[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 7

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

X

CRESCENCIO HERRERA

Index Nº. 22521/06

-against-

Hon. WILMA GUZMAN

JACKSON DEVELOPMENT GROUP

Justice.

X

The following papers numbered 1 to ____ Read on this motion
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION AND ORDER.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10 / 23 / 12

Hon. _____ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 22521/06
Motion Calendar No. 15
Motion Date: 9/10/12

CRESCENSIO HERRERA

Plaintiff(s),

-against-

JACKSON DEVELOPMENT GROUP, LTD., BELLEROSE BUILDERS, INC., PARKER DVLP., LTD., PARKER DEVELOPMENT, LIMITED, and FLJ DEVELOPMENT, INC., FLJ DEVELOPMENT and FRANSICSO JEDRZEJCYK.

Defendant(s).

DECISION/ ORDER
Present:
Hon. Wilma Guzman,
Justice Supreme Court,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Defendants cross-move pursuant to C.P.L.R. 3212 for an Order granting summary judgment and dismissing the plaintiff's complaint.[1] Plaintiff submitted written opposition.

Plaintiff commenced this cause of action seeking damages for injuries allegedly sustained on June 22, 2004 when he allegedly tripped on the metal base of a chain link fence located at 607 Southern Boulevard, Bronx, NY. Defendant Bellerose Builders, Inc. (Bellerose) was the general contractor, defendant FLJ Development (FLJ) was the subcontractor and defendant Jedrzejczyk was the sub-contractors principal.

Defendants assert that all work, labor and services concerning the premises in question was

[1] That portion of defendants motion which sought to strike the plaintiff's complaint for failure to comply with discovery and/or preclusion of evidence at trial was decided pursuant to the June 25, 2012 Order of the Honorable Laura Douglas.

done by defendant FLJ without input, supervision, dominion or control of any other named defendant. FLJ hired a non-party National Rent-a-Fence to install and service the fence. Defendants further argue that there was no actual or constructive notice of any defect and that plaintiff was aware of the object over which he fell.

In opposition, plaintiff argues that there has been no testimony from a representative of FLJ and thus there are material issues of fact within the exclusive knowledge of the defendants that prevent his ability to properly oppose the motion for summary judgment. Plaintiff's further argue that notwithstanding the lack of discovery that prevents proper opposition to the issue of notice, defendant's caused and created the hazardous condition over which plaintiff fell and therefore had notice of such. Plaintiff further argues that the owner of the building at the time of the accident was Parker Development.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *see*, Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *see*, Rose v. Da Ecib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *see*, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957). Furthermore when issues of credibility are presented by conflicting testimony, a motion for summary judgment should not be granted. See (Lossing v. Dilemani, 118 A.D.2d 423, 592 N.Y.S.2d 428 (1st Dept. 1992), or where there is any doubt as to the existence of a material and triable issue of fact, summary judgment should not be granted. See (Krupp v. Aetna Life & Casualty Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2nd Dept. 1984).

In support of the motion for summary judgment, defendants submit inter alia, a copy of the

pleadings and a December 12, 2003 contract between Jackson Development Group (Jackson)/Bellerose to FLJ.

Mr. Jedrzejczyk testified that between 2002 to 2007 he worked for FLJ which worked pursuant to a contracts with Jackson Development Group. It was his understanding that Jackson was the general contractor. In June 2004 Jackson contracted with FJL to do work at 607 Southern Boulevard in the Bronx. The contracts included jobs such as masonry, concrete, framework, sheetrock, ceramic tile, paint and clean up. Ont his particular job, FLJ was responsible for the clean up of the work area which was inside the fence. The fence was erected by National Rent-a-Fence, however, if there was damage to the fence after it was set up by National Rent-a-Fence, FJL would try to fix it. FLJ also constructed the sidewalk which was constructed after the fence was erected and the last phase of the job. In order to construct the side walk the fence would be temporarily removed and replaced each night until the sidewalk was complete by FJL workers.

Plaintiff testified that on June 22, 2004 that as he walked to turn onto Southern Boulevard and St. Johns he walked passed the house being constructed he had an accident and tripped and fell. He had passed by the house under construction prior to his accident. Plaintiff testified that he tripped over a piece of iron which he referred to as an obstacle.

A December 12, 2003 contract between Jackson/Bellerose and FJL indicates contract work for six houses, including the house at the subject location. Detailed work included FJL's responsibility for the maintenance of the exterior fence which must be functional and replaced at the end of each work day.

The affidavit of Neil Weissman, an officer of Jackson, indicates that Jackson was not the owner of the property located at 607 Southern Boulevard. Rather, Jackson was responsible for payment of staffing bills and hiring the general contractor Bellerose Builders to perform work, labor and services for non-party owner Clay Development. Mr. Weissman further affirms that Parker Development was not involved in any manner with the subject premises or the work being done.

The July 12, 2004 NYC Recording of the Deed indicates that the owner of the premises prior to the sale of the property to Secundo Pillcorema on July 12, 2004 was Clay Development, an entity not a party herein.

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the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

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In the instant case, defendant has met the burden for summary judgment as to defendants Jedrzejczyk and plaintiff has offered no proof to raise a triable issue of fact as to whether this defendant should be sued individually. An individual will not be held individually liable for corporate obligations notwithstanding some indication of some exclusive domination in wrong doing of the individual shareholder in committing a tort against the person seeking to pierce the corporate veil. Brito v. BILP Corp., 282 A.D.2d 320 (1st Dept. 2001) citing Morris v. Dept. of Taxation 82 N.Y.2d 135 (1993). As such, the plaintiff's complaint is dismissed as to this

defendant.

This Court would note that the affidavit of Mr. Weissman which indicates Jackson's role in this endeavor as that of the company responsible for paying the staffing bills is contradicted by the testimony of defendant Jedrzejczyk, where he indicates defendant Jackson as the general contractor. The December 12, 2003 contract indicates Jackson and Bellerose as the companies that contracted with defendant FJL. This contract also indicates that the owner retained only the responsibility for filings with the DOB and DOT. As such, defendants arguments that the landowner, general contractor and developer duty had been extinguished by the complete control of the fence by the subcontractor is supported by documentary evidence. Hernandez v. Racanelli Construction Company, Inc., 33 A.D.3d 536 (1st Dept. 2006). This documentary evidence is further supported by the testimony of defendant Jerzejczyk and the affidavit of Mr. Weissman(Jackson).

Plaintiff in opposition, and relying on the documentary and testimonial evidence submitted with defendants moving papers, fails to raise a triable issue of fact that defendants Bellerose, Jackson or Parker had actual or constructive notice of the hazardous defect. Nor does plaintiff offer any proof that these defendants caused or created the hazardous condition upon which plaintiff tripped and fell. or caused or created the defect upon which plaintiff alleges he fell. As such, the plaintiff's complaint is also dismissed as to defendants Bellerose, Jackson and Parker. The contract, serving as the best evidence for the issue of responsibility for the maintenance, removal and replacement of the fence as belonging solely to FJL, plaintiff has failed to prove through competent proof that there are issues of fact outstanding that would warrant further discovery.

The defendants motion for summary judgment is denied as to defendant FJL as defendants own submissions fail to meet the burden for summary judgment as to this defendant. The December 12, 2003 contract makes reference that "Frank will also be responsible for the exterior fence and maintenance of the fence" and "exterior fence must be functional and put back at the end of the day to prevent accidents and security issues to neighbors." Defendant has provided no documentation as to how, when and on what days the fence was replaced and if the fence was removed and replaced on the date of plaintiff's accident As such, issues of fact remain as to whether defendant FJL's actions caused or created the hazardous condition upon which plaintiff fell.

Accordingly, it is

ORDERED that defendants motion for summary judgment pursuant to C.P.L.R. § 3212 is hereby granted as to defendants Jackson Development Group, Ltd., Bellerose Builders, Inc., Parker Dvlp., LTD., Parker Development Limited and Francisco Jedrzejcyzk only. It is further

ORDERED that the defendants motion for summary judgment is denied as to defendant FJL Development is denied. It is further

ORDERED that the Clerk of the Court shall mark the court file accordingly.

Plaintiff shall serve a copy of this Order with Notice of Entry upon defendant within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

OCT 23 2012

DATE

HON. WILMA GUZMAN
Justice Supreme Court