

**Andramunio v 3402 Land Acquisition, LLC**

2007 NY Slip Op 31326(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0108557/2004

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10  
108557/04

5-24-07

Andramunio (elo Duta)

INDEX NO. TP 590819/04  
MOTION DATE 590885/04  
MOTION SEQ. NO. 590566/05  
MOTION CAL. NO. 590754/05  
seq # 5

- v -  
3402 Land Acquisition LLC  
+ other actions

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

C

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

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

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

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
**FILED**  
MAY 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: MAY 22 2007

[Signature]  
HON. JUDITH J. GISCHE 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: PART 10

-----X  
Luz Dalinda Andramunio,  
*as administratrix of the estate of*  
Edgar Geovanny Dutan, and  
Luz Dalinda Andramunio, individually,  
Plaintiffs

-against-

3402 Land Acquisition, LLC,  
3402 Queens Boulevard Associates, LLC,  
Meringoff Properties, Inc., and  
T&G Contracting, Inc.,  
Defendants.

-----X  
T&G Contracting, Inc.,  
3<sup>rd</sup> party Plaintiff,

-against-

Jerrick Waterproofing, Inc.,  
3<sup>rd</sup> party Defendant.

-----X  
3402 Land Acquisition, LLC,  
3402 Queens Boulevard Associates, LLC, and  
Meringoff Properties, Inc.,  
2<sup>nd</sup> - 3<sup>rd</sup> party Plaintiffs

-against-

Jerrick Waterproofing, Inc.,  
2<sup>nd</sup>- 3<sup>rd</sup> party Defendant.

-----X  
T&G Contracting, Inc.,  
3<sup>rd</sup> -3<sup>rd</sup> party Plaintiff

-against-

Jerrick Contracting, Co.,  
3<sup>rd</sup> -3<sup>rd</sup> party Defendant  
-----X

**DECISION/ORDER**

Index No.: 108557/04  
Seq. No.: 005

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
MAY 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

TP action#: 590819/04

2<sup>nd</sup> TP action#: 590885/04

3<sup>rd</sup> TP action#: 590566/05

-----X

3402 Land Acquisition, LLC,  
3402 Queens Boulevard Associates, LLC, and  
Meringoff Properties, Inc.,  
4<sup>th</sup> - 3<sup>rd</sup> party Plaintiffs

4<sup>th</sup> TP action#: 590754/05

-against-

Jerrick Contracting, Co.,  
4<sup>th</sup> - 3<sup>rd</sup> party Defendant.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

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<b>Papers</b>	<b>Numbered</b>
N/M by Defs 3402 LA, 3402 QBA, Meringoff N/M (§3212)	
w/TJD, exhs . . . . .	1
X/M by T&G (§3212) w/ASW affirm, exhs . . . . .	2
Pltff's opp w/SAI affirm, exhs . . . . .	3
T&G reply w/ASW affirm, exhs . . . . .	4
ASW Sur-affirmation in reply . . . . .	5

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***Glsche J.:***

*Upon the foregoing papers the court's decision is as follows:*

This is a wrongful death action based upon alleged violations of Labor Law §§ 200, 240 (1), 241 (6), and common law negligence brought by the Administratrix of the estate of Edgar Geovanny Dutan ("Mr. Dutan"), a laborer who died following an accident at a construction project. 3402 Land Acquisition, LLC and 3402 Boulevard Associates, LLC own the commercial building and Meringoff Properties is their property manager (collectively hereinafter, the "owners" or the "3402 defendants"). Mr. Dutan was working on the exterior of their building at the time of his accident. T&G

Contracting, Inc. ("T&G") was the contractor at the time of the accident and Jerrick Waterproofing, Inc. ("Jerrick Waterproofing") its subcontractor and Mr. Dutan's employer. Jerrick Contracting Co. ("Jerrick Contracting") is a related entity.

The 3402 defendants seek summary judgment against T&G on their common law and contractual indemnification claims in the main action. The 3402 defendants also seek summary judgment on their common law and contractual indemnification claims against defendant against Jerrick Waterproofing in the 3<sup>rd</sup> party action. The 3402 defendants have also moved for summary judgment on their common law indemnification claims against Jerrick Contracting in the 4<sup>th</sup>- 3<sup>rd</sup> party action. Neither of the Jerrick defendants oppose the owners' motion, although they have appeared in this action and engaged in discovery.

T&G has cross moved for summary judgment, dismissing plaintiff's Labor Law § 200 and common law negligence claims against it. T&G also seeks: 1) summary judgment on its own claims against Jerrick Waterproofing (3<sup>rd</sup> party action) for contractual and common law indemnification; and 2) common law indemnification by Jerrick Contracting (3<sup>rd</sup>- 3<sup>rd</sup> party action).

While T&G does not oppose the 3402 defendants' motion against it for summary judgment on their contractual indemnification claims, T&G does so without any admission or concession of negligence by it. Therefore, the owners' motion for summary judgment on their contractual indemnification claims against T&G is granted, without opposition. Having prevailed on their (stronger) contract based claim for indemnification claim against T&G, the owners' claim for common law indemnification

against T&G is hereby severed, since it is for the same relief.

In a separate action for a declaratory judgment, T&G moved for summary judgment on its claim that Admiral Insurance Company ("Admiral") and Jerrick Waterproofing had a contractual obligation to defend and indemnify T&G in this wrongful death action and that Admiral's insurance coverage of T&G was "primary." See: Tower Insurance Company of New York and T&G Contracting, Co. v. Admiral Insurance Company, Jerrick Waterproofing, Co., Inc., Merchants Mutual Insurance Co., and the Estate of Edgar Geovanny Dutan, Sup Ct., N.Y. Co. (Gische, J.) Index No. 114436/05 (the "declaratory judgment action"). The court granted T&G's motion which was only opposed by Admiral (*i.e.* Jerrick Waterproofing), and ordered that Admiral had a contractual obligation to defend and indemnify T&G in this wrongful death action. Order, Gische J., 8/14/06. The decision was rendered after the motions (at bar) were served, but before they were submitted for the court's decision.

Based upon that August 14, 2006 decision T&G now raises the argument that plaintiff is collaterally estopped from re-litigating the issue of whether T&G is entitled to summary judgment dismissing her Labor Law § 200 and common law negligence claims. This argument is raised in reply, and not in its moving papers. Plaintiff argues that this is not only a completely new theory for why T&G is entitled to summary judgment, but the arguments are being raised untimely. The court's decision in the declaratory judgment action (and, therefore T&G's arguments) were made more than 120 days after the note of issue was filed in this action.

Alternatively, plaintiff argues that the issues that were decided in the declaratory

[\* 6 ]

judgment action (whether Jerrick Waterproofing had to provide defense and indemnify T&G under their contract) are entirely different than those the court has to now decide. These arguments are addressed more fully further below in this decision.

Although some issues have been resolved or rendered moot, the following relief still remains to be decided by the court on these motions: 1) in connection with the 3402 defendants' motion, whether the owners are also entitled to contractual indemnification by Jerrick Waterproofing; and 2) whether they are entitled to common law indemnification by Jerrick Contracting. In connection with T&G's motion, the court still to decide: 1) whether it is entitled to summary judgment dismissing the plaintiff's negligence based (Labor Law § 200 and common law) claims, 2) the related issue of whether the doctrine of collateral estoppel applies; and 3) whether T&G is entitled to common law indemnification by Jerrick Contracting.

Since the 3402 defendants and T&G seek summary judgment, each bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if each meets their burden will it then shift to the party opposing summary judgment to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponents fails to make out their respective *prima facie* cases for summary judgment, then that motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986);

[ 7 ]

Ayotte v. Gervasio, 81 NY2d 1062 (1993). However, if the proponent meets its burden, then the opposition must lay bare its proof to raise real issues of fact and not just shadowy semblances of disputes.

Since T&G and plaintiff each also present legal argument about whether the doctrine of collateral estoppel is dispositive of plaintiff's negligence based claims, the court will also consider whether: 1) T&G's arguments in reply are timely, and 2) whether the doctrine of collateral estoppel applies. The court's decision follows.

### **Background**

On April 24, 2004 Mr. Dutan sustained a fatal injury while performing exterior work on a pipe scaffold at the commercial building owned by the 3402 defendants. The 3402 defendants had a construction agreement with T & G dated March of 2004 (the "construction contract"). The construction contract specifically identifies T&G as the contractor on the project. T&G subcontracted the façade work on the project to Jerrick Waterproofing as per their written subcontract of March 19, 2004 ("T&G/JW subcontract"). T&G and Jerrick Waterproofing thereafter entered into a separate insurance rider on April 15, 2004 that contains indemnification and hold harmless provisions for T&G's benefit. Jerrick Waterproofing was Mr. Dutan's employer, but both Jerrick defendants were involved with this project. Further, it appears that Jerrick Contracting was performing some of the work that falls within the scope of the T&G/JW subcontract.

In support of their motion for summary judgment on their section 200 and common law negligence claims, T&G argues that it did not direct, control or supervise

the injury resulting work. It also argues that it did not create the condition that resulted in his fatal accident, nor did it have prior notice of an unsafe or dangerous condition at the work site. T&G argues that, at most, it only maintained a general presence at the work site to enforce general safety standards, and that its retention of such general contractual inspection privileges is insufficient, as a matter of law, to impose Labor Law § 200 claim and common law negligence liability upon it.

For these arguments, T&G offers and relies upon the EBT testimony of Mr. Auda, the foreman for the Jerrick defendants. Mr. Auda testified that he was the only foreman on the project and that it was he who instructed the Jerrick Waterproofing employees (including Mr. Dutan) what to do each day when they reported to work. He also testified that Jerrick held monthly safety meetings that were mandatory and held in three languages, including Spanish, Mr. Dutan's native language. Mr. Auda testified that the meetings were held on payday and that if an employee did not get attend, s/he would not be handed a check.

T&G also relies upon the EBT testimony of Messrs Patino, Lewart and Hernandez, all of whom testified on behalf of the Jerrick defendants. Mr. Patino testified he was at the time of the accident employed by Jerrick Waterproofing, and Mr. Dutan's partner. He testified that he and other employees, (including Mr. Dutan) were instructed and supervised by Mr. Hernandez, Jerrick's supervisor and Mr. Auda, the foreman. Mr. Auda also said he was instructed by Jerry Lewart the owner of Jerrick Waterproofing, and his son Bradley Lewart, Vice President of the Jerrick defendants.

Mr. Lewart testified that Jerrick Waterproofing owned "all of the pipe scaffolds at

this job site for the exterior work.” He also testified that he had personally observed his employees “put together” these pipe scaffolds. He testified further that Mr. Auda told the Jerrick employees how to perform their work. Bradley Lewart testified that although he met with George Tsimoyanias, the owners’ building superintendent, a few times, but their discussions about the project were general. Mr. Lewart also states that Mr. Tsimoyanias did not instruct the Jerrick employees about what to do, or how to do, their jobs. Mr. Tsimoyanias has testified that it was Jerrick Waterproofing’s responsibility to provide the labor, equipment and materials for the project, including scaffolding.

In support of its legal argument, that the court’s decision in the declaratory judgment has a collateral estoppel effect, precluding the plaintiff from relitigating the issue of T&G’s negligence, T&G relies on the following findings in the court’s decision:

“Relying on the depositions in the Dutan wrongful death action, T & G has shown that the accident occurred while Dutan was working as Jerrick’s employee at the work site. It has shown that T & G did not supervise or control that work, precluding any finding of negligence on T & G’s part.”

Although only Admiral opposed that motion for summary judgment, T&G contends that the estate was a named defendant and it was Ms. Andramunio’s decision not to take a position on it.

In opposition to T&G’s cross motion, plaintiff contends that T&G had actual and constructive notice of a dangerous condition at the project because it could have and should have inspected the premises, as it had the right to do under its contract with the owners and with Jerrick Waterproofing. Thus, and it also had the authority to control the activity that brought about Mr. Dutan’s fatal accident. Plaintiff argues that T&G could have and should have insisted that proper safety procedures be followed by

Jerrick's employees because it retained those rights under its contract with the owners. Moreover, plaintiff argues that based upon the EBT testimony of Mr. Tsimoyianis on behalf of T&G, he had the right to "if he wanted to. . ." to stop any unsafe work practices by Jerrick Waterproofing at the site. In relevant part, the contract between T&G and the 3402 defendants provides as follows:

"[t]he contractor shall supervise and direct the Work, using the Contractor's best skill and attentions. The contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures . . ."  
*Article 8.2.2 of contract between T&G and owners*

Plaintiff also relies upon the EBT testimony of Mr. DeRosa on behalf of Meringoff, the property manager to support her claim that there is factual dispute about who provided the pipe scaffolding at the job site. Mr. DeRosa testified that T&G was "supposed to" provide the scaffolding for the project. He also testified, however, that "he had no idea" whether T&G hired other contractors to do the work on the façade or even whether the scaffolding he observed at the site did, in fact, belong to T&G, Jerrick or some other another entity.

### **Discussion**

#### *Labor Law § 200 claim and common law negligence*

The note of issue was filed in this case on April 11, 2006. The court did not decide the motion for summary judgment in the declaratory judgment until August 14, 2006, after the motions in this case had been made, and beyond the 120 days set forth in the CPLR for dispositive motions. T&G charted its course by litigating in two separate cases similar issues (defense and indemnification). It did not seek a stay of either case or move to amend this motion once the court rendered its decision in the

declaratory judgment. Nonetheless, it would be ridiculous for the court to sidestep the legal issue of what effect its decision in the declaratory action has on the issues raised in this case on summary judgment.

The doctrine of collateral estoppel precludes a party from relitigating an issue that was previously decided against him in a proceeding in which he had a fair opportunity to litigate the point. The two requirements for its application are that: [1] the identical issue must have been decided in the prior action and be decisive in the present action, and [2] the precluded party had a full and fair opportunity to contest the prior determination. *In re: Abady*, 22 AD3d 71 (1st dept. 2005). In general, collateral estoppel will not apply to default determinations, unless the party against whom the doctrine is invoked has actually appeared or has deliberately refused to appear in the prior action. *In re: Abady*, supra.

Although Mr. Dutan's estate is a named defendant in the declaratory judgment action, Ms. Andramunio, the legal representative of the estate, did not take a position on the motion. The claims regarding T&G's negligence were addressed head on and the court decided that T&G was not negligent triggering the obligation of Jerrick Waterproofing (and Admiral, its insurance carrier) to defend and indemnify T&G in this action. Thus, it would appear that the doctrine of collateral estoppel is applicable, and also dispositive of plaintiff's claims. The court had before it the EBT transcripts from this case to consider, but only Admiral opposed that motion.

Even were the court persuaded that the prior decision does not have the effect of collaterally estopping plaintiff from litigating her Labor Law section 200 and common law negligence claims in this wrongful death action, the court now holds that T&G has

proved its defenses and is entitled to the grant of summary judgment in its favor dismissing those claims. In this respect any issues about the timeliness of the collateral estoppel argument are irrelevant.

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., *supra*. Unlike Labor Law §§ 240 (1) and 241 (6), liability can be imposed only if the defendant has actually been negligent. A *prima facie* case requires that plaintiff prove the defendant exercised supervisory and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1<sup>st</sup> dept. 1996) *iv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1<sup>st</sup> dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 (1993). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., \_\_\_AD3d\_\_\_, 2007 NY Slip Op 04025 (1<sup>st</sup> Dept 2007); Brown v. New York City Economic Dev. Corp., 234 AD2d 33 (1<sup>st</sup> dept. 1996);

Gonzalez v. United Parcel Serv., *supra*. It must be shown that the contractor controlled the manner in which the plaintiff performed his or her work, i.e. how the injury producing work was performed. Hughes v. Tishman Construction Corp., *supra* at 2.

T&G has proved that it did not direct, control nor supervise the Jerrick employees. It has also proved that it did not create, nor did it have notice of, a dangerous condition at the project. Plaintiff has failed to raise factual disputes that would require a trial of her claims. The statements she relies upon from the depositions of various individuals are either taken out of context or, at best, only establish that T&G may have had a general involvement with the project and its progress, but insufficient, as a matter of law, to prove the level of supervisory control necessary to impose Labor Law § 200 or common law liability for negligence.

*3402 Defendants' motion for contractual indemnification*

Although this motion is submitted on default, 3402 defendants still have the initial burden of proving their prima facie case for summary judgment through admissible evidence. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Therefore, the failure (in this case by Jerrick Waterproofing) to oppose a motion for summary judgment does not immediately warrant the grant of summary judgment to the movant. Cugini v. System Lumber Co., Inc., 111 AD2d 114 (1<sup>st</sup> dept. 1985); *also* Liberty Taxi Management, Inc. v. Gincherman, 32 AD3d 276 (1<sup>st</sup> dept 2006). Thus, the court still must assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment, as a matter of law. Cugini v. System Lumber Co., Inc., *supra*.

The 3402 defendants contend they are entitled to contractual indemnification by

Jerrick Waterproofing on two separate bases. First, because the owners' contract with T&G requires that T&G hold harmless the owners and indemnify them, as does the separate insurance rider (dated April 15, 2004) to the T&G/JW subcontract ("insurance rider"). 3402 defendants' second argument is that because it is free from negligence, (only statutorily liable), and the indemnification language in these contracts (and the insurance rider) does not violate the General Obligations Law's [GOL § 5-322.1] prohibition against full indemnification of the owner/ general contractor's own negligence by a subcontractor. GOL § 5-322.1 Itri Brick & Concrete Corp. v. Aetna Casualty & Sur. Co., 89 NY2d 786 (1997).

The insurance rider provides (in relevant part) as follows:

"This agreement is being entered into by all indicated parties for any and all work done for, with, or on behalf of T&G Contracting for the period starting with 01/01/04 and running until 12/31/04.

This agreement is being provided for T&G Contracting by Jerrick Waterproofing in full agreement to the insuring and hold harmless conditions outlined below, and pertains to work performed during this indicated period of time whether via written or oral arrangements.

Prior to commencement to any work under this Contract [ \* \* \* ]<sup>1</sup> the Subcontractor shall, at its sole expense, maintain the following insurance on its own behalf, and furnish to the Owner and General Contractor, Certificates of Insurance evidencing same and reflecting the effective date of such coverage."

The hold harmless provisions provides that:

"[t]o the fullest exten[t] permitted by law, Subcontractor will indemnify and hold harmless [*Name of Contractor*] (sic) and

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<sup>1</sup>The use of "[\* \* \*]" indicates language being omitted by the court, yet found in the provision being quoted from.

Owner [ \* \* \* ] from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability (including statutory liability), arising in whole or in part and in any manner [ \* \* \* ] from the acts, omissions, breach or default of Subcontractor [ \* \* \* ] except those claims [ \* \* \* ] caused by the negligence of [Name of Contractor] Subcontractor will defend and bear all costs of defending any actions or proceedings brought against [Name of Contractor], Subcontractor will defend and bear all costs of defending any actions [ \* \* \* ] brought against [Name of Contractor] and/or Owner [ \* \* \* ] arising in whole or in part out of any employee (sic) or the Contractor of Subcontractor and shall not limited (sic) in any way by an amount or type of damage, compensations or benefits act.”

For the following reasons, both arguments by the 3402 defendants fail.

A clause in a construction subcontract that incorporates the clauses of a prime contract by reference binds a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor. Bussanich v. 310 East 55<sup>th</sup> Street Tenants, 282 AD2d 243 (1<sup>st</sup> Dept 2001). Provisions other than scope, quality, character and manner of work must be specifically incorporated to be effective against the subcontractor and they have to be clear. The provisions relied upon by the owners are general and subject to interpretation because the insurance rider (made after the T&G/JW subcontract) does not identify who the “owner” or contractor is by name and uses boilerplate language (“[name of contractor]”). There is no direct reference to the prime contract or the project where Mr. Dutan’s fatal accident occurred. Therefore, the owners will have to prove their contract and common law claims against Jerrick Waterproofing at trial and the owner’s motion for summary judgment against Jerrick Waterproofing is denied.

Nor have the owners proved that they were not negligent, but only statutorily liable. Benedetto v. Carrera Realty Corp., 32 AD3d 874 (2 Dept. 2006). While they

state this position, they have not articulated what facts or proof they are relying upon to assert this broad conclusion. Therefore their claims for common-law indemnification by either or both of the Jerrick defendants is denied as premature. The owners' motion for a conditional order of indemnification is also denied. See: Correia v. Professional Data Mgt., Inc., 259 AD2d 60, 65 (1<sup>st</sup> Dept 1999); Sledz v. 333 E. 68 St. Corp., 254 AD2d 196 (1<sup>st</sup> Dept 1998); Odom v. Bridge View II Company, 291 AD2d 280 (1<sup>st</sup> Dept. 2002).

### **Conclusion**

The motion by 3402 Land Acquisition, LLC, 3402 Queens Boulevard Associates, LLC, and Meringoff Properties, Inc. for summary judgment on its contractual indemnification claims against co-defendant T&G Contracting, Inc., is granted on consent. However, the remaining relief in that motion, seeking summary judgment on its its contractual and common law indemnification claims against Jerrick Waterproofing, Inc. (3<sup>rd</sup> party action) and Jerrick Contracting, Co. (4th-3rd party action) is denied.


T&G's cross motion for summary judgment on its motion for contractual indemnification by Jerrick Waterproofing was the subject of the court's decision in a separate action for declaratory judgment. Any further relief against either of the Jerrick defendants is denied, without prejudice, since T&G raised no new issues in connection with this motion. T&G's cross motion dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted. The Labor Law § 200 and common law negligence based claims are hereby dismissed.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

Plaintiff shall serve a copy of this Order on the Office of Trial Support so that it may scheduled and assigned for Trial.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 22, 2007

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
MAY 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE