Brooks v Queens W. Dev. Corp.
2017 NY Slip Op 30760(U)
March 2, 2017
Supreme Court, Bronx County
Docket Number: 303261/13
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MICHAEL BROOKS AND MONIQUE BROOKS,

Plaintiff(s),

- against -

QUEENS WEST DEVELOPMENT CORPORATION, 4610 EAST COAST, LLC (FORMERLY KNOWN AS EAST COAST 3 LLC), TF CONERSTONE, INC., AND TF CONERSTONE QW 3 GC, LLC,

Defendant(s).

DECISION AND ORDER

Index No: 303261/13

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QUEENS WEST DEVELOPMENT CORPORATION, 4610 EAST COAST, LLC (FORMERLY KNOWN AS EAST COAST 3 LLC), TF CONERSTONE, INC., AND TF CONERSTONE QW 3 GC, LLC,

Third-Party Plaintiff(s),

- against -

NEW YORK CRANE & EQUIPMENT CORP., THE MANITOWOC CRANES, LLC, MANITOWOC CRANE GROUP, AND THE CROSBY GROUP, LLC,,

Third-Party Defendant(s).

Third-Party Index No.: 83776/14

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In this action for personal injuries arising from, *inter alia*, violations of Labor Law § 240(1) and § 241(6), plaintiffs move seeking an order granting them partial summary judgment with respect to liability on their claims pursuant to Labor Law § 240(1) § 241(6). Plaintiffs claim that insofar as plaintiff MICHAEL

BROOKS (Michael) was struck by portions of a collapsing crane while in the course of his employment at defendants' construction site, defendants violated Labor Law § 240(1). With respect to Labor Law § 241(6), plaintiffs aver that defendants are liable thereunder because by virtue of the foregoing crane collapse, defendants violated several sections of the Industrial Code, including 12 NYCRR 23-8.1(a). Defendants oppose all aspects of the instant motion pursuant to CPLR § 3212(f), asserting that it is premature. Specifically, defendants contend, *inter alia*, that in light of third-party defendant NEW YORK CRANE & EQUIPMENT CORP.'s (New York Crane) bankruptcy filing and the stay resulting therefrom, defendants have been unable to depose New York Crane to ascertain details regarding the instant crane and it maintenance. Defendants also oppose the portion of the instant motion seeking summary judgment against defendant TF CORNERSTONE, INC. (TF), asserting that TF was neither an owner or a contractor at the construction site so as to make it liable under the Labor Law. Lastly, defendants oppose the portion of the instant motion seeking summary judgment on the claims pursuant to Labor Law § 241(6) on grounds that questions of fact as to whether the Industrial Code was violated preclude summary judgment.

For the reasons that follow hereinafter, plaintiffs' motion is

denied[1].

The instant action is for alleged personal injuries resulting from alleged violations of the Labor Law. A review of plaintiffs' amended complaint establishes, in relevant part, the following. On February 9, 2013, Michael sustained injury while working at the Queens West Project, located at 46th Avenue and Center Boulevard, Long Island City, Queens, NY. Plaintiffs alleges that while working at the premises, atop a scaffold, a crane being used thereat collapsed, falling on top of him. It is alleged that defendants owned, leased, maintained, and operated the premises and were performing construction thereat. It is further alleged that defendants violated, *inter alia*, Labor Law § 240(1) and § 241(6), such violations causing the foregoing accident and injuries resulting therefrom. Plaintiff MONIQUE BROOKS, Michael's wife asserts a derivative loss of consortium claim.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a

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[1] While this action had been stayed in its entirety by virtue of New York Crane's bankruptcy filing, on December 13, 2016, this Court granted plaintiffs' motion to sever the first-party action. While not explicitly stated in the Court's decision, in severing this action and insofar as New York Crane is not a party to the first-party action, the stay is not applicable to this action.

defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of

> evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted

> in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 297 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue, N.V., Inc*, 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the instant motion, is wholly within the control of the party opposing summary judgment and could

be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f), will be denied (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999).

A party claiming ignorance of facts critical to the defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because, a court cannot condone fishing expeditions and as such "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery, should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).

Notwithstanding the foregoing, CPLR § 3212(f) mandates denial of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the

preliminary conference, if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v. Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature, need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id.*). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

CPLR § 3212(f)

Plaintiffs' motion seeking partial summary judgment is hereby decided on the merits. Contrary to defendants' assertion, the instant motion is not premature in that none of the discovery alleged to be outstanding is relevant to the issues before this Court on this motion. To be sure, pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge

of the moving party (*Franklin National Bank of Long Island* at 297; *De France* at 735-736; *Blue Bird Coach Lines, Inc.* at 971). Here, defendants contend that the instant motion ought to be denied because there has been little discovery in the third-party action. Particularly, it is alleged that New York Crane has yet to be deposed such that very little is known about the crane's maintenance and such information is necessary to oppose plaintiffs' motion. This contention is bereft of merit. Contrary to defendants' assertion, disposition of plaintiffs' claims pursuant to Labor Law § 240(1)[2] and 241(6)[3] do not hinge on whether the crane

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[2] Labor Law § 240(1), applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Gordon* at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate so as to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]).

For purposes of liability, a violation of the statute which proximately causes an employee to sustain injury gives rise to absolute liability (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Gordon* at 559). Notably, Under Labor Law § 240(1), a complete failure to provide the safety devices promulgated by the statute constitutes a violation thereof, and is, in it of itself, conclusive proof of proximate causation (*Zimmer v Chemmung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985]). Hence, if the evidence demonstrates that the defendants failed to provide any safety devices at all, the statute has been violated as a matter of law (*id.*).

Notably, Labor Law § 240(1) is also violated when a hoist at a construction site falls causing injury to those below (*Jiron v China Buddhist Ass'n*, 266 AD2d 347, 349 [2d Dept 1999] ["The statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling from the hoist as they are being conveyed to the top of the structure, but also to the hazard of a defective hoist, or portion of the hoist, falling from an elevated level to the ground."). A crane, has been deemed a hoist under Labor Law § 240(1) as a matter of law and accordingly, when crane that topples over injuring those below it, Labor Law § 240(1) is violated as a matter of law (*Fitzsimmons v City of New York*, 37 AD3d 655, 656-57 [2d Dept 2007] ["As a result, the plaintiff established his prima facie entitlement to judgment as a matter of law by proffering evidence that the crane toppled and fell on the lift, causing him to sustain injuries."]; see, *In re E. 51st St. Crane Collapse Litig.*, 89 AD3d 426, 427 [1st Dept 2011] ["Where, as here, it is undisputed that plaintiff John Della Porta was injured as a result of the collapse of a crane, a prima facie case of liability under Labor Law § 240(1) is established."]; *Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1st Dept 1996] ["The toppling of a crane on its side for no apparent reason constitutes a prima facie violation of Labor Law § 240 (1)."]).

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Labor Law § 241(6) imposes a duty of reasonable care upon owners, contractors and their agents. Moreover, owners, contractors and their agents must provide reasonable and adequate protection to those employed in all areas where construction, excavation, or demolition is being conducted (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 [1993]). The duty imposed by the this section of the labor law is nondelegable, meaning that an owner, contractor or agent can be held liable for the breach of the statute absent supervision or control of the particular work site at issue (*Rizzutto* at 348-349; *Ross* at 502. Significantly, a violation of Labor Law §241(6) necessarily requires a failure to comply or adhere to external rules and statutes (*Ross* at 503). Thus, a violation of this provision of the labor law requires "reference to outside sources to determine the standard by which a defendant's conduct must be measured" (*id.* at 503 (internal quotation marks omitted)]; *see Zimmer v Chemmung County Performing Arts, Inc.*, 65 NY2d 513, 523 [1985]). More specifically, in order to establish a violation of Labor Law § 241(6), it must be shown that a defendant also violated an applicable section of a rule or

was properly maintained and as such the absence of that information does not warrant denial of the motion. Indeed, the relevant inquiry on the instant motion is whether the crane failed and if such failure occurred under facts tantamount to violations of the Industrial Code. While issues of maintenance are, *inter alia*, relevant to defendants third-party claims sounding in contribution and indemnification, such issues are not before the Court on this motion.

Labor Law § 240(1) and 241(6)

Plaintiffs' motion seeking partial summary judgment, on the issue of liability, on their claim pursuant to Labor Law § 240(1) and 241(6) is denied because the record is bereft of any admissible evidence establishing defendants' connection to the construction site at issue and as such, plaintiffs fail to establish - as required by prevailing law - that defendants were either owners or lessees of the instant premises, general contractors, or subcontractors who controlled Michael's work.

Under Labor Law § 240(1) owners of the location where an accident occurs and the general contractor employed by the owner are absolutely liable irrespective of whether they exercised supervision and/or control over the particular work from which the accident arose (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494,

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regulation promulgated by the Commissioner of Labor, which mandates compliance with concrete specifications (Ross at 501-502; Basile *v ICF Kaiser Engineers Corp*, 227 AD2d 959, 959 [4th Dept 1996]).

500 [1993]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 135 [1978]). The same is true for lessees of a premises, since for purposes of liability under the Labor Law, a lessee is deemed an owner (*Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]; *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]; *Tate v Clancy-Cullen Stor. Co.*, 171 AD2d 292, 295 [1st Dept 1991]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). However, the party to whom such work is delegated is only liable under Labor Law § 240(1) if such party - such as a subcontractor - controls and exercises supervision over the work from which the accident arises (*Russin v Picciano*, 54 NY2d 311, 318 [1981]; *Serpe v Eyris Production, Inc.*, 243 AD2d 375, 379-380 [1st Dept 1997]).

Similarly, under Labor Law § 241(6) owners and general contractors are liable for a violation of the statute absent supervision or control of the particular work site at issue (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 348-349; *Ross* at 502). Moreover, like Labor Law § 240(1), a violation of Labor Law §241(6) imposes only confers liability upon a third-party - meaning a subcontractor - to whom work is delegated if said party controls the work from which an accident arises (*Long v Forest-Fehlhaber*, 55 NY2d 154, 159 [1982]).

In support of their motion, plaintiffs submit Michael's deposition transcript wherein he testified, in pertinent part, as follows: On January 9, 2013, while working as a carpenter for Cross

Country, he was involved in accident at 4610 Central Boulevard (4610). Michael had just been hired by Cross County on January 8, 2013 and the date of his accident was only his second day with Cross County. Upon arriving at 4610, where a building was being erected, Michael was assigned to erect scaffold around the perimeter of the building's foundation, which scaffold would then be used to pour concrete. Michael noticed that the construction site had a crane and also noticed that it was being used to move banded bundles of wood to different locations within the construction site. The bundles of wood were then used to erect the scaffold. On the date of his accident, Michael had been initially tasked with working on the building's deck, which at the time was only one story high. Michael laid down plywood and was then asked to assemble boxes. Thereafter, Michael was again tasked with erecting scaffold on the south side of the building. As he stood atop a portion of scaffold about 18 feet off the ground and about 15 inches below the deck, he was asked to install I-beams to the top of the scaffold. As he prepared to install a second I-beam, Michael heard two loud pops. He then saw that the crane's boom was falling towards him. He attempted to descend the scaffold and before he could get to the bottom, the scaffold collapsed on top of him.

Plaintiffs also submit several agreements, an incident report and several accident reports.

Based on the foregoing, plaintiffs fail to establish prima facie entitlement to summary judgment insofar as they fail to establish defendants' relationship to the construction at issue so as to make them liable under Labor Law § 240(1) and § 241(6). Under Labor Law § 240(1) and § 241(6) liability attaches to owners of the location where an accident occurs and the general contractor employed by the owner to perform work (*Rizzutto* at 349; *Ross* at 500; *Haimes* at 135), lessees of the premises in which the an accident occurs (*Kane* at 311; *Bart* at 5; *Tate* at 295; *Copertino* at 566) and subcontractors who supervise or control the accident causing work (Long at 159; *Russin* at 318; *Serpe* at 379-380). Here, beyond asserting that he was employed by non-party Cross Country, Michael's testimony did not establish that defendants had any connection to the project at which he was injured, let alone that they were owners, lessees, general contractors, or subcontractors with supervision over his work. To the extent that plaintiffs submit agreements, which purportedly establish defendants' relationship to the instant project, such agreements are hearsay and are not accompanied by any foundation warranting their admissibility. Indeed, the proponent of a motion for summary must tender sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez* at 324; *Zuckerman* at 562). Moreover, while a business record is an exception to rule barring hearsay, the foundation for such

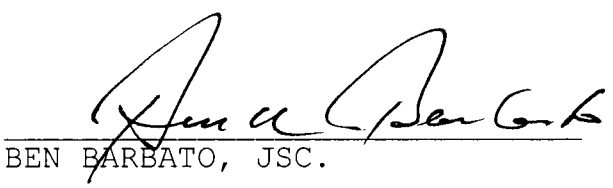
exception requires that (1) the record be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). Plaintiffs' provide no such foundation and therefore the Court cannot consider the documents tendered.

Because plaintiffs fail to establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of any papers submitted in opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). It is hereby

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : March 2, 2017
Bronx, New York



BEN BARBATO, JSC.