

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. BRUCE D. ALPERT**

Justice  
TRIAL/IAS, PART 4  
NASSAU COUNTY

ROMA MARBLE, INC.,

Plaintiff,

Index No. 3281/03

-against-

**Motion Sequence No. 1**

MOTION DATE: July 20, 2005

WAYNE LIBERTI a/k/a WAYNE ALIBERTI,

Defendant.

The following papers read on this motion for summary judgment:

Notice of Motion	X
Opposing Submission	X
Reply Papers	X

Upon the foregoing papers it is ordered that defendant's application for relief pursuant to CPLR 3212 is denied for the reasons hereinafter articulated.

While the defendant in his supporting affidavit contends that he retained the plaintiff in March of 1999 to furnish material and to provide labor and services in connection with the construction of several private dwellings, one of which he acquired by deed dated September 16, 1999, he contends that he at all times acted in his capacity as a shareholder in Foxland Estates, Inc.

However, in reply papers he appears to contradict himself and introduces but another corporate entity (Markland Corp.) into the equation.

Though his deposition testimony is lacking in clarity, he conceded that he is the president and sole

shareholder of Markland Corp.

In reply papers the defendant's counsel points to the plaintiff's failure to submit an affidavit authored by one with personal knowledge of the facts, contending that the failure to do so mandates the summary dismissal of the underlying complaint. The Court disagrees. Where, as here, the plaintiff relies on the defendant's deposition testimony which undermines the movant's position, the lack of an opposing affidavit is not dispositive. (see, *Zuckerman v City of New York*, 49 NY2d 557, 563)

While the absence of a written agreement is troublesome, there is nothing in the record which suggests that the defendant made his status known to the plaintiff. If he failed to do so, and is found to have acted as an agent for an undisclosed principal, he would not be insulated from the imposition of personal liability for the purported corporate debt, and the lack of a personal guarantee would stand without significance. (see, *Judith Garden, Inc. v Mapel*, 73 Misc 2d 810, 812, affd 75 Misc2d 558; *Johnson v Block*, 62 Misc 2d 126, affd 65 Misc 2d 634)

Dated: September 6, 2005

  
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J.S.C.

**ENTERED**

SEP 09 2005

NASSAU COUNTY  
COUNTY CLERK'S OFFICE