

<b>McCarthy v Cranes, Inc.</b>
2010 NY Slip Op 32864(U)
October 7, 2010
Supreme Court, New York County
Docket Number: 109746/07
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Salvatore Scarpulla

PART 19

Index Number : 109746/2007

MCCARTHY, DENIS

vs

CRANES

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross motion*  
*are determined in accordance with*  
*the accompanying decision/order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/7/10

Salvatore Scarpulla  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
DENIS MCCARTHY,

Plaintiff,

-against-

Index No.:109746/07

Submission Date: 7/7/2010

CRANES, INC., PLAZA CONSTRUCTION CORP.,  
MCKETTRICK-WILLIAMS, INC., MARJAYROB  
ASSOCIATES, LLC AND ROSELAND/STEMPEL  
21<sup>ST</sup> STREET ASSOCIATES, LLC,

Defendants.

**DECISION AND ORDER**

-----X  
CRANES, INC.,

Third-Party Plaintiff,

Index No.: 590789/07

-against-

NAVILLUS TILE, INC. D/B/A NAVILLUS  
CONTRACTING,

Third-Party Defendant.

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
For Plaintiff:  
Howard R. Sanders  
60 East 42<sup>nd</sup> Street, Suite 1446  
New York, NY 10165

For Defendants Plaza Construction Corp., McKettrick-Williams, Inc.,  
Marjayrob Associates, LLC and Roseland/Stempel 21<sup>st</sup> Street Associates,  
LLC and Third-Party Defendant Navillus Tile, Inc. d/b/a Navillus  
Contracting:  
Malapero & Prisco LLP  
295 Madison Avenue, 4<sup>th</sup> Floor  
New York, NY 10017

Papers considered in review of this motion for summary judgment and cross motion for partial summary judgment:

Notice of Motion . . . . . 1  
Notice of Cross Motion . . . . . 2  
Aff in Opp . . . . . 3  
Reply . . . . . 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Plaza  
Construction Corp., McKettrick-Williams, Inc., Marjayrob Associates, LLC and

Roseland/Stempel 21<sup>st</sup> Street Associates, LLC (“Plaza Defendants”) move for summary judgment dismissing the complaint insofar as asserted against them. Plaintiff Denis McCarthy (“McCarthy”) cross moves for partial summary judgment against the Plaza Defendants on the issue of liability based on Labor Law Sections 240(1) and 241(6).

Defendants McKettrick-Williams, Inc., Marjayrob Associates, LLC and Roseland/Stempel 21<sup>st</sup> Street Associates, LLC, owners of the property located at 35 West 21<sup>st</sup> Street in New York City (“subject premises”), entered into a contract with defendant Plaza Construction Corp. (“Plaza”) under which they agreed that Plaza would serve as general contractor for a construction and/or renovation project at the subject premises.

Plaza entered into a subcontract with defendant Cranes, Inc. and third-party defendant Navillus Tile, Inc. d/b/a Navillus Contracting (“Navillus”) under which Cranes, Inc. and Navillus were to perform certain construction work at the subject premises. McCarthy was employed by Navillus as a concrete and cement worker and was assigned to the construction project.

On July 10, 2007, McCarthy sustained injuries while working at the subject premises. McCarthy then commenced this action by summons and complaint dated July 16, 2007 seeking to recover damages for the injuries he sustained to his left wrist and forearm. McCarthy asserted a negligence cause of action and violations of Labor Law Sections 200 and 240(1). He also asserted a Labor Law Section 241(6) cause of action based on violations of Industrial Code Sections 23-1.7(a) and 23-8.2(c)(3).

At an examination before trial, McCarthy testified that on the day of the accident, the construction workers were preparing to erect a third floor and pour the wall for a fourth floor. McCarthy was standing on the third floor, which, at that time, consisted of "plywood and rebar, steel." The workers were preparing to remove a steel plate that was positioned between the wall connecting the second and third floor and the adjacent building. McCarthy was told by the workers on the second floor that the metal plate had been dislodged from its location on the concrete wall and that the crane could begin to lift up the plate. The plate was connected to the crane with two way spreaders and two hooks. The spreaders were attached to the crane's boom.

McCarthy signaled the crane operator, Navillus employee Arthur Boyd ("Boyd") to begin lifting the plate. The crane was only able to lift the plate a foot or so then it seemed to be getting caught on something. McCarthy told Boyd "hold what you've got." The crane stopped. McCarthy told the workers on the second floor to try loosening the plate more from the concrete. Three or four seconds later, he saw a black object fall. The object hit him in the left hand and knocked him down. He was standing approximately seven or eight feet away from the steel plate when the accident occurred. He saw a big piece of tile on the ground next to him and assumed that was what hit him. He later learned that the crane had hit terra cotta tile on a parapet on the roof of the adjacent building to the left and the tile fell and hit him.

Plaza Safety Coordinator Scott Palumbo (“Palumbo”) testified at an examination before trial that he, or his co-worker Joanne Fitzsimmons, visited the site of the construction project on a weekly basis and prepared safety audit reports after those visits. During his visits, he toured the site with Site Safety Coordinator Richard Green (“Green”), Plaza’s on-site supervisor Dan Devine (“Devine”), or Green’s supervisor Tomaz Deering (“Deering”). During those times, he would also see an “owner’s representative” “walking the job” at the job site. A July 3, 2007 safety audit report indicated that safety at the site was “well maintained.”

Palumbo arrived at the site of the accident and was told by Green and Devine that “while they were moving the form work up, the cable from the crane hit the coping on the adjacent building, and a piece broke off that fell and hit the guy in the arm.” He saw that “the boom was over the job, and the cable was attached to the form work up alongside the adjacent building.” The load was still on the crane and there was no tag line. According to Palumbo, a tag line was not required because the workers were not hoisting the form work, rather, they were just lifting it. He did not observe any horizontal safety netting, the purpose of which is to generally catch debris, and in his opinion, none was necessary. There were guardrails in place. There was no protection from anything falling from above, and in his opinion, there was none required at that point.

He discussed the accident with Green. They concluded that “the cables hit the coping because they had to lift - - to lift the form work up. There was little slack to the

line, and he went to pull it. When he went to lift the form work up it hit the coping, I guess. I guess the coping was an old piece that broke off, and that is what caused the accident.” According to Palumbo, the accident could have been prevented had a wooden box been built to place over the coping to protect it. He testified that after the accident, Navillus built a box over the coping.

The Plaza Defendants now move for summary judgment dismissing the complaint insofar as asserted against them, first arguing that the cause of action based on Labor Law 240(1) must be dismissed because there was no object being hoisted when McCarthy sustained his injuries and there was no evidence that the absence of a safety device caused McCarthy’s injury.

The Plaza Defendants next argue that the Labor Law 241(6) cause of action which was based on alleged violations of Industrial Code Sections 23-1.7(a) and 23-8.2(c)(3) must be dismissed because those Industrial Code Sections are inapplicable. Specifically, the Plaza Defendants argue that compliance with Section 23-1.7(a), which requires placement of certain overhead protection, would have made the work being performed impossible to carry out and section 23-8.2(c)(3), which requires certain safety measures to be taken while loads are being hoisted, is inapplicable because there was no hoisting occurring at the time of the accident.

Finally, the Plaza Defendants argue that the Labor Law 200 and negligence causes of action must be dismissed because the Plaza Defendants did not supervise or exercise

control over the operation that caused McCarthy's injury. Rather, according to McCarthy, Jimmy O'Sullivan, who worked for Navillus, was McCarthy's only supervisor on the day of the accident.

McCarthy cross moves for partial summary judgment against the Plaza Defendants on liability under Labor Law 240(1) and 241(6). He first argues that he is entitled to the protection of Labor Law Section 240(1) in that his accident occurred as the result of an elevation related hazard as contemplated by the statute. Specifically, he argues that the statute is not limited to cases where the object is being hoisted or secured at the precise time that it falls and the Plaza Defendants' failure to employ appropriate safety devices proximately caused his accident. He submits the accident report dated July 10, 2007 which provides, in relevant part,

The crane was lifting up the steel plate on the east side of the building when the cable on the crane hit the coping that was on the roof of the existing building to the East. Dennis was standing by the east wall when a 12" long wedge of the coping fell down about 45' and hit Dennis on his left wrist, causing a laceration.

The crane did not resume work until the NYC Cranes and Derricks finished their investigation of the accident. Navillus built and immediately installed a wood protective cover over the damaged section of coping.

Francis De Silva of the [NYC DOB] BEST SQUAD issued a violation for failure to safe guard public and private property during construction.

He further refers to Palumbo's testimony that the accident could have been prevented had the coping been protected by a wooden box. Finally, he submits the Notice of Violation Hearing dated August 1, 2007 from the Department of Buildings BEST

Squad indicating that horizontal safety netting was not provided at the subject construction site as per the “code and as per site safety plan.”

McCarthy next argues that he is entitled to summary judgment on his Labor Law 241(6) cause of action. He first maintains that Section 23-8.2(c)(3) is not limited only to rotating or swinging loads. Rather, it applies to any movement of a load and here, the incident occurred due to the movement of load and thus, the statute applies. He also argues that 23-1.7(a) is applicable and would not render the work being performed impossible to carry out because Palumbo testified that the implementation of a wooden box to cover the coping could have prevented the accident from occurring, and there was no indication that such implementation would render the work impossible. In fact, after the accident, the wooden box was constructed over the coping and the work was planned to continue. Therefore, fulfilling the requirements of 23-1.7(a) would not have rendered the work impossible.

Finally, McCarthy argues that his Labor Law 200 or negligence cause of action should not be dismissed because the Plaza Defendants fail to show that they neither exercised supervision or control over the work site nor had actual or constructive notice of the dangerous condition at the work site. First, with regard to supervision and control, he submits Palumbo’s testimony that either he or his co-worker visited the site weekly with either Green, Devine or Deering and prepared safety audit reports thereafter, he attended safety meetings, and he observed the owner’s representative “walking the job” at

the construction site. He refers to the Plaza Defendants' Project Safety Manual which provides, in relevant part, that if the Plaza Safety Representative identified a dangerous area at the construction site, work would be stopped to correct the hazard immediately. It further provides that "the Plaza Safety Representative will also perform periodic safety inspections of the site. Affected Subcontractor(s) shall promptly correct any infractions or poor safety practices uncovered by these inspections."

Second, he argues that an issue of fact exists as to the Plaza Defendants' notice of the dangerous condition at the site based on, inter alia, Palumbo's testimony that he or his co-worker visited the site weekly and prepared safety audits and that he had not observed any horizontal safety netting when he visited the site.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Labor Law 240(1) imposes absolute liability on building owners, construction contractors and their agents with regard to elevation-related risks to workers at construction sites. See *Rodriguez v. Forest City Jay St. Assocs.*, 234 A.D.2d 68 (1<sup>st</sup> Dept. 1996). The statute was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. See *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2009); *Luongo v. City of New York*, 72 A.D.3d 609 (1<sup>st</sup> Dept. 2010). What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken. See *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263 (1<sup>st</sup> Dept. 2007).

Here, the Court finds McCarthy met his burden of establishing entitlement to summary judgment on liability under Labor Law 240(1). The evidence presented demonstrates that the accident occurred during a pause in the process of lifting the steel plate. The accident occurred as the result of the application of the force of gravity to the steel plate and the coping, thereby causing the coping to fall and strike McCarthy. Palumbo testified that the accident could have been prevented had a box been constructed over the coping. The BEST squad issued a violation for failure to safeguard public and private property during construction by not installing horizontal safety netting at the site. The Plaza Defendants fail to submit evidence sufficient to raise any issue of fact as to

whether Labor Law 240(1) was violated or whether the violation was a proximate cause of the accident. As such, based on the evidence submitted, including the testimony of McCarthy and Palumbo and the accident report, the court grants summary judgment to McCarthy on liability under Labor Law 240(1).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Denis McCarthy's cross motion for summary judgment on liability against defendants Plaza Construction Corp., McKettrick-Williams, Inc., Marjayrob Associates, LLC and Roseland/Stempel 21<sup>st</sup> Street Associates, LLC is granted; and it is further

ORDERED that defendants Plaza Construction Corp., McKettrick-Williams, Inc., Marjayrob Associates, LLC and Roseland/Stempel 21<sup>st</sup> Street Associates, LLC's motion for summary judgment dismissing the complaint insofar as asserted against them is denied; and it is further

ORDERED that a trial for damages is to be held assessing damages against defendants Plaza Construction Corp., McKettrick-Williams, Inc., Marjayrob Associates, LLC and Roseland/Stempel 21<sup>st</sup> Street Associates, LLC and entering judgment in accordance therewith, and awarding costs; and it is further


ORDERED that plaintiff Denis McCarthy shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 30 days of entry; and it is further

ORDERED that the remainder of the action with respect to the remaining defendant Cranes, Inc. is severed and shall continue under this index number.

This constitutes the decision and order of the Court.

Dated: New York, NY  
October 7, 2010

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE