At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 9th day of September, 2005

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

TRACY SHENANDOAH,

Plaintiff,

vs.

GARBADE CONSTRUCTION CORP., INDUSTRIES CANATAL, INC. and BBL, LLC,

Defendants.

INDUSTRIES CANATAL, INC.,

Third-Party Plaintiff,

vs.

BROWNELL STEEL, INC. and INTERSTATE FIRE AND CASUALTY COMPANY,

Third-Party Defendants.

DECISION AND ORDER

Index No. 2003-1149
RJI No. 2004-1052-C

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on multiple motions. The first of the motions was made on July 7, 2005, with other parties making motions after that date. After requests to adjourn the original return date were granted, counsel for the parties presented oral argument on September 9, 2005. Post argument submissions were accepted and the final such submission was received on October 7, 2005.

This action arises out of a construction project at a site owned by the Johnson City Central School District ("School District") located in Broome County, New York. The plaintiff Tracy Shenandoah was employed as a worker on that site by the third-party defendant Brownell Steel, Inc. ("Brownell"). Other parties to this action are the defendants Garbade Construction Corp. ("Garbade"), a prime contractor, Industries Canatal, Inc. ("Canatal"), a prime contractor with a contract with the Johnson City Central School District, and BBL, LLC ("BBL"), the construction manager for the project. Brownell was added as a third-party defendant by Canatal.

Canatal's contract with the School District provided for it to perform the structural steel and miscellaneous metal work. Garbade's contract with the School District provided for it to perform the general construction work and finish carpentry, casework, and specialties work. Brownell performed the structural steel erection under its subcontract with Canatal.

Plaintiff Shenandoah alleges that he was injured when a ball hanging from a crane that was moving steel beams on the site hit him in the head. The precise manner in which the ball hit him is contested, with the parties claiming either that it fell from above to hit him or that it

swung from the side to hit him or some combination of falling and swinging.[1] Mr. Shenandoah commenced this action against the defendants alleging liability under New York State Labor Law §§200, 240 and 241(6).

GARBADE CONSTRUCTION MOTION

Garbade moves to dismiss the cross claims of BBL based on its assertion that it was not involved in the direction or control of steel operations when the plaintiff was injured.[2] Mr. Shenandoah has discontinued his action against Garbade. Canatal also discontinued its cross claim against Garbade. Brownell did not assert a claim against Garbade.

BBL's cross claim against Garbade alleges that any damages or injuries sustained by Mr. Shenandoah were sustained "in whole or in part by reason of the negligence, want of care, breach of contract and/or culpable conduct of the co-defendants."[3]

In opposition to the motion, BBL asserts that the motion is premature, as Garbade has not adequately responded to outstanding discovery requests from BBL.

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[1] A careful reading of the deposition transcripts seems to reveal that it may have been moving laterally and vertically at the same time. The testimony of the crane operator seems to indicate that he was raising the boom of the crane while simultaneously lowering the ball by releasing the cable so as to keep the ball at or near the same height. Depending on what view one has (which party is represented) this is clearly vertical or horizontal movement.

[2] The motion references both CPLR 3211 and 3212 as grounds for the requested relief.

[3] *See* BBL, LLC's amended answer dated April 27, 2004 at ¶ 22.

During the discovery phase of this action, the parties deposed Robert Garbade. At that time, he was the President of Garbade, which was then winding up its affairs.[4] At that time, there was one other employee still employed by that company.[5] During questioning of Mr. Garbade, he revealed that the records of this project were in the possession of Garbade's bonding company. Information was provided regarding where these documents might be located and a contact person with the bonding company.

During oral argument of this motion and previously in conferences, counsel for Garbade repeatedly stated that he had supplied all of the requested documents that were in the possession of Garbade. There is nothing to indicate this is not the case.

On this motion, after Garbade makes a prima facie showing that there are no issues of fact, it is incumbent on BBL to come forward with some evidence in admissible form to create an issue of fact regarding Garbade's liability to BBL on BBL's claim for indemnification or contribution. BBL's only response to the motion is that it is premature as BBL has not received all of the documents that it seeks.

Garbade has established, based on the documents before the Court, that it had a direct contract with the project owner (the Johnson City Central School District) to perform certain general construction and carpentry work and that the structural steel work was performed under

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He stated that the company had not sought or obtained any new projects during the past six or eight months

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It appears from the deposition testimony that the employee was not actively involved in the Johnson City School project, as she may have been an office worker.

a separate contract between Canatal and the project owner with the erection being performed by its subcontractor, Mr. Shenandoah's employer, Brownell.

Under theses circumstances, BBL raises no issue of fact in support of its cross-claim. For that reason, the motion of Garbade to dismiss the cross-claim of BBL is granted.

TIMELINESS OF THE BBL AND BROWNELL STEEL MOTIONS FOR SUMMARY JUDGMENT

Brownell filed its motion for summary judgment with the court clerk on July 13, 2005. BBL filed its cross-motion for summary judgment on August 10, 2005. Plaintiff opposes these motions on the ground that they are untimely as they were filed beyond the time limit provided in CPLR 3212(a).

The Court of Appeals has established a fixed, and by all indications immutable, rule that motions for summary judgment made beyond the 120 time limit of CPLR 3212(a) must be dismissed as untimely, regardless of their underlying merit (*see Brill v. City of New York*, 2 NY3d 648 [2004]).

While this court is generally sympathetic to determinations of issues on the merits and reluctant to base decisions on technical or procedural violations or failures, the Court of Appeals has made it clear that the underlying merits of untimely motions for summary judgment are irrelevant[6] (*see Miceli v. State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]).

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[6] The cases decided since the Court of Appeals decision in *Brill* make it clear that the Court is intent on applying the ruling therein uniformly. It appears to this court that few principles in law are as clear as this one or more likely to be applied without regard to practical considerations (i.e. overlooking the untimeliness to save time and effort on claims where summary judgment might be appropriate). Rather than create an easily appealable issue, this court will follow and apply the Court of Appeals holding as I believe that Court intended.

The trial note of issue was filed on March 9, 2005, as indicated by the receipt stamp of the County Clerk and the Court Clerk.[7] One hundred twenty days from March 9, 2005 is July 7, 2005.

A motion is made when served (*see* CPLR §2211). Plaintiff's assertion that a motion is made when it is filed is not correct. CPLR 3212(a) uses the word "made" rather than "filing" when referring to the time limit for making the motion. Consequently, it is the date the motion is "made," which under CPLR §2211 is the date of service, that is controlling for evaluating timeliness.

The affidavit of service of the cross-motion of BBL states that it was served on August 5, 2005. The court clerk's receipt stamp for the motion clearly shows that it was filed on August 10, 2005. The BBL cross-motion was served and filed beyond the time limit.

The Brownell motion is dated July 7, 2005. The affidavit of service of the motion states that it was served on July 7, 2005.[8] The court clerk's receipt stamp for the motion shows that it was filed on July 13, 2005. Thus, the Brownell motion was served within the time limit and filed beyond the time limit. As it was served within the time limit, it was "made" on that date and is timely and will be considered on the merits.

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[7] Since the statute states that the time for making a motion for summary judgment is measured from the date of filing rather than service, it would not appear that the addition of five days pursuant to CPLR §2103(b) is applicable.

[8] The affidavit of service is a part of the motion papers behind the affidavit of Ms. Grogan. The letter forwarding the motion papers to the County Clerk is dated July 8, 2005.

As the BBL cross-motion was untimely under CPLR 3212(a), the court can address and consider it on the merits only if there is "good cause" for the untimeliness. The Court of Appeals has made it clear that "good cause" for any late motion for summary judgment motion cannot be found or based on the underlying merits of the motion, as that would for all practical purposes negate the rule and lead to its practical emasculation (*see Miceli*, 3 NY3d at 726-7). Obviously a party with a meritorious summary judgment motion could ignore the time limit, point to the merits of the motion, and thus be able to ignore the time limit without consequence. The Court of Appeals evaluated this possibility and clearly provided that respect and adherence to the time limit was of paramount importance. It therefore mandated dismissal of untimely motions regardless of their underlying merit as a way to protect and require adherence to the rule.

At oral argument there was a suggestion that one timely motion would provide a basis for or allow all other later filed motions to be heard on their merits. The court can find no case law applying that principle and the CPLR does not provide any basis for such a principle or interpretation.

Simply put, BBL does not point out any excuse that could be construed as good cause for its failure to make its summary judgement motion on a timely basis. For that reason, the BBL motion for summary judgment is denied.[9]

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[9] Shenandoah claims a "prima facie right to partial summary judgment under Labor Law 240(1)" in its submission in opposition to Brownell's motion to dismiss. As this submission is dated August 15, 2005 and is thus beyond the 120 day period, partial summary judgment on the Labor Law 240(1) claim is denied.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

BROWNELL MOTION FOR SUMMARY JUDGMENT

As it has been established that the Brownell motion for summary judgment is timely, that motion will be considered on its merits. Brownell seeks summary judgment dismissing each of the three cause of action in Mr. Shenandoah's complaint. The three causes of action assert claims for damages under Labor Law §§200, 240 and 241(6), respectively.

A) Labor Law §200

In support of its motion on the Labor Law §200 claim, Brownell asserts that the danger (being hit by the ball and hook attached to the crane) was "of an obvious nature."[10] Therefore, Brownell asserts there is no fact issue regarding negligence, as Mr. Shenandoah was aware of the obvious danger and failed to properly conduct himself accordingly. Brownell refers to portions of Mr. Shenandoah's deposition testimony in essence acknowledging his awareness of the danger.

It is true that Labor Law §200 does not impose a duty to insure the safety of workers against conditions, dangers, defects, or risks that are readily observable (*see Dorr v. General Elec. Co.*, 235 AD2d 883, 885 [3d Dept 1997]). Labor Law §200 codifies the "common law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work" (*see Comes v. New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases granting motions for summary judgment on this issue have involved facts showing that the injured claimants were well aware of the danger and engaged in some affirmative act to encounter that danger (*see Musillo v. Marist College*, 306 AD2d 782 [3d Dept 2003]).[11]

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[10] In its Memorandum of Law, Brownell states that Labor Law §200 requires warning of dangers in the workplace. That is not actually what that section requires. It actually requires employers to provide "reasonable and adequate protection."

[11] In *Musillo*, the injured plaintiff had 30 years of experience in the construction industry, 20 years of experience with the particular activity creating the danger, had seen that danger at the site for 1 to 1 ½ weeks prior to his accident, was aware of the danger and that it existed that day, and had seen others encounter that danger.

Here, the dangerous condition was more than the ball and hook on the crane – it was apparently the rapidly falling ball and hook and the manner in which the crane operator operated the crane. There is a fact issue whether the rapid dropping of the ball and hook to a level where they could come in contact with the plaintiff is such a dangerous condition. After all, in a very real and general sense, all workers are aware that a construction site holds many dangers that they must be alert to and watch out for. However, the location of the ball and hook at or below head level was not a routine, regular, or well known condition at the site based on this record. As such, there is, at a minimum, an issue regarding whether this particular danger was obvious and known and, for that reason, summary judgment is denied.

B) Labor Law §240

In support of its motion pursuant to Labor Law §240, Brownell states that a plaintiff must show that he was injured by an object falling on him and that the injury was caused by lack of a proper safety device. Brownell reasons that even if the ball and hook can be considered a falling object, there is nothing to suggest that a safety device failed or a failure to use or make available a safety device. According to Brownell, plaintiff testified at his deposition that there is no safety device that would have prevented this incident.[12]

Labor Law §240 is to be construed as liberally as possible to accomplish the purpose for which it was framed, which is to protect workers from the "special hazards" that arise when either the worksite is itself elevated or is positioned below the level where materials are being hoisted or secured (*see Jiron v. China Buddhist Assn*, 266 AD2d 347, 349 [2d Dept 1999]; *see*

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[12] This testimony is found at page 81 of plaintiff's deposition transcript (*see* Brownell motion for summary judgment Exhibit D).

also Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). These "special hazards" typically involve gravity-related accidents, such as being struck from a falling object that was improperly hoisted or inadequately secured (*see Ross*, 81 NY2d at 501).

While it is not entirely clear, the plaintiff's point here seems to be that the crane may have been the wrong size or type and that it was placed and/or operated in an improper manner, thereby bringing plaintiff's claim within the purview of Labor Law §240. Support for this assertion can be found in the testimony of the crane operator, who indicates that the unique confines of the job site, the type of crane being used, and the location of the steel on the ground mandated that the ball and hook be moved and swung in a certain manner,[13] all of which plaintiff contends resulted in the injuries he suffered.

Labor Law §240(1) states:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangars, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

As the crane in this case was being used as a hoist to lift and move steel beams on the site, the provisions of Labor Law §240 – which require that hoists be so "placed and operated as to give proper protection" to employees – are applicable (*see Region v. W.J. Woodward Constr.*, 140 AD2d 758, 760 [3d Dept 1988]).

Brownell alleges that there is little evidence of the failure of a specific safety device or failure to use a safety device. However, at his deposition, the crane operator testified that the

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[13] This testimony can be found in the deposition of Brian Zedar at pages 63 through 67.

crane was placed in a manner such that he was required to operate the crane by swinging the ball and hook back toward Mr. Shenandoah and his brother (*see* footnote 13 herein). While the crane operator appears to indicate that this method of operation is sometimes used, it is not clear that this was the method that had to be used and there may have been some other method that would have given proper and adequate protection to the plaintiff. While the record is not entirely clear, there are issues of fact regarding the placement and operation of the crane and hoist and whether that placement and operation lead to the ball and hook being improperly hoisted in relation to the plaintiff. Further, it appears from the record that there is a fact issue regarding whether the operation of the crane and hoist by swinging the ball and hook back toward the steel (so the steel could be hooked on) was proper.

In light of the foregoing, Brownell's motion for summary judgment dismissing this cause of action is denied.

C) Labor Law §241(6)

Labor Law §241(6) imposes on owners, contractors, and their agents a non-delegable duty to provided reasonable and adequate protection and safety to persons employed in construction or demolition (*see Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). That section states:

> All areas in which construction, excavation or demolition work is being performed shall be constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and owners and contractors and their agents for such work . . . shall comply therewith.

To establish a claim under Labor Law §241(6), a plaintiff must prove that a rule or regulation of the Commissioner of Labor that sets a specific standard of conduct was violated (*see Ross*, 81 NY2d at 501-505).

To prevail on its motion, Brownell must show that there is no issue of fact regarding the failure to provide reasonable and adequate safety and protection to Mr. Shenandoah at the Johnson City School worksite. This aspect of the motion will turn on whether there is a fact issue regarding noncompliance with a regulation that sets a specific standard of conduct, rather than a general standard.

Mr. Shenandoah's claim seems to focus on the brake mechanism of the crane and an alleged failure of that brake. In the Memorandum of Law submitted in opposition to the motion, Mr. Shenandoah cites three regulations that were allegedly violated to support his Labor Law §241(6) claim, including 12 NYCRR 23-1.7(a)(1) [Protection from General Hazards – Overhead Hazards], 12 NYCRR 23-8.1(d) [Mobile Cranes, Tower Cranes & Derricks – Hoisting Mechanism, brakes and locking devices] and 12 NYCRR 23-8.2 [Special Provisions for Mobile Cranes – Braking Mechanism].

A reading of the testimony in this regard fails to reveal any fact issue regarding the failure of the braking mechanism of the crane. While the crane operator testified about crane operation in general, the operation of the brakes, and the way they are used, he did not identify or even hint, to this Court's reading of his testimony, that the brakes or brake mechanism failed in any way. This is true regarding the testimony of others, including the plaintiff's brother, who was his co-worker that day.

Based on the record before the Court, Brownell has made a prima facie showing that the operation at the job site did not violate the cited regulations. As Mr. Shenandoah has failed to raise an issue of fact in that regard, Brownell's motion dismissing Mr. Shenandoah's Labor Law §241(6) cause of action is granted.

INDUSTRIES CANATAL MOTION FOR SUMMARY JUDGEMENT

This motion was served on July 7, 2005. By letter dated August 25, 2005, counsel for Industries Canatal withdrew the motion with prejudice as against Interstate Fire and Casualty Company and withdrew the motion as against Brownell Steel.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: November 8, 2005
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion of Sugarman Law Firm, LLP dated July 7, 2005 with attached Affidavit of Paul V. Mullin, Esq., sworn to July 7, 2005 and attached Exhibits A through M.

- Affidavit of Service by Mail of Sue Mirarche sworn to July 7, 2005

- Notice of Motion of Levene, Gouldin & Thompson, LLP dated July 7, 2005, Exhibit 1 with attached Exhibits A through E, Exhibit 2 with attached Exhibits A through E and attached Exhibits 3 through 7.

- Affidavit of Service by Mail of Michael R. Wright sworn to July 7, 2005

- Notice of Motion of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP dated July 7, 2005 with attached Affidavit in Support of Motion for Summary Judgement of Elizabeth J. Grogan, Esq., sworn to July 7 2005, Affidavit of Service of Michelle R. Brown sworn to July 7, 2005 and attached Exhibits A through F

- Notice of Cross-Motion of Levene, Gouldin & Thompson, LLP dated July 14, 2005 with attached Affidavit of Michael R. Wright, Esq., sworn to July 14, 2005

- Affidavit of Service by Mail of Sheryl L. Juliussen sworn to July 14, 2005

- Notice of Cross Motion for Summary Judgement of Burke, Scolamiero, Mortati & Hurd, LLP dated August 5, 2005 with attached Affidavit in Support of Summary Judgement Motion of Terese Burke Wolff, Esq., sowrn to August 5, 2005 together with attached Exhibits A through Z and 1, 2, and 3.

- Affidavit of Service of Coleen M. Chambers sworn to August 5, 2005

- Affirmation in Opposition to Third-Party Defendant's Motion to Dismiss of Martin J. Rothschild, Wsq. dated August 14, 2005 together with attached Exhibits A, B, and C.

- Affidavit of Mailing of Charis M. Duger sworn to August 15, 2005

- Affidavit of Michael R.Wright, Esq., sworn to August 25, 2005 with attached Exhibit 1

- Affidavit in Opposition of Motion BBL, LLC of David L. Cochran, Esq., sworn to August 26, 2005 attached Affidavit of Service of Michelle R. Brown sworn to August 26, 2005 *(photocopies)* and Exhibits A through I