

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEOFFREY J. O'CONNELL**

Justice

TRIAL/IAS, PART 9

NASSAU COUNTY

DARIO MANNARINO,

Plaintiff(s),

INDEX No. 10748/00

-against-

MOTION DATE: 1/6/03

BILTMORE CONTRACTING, INC.,  
JOHN F. CAPOBIANCO, ARCHITECT,  
LINDSEY A. ROSENWALD and RIVKI  
ROSENWALD,

Defendant(s).

MOTION SEQ. No. 1-MG  
2-MG  
3-MD

The following papers read on this motion:

- Biltmore Notice of Motion/Affirmation /Exhibits A-Q
- Rosenwald Notice of Cross Motion/Affirmation/Exhibits A-L
- Plaintiff Affirmation
- Capobianco Notice of Cross Motion/Affirmation/Exhibits A-H
- Memorandum of Law
- Rosenwald Reply Affirmation/Exhibits A-C
- Biltmore Reply/Exhibit A
- Rosenwald Reply/Exhibit A
- Plaintiff Affirmation in Opposition/Exhibits A-E
- Capobianco Reply

In this action all defendants move for Orders granting them summary judgment pursuant to CPLR § 3212. Plaintiff does not oppose the applications of defendants BILTMORE CONTRACTING or LINDSEY and RIVKI ROSENWALD, but opposes the application of JOHN E. CAPOBIANCO, ARCHITECT.

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This action arises out of an incident on April 6, 1999, at which time Plaintiff fell during the construction of the ROSENWALD's home in Lawrence New York. Plaintiff allegedly fell from exterior planking when it collapsed without warning. Plaintiff commenced this action against the defendants seeking damages for his injuries, alleging violations of the Labor Law sections 200, 240 and 241. Labor Law § 240(1) regulates scaffolding and devices used to elevate workers at job sites. Labor Law § 241(6) regulates construction, excavation and demolition work, providing for owners and contractors to provide reasonable safety equipment and protection to workers.

Plaintiff brought this action against BILTMORE, as BILTMORE was listed on the work permit as the general contractor. BILTMORE contends that it was not the general contractor on the project, and only performed construction of the foundation. BILTMORE claims that it was mistakenly listed as general contractor on the permit by CAPOBIANCO. BILTMORE contends that it did not provide any scaffolding or planking at the premises, and claims that there is no proof that it supervised or directed any work of the plaintiff. It seeks summary judgment dismissing all claims against it and granting it summary judgment.

The only opposition to this application is stated by counsel for the ROSENWALDs who objects to a dismissal of claims against BILTMORE only if his clients' application for summary judgment is Denied. The opposition offers no proof of any potential liability for BILTMORE.

Based on the proof presented, BILTMORE's motion for summary judgment is Granted and all claims and cross claims asserted against it are dismissed.

The defendant homeowners, the ROSENWALDs also seek summary judgment dismissing all claims against them. They contend that they are exempt from the Labor Law violations, as they are non-commercial homeowners, and there is no evidence that they directed or supervised the plaintiff's work at the site or otherwise acted as their own general contractor.

At his deposition plaintiff stated that he was a laborer working for his brother's company, SDR Construction, at the time of his fall. He testified that the scaffolding was on at the time of his accident was constructed of two pieces of wood at an angle and a plank laying horizontally across. (Rosenwald, Exh. F. pp. 30-31, Exh. J). Plaintiff testified that at the time of the accident he had been instructed by one of his own

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bosses at SDR to cut fascia board on the roof, and that he fell while performing this task. There is no testimony or evidence offered to dispute plaintiff's description of the accident.

Plaintiff further testified that the only people who directed his work on a daily basis were his brother, Raffael, and co-defendant CAPOBIANCO. Plaintiff also testified that he never saw either ROSENWALD speak to his employer.

At his deposition Mr. LINDSEY ROSENWALD testified that he hired CAPOBIANCO to act as general contractor for the Construction, and that CAPOBIANCO oversaw the progress of the work, recommended or brought in all of the subcontractors and told ROSENWALD when to pay the subcontractors. ROSENWALD testified that he did not oversee any of the project and that CAPOBIANCO was responsible for the plans and for the workers following the plans.

Raffael Mannarino, the President of SDR, and plaintiff's brother, also appeared for deposition. He testified that CAPOBIANCO acted as the general contractor, and that his company, SDR, was hired to perform framing work at the home by CAPOBIANCO. He also testified that all of his bills to the homeowners were submitted to CAPOBIANCO for approval and payment, and that he was not paid until CAPOBIANCO was satisfied that his work was performed satisfactorily. He further testified that CAPOBIANCO was at the job site on almost a daily basis and that he oversaw and directed the way his work was performed, as well as that of the other subcontractors. He stated that he believed that CAPOBIANCO hired the plumbers, electricians, roofers and other tradesmen.

The ROSENWALDs seek summary judgment dismissing the claims against them, contending that as homeowners not directing or supervising the Construction, they are exempt from liability under the cited Labor Law provisions. The Court agrees. The proof presented demonstrates they are exempt as there is no evidence that the homeowners were directing the work be performed by contractors and subcontractors on the premises. The testimony of those involved in the construction clearly demonstrates that neither homeowner oversaw, supervised or directed the construction project.

The motion of the ROSENWALDs seeking summary judgment is therefore Granted.

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CAPOBIANCO also seeks summary judgment dismissing the claims and crossclaims against him. Counsel for CAPOBIANCO claims that his client was only retained to perform architectural services to the ROSENWALDs, and relies upon the written contracts of these parties. In this instance the parties executed a contract for architectural services and also entered into an agreement, dated November 11, 1998, whereby the ROSENWALDs retained CAPOBIANCO to provide "construction coordination" services. (Capobianco, Exh. F). He claims that CAPOBIANCO did not enter into any contract with the ROSENWALDs to act as general contractor, and notes that the language of his contract states that the subcontractors are solely responsible for job site safety.

The mere absence of a written contract designating CAPOBIANCO as general contractor does not relieve this defendant of responsibility, especially in light of the contract wherein he agrees to coordinate the construction. In that contract CAPOBIANCO agrees to coordinate the work of the sub-contractors with each others activities and responsibilities and provide organization, personnel and management to carry out the requirements of that agreement. He agreed to schedule the subcontractors and recommend changes or actions to the owners as well as assist in obtaining the proper permits and approvals and to determine whether the work of the subcontractors are satisfactory. CAPOBIANCO was apparently paid a retainer of \$12,000.00 to perform these services. (Capobianco, Exh. F)

A review of the duties and responsibilities outlined in this agreement, as well as the deposition testimony of those involved in the Construction, raise a triable issue of fact as to whether CAPOBIANCO was acting as a general contractor on this project. This contract, as well as his role at the site, can be found to be more than architectural planning, exempt under Labor Law 240(1) and 241. *Hamby v. Clough Harbour & Associates*, (4<sup>th</sup> Dept. 1987); *Bernal v. Pinkerton's, Inc.*, 52 AD2d 760, aff'd 41 NY2d 932 (1977). There is clearly a question of fact whether he supervised employees at the worksite. *Russin v. Picciano & Son*, 54 NY2d 311 (1981).

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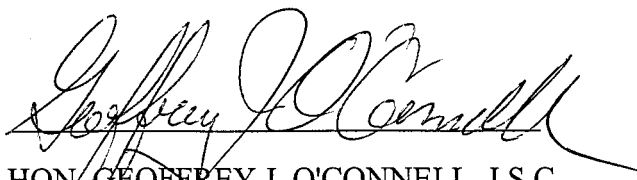
Despite the contentions of his attorneys, it is clear that this defendant performed duties at the job site on behalf of the owners in addition to that of an architect. The "Construction coordination services" could be viewed as the same as those provided by a general contractor, thus clearly exposing him to Labor Law liability. *Carollo v. Tishman*, 440 NYS2d 437 (1981). The fact that he did not actually construct or provide the scaffolding also does not relieve him from liability, where, as here there is a question of whether he exercised control over or supervised the construction of the scaffold. *Amato v. State*, 241 AD2d 400 (1<sup>st</sup> Dept. 1997); *Kyle v. City of New York*, 268 AD2d 192 (1<sup>st</sup> Dept. 2000).

Based on the proof and arguments presented, CAPOBIANCO's motion for summary judgment dismissing all claims and cross claims asserted against him is Denied.

It is, SO ORDERED.

Dated:

Jan 15, 2003

  
HON. GEOFFREY J. O'CONNELL, J.S.C.

**ENTERED**

**JAN 24 2003**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**