Argueta v Fleming
2018 NY Slip Op 31716(U)
June 12, 2018
Supreme Court, Suffolk County
Docket Number: 12-36776
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 12-36776
CAL. No. 17-00920OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 10-11-17
ADJ. DATE 1-3-18
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - MG

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ANTONIO A. ARGUETA,

Plaintiff,

- against -

STEPHEN FLEMING, THERESA FLEMING, C&J BUILDERS, INC., and CARY INSULATION A MASCO CONTRACTOR SERVICE CO.,

Defendants.

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PETER D. BARON, ESQ.
Attorney for Plaintiff
90 Main Street
Cold Spring Harbor, New York 11724

LEDWITH & ATKINSON
Attorney for Defendant Fleming
14 St. James Place
Lynbrook, New York 11563

MAZZARA & SMALL, P.C.
Attorney for Defendant C&J Builders, Inc.
1698 Roosevelt Avenue
Bohemia, New York 11716

STAGG, TERENZI,
CONFUSIONE & WABNIK, LLP
Attorney for Defendant Cary Insulation
A Masco Contractor Service Co.
401 Franklin Avenue, Suite #300
Garden City, New York 11530

Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 to 30; Notice of Cross Motion and supporting papers 31 to 36 ; Answering Affidavits and supporting papers 37-43 ; Replying Affidavits and supporting papers 44-46; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Cary Insulation a Masco Contractor Service Co. for summary judgment dismissing the complaint and the cross claims against it is decided as set forth herein; and it is further

ORDERED that the cross motion by Stephen and Theresa Fleming for summary judgment dismissing the complaint against them is granted.

Plaintiff commenced this action to recover damages for personal injuries that he sustained on April 23, 2012, while installing insulation inside of a residence on behalf of his employer, defendant Cary Insulation A Masco Contractor Service Co. ("Cary"). The residence was owned by Stephen and Theresa Fleming (collectively, the "Flemings") who entered into a contract with defendant C&J Builders ("C&J") to build their home. C&J in turn subcontracted with Cary to install the insulation. Plaintiff alleges that he sustained injuries when he fell from the second floor of the residence, which had an open stairway. He claims that the stairway did not have guardrails in place at the time of his accident. Plaintiff alleges that the defendants are liable for his injuries pursuant to Labor Law §§ 200, 240, 241, and common law negligence. C&J instituted cross claims against Cary for common law indemnification and contribution based upon their work agreement.

Cary now moves for summary judgment dismissing all claims against it, arguing that (1) pursuant to New York's Worker's Compensation Law § 11, plaintiff is barred from bringing the instant action inasmuch as plaintiff received worker's compensation benefits, (2) Worker's Compensation Law § 11 also bars C&J's indemnification and contribution claims, and (3) Cary was not negligent as a matter of law. Cary further argues that it was C&J's responsibility to install guardrails on the second floor stairway prior to the commencement of the insulation work and C&J failed to perform its duty, and that plaintiff violated the company's policy by performing his work without guardrails in place. In support of its motion, Cary submits the pleadings, plaintiff's medical records, and the deposition transcripts of the parties and witnesses. Plaintiff and C&J oppose, arguing that Cary has failed to meet its burden on the motion.

The Flemings also cross-move for summary judgment on the ground that plaintiff's claims under Labor Law and common law negligence do not apply to them inasmuch as their home was a single-family residence, and they did not direct, control or supervise the construction thereof. Plaintiff opposes the cross motion, arguing that (1) it was untimely and should not be considered, (2) the motion was defective, and (3) the evidence submitted in support of the motion was deficient.

With regard to Cary's motion for summary judgment, plaintiff and C&J contend that the deposition transcripts submitted should not be considered as a matter of law because they were not signed by any of the deponents, and Cary failed to show that were sent to the deponents for review (*see* CPLR 3116 [a]). Plaintiff argues that he was not given the opportunity to review his testimony, and he "cannot vouch" for the accuracy of the transcripts of other deponents. Neither C&J nor the Flemings make any challenge to the deposition testimony. The Court notes that C&J submitted the transcript of Gerald Santiago, its employee, in opposition to the motion, and the Flemings submitted the transcript of Theresa Fleming in support of their cross-motion. The deposition transcripts that Cary submitted are

unsigned but all are certified by the court reporter (*see* ***David v Chong Sun Lee***, 106 AD3d 1044, 1045 [2d Dept 2013]).

The Court finds that the deposition transcripts of Theresa Fleming and Gerald Santangelo, although unsigned, are admissible inasmuch as they constitute the Flemings' and C&J's own testimony (***Gallway v Muintir, LLC***, 142 AD3d 948, 949 [2d Dept 2016]). C&J and the Flemings in effect, "adopted [the testimony] as accurate" by including it in their papers (***Gezelter v Pecora***, 129 AD3d 1021, 1022 [2d Dept 2015]; ***Carey v Five Bros., Inc.***, 106 AD3d 938, 939 [2d Dept 2013]). Additionally, the testimony of Lance Coyle, Cary's employee, is also admissible for the same reason (*see* ***Pavane v Marte***, 109 AD3d 970, 970 [2d Dept 2013] [deposition transcripts "submitted by the party deponents themselves . . . were adopted as accurate by those deponents"]; ***David v Chong Sun Lee***, 106 AD3d 1044, 1045 [2d Dept 2013]). Although the deposition transcripts of the nonparty witnesses are unsigned, they are certified by the court reporter, and are deemed admissible under the circumstances (*see* ***David v Chong Sun Lee***, 106 AD3d 1044, 1045 [2d Dept 2013]). The plaintiff asserts that he did not have an opportunity to review the deposition testimony; he does not assert that the testimony as transcribed was inaccurate (*see* ***Casa Di Roma Furniture, Inc. v Sovereign Bank***, 2012 NY Slip Op 50033 [U], 2012 WL 118741 [Sup Ct Kings County, 2012]).

Plaintiff testified that he was employed by Cary for three years prior to the accident. On the morning of the incident, plaintiff and a co-worker arrived at the job site between 9 and 10 a.m. No one else was at the residence when he arrived, and he received his instructions only from Cary. He was tasked with spraying insulation into the walls using equipment that Cary provided. The plaintiff recalled that he used the stairway to enter the second floor, but he could not recall whether the stairway had a railing. He observed an opening of approximately 4 feet wide on the second floor stairway. Soon after he started spraying insulation inside of the walls on the second floor, he fell and lost consciousness. When he became alert, plaintiff was lying on the first floor and he could not remember the accident. Plaintiff testified that he made a claim for and received worker's compensation benefits for injuries he suffered as a result of his fall.

Gerald Santangelo testified that he was the president of C&J, and he entered into a contract to build a home for the Flemings. C&J subsequently entered into an agreement with Cary to perform insulation work on the three-story residence. Santangelo testified that he personally installed temporary stair railings, which had not been removed before plaintiffs' arrival. Santangelo was not at the residence when plaintiff came to perform the insulation work, and it was not until the day after the accident that Santangelo was told that someone was injured at the job site. When he arrived at the residence after the incident, he observed that the railings were not in place. Santangelo testified that he did not know who removed the railings. Santangelo further testified that the Flemings did not have any contact with Cary, and he did not have any conversation with the Flemings concerning the railings.

The Flemings hired C&J to build their home; however, Theresa Fleming testified that she was not involved in the negotiation process for the project. Theresa was not aware that Cary worked on the property prior to being served in subject action, and she was not involved in how the project operated. Theresa testified that her family moved into their home when it was completed in August 2012. Stephen

Fleming testified that he occasionally visited the property during the construction phase and observed that temporary railings were on the stairway "at times." Stephen did not hire Cary, he was not at the residence when the insulation was being installed, and he was not aware of the type of insulation that would be installed.

Jose Argueta testified that he was plaintiff's brother, and he worked for Cary along with plaintiff when the accident occurred. Argueta arrived at the job site after the plaintiff. While he was on the first floor working, Argueta heard plaintiff scream, and "heard him roll all the way down the stairs." He testified that there were no railings along the opening of the second floor staircase. According to Argueta, when an employee arrived at the job site, the employee was supposed to "call and ask for guardrails." He was not ceratin whether plaintiff called Cary concerning the absence of guardrails. Immediately after the incident, Argueta called his supervisor and took photographs of the scene. Argueta did not meet the owners of the residence at any point.

Lance Coyle testified that he was an employee of Masco Contractor Services ("Masco"), and that Cary was a division Masco. Coyle was not employed by Masco when the accident occurred. Cary employees were prohibited from working where guardrails were needed but not installed, and when an employee arrived at a job site that did not have guardrails in place, the employee was required to contact a manager before commencing work. Either the manager or the general contractor would provide the materials for installing the railing. Masco's records indicated that the plaintiff received a copy of the company's policy manual. Coyle further testified that the insulation work agreement between Cary and C&J was on a standard form that was generated by Masco. Masco also drafted the indemnity clause in the agreement.

Glen Reitter testified that he was employed by Cary as a manager when plaintiff's accident occurred. He was not at the residence when the plaintiff got injured, but he was notified by telephone soon thereafter. As a general practice, prior to commencement of work, Cary requested that the general contractor have OSHA regulated safety features in place. Reitter recalled that a supervisor who arrived on the scene after the accident informed Reitter that there were no guardrails on the stairway of the residence. The day following the accident, Reitter spoke to Santangelo, who stated that he was "sure" that guardrails were installed. Reitter further testified that if an employee proceeded to work in the absence of guardrails, the employee would be in violation of Cary's safety policy. Reitter could not recall whether plaintiff was reprimanded for working without guardrails.

Thomas Cook testified that he was the production manager at Cary in April 2012, and that he was terminated in 2015. On the day of plaintiff's accident, Cook received a phone call from one of the workers to inform him that plaintiff fell and was injured. When he arrived at the job site, he was told that as plaintiff was installing the spray insulation, he fell from the second floor down to the first floor. Cook observed that there were no guardrails in place, and made a note in the accident report that he created. Cook could not recall whether he was notified that the guardrails were not in place when the employees arrived at the job site. He testified that if was notified, he would have instructed them to stop working, and he would have contacted C&J to have the guardrails installed.

The agreement between Cary and C&J contained an indemnity clause, which stated, in part, that each of the parties to the agreement "agrees to defend and indemnify one another from any and all claims [] and/or lawsuits caused by the party's negligent acts or omissions." Cary also submitted accident reports about plaintiffs accident. In one report, Cook indicated that a contributing factor for the accident was that no guardrails were installed, and in the other, the writer indicated that plaintiff was working in "unsafe conditions."

It is well established that 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 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). The burden then shifts to the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Town of Fishkill***, *supra*).

Cary has sustained its burden with respect to plaintiff's claims against it. "Under New York's workers' compensation scheme, an employee receives medical benefits and compensation for workplace injuries, regardless of fault, paid for by the employer" (***New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.***, 22 NY3d 501, 509-510 [2014]). Accordingly, workers' compensation is intended to be the exclusive remedy for unintentional injuries sustained during the course of employment (Workers' Compensation Law §§ 11, 29 [6]; *see* ***Macchirole v Giamboi***, 97 NY2d 147 [2001]; ***Burlew v American Mut. Ins. Co.***, 63 NY2d 412, 416 [1984]; ***Kruger v EMFT, Inc.***, 87 AD3d 717 [2d Dept 2011]; ***Hyman v Agtuca Realty Corp.***, 79 AD3d 1100 [2d Dept 2010]; ***Pereira v St. Joseph's Cemetery***, 54 AD3d 835 [2d Dept 2008]).

Cary established that plaintiff was its employee, and that plaintiff sustained injury during the course of his employment. At his deposition, plaintiff testified that he applied for and received worker's compensation benefits as a result of his workplace injury. It stands to reason that plaintiff cannot now seek damages from Cary under the circumstances inasmuch as workers' compensation was the exclusive remedy for the injuries he sustained (*see* Workers' Compensation Law §§ 11, 29 [6]; ***Weiner v City of New York***, 19 NY3d 852, 854 [2012]; ***Macchirole v Giamboi***, 97 NY2d 147 [2001]; ***Richmond v BMC Indus., Inc.***, 226 AD2d 1063, 1064 [4th Dept 1996]). In opposition, plaintiff has failed to raise an issue of fact. Accordingly, plaintiff's claims against Cary are dismissed.

Next, Cary claims that C&J's cross claims were also barred by worker's compensation law. Cary's contentions lack merit. Workers' Compensation Law provides, in part, that "[a]n employer may be held liable for contribution or indemnification [] when its employee has sustained a grave injury as defined by the Workers' Compensation Law or when there is a 'written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant' " (***Cacanoski v 35 Cedar Place Assoc., LLC***, 147 AD3d 810, 812 [2d Dept 2017], quoting

Workers' Compensation Law § 11; ***New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.***, 22 NY3d 501 [2014]; ***Cano v Mid-Valley Oil Co., Inc.***, 151 AD3d 685 [2d Dept 2017]). "A party's right to contractual indemnification depends upon the specific language of the relevant contract" (***Tolpa v One Astoria Square, LLC***, 125 AD3d 755, 756 [2d Dept 2015]; *see also* ***Cano v Mid-Valley Oil Co., Inc.***, *supra*).

Plaintiff's testimony establishes that he did not suffer grave injuries withing the meaning of workers' compensation law. Notwithstanding, the record shows that Cary and C&J entered into an agreement that contained an indemnity clause. Specifically, the clause provided that the parties agreed "to defend and indemnify one another from any and all claims [] and/or lawsuits caused by the party's negligent acts or omissions." Cary acknowledges the validity of the clause, but argues that C&J cannot prove that Cary was negligent; thus, it cannot pursue a cause of action for contribution and indemnification.

Some facts presented herein are undisputed. C&J hired Cary to install the insulation on the Flemings' residence, and plaintiff, who was Cary's employee, was injured while he was on the job site performing work that Cary instructed him to do. Other facts are in dispute, however. Cary did not conclusively establish whether C&J failed to install a safety railing on the staircase at the residence, and whether plaintiff or one of Cary's employees removed the safety railing while working.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a 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 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Messina v City of New York***, 147 AD3d 748 [2d Dept 2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61 [2d Dept 2008]). Where the condition of the premises is at issue, the property owner or general contractor may be held liable for a violation of Labor Law § 200 if it "either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, 57 AD3d 61; *see* ***Pacheco v Smith***, 128 AD3d 926 [2d Dept 2015]; ***Chowdhury v Rodriguez***, 57 AD3d 121 [2d Dept 2008]).

Moreover, Labor Law §§ 240 (1) and 241 (6) impose a "nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348 [1998]; *see* ***Harrison v State***, 88 AD3d 951 [2d Dept 2011]). A contractor, owner or agent will be held strictly liable where a violation of these sections of the Labor Law statute is the proximate cause of a plaintiff's injuries (*see* ***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513 [1985]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515 [2d Dept 2009]; *see also* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343; ***Hricus v Aurora Contrs., Inc.***, 63 AD3d 1004 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808 [2d Dept 2005]). An owner or

contractor may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513).

Here, C&J's president testified that he personally installed a temporary stair railing at the residence prior to plaintiff's arrival. Additionally, the homeowner, Stephen Fleming, testified that he observed temporary railings in place when he visited the residence during the construction phase. Cary, on the other hand, posits that because plaintiff and its other employees testified that there was no stair railing in place when they arrived at the work cite, Cary is entitled to summary judgment. Cary's position is untenable. The court's function on this motion is not to resolve issues of fact or to determine matters of credibility (***Roth v Barreto***, 289 AD2d 557 [2d Dept 2001]).

Cary further contends that because it was C&J's responsibility to install the safety railings and C&J failed to perform its duty, C&J's claims should be dismissed. Cary established that C&J was responsible for installing the stair railing; nevertheless, Cary failed to establish that C&J failed to fulfill its duty. Testimony revealed that Cary's employees were prohibited from beginning to work without safety railings in place, and if there were no railings in place when the employee arrived at the job site, the employee was required to contact Cary. Cary did not receive any phone calls concerning the absence of safety railings before its employees started working. Additionally, as indicated above, C&J's president testified that he installed the safety railing before Cary's employees arrived at the job site. Accordingly, inasmuch as Cary failed to meet its burden to eliminate all issues of fact with respect to C&Js' third-party complaint, its motion for summary judgment is denied.

With respect to the Flemings' cross motion for summary judgment, plaintiff argues that it is untimely and should not be considered. It is well established that a motion for summary judgment that is made more than 120 days after the filing of the note of issue cannot be considered by the court absent good cause shown (***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 726 [2004]; ***Brill v City of New York***, 2 NY3d 648, 652 [2004]). However, "[a] cross motion for summary judgment made after the expiration of the statutory 120–day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (***Filannino v Triborough Bridge and Tunnel Auth.***, 34 AD3d 280, 281 [1st Dept 2006] [internal quotation marks omitted]; *see* ***James v Jamie Towers Hous. Co., Inc.***, 294 AD2d 268, 272 [1st Dept 2002]). "In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause . . . to review the untimely motion or cross motion on the merits" (***Grande v Peteroy***, 39 AD3d 590, 592 [2d Dept 2007]). Here, although the cross motion was filed after the 120-day period, the court exercises its discretion to review the cross motion on the merits.

A homeowner may be strictly liable in damages for failure to provide adequate protection and safety to those employed in the construction and repair of their home (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343; ***Harrison v State***, 88 AD3d 951]). However, the homeowner's exemption to liability under Labor Law § 240 and § 241 is available to "owners of one and two-family dwellings who contract for, but do not direct or control the work" (*see* ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879 [2d Dept 2010]; ***Boccio v Bozik***, 41 AD3d 754 [2d Dept 2007]; ***Ferrero v***

Best Modular Homes. Inc., 33 AD3d 847 [2d Dept 2006]; ***Murphy v Sawmill Constr. Corp.***, 17 AD3d 422 [2d Dept 2005]). The exception was enacted to "protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (***Acosta v Hadjigavriel***, 18 AD3d 406, 406-407, 794 NYS2d 445 [2d Dept 2005]; *see* ***Szczepanski v Dandrea Constr. Corp.***, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]). When the owner of a one-or two-family dwelling contracts for work that directly relates to the residential use of the home, the owner is shielded by the homeowner's exemption (*see* ***Bartoo v Buell***, 87 NY2d 362 [1996]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879 [2d Dept 2010], *lv denied* 16 NY3d 704 [2011]).

Here, the Flemings established, prima facie, that they are entitled to the homeowner's exemption from liability under Labor Law § 240 and § 241(6) by demonstrating that the subject premises was a single family dwelling used primarily for residential purposes, and that they did not direct or control plaintiff's work as those terms are defined by the statute (*see* ***Duda v Rouse Constr. Corp.***, 32 NY2d 405, 409 [1973]; ***Nai Ren Jiang v Shane Yeh***, 95 AD3d 970 [2d Dept 2012]; ***Ruiz v Walker***, 93 AD3d 838 [2d Dept 2012]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Umanzor v Charles Hofer Painting & Wallpapering, Inc.***, 48 AD3d 552 [2d Dept 2008]; ***Arama v Fruchter***, 39 AD3d 678 [2d Dept 2007]; ***Rodas v Weissberg***, 261 AD2d 465 [2d Dept 1999]). In an affidavit, Stephen Fleming averred that neither he nor his wife directed or supervised the construction work on their residence. Theresa Fleming testified that they hired C&J as the general contractor to construct their residence, and that she was not involved in the process of selecting or hiring Cary. The Flemings communicated with C&J during the construction of the home and only visited the residence to observe the progress of construction. Plaintiff failed to raise any triable issues as to whether the Flemings' directed or controlled the construction of their home (*see* ***Nai Ren Jiang v Shane Yeh***, *supra*; ***Ruiz v Walker***, *supra*; ***Garcia v Petrakis***, 306 AD2d 315 [2d Dept 2003]; ***Edgar v Montechiari***, 271 AD2d 396 [2d Dept 2000]).

The Flemings have also established that they did not create or have notice of the alleged defective condition (*see* ***Rojas v Schwartz***, 74 AD3d 1046 [2d Dept 2010]; ***Ortega v Puccia***, 57 AD3d 54, 61 [2d Dept 2008]; ***Payne v 100 Motor Parkway Assoc.***, LLC, 45 AD3d 550, 553 [2d Dept 2007]). The record demonstrates that the Flemings did not possess the authority to supervise or control plaintiff's insulation work, and that their involvement during the project was limited to general supervision of the progress of the construction. The burden, therefore, shifted to plaintiff and codefendants to raise triable issues in opposition requiring denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320 [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]), and they failed to meet their burden (*see* ***Tomecek v Westchester Additions & Renovations, Inc.***, 97 AD3d 737 [2d Dept 2012]; ***Ortega v Puccia***, 57 AD3d 54; ***Decavallas v Pappantoniou***, 300 AD2d 617 [2d Dept 2002]). Accordingly, the motion by the Flemings for summary judgment dismissing the complaint against them is granted.

Dated: June 12, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.