Johnson v Cremoux
2022 NY Slip Op 34529(U)
January 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 500451/2018
Judge: Lisa S. Ottley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24
---x
ANTHONY JOHNSON,

Plaintiff, Index # 500451/2018

-against- **ORDER**
Motion Seq. #6, #7 & #8

GERARD CREMOUX, CATHERINE CREMOUX
and SCOTT BAVOSA CONSTRUCTION CORP.,

Defendants.
---x
GERARD CREMOUX and CATHERINE CREMOUX,

Third-Party Plaintiff,

-against –

SCOTT BAVOSA CONSTRUCTION CORP.,

Third-Party Defendant.
---x

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment, submitted on November 3, 2021.

Papers	Numbered
Notice of Motion and Affirmation	1& 2 (Exh. 1-34)
Notice of Cross-Motion and Affirmation............................	7&8 (Exh. A-P); 12&13(Exh. A-E)
Affirmation/Affidavit in Opposition..................................	3; 5(Exh. A-E); 10; 14
Reply Affirmations..	6; 11
Memoranda of Law...	4; 9(Exh. 1); 15 (Exh. 1-2)

Upon review of the foregoing cited papers, and oral argument the court finds as follows:

By notice of motion filed on June 9, 2021, under Mot. Seq. #6, plaintiff Anthony Johnson moves pursuant to CPLR § 3212 for (1) an order granting summary judgment in his favor on the issue of liability against defendants Gerard and Catherine Cremoux (hereinafter

"the Cremouxs") on his Labor Law § 241 (6) claim; (2) holding the plaintiff free from comparative negligence; and (3) holding as a matter of law that plaintiff suffered a "grave injury" within the meaning of New York State Workers' Compensation Law § 11.

By notice of motion filed on August 23, 2021, under Mot. Seq. #7, the Cremouxs jointly cross-move pursuant to CPLR § 3212 for (1) an order granting summary judgment in their favor and dismissing the complaint; (2) finding the plaintiff suffered "grave injuries;" and (3) for a conditional order of common law indemnity, including past and future defense costs and attorney's fees.

By notice of motion filed on October 25, 2021, under Mot. Seq. #8, the defendant/third-party defendant moves pursuant to CPLR § 3025(b) to amend its Answer to assert an affirmative defense based on the anti-subrogation doctrine.

BACKGROUND

On January 9, 2018, the plaintiff commenced this action by filing a summons and complaint with the Kings County Clerk's office. The Cremouxs joined issue by their joint verified answer dated February 7, 2018. The complaint was based on personal injuries allegedly sustained by the plaintiff on November 3, 2016, while the plaintiff was performing construction work in the residence owned by the Cremouxs. In the course of performing his duties, plaintiff was caused to be injured by a portable saw that was allegedly missing a protective guard. The plaintiff's causes of action against the defendants are pursuant to common law negligence and violations of Labor Law §§§ 200, 240, and 241(6) for failure to provide sufficient safety devices.

The Cremouxs' verified answer include several affirmative defenses, including but not limited to, comparative negligence and homeowners' exemption. The Cremouxs also commenced a third-party action by filing a summons and complaint on March 29, 2018 against the plaintiff's employer, Scott Bavosa Construction Corp. (hereinafter "Bavosa"). Bavosa's third-party answer, filed on September 7, 2018, include counterclaims for indemnification and contribution.

A note of issue was filed on April 22, 2021.

TIMELINESS OF THE CROSS-MOTION

A cross-motion for summary judgment made more than 60 or 120 days after the filing of a note of issue may be considered on its merits if there is a timely pending motion for summary judgment made by another party on nearly identical grounds. Grande v. Peteroy, 39 A.D.3d 590, 833 N.Y.S.2d 615 (2nd Dept., 2007); Bressingham v. Jamaica Hosp. Med. Ctr., 17 A.D.3d 496, 793 N.Y.S.2d 176 (2005); Boehme v. A.P.P.L.E., A Program Planned for Life Enrichment, 298 A.D.2d 540, 749 N.Y.S.2d 49 (2002). In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR § 3212 [a]) to review the untimely motion or cross motion on the merits. Notably, the court, in the course of deciding the timely motion is empowered to search the record and award summary judgment to a non-moving party (see CPLR § 3212 (b)); Grande, supra. The Supreme Court's search of the record is limited to those causes of action or issues that are the subject of the timely motion. Whitehead v. City of NY, 79 A.D.3d 858, 913 N.Y.S.2d 697 (2nd Dept., 2010), *citing*, Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 676 N.E.2d 1178, 654 N.Y.S.2d 335 (1996).

Here, there is no dispute that the plaintiff timely filed its pending motion (Mot. Seq. #6) which was for summary judgment, seeking an order granting his Labor Law § 241(6) claim, holding the plaintiff free from comparative negligence, and a finding of "grave injury" as a matter of law. The note of issue was filed on April 22, 2021, and one hundred and twenty days from that date was August 20, 2021. The Cremouxs' cross-motion sought dismissal of not only the plaintiff's Labor Law § 241(6) claim but included the plaintiff's Labor Law § 240 (1), and § 200 claims, and a third-party cause of action for common-law indemnity. The subject cross-motion was filed on August 23, 2021, three days after the August 20, 2021 deadline. The Cremouxs have not offered any excuse for their delay in filing their cross-motion. As the New York Court of Appeals has stated, "[n]o excuse at all, or a perfunctory excuse, cannot be good cause." Brill v. City of New York, 2 N.Y.3d 648, 814 N.E.2d 431 (2004); *see*, Kunz v. Gleeson, 9 A.D.3d 480, 781 N.Y.S.2d 50 (2nd Dept., 2004).

As the Cremouxs' cross-motion seeking dismissal of the plaintiff's Labor Law § 240 (1) and Labor Law § 200 claims are not responsive to a timely, pending motion for summary judgment, this court does not have authority to consider the motion on its merits. Nonetheless, the court notes that the plaintiff concedes that his Labor Law § 240 (1) claim as against the defendant homeowners cannot be proven as it does not involve a gravity-related injury. (*See, Plaintiff's Affirmation in Opposition to Cross-Motion for Summary Judgment, para. 6.*) As such, plaintiff's claim as per Labor Law §240(1) is dismissed.

PLAINTIFF'S LABOR LAW §241(6) CLAIM

Labor Law § 241(6) specifically exempts from liability thereunder "owners of one and two-family dwellings who contract for but do not direct or control the work." Diaz v. Trevisani, 164 A.D.3d 750, 82 N.Y.S.3d 549 (2nd Dept., 2018). This homeowner's exemption protects "those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability." Id., *citing*, Nai Ren Jiang v. Shane Yeh, 95 A.D.3d 970, 944 N.Y.S.2d 200 (2nd Dept., 2012), *quoting*, Rodriguez v. Gany, 82 A.D.3d 863, 918 N.Y.S.2d 187 (2nd Dept., 2011); *see also*, Rodriguez v. Mendlovits, 153 A.D.3d 566, 60 N.Y.S.3d 87 (2nd Dept., 2017); Abdou v. Rampaul, 147 A.D.3d 885, 47 N.Y.S.3d 430 (2nd Dept., 2017). A defendant seeking the protection of the exemption must demonstrate that (1) the work was conducted at the defendant's one- or two-family residence, and (2) the defendant did not direct or control the work. Id.; *see also*, Marquez v. Mascioscia, 165 A.D.3d 912, 86 N.Y.S.3d 180 (2nd Dept., 2018).

In the first prong, the determination whether the exemption is available to an owner in a particular case turns on the "site and purpose" of the work. Khela v. Neiger, 85 N.Y.2d 333, 337, 648 N.E.2d 1329 (1995), *citing*, Cannon v. Putnam, 76 N.Y.2d 644, 564 N.E.2d 626 (1990). Where an owner engages in both commercial and residential uses of the property, a "determination as to whether the exemption applies . . . must be based on the owner's intentions at the time of the injury." Marquez, supra, citing, Caiazzo v. Mark Joseph Contr., Inc., 119 A.D3.d 718 (2014); see, Batzin v. Ferrone, 140 A.D.3d 1102 (2016); Lenda v Breeze Concrete Corp., 73 A.D.3d 987 (2010); Morgan v. Rosselli, 9 A.D.3d 417 (2004); Moran v. Janowski, 276 A.D.2d 605 (2000).

In the second prong, the phrase "direct or control" as used in those statutes is construed strictly and refers to the situation where the owner supervises the method and manner of the work. Diaz, supra., citing, Torres v. Levy, 32 A.D.3d 845, 821 N.Y.S.2d 127 [internal quotation marks omitted]; Abdou v. Rampaul, 147 A.D.3d at 886, 47 N.Y.S.3d 430; Yousefi v. Malik, 112 A.D.3d 617, 977 N.Y.S.2d 53; Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 823 N.Y.S.2d 477.

Under the first prong, the Cremouxs made a *prima facie* showing that the building was used as a two-family residence where together with their mother/mother-in-law, Ms. Hamud, they maintained a common household as a single family. The record shows that Ms. Hamud does not pay rent or utilities in her apartment; she cooks for and eats with the family daily; the doors to the separate units are never locked; Ms. Hamud shops for groceries for the entire family and stores them in a refrigerator in the Cremouxs' apartment; and at the time of the subject injury, Ms. Hamud was not living in the subject apartment unit (Marquez, supra).

In essence, the Cremouxs have demonstrated that although Ms. Hamud lived in a separate unit, they were all living together and maintaining a common household as a single family.

In opposition to the Cremouxs' cross-motion, the plaintiff cites to Hossain v. Kurzynowski in support of the proposition that the subject building is a three-family multiple dwelling. 92 A.D.3d 722, 939 N.Y.S.2d 89 (2nd Dept., 2012). However, the court notes that the facts herein are slightly different from the facts under Hossain. In denying the defendant homeowners' motion for summary judgement pursuant to the one-and two-family home exemption, the Appellate Division in Hossain held that the defendants failed to meet their burden of proof where the defendants, their relatives, and a paying tenant occupied three separate apartments, all of which had three separate entrances; the defendants did not claim nor was the building undergoing work to convert it to a two-family home at the time of the accident; and where the defendants failed to demonstrate that the related occupants of the subject separate apartments were living together and maintaining a common household as a single family. Hossain, supra.

The second prong of the homeowners' exemption is that the defendants "not direct or control the work." Chowdhury v. Rodriguez, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2nd Dept., 2008). There is no evidence in the record (and the plaintiff does not make the argument) to support the fact that the Cremouxs directed or controlled the method or manner of plaintiff's work. See, Small v. Gutleber, 299 A.D.2d 536, 751 N.Y.S.2d 49 (2nd Dept., 2002), (*Although the defendants' building was classified as a multiple dwelling, the court found that the defendants were statutorily exempt from liability under Labor Law Section 241(6) where there was no evidence that the defendants exercised any supervision or control over the plaintiff's work*).

Based on the foregoing, the court finds that the building functions exclusively as a two-family dwelling and falls within the scope of the exemption. Furthermore, under the facts of this case, the court finds that the project was purely and simply a home improvement measure solely for residential use, notwithstanding the fact that the Cremouxs ran a business out of their unit; that the building was registered as and deemed a multiple dwelling pursuant to the New York Multiple Dwelling Law; and that a rent-paying tenant was renting an apartment in the building. See, Bartoo v. Buell, 87 N.Y.2d 362, 366 (1996), (*Owners of single-family dwellings, who do not direct or control construction work on their property, are entitled to the protection of the homeowner exemption of N.Y. Lab. Law §§ 240(1), 241(6), notwithstanding the presence of some commercial activity on their properties*).

Consequently, the Cremouxs' cross-motion for summary judgment seeking dismissal of the plaintiff's Labor Law Section 241(6) claim is granted, and the plaintiff's motion for

summary judgment on the issue of liability pursuant to his Labor Law Section 241(6) claim as against the Cremouxs is denied. The third-party defendant's anti-subrogation doctrine claim (Mot. Seq. #8) is thereby rendered academic.

"GRAVE INJURY" CLAIM

Grave injuries are those injuries that are listed in the statute and are determined to be permanent. Grech v. HRC Corp., 150 A.D.3d 829, 150 A.D.3d 829 (2nd Dept., 2017), *citing*, Persaud v. Bovis Lend Lease, Inc., 93 A.D.3d 831, 941 N.Y.S.2d 208 (2nd Dept., 2012).

New York State Workers' Compensation Law § 11 provides:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, **loss of multiple fingers**, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, **loss of an index finger** or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (*emphasis added*).

"Consistent with the principle that '[w]ords in a statute are to be given their plain meaning without resort to forced or unnatural interpretations,' this Court has held that the word 'finger' means the whole finger, not just its tip." Castillo v. 711 Grp., Inc., 10 N.Y.3d 735, 882 N.E.2d 885 (2008), *citing*, Castro v. United Container Mach. Group, 96 N.Y.2d 398, 736 N.Y.S.2d 287 (2001). However, where the plaintiff demonstrates that he lost both interphalangeal joints of an index finger, leaving a "painful amputation stump, the plaintiff will establish that he suffered the 'loss of an index finger' within the meaning of Workers' Compensation Law § 11." Id.

The record, *to wit*, the plaintiff's deposition testimony and medical testimony, confirms that the plaintiff has suffered a permanent loss of his index and middle fingers proximately caused by the subject accident, without opposition. The defendant homeowners do not oppose the categorization of the plaintiff's injuries as grave. (See, Affirmation of Robert C. Baxter, Counsel to Defendants/Third-party Plaintiffs, para. 44). The court, therefore, finds as a matter of law that the plaintiff has suffered a "grave injury" within the meaning of Workers' Compensation Law § 11.

CONCLUSION

Accordingly, Mot. Seq. #6 is denied on the issue of liability and granted in finding that the plaintiff's injuries constitute a grave injury as a matter of law. Motion Seq. #7 is granted in favor of the defendant/third-party plaintiff against the plaintiff's Labor Law § 241(6) cause of action and denied on the plaintiff's Labor Law § 200 and indemnity claims. Motion Seq. #8 is denied as moot.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
January 4, 2022

HON. LISA S. OTTLEY, J.S.C.