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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

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 12-29-11 (007)
MOTION DATE 6-19-12 (008)
MOTION DATE 9-25-12 (009)
MOTION DATE 10-2-12 (010)
ADJ. DATE 12-11-12
Mot. Seq. # 007 - MotD # 008 - MD
009 - MD # 010 -MD
011 - XMG

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 __154__ read on these motions for summary judgment; to strike; to disqualify attorney; and these cross motions to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers __1 - 10; 11-62; 63-67; 68-73__; Notice of Cross Motion and supporting papers _74-90_; Answering Affidavits and supporting papers _91-112; 113-116; 117-118; 119-120; 121-125; 126-132; 133-136; 137-140_; Replying Affidavits and supporting papers _141-148; 149-154_; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (007) by defendants Michael Hucke and Cindy Hucke, the cross motion (008) by plaintiffs, the motions (009 and 010) by plaintiffs, and the cross motion (011) by defendants Michael and Cindy Hucke are consolidated for the purpose this determination; and it is further

ORDERED that the motion (007) by defendants Michael Hucke and Cindy Hucke for summary judgment dismissing the complaint and cross claims against them is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion (008) by plaintiffs for an order striking defendants' Michael Hucke's and Cindy Hucke's affirmative defense based upon section 11 of the Workers' Compensation Law is denied; and it is

ORDERED that the motion (009) by plaintiffs for, inter alia, partial summary judgment on the issue of liability with respect to the claims contained in their complaint is denied; and it is further

ORDERED that the motion (010) by plaintiffs for an order disqualifying Schondebare & Korcz, Esqs. as attorneys for defendants Michael Hucke and Cindy Hucke is denied; and it is further

ORDERED that the cross motion (011) by defendants Michael Hucke and Cindy Hucke for an order dismissing the second cause of action contained in the complaint is granted.

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., (hereinafter collectively known as "the Kirks"), A&LP Construction Co., Inc., and Andrew Percoco (hereinafter collectively known as "Andrew Percoco") as defendants to the action. The defendants joined issue, and the Huckes and the Kirks asserted cross claims against each other for contribution and indemnification. In April 2005, the Kirks 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 Kirks 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.

The Huckes now move for summary judgment dismissing the complaints and cross claims against them on the grounds they are exempted from plaintiffs' Labor Law and common law claims, as they owned the subject premises and neither controlled plaintiff's work nor had actual or constructive notice of the alleged dangerous condition which caused his injuries. Plaintiffs oppose the motion, arguing a triable issue exists as to whether the Huckes should be beneficiaries of the homeowners' exemption, as they were sophisticated business people who listed the premises as the location of their mobile disc jockey business, maintained a home office for the business, and utilized the garage at the premises to store commercial vehicles and other items connected to the business. Plaintiffs cross-move for an order striking the affirmative defense based upon the exclusivity provision of the Workers' Compensation Law contained in the Huckes' answers to the actions. In opposition, the Huckes argue that the cross motion should be denied, as they have previously sent correspondence to plaintiffs indicating that they are voluntarily withdrawing the affirmative defense.

By way of a separate motion, plaintiffs also move for summary judgment on their complaint and for the imposition of a Noseworthy inference in their favor. The Huckes oppose the motion on the bases they are exempt from plaintiffs' Labor Law claims, and they neither controlled nor supervised Bennett's work or had actual or constructive notice of any dangerous condition at the worksite. The Huckes further cross-move for an order granting summary judgment dismissing plaintiffs' second cause of action based on their alleged failure to secure Workers' Compensation insurance on behalf of Bennett. The Huckes assert that they were not

required to secure insurance on behalf of Bennett, as they were the owners of the residential premises and did not directly or indirectly employ him at the time of the accident. Plaintiffs oppose the Huckes' cross motion, arguing, inter alia, that the motion violates the rules against successive summary judgment motions.

By order to show cause dated September 14, 2012, plaintiffs move for an order disqualifying Schondebare & Korcz, Esqs. as attorneys for the Huckes on the bases said attorneys acted against the interests of the Huckes by permitting their clients to voluntarily withdraw their defense based on the exclusivity provision of the Workers' Compensation Law, and by failing to advise them that they may be held criminally liable for failing to procure Workers' Compensation insurance on behalf of Bennett. The Huckes oppose the motion, arguing, inter alia, that plaintiffs lack standing to make such a motion, and that their assertions regarding the existence of any conflict is conclusory and speculative.

Initially, the Court notes that the branches of the motion by the Huckes seeking summary judgment dismissing the complaint and any cross claims filed against them in the action assigned index number 05-1872 is denied. The branches of the respective motions seeking relief in said action are likewise denied. Since the actions 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]).

The homeowner's exemption to liability under Labor Law §§240 and 241(6) is available to "owners of one and two-family dwellings who contract for but do not direct or control the work" performed on their premises (*see* ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Boccio v Bozik***, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]). The phrase "direct or control" refers to the situation where the owner supervises the method and manner of the work (*see* ***Walsh v Kresge***, 69 AD3d 612, 893 NYS2d 137 [2d Dept 2010]; ***Boccio v Bozik***, *supra*). The homeowners' exemption is intended to protect homeowners who, lacking sophistication or business acumen, fail to recognize the necessity of insuring against the strict liability imposed by the Labor Law (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). The exemption is not available to an owner who uses or intends to use a dwelling only for commercial purposes (*see* ***Van Amerogen v Donnini***, 78 NY2d 880, 573 NYS2d 443 [1991]), and, in the case of mixed residential and commercial use, the availability of the exemption turns on the site and purpose of the work (***Khela v Neiger***, 85 NY2d 333, 337, 624 NYS2d 566 [1995]; ***Lenda v Breeze Concrete Corp.***, 73 AD3d 987, 989, 903 NYS2d 417 [2d Dept 2010]). The "site and purpose" test is "employed on the basis of the homeowners' intentions at the time of the injury underlying the action and not their hopes for the future" (***Truppi v Busciglio***, 74 AD3d 1624, 1625, 905 NYS2d 291 [3d Dept 2010] *quoting* ***Allen v Fiori***, 277 AD2d 674, 675, 716 NYS2d 414 [3d Dept 2000]; *see* ***Lenda v Breeze Concrete Corp.***, *supra*). Furthermore, where the work contracted for relates to the residential nature of the premises, even if the work also serves a commercial purpose, the exemption applies (*see* ***Bartoo v Buell***, 87 NY2d 362, 639 NYS2d 778 [1996]; ***Muniz v Church of Our Lady of Mt. Carmel***, 238 AD2d 101, 655 NYS2d 38 [1st Dept 1997]).

Here, the Huckes established their prima facie entitlement to summary judgment dismissing plaintiffs'

claims against them under Labor Law §§240 and 241(6) by demonstrating that the subject premises was a one-family dwelling used primarily for residential purposes, and that neither of them directed or controlled Bennett's work (*see* ***Bartoo v Buell***, *supra*; ***Khela v Neiger***, 85 NY2d 333, 624 NYS2d 566 [1995]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Umanzor v Charles Hofer Painting & Wallpapering, Inc.***, 48 AD3d 552, 852 NYS2d 205 [2d Dept 2008]). Significantly, the Huckes submitted evidence that they relied upon the Kirks to supervise the work of the subcontractors, and that their supervisory role, if any, was general and limited to giving instructions about the aesthetic design of the premises and paying for labor and building materials (*see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; ***Decavallas v Pappantoniou***, 300 AD2d 617, 618, 752 NYS2d 712 [2d Dept 2002]). It is not a defendant's title that is determinative, but the degree of control or supervision it exercised (*see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]). Additionally, the Huckes testified that the remodeling of the premises was for residential purposes only, and that any alleged commercial use of the premises was ancillary to the residential purpose of the home (*see* ***Umanzor v Charles Hofer Painting & Wallpapering, Inc.***, *supra*; ***Putnam v Karaco Indus. Corp.***, 253 AD2d 457, 676 NYS2d 651 [2d Dept 1998]; *cf* ***Krukowski v Steffensen***, 194 AD2d 179, 605 NYS2d 773 [2d Dept 1993]).

The Huckes also established their prima facie entitlement to summary judgment dismissing plaintiffs' common law negligence and Labor Law §200 claims by demonstrating that they did not have the authority to supervise or control Bennett's work at the time of the alleged accident (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*; ***Ortega v Puccia***, *supra*; ***Gray v City of New York***, 87 AD3d 679, 928 NYS2d 759 [2d Dept 2011]; *see also* ***Circosta v 29 Washington Sq. Corp.***, 2 NY2d 996, 163 NYS2d 611 [1957]), and that they neither created nor had actual or constructive notice of any alleged defective or dangerous condition on the premises (*see* ***Ortega v Puccia***, *supra*; ***Azad v 270 Realty Corp.***, *supra*; ***Chowdhury v Rodriguez***, *supra*; ***Duarte v East Hills Constr. Corp.***, 274 AD2d 493, 711 NYS2d 182 [2d Dept 2000]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if it either created the dangerous condition or had actual or constructive notice of its presence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; ***Chowdhury v Rodriguez***, *supra*; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, *supra*).

In opposition, plaintiff failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). The cost of the renovation project and the Huckes' incidental use of the premises as a location to store commercial vehicles, documents or equipment related to their mobile disc jockey business, does not vitiate the Huckes' primary use of the building as a residence (*see* ***Putnam v Karaco Indus. Corp.***, *supra*; ***Telfer v Gunnison Lakehouse Orchards***, 245 AD2d 620, 664 NYS2d 493 [1997]; ***Krukopwski v Steffensen***, 194 AD2d 179, 605 NYS2d 773 [2d Dept 1993]), and their mere "retention of the limited power of general supervision [over the project], do not constitute 'direction' or 'control' as those terms are used in the [Labor Law]" (***Decavallas v Pappantoniou***, 300 AD2d 617, 618, 752 NYS2d 712 [2d Dept 2002]; *see* ***Chowdhury v Rodriguez***, *supra at* 128). Moreover, the Huckes did not

become the general contractor for the project responsible for enforcing safety standards by virtue of the fact that they hired separate contractors to perform different aspects of the project (*see* ***Ferrero v Best Modular Homes. Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]; ***Rodas v Weissberg***, 261 AD2d 465, 466, 690 NYS2d 116 [2d Dept 1999]). Even assuming arguendo that the accident occurred because of a dangerous condition at the worksite, plaintiffs failed to submit any evidence that the Huckes had actual or constructive notice of any such condition (*see* ***Tomecek v Westchester Additions & Renovations, Inc.***, 97 AD3d 737, 948 NYS2d 671 [2d Dept 2012]; ***Chowdhury v Rodriguez***, *supra*). Accordingly, the branch of the motion by the Huckes seeking, inter alia, summary judgment dismissing the Labor Law and common law negligence claims asserted against them is granted.

Although the Huckes' initial motion failed to address the second cause of action in the complaint predicated upon their alleged failure to procure Workers' Compensation insurance on behalf of Bennett, for the sake of judicial economy, the Court will now address their subsequent cross motion seeking dismissal of the cause of action. 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 while 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]).

An essential requirement for protection under the Workers' Compensation Law is the existence of an employer/employee relationship between the injured worker and the purported employer (Workers' Compensation Law §§ 10 and 11; *see generally* ***O'Rourke v Long***, 41 NY2d 219, 214, 391 NYS2d 553 [1976]). Section 10 of the Workers' Compensation Law provides, in pertinent part, that "[e]very employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault." 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 either to sue for the damages sustained as a result of the injury, or to seek the benefits provided under the Workers' Compensation Law (*see* ***Matter of Zatz v Moscovici***, 258 AD2d 850, 686 NYS2d 167 [3d Dept 1999]). If a court action is commenced, the employee must prove that 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). Moreover, an employee who exercises his/her option to seek compensation in a plenary action must demonstrate negligence on the part of the employer (*see* ***Morgan v Robacker***, 2 AD2d 637, 151 NYS2d 836 [1956]).

"A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (***Schramm v Cold Spring Harbor Lab.***, 17 AD3d 661, 662, 793 NYS2d 530 [2d Dept 2005], *quoting* ***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 578 NYS2d 106 [1991]). "General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (***Thompson v Grumman Aerospace Corp.***,supra at 557; ***Samuel v Fourth Ave. Assoc.***, 75 AD3d 594, 906 NYS2d 67 [2d Dept 2010]). While no one factor is determinative in deciding

whether or not a special employment relationship exists, "a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (***Thompson v Grumman Aerospace Corp.***, *supra* at 558). Other relevant factors include who is responsible for the payment of wages, who furnishes the worker's equipment, who had the right to hire and discharge the worker, and whether the work being performed was in furtherance of the special employer's or the general employer's business (*see* ***Pena v Automatic Data Processing***, 75 AD3d 724, 900 NYS2d 393 [2d Dept 2010]). A person's status as a special employee is generally a question of fact, but may be determined as a matter of law where particular undisputed critical facts compel the conclusion that there is no triable issue of fact (*see* ***Thompson v Grumman Aerospace Corp.***, *supra*; ***Pena v Automatic Data Processing Inc.***, *supra*; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]; ***Franco v Kaled Mgt. Corp.***, 74 AD3d 1142, 903 NYS2d 512 [2d Dept 2010]; ***Weitz v Anzek Constr. Corp.***, 65 AD3d 678, 885 NYS2d 314 [2d Dept 2009]).

Here, the Huckes established, prima facie, that they were not required to secure Workers' Compensation insurance on behalf of Bennett since they were not his general or special employers at the time of the alleged accident (*see* Workers' Compensation Law §§10 and 11; *see also* ***Thompson v Grumman Aerospace Corp.***, *supra*; ***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]). Significantly, it is undisputed that third-party defendant "J. Bennett Building Inc." was Bennett's general employer, and that it was not engaged in a joint venture with the Huckes at time of the alleged accident. Moreover, the Huckes submitted undisputed evidence that they did not supply Bennett's equipment or directly pay his wages, and that they never assumed control or directed the manner, details and ultimate result of his work.

In opposition, plaintiffs failed to raise any triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*). Indeed, plaintiffs' concede that Bennett was not employed by the Huckes at the time of the alleged accident. Rather, plaintiffs contend that the Huckes, as owners of the worksite, are somehow "among a class of people" who were responsible for securing compensation on behalf of Bennett. However, plaintiffs failed to reference any specific provision of the Workers' Compensation Law in support of their contention, and the single case cited by them, ***Matter of Simmons v Moss***, 191 AD2d 944, 595 NYS2d 261 [3d Dept 1993], is distinguishable, as it involved a baby sitter working in excess of forty hours per week who benefitted from the protection provided to domestic workers under section 3 of the Workers' Compensation Law. Furthermore, plaintiffs failed to demonstrate that any alleged violation of section 57 of the Workers' Compensation Law or section 125 of the General Municipal Law, which prohibit the issuance of building permits to uninsured applicants, creates a private cause of action against a purported homeowner. The Huckes, therefore, are entitled to summary judgment dismissing plaintiffs' second cause of action against them.

Inasmuch as the Huckes have been granted summary judgment dismissing the common law and statutory claims against them, the branch of their motion seeking dismissal of Tracey Bennett's derivative claim for loss of services and the reimbursement of medical fees also is granted. The Huckes, likewise, are entitled to summary judgment dismissing the cross claims against them by the Kirks and Andrew Percoco for contribution and indemnification (*see e.g.* ***Tomecek v Westchester Additions & Renovations, Inc.***, 97 AD3d 737, 948 NYS2d 671 [2d Dept 2012]; ***Gittins v Barbaria Constr. Corp.***, 74 AD3d 744, 902 NYS2d 613 [2d Dept 2010]). Additionally, where, as here, the Huckes have been granted summary judgment dismissing plaintiffs' Labor Law

and common law negligence claims, the cross motion by plaintiffs for an order striking the Huckes' affirmative defense to those claims based upon section 11 of the Workers' Compensation Law has been rendered academic, and is denied. In any event, the Huckes have submitted a copy of a letter they sent to plaintiffs' attorney indicating that they are voluntarily withdrawing the affirmative defense.

In light of the foregoing, plaintiffs' motion seeking partial summary judgment on the issue of liability against the Huckes is denied, as moot. Likewise, plaintiffs' request for the imposition of a Noseworthy preference is denied, as plaintiffs failed to provide the requisite expert testimony in support of their application (*see* ***Sawyer v Dreis & Krump Mfg. Co.***, 67 NY2d 328, 502 NYS2d 696 [1986]; ***Wahid v Long Is. R.R. Co.***, 59 AD3d 712, 873 NYS2d 738 [2d Dept 2009]). Finally, the motion by plaintiffs' for an order disqualifying Schondebare & Korcz, Esqs. as attorneys for the Huckes is denied. The disqualification of an attorney is a matter that rests solely in the discretion of the trial court (*see* ***Boyd v Trent***, 287 AD2d 475, 731 NYS2d 209 [2d Dept 2001]), and a client's right to the counsel of its own choosing is an invaluable right that should not be tampered with unless a clear showing of disqualification has been made (***S & S Hotel Ventures Ltd. v 777 S.H. Corp.***, 69 NY2d 437, 515 NYS2d 735 [1987]). The burden is on the proponent of disqualification to make that showing (*see* ***Lipshitz v Stein***, 65 AD3d 577, 884 NYS2d 442 [2d Dept 2009]; ***Petrossian v Grossman***, 219 AD2d 587, 631 NYS2d 187 [2d Dept 1995]). Here, plaintiffs failed to meet their prima facie burden on the motion, as their assertions regarding the alleged existence of a conflict of interest between the interests of the Huckes' attorney and the interests of their insurer are based on mere speculation (*see* ***Jamaica Public Service Co. Ltd. v AIU Ins. Co.***, 92 NY2d 631, 684 NYS2d 459 [1998]; ***S & S Hotel Ventures Ltd. v 777 S.H. Corp.***, *supra*; ***Olmoz v Town of Fishkill***, 258 AD2d 447, 684 NYS2d 611 [2d Dept 1999]).

The foregoing constitutes the Order of this Court.

Dated: April 1, 2013
Riverhead, NY

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION