Giordano v Allen
2014 NY Slip Op 31481(U)
June 5, 2014
Sup Ct, Suffolk County
Docket Number: 06-34038
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

INDEX No. 06-34038
CAL. No. 13-01011OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-17-13 (008 & 011)
MOTION DATE 10-24-13 (010 & 012)
MOTION DATE 11-6-13 (009)
MOTION DATE 11-14-13 (013)
MOTION DATE 1-16-14 (014 & 015)
ADJ. DATE 2-20-14
Mot. Seq. # 008 - MD # 012 - MG
009 - MG # 013 - MG
010 - MG # 014 - MD
011 - MD # 015 - MD

JOHN GIORDANO and LAURA GIORDANO,

Plaintiffs,

- against -

RANDALL S. ALLEN, individually, RANDALL S. ALLEN d/b/a ULTRA MACHINE, RANDALL S. ALLEN d/b/a MPM INC., SETAUKET CONTRACTING CORP., and BELL CABOT REALTY, LLC,

Defendants.

G. RONALD HOFFMAN, ESQ.
Attorney for Plaintiff
250 West Main Street
Bay Shore, New York 11706

PENINO & MOYNIHAN, LLP
Attorney for Defendant Setauket Contracting
180 East Post Road, Suite 300
White Plains, New York 10601

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C.
Attorney for Defendant Bell Cabot Realty
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Syosset, New York 11791

Upon the following papers numbered 1 to 128 read on these motions for summary judgment; these motions to quash subpoena; and this motion to amend pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1-18; 29-44; 45-56; 59-63; 64-68 ; Notice of Cross Motion and supporting papers 57-58; 69-75; 76-92; Answering Affidavits and supporting papers 93-96; 97-99; 100-101; 102-103 ; Replying Affidavits and supporting papers 104-116; 117-118; 119-126; 127-128 ; Other Parties Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (008, 011, 014, & 015) by plaintiff John Giordano, the motions (009, 012 & 013) by defendant Bell Cabot Realty, LLC, and the cross motion (010) by defendant Setauket Contracting Corp. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff John Giordano for partial summary judgment on his complaint is denied; and it is

ORDERED that the motion by defendant Bell Cabot Realty, LLC, for summary judgment dismissing plaintiff's complaint against it is granted; and it is

ORDERED that the motion by plaintiff, pursuant to CPLR 3211(b), for dismissal of Bell Cabot Realty, LLC's affirmative defense based on Workers' Compensation Law §§ 11 and 29 (6) is denied; and it is

ORDERED that the motion by defendant Setauket Contracting Corp. for summary judgment dismissing plaintiff's complaint against it is granted; and it is

ORDERED that the cross motion by plaintiff for partial summary judgment on its complaint as against defendant Setauket Contracting Corp. is denied; and it is

ORDERED that the motion by plaintiff for, inter alia, leave to serve a fourth amended complaint against defendant Setauket Contracting Corp. is denied; and it is further

ORDERED that the motions by defendant Bell Cabot Realty, LLC, for an order quashing subpoenas served by plaintiff on nonparty witnesses M&T Real Estate Trust and Manufacturers and Traders Trust Company are granted.

Plaintiff John Giordano commenced this action to recover damages for personal injuries he allegedly sustained on September 5, 2005, while inside an industrial building known as 33 Bell Street, West Babylon, New York. Plaintiff, who had allegedly returned to the building to retrieve equipment left there by his employer, nonparty Our Terms Fabricators ("OTF"), sustained injuries when he fell from a 14-foot ladder while attempting to remove a pair of sneakers looped over a ceiling joist inside the building. OTF was the former tenant of the building, where it operated a glass fabrication business before moving to a new location. At the time of the accident, the owner of the premises, defendant Bell Cabot Realty, LLC ("Bell Cabot"), had allegedly hired defendant Setauket Contracting Corp. ("SCC") as the general contractor to perform renovations inside the building. Defendant Randall Allen, the principal of defendants Ultra Machine and MPM Inc., allegedly was involved in the removal and relocation of machinery, equipment and electrical components from the building. By way of his third amended complaint, plaintiff alleges causes of action against defendants based on common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff's wife, Laura Giordano, for damages related to loss of services and the payment of medical expenses. The defendants have joined issue and asserted cross claims against each other for contribution and indemnification. The note of issue was filed on June 3, 2013.

Plaintiff now moves for, inter alia, summary judgment on his complaint, arguing defendants violated Labor Law §§240(1), 241(6), and 200 by failing to provide him with a safe place to work or with adequate safety equipment designed to prevent or break his fall, and that they breached various provisions of the Industrial Code. Bell Cabot opposes the motion and cross-moves for summary judgment dismissing the

complaint and cross claims asserted against it on the ground plaintiff's action is barred by section 11 of the Workers' Compensation Law, since it is the alter ego of plaintiff's employer, OTF. Alternatively, Bell Cabot asserts that the complaint should be dismissed because plaintiff was not engaged in any activity covered by the Labor Law when he fell from the ladder, and that it neither created nor had actual or constructive notice of the alleged dangerous condition. SCC also opposes plaintiff's motion and cross-moves for summary judgment dismissing his complaint, asserting that it did not owe plaintiff a duty of care, since it neither owned nor maintained the subject premises, and that it did not create the alleged dangerous condition. SCC further argues that plaintiff's complaint fails to allege Labor Law claims against it, and that, even if such claims had been alleged, they must be dismissed, as plaintiff was a volunteer at the time of his accident and was not engaged in any activity covered by the statute. Plaintiff opposes SCC's motion and cross-moves for partial summary judgment against it, arguing no triable issues exists as to whether SCC violated Labor Law §§241(6) and 200 when it performed defective electrical work at the building.

By way of a separate motion, plaintiff moves for leave to serve a fourth amended complaint which asserts Labor Law claims against SCC. Plaintiff further moves, pursuant to CPLR 3211(b), for dismissal of Bell Cabot's affirmative defense based on Workers' Compensation Law §§ 11 and 29 (6), arguing, inter alia, that Bell Cabot and OTF functioned as distinct, unrelated entities, and were not alter egos merely because Bell Cabot owned the building in which OTF formerly operated its business. In opposition, Bell Cabot asserts that dismissal of the defense is not warranted, since it met its burden by submitting evidence establishing that the formation of Bell Cabot was solely for the purpose of holding title to the premises where OTF operated its business, that Bell Cabot conducts no other business and has no employees, and that the two entities share common shareholders and a general liability insurance policy. Additionally, Bell Cabot moves to quash subpoenas duces tecum plaintiff served on nonparty witnesses M&T Real Estate Trust and Manufacturers and Traders Trust Company seeking "any and all" records relating to certain mortgages taken by Bell Cabot. Bell Cabot asserts that the subpoenas are facially defective, since they did not include notices stating the circumstances and reason such disclosure was sought, and plaintiff failed to demonstrate unusual circumstances warranting his belated attempt to reopen discovery more than 120 days after the note of issue was filed. Plaintiff opposes Bell Cabot's motions to quash, arguing that the subpoenas are precise and request non-privileged information not available from any other source.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487

NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

The defense afforded to employers by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought against an entity which is found to be the alter ego of the corporation which employs the plaintiff (*see* ***Quizhpe v Luvin Constr. Corp.***, 103 AD3d 618, 960 NYS2d 130 [2d Dept 2013]; ***Hageman v B & G Bldg. Servs., LLC***, 33 AD3d 860, 823 NYS2d 211 [2d Dept 2006]; ***Ortega v Noxxen Realty Corp.***, 26 AD3d 361, 809 NYS2d 546 [2d Dept 2006]). While a corporation organized into two separate legal entities to protect its assets from civil tort actions by unrelated third-parties will not be granted protection under the Worker's Compensation Law (*see* ***Richardson v Benoit's Elec.***, 254 AD2d 798, 677 NYS2d 855 [4th Dept 1998]), legally separate corporations which act as a single integrated entity and share a common corporate purpose will be granted such protection (*see* ***Quizhpe v Luvin Constr. Corp.***, 103 AD3d 618, 960 NYS2d 130; ***Carty v East 175th St. Hous. Dev. Fund Corp.***, 83 AD3d 529, 921 NYS2d 237 [1st Dept 2011]; ***Anduga v AHRC NYC New Projects, Inc.***, 57 AD3d 925, 869 NYS2d 801 [2d Dept 2008]; ***Ortega v Noxxen Realty Corp.***, 26 AD3d 361, 809 NYS2d 546). An entity meets its burden of showing an alter ego relationship by proffering evidence that one entity exercised managerial and financial control over the other (*see eg* ***Cappella v Suresky at Hatfield Lane, LLC***, 55 AD3d 522, 864 NYS2d 316 [2d Dept 2008]; ***Ortega v Noxxen Realty Corp.***, *supra*).

Here, Bell Cabot established, prima facie, that the action against it is barred by the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6), by submitting evidence that it was the alter ego of plaintiff's employer, OTF, and that plaintiff collected workers' compensation benefits from OTF as a result of the accident (*see* ***Quizhpe v Luvin Constr. Corp.***, *supra*; ***Carty v East 175th St. Hous. Dev. Fund Corp.***, 83 AD3d 529, 921 NYS2d 237 [1st Dept 2011]; ***Anduga v AHRC NYC New Projects, Inc.***, 57 AD3d 925, 869 NYS2d 801 [2d Dept 2008]; ***Ortega v Noxxen Realty Corp.***, *supra*). In particular, Bell Cabot submitted an affidavit by one of its principals, Joseph D'Arrigo, stating that Bell Cabot existed for the sole purpose of owning the building out of which OTF operated, that Bell Cabot had no employees and conducted no other business, and that OTF and Bell Cabot had common shareholders, including himself and John Fries, who exercised complete managerial and financial control over them. Further, Bell Cabot also submitted a copy of a commercial liability insurance policy issued by Utica National Insurance naming OTF and Bell Cabot as co-insureds for the subject premises during the period of plaintiff's accident.

Moreover, Bell Cabot established that plaintiff's conduct at the time of the accident, which consisted of the voluntary removal of a pair of sneakers strung over a ceiling joist, was not protected by the Labor Law (*see* ***Stringer v Musacchia***, 11 NY3d 212, 869 NYS2d 362 [2008]; ***Lipsker v 650 Crown Equities, LLC***, 81 AD3d 789, 917 NYS2d 249 [2d Dept 2011]; ***Rodriguez v 1-10 Indus. Assoc., LLC***, 30 AD3d 576, 816 NYS2d 383 [2d Dept 2006]; ***Vilardi v Berley***, 201 AD2d 641, 608 NYS2d 243 [2d Dept 1994]), and did not fall within any of the protected activities listed in Labor Law §§240(1) and 241(6) (*see* ***Soto v J. Crew Inc.***, 21 NY3d 562, 568-569, 976 NYS2d 421 [2013]; ***Hutchins v Finch, Pruyn & Co.***, 267 AD2d 809, 700

NYS2d 517 [3d Dept 1999]; ***Vernieri v Empire Realty Co.***, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]). Significantly, plaintiff admitted that no one asked him to work at the building on the day of his accident, and that, like his retrieval of his employer's ladder, his decision to remove the pair of sneakers from the ceiling joist was done on a voluntary basis. Indeed, plaintiff testified that he had completed the repair of the broken windows at the premises, a task allegedly assigned him by Joseph D'Arrigo two days prior to his accident, and that there was no construction or renovation related work being performed at the building on the day he fell from the ladder.

As for plaintiff's claims under the common law and Labor Law §200, where, as in this case, the injury resulted from an alleged dangerous condition, an owner or contractor may be held liable in common-law negligence and under Labor Law §200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 475, 781 NYS2d 47 [2d Dept 2004]; *see* ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]). Here, Bell Cabot established, prima facie, that it did not have the authority to control or supervise plaintiff's work, and that it neither created nor had actual or constructive notice of the alleged dangerous condition (*see* ***Pilato v 866 U.N. Plaza Associates, LLC***, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; ***Ortega v Puccia***, *supra*). Further, Bell Cabot's general supervisory authority over work at the subject premises is insufficient to establish the level of control making it liable under Labor Law §200 (*see* ***Pilato v 866 U.N. Plaza Associates, LLC***, *supra*), and, by plaintiff's own admission, the alleged defect was latent, since the pipe in question was one among many located near the ceiling, and did not have any electrical wires protruding from it.

In opposition, plaintiff failed to raise any triable issues warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316). Plaintiff's submission of additional commercial liability policies held by OTF during the time of his accident is insufficient to defeat Bell Cabot's entitlement to protection under Workers' Compensation Law §§ 11 and 29 (6), as the alter ego doctrine does not require complete integration of the entities. OTF's possession of a separate Workers' Compensation Insurance policy is similarly unpersuasive, since Bell Cabot avers that it has no employees and exists solely for the purpose of owning the building out of which OTF operates (*see* ***Cappella v Suresky at Hatfield Lane, LLC***, 24 Misc 3d 1225(A), 897 NYS2d 668, *affirmed by* 55 AD3d 522, 864 NYS2d 316 [2d Dept 2008]). The case of ***Wernig v Parents & Bros. Two.***, 195 AD2d 944, 600 NYS2d 852 (3d Dept 1993) also is distinguishable, as plaintiff failed to submit any evidence that Bell Cabot's primary business was to buy, sell or manage the subject property.

Additionally, plaintiff failed to raise any triable issues as to whether his conduct fell within the coverage of the Labor Law §§240(1) and 241(6), or that Bell Cabot created or had actual or constructive notice of the dangerous condition. Plaintiff's affidavit in opposition to the motion merely raises a feigned issue of fact in an effort to avoid the consequences of dismissal, as it contradicts his earlier deposition testimony in which he stated that the alleged work being done to the building had either ceased or had been completed before the day of his accident (*see* ***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; ***Novoni v La Parma Corp.***, 278 AD2d 393; 717 NYS2d 379 [2d Dept 2000]). Further, plaintiff failed to submit any evidence that his removal of the sneakers from the ceiling joist was not voluntary, or that it constituted cleaning for the purposes of the Labor Law (*see* ***Soto v J. Crew Inc.***, 21 NY3d 562, 568-569, 976 NYS2d 421; ***Hutchins v Finch, Pruyn & Co.***, 267 AD2d 809, 700 NYS2d 517; ***Vernieri v Empire Realty Co.***, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]; *compare* ***Missico v Tops Mkts., Inc.***, 305 AD2d 1052 ,758 NYS2d 890 [4th Dept 2003]). Accordingly, the motion by Bell Cabot for summary judgment dismissing plaintiff's complaint against it is granted.

As to the motions by Bell Cabot for an order quashing subpoenas plaintiff served on nonparty witnesses M&T Real Estate Trust and Manufacturers and Traders Trust Company for the production of "any and all" records relating to certain mortgages taken by Bell Cabot, a subpoena duces tecum must be served in the same manner as a summons, and when it is served by substituted service, a follow-up mailing is required (CPLR 2303[a]; *see* ***Jaggars v Scholeno***, 6 AD3d 1130, 776 NYS2d 684 [4th Dept 2004]). A subpoena served on a nonparty witness also is facially defective and unenforceable if it neither contains nor is accompanied by a notice stating the reasons the requested disclosure is sought or required (*see* CPLR 3101 [a][4]; ***Matter of American Express Prop. Cas. Co. v Vinci***, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]; ***Knitworks Prods. Corp. v Helfat***, 234 AD2d 345, 651 NYS2d 99 [2d Dept 1996]). Furthermore, a party seeking discovery after the filing of the note of issue must move to vacate the note within 20 days after service of the note of issue and submit an affidavit demonstrating that the case is not ready for trial (22 NYCRR 202.21[e]). A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(e) must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21 [d]; *see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, the adduced evidence indicates that plaintiff, who mailed the subpoenas, neither personally served the nonparty witnesses, nor complied with the procedures set forth in CPLR 308(2) when substituted service is attempted. Moreover, an examination of the subpoenas reveal that they were facially defective and unenforceable, since they neither contained, nor were accompanied by an affirmation describing the circumstances or reasons the requested disclosure was sought (*see* ***Needleman v Tornheim***, 88 AD3d 773, 930 NYS2d 896 [2d Dept 2011]; ***Matter of American Express Prop. Cas. Co. v Vinci***, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]). Additionally, the subpoenas were served more than 120 days after the filing of the note of issue, and plaintiff failed to make a showing of unusual or unanticipated circumstances

sufficient to compel further pre-trial discovery (*see* ***Filippazzo v Kormoski***, 75 AD3d 618, 905 NYS2d 276 [2d Dept 2010]; ***Tirado v Miller***, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]; ***Racine v Grant***, 65 AD3d 535, 882 NYS2d 908 [2d Dept 2009]). Accordingly, the motions by Bell Cabot for an order quashing subpoenas served by plaintiff on nonparty witnesses M&T Real Estate Trust and Manufacturers and Traders Trust Company are granted.

Having determined that plaintiff failed, as a matter of law, to state causes of action under Labor Law §§240(1) and 241(6), the branch of his cross motion for leave to serve a fourth amended complaint adding such claims against SCC, and for summary judgment on those claims, is denied. Leave to amend a pleading will be denied, where, as here, the proposed amendment is palpably insufficient and devoid of merit (*see* CPLR 3025(b); ***Longo v Long Island Railroad***, 116 AD3d 676, 983 NYS2d 579 [2d Dept 2014]; ***Lucido v Mancuso***, 49 AD3d 220, 238, 851 NYS2d 238 [2d Dept 2008]). Further, inasmuch as it is determined herein, that the proposed Labor Law §200 claim against SCC is devoid of merit, the branch of the motion seeking leave to serve an amended pleading adding such a claim against SCC is denied.

Turning to the motion by SCC for, inter alia, dismissal of plaintiff's common law claims against it, SCC met its prima facie burden on the motion by demonstrating that it did not owe plaintiff a duty of care under the circumstances of this case, since it neither owned the premises in question, nor launched a force of harm which caused plaintiff's accident (*see eg.* ***Spaulding v Loomis Masonry, Inc.***, 105 AD3d 1309, 964 NYS2d 335 [4th Dept 2013]; *see also* ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). Significantly, plaintiff testified that the only work he observed SCC do at the premises was the erection of the interior cinder block wall, and that such work was completed before his accident. SCC's president also testified that it did not perform any electrical work on the premises, including the disconnection and removal of OTF's machines to its new location. Rather, SCC submitted an affidavit by defendant Randy Allen, which states, among other things, that he disassembled the machines at the premises and relocated them to OTF's new location. As for the proposed Labor Law §200 claim against SCC, such a claim merely codifies the common-law duty imposed upon an owner or contractor to provide workers with a reasonably safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). Therefore, where, as here, SCC established it did not have the authority to control or supervise plaintiff's work, and did not have actual or constructive notice of the alleged dangerous condition, plaintiff's claim against it under Labor Law §200 is likewise devoid of merit (*see* ***LaGiudice v Sleepy's Inc.***, *supra*; ***Ortega v Puccia***, *supra*; ***Azad v 270 Realty Corp.***, *supra*). In opposition, plaintiff's conclusory and unsubstantiated allegations that SCC performed electrical work at the premises, including disconnecting and removing OTF's machines to the new location, are insufficient to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York***, *supra*).

In light of the foregoing, the branches of plaintiff's motion for partial summary judgment on his complaint as against Bell Cabot and SCC are denied, as moot. Further, plaintiff failed to meet its prima

facie burden on the branch of the motion seeking partial summary judgment as against Randall Allen individually, and Randall Allen d/b/a as Ultra Machine, as he failed to submit any evidence demonstrating, as a matter of law, that said defendants owed him a duty of care, or that they created the alleged dangerous condition which caused his accident (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra*; ***Spaulding v Loomis Masonry, Inc.***, *supra*).

Dated: June 5, 2014

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION