**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND DCM PART 3**
**SHALABI ALI and JOANN ALI,**

***Plaintiffs,***

***-against-***

**RICHMOND INDUSTRIAL CORP.,**
**INFANTI INTERNATIONAL, INC.,**
**INFANTI, CHAIR MFG. CORP., CO.,**
**NAVIS REALTY, INC. and GROVE CRANE,**

***Defendants.***

**Index No. 10510/04**
**Calendar Nos. 3888-006**
**3932-007**
**133-008**
**334-009**
**370-010**

**DECISION & ORDER**
**HON. JOSEPH J. MALTESE**

The following papers numbered 1 to 12 were used on these motions the 16th day of February 2007.

| | Papers Numbered |
|---|---|
| Notice of Motion for Summary Judgment by Defendant Grove Crane, with Exhibits and Memorandum of Law (Dated December 15, 2006) | 1 |
| Notice of Motion for Summary Judgment by Defendant Richmond Industrial Corp., with Exhibits (Dated December 8, 2006) | 2 |
| Notice of Motion to Preclude Defendant Grove Crane, with Exhibits and Memorandum of Law (Dated January 12, 2007) | 3 |
| Notice of Cross Motion for Summary Judgment by Plaintiffs against Defendant Richmond Industrial Corp., with Exhibits and Memorandum of Law (Dated January 30, 2007) | 4 |
| Notice of Cross Motion to Preclude by Defendant Richmond Industrial Corp., with Exhibits (Dated January 19, 2007) | 5 |
| Affirmation in Opposition to Grove Crane's Motion for Summary Judgment by Plaintiffs, with Exhibits (Dated January 30, 2007) | 6 |

Affirmation in Opposition to the Motion and Cross Motion to Preclude by Plaintiffs, with Exhibits (Dated January 31, 2007) _____ 7

Reply Affirmation and Memorandum of Law by Defendant Richmond Industrial Corp. (Dated February 7, 2007) _____ 8

Reply Affirmation by Defendant Grove Crane, with Exhibit (Dated February 8, 2007) _____ 9

Reply Affirmation and Supplemental Affirmation by Defendant Grove Crane (Dated February 8, 2007) _____ 11

Reply Affirmation by Plaintiffs, with Exhibits (Undated) _____ 12

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Upon the foregoing papers, the motions are decided as indicated herein.

Defendant Grove U.S. LLC s/h/a Grove Crane (hereafter "Grove") moves by separate notices of motions for an order (1), inter alia, dismissing the complaint and all cross claims against it (Motion No. 3888) and (2) precluding plaintiffs from offering expert testimony at trial (Motion No. 133). Defendant Richmond Industrial Corp. (hereafter "Richmond") opposes such motions, and (cross) moves (1) for a summary judgment pursuant to CPLR 3212 dismissing the complaint as against it (Motion No. 3932) and (2) pursuant to CPLR 3101(d)(1)(I), inter alia, for an order of preclusion against plaintiffs (Motion No. 370). Plaintiffs oppose all such applications, and cross-move for an order pursuant to CPLR 3212 for partial summary judgment as against defendant Richmond on the issue of liability under Labor Law §§200, 240(1) and 241(6) (Motion No. 334). Richmond opposes plaintiffs' cross motion.

This case involves an accident which occurred on June 28, 2002, when a crane manufactured and designed by Grove, toppled over while lifting concrete blocks onto a barge, injuring its operator, plaintiff Shalabi Ali (hereafter, "plaintiff"). Plaintiff was employed at the time by (nonparty) May Ship Repair Contracting Corp. (hereafter "May"). Plaintiff's wife has asserted a derivative cause of action.

Insofar as it appears, May was in the business of dry docking, repairing and constructing barges, tug boats and other vessels, and had leased the premises where the accident occurred, 3075 Richmond Terrace, Staten Island, New York (hereafter "the premises"), from defendant Richmond . The premises consist of approximately six acres of land containing two buildings and a pier, with a waterway on one side. Co-defendants Infanti International, Inc., Infanti Chair Manufacturing Corp. Co. and Navis Realty, Inc. occupy separate and distinct spaces within the premises. Plaintiffs commenced this action on or about February 18, 2004 by the filing and service of a summons and compliant upon each of the defendants. Issue was joined as to Grove by the service of an answer with cross claims on or about March 31, 2004; Richmond answered on or about April 28, 2004. By order dated June 27, 2005 and entered on June 30, 2005, plaintiffs were granted a default judgment against defendants Infanti International Inc., Infanti Chair Mfg. Corp. and Navis Realty Corp. based on their failure to appear or answer.

In moving for summary judgment, defendant Grove alleges that the complaint as against it must be dismissed as a matter of law. To the extent relevant, Grove alleges that it cannot be cast in damages in 2002 under a theory of strict products liability and/or negligence, as plaintiffs have not and cannot establish that the crane, which was manufactured in 1975, was not reasonably safe for its intended use. More importantly, Grove alleges that the deposition testimony of plaintiff Shalabi Ali, the crane operator, demonstrates that his injury was not the result of any manufacturing or design defect, but rather May's failure to maintain and repair the crane after its purchase in 1998 (some 23 years after the date of its manufacture), despite daily complaints by the injured plaintiff that the machine was not operating properly.

In support of these contentions, Grove has submitted an expert affidavit, as well as the deposition testimony of Eric Fidler, Grove's manager of product safety, a person with knowledge of the crane involved in the accident. In his affidavit, Fidler states that "the crane as designed and manufactured complied with all crane industry standards and national consensus standards in effect on the date of manufacture (e.g., PCSA Standard No. 2, American National Standard ASME ('ANSI') B30.15, and SAE Standards), certain of which are incorporated by

reference into various federal Occupational Safety and Health Administration (OSHA) Rules and Regulations". He explained that the crane is equipped with four outriggers, i.e. beams that extend outward horizontally, which must be fully extended to provide stability during lifting operations. The outriggers operate through hydraulic jacks to raise and lower the crane. When the crane is raised, "spin locks" operate to prevent the jacks from dropping and maintain stability while the crane is being supported by the outriggers.

According to Fidler, this is why proper maintenance of the hydraulic jacks is essential to safe operation. Fidler further states that this and other necessary information would have been contained in the operation and service manuals provided to the independent dealer (Equipco) which initially purchased the crane in March of 1975. It is claimed that Grove subsequently performed no work on the crane (Fidler E/B/T p 37); had no involvement in the sale to May; and was never requested to inspect, maintain or repair the crane. The post-accident photographs reviewed by Mr. Fidler are said to reveal that the outriggers were not fully extended when the accident occurred, a circumstance that is consistent with improper maintenance and plaintiff's deposition testimony to the effect that he was neither trained nor certified to operate the crane (Ali E/B//T pp 28, 29) . Upon personal inspection on July 6, 2004, Fidler found the crane in question to be in a significant state of disrepair.

The foregoing analysis of the crane's condition is consistent with plaintiff's deposition testimony, wherein he stated that the hydraulic outrigger jacks had been leaking oil for more than a year before the accident, causing them to drift or sink down every time he operated the crane (Ali E/B/T pp 30-36). Because he was afraid of a fatal accident (Ali E/B/T p 45), plaintiff complained about these problems to his immediate supervisor, Mr. Averem, and to Mr. Adam, the majority owner and president of May, on a daily basis for at least three months prior the date of the accident (Ali E/B/T pp 31, 32, 40).[1] Despite such complaints, plaintiff testified that he was directed to continue to work the crane, which had now become and remained unstable (Ali

[1] According to plaintiff, the leak was coming from the boom, the hoses, the hydraulic lines and the tank of hydraulic oil (Ali E/B/T p 52).

E/B/T pp 36-45). Plaintiff never saw anyone fixing the crane during the six months preceding his accident (Ali E/B/T p 65).[2]

In the verified complaint, plaintiffs allege that the failure of each defendant to properly inspect, repair and maintain the nearly 30 year-old crane was the sole cause of the accident. Notably, the complaint does not allege that the crane was defectively designed or manufactured, and it is on this basis that Grove demanded that plaintiffs voluntarily discontinue the action against it or produce some evidence upon which Grove might be found liable. Pertinent to the foregoing, Grove served plaintiffs with a demand for a verified bill of particulars on March 29, 2004, and some nine months later received bill of particulars that merely repeated the earlier allegations of negligence. At a subsequent preliminary conference on February 8, 2005, this Court "So Ordered" plaintiffs to supplement their bill of particulars by April 13, 2005.

Upon plaintiffs failure to comply with this order, Grove was granted leave and moved for an order of dismissal based on plaintiffs' failure to specify a product defect (*see* Grove's Exhibit N). However, just eight days before the return date of that motion, plaintiffs served two supplemental bills of particulars in which they alleged for the first time that the crane had toppled over because of a design defect. It was also alleged that Grove was negligent in failing to warn users about the danger of operating the crane with leaking hydraulic oil. In response to plaintiffs' failure to offer any expert evidence in support of these new allegations, this Court "So Ordered" the successive stipulations dated October 3, 2006 and November 2, 2006 which required plaintiff to disclose their expert witnesses by December 3, 2006. Grove maintains that plaintiffs again failed to comply, and only now, in opposition to these motions, have they submitted the affidavit. Grove contends that plaintiffs' proffer (1) is untimely, (2) is violative of the aforementioned orders, and (3) should not be considered in opposition to its motion for summary judgment. In the alternative, should summary judgment be denied, Grove has cross-moved for

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[2]Plaintiff testified that the only time he saw anyone try to effectuate repairs or service this crane was in 1999, when an unsuccessful attempt was made to put on new hydraulic hoses (Ali E/B/T pp 73-74).

an order precluding plaintiffs from offering any expert testimony at trial. Co-defendant Richmond also seeks an order of preclusion.

In opposition to Grove's motion, plaintiffs have submitted, inter alia, the January 29, 2007 affidavit of a purported expert (Irving U. Ojalvo), a licensed professional engineer, to which Grove and Richmond object. Based upon the opinion of this expert, plaintiffs contend that triable issues of fact exist with respect to Grove's improper design and manufacture of the subject crane. In particular, plaintiffs now allege that the crane was defective in that it lacked an automatic "shut off" or warning device that would be triggered in the event that the crane became unstable due to a hydraulic oil leak. Questions of fact are also alleged to exist regarding Grove's failure to warn users of the dangers inherent in operating the crane with a hydraulic leak.

In opposition to preclusion, plaintiffs allege they have complied with the "So Ordered" stipulations by serving responsive pleadings providing expert disclosure on all of the parties.[3] While admitting that their disclosure was served ten days late, it is plaintiffs' claim that the delay was the inadvertent result of secretarial error, and that they did not act in bad faith. It is also claimed that defendants have not been prejudiced by the minimal delay. In addition, plaintiffs note that the So-Ordered stipulations did not threaten preclusion, and were, in fact, silent with respect to the designation of a liability expert. It is allegedly for this reason that plaintiffs did not retain Dr. Ojalvo until he was needed to oppose Grove's summary judgment motion.[4] Thus, it is claimed that (1) any delay in disclosing the identity of their engineering expert was neither willful nor contumacious; (2) preclusion is not warranted; and (3) the Court should consider the affidavit of Dr. Ojalvo in opposition to Grove's summary judgment motion.

Preclusion in any form is a harsh remedy not favored by this Court. Whenever possible,

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[3]The individuals named as experts include Ron Missun (an economist), Charles Kincaid (a vocational rehabilitation specialist), and Barbara Scheffel (a life care planner).

[4]It is clear, however, that Grove had served a demand for expert witness disclosure on March 9, 2004, more than one and one-half years before moving for summary judgment.

actions should be resolved on their merits (Hinds v Price Club, 2 AD3d 585, 586). Therefore, absent a clear showing that plaintiffs' failure to provide discovery was willful and contumacious, an order of preclusion will not be granted (*see* Mawson v Historic Properties, LLC, 30 AD3d 480, 481).

Here, it is readily apparent, that plaintiffs failed to comply in a timely manner with any of the So-Ordered stipulations. Nevertheless, the record before this Court does not demonstrate the type of non-compliance or prejudice necessary to warrant an order of preclusion (*see* Lombardo v St. Francis Hosp. Rehabilitation Servs., 16 AD3d 385; Torres v Lowinger, 12 AD3d 363, 364). Accordingly, the Court will consider the affidavit of Dr. Ojalvo in opposition to Grove's summary judgment motion, and Grove's motion to preclude is denied with leave to renew before the trial court. The same is true of Richmond's cross motion to preclude. In this instance, however, plaintiffs are directed to complete disclosure with Richmond by providing it with a curriculum vitae of each expert expected to be called at trial, as well as the notes, records or data relied upon by such expert in generating any expert report (CPLR 3101[d]).

Turning to the merits of the summary judgment motions, it is well settled that summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (Rotuba Extruders v Ceppos, 46 NY2d 223; Herrin v Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (*see* Weiner v Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*see* Glennon v Mayo, 148 AD2d 580). In order to prevail on such a motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law, and upon its failure to do so, the motion will be denied (*see* Alvarez v Prospect Hosp., 68 NY2d 320, 324). Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v City of New York, 49 NY2d 557, 562). In this regard, "mere conclusions, expressions of hope or

unsubstantiated allegations or assertions are insufficient" to raise a triable issue (*id*. at 562). Thus, summary judgment, which operates to deprive a party of his or her day in court, is only appropriate where the movant's initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of genuine issues of material fact (*cf*. Persaud v Darbeau, 13 AD3d 347).

With these criteria in mind, the Court concludes that Grove has carried its evidentiary burden, and that plaintiffs have failed to raise any triable issues of fact.

The allegations contained in plaintiffs' verified complaint against Grove are identical to those against the other named defendants, i.e., that the accident was caused solely by the negligent failure to properly inspect, repair and maintain the crane. However, it is undisputed that the crane was sold to Equipco in 1975, and was acquired by May in 1998. Thus, Grove has not owned, possessed, serviced, repaired or had any other contact with this crane for over 27 years preceding the date of plaintiff's injury. In addition, as late as 1996 the crane (then owned by the Adco Contracting Co.), was inspected by the City of New York and certified as safe to operate; no defects of any kind were noted. It is further undisputed that May inspected the crane prior to purchase and found it to be in good working order. Thereafter, the crane was operated exclusively by plaintiff, who May employed as a crane operator even though he had never received any training or instruction on the crane, and was neither licensed nor certified to operate or maintain it. It further appears that the crane fell into a considerable state of disrepair during May's stewardship, and that hydraulic fluid had been leaking from every coupling for up to one year before the accident occurred(Ali E/B/T p 36).[5] This disrepair was evident to plaintiff,

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[5]In contrast to plaintiff's deposition testimony, it must be noted Mohamed Adam, an 80% shareholder in May and the owner of Richmond, testified that May sometimes hired a company to maintain the crane or perform the big repairs, but could not remember either its name or whether it performed maintenance work on the crane at any time in 2002. Contrary to plaintiff's testimony, Mr. Adam also testified that plaintiff performed routine daily checks on the crane, and that he had a booklet indicating the checks that were to be performed on a regular basis. However, neither version of these facts is adverse to Grove's position (Adam E/B/T pp 42-47).

who appreciated that the leaks caused instability during operation to such an extent that he feared for his life. Apparently, this instability was also apparent to May, which attempted without success to have one of their employees fix the leaks at some point prior to plaintiff's accident. In fact, it appears that on the day of the accident, plaintiff's complaints to another construction supervisor, Mr. Dashi, prompted the latter to tell him to "work [the crane] easy". Finally, it is uncontroverted that May never asked or hired Grove to inspect, repair and maintain the crane.[6]

Also relevant in this regard is the fact that it was not until September 25, 2005 that plaintiffs filed a supplemental bill of particulars in which, for the first time and in an apparent attempt to keep Grove in the case, accused it of unspecified design and manufacturing defects. At this point, and despite multiple discovery requests for expert disclosure in support of this theory of liability, plaintiffs continued to demur, and it was not until Grove moved for summary judgment that plaintiffs finally provided this Court with the (untimely) expert affidavit . Clearly, Grove had no duty to design a bulletproof, fail-safe and fool-proof crane that would never wear out (*see* Mayorga v Reed-Prentice Packaging Mach. Co., 238 AD2d 483, 484). Neither did it have a duty to warn remote users of the potential for catastrophe associated with the continued operation of a 27 year-old crane in an advanced state of disrepair (*see* Aparicio v Acme Am Repair, 33 AD3d 480, 481).

Under all of these circumstances, it is the opinion of this Court that the conclusions reached in the affidavit of plaintiffs' "last minute" expert are speculative in nature, and bear all the hallmarks of having been tailored to meet the exigencies of the case. Plaintiffs having failed to rebut Grove's prima facie showing of its right to judgment as a matter of law, its motion for summary judgment should be granted, and the complaint and any cross claims against this defendant should be severed and dismissed. Next, the Court will consider Richmond's motion for summary judgment and plaintiffs' cross motion for like relief.

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[6]In this regard, the Court notes that in response to plaintiff's constant complaints about the need to repair the leaks, Mr. Adam is reputed to have said "I can't spend $150,000 on this boom" (Ali E/B/T p 47).

In support of its application, Richmond has submitted an attorney's affirmation and memorandum of law alleging that it is an out-of-possession landlord, and that plaintiffs have failed to establish any legal basis upon which liability might be imposed upon it.

Plaintiffs oppose and have cross-moved for partial summary judgment against Richmond on the issue of liability under Labor Law §§200, 240(1) and 241(6), and common-law negligence. In support, plaintiffs contend that Richmond, as the owner, is statutorily liable for the collapse or failure of the crane under Labor Law §240(1), and that its failure to enforce the relevant rules and regulations promulgated under section 23 of the Industrial Code renders it subject to liability under Labor Law §241(6).[7]

As is relevant, Labor Law §240(1) reads as follows:

> "All contractors and owners or their agents. . .[engaged] in the erection, demolition repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding. . .and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.".

This section sounds in strict liability and is intended to protect workers by placing the ultimate responsibility for their safety at the enumerated work sites on the owners and general contractors, rather than on the workers themselves (*see* Panek v County of Albany, 99 NY2d 452, 457; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500). Since liability rests upon ownership, issues such as to whether the owner contracted for or received some benefit from the work being performed is irrelevant (*see* Gordon v Eastern Ry. Supply, 82 NY2d 555, 560;

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[7]The Court reiterates that Mohamed Adam is both the owner of Richmond and an 80% shareholder of May, which employed him as president and supervisor of the whole company (Adam E/B/T pp 5-6, 35-36). It is undisputed that Adam was in complete control of the construction work in which plaintiff was engaged on the day of the accident.

Peritore v Don-Alan Realty Assocs., 18 AD3d 846, 847). However, in the absence of any nexus between the owner and the worker, an out-of- possession owner will not be held strictly liable under Labor Law §240(1) (*see* Abbatiello v Lancaster Studio Assoc., 3 NY3d 46, 51; *cf.* Coleman v City of New York, 91 NY2d 821).

In this case, a clear nexus can be seen to exist between Richmond, the lessor and May, the tenant and plaintiff's employer, through the person of Mohamed Adam, the owner of Richmond and an 80% shareholder and president of May. Accordingly, any purported reliance on Richmond's claim of being and out-of-possession landlord with no nexus to the plaintiff or his work must fail. Moreover, a crane is a structure under §240(1) of the Labor Law, and it is undisputed that plaintiff, who fell from an elevated height, was not provided with any type of safety equipment (*See* Cun-En Lin v Holy Family Monuments, 18 AD3d 800, 801). Thus, Richmond is strictly liable under Labor Law §240(1). As a result, so much of Richmond's motion as is for the dismissal of plaintiffs' cause of action under §240(1) of the Labor Law must be denied, and plaintiffs' cross motion for summary judgment on the issue of liability under the same section must be granted.

Pursuant to Labor Law §241(6), "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith" will be held liable for injuries caused by the failure to comply with a specific safety standard required by the Commission of Labor. Under this subdivision, liability is not absolute; comparative negligence is a defense; and the violation of an applicable section of the Industrial Code is only some evidence of negligence (*see* Long v Forest-Fehlhaber, 55 NY2d 154, 161). Here, too, the liability of an out-of-possession landlord has been limited by case law, and will not be imposed where the right to control the work is lacking (*see* Sumner v FCE Indus, Ltd., 308 AD2d 440).

In the instant case, Adam's dual relationship and complete control of both Richmond and May make it virtually impossible to conclude, as a matter of law, that Richmond had no role in the controlling the work (*cf.* Ryba v Almeida, 27 AD3d 718). Any doubt on this issue must inure to plaintiffs' benefit. On the other hand, even if the numerous, specific industrial code violations[8] cited by plaintiffs could be said, as a matter of law, to make out a prima facie case of liability under §241(6) of the Labor Law, they constitute only some evidence of negligence. Thus, triable issues of fact exist which preclude summary judgment at the insistence of either party under this subdivision.

As is relevant, Labor Law §200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see* Jock v Fein, 80 NY2d 965, 967). Under this section, liability is limited to parties that exercise control or supervision over the work out of which the accident arises, or parties that have notice, actual or constructive, of the unsafe condition of the premises and/or the machinery and equipment that allegedly caused the accident (*see* Lozado v Felice, 8 AD3d 633, 634). Thus, triable issues of fact exist regarding, e.g., to the extent of Richmond's control of the work and/or its notice of the crane's condition. Accordingly, so much of plaintiffs' cross motion as is for summary judgment under Labor Law §200 and common-law negligence must be denied.

Accordingly it is hereby:

**ORDERED** that the motion for summary judgment by defendant Grove Crane is granted, and the complaint and all cross claims against it are severed and dismissed; and it is further

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[8]*See* Industrial Code Rule 23-8 relating to mobile cranes and in particular, sections 23-8.1(a);(b)(1),(4),(5);(c);(d)(1),(2); 23-8.2(b)(1);(2)(i),(ii),(iii),(iv);(f)(iii) and 23.8.5(c)(1) thereof.

**ORDERED** that the motion and cross motion to preclude expert testimony is denied without prejudice to the making of such motions as defendants may be advised to make at the time of trial court; and it is further

**ORDERED** that the motion for summary judgment by defendant Richmond Industrial Corp. is denied in its entirety; and it is further

**ORDERED** that plaintiffs' cross motion for summary judgment on the issue of liability as against defendant Richmond Industrial Corporation under Labor Law §240(1) is granted; and it is further

**ORDERED** that the balance of plaintiffs' cross motion is denied; and it is further

**ORDERED** that the Clerk enter judgment accordingly.

All parties shall appear for a status conference in DCM Part 3 at 9:30 a.m. on **August 21, 2007.**

E N T E R ,

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Joseph J. Maltese
Justice of the Supreme Court

Dated: July 11, 2007