

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA, J.S.C.

Part 17

STEPHEN MANISCALCO and STELLA
MANISCALCO,

Index #3437/02

Plaintiffs,

Motion Date: 6/23/05

-against-

Sequence No. 007, 008

RICHARD SILVERMAN and ANDREA
SILVERMAN, REINHARD WORCH CARPENTER
CONTRACTOR, INC. and ROBERT DEROSA
MASONRY CONTRACTING, INC.,

Defendants.

RICHARD SILVERMAN and ANDREA
SILVERMAN,

Third-Party Plaintiffs,

-against-

REINHARD WORCH CARPENTER CONTRACTOR,
INC.,

Third-Party Defendant.

RICHARD SILVERMAN and ANDREA
SILVERMAN,

Second Third-Party Plaintiffs,

-against-

ROBERT DEROSA MASONRY CONTRACTING,
INC.,

Second Third-Party Defendant.

**ROBERT DEROSA MASONRY CONTRACTING,
INC.,**

Third Third-Party Plaintiff,

-against-

MARBELINE OF L.I., INC.,

Third Third-Party Defendant.

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Upon the foregoing papers, the motion by defendants Richard and Andrea Silverman for an order granting leave to reargue their prior motion for summary judgment is granted (*see, Foley v. Roche*, 68 AD2d 558). Upon reargument, the motion by defendants Silverman for an order granting summary judgment dismissing the Complaint and cross-claims against them is granted to the extent that the Labor Law claims asserted against them in the second cause of action are dismissed.

The cross-motion by defendant Richard Worch Carpenter Contractor ("Worch") for an order granting leave to reargue his prior motion for an order granting summary judgment dismissing the Complaint and all cross-claims against it is granted. Upon reargument, the Court (a) adheres to its original order denying the motion on the ground that it was not timely (*Brill v. City of New York*, 2 NY3d 648), and (b) vacates the last sentence of this Court's order dated May 6, 2005 (Parga, J.) as unnecessary *dicta*. In addition, this cross-motion by defendant Worch underscores the different defenses the Silvermans and Worch have and consequently defendant Worch's motion does not fall into the "nearly identical"

exception to Brill v. City of New York carved out by the Second Department (*see, Bressingham v. Jamaica Hosp. Med. Center*, 17 AD3d 496).

The Court notes that it considered the motions at bar in the interests of justice even though they did not include the Complaint they were seeking to dismiss; the Court reviewed the Complaint from the County Clerk's file.

In accordance with the foregoing decretal paragraphs, this Court vacates Pages 2 and 3 of its May 5, 2005 decision and substitutes the following:

This is an action to recover damages for the personal injuries sustained by plaintiff Stephen Maniscalco on October 6, 2001, at 10:00 A. M. during a renovation/construction project in the home of defendants Silverman. The plaintiffs claim that the defendants were negligent and violated Labor Law §§200, 240(1), 241(6) and 242-a. Defendant DeRosa was orally retained by defendant Worch to install a tile floor and had completed its work approximately five weeks before the accident. At the time of the accident, the plaintiff was taking measurements on behalf of Marbleline of L.I., Inc. ("Marbleline") for marble countertops which were to be installed at the home. It appears that plaintiff Stella Maniscalco owns Marbleline, but it is not clear if plaintiff is an employee of Marbleline. The plaintiff fell one level through an opening in the floor between the kitchen and the family room. The opening was created by defendant Worch, who was the general contractor for the project, for the eventual placement of a staircase in that space. On the date of the accident the opening was unprotected and there were no signs warning of the dangerous condition.

Robert Worch testified at his examination before trial that the hole had been left open for three to four months but that the opening would be covered with plywood (EBT transcript at pages 67-68, 71-72). He further testified that the plywood was removed before the accident (Tr. page 73). Defendant Richard Silverman, who was not home at the time of the accident, testified that he knew about the opening and that plywood had been placed over

the opening. Defendant Andrea Silverman testified at her deposition that on the day of the accident the hole was not blocked off with plywood but she did not know who removed the plywood (EBT transcript at pages, 33, lines 21-22, and 34, lines 20-21, 23-25). The Silvermans were not asked at their depositions whether they inspected the accident site at any time prior to the occurrence of the accident.

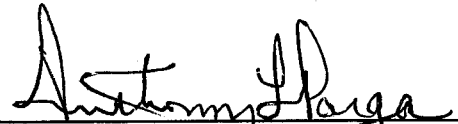
The motion by defendants/third-party plaintiffs Silverman for an order dismissing the plaintiffs' Complaint and all cross-claims against them is granted to the extent that the Labor Law causes of action asserted against them are dismissed. The Silvermans made a *prima facie* showing of entitlement to judgment as a matter of law that, as the owners of a single-family dwelling, they did not direct and control the plaintiff's work (*see, Miller v. Shah*, 3 AD3d 521, 522). The plaintiffs failed to meet their burden of raising a triable issue of fact as to whether the Silvermans directed and controlled the plaintiff's work.

However, the Silvermans' motion for summary judgment dismissing the plaintiff's claim of common law negligence committed by the Silvermans has been denied. The Silvermans failed to make a *prima facie* showing of entitlement to judgment as a matter of law by eliminating all material issues of fact bearing on the question of their purported negligence (*see, Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853). For example, there are triable issue of fact as to whether (1) the Silvermans had actual or constructive notice of the unsafe condition which caused the accident and (2) the Silvermans had a duty to warn plaintiff Stephen Maniscalco of the open hole.

The cross-motion by defendant/third-party defendant Worch for an order granting summary judgment dismissing the plaintiffs' Complaint and all cross-claims against it has been denied on the ground that the cross-motion was made 24 days late. The Certification Order dated October 21, 2004, required the motion to be made within 60 days of the filing of the Note of Issue, which was done on December 1, 2004, and the cross-motion by Worch was made on February 25, 2005. In view of the fact that defendant Worch did not proffer

an explanation as to why the motion could not be made timely, and since the legal theory underlining the basis of Worch's motion is not identical to the one proffered by the Silvermans in their timely motion, this Court does not have discretion to entertain Worch's late cross-motion (CPLR 3212(a); *Brill v. City of New York*, 2 NY3d 648; *Bressingham v. Jam. Hosp. Med. Center*, __ AD3d __, __ NYS2d __, 2005 N.Y. App. Div. LEXIS 4083 [April 18, 2005]).

Dated: June 24, 2005.



Anthony L. Parga, J.S.C.

ENTERED

JUN 29 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE