McCabe v Incorporated Vil. of Flower Hill
2012 NY Slip Op 31316(U)
April 16, 2012
Sup Ct, Nassau County
Docket Number: 1345/09
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

x

ROBERT MCCABE AND KATHLEEN MCCABE,

Plaintiff(s),

-against-

THE INCORPORATED VILLAGE OF FLOWER HILL, KEM CONSTRUCTION CORP., ROCON PLUMBING & HEATING, INC., and CORSONS MASONRY CONSTRUCTION, INC.,

Defendant(s).

x

THE INCORPORATED VILLAGE OF FLOWER HILL,

Third-Party Plaintiff(s),

-against-

KEM CONSTRUCTION CORP., ROCON PLUMBING & HEATING, INC. and MADHUE CONTRACTING INC.,

Third-Party Defendant(s).

x

Index No. 1345/09

Motion Seq. No.: 006, 007, 008 & 009
Motion Submitted: 2/14/12

The following papers read on this motion:

Notice of Motion/Supporting Exhibits....................................X
Affirmation in Opposition..X
Reply Affirmation..X

Motion #6 by third-party defendant, Rocon Plumbing & Heating, Inc. ("Rocon"), for an

Order granting Summary Judgment dismissing the cross-claim against it by the Incorporated Village of Flower Hill ("Village"), dismissing the complaint of the plaintiffs, Robert McCabe and Kathleen McCabe as against this defendant in the main action, is granted.

Motion #7 by defendant, Corsons Masonry Construction, Inc. ("Corsons") , for an Order granting Summary Judgment dismissing the complaint of the plaintiff and all cross claims of the co-defendants, is denied.

Motion #8 by defendant, the Incorporated Village of Flower Hill, for an Order granting Summary Judgment, pursuant to CPLR §3212 dismissing the plaintiff's Labor Law §200 and common law negligence causes of action and all cross claims of all defendants, and granting Summary Judgment pursuant to pursuant to CPLR §3212, as a third-party plaintiff, on its claims for contractual indemnity over and against third-party defendant, Madhue Contacting, Inc. is granted in part.

Cross Motion by defendant KEM Construction Corp. ("KEM"), KEM, for an Order granting Summary Judgment dismissing plaintiff's complaint and third-party plaintiff's complaints, and an Order pursuant to CPLR §3211 (a)(7) dismissing any and all cross claims against it, and an Order denying the motions of Corsons and the Village, is denied.

The instant motions arise out of an underlying personal injury action sounding in negligence and violations of the Labor Law by plaintiffs, Robert McCabe and Kathleen McCabe, initially against the Incorporated Village of Flower Hill. The injury occurred on December 13, 2007 during a renovation and construction project on Village Hall and the Village garage complex. The plaintiff sustained injury and he slipped and fell during the course of performing his duties on the construction project. The plaintiff, at the time of the accident, was an employee

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of third-party defendant, Madhue Contracting Inc. ("Madhue"), the electrical contractor on the project.

There were four main contracts that were awarded for the project; KEM for general construction; HVAC for mechanical trade; Rocon for plumbing; and Madhue for electrical. KEM subcontracted its masonry, block and brick work to Corsons, and Rocon subcontracted out its sprinkler/sprinkler head work to A&F Fire Protection.

FACTS

On December 13, 2007 at 6:30 a.m., plaintiff, who was employed by Madhue as journey man electrician, slipped and fell in a hallway leading to the lounge area of the Village Hall complex, sustaining injury to his knee. At the time he was carrying, according to defendant KEM, cables weighing about 40-50 pounds. Specifically, plaintiff attempted to enter the make shift doorway and placed his foot upon the step area, created by Corsons, when he fell. According to the moving defendant, Rocon, the construction was ongoing and the makeshift entrance door was created by KEM by using a 4 ft. by 8 ft. plank of plywood, held in place by cinder blocks. Shortly before the accident, Madhue's employee and foreman, Michael Perez, moved the plywood and cinder block to open the entryway. There is a dispute as to whether plaintiff tripped and fell over the cinder block or construction debris.

PROCEDURAL HISTORY

Plaintiffs first commenced an action in January 2009, against the Village alleging acts of negligence and violations of Labor Law §§200, 240, and 241. The Bill of Particulars cited, inter alia, the defendants' failure to provide safe working conditions, specifically adequate lighting, and defendants' negligent construction of the step area. The Village brought a third-party

complaint against KEM, Rocon, and Madhue seeking contribution, indemnification, and alleging a breach of contract in that the defendants failed to procure the requisite insurance.[1] KEM and Madhue asserted cross claims against Rocon seeking contribution, indemnification, and alleging a breach of contract in that the defendant failed to procure the requisite insurance.

Plaintiffs later amended their complaint to include KEM, Rocon and Corsons, as direct defendants. There is reference to KEM commencing a third party action against an architectural firm, Angelo Frances Corva, R.A., LLC and Angelo Frances Corva & Associates. The main action as against Rocon, was discontinued as per the Stipulation of discontinuance, dated April 22, 2011. The remaining claims against Rocon are the cross claims asserted against it by the co-defendants.

ARGUMENTS

Rocon

Rocon argues that there is no evidence in the record that plaintiff, Robert McCabe, came in contact with any plumbing or heating fixtures; therefore, the accident had nothing to do with its work. Further, there is no evidence that Rocon was on site on or around the date of the accident as it completed its construction work as of November 16, 2007, and only returned on January 8, 2008 to install plumbing fixtures. It is noted that there is no actual stated opposition to Rocon's motion

Rocon submits as supporting evidence: the pleadings; the contractor agreements between the Village and KEM, and the Village and Rocon; purchase order between Flower Hill and

[1]It is noted the Village's does not address the issue of breach of contract in its papers, and the relief sought is limited to the dismissal of negligence and Labor Law claims as against it, and indemnification from Madhue.

Corson's Masonry; subcontractor agreement between and Rocon and A&F Fire Protection Co. Inc.; and Stipulation of Discontinuance between Rocon and plaintiffs, KEM and Flower Hill, executed only by plaintiffs and Rocon. Rocon also submits the following transcripts of testimony: plaintiff Robert McCabe at his 50-H hearing and his Examination Before Trial; Village DPW supervisor, Scott Hislop; Village building inspector, James Gilhooly; Steve Eberhardt, part-owner of KEM; Sal Romano, Rocon president; Richard Corbo, Corsons president; Joseph Flannagan, principal of Madhue; and non party witness and Madhue foreman, Michael Perez.

Corsons

As a subcontractor of KEM, its contract only provided for the furnishing of labor and not materials. Corsons was not on site at the time of the accident and it was KEM that supplied the plywood for the doorway, and used the concrete blocks to hold the plywood in place. Corsons was finished with the job a week and a half before the accident. Because KEM directed Corsons' work, it had no control over the work site, a requirement under Labor Law §241 (6).

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Plaintiff's co-employee admitted to creating the condition upon which the plaintiff fell. Because the hazardous condition occurred"mere minutes" before the plaintiff fell and the Village had no notice of such condition, the claims must therefore be dismissed as against it. As to its third-party action, the contract between the Village and Madhue contained indemnification clauses which provide that the entities must indemnify the Village for actions arising out of actions and/or omissions by one of its employees.

KEM

The contracts between each of the prime contractors and the Village contained a housekeeping provision requiring all prime contractors to clean up after themselves. KEM inspected the area upon leaving the site on the evening prior to the accident and there was no debris left in the area. Further, plaintiff was not a KEM employee nor was he acting on behalf of KEM. Therefore, it had no responsibility to the plaintiff nor did it owe the plaintiff a duty of care. Additionally, KEM was not the main contractor or general contractor on the project. Finally, because Madhue's employee placed the cinder block in the area where plaintiff fell, Madhue created the condition that gave rise to the injury.

In opposition, plaintiff, and co-defendants argue that KEM's motion is untimely as it was filed over sixty days--the time parameter set by this Court-- after the filing of the Note of Issue. In reply, KEM contends that the issues argued in its motion, are already before this Court and its motion should be decided on the merits.

DISCUSSION

The proponent of a motion for summary judgment must establish, *prima facie,* its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues (*Alvarez v. Prospect Hosp.,* 68 NY2d 320 [1986]; *Walden Woods Homeowners Assn. v. Friedman,* 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. The burden of proof then shifts to the opposing party to produce admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests (*Zuckerman v. New York,* 49 NY2d 557 [1980]).

To hold a defendant liable in common-law negligence, a plaintiff must demonstrate: a

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duty owed by the defendant to the plaintiff; a breach of that duty; and that the breach constituted a proximate cause of the injury (see *Ingrassia v. Lividikos,* 54 AD.3d 721 [2nd Dept 2008]). Generally, the existence of a defendant's duty is a legal question to be determined by the court in the first instance. In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable (see *Lynfatt v. Escobar,* 71 AD3d 743[2nd Dept 2010]).

After defendant's duty to the plaintiff has been established, the defendant is required to show that its alleged breach of duty was not a substantial cause of the events which produced the injury (see *Cruz v. City of New York,* 6 AD3d 644 [2nd Dept. 2004]). Ordinarily, it is for the trier of fact to determine the issue of proximate cause. The issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (see *Gestetner v Teitelbaum* 52 AD3d 778 [2nd Dept 2008]).

The other prevailing issue is whether any of the defendants controlled, supervised or directed construction work on the project. Any liability must be premised upon the duty to safeguard the construction area. Without control over the construction project, defendants would then have no duty with respect to the condition that resulted in plaintiff's accident. In sum, in the absence of duty, there can be no liability (see *Miano v. State University Const. Fund*, 291 AD2d 830 [4th Dept 2002], *Giordano v. Seeyle, Stevenson & Knight, Inc.*, 216 AD2d 439 [2nd Dept 1995]).

The Labor Law statutes imposing a duty on owner or general contractor to provide construction site workers with a safe place to work applies to owners and contractors who

actually exercise control or supervision over the work and had actual or constructive notice of the unsafe condition (see *Cahill v. Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]).

Subdivision 1 of section 200 of the Labor Law is merely a codification of the common-law duty of owners and contractors to furnish a safe work place . It requires that the work site " ... be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein ... "(see *DaBolt v. Bethlehem Steel Corp.*, 92 AD2d 70[4th Dept 1983])

Under Labor Law § 240(1), owners, general contractors and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the *erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure.*

Labor Law § 241(6) provides that "...[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places..."

Generally, a separate prime contractor is not liable under Labor Law § 240 or §241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker. However, where a separate prime contractor has been delegated the authority to supervise and control the plaintiff's work, the contractor becomes a statutory agent of the owner or general contractor (see *Barrios v. City of New York,* 75 AD3d 517 [2nd

Dept 2010]).

To assert a sustainable cause of action under section 241(6), a plaintiff must allege a violation of a concrete specification of the regulations in the Industrial Code and by the Industrial Board of Appeals, the agency entrusted with issuing rules and regulations to carry into effect the provisions of Labor Law 241, provided that the rules are not in conflict with the statute (see *Messina v. City of New York,* 300 AD2d 121 (1st Dept 2002). In their Bill of Particulars, plaintiffs seek relief for violations of Industrial Code §§ §§ 12 NYCRR, 23-1.5(a), 23-1.7 (e)(1)(2) § 23–2.1 (a).

Section 23-1.5(a) sets forth the general responsibility of employers;

"... All places where employees are „,permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule)..."

The NYCRR in § 23-1.7 (e)(1)(2) , provides in relevant part; "...[a]ll passageways shall

be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping... The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris..." Section 23–2.1(a) and (b) regulates "Maintenance and Housekeeping,"; however, this section of the regulations, which concerns storage of material and equipment and the disposal of debris, is not applicable to the facts as presented in the case at bar.

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Although this motion is out of sequence, it is prudent to discuss it at this point as the evidence and/or arguments are pertinent and applicable to the remaining movants' applications before this Court.

Even though owner and general contractor are primarily liable for failure to comply with statutes relating to safety practices, they may protect themselves financially and otherwise by agreements with those they hire (see *Greenberg v. City of New York*, 81 AD2d 284 [2nd Dept 1981]). It is noted that KEM argues that it was not the general contractor or contractor of the project. Also, the Court notes that, for some curious reason, the Village is seeking summary judgment relief of contractual indemnification solely against Madhue although the Village seeks such relief of KEM *and* Madhue in its third party complaint (see Village of Flower Hill, Notice of Motion; see also Exhibit C) . However, evidence indicates that KEM was the general contractor of the project as per the agreements that are part of the record (see Rocon, Notice of Motion, Exhibit B), and by the testimony of KEM's vice-president:

"...Q. Was KEM Construction involved in a project at the Incorporated Village of Flower Hill?

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A. Yes.

Q. In what capacity?

A. *We were the general contractor and mechanical contractor.*

Q. Can you tell me what the duties and responsibilities are for the general contractor?

....

A. We were the- - responsible for construction of the building...

...

Q. Were there two separate contractor, one for general contractor and one for mechanical contracting?

A. Yes. (see Rocon, Notice of Motion, Exhibit X, Tr. Eberhardt. Tr. p. 14 ln.. 1-3, 14 - 20,).

As such, KEM is the contractor referred to in The General Conditions of the Contract for Construction, part of the construction agreement submitted in full by the Village and notably in a limited version by KEM. The relevant provisions are set forth below in relevant part:

"....

[¶] 3.3.1 The Contractor shall supervise and direct the Work, ...The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the contract..."

[¶] 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the

Contractor's employees, Subcontractors and their agents and employees and other persons performing portions of the work under a contract with the Contractor."

...

[¶] 3.4.1. Unless otherwise provided ...the Contractor shall provide and pay for labor, materials, equipment ,tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or nor incorporated or to be incorporated in the Work.

...

[¶] 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, *including but not limited to attorneys' fees, arising out of or resulting from performance of the work*, provided that such claim, damage, loss or expense is attributable to bodily injury...resulting therefrom, but to the extent caused whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, *regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*

...

[¶]...The contractor shall provide all required temporary access walkways, both interior and exterior, temporary partitioning, and the like, necessary to complete the operations...

...

[¶]3.13.7 ....The Work shall be performed, to the fullest extent reasonably possible, in such a manner that affords reasonable access...to the site of the Work in all adjacent areas. The Work shall be performed, to the fullest extent reasonably possible, in such a manner that public areas adjacent to the site of Work shall be free of debris, building materials and equipment likely to cause hazardous conditions...."

[¶]3.13.9 The contractor shall familiarize himself with the access and storage requirements... The Contractor shall properly maintain all access to work and storage areas so that there will be continuous unimpeded access to the work site in all seasons of the year, on all regular working days and during all regular working hours of any and all trades employed by any contractor during work at the site..." (see Village of Flower Hill, Notice of Motion, Exhibit Q)

Similar language appears in the agreement between the Village and Madhue. Based on the foregoing, the Village is indemnified by the contractors, but under certain conditions. In sum, KEM and Madhue expressly assumed primary liability for its workers' safety and it relieved premises owners of that liability if injury arose out of the performance of KEM's and Madhue's work or anyone employed by them.

Generally, contractors for construction project do not have control required to be held liable for worker's injuries based on common-law negligence or under workplace safety statutes when prime contractors generally supervised the project and maintained presence at construction site, but had no direct supervision over subcontractor's employees or manner in which work was

performed (see *Biance v. Columbia Washington Ventures, LLC,* 12 AD3d 926 [3rd Dept 2004]). The undisputed evidence indicates that KEM and Madhue were actively working on the site on date of the accident, while Corsons, the only subcontractor under KEM's employ (see Notice of Motion, Rocon, Exhibit W, Tr. Eberhardt, p. 41, ln. 1-8), was not on site at that time.

Additionally, there is nothing in evidence that resolves the issue as to cause of the plaintiff's injury as between KEM, Madhue, Corsons. As already stated herein, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts; however, this is not the case in the instant matter (see *Gestetner v Teitelbaum* 52 AD3d 778 [2nd Dept 2008]). The evidence indicates that KEM erected and designed the doorway structure, that the Madhue employee moved a portion of it, and that Corsons created the step/stair structure.

Viewing the evidence in the light most favorable to then non-moving party, McCabe testified that block and rubble caused him to lose footing. He was not certain as to whether the concrete block was in the form of an actual block before he stepped on it (see Rocon, Notice of Motion, Exhibit U, Tr. McCabe, p.58, ln. 22-24, p. 74, ln. 13-18, p. 81, ln 5- 10, *Treminio v. Argueta*, 49 AD3d 862 [2nd Dept 2008]). This raises an issue as to whether the plaintiff slipped on debris left by KEM, or the concrete block that his foreman may have placed in his way. Additionally, there is also an issue as to whether the stair structure, erected by Corsons, was defective and/or hazardous.

As to any issue that the Village may not assert the foregoing contractual indemnification

provisions, as they may be in violation of General Obligations Law §5–322.1 which prohibits a contractor and/or owner from recovering for its own negligence, the applicable provisions contain the specific language; "to the fullest extent allowed by law". The clauses are therefore enforceable as it meets the requirements of General Obligations Law § 5–322.1. (see *McLean v. 405 Webster Avenue Associates,* 28 Misc3d 1219(A) [NY Sup Ct. 2010]).

However, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the non-delegable duty imposed by Labor Law Section 240(1) (see *McDermott v. City of New York*, 50 N.Y.2d 211 [1st Dept 1999]).

As to Labor Law claims, the crux of liability lies as to whether the Village controlled the work or had notice. Defendants' evidence indicates that the Village had no control and did not exercise any control of any of the contractors and/or their employees during the project. The other issue is whether its knowledge about contractor's failure to clean up construction debris constitutes actual or constructive knowledge of a hazardous condition. The Village concedes a notice of debris left on the site by the various contractors. It also appeared that contractors were regularly engaged in cleaning up the debris that inevitably appears on construction jobs. However, there was no evidence of actual or constructive notice to the Village of the presence of the debris on the steps on which plaintiff fell any time after the last clean-up; nor indeed is there any clear evidence that the condition caused the plaintiff's fall (see Rocon, Notice of Motion, part 3, Exhibit B, Tr. Perez, p. 25, ln. 20 -24, *Rosenbaum v. Lefrak Corp.*, 80 AD2d 337 [1st

Dept 1981]).

Here, it has been established that the Village is not guilty of negligence or any Labor Law violations, and such liability is attributable to either KEM, Madhue, or Corsons. Accordingly, claims under Labor Law § 200 claim are dismissed. Additionally, the claims sounding in negligence against the Village are also dismissed.

For the foregoing reasons, it is not only premature for this Court to grant the Village's motion for Summary Judgment for indemnification as to Madhue (See *Conrad v. 105 Street Associates, LLC,* 55 AD3d 461 [1st Dept 2008], *Cohen v. New York City Indus. Development Agency*, 91 AD3d 416 [1st Dept 2012]), the dismissal of the claims against the Village renders its branch of the motion seeking indemnification, moot.

Rocon's Motion

Rocon claims it was off site at the time of the subject accident; however, KEM placed them on site. It is noted that KEM indicated that Rocon was "running plumbing in the bathroom above [the site]", which supports that Rocon was not working in the area of the site of the accident (see Rocon, Notice of Motion, Exhibit W, Tr. Eberhardt, p. 80, ln. 1 -5). It is also noted that KEM could not locate company records regarding the date of accident and, consequently, was not able to state with certainty, which contractors were actually present and on site on that date (see Rocon, Notice of Motion, Exhibit W, Tr. Eberhardt,, p. 64, ln. 17 -25, p. 65 ln. 1-25, p. 66. ln. 1-5). Also, Rocon cites November 16, 2007 as the specific date when the Rocon workers and Rocon's subcontractors left the site (see Rocon, Notice of Motion, Exhibit Y, Tr. Romano, p. 20, ln. 17 -21, p. 22, ln. 3 -7).

The evidence indicates: that Rocon already completed the plumbing phase of the construction work at least a month before the accident; that Rocon had not requested its subcontractor to send personnel to the site on that day; and that Rocon had no supervisory control and/or contractual obligation to and/or for any contractor performing work on the date of the accident. Rocon, therefore, cannot be held liable to plaintiff under negligence and/or violations of the Labor Law. As plaintiff has also agreed to discontinue the action as against Rocon, the complaint and claims as against it, are dismissed, and its motion is granted in its entirety (see *Nakis v. Apple Computer, Inc.*, 24 Misc3d 967 [NY.Sup Ct 2009]).

KEM's Motion

This Court acknowledges that KEM's motion can be disposed as the filing of its cross motion is untimely. CPLR §3212 (a) provides in relevant part: "...[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that *the court may set a date after which no such motion may be made...* If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Here, the Notice of Issue was filed on October 3, 2011, and the Court set a time period of 60 days after such filing for the filing of a summary judgment motion. KEM filed its Cross Motion on December 16, 2011, about two weeks after the deadline. However, it is indeed true, as argued in its Reply, that when the issues raised by the untimely cross motion are already properly before the court, the nearly identical nature of the grounds may provide the requisite good cause to review the cross motion on the merits (see *Grande v. Peteroy,* 39 AD3d 590 [2d Dept 2007).

As already discussed in the foregoing under the Village's motion, KEM's motion is denied based on the merits. A material issue of fact existed as to whether electrical contractor, Madhue, was responsible for condition that caused plaintiff's accident and whether KEM or its subcontractor, Corsons, was responsible, precluding the granting of its cross motion.

Corsons' Motion

Although the evidence indicates that Corsons was not on site on the date of the accident, the Bill of Particulars cites that the stairway structure which Corsons erected, was hazardous and/or dangerous and consequently, contributed to plaintiff's injury. As the record does not set forth anything to the contrary, there still remains a question of fact which precludes the granting of its motion.

It is noted that there is no stated opposition to Corsons' motion; however, it avers that it "played no role" in the construction project on the date of the accident nor did it have any control over any aspect of the contractors who did perform work on that date. Although the foregoing may indeed be accurate, the Verified Bill of Particulars specifically sets forth:

> The negligence of the defendant, its agents, servants, and/or employees consisted of maintaining said premises in such a dangerous and defective condition that it was rendered unsafe and liable to cause injury to visitors of the premises and others walking thereon and more particularly to plaintiff herein; in causing and allowing a dangerous condition, more specifically, a defective and improperly maintained stoop/walkway with a height differential of several inches in, on, or about the aforesaid premises , which was liable and did cause injury to the plaintiff..." (see Village of Flower Hill, Notice of

Motion, Exhibit I, ¶ 3)

Corsons, not only failed to submit evidence to refute, or even address, the specific factual allegations of negligence asserted in the Bill of Particulars, it did not even offer a single argument as to this issue in its moving papers. Further, the issue of proximate cause has already been discussed under the Village's motion.

Accordingly, its motion is **denied**.

CONCLUSION

The Village's motion is granted in part, and the plaintiffs' complaint as to this defendant is dismissed. The Village's motion for Summary Judgment as to its third party complaint is therefore rendered moot. Rocon's motion is granted and the plaintiffs' complaint is dismissed as to this defendant and all related cross claims against it, are also dismissed. KEM's cross motion is denied, and Corsons' motion is denied.

The matter is to be set down for a conference in this part on May 8, 2012 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: April 16, 2012
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE