion by defendants A&LP Construction Co. Inc. and Andrew Perroco for summary judgment in their favor dismissing all claims against them, the movants argue that they neither controlled nor supervised Bennett's work, as he was employed by Bennett Building Inc. at the time of the alleged accident. Specifically, 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. Plaintiffs oppose the motion, arguing triable issues exist as to whether A&LP was a statutory agent or general contractor for the project, whether it had authority to control James Bennett's work since it was engaged in a joint venture/partnership with Bennett Building, Inc., and, if so, whether, as James Bennett's special employer, A&LP was required to secure Workers' Compensation insurance on his behalf.

The branch of the motion by defendants A&LP and Andrew Percoco for summary judgment dismissing the claims and cross claims against Andrew Percoco personally is granted, as the defendants submitted unrefuted documentary evidence that Andrew Percoco entered the agreement with the Huckes in his corporate capacity, and that his conduct at the worksite was undertaken as the principal of A&LP (*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]). Specifically, the defendants submitted copies of the agreements A&LP entered in relation to the framing of the Huckes' residence which identify Percoco as the agent authorized to sign on behalf of the corporation. Plaintiffs failed to raise a triable issue, as their opposition did not address this branch of defendants' motion.

Turning to the branch of defendants' motion for summary judgment dismissing plaintiffs' Labor Law claims, Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure"(***Bland v Manocherian***, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; *see* ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]; ***Greenberg v City of New York***, 81 AD2d 284, 440 NYS2d 332 [2d Dept 1981]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, *supra*; ***Sprague v Peckham Materials Corp.***, *supra*). Section 240(1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 NE 2d 133 [1948]). Moreover, an owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, *supra*).

"A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a

statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (***Coque v Wildflower Estates Dev., Inc.***, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]). The fact that the subcontractor retained concomitant or overlapping authority to supervise the work the prime contractor hired it to perform does not negate the prime contractor's ultimate authority to supervise and control such work (*see* ***Tuccillo v Bovis Lend Lease, Inc.***, 101 AD3d 625, 958 NYS2d 86 [1st Dept 2012]; ***Nascimento v Bridgehampton Constr. Corp.***, 86 AD3d 189, 924 NYS2d 353 [1st Dept 2011]; ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; ***Everitt v Nozkowski***, 285 AD2d 442, 728 NYS2d 58 [2d Dept 2001]). Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity (*see* ***Samaroo v Patmos Fifth Real Estate, Inc.***, 102 AD3d 944, 959 NYS2d 229 [2d Dept 2013]; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; ***McGlynn v Brooklyn Hosp.-Caledonian Hosp.***, 209 AD2d 486, 619 NYS2d 54 [2d Dept 1994]).

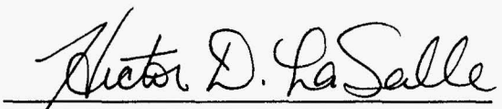
Here, it is undisputed that at the time of James Bennett's fall from the scaffold no other safety devices such as guardrails or safety nets were in place to prevent or break his fall (*see* ***Canosa v Holy Name of Mary R.C. Church***, 83 AD3d 635, 920 NYS2d 390 [2d Dept 2011]; ***Nimirovski v Vornado Realty Trust Co.***, 29 AD3d 762, 818 NYS2d 93 [2d Dept 2006]; ***Rodriguez v Forest City Jay St. Assoc.***, 234 AD2d 68, 650 NYS2d 229 [1st Dept 1996]). Further, A&LP failed to establish its prima facie entitlement to summary judgment dismissing plaintiffs' Labor Law §240 (1) claim, as triable issues exist as to whether it retained authority to supervise and control James Bennett's work as a statutory agent of the homeowners (*see* ***Russin v Louis N. Picciano & Son***, *supra*; ***Nascimento v Bridgehampton Constr. Corp.***, *supra*; ***Nasuro v PI Assoc., LLC.***, *supra*; ***Everitt v Nozkowski***, *supra*). A&LP's own submissions indicate that the Huckes hired it as the prime contractor for the framing of the residence, and that it hired plaintiff's employer, James Bennett Inc., as a framing subcontractor. Notwithstanding Percoco's assertion that he considered James Bennett Inc. an equal partner for the framing project, such overlapping authority does not negate A&LP's authority to control or supervise the subcontractors's work (*see* ***Tuccillo v Bovis Lend Lease, Inc.***, *supra*; ***Everitt v Nozkowski***, *supra*).

Additionally, where, as here, Andrew Perroco testified that A&LP hired James Bennett Inc. as an "equal partner," and that both entities were engaged in a "joint venture" for the purpose of framing the Huckes' residence, triable issue exists as to whether James Bennett was a special employee or a co-employee of A&LP (*see* ***Fung v Japan Airlines Co., Ltd.***, 9 NY3d 351, 850 NYS2d 359 [2007]; ***Macchirole v Giamboi***, 97 NY2d 147, 150, 736 NYS2d 660 [2001]; ***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 578 NYS2d 106 [1991]) and, if so, whether A&LP was required to obtain workers' compensation insurance on his behalf (*see* ***D'Alessandro v Aviation Constructors, Inc.***, 83 AD3d 769, 921 NYS2d 140 [2d Dept 2011]; ***Slikas v Cyclone Realty, LLC***, 78 AD3d 144 , 908 NYS2d 117 [2d Dept 2010]). The exclusive remedy doctrine has been extended to entities other than the injured plaintiff's direct employer where an employee is specially employed by way of a joint venture or is acting in the capacity of a co-employee (*see* ***Thompson v Grumman Aerospace Corp.***, *supra* at 359). A person's categorization as a special employee is usually a question of fact and may only be made as a matter of law where the particular, undisputed critical facts compel that conclusion (*see* ***Thompson v Grumman Aerospace Corp.***,

supra). Accordingly, the motion by A&LP for summary judgment dismissing the complaint against it is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 14, 2014
Riverhead, NY



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

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**