

Hammock v 213-227 W. 28th St. LLC
2021 NY Slip Op 33057(U)
November 15, 2021
Supreme Court, Bronx County
Docket Number: Index No. 31940/2019E
Judge: Theresa M. Ciccotto
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At IAS Part 22 of the Supreme Court of the State of New York, held in and for Bronx County, on the 15th day of November, 2021.

PRESENT: HON. THERESA M. CICCOTTO
Justice of the Supreme Court

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TERENCE HAMMOCK,

Index No.: 31940/2019E

Plaintiff,

-against-

DECISION/ORDER

213-227 WEST 28TH STREET LLC and HAP
CONSTRUCTION LLC,

Motion Seq. #1

Defendants.

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213-227 WEST 28TH STREET LLC and HAP
CONSTRUCTION LLC,

Third-Party
Index No.: 43262/2020E

Third-Party Plaintiffs,

-against-

IBK CONSTRUCTION GROUP LLC and NEW YORK
CONCRETE CORP.,

Third-Party Defendants.

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RECITATION, AS REQUIRED BY CPLR § 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ANSWERING AFFIDAVITS.....4-6.....
REPLY AFFIDAVITS.....8.....
OTHER MEMO OF LAW.....7.....

Plaintiff moves for an Order pursuant to CPLR §3212, granting partial summary judgment on the issue of liability pertaining to his Labor Law §240(1) claim.

Defendants/Third-Party Plaintiffs, 213-227 West 28th Street LLC (hereinafter "WEST 28") and HAP Construction LLC (hereinafter "HAP"), and Third-Party Defendant New York Concrete Corp., all oppose.

Background:

This matter arises out of an incident occurring on March 5, 2019, wherein Plaintiff allegedly sustained injuries at a construction site when he fell while descending a caisson and drill rig at the premises located at 215 West 28th Street, New York, New York. WEST 28 is the owner of said premises, and HAP was a general contractor that was hired to perform certain construction at the premises. HAP hired Third-Party Defendant New York Concrete Corp. as a subcontractor to perform pre-foundational work on the premises. Plaintiff was employed by New York Concrete Corp. The subject incident occurred while he was performing a specific task in the course of his employment. Plaintiff alleges that he was not provided with any safety device prior to removing drill pins from a caisson that was approximately 10 ½ feet above the ground.

Positions of the Parties:

Plaintiff argues that he is entitled to summary judgment because the uncontroverted evidence establishes that Defendants failed to provide him with gravity-related safety devices in violation of Labor Law §240(1). Plaintiff further argues that said failure was the proximate cause of Plaintiff's injuries. Additionally, he argues that Labor Law §240(1) places a non-delegable duty on owners and contractors, such as Defendants in the instant action, to provide said gravity-related safety devices to workers who are exposed to an elevation-related risk. Plaintiff further argues that because Labor Law §240(1) does not permit a worker's contributory negligence to be asserted as a defense, he has established a *prima facie* entitlement to summary judgment on the issue of liability based on same.

Defendants argue that Plaintiff's motion is premature, and warrants denial because discovery has not yet been completed. At present, a preliminary conference has not yet been held, no depositions have been conducted and a Note of Issue has not yet been filed. Defendants argue that without more discovery, they are unable to sufficiently investigate the underlying facts of the incident. Defendants further argue that there are triable issues of fact as to the proximate cause of Plaintiff's injuries, since fellow employee Jason Garland avers in an annexed affidavit, that he witnessed Plaintiff unexpectedly jump off of the caisson. Defendants argue that by jumping off said caisson, Plaintiff acted in an unsafe manner. As such, his was the proximate cause of his own injury.

In his Reply, Plaintiff argues that Defendants have frustrated his attempts to obtain depositions. Plaintiff further argues that Defendants fail to defeat the instant motion as premature pursuant to CPLR §3212(f), .

Conclusions of Law:

CPLR §3212(f) provides:

“Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

The First Department has routinely denied motions for summary judgment without prejudice, and with leave to renew when the motion is premature in light of outstanding discovery (*Bradley v. Ibex Constr. LLC*, 22 A.D.3d 380, 380-381 [1st Dept. 2005]; *Rodriguez v. Architron Environmental Services, Inc.*, 166 A.D.3d 505, 506 [1st Dept. 2018]; *Marabyan v. 511 West 179 Realty Corp.*, 165 A.D.3d 581, 581-582 [1st Dept. 2018]). In *Bradley*, the First Department found that “[t]he motions,

[for summary judgment] which were made before a preliminary conference had been held and before defendants had any opportunity to obtain disclosure, were properly denied as premature under the circumstances presented” (*Bradley v. Ibex Constr. LLC*, 22 A.D.3d at 380-381, citing, *McGlynn v. Palace Co.*, 262 A.D.2d 116, 116-117 [1st Dept. 1999]).

In the instant action, despite the fact that the case is just over two years old, a preliminary conference has not yet been held and depositions have not yet been conducted. As Plaintiff notes in his Reply, this delay is likely due to the backlog from the COVID-19 pandemic (Reply, p. 2, ¶4). While the Court acknowledges Plaintiff’s frustration, the Court finds his motion for summary judgment to be premature at this time (see *id.*; *Rodriguez v. Architron Environmental Services, Inc.*, 166 A.D.3d at 506; *Marabyan v. 511 West 179 Realty Corp.*, 165 A.D.3d at 581-582).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that Plaintiff’s motion for summary judgment is denied without prejudice.

This constitutes the decision and order of the Court.

DATED: November 15, 2021

ENTERED:



Hon. Theresa M. Cicotto
JSC