

**Torres-Quito v 1711 LLC**

2022 NY Slip Op 34707(U)

October 19, 2022

Supreme Court, Bronx County

Docket Number: Index No. 27882/2017E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 3, 4, 5, 6 & 7

JOHNNY TORRES-QUITO,

Index No.: 27882/2017E

Plaintiff,

- against -

**DECISION and ORDER**

1711 LLC and RYDER CONSTRUCTION, INC.,  
PIONEER WINDOW MFG CORP., BUNLIN, LLC and  
V&P ALTITUTDE CORP.,

Defendants.

and Third-Party actions.

	<u>PAPERS NUMBERED</u>
Defendant/Third-Party Defendant Bunlin, LLC's Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 203-219
Plaintiff's Affirmation in Opposition, Response to Statement of Material Facts (Mtn. Seq. # 3)	NYSCEF Doc. No. 337-338
Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition, Response to Statement of Material Facts (Mtn. Seq. # 3)	NYSCEF Doc. No. 364
Third-Party Defendant P.I. Mechanical Corp.'s Notice of Cross-Motion, Affirmation in Support, Statement of Material Facts in Support, Counter-Statement of Material Facts, Affirmation in Partial Opposition to Defendant/Third-Party Defendant Bunlin, LLC's motion and Affirmation in Support of Cross-Motion (Mtn. Seq. # 3)	NYSCEF Doc. No. 401-404
Defendant/Third-Party Defendant Bunlin, LLC's Reply Affirmation to Plaintiff's Affirmation in Opposition (Mtn. Seq. # 3)	NYSCEF Doc. No. 356-357
Defendant/Third-Party Defendant Bunlin, LLC's Reply Affirmation to Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition (Mtn. Seq. # 3)	NYSCEF Doc. No. 374-377
Defendant/Third-Party Defendant Bunlin, LLC's Reply Affirmation and Affirmation in Opposition to Third-Party Defendant P.I. Mechanical Corp.'s Cross-Motion, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 407-4011
Third-Party Defendant P.I. Mechanical Corp.'s Reply Affirmation to Defendant/Third-Party Defendant Bunlin, LLC's Affirmation in Opposition (Mtn. Seq. # 3)	NYSCEF Doc. No. 422
Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Affidavit, Exhibits (Mtn. Seq. # 4)	NYSCEF Doc. No. 220-266, 292
Plaintiff's Affirmation in Opposition to Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Motion, Response to Statement of Material Facts (Mtn. Seq. # 4)	NYSCEF Doc. No. 339-340
Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition, Counterstatement of Material Facts, Exhibit (Mtn. Seq. # 4)	NYSCEF Doc. No. 358-361
Defendant/Third-Party Defendant Bunlin, LLC's Partial Opposition to Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Motion (Mtn. Seq. # 4)	NYSCEF Doc. No. 362
Third-Party Defendant P.I. Mechanical Corp.'s Notice of Cross-Motion, Affirmation in Support, Statement of Material Facts in Support, Counterstatement of Material Facts, Affirmation in Partial Opposition to Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Motion, Affirmation in Support of Cross-Motion, Exhibits (Mtn. Seq. # 4)	NYSCEF Doc. No. 396-400

Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Affirmation in Opposition to Third-Party Defendant P.I. Mechanical Corp.'s Cross-Motion and in Reply to Third-Party Defendant P.I. Mechanical Corp.'s Affirmation in Opposition (Mtn. Seq. # 4)	NYSCEF Doc. No. 414-416
Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Reply Affirmation to the Affirmations in Opposition by Defendant/Third-Party Defendant Bunlin, LLC, Defendant/Second Third-Party Defendant V&P Altitude Corp., and Third-Party Defendant P.I. Mechanical Corp. (Mtn. Seq. # 4)	NYSCEF Doc. No. 417
Third-Party Defendant P.I. Mechanical Corp.'s Reply Affirmation to Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Affirmation in Opposition (Mtn. Seq. # 4)	NYSCEF Doc. No. 425
Plaintiff's Notice of Cross-Motion to Strike (Mtn. Seq. # 4)	NYSCEF Doc. No. 343
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 5)	NYSCEF Doc. No. 267-291
Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition, Counterstatement of Material Facts (Mtn. Seq. # 5)	NYSCEF Doc. No. 365-366
Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Affirmation in Opposition to Plaintiff's Motion, Affidavit, Counterstatement of Material Facts (Mtn. Seq. # 5)	NYSCEF Doc. No. 391-395
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Pioneer Window Mfg Corp.'s Affirmation in Opposition, Counterstatement of Material Facts (Mtn. Seq. # 5)	NYSCEF Doc. No. 405-406
Plaintiff's Reply Affirmation to Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Affirmation in Opposition (Mtn. Seq. # 5)	NYSCEF Doc. No. 419
Plaintiff's Reply Affirmation to Defendant/Third-Party Defendant/Second Third-Party Plaintiff Pioneer Window Mfg Corp.'s Affirmation in Opposition (Mtn. Seq. No. 5)	NYSCEF Doc. No. 420
Plaintiff's Reply Affirmation to Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition (Mtn. Seq. # 5)	NYSCEF Doc. No. 421
Third Third-Party Defendant Construction Realty Safety Group, Inc.'s Notice of Motion, Statement of Material Facts, Affirmation in Support, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 6)	NYSCEF Doc. No. 293-320
Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition, Counterstatement of Material Facts (Mtn. Seq. # 6)	NYSCEF Doc. No. 367-368
Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc.'s Affirmation in Opposition to Third Third-Party Defendant Construction Realty Safety Group, Inc.'s Motion, Counterstatement of Material Facts (Mtn. Seq. # 6)	NYSCEF Doc. No. 388-390
Third Third-Party Defendant Construction Realty Safety Group, Inc.'s Reply Affirmation (Mtn. Seq. # 6)	NYSCEF Doc. No. 413
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Pioneer Window Mfg Corp.'s Notice of Motion, Statement of Material Facts, Affirmation in Support, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 7)	NYSCEF Doc. No. 321-335
Defendant/Second Third-Party Defendant V&P Altitude Corp.'s Affirmation in Opposition, Counterstatement of Material Facts, Exhibit (Mtn. Seq. # 7)	NYSCEF Doc. No. 378-381
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Pioneer Window Mfg Corp.'s Reply Affirmation, Memorandum of Law in Further Support (Mtn. Seq. # 7)	NYSCEF Doc. No. 423-424

Upon the foregoing papers; and due deliberation; this court finds:

The issue in Defendant/Third-Party Defendant Bunlin, LLC's ("Bunlin") summary judgment motion is whether it established its entitlement to judgment dismissing the complaint with respect to the Labor Law §200 claim.<sup>1</sup> This court holds there are triable issues of fact concerning the Labor Law §200 claim that preclude summary judgment in favor of Bunlin.

<sup>1</sup> Plaintiff did not oppose the branch of Bunlin's summary judgment motion seeking dismissal of the Labor Law

The issue in Third-Party Defendant P.I. Mechanical Corp.'s ("P.I. Mechanical") cross-motion for summary judgment is whether it established its entitlement to judgment concerning its cross-claims for common law contribution and indemnification against Bunlin.<sup>2</sup> This court holds there are triable issues of fact that preclude P.I. Mechanical's entitlement to summary judgment.

The issue in Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder Construction, Inc. ("Ryder") is whether they are entitled to judgment dismissing the Labor Law §§200, 240(1), and 241(6) claims, and judgment on its cross-claims and third-party claims for contractual indemnification, breach of contract, common law indemnification, and contribution against P.I. Mechanical. This court holds there are triable issues of fact that preclude summary judgment in favor of 1711 LLC and Ryder with respect to the Labor Law §240(1) claim, and triable issues of fact that preclude summary judgment in favor of Ryder as to the Labor Law §200 claim.<sup>3</sup> As to the Labor Law §241(6) claim predicated on Industrial Codes 12 NYCRR §§23-1.7(a), 23-1.18(a), and 23-2.6, there are triable issues of fact that preclude 1711 LLC's and Ryder's application for summary judgment.

The issue in Third-Party Defendant P.I. Mechanical's cross-motion for summary judgment is whether it is entitled to judgment dismissing 1711 LLC's and Ryder's third-party claims for contractual indemnification and breach of contract for failure to procure insurance, and judgment on P.I. Mechanical's counterclaim for common law contribution and indemnification against 1711

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§§240(1) and 241(6) claims. Therefore, that branch of Bunlin's motion is granted, without opposition.

<sup>2</sup> Although P.I. Mechanical cross-moved for an order pursuant to CPLR 3211(a)(7) and 3212, a review of the papers indicate that the cross-movant fashioned its papers as one for summary judgment and not for dismissal of the third-party complaint and will be addressed as such herein.

<sup>3</sup> Plaintiff did not oppose the branch of 1711 LLC's and Ryder's summary judgment motion seeking dismissal of the Labor Law §200 claim against 1711 LLC. Therefore, that branch of 1711 LLC's and Ryder's motion is granted, without opposition.

LLC and Ryder.<sup>4</sup> This court holds there are triable issues of fact that preclude P.I. Mechanical's application for summary judgment.

P.I. Mechanical's cross-motion also seeks dismissal of 1711 LLC's and Ryder's third-party claims for contractual indemnification and breach of contract for failure to procure insurance pursuant to CPLR 3211(a)(7). However, this court holds that a review of the third-party complaint reveals Third-Party Plaintiffs 1711 LLC and Ryder stated claims under cognizable legal theories, alleging that P.I. Mechanical is obligated to defend and indemnify Third-Party Plaintiffs as a result of its negligence in causing or contributing to the accident. Thus, the branch of the cross-motion seeking dismissal pursuant to CPLR 3211(a)(7), is denied.

The issue in Plaintiff's cross-motion to strike the Statement of Material Facts by Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder pursuant to 22 NYCRR 202.8-g is whether 1711 LLC's and Ryder's alleged failure to comply with the mandates of 22 NYCRR 202.8-g permits the striking of their Statement of Material Facts. This court holds that the proper method of objecting or disputing the material facts as presented by a movant in support of its summary judgment motion is submission of a Statement of Material Facts in response "to which it is contended that there exists a genuine issue to be tried." *See* 22 NYCRR §202.8-g. As a review of the record indicates that Plaintiff submitted a counter statement of material facts, thus, motion practice on this issue is not warranted.

Further, the issue in Plaintiff's summary judgment motion is whether he is entitled to judgment with respect to the Labor Law §§240(1) and 241(6) claims against Defendants/Third

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<sup>4</sup> Defendants/Third-Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder do not oppose the branch of P.I. Mechanical's summary judgment cross-motion seeking dismissal of the third-party claim for breach of contract for failure to procure insurance. Therefore, that branch of P.I. Mechanical's cross-motion is granted, without opposition.

Party Plaintiffs/Third Third-Party Plaintiffs 1711 LLC and Ryder. This court holds there are triable issues of fact concerning the Labor Law §§240(1) and 241(6) claims precluding Plaintiff's entitlement to summary judgment.

Moreover, the issue in Third Third-Party Defendant Construction Realty Safety Group, Inc.'s ("CR Safety") summary judgment motion is whether it is entitled to judgment dismissing all claims and cross-claims as against it. This court holds CR Safety did not demonstrate its *prima facie* entitlement to summary judgment.

Lastly, the issue in Defendant/Third-Party Defendant/Second Third-Party Plaintiff Pioneer Window Mfg. Corp.'s ("Pioneer") summary judgment motion is whether it is entitled to judgment on its third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Defendant/Second Third-Party Defendant V&P Altitude Corp. ("V&P Altitude"). This court holds Pioneer did not establish its *prima facie* burden for judgment as to its third-party claims for contractual indemnity claim and breach of contract for failure to procure insurance against V&P Altitude.

According to Plaintiff, Johnny Torres-Quito, ("Plaintiff") on the date of the incident, he was employed as a helper for P.I. Mechanical at a building owned by Defendant 1711 LLC and at which Defendant Ryder was serving as the general contractor. He testified that he was with other P.I. Mechanical workers who were installing pipe on the 14<sup>th</sup> floor of the building. Plaintiff was instructed by his foreman to report to the street level to help unload a delivery of duct materials from a P.I. Mechanical truck. The truck was parked inside construction barricades in a designated unloading area or construction lane for truck deliveries by various trades. Plaintiff wore a hard hat while unloading the truck and at the time of the incident. He further testified that other trades were on site, but he recalled that window installers were working from an exterior scaffold on the

building façade. He claims the incident occurred as he was unloading materials from the rear of the truck, when he felt an impact to his hard hat at which point the truck driver pointed to pieces of brick on the ground. As Plaintiff looked above, he observed people working from the scaffold.

Prior to the incident, Plaintiff never observed any bricks or broken bricks on the ground in the designated truck delivery area. He also never observed materials falling during the time he was assisting in unloading the subject truck.

Pioneer was hired by Ryder, as a window installation subcontractor and Pioneer then subcontracted the actual installation of the windows to V&P Altitude. CR Safety was the site safety company hired by Ryder for the project. Lastly, Bunlin was hired by Ryder as a mason contractor for the project.

This court finds there are triable issues of fact as to whether the brick debris that allegedly fell on Plaintiff was a “load that required securing for the purposes of the undertaking at the time it fell” given the elevation differential, the weight of the debris, and the amount of force it can generate in the fall. *See Peters v. Structure tone, Inc.*, 204 A.D.3d 522, 166 N.Y.S.3d 632 (1st Dep’t 2022). The trier of fact could find that the elevation differential between Plaintiff and the level from which the brick debris fell was *de minimis*, that the debris’ weight was inconsequential, or that the debris could not have generated any meaningful amount of force, and determine that Plaintiff’s “injuries were the result of [a] usual and ordinary danger at a construction site.” Therefore, these issues preclude summary judgment on the Labor Law §240(1) claim. *Id.*

As to the Labor Law §200 and common law negligence claims, this court finds there are triable issues of fact as to whether the incident arose out of work performed by Bunlin, V&P Altitude or P.I. Mechanical workers. There are also issues of fact as to whether Ryder, Pioneer

Window, P.I. Mechanical, and CR Safety were on notice of a potential hazard of bricks or brick debris becoming dislodged and falling or whether they had the authority to control the means and methods of any trade responsible for the fallen debris. *See Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018); *see also Makarius v. Port Auth. of N.Y. & N.J.*, 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

Further, Plaintiff cites Industrial Codes 12 NYCRR §§23-1.7(a) (overhead hazards), 23-1.18(a) (sidewalk sheds), and 23-2.6 (catch platform) to support the Labor Law §241(6) claim, therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

As to Industrial Code 12 NYCRR §23-1.7(a), although Plaintiff testified that he did not recall any overhead protection, netting or debris envelope an issue of fact remains as to whether the designated truck delivery area where the incident occurred was “normally exposed to falling material or objects” within the meaning of the regulation. *See Garcia v. SMJ 210 W. 18 LLC*, 178 A.D.3d 473, 111 N.Y.S.3d 545 (1st Dep't 2019).

With respect to Industrial Code 12 NYCRR §23-1.18(a), this court also finds there is an issue of fact as to whether this section applies to the facts, including whether “thoroughfares” include the construction lane in a roadway designated for truck deliveries at the construction site.

Likewise, there are triable issues of fact concerning the applicability of Industrial Code 12 NYCRR §23-2.6 due to conflicting testimony as to whether the incident occurred during “construction of exterior masonry walls” of the subject building.



Further, although CR Safety failed to demonstrate its *prima facie* entitlement to summary judgment, its motion is nevertheless premature given its intent to produce a witness with knowledge of the facts for an deposition pursuant to court directives on a date subsequent to the filing and submission of the herein motion.

Similarly, Pioneer did not establish its *prima facie* burden for judgment as to its third-party contractual indemnity claim against V&P Altitude as there are triable issues of fact concerning whether the incident arose out of V&P Altitude's contracted work. Further, since Pioneer failed to provide an affidavit or some other form of admissible evidence demonstrating that no liability insurance was obtained by V&P Altitude it therefore, failed to make a *prima facie* showing of entitlement to summary judgment on its third party claim against V&P Altitude for breach of contract for failure to procure insurance.

Accordingly, it is

ORDERED, that Bunlin's summary judgment motion seeking dismissal of the complaint (Mtn. Seq. No. 3) is granted in part; and it is further

ORDERED, that the Labor Law §§240(1) and 241(6) claims are dismissed only as to Bunlin; and it is further

ORDERED, that P.I. Mechanical's cross-motion to dismiss and for summary judgment (Mtn. Seq. No. 3) against Bunlin is denied; and it is further

ORDERED, that 1711 LLC's and Ryder's motion for summary judgment and dismissal of the Labor Law §§200, 240(1), and 241(6) claims (Mtn. Seq. No. 4), is granted in part; and it is further

ORDERED, that the Labor Law §200 claim is dismissed only as to 1711 LLC; and it is further

ORDERED, that P.I. Mechanical's cross-motion to dismiss and for summary judgment (Mtn. Seq. No. 4) against 1711 LLC and Ryder is granted in part; and it is further

ORDERED, that 1711 LLC's and Ryder's third-party claim for breach of contract for failure to procure insurance against P.I. Mechanical is dismissed; and it is further

ORDERED, that Plaintiff's cross-motion to strike (Mtn. Seq. No. 4) is denied; and it is further

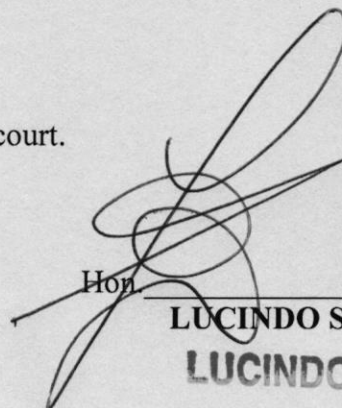
ORDERED, that Plaintiff's summary judgment motion seeking judgment on liability as to the Labor Law §§240(1) and 241(6) claims (Mtn. Seq. No. 5) is denied; and it is further

ORDERED, that CR Safety's summary judgment motion seeking a dismissal of all claims and cross-claims (Mtn. Seq. No. 6) is denied; and it is further

ORDERED, that Pioneer's summary judgment motion seeking judgment on its third-party claims for contractual indemnity and breach of contract for failure to procure insurance asserted against V&P Altitude (Mtn. Seq. No. 7) is denied.

This constitutes the decision and order of the court.

**Dated: October 19, 2022**

  
Hon \_\_\_\_\_  
**LUCINDO SUAREZ, J.S.C.**  
**LUCINDO SUAREZ, J.S.C.**