

Simon v Granite Bldg. 2, LLC
2012 NY Slip Op 30270(U)
January 31, 2012
Supreme Court, Nassau County
Docket Number: 022101/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 14

_____ X

CHARLES SIMON and CHARLES SIMON, as
Administrator of the Estate of JULIE SIMON,
deceased,

Plaintiffs,

-against-

Index No.: 022101/08
Motion Sequence...04, 05,
06, 07, 08, 09, 10, 11, 12
Motion Date...12/14/11

GRANITE BUILDING 2, LLC, LALEZARIAN
PROPERTIES, LLC, KULKA CONSTRUCTION
CORP., KULKA CONTRACTING, LLC, FXR
CONSTRUCTION, INC. d/b/a DEV CONSTRUCTION,
CANATAL INDUSTRIES, INC., MCLO
STRUCTURAL STEEL CORP., NDG ARCHITECT,
P.C. and THE OFFICE OF JAMES RUDERMAN, LLP,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion (Mot. Seq. 04).....X
- Affirmation in Partial Opposition.....X
- Affirmation in Further Support.....X
- Notice of Motion (Mot. Seq. 05).....X
- Affidavit in Support.....X
- Memorandum of Law.....X
- Affirmation in Partial Opposition.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Notice & Amended Notice of Cross-Motion
(Mot. Seq. 06).....X

Memorandum of Law.....X
Affirmation in Partial Opposition.....X
Reply Affidavit.....X
Sur-Reply Affidavit.....X
Notice of Motion (Mot. Seq. 07).....X
Memorandum of Law.....X
Affirmation in Partial Opposition.....X
Affirmation in Opposition.....X
Reply Affirmation.....X
Notice of Cross-Motion (Mot. Seq. 08).....X
Reply Affirmation.....X
Notice of Motion (Mot. Seq. 09).....X
Affirmation in Opposition.....X
Affidavit in Opposition.....X
Reply Affirmations (3).....X
Notice of Cross-Motion (Mot. Seq. 10).....X
Affidavit in Opposition.....X
Affirmation in Opposition.....X
Affirmation in Reply.....X
Notice of Motion (Mot. Seq. 11).....X
Affirmation in Partial Opposition.....X
Affirmation in Opposition.....X
Reply Affirmation.....X
Notice of Cross-Motion (Mot. Seq. 12).....X
Affidavit in Opposition.....X
Affirmation in Opposition.....X
Affirmation in Partial Opposition.....X
Reply Affirmation.....X

Submitted for this Court’s determination, in the above captioned action, are five (5) motions and four (4) cross-motions which are described as follows:

The Motion brought by the Plaintiff, seeking an order of this Court, pursuant to CPLR § 3025 (b), permitting the Plaintiff to amend his Bills of Particulars to add a violation of Section 23-4.2 Subsections (h) and (i) of the Industrial Code of the State of New York and violations of the Occupational Safety and Health Administration Subpart C

Sections 1926.20 and 1926.21, Subpart G Section 1926.200, Subpart O Section 1926.602, Subpart P Sections 1926.651 and Subpart M Sections 1926.501, 1926.502 and 1926.503 in the form annexed to the moving papers (Mot. Seq. 04).

The Motion brought by the Defendant, The Office of James Ruderman, LLP, seeking an order of this Court, pursuant CPLR § 3212, granting summary judgment in favor of this moving Defendant, based upon uncontroverted documentary evidence and the sworn statement of the movant's Managing Partner (Mot. Seq. 05).

The Amended Cross-motion brought by the Defendants, Granite Building 2, LLC, and Lalezarian Properties, LLC, seeking an order of this Court, pursuant to CPLR § 3212, granting them summary judgment dismissing the Plaintiff's Labor Law Sections 240 and 241 (6) causes of action on the ground that the Plaintiff has failed to allege that these moving Defendants violated an Industrial Code regulation that sets forth a specific standard of conduct applicable to the working conditions which existed at the time of the incident that is the subject matter of the above captioned action (Mot. Seq. 06).

The Motion brought by the Defendant, The Newman Design Group, LLC, s/h/a NDG Architect, P.C., seeking an order of this Court pursuant to CPLR § 3212, granting it summary judgment dismissing the Second Amended Complaint and all cross-claims asserted against this moving Defendant for indemnification and breach of any contract which obligated NDG Architect, P.C. to indemnify or procure insurance for any of the co-Defendants (Mot. Seq. 07).

The Cross-motion brought by the Defendants, Kulka Construction Corp. and Kulka Contracting, LLC, seeking an order of this Court, pursuant CPLR § 3212, granting it partial summary judgment dismissing the Plaintiff's Labor Law Sections 240(1) and 241(6) causes of action (Mot. Seq. 08).

The Motion brought by the Defendant, MCLO Structural Steel Corp., seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment to this moving Defendant, dismissing the Plaintiff's Complaint as well as any cross-claims (Mot. Seq. 09).

The Cross-motion brought by the Defendant, Canatal Industries, Inc., seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment to this moving Defendant, dismissing the Plaintiff's Complaint and all cross-claims (Mot. Seq. 10).

The Motion brought by the Defendants, Kulka Construction Corp. and Kulka Contracting, LLC, seeking an order of this Court, pursuant to CPLR § 3025 (b), granting these moving Defendants leave to serve a Third Amended Answer to include additional cross-claims against the Defendants, FXR Construction, Inc. d/b/a DEV Construction, Canatal Industries, Inc. and MCLO Structural Steel Corp., for contractual indemnification and failure to procure insurance as required by each of the said Defendants' respective construction contracts, in the form annexed to the moving papers (Mot. Seq. 11).

The Cross-motion by the Defendant, FXR Construction, Inc., d/b/a DEV Construction, seeking an order of this Court, pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff's causes of action against this moving Defendant, as well

as any cross-claims (Mot. Seq. 12).

Upon the foregoing papers submitted for this Court's consideration, the Court makes the following findings of fact and conclusions of law and the Motions and Cross-motion are decided as provided herein:

Findings of Fact:

The incident which is the subject matter of the instant action occurred on February 13, 2008 at approximately 9:00 a.m. at or about the open ground level deck of a subterranean parking garage located at 1991 Marcus Avenue, New Hyde Park, New York.

The Defendant, Granite Building 2, LLC, was the owner of the subject premises, 1991 Marcus Avenue, New Hyde Park, New York, at the time of the aforesaid incident.

On February 12, 2008, Frank Lalezarian was a managing member of the Defendants herein, Granite Building 2, LLC and Lalezarian Properties, LLC, and Kevin Lalezarian was a member of the said Defendants.

On February 12, 2008, Kevin Lalezarian, on behalf of the Defendant, Granite Building 2, LLC, entered into an oral contract with an entity known as On The Wall, to affix wallpaper to the common areas of 1991 Marcus Avenue, New Hyde Park, New York, a building then under construction.

On The Wall was a business entity owned and operated by the Plaintiff, Charles Simon and his wife, the deceased, Julie Simon.

On February 13, 2008, at about 9:00 a.m., the weather was windy with freezing rain/sleet and snow had fallen during the evenings of February 12 and February 13.

1991 Marcus Avenue, New Hyde Park, New York, was a multi-story office building with three (3) levels of parking under construction. Two (2) levels of parking were below ground level with one (1) level at ground level.

A descending entrance to the subterranean levels of parking was located along the west side of 1991 Marcus Avenue.

At the time, date and place of the subject incident, the ground level of the subterranean parking levels was an open excavation at the southwest corner of 1991 Marcus Avenue.

At the time, date and place of the subject incident, the deceased, Julie Simon, was operating a 1998 GMC Suburban motor vehicle with the Plaintiff, Charles Simon, riding in the front passenger seat.

At the time, date and place of the subject incident, Charles Simon and Julie Simon were intending to commence wallpapering inside of 1991 Marcus Avenue, pursuant to the February 12, 2008 oral contract between their company, On the Wall and Granite Building 2, LLC.

On February 13, 2008, there existed a fence or gate extending across the westerly portion of the premises upon which 1991 Marcus Avenue was constructed. This fence or gate was from the northwest corner of the aforesaid building to the westerly

boundary of the property.

At the time, date and place of the subject incident, the aforesaid fence or gate was open, permitting vehicular traffic along the westerly side of 1991 Marcus Avenue.

At the time, date and place of the subject incident, the deceased, Julie Simon, was operating her above described vehicle southbound along the westerly side of 1991 Marcus Avenue, having passed through the opening of the fence or gate hereinabove described.

Immediately after passing through the aforesaid opening, the Plaintiff, Charles Simon, realizing that Julie Simon was unable to bring their vehicle to a stop, jumped out of the passenger side of the vehicle and landed on the ground.

The vehicle continued forward and fell into the uncovered ground level of the subterranean parking garage landing two (2) levels below.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated subterranean parking garage, Granite Building 2, LLC, entered into a contract with the Defendant, Kulka Contracting, LLC, for the said Defendant, Kulka Contracting, LLC to act as the Construction Manager for this project.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated subterranean parking garage, Granite Building 2, LLC, entered into a contract with the Defendant, The Newman Design Group, LLC, s/h/a NDG Architect, P.C. for the said Defendant, The Newman Design Group, LLC, s/h/a NDG Architect, P.C., to act as the

architect for the aforesaid Construction Project.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated subterranean parking garage, Granite Building 2, LLC, entered into a contract with the Defendant, Canatal Industries, Inc., a steel fabricator for the fabrication, delivery and erection of the steel structures for the incorporated subterranean parking garage for the hereinabove described Construction Project.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated subterranean parking garage, the Defendant, Canatal Industries, Inc., on April 13, 2006, entered into a subcontract with the Defendant, MCLO Structural Steel Corp., for the erection of the steel structures for the incorporated subterranean parking garage for the aforesaid Construction Project.

Prior to the date of the subject incident, pursuant to its April 13, 2006 contract with Canatal Industries, Inc., MCLO Structural Steel Corp. installed worker fall protection at or about the edge of the ground level of the subterranean parking garage which was an open excavation at the southwest corner of 1991 Marcus Avenue at the time and date of the subject incident.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated parking garage, Granite Building 2, LLC, entered into a contract with the Defendant, FXR Construction, Inc., d/b/a DEV Construction, for the placement of the rebar and pouring of concrete for the incorporated subterranean garage for the aforesaid

Construction Project.

With respect to the Construction Project of 1991 Marcus Avenue and the incorporated parking garage, Granite Building 2, LLC, entered into a contact with the Defendant, The Office of James Ruderman, LLP, for this Defendant to be the structural engineer for the aforesaid project.

Determinations of the Motions:

The motion brought by the Plaintiff seeking an order of this Court, pursuant to CPLR § 3025 (b), permitting the Plaintiff to amend his Bill of Particulars to allege violations of the hereinabove set forth Industrial Code and Occupational Safety and Health Act Articles in the form annexed to the moving papers (Mot. Seq. 04) is **GRANTED**.

The New York Court of Appeals has stated the purpose of CPLR § 3025 (b) “[l]eave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay.” *McCaskey, Davies and Assoc., Inc. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983).

Initially, this Court finds that the Defendants had full knowledge and notice of the event and facts supporting the Plaintiff’s proposed amendments. Furthermore, “[n]o evidentiary showing of merit is required under CPLR § 3025 (b),” *Lucido v. Mancuso*, 49 A.D.3d 220 (2d Dept. 2008).

Therefore, the Note of Issue and Statement of Readiness, filed in the instant action, are herewith vacated, pursuant to 22 NYCRR Section 202.21 (e), to permit the

Defendants an opportunity to conduct applicable discovery with respect to the Plaintiff's Amended Verified Bills of Particulars.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2d Dept. 1994):

“It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank v McAuliffe*, 97 AD2d 607 [3rd Dept 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York supra*, at p. 562).”

Summary judgment, however, is a drastic remedy which should be granted only when there is no clear triable issue of fact presented. Even the color of a triable issue of fact should foreclose this remedy. Therefore, in deciding a summary judgment motion, the evidence must be scrutinized carefully in the light most favorable to the party or parties opposing the motion (*Marine Midland Bank, N.A. v. Dino & Artie's Automotice Transmission Co.*, 168 A.D.2d 610 [2d Dept. 1990]). Issue finding rather than issue determination is the key to the proper review of a summary judgment motion. *See Rudnitsky*

v. Robbins, 191 A.D.2d 488 (2d Dept. 1993); *Triangle Fire Protection Corp. v. Manufacturers Hanover Trust Co.*, 172 A.D.2d 658 (2d Dept. 1991).

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement, in admissible form, to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The movant's failure to meet their burden of proof requires the denial of summary judgment regardless of the sufficiency, or lack thereof, of opposing papers. (*Liberty Taxi Management, Inc. v. Gincherman*, 32 A.D.3d 276 [1st Dept. 2006]).

In support of its motion for summary judgment (Mot. Seq. 05), the Defendant, The Office of James Ruderman, LLP, submits an Affidavit of its Managing Partner, Steven Smolinsky, P.E., and a copy of the transcript of the oral deposition before trial herein of Steven Smolinsky. Taken together, Mr. Smolinsky proffers that the Defendant, The Office of James Ruderman, LLP, had no role in the maintenance, operation or control of the subject parking garage and that this Defendant had no responsibilities with regard to security, snow and/or ice on the project job site.

The Plaintiff and the Defendants, Granite Building 2, LLC, Lalezarian Properties, LLC, FXR Construction, Inc. d/b/a DEV Construction, Canatal Industries, Inc., and NDG Architect, P.C. do not oppose the motion of the Defendant, The Office of James Ruderman, LLP.

However, this moving Defendant's proffer that there is no evidence that it was negligent does not satisfy its burden in moving for summary judgment (*see Winegrad v. New York Univ. Med. Center, supra*). It must tender evidence that it was not negligent (*Peskin v. New York City Transit Authority*, 304 A.D.2d 634 [2d Dept. 2003]). There is no such evidence submitted in support of this motion.

Therefore, the motion of the Defendant, The Office of James Ruderman, LLP, (Mot. Seq. 05) is **DENIED**.

The Amended Cross-motion of the Defendants, Granite Building 2, LLC, and Lalezarian Properties, LLC (Mot. Seq. 06), seeking an order of this Court dismissing the Plaintiff's Labor Law Section 240 and 241 (6) causes of action on the ground that the Plaintiff has failed to allege that the said Defendants violated an Industrial Code regulation that sets forth a specific standard of conduct applicable to the working conditions which existed at the time of the incident is **DENIED**. See this Court's granting of the Plaintiff's motion for leave to amend its Bill of Particulars (Mot. Seq. 04).

Furthermore, the Amended Cross-motion of the Defendants, Granite Building 2, LLC and Lalezarian Properties, LLC seeks an order dismissing the Plaintiff's Labor Law 240 and 241 (6) causes of action on the ground that wallpapering is not a protected activity under the Labor Law.

While wallpapering is not an enumerated activity under the prophylactic provisions of the Labor Law, Sections 240 and 241 (6) apply to all contractors, property

owners and their agents involved in the erection and/or construction of a building or structure.

Based upon this Court's hereinabove set forth findings of fact, the Court finds as a matter of law that the wallpapering activities of Charles Simon and Julie Simon were an integral and necessary part of the erection and construction of 1991 Marcus Avenue and the incorporated multi-level subterranean garage.

Therefore, the wallpapering activities of Charles Simon and Julie Simon were within the purview of Labor Law Sections 240 and 241 (6) (*see Martinez v. City of New York*, 93 N.Y.2d 322 [1999]).

Accordingly, the Amended Cross-motion of the Defendants, Granite Building 2, LLC, and Lalezarian Properties, LLC (Mot. Seq. 06) is **DENIED** in all respects.

The Defendant, NDG Architect, P.C., in support of its motion seeking an order of this Court, pursuant to CPLR § 3212, granting this Defendant summary judgment dismissing the Plaintiff's Second Amended Complaint and all cross-claims asserted against it (Mot. Seq. 07), submits an Affidavit from Mitchell D. Newman, A.I.A., the President of NDG Architect, P.C., the April 21, 2005 Contract between Granite Building 2, LLC and NDG Architect, P.C., and the A.I.A. Document B151-1997 which was incorporated as part of the aforesaid contract. The said contract was authenticated at the November 9, 2010 oral deposition before trial of Frank Lalezarian herein (*see Transcript*, pgs. 13 & 14). Although the transcript of the said oral deposition before trial submitted in support of the instant

motion was not executed, this Court finds same to be admissible evidence pursuant to CPLR § 3116 (a).

Section 2.6.5 of A.I.A. Document B151-1997, incorporated in the contract between NDG Architect, P.C. and Granite Building 2, LLC, provides in pertinent part:

However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work. The Architect shall neither have control over, or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

Based upon the oral deposition before trial of Frank Lalezarian and the hereinabove described contract between NDG Architect, P.C. and Granite Building 2, LLC and the hereinabove described A.I.A. Document, the Court finds that the Defendant, NDG Architect, P.C. has *prima facie* demonstrated that it was not obligated to, and did not, direct or instruct the contractors on the means and methods in the performance of their work at the construction project and NDG Architect, P.C. bore no responsibility for specifying or implementing safety precautions at the site.

Additionally, this Court's review of all of the papers submitted herein finds that there was no contract in existence which obligated NDG Architect, P.C. to indemnify or procure insurance for any of the Co-Defendants.

Furthermore, this Court finds and determines that the parties opposing the instant motion have failed to establish material issues of fact which would require a trial with

respect to this moving Defendant.

Accordingly, the motion of the Defendant, NDG Architect, P.C. (Mot. Seq. 07) is **GRANTED** in all respects.

The Cross-motion of the Defendants, Kulka Construction Corp. and Kulka Contracting, LLC (Mot. Seq. 08) seeking (1) partial summary judgment dismissing the Plaintiff's Labor Law Sections 240 (1) and 241 (6) causes of action; (2) in support of Co-Defendants, Granite Building 2, LLC and Lalezarian Properties, LLC's Cross-motion for summary judgment dismissing the Plaintiff's Labor Law Sections 240 (1) and 241 (6) causes of action; and (3) in opposition to the Plaintiff's motion to amend his Bill of Particulars is **DENIED** in all respects for the reasons enunciated hereinabove.

The motion brought by the Defendant, MCLO Structural Steel Corp. (Mot. Seq. 09), seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment to this moving Defendant dismissing the Plaintiff's action against this movant, as well as any cross-claims is **DENIED**.

While meeting its *prima facie* burden of proof by submitting in support of this motion the Affidavits of Bernard P. Lorenz, P.E., William J. Meyer, P.E. and the transcripts of the oral depositions before trial of Charles Simon, Frank Lalezarian, Frank Gagliardi, Blaise Swiatkowski, Jack Kulka, John Loc, Dennis Vita, Edward Mejia and Sylvain Routhier and the written contract between Canatal Industries, Inc. and MCLO Structural Steel Corp., dated April 13, 2006, this Court finds and determines that the Plaintiff and the Defendants,

Granite Building 2, LLC, Lalezarian Properties, LLC, Kulka Construction Corp. and Kulka Contracting, LLC, have demonstrated, in admissible evidentiary form, sufficient questions of fact to deny the instant motion in all respects.

The significant questions of fact are whether the Defendant, MCLO Structural Steel Corp. entirely displaced the owner's duty to safely maintain the premises by virtue of the terms of the contracts between Granite Building 2, LLC and Canatal Industries, Inc., and Canatal Industries, Inc. and MCLO Structural Steel Corp.

Additionally, a significant question of fact exists as to whether the nature and substantialness of the worker fall protection installed by the Defendant, MCLO Structural Steel Corp., was of such a nature to constitute a force or instrument of harm launched by the said Defendant with respect to motor vehicles that would travel along the westerly side of 1991 Marcus Avenue.

Lastly, the objections raised with respect to the timeliness of the summary judgment motion brought by the Defendant, MCLO Structural Steel Corp., are found to be without merit as the Court finds that the said motion was served upon all parties within the time constraints of this Court's April 5, 2011 Certification Order herein.

The motion brought by the Defendant, Canatal Industries Inc. (Mot. Seq. 10), seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment to this moving Defendant dismissing the claims asserted in the Plaintiff's Complaint and all cross-claims is **DENIED**.

This moving Defendant has not met its *prima facie* burden of proof by submitting in support of this motion the transcripts of the oral depositions before trial of Charles Simon, Frank Lalezarian, Frank Gagliardi, Blaise Swiatkowski, Sylvain Routhier and John Lock together with an Affidavit of Counsel positing that this Defendant is not a proper Labor Law Defendant and that the Plaintiff is unable to establish the elements necessary to sustain a cause of action based upon a claim of negligence. This failure requires the denial of summary judgment regardless of the sufficiency, or lack thereof, of opposing papers (*Liberety Taxi Management, Inc. v. Gincherman, supra*).

In denying this motion, the Court is ever mindful of the New York Court of Appeals interpreting the subject Labor Law provisions as liberally as possible to achieve the intent of the statute to protect workers from gravity-related dangers that could be eliminated by the placement of appropriate safety devices (*see Ortiz v. Varsity Holdings, LLC*, 2011 N.Y. Slip Op. 09161 [Dec. 20, 2011]).

The motion of the Defendants, Kulka Construction Corp. and Kulka Contracting, LLC (Mot. Seq. 11), seeking an order of this Court, pursuant to CPLR § 3025 (b) of the CPLR, granting these moving Defendants leave to serve a Third Amended Answer to include additional cross-claims against the Defendants, FXR Construction, Inc., d/b/a DEV Construction, Canatal Industries Inc. and MCLO Structural Steel Corp., in the form annexed to the moving papers is **GRANTED**.

This Court finds that there is no surprise or undue prejudice to any of the

parties herein by the granting of the prayed for leave to serve a Third Amended Answer asserting the set forth additional cross-claims for contractual indemnification and the failure to procure insurance as required by contract.

The Cross-motion of the Defendant, FXR Construction, Inc., d/b/a DEV Construction (Mot. Seq. 12), seeking an order of this Court, pursuant to CPLR § 3212, granting summary judgment in favor of this moving Defendant dismissing the Plaintiff's Complaint, as well as any cross-claims, is **DENIED**.

In support of the instant motion, this moving Defendant has submitted the Affidavit of Dennis Vita, the President of FXR Construction, Inc. d/b/a DEV Construction, a surveillance video of part of the subject premises, copies of the Nassau County Police Department photographs of the site of the subject incident and moving counsel's adoption of the heretofore submitted Affirmations of Karen S. Drotzer, Esq., dated August 15, 2011, Stephen K. Blunda, Esq., dated August 11, 2011, Jeffrey L. Richman, Esq., dated August 11, 2011 and John S. Dooley, dated September 7, 2011.

Initially, the Court finds the instant Cross-motion timely in that it is upon nearly identical issues set forth in the hereinabove considered timely motions for summary judgment (*see Filanninno v. Triborough Bridge and Tunnel Authority*, 34 A.D.3d 280 [1st Dept. 2006]; *Fahrenheit v. Security Mut. Ins. Co.*, 32 A.D.3d 1326 [4th Dept. 2006]; *Bressingham v. Jamaica Hosp. Med. Ctr.*, 17 A.D.3d 496 [2d Dept. 2005]; *Altschuler v. Gramatan Mgt., Inc.*, 27 A.D.3d 304 [1st Dept. 2006]).

This moving Defendant's reliance on the oral depositions before trial of Mr. Dennis Vita, its President, and Mr. Edward Mejia, its foreman at the time of the subject incident, precludes a finding that this Defendant has met its *prima facie* burden of proof in moving for summary judgment.

The aforesaid depositions acknowledge that on the day before the subject incident, the Defendant's employees removed two (2) panels of fence adjacent to 1991 Marcus Avenue to allow for the tractor trailer delivery of steel rebar along the westerly side of 1991 Marcus Avenue.

Furthermore, after the said delivery was completed, the Defendant's employees did not replace or close the fence that allowed access to the subject premises.

This omission requires the denial of summary judgment regardless of the sufficiency, or lack thereof, of opposing papers (*Liberty Taxi Management, Inc. v. Gincherman, supra*).

Accordingly, it is hereby

ORDERED, that any discovery demands relating to the newly amended pleadings are to be served within fourteen (14) days of the date of this Order; and it is further

ORDERED, that all parties, except the herewith dismissed Defendant, NDG Architect, P.C., are directed to appear before this Court for a scheduling conference with respect to all remaining discovery to be demanded herein on **February 27, 2012 at 9:30 a.m.**

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
January 31, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED
FEB 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE