

Bustamante v St. George Outlet Dev. LLC
2026 NY Slip Op 31082(U)
March 10, 2026
Supreme Court, Kings County
Docket Number: Index No. 514444/18
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of March, 2026.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MIGUEL BUSTAMANTE,

Plaintiff,

-against-

Index No. 514444/18

ST. GEORGE OUTLET DEVELOPMENT LLC,
d/b/a EMPIRE OUTLETS, and EMPIRE OUTLET
BUILDERS LLC,

**SUPPLEMENTAL
DECISION AND ORDER**

Defendants.

Mot. Seq. Nos. 10, 12

-----X
ST. GEORGE OUTLET DEVELOPMENT LLC and
EMPIRE OUTLET BUILDERS LLC,

Third-Party Plaintiffs,

- against -

DiFAMA CONCRETE, INC. and
DFC STRUCTURES, LLC,

Third-Party Defendants.

-----X
ST. GEORGE OUTLET DEVELOPMENT LLC and
EMPIRE OUTLET BUILDERS LLC,

Second Third-Party Plaintiffs,

- against -

COMMERCIAL PAYROLL, INC.,

Second Third-Party Defendant.

-----X

The following e-filed papers read herein:

- Notice of Motion and Affidavits (Affirmations) Annexed _____
- Opposing Affidavits (Affirmations) _____
- Affidavits/Affirmations in Reply _____
- Order, dated April 23, 2025, on Motions Seq. Nos. 9-13 _____
- Plaintiff's Counsel's Letter to Court, dated July 23, 2025, _____
- Enclosing EBT Transcript of Non-Party Witness Yiraldy Lopez _____

NYSCEF Doc Nos.:

- 301 – 321; 339 – 365
- 431 – 444; 472 – 498; 531, 535; 538 – 542
- 540 – 542; 555 – 557
- 572
- 584; 586

Upon the foregoing papers, Third-Party Defendants DiFama Concrete, Inc. and DFC Structures, LLC (collectively, "DiFama") move for an order, pursuant to CPLR 3212, (i) dismissing Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs St. George Development LLC DBA Empire Outlets and Empire Outlet Builders LLC's (collectively, "Empire") claims against DiFama for contribution and common law indemnification, attorneys' fees, and breach of contract for failure to procure insurance; (ii) dismissing Empire's claim against DiFama for breach of contract for failure to procure requisite insurance; and (iii) dismissing Plaintiff's claims based on alleged violations of Labor Law §§ 220, 240 (1) and 241 (6) predicated on violations of 12 NYCRR 23-1.7 (a), 23-2.2 (a), (c), (d), and (e), and 23-3 (Mot. Seq. No. 10). Empire opposes the motion and moves for an order, pursuant to CPLR 3212, (a) granting Empire summary judgment dismissing Plaintiff's complaint in its entirety and all cross-claims and counterclaims against them; (b) granting Empire summary judgment on their third-party claims for contractual indemnification against DiFama and Second Third-Party Defendant Commercial Payroll, Inc. ("CPI"); and (c) granting Empire summary judgment on their third-party claim for common law indemnification against CPI.

This matter involves an accident that occurred on May 2, 2018, at a construction site located at 55 Richmond Terrace in Staten Island, New York (the "Premises"). The Premises was owned by St. George Development LLC DBA Empire Outlets. Empire Outlet Builders LLC was the general contractor for the construction project and contracted with Plaintiff's employer, DiFama Concrete, Inc., to perform structural concrete work. Plaintiff, a laborer, alleges that on the date of the accident, he was instructed by his supervisor Frank Fama, to level up the dumpster. Plaintiff testified that his right foot was on the edge of the dumpster, with his left foot positioned on top of the debris in the dumpster. Plaintiff testified that debris was dumped on him, causing him to fall to the ground.

Pursuant to an order dated April 23, 2025, Plaintiff's Labor Law § 241 (6) claim was dismissed as against DiFama and Empire (*see* NYSCEF Doc No. 572). Upon review of the documents, however, it is necessary to clarify that in moving to dismiss Plaintiff's Labor Law § 241 (6) claim DiFama only addressed Industrial Code §§ 23-1.7 (a), 23-2.2 (a), (c), (d), and (e), and 23-2.3.¹ Therefore, DiFama is only entitled to dismissal of the Labor Law § 241 (6) claim to the extent it is premised on these sections.

In denying Plaintiff's motion against Empire on the issue of liability under Labor Law § 240 (1) (Mot. Seq. No. 9), the Court found issues of fact as to how the accident occurred, precluding summary judgment in Plaintiff's favor.² Accordingly, the portion of Empire's motion seeking to dismiss Plaintiff's Labor Law § 240 (1) claim is denied. In its Notice of Motion DiFama sought to dismiss Plaintiff's Labor Law § 240 (1) claim, but did not assert any arguments in its affirmation in support or memorandum of law.

¹ Plaintiff did not oppose DiFama's motion seeking dismissal of his Labor Law § 241 (6) claim premised on these sections (NYSCEF Doc No. 538, ¶ 5).

² *See* NYSCEF Doc No. 589.

Since DiFama did not substantiate its request for dismissal of this claim, that portion of its motion is denied. Thus, the Court will only address the remaining portions of DiFama's and Empire's motions.³

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

The Court first turns to DiFama's motion (Mot. Seq. No. 10). In its motion, DiFama Concrete, Inc., Plaintiff Miguel Bustamante's employer, argues that Empire's claims for common law negligence, contribution and common law indemnification should be dismissed since they are barred by Workers' Compensation Law §§ 11 and 29 (6) and Plaintiff has neither alleged nor sustained a grave injury. According to DiFama, Plaintiff's injuries do not meet the "grave injury" exception of Section 11 of the Workers' Compensation Law. DFC Structures, LLC contends that it is an alter ego of DiFama Concrete, Inc.; thus, claims for contribution and common law indemnification against it should also be dismissed. With respect to Empire's claim for breach of contract for failure to procure insurance, DiFama argues that it purchased the requisite insurance and named Empire as additional insureds.

Empire opposes the motion, arguing that Plaintiff alleged in his Bill of Particulars that he sustained, inter alia, a traumatic brain injury, and DiFama failed to proffer any objective medical evidence that Plaintiff did not sustain a grave injury. Thus, Empire contends that a triable issue exists as to whether Plaintiff suffered a grave injury under Workers' Compensation Law, and its common law indemnity and contribution claims should not be dismissed. In addition, Empire argues that it is entitled to common law indemnification

³ The Court will not summarize the arguments in support of, or in opposition to, those portions of the two motions that were already decided.

because it was not negligent and did not supervise or control Plaintiff's work. As the construction manager, Empire asserts that it had mere general supervisory authority. Empire also asserts that it did not have actual or constructive notice of the condition (dumpster debris). Since DiFama was negligent for its supervision, direction and control of Plaintiff's work at the time of the accident, if Plaintiff is found to have suffered a grave injury, Empire avers that it will be entitled to common law indemnification/contribution. Therefore, Empire contends that it is entitled to conditional common law indemnification. Turning to the issue of insurance, Empire asserts that the parties' contract mandated that DiFama Concrete, Inc. and DFC Structures, LLC purchase general liability insurance and excess insurance and name Empire as additional insureds. According to Empire, since there is no evidence that both entities procured the requisite insurance, summary judgment on this claim should be denied.

Plaintiff also opposes DiFama's motion, asserting that he has not pled a Labor Law § 220 cause of action and thus, this branch of DiFama's motion should be denied as moot.

In reply, DiFama argues that Empire has not proffered any evidence to raise an issue of fact with respect to whether Plaintiff sustained a grave injury. Instead, DiFama asserts that Empire's own experts support its argument that Plaintiff did not sustain a grave injury, as defined by Workers' Compensation Law § 11. In support, DiFama submits the expert reports of Dr. David M. Erlanger, a neuropsychologist, and Josiah Pearson, a vocational rehabilitation expert. Both Dr. Erlanger and Mr. Pearson evaluated Plaintiff and found that he was able to return to work. DiFama further maintains that Empire's cause of action for breach of contract for failure to procure insurance should be dismissed. According to DiFama, the general liability policy issued by Hiscox Insurance Company Inc. shows that both DiFama Concrete, Inc. and DFC Structures, LLC purchased the policy and are named insureds. Pursuant to the policy's endorsements, Empire is deemed to be additional insureds as required by the contract on a primary non-contributory basis. In addition, DiFama argues that it procured the requisite excess policy of insurance from Arch Insurance Company and both entities are named insureds. DiFama also argues that Empire is an additional insured under this excess policy.

Upon review of the record, the Court finds that DiFama did not establish entitlement to summary judgment dismissing Empire's claims for contribution and common law indemnification on the grounds that Plaintiff did not sustain a serious injury under Workers' Compensation Law § 11. In its motion, DiFama merely argued that the injuries listed in Plaintiff's Bill of Particulars did not meet the "grave injury" exception. DiFama failed to proffer competent medical evidence indicating that Plaintiff's alleged injuries were not "grave" (*see O'Flaherty v Columbo*, 202 AD3d 509, 510 [1st Dept 2022]). DiFama cannot rely on Empire's experts' reports to meet its burden since they were submitted for the first time in the reply (*id.*; *see also USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704, 706 [2d Dept 2016] [reply papers are not intended

to allow the “movant to introduce new arguments in support of, or *new grounds or evidence for*, the motion”) [emphasis added]).

With respect to the branch of DiFama’s motion seeking summary judgment dismissing Empire’s claim for breach of contract for failure to procure insurance, it is undisputed that two policies are at issue. The Court will address each one separately. The general liability insurance policy issued by Hiscox names both DiFama Concrete, Inc. and DFC Structures, LLC as insureds. The policy also includes entities required by written contract to be included for coverage as additional insureds (*see* NYSCEF Doc No. 315, Section III.K, Endorsements 8-9). Endorsement 12 also provides that coverage will be primary if required by written contract (*see* NYSCEF Doc No. 315). The excess policy issued by Arch also names DiFama Concrete, Inc. and DFC Structures LLC as named insureds (*see* NYSCEF Doc No. 316, Endorsement 10). The excess policy lists the Hiscox general liability policy as the controlling underlying insurance for general liability. The excess policy’s definition of insureds includes any “organization qualifying as an insured under controlling underlying insurance” (NYSCEF Doc No. 316, Section V.b.2.). Here, there is a written contract between DiFama and Empire, requiring Empire to be named as an additional insured. Since Empire is an additional insured under the Hiscox policy, it is also an additional insured under the Arch policy. Accordingly, the Court finds that DiFama demonstrated entitlement to dismissal of Empire’s breach of contract claim, and Empire failed to raise an issue of fact.

In sum, DiFama’s motion for summary judgment is granted to the extent that Empire’s claim for breach of contract for failure to procure insurance is dismissed.

The Court next turns to Empire’s motion (Mot. Seq. No. 12). In the branch of its motion seeking dismissal of Plaintiff’s complaint, the only remaining arguments for consideration pertain to Plaintiff’s Labor Law § 200/common law negligence claims. Empire first argues that the sole proximate cause of Plaintiff’s accident was the manner and method chosen by Plaintiff to carry out the work (i.e., standing on top of debris in a dumpster). According to Empire, Plaintiff’s accident was not caused by any dangerous condition on the premises. Empire also argues that it had at most mere general supervisory authority. In support, Empire cites to the deposition testimonies of Plaintiff and its witness Travis McBain. At his deposition, Plaintiff testified that he only received work instructions from Frank Fama of DiFama Concrete, and that Mr. Fama instructed him on the morning of the accident to level up a dumpster. Mr. McBain testified that Empire did not provide any equipment or tools to subcontractors or own any machinery. In addition, Empire asserts that it did not create a hazard or have notice thereof. Empire argues that Mr. Fama instructed Plaintiff to level up a dumpster, Empire did not provide any machinery or supervise the subcontractors, and the subject dumpster was provided by non-party Citywide Container Service Corp. Therefore, Empire asserts that it was not foreseeable that Plaintiff would attempt to stand on a dumpster to

level debris. Moreover, Empire argues that Plaintiff knew or should have known that standing on top of a dumpster where debris was being deposited was an open and obvious hazard.

Empire further seeks summary judgment against DiFama and CPI for contractual indemnity. Empire argues that it was not negligent because it had no obligation to supervise and control the means and methods of Plaintiff's work. Instead, Empire asserts Mr. Fama, as the supervisor for DiFama, had the authority to stop any unsafe work that its laborers were performing. According to Empire, Mr. Fama either negligently directed Plaintiff to work in the dumpster or should have ordered him out of the dumpster upon seeing him. Since Plaintiff's accident arose out of the negligent supervision and control of DiFama, Empire contends that it triggers contractual indemnity. With respect to CPI, Empire asserts that CPI was responsible for housekeeping, including removing and cleaning up debris, and employed Joseph Fama Jr., who admittedly operated the Lull forklift at the jobsite. Thus, Empire claims that pursuant to the agreement between the two entities, CPI must indemnify Empire. Empire further seeks an order of conditional common law indemnification from CPI.

In partial opposition, CPI argues that the portion of Empire's motion seeking summary judgment against it should be denied. According to CPI, pursuant to its contract with Empire, it provided union labor. However, CPI contends that it was not required to perform any labor on the worksite. Its president Sean Moran testified that CPI did not have a supervisor, project manager or any other presence at the premises. According to CPI, Joseph Fama testified that he only received instructions from BFC and never used the forklift to dispose of debris. CPI further contends that Plaintiff received instructions from Frank Fama. Even if the Court finds that the contract required CPI to perform labor, CPI asserts that any work being performed at the time of Plaintiff's accident was outside the scope of its contract. Specifically, CPI asserts that (a) Plaintiff was employed by DiFama, (b) the only laborer CPI provided, Yiraldi Lopez, was working as a flagman, and (c) Plaintiff's testimony regarding the debris upon which he was working on, and which allegedly fell on him, indicates that any work being performed was outside the scope of Section 2.1 (a) of the contract.⁴ CPI argues that there is no evidence that Plaintiff's accident was caused by the conduct of any CPI employee. Since there is no evidence that Plaintiff's injuries arose out of the performance of CPI's work, CPI avers that Empire has no valid claim for contractual indemnification.

Similarly, CPI argues that Empire has no valid claim for common law indemnification. According to his testimony, Mr. Moran only visited the worksite for purposes of picking up timesheets and delivering paychecks. In addition, Mr. Moran testified that CPI did not provide tools, equipment, training, or

⁴ Under Section 2.1 (a), CPI was required to "[p]rovide, as requested by [Empire Outlet Builders LLC], all union Labor required to complete miscellaneous concrete, defined as curbs, stairs, ramps and planters, and general conditions" (NYSCEF Doc No. 444).

supervision to any workers. Since CPI did not exercise authority, direction or supervision over Plaintiff's or any other individual's work, CPI avers that there can be no finding of common law indemnity against it.

DiFama opposes the motion seeking contractual indemnification against it and dismissal of Plaintiff's Labor Law § 200 claim. DiFama asserts that there are issues of fact as to how the accident occurred. While Plaintiff alleges that the accident occurred when debris was dumped on top of him by the Lull lift, DiFama argues that Daniel Fama stated that Plaintiff informed him that he had slipped and fell. DiFama further argues that Joseph Fama denied dumping any debris using a forklift. In addition, DiFama asserts that Plaintiff testified that he entered the container through a side door. Thus, DiFama argues there is a question of fact as to whether Plaintiff was the sole proximate cause of his accident since he decided to climb over the side of the container to exit. Since Daniel Fama testified that Empire had laborers onsite who disposed of debris into containers, DiFama contends that there are issues of fact as to whether Empire laborers using a Lull lift dumped debris onto Plaintiff.

In opposition, Plaintiff argues that Empire has not met its burden in establishing that it lacked notice of the dangerous condition (the unguarded dumpster) or that it did not have authority to control the injury producing work. Plaintiff asserts that Empire was present at the jobsite daily, and had or should have had notice of the unguarded dumpster. In addition, Plaintiff argues that Empire's witness Mr. McBain testified that Empire was responsible for the coordination of the various trades and the disposal of debris and had the authority to restrict access to the dumpster. Plaintiff further contends that Empire did not submit evidence indicating when the dumpster was last inspected and therefore, Empire cannot demonstrate lack of constructive notice.

In reply, Empire asserts that the evidence establishes that Plaintiff's accident arose out of CPI's operation of the Lull lift since there is no dispute that CPI's employee Joseph Fama was the only person operating a Lull lift on the date of the accident in the vicinity where Plaintiff's accident occurred. Empire further asserts that whether Joseph Fama actually dumped debris on Plaintiff is a question of fact for the jury; however, it does not impact Empire's request for contractual indemnification. Further, Empire argues that CPI's work was intertwined with that of DiFama and CPI did have supervisors onsite. According to Empire, the negligent operation of the Lull lift falls within CPI's contracted work as it was performed and billed to Empire. Similarly, Empire maintains that it is entitled to common law indemnity since CPI and DiFama are the only entities that could be found affirmatively liable for the accident. Since it did not supervise, direct or control Plaintiff's work or Joseph Fama's operation of the Luff lift, Empire argues that they have no active fault/negligence.

With respect to DiFama's opposition, Empire asserts that the accident arose out of DiFama's work since DiFama either (a) ordered Plaintiff to work in the dumpster or (b) by Daniel Fama, saw Plaintiff working in the dumpster prior to the accident and failed to remove him from it. Therefore, Empire argues

that the indemnity clause is triggered. According to Empire, there are no triable issues of fact with respect to any alleged negligence or affirmative liability on its part.

Turning to Plaintiff's opposition, Empire argues that only DiFama and CPI are affirmatively liable for causing the accident; thus, dismissal of Plaintiff's Labor Law § 200/common law negligence claims is warranted. Empire asserts that this action involves the "means and methods" of Plaintiff's work—not a dangerous condition. Therefore, Empire avers that this Court need only consider whether Empire exercised the authority to control the injury-producing work. Empire reiterates that Plaintiff testified that he never received instructions from Empire. In addition, Empire claims that it did not own any work machinery or perform work at the site.

The Court will first discuss Plaintiff's Labor Law § 200 and common law negligence claim against Empire. "Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). "[A] defendant is not required to blindly accept a plaintiff's categorization of an accident as either a method and manner case or a dangerous condition case, or both and may establish, as part of its prima facie showing, that the accident falls into one of the two broad categories of Labor Law § 200 cases (*Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841-842 [2d Dept 2021] [internal quotation marks omitted]).

Here, Empire established, prima facie, that Plaintiff's accident arose out of the means and methods of the work, rather than a premises condition (*see Cagua v Bushwick Holdings, LLC*, 238 AD3d 698, 702 [2d Dept 2025]; *Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]). Plaintiff testified that at the time of the accident, one foot was on top of the debris and the other was on top of the edge of the dumpster (Plt tr 11/12/21 at 83, lines 6-11). Whether Plaintiff was struck by debris, as he testified, or whether he slipped, as Daniel Fama claims he was told, Plaintiff's injuries did not occur because of a dangerous condition at the premises (*see Monterroza v State Univ. Constr. Fund*, 56 AD3d 629, 630 [2d Dept 2008]; *Gargan v Palatella Saros Bldrs. Group, Inc.*, 162 AD3d 988, 989 [2d Dept 2018]).

"[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*id.* at 62). "[T]he right to generally supervise the work, stop the contractor's work if a

safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (*Gasques v State of NY*, 59 AD3d 666, 668 [2d Dept 2009], *affd* 14 NY3d 869 [2010]).

It is undisputed that Plaintiff’s supervisor was Frank Fama of DiFama, who directed Plaintiff’s work (Pl tr 11/12/21 at 61, lines 8-25; at 62, lines 2-3). At his deposition, Plaintiff testified that only Frank Fama supervised his work and gave him instructions (*id.* at 62, lines 4-13). Plaintiff also testified that Frank Fama gave him the task of leveling up the dumpster (*id.* at 68, lines 19-24). In addition, Joseph Fama, who allegedly operated the subject forklift, was employed by CPI. It is further uncontested that Empire did not have machinery onsite. Thus, the Court finds that Empire has established, *prima facie*, that it did not have supervisory authority over the work (*see Cagua*, 238 AD3d at 702; *Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]). In opposition, Plaintiff raised no triable issue of fact. Accordingly, Plaintiff’s Labor Law § 200 and common law negligence claims against Empire are dismissed.

The Court will now address the portion of Empire’s motion seeking indemnification. “A party’s right to indemnification may arise from a contract or may be implied based upon the law’s notion of what is fair and proper as between the parties” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011] [internal quotation marks omitted]). “A party’s right to contractual indemnification depends upon the specific language of the relevant contract” (*McNamara v Gusmar Enters., LLC*, 204 AD3d 779, 783 [2d Dept 2022]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*id.*). “In the absence of a legal duty to indemnify, a contract for indemnification should be strictly construed to avoid imputing any duties which the parties did not intend to assume” (*id.*). A party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; General Obligations Law § 5-322.1).

Here, there are two indemnity provisions at issue. The contract with DiFama limits DiFama’s duty to indemnify Empire “only to the extent caused in whole or in part by the negligence, acts, errors or omissions of [DiFama], its sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable” (NYSCEF Doc No. 360, Section 8.2). The contract with CPI provides, in part, that CPI will indemnify Empire for any personal injury “arising out of the performance of the Work of [CPI]” (NYSCEF Doc No. 359 at 13).

However, at this juncture, any negligence, or lack thereof, by Empire, DiFama, or CPI, has not been established, since there are issues of fact surrounding the circumstances of the Plaintiff’s accident. Accordingly, Empire has failed to establish that the indemnification provision has been triggered.

Therefore, this branch of Empire’s motion is denied, without regard to DiFama and CPI’s oppositions (see *Winegrad*, 64 NY2d at 853).

Liability for common law indemnification may be imposed against the party “responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the plaintiff’s injuries” (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098, [2d Dept 2018], citing *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017]; see *McCarthy*, 17 NY3d at 378; *Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2022]). “[A]n award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties” (*Mendelsohn v Goodman*, 67 AD3d 753, 754 [2d Dept 2009]).

The Court has already determined that there are issues of fact as to how Plaintiff’s accident occurred. Consequently, there is an issue of fact as to CPI’s negligence and Empire is not entitled to summary judgment on their common law indemnification claim against CPI (see *Rosario v Horizon Networks, Inc.*, 240 AD3d 537, 541 [2d Dept 2025]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 685 [2d Dept 2005]).

The parties’ remaining contentions have been considered and found to be either without merit or moot in light of the court’s determination.

Accordingly, it is hereby

ORDERED that in Mot. Seq. No. 10, DiFama Concrete, Inc. and DFC Structures, LLC’s motion for summary judgment is granted to the extent that Empire’s claim for breach of contract for failure to procure insurance is dismissed;⁵ and it is further

ORDERED that in Mot. Seq. No. 12, St. George Development LLC DBA Empire Outlets and Empire Outlet Builders LLC’s motion for an order, pursuant to CPLR 3212, is granted to the extent that Plaintiff’s Labor Law § 200 and common law negligence claims are dismissed against them.⁶

This constitutes the decision and order of the court.

E N T E R,



Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice

⁵ The Court previously granted the portion of DiFama’s motion seeking dismissal of Plaintiff’s Labor Law §§ 240 (1) and 241 (6) claims.

⁶ The Court previously granted the portion of Empire’s motion seeking dismissal of Plaintiff’s Labor Law § 241 (6) claim.

KINGS COUNTY CLERK
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