

To commence the statutory time period for appeals as of right (CPLR 5513 (a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**FILED and ENTERED
OCTOBER 2 / , 2011
WESTCHESTER COUNTY CLERK**

**PRESENT: HON. J. EMMETT MURPHY
SUPREME COURT JUSTICE**

-----X
ROBERT MARKOWSKI and OXONA JUVKO,

Plaintiffs,

- against -

SHORT FORM ORDER

Index No.: 12542/09

Motion Date: Oct. 5, 2011

**MICHAEL PROBER and BETTINA PROBER and
LUPPINO LANDSCAPING & MASONRY, LLC,**

Defendants.

-----X
MICHAEL PROBER and BETTINA PROBER,

Third-Party Plaintiffs,

- against -

Index No. 12542/09T

**CORNERSTONE CONTRACTING CORPORATION,
LUPPINO LANDSCAPING CORP., and LUPPINO
LANDSCAPING & MASONRY, LLC,**

Third-Party Defendants.

-----X
The following papers numbered 1 to 44 have been read on these motion brought pursuant to CPLR 3212 by defendants/third-party plaintiffs Michael Prober and Bettina Prober and by defendant/third-party defendant Luppino Lanscaping & Masonry, LLC each seeking summary judgment dismissing plaintiffs' complaint and all cross-claims:

Papers

Notices of Motion/Attorney Affirmations/Affidavits;
Attorney Affirmation/Affidavit in Opposition;
Attorney Affirmations/Affidavit in Reply;
Exhibits;

Numbers

1 - 2, 8, 9 - 10, 23, 25
27, 35
39, 41 - 42
3 - 7, 11 - 22, 24, 26
28 - 34, 36 - 38, 40, 41 - 44

Upon the foregoing papers, it is ORDERED that, for the reasons that follow, the motion brought pursuant to CPLR 3212 by defendants/third-party plaintiffs Michael Prober and Bettina Prober seeking an Order granting summary judgment dismissing the complaint and any cross-claims is granted; and it is further

ORDERED that, for the reasons that follow, the motion brought pursuant to CPLR 3212 by defendants/third-party defendant Luppino Landscaping & Masonry, LLC seeking an Order granting summary judgment dismissing the complaint and any cross-claims is denied.

Background

This is an action to recover for personal injuries allegedly incurred on November 21, 2008, by plaintiff Robert Markowski (plaintiff), a carpenter then employed by non-party Cornerstone Contracting Corporation at the site of a residential home construction project at 33 Lawrence Farms Crossway in Chappaqua. Plaintiff alleges that he sustained personal injuries when he slipped on natural stone steps, constructed by defendant/third-party defendant Luppino Landscaping & Masonry, LLC (Luppino) as he was moving a cabinet from the garage area to the pool area of the residence which is owned by defendant/third-party plaintiffs Michael and Bettina Prober. Oxona Juvko, plaintiff's wife, has a derivative action. The summons and verified complaint were served on the Probers on May 20, 2009 and issue was thereafter joined as to them on August 10, 2010. Plaintiffs served an amended verified complaint adding Luppino as a defendant and issue was joined as to Luppino on October 21, 2010. The Probers commenced a third-party action against Luppino for contribution and indemnification. Issue was joined and examinations before trial were conducted. All discovery has been completed or waived. These applications have been brought seeking dispositive relief.

At his deposition, plaintiff testified that on the day of the accident, he was employed by Cornerstone Contracting Corporation as a carpenter and that Pete, the project manager sent him to 33 Lawrence Farms Crossway to assist in performing some of the exterior and interior finishing work that was underway at this home construction/renovation project. Plaintiff knew the Probers as the homeowners and he recalled that they consulted with him, through Pete, with respect to how some of the work was supposed to be done. Plaintiff characterized Pete as the project manager and he testified that Pete, and only Pete, would tell him what work he was supposed to do at the site. In addition to himself and Pete, Cornerstone Contracting Corporation also had Rudy Albano, a laborer, at the site. Between Tuesday, November 18, 2008 and Friday November 21, 2008, plaintiff was at the site fixing closets, leveling doors, adjusting locks and doing other finishing work. During this time, Pete would come and go, supervising but not performing any labor himself. As the construction was ongoing in the house, landscaping work was being done on the property. The area between the garage and the pool house descended three levels and there were natural stone steps constructed in this area.

The plaintiff testified that on Friday, November 21, 2008, at about 1:00 p.m. he slipped on the natural stone stairs outside the main house as he was carrying a cabinet from the garage into the pool house to be sanded, cleaned and primed. Rudy Albano, the laborer who worked for Cornerstone Contracting Corporation, was assisting him in moving the 100 pound cabinet. Mr. Albano carried the cabinet from the front and plaintiff held it from the back. Both men walked facing forward. Plaintiff recalled that at one point, he stepped on one of the stone steps and that it felt as if something had moved or tipped left underneath his left foot. Feeling as if he was losing his balance, he "propped himself up with his right leg" and straightened up. As he did so, plaintiff testified that his "right leg fell into this hole. So it fell into the hole so that stone or that step stone that was below of that step on which I lost my balance [sic]." Plaintiff immediately felt pain in his lower back on his right side and down his right leg and he observed that the stone under his left foot was moving. Plaintiff described the stone step as irregular in shape, three feet in width and perhaps eighteen to twenty inches at its longest point. Plaintiff recalled seeing Mr. Albano wobble on the step when he walked over it just prior to him. After the incident, plaintiff and Mr. Albano spoke of the step stone and plaintiff recalled that Mr. Albano told him that he could feel the stone had moved by the way in which the cabinet moved as they were carrying it. After the incident, plaintiff continued to work the three remaining hours of the work day. He returned the Monday and Tuesday of the following week and installed the cabinet in the pool house and did other finishing work. During those two days he saw Bettina Prober on one occasion but he did not inform her of the accident. He told Pete about the accident on November 24th and then reported the accident to Cornerstone Contracting Corporation on November 26, 2008. Plaintiff sought medical attention on December 1, 2008.

Defendant Bettina Prober testified at her examination before trial that she and her husband owned 33 Lawrence Farms Crossway in Chappaqua and have lived there since 2007. The Probers retained Cornerstone Contracting Corporation to demolish an old house and build a new one on the property. She obtained a demolition permit from the Town of New Castle but Cornerstone Contracting Corporation applied for all of the building permits. She thought that there were subcontractors involved in the demolition, the blasting, the laying of the foundation and the framing but, she testified, Cornerstone Contracting handled all of that for them. The Probers moved into 33 Lawrence Farms Crossway in November 2007. She recalled that during the year and a half before they moved in she would come to the site once or twice a week to speak with the contractor or the architect about, inter alia, which subcontractors should be retained since they had retained the right to approve a subcontractor's bid. She attended meetings. She recalled exchanging pleasantries with plaintiff on occasion. The landscaping work on the property was done by defendant/third-party defendant Luppino, a company that was recommended to the Probers by Cornerstone Contracting Corporation. Luppino did all of the stone work at the house including the step pathway where plaintiff allegedly slipped. Cornerstone Contracting Corporation monitored that work. She had not experienced any wobbling in these steps and, in the years since they had been installed, neither she nor anyone in her family nor any pool maintenance people or anyone else who has used these stairs from time to time has complained of any looseness in the stones as they walked over them. She had not called Luppino or anyone else to work on these steps since they were initially installed.

Carmelo Luppino, a partner in Luppino, testified at his examination before trial and also provided an affidavit in support of Luppino's motion for summary judgment. Luppino performed work at 33 Lawrence Farms Crossway pursuant to a contract with Cornerstone Contracting Corporation, the general contractor for the project. Luppino was given plans for the installation of certain masonry work inside and outside the house as well as paving and landscaping work. He recalled in his testimony that the whole back of the house pitched away from the house downhill. The yard was leveled to some degree and one set of steps with a number of grass landings were installed, using a mix of natural fieldstone, in the backyard from the side of the garage down to the pool which was somewhat behind it. In his affidavit, Mr. Luppino avers that the stones were selected and then shaped prior to installation. In his testimony, Mr. Luppino characterized the stones used for the steps as boulder steps because they were stones selected for their flat tops and their six to eight inch height.

Mr. Luppino testified that he installed the steps at issue here. Most of the bolder steps and the stone chips and dirt used in the building of the steps came from the site itself. He could not recall having any conversation with the Probers about the installation of the steps. In constructing the steps, he and his workers would prepare the subgrade, compact it and set the stone in place. If it moved once placed, it would be picked up and the subgrade underneath would be fixed and it would be tested again until it was found to be stable. They used an excavator to tap the stone in place and it would be tested before they moved to the next step because if one step were loose, the subsequent steps would also end up loose. During the construction process as the stones were set, people would walk on them and, if movement were detected, the boulder step would be taken back out and replaced or reset. Mr. Luppino testified with respect to the step on which plaintiff allegedly slipped that after it was set, there was no movement in it and that he himself walked over it at least 150 or 200 times between when it was constructed and November 2008 and that he detected no movement in any of the steps. In his affidavit, Mr. Luppino avers that the steps were completed many months prior to November 2008 and that he and many others have used the steps before and after the alleged accident and that no step movement or shifting has been noted. Mr. Luppino additionally avers that Luppino has no ownership interest in the premises where the accident allegedly occurred nor was it a general contractor on the site nor did it employ plaintiff or direct his work in any way.

Rudy Albano, Cornerstone Contracting Corporation's laborer on the site in 2008, testified at his deposition through an interpreter that he worked at the site from the time when work commenced until the project was completed. He would take direction only from his boss, Pete. He knew plaintiff and another Cornerstone Contracting Corporation employee. Mr. Albano testified that he had helped the plaintiff construct the cabinet and move it from the garage to the pool house but plaintiff never told him that he had trouble walking on the stone steps. He thought that the cabinet weighed no more than 120 or 125 pounds and he testified that they did not stop at all as they carried the cabinet down the stairs. They descended the stone steps, which he recalled Luppino having built, with plaintiff walking backward while looking over his shoulder. Mr. Albano testified that the cabinet never shifted and that neither he nor plaintiff had slipped or was in danger of losing his balance. Plaintiff did not mention that he had hurt himself the next day when he saw him. Mr. Albano did not recall hearing anyone complain about the condition of the steps which had been installed using heavy machinery to set the 400 pound stones.

He himself had walked across them thousands of times and, while they were not particularly smooth, they did not move and he never had any difficulty maintaining his balance on them.

Mr. Albano denied having seen plaintiff slip or lose his balance, he did not feel the cabinet shift as they were moving it and he testified that he never saw plaintiff get hurt. Mr. Albano testified that about two months after he was laid off by Cornerstone Contracting Corporation, he received a call from plaintiff who told him that he had been hurt at the site and that he, Mr. Albano, had observed the incident. Mr. Albano testified that he explained to plaintiff that he recalled having asked plaintiff if he was all right but that this had not occurred on the stone steps and further, that he had not made this inquiry because he had seen plaintiff slip but in case plaintiff needed to rest since plaintiff was an older man who was heavyset, who was a smoker and who had complained in the past about back and knee pain. Mr. Albano testified that he spoke and understood very little English and that he was not literate at all in English. When asked if he signed a statement indicating that he had observed the plaintiff slip on the stone step, Mr. Albano testified that he recalled signing a statement but that the statement was in English and he did not know what it said.

In further support of the Probers' motion for summary judgment, they have proffered the affidavit of Vincent A. Ettari, P.E., a licensed professional engineer who avers that he performed an on-site inspection of the stone step upon which plaintiff allegedly slipped. Based on his measurements, the stone weighs some 722 pounds. During his inspection, Mr. Ettari avers that he tried to move the stone by stepping on it, jumping and trying to wobble it but could not make the stone move. He noted as well that plaintiff's expert was also unable to make the stones, which were set in place and tamped down with a 46,643 pound excavator, move. By Mr. Ettari's calculations, plaintiff did not weigh enough to have caused the stone to slide laterally, or forward or backward. Further, it was his opinion, based on analysis included in his deposition, that the step would have had to have been cantilevered over a subsurface void of 12 or 13 inches in order for it to have been capable of wobbling by the plaintiff. There was no evidence of this on the site inspection. Since the property is listed in New Castle Assessment records as a single family residence, the multiple dwelling law is inapplicable as is the New York City Building Code.

In further support of Luppino's motion for summary judgment, it proffers the affidavit of Richard L. Katriess, a registered professional engineer. Mr. Katriess avers that he performed an on-site inspection of the stone step upon which plaintiff allegedly fell. He noted that they are natural stones which were taken from the site and formed in accordance with the design of the landscape architect. He observed them to be in conformity with applicable standards for exterior steps. The riser heights were in accord with the applicable criteria. The steps were installed with a hydraulic excavator and, based upon Mr. Katriess' professional opinion, it was not possible for the step to have moved in the manner claimed by plaintiff nor were there any other elements observed with respect to the placement of the boulder stones which presented an unsafe condition.

The Probers' Motion for Summary Judgment

The Prober defendants move to dismiss the plaintiffs' complaint as asserted against them. With respect to the plaintiffs' Labor Law claims, the Probers maintain that they are entitled to an exemption from Labor Law § 240 and § 241 because they are single-family homeowners and they maintain that the cause of action brought under Labor Law § 200 should be dismissed because there is no record evidence that either of them supervised, directed or controlled the work that plaintiff was performing at 33 Lawrence Farms Crossway at the time when he allegedly slipped on the stone stairs. Plaintiffs oppose the motion and argues that the Labor Law applies to the Probers and that they have failed to make a prima facie showing of entitlement to judgment as a matter of law, inter alia, because the testimony of non-party Mr. Albeno is directly contradicted by a statement which he has conceded having signed in which he claims to have observed plaintiff's accident. Plaintiffs contend that the expert evidence is speculative and that they were not provided with the identity of the Probers' expert witness pursuant to CPLR 3101(d). Further, plaintiffs claim that an issue of fact exists inter alia as to whether the steps examined by the parties' experts were in the same condition as when plaintiff slipped, whether the Probers had notice of the allegedly defective condition and whether the Probers had authority to direct the installation of the natural stone staircase.

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York University Medical Center*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The homeowner's exemption to liability under Labor Law § 240(1) and § 241(6) is available to "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 240[1], § 241[6]; see *Parnell v. Maredy*, 69 AD3d 915 [2d Dept., 2010]; *Ferrero v. Best Modular Homes, Inc.*, 33 AD3d 847 [2d Dept., 2006]). In determining whether a homeowner is entitled to the exemption, Courts will consider a number of factors including the nature and purpose of the work and the commercial versus residential use of the property and whether the homeowner supervised the method or manner of the work being performed (see *Bartoo v. Buell*, 87 NY2d 362 [1996]; *Van Amerongen v. Donnini*, 78 NY2d 880 [1991]; *Cannon v. Putnam*, 76 NY2d 644 [1990]). Here, the Probers have demonstrated their entitlement to judgment as a matter of law with respect to the homeowner's exemption under Labor Law § 240(1) and § 241(6) by supplying sufficient evidence to demonstrate both that the work was conducted at a residence for a single family and that they neither exercised supervision or control over the work performed at the work site (see *Ortega v. Pucclia*, 57 AD3d 54, 63 [2d Dept., 2008]). Neither Bettina Prober's regular site visits to check on the progress of the work nor her mere attendance at progress meetings rises to the level of supervision or control necessary to establish common-law negligence or to impose liability under Labor Law § 200 (see *Castellanos v. United Cerebral Palsy Association of Greater Suffolk, Inc.*, 77 AD3d 879 [2d Dept.,

2010]. Moreover, in his deposition, plaintiff testified unambiguously that he only took direction from Pete, Cornerstone Contracting Corporation's supervisor at the site. Mr. Luppino testified consistently that Bettina Prober, while sometimes present at the site, exchanged pleasantries with the workers but did not supervise, direct or control the work performed by Luppino.

Neither is there any evidence on this record to suggest that defendant either created the defective condition or that it had actual or constructive notice of the allegedly wobbly condition of the boulder stone step for a sufficient length of time so as to discover and remedy it (*see Gordon v. American Museum Of Natural History*, 67 NY2d 836, 837 [1986]; *Perlongo v. Park City # & 4 Apts., Inc.*, 15 AD3d 409 [2d Dept., 2006]; *Murphy v. Lawrence Towers Apts., LLC*, 15 AD3d 371 [2d Dept., 2005]).


In response to this prima facie showing of entitlement to judgment as a matter of law, the plaintiffs have failed to raise a triable issue of fact (*see Uddin v. Three Bros. Constr. Corp.*, 33 AD3d 691 [2d Dept., 2006]). Accordingly, the Probers' motion for summary judgment dismissing the complaint is granted.

Luppino's Motion for Summary Judgment

Luppino's motion for summary judgment was untimely pursuant to the 60-day deadline set forth in the Trial Readiness Order of this Court (Lefkowitz, J.) dated April 8, 2011 (*see Micell v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 727 [2004]; *Brill v. City of New York*, 2 NY3d 648, 652 [2004]; *Castro v. New York City Health & Hosp. Corp.*, 74 AD3d 1005, 1006 [2d Dept., 2010]). In order to consider its late motion, Luppino is required to demonstrate a good cause, satisfactory explanation for its failure to timely file its motion (*see CPLR 3212[a]*; *Brill v. City of New York*, 2 NY3d at 650). In the absence of a good cause showing, the Court lacks the discretion to entertain even a meritorious, non-prejudicial motion for summary judgment (*see CPLR 3212[a]*; *Brill v. City of New York*, 2 NY3d at 650).

Here, Luppino concedes, albeit in its reply, that its motion for summary judgment is untimely. It asserts that good cause is demonstrated by the affidavit of counsel's legal secretary, Sylvia Silvere, who avers that she was asked to diary the deadline for submission of Luppino's summary judgment motion but that she misunderstood the Court's Trial Readiness Order and calendared the deadline late based on this misunderstanding. Law office failure does not constitute good cause especially where, as here, the failure arises from a misinterpretation made by a non-lawyer who was tasked not with scheduling a particular calendar date as a deadline date but with determining when the deadline date would occur based upon a reading of an Order of this Court. Accordingly, as it is undisputed that the motion is untimely and Luppino has failed to show good cause for the delay, the motion must be denied without consideration of the merits (*see Castillo v. Valente*, 85 AD3d 1080 [2d Dept., 2011]; *Riccardi v. CVS Pharmacy, Inc.*, 60 AD3d 838 [2d Dept., 2009]; *Finger v. Saal*, 56 AD3d 606 [2d Dept., 2009]).

Dated: White Plains, New York
October 20, 2011


HON. J. EMMETT MURPHY
J.S.C.

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