

**Samuel v Tully Posillico Joint Venture**

2015 NY Slip Op 30899(U)

January 20, 2015

Supreme Court, Queens County

Docket Number: 25111/2011

Judge: Carmen R. Velasquez

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38  
Justice

ASHLEY G. SAMUEL and SHARON SAMUEL, x

Index  
Number 25111 2011

Plaintiffs,

-against-

Motion  
Dates June 16, 2014

TULLY POSILICO JOINT VENTURE, TULLY  
CONSTRUCTION CO. INC and POSILICO CIVIL  
INC.,

Motion Seq. Nos. 2-4

Defendants.

X  
TULLY POSILICO JOINT VENTURE, TULLY  
CONSTRUCTION CO. INC and POSILICO CIVIL  
INC.,

Third-Party Plaintiffs,

-against-

FALCO CONSTRUCTION CORP.

Third-Party Defendants.

X

The following papers numbered 1 to 30 read on these separate motions by defendants/third-party plaintiffs Tully Construction Co. Inc./Posillico Civil, Inc. JV i/s/h/a Tully Posillico Joint Venture, Tully Construction Co. Inc. and Posillico Civil, Inc. (Tully/Posillico) pursuant to CPLR 3212 for summary judgment in their favor dismissing plaintiffs' complaint against them and for summary judgment in their favor on their third-party claim for contractual indemnification against third-party defendant Falco Construction Corp. (Falco) and by third-party defendant Falco for summary judgment in its favor dismissing defendants/third-party plaintiffs Tully/Posillico's third-party complaint as there is no legal basis to seek common-law contribution or indemnification from third-party defendant Falco; for summary judgment in third-party defendant Falco's favor dismissing defendants/third-party plaintiffs Tully/Posillico's third-party claim for contractual

indemnification based upon the anti-subrogation rule, or, in the alternative, to render summary judgment for movant to the extent of the applicable policies; and for summary judgment in third-party defendant Falco's favor as there are no disputed material facts that would provide a basis to find that third-party defendant Falco failed to procure insurance as alleged in the third-party complaint.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits .....	1-14
Answering Affidavits - Exhibits .....	15-23
Reply Affidavits .....	24-30

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Ashley G. Samuel on August 1, 2011, in the course of his employment as a dock-builder with third-party defendant Falco, on a construction project involving the replacement of bridges on the Shore (Belt) Parkway in Kings and Queens Counties in New York. Nonparty New York City Department of Transportation hired defendants/third-party plaintiffs Tully/Posillico as the general contractor for the project. Defendants/third-party plaintiffs Tully/Posillico entered into a subcontract with plaintiff Ashley G. Samuel's employer, third-party defendant Falco, to perform the underpinning work for the project. The terms of that subcontract require third-party defendant Falco to indemnify and save harmless defendants/third-party plaintiffs Tully/Posillico from "all damages or liability to which [defendants/third-party plaintiffs Tully/Posillico] . . . may be subjected by reason of injury . . . to the person or property of others resulting from the performance of the work of [third-party defendant Falco]."

On the date of the accident, plaintiff Ashley G. Samuel was acting as a monk on a pile driving crew. The crew was operating a Manitowoc Model 2900, which is equipped with a boom from which two cables are suspended: the No. 1 cable, which is used to pick up the piles, and the No. 2 cable, which lifts and lowers the hammer that drives piles into the ground. Each cable is raised and lowered with the use of controls operated by the operating engineer, who sits in a cab located on the base of the pile driver. Each cable wraps around its own drum located on the base next to the cab. The pile driving crew communicates through hand signals. The operating engineer (operator) raises and lowers the cables in response to hand signals from the foreman, who is positioned on the ground in front of the

pile driver. A platform known as an A-frame is located in front of the boom. There are hydraulic controls located on the A-frame that are used to maneuver the leads on the pile driver. These controls are operated by the monk in response to signals from the foreman to guide the pile into alignment before the operator lowers the hammer to drive the pile into the ground. As the cables are raised in the ordinary course of operations, the cables spool around their respective drums. If a cable overlaps or tangles, it must be straightened out before lifting can begin.

Plaintiff Ashley G. Samuel testified as follows: On the date of the accident, the No. 2 cable repeatedly became loose on the drum when the hammer was lowered causing the cable to become tangled. This tangling happened on just this and not other pile drivers, and had been happening for days. The site foreman, John Staria, was acting as signalman, and had instructed him to straighten the cable after each pile was driven and before the hammer was raised. On the subject date, he saw the No. 2 cable was tangled and went to fix it. The foreman on the ground, John Staria, and the operator, Michael Bayon saw him get into position by the drum. He signaled to the operator, Michael Bayon, to lower the hammer to give him some slack to untangle the cable, and Michael Bayon did. As he was adjusting the tangled No. 2 cable, he felt the cable tighten up because the operator had raised the hammer, and his left hand, which was between the cable and the drum, was injured.

The foreman, John Staria, testified as follows: The morning of the accident, they were driving piles. Plaintiff Ashley G. Samuel was the monk on the job. The monk stands on the A-frame where the spotter area is located. Just prior to the subject accident a City inspector had told him that a pile they were driving was done, and so he signaled the operator, Michael Bayon, to stop the hammer. He then gave the operator, Michael Bayon, the signal to raise the hammer and heard plaintiff Ashley G. Samuel yelling. He told the operator to put the hammer down, which gave some slack to the cables. He then ran up on the crane back where plaintiff Ashley G. Samuel was and observed Ashley G. Samuel holding his hand.

The operator, Michael Bayon testified as follows: The cable had tangled earlier the subject day. The procedure was for plaintiff Ashley G. Samuel to signal him when he's going to fix a tangled cable. When done, plaintiff Ashley G. Samuel would then signal him that the cable was untangled and that it was all right to raise the hammer. They had just driven a pile and Michael Bayon was watching the foreman, John Staria, who signaled him to raise the hammer. He did and heard yelling so he released the brake which released the cable. He got out of the cab and helped plaintiff Ashley G. Samuel. Prior to the accident, plaintiff Ashley G. Samuel did not signal to him that he was going to fix the cable. He last saw plaintiff Ashley G. Samuel just moments before the accident on the spotter.

A report filed after the incident indicated that there was miscommunication among the plaintiff Ashley G. Samuel, the foreman and the operator of the pile driver.

Plaintiff Ashley G. Samuel, and his wife, plaintiff Sharon Samuel, suing derivatively, commenced this action against defendants/third-party plaintiffs Tully/Posillico alleging violations of Labor Law §§ 240 (1), 241 (6), and § 200, as well as, for common-law negligence.

Defendants/third-party plaintiffs Tully/Posillico now move for summary judgment in their favor dismissing plaintiffs' complaint and for summary judgment in their favor and against third-party defendant Falco on their third-party claim for contractual indemnification. Third-party defendant Falco moves for summary judgment in its favor dismissing the third-party complaint of defendants/third-party plaintiffs Tully/Posillico against it or to limit the third-party claim for contractual indemnification to the extent of the applicable insurance policies.

Although not made returnable by April 17, 2014, as per the terms of the parties' so-ordered stipulation dated December 4, 2013, the Court will entertain third-party defendant Falco's late motion for summary judgment (Seq. No. 4) along with its timely amended motion (Seq. No. 5) which seeks the same relief.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) Once this showing is made, however, the burden shifts to the opposing party to produce contrary evidence, in admissible form, sufficient to require a trial of material factual issues. (*See Kaufman v Silver*, 90 NY2d 204 [1997]; *see also Alvarez v Prospect Hosp.*, *supra*; *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [1991].)

Labor Law § 240 (1) imposes a nondelegable duty upon owners and contractors to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute. (*See Soto v J. Crew Inc.*, 21 NY3d 562 [2013]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Corchado v 5030 Broadway Props., LLC*, 103 AD3d 768 [2013].) To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries. (*See Blake v Neighborhood Hous.*

*Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]; *see also Corchado v 5030 Broadway Props., LLC, supra*; *Wahab v Agris & Brenner, LLC*, 102 AD3d 672 [2013].)

Defendants/third-party plaintiffs Tully/Posillico established their entitlement to judgment as a matter of law dismissing plaintiffs' Labor Law § 240 (1) cause of action by submitting competent evidence demonstrating that plaintiff Ashley G. Samuel was not exposed to an elevation-related hazard as contemplated by Labor Law § 240 (1). Plaintiffs did not submit any opposition to this branch of defendants/third-party plaintiffs Tully/Posillico's motion.

Accordingly, that branch of the motion of defendants/third-party plaintiffs Tully/Posillico seeking summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action is granted.

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Miranda v City of New York*, 281 AD2d 403 [2001].) In order to support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR 23-1.1 *et seq.*) that is both concrete and applicable given the circumstances surrounding the accident. (*See Rizzuto v L.A. Wenger Contracting Co., Inc., supra.*) In their bill of particulars and supplemental bill of particulars, plaintiffs allege violations of the following Industrial Code Sections: 23-1.5(a), (b) and (c); 23-1.7; 23-1.8; 23-2.1; 23-5; 23-6; 23-7; 23-8; 23-9.1; 23-9.2 (a), (b)(1) and (2); 23-9.3; 23-9.4; 23-9.5; 23-9.6; 23-9.7; 23-9.8; 23-9.9; 23-9.10; and 23-9.11, as well as, Article 1926 of OSHA.

Defendants/third-party plaintiffs Tully/Posillico, here, failed to meet their initial burden of establishing their *prima facie* entitlement to judgment as a matter of law dismissing plaintiffs' Labor Law 241(6) cause of action. One of the Industrial Code sections which plaintiffs rely upon in support of this cause of action is Industrial Code Section 23-9.10 (b). Section 23-9.10, "Pile Drivers," provides in relevant part: "(b) Inspection. All pile driving equipment shall be inspected daily before the start of work and every defect or unsafe condition shall be immediately corrected before pile driving operations are begun." Contrary to the assertion of defendants/third-party plaintiffs Tully/Posillico, this provision is sufficiently concrete to support a Labor Law § 241 (6) cause of action. In addition, the monthly inspection reports upon which defendants/third-party plaintiffs Tully/Posillico rely are insufficient to establish compliance with this regulation which required the subject pile

driving equipment to be inspected and every defect and unsafe condition to be immediately corrected before pile driving operations began on the subject date. Moreover, plaintiffs, in opposition to this branch of the motion of defendants/third-party plaintiffs Tully/Posillico raise triable issues of fact, including whether the excess cable and its repeated tangling constituted a “defect or unsafe condition” which was to “be immediately corrected before pile driving operations [were] begun,” based on the affidavit of their expert, which conflicts with the affidavit of defendants/third-party plaintiffs Tully/Posillico’s expert. (12 NYCRR 23-9.10 [b].) Another issue of fact exists concerning whether the alleged violation of Industrial Code Section 23-9.10 (b) was a proximate cause of plaintiff Ashley G. Samuel’s injuries.

Plaintiffs have abandoned their allegations of violations of the other sections of the Industrial Code and OSHA by failing to dispute defendants/third-party plaintiffs Tully/Posillico’s showing that they are inapplicable. (*See VanName v Rochester Gas & Electric, Inc.*, 111 AD3d 1331 [2013].)

Accordingly, the branch of the motion of defendants/third-party plaintiffs Tully/Posillico seeking summary judgment dismissing plaintiffs’ cause of action based upon violation of Labor Law § 241 (6) is denied to the extent it is based on a violation of Industrial Code Section 23-9.10 (b).

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work. (*See Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Yong Ju Kim v Herbert Constr. Co., Inc.*, 275 AD2d 709 [2000].) Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 may be imposed on those who exercise control or supervision over the means and methods that the plaintiff employs in his or her work (*see Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Cabrera v Revere Condominium*, 91 AD3d 695 [2012]), or who have actual or constructive notice of an unsafe condition that causes an accident. (*See Gray v City of New York*, 87 AD3d 679 [2011].) General supervisory authority to oversee the progress of the work is insufficient to impose liability. (*See Cabrera v Revere Condominium*, *supra*.)

On this issue, defendants/third-party plaintiffs Tully/Posillico have established entitlement to judgment as a matter of law by demonstrating that they did not supervise plaintiff Ashley G. Samuel’s work, or control the manner or method in which he performed his duties, and that they were not aware of the alleged unsafe condition. (*See Seepersaud v City of New York*, 38 AD3d 753 [2007]; *see also Lopez v Port Auth. of New York & New*

*Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappinger Falls, LP*, 5 AD3d 648 [2004].) Plaintiffs, in opposition, fail to demonstrate the existence of a triable issue of fact.

Accordingly, that branch of the motion of defendants/third-party plaintiffs Tully/Posillico seeking summary judgment dismissing plaintiffs' causes of action based upon violation of Labor Law § 200 and common-law negligence is granted.

The branches of third-party defendant Falco's motions to dismiss the causes of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint seeking common-law indemnification and contribution are granted.

Third-party defendant Falco established its prima facie entitlement to judgment as a matter of law dismissing those causes of action by establishing that plaintiff Ashley G. Samuel's alleged injury was not a "grave injury" as defined in Workers' Compensation Law § 11. In opposition, defendants/third-party plaintiffs Tully/Posillico failed to raise a triable issue of fact by demonstrating that plaintiff Ashley G. Samuel sustained a "grave injury." In the absence of a "grave injury," the causes of action seeking common-law indemnification and contribution are dismissed. (*See Workers' Compensation Law § 11; see also Storms v Dominican College of Blauvelt*, 308 AD2d 575 [2003]; *Schuler v Kings Plaza Shopping Center & Marina, Inc.*, 294 AD2d 556 [2002].)

The branches of the motions of third-party defendant Falco to dismiss the cause of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint for failure to procure insurance are denied.

Third-party defendant Falco failed to meet its initial burden of establishing through competent evidence that it obtained the requisite insurance under its subcontract with defendants/third-party plaintiffs Tully/Posillico. While third-party defendant Falco claims that it obtained primary and excess insurance for the project naming Tully as an additional insured and that it annexed certified copies of both policies to its motion papers, only one policy of insurance was so annexed. The policy annexed is from Valiant Insurance Company, a subsidiary of First Mercury Insurance Company, and names defendants/third-party plaintiffs Tully/Posillico as additional insureds under that policy.<sup>1</sup> Moreover, defendants/third-party plaintiffs Tully/Posillico, in opposition, raise a triable issue of fact as to whether third-party defendant Falco obtained the requisite type and amount of insurance in accordance with the terms of the subject subcontract.

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<sup>1</sup>First Mercury Insurance Company accepted tender and agreed to defend and indemnify defendants/third-party plaintiffs Tully/Posillico in an amount up to \$1,000,000 based on the policy limit of \$1,000,000 per occurrence.

The branches of the motions of third-party defendant Falco for summary judgment dismissing the cause of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint for contractual indemnification are denied.

Contrary to defendant Falco's assertion, an indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]; *see also Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641 [2006]; *Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508 [2005]), and its liability is merely imputed or vicarious. (*See Lesisz v Salvation Army*, 40 AD3d 1050 [2007].) Since plaintiffs' Labor Law §240, §200 and common-law negligence causes of action have been dismissed herein, and the only cause of action remaining against defendants/third-party plaintiffs Tully/Posillico is the one predicated on a violation of Labor Law § 241 (6), which is not based on any active negligence on the part of said parties, the subject indemnification clause may be enforced.

Third-party defendant Falco also asserts that the third-party claim for contractual indemnification is barred by the anti-subrogation rule, which provides that an insurer "has no right of subrogation against its own insured for a claim arising from the very same risk for which the insured was covered." (*North Star Reinsurance Corp. v Continental Insurance Co.*, 82 NY2d 281, 294 [1993]; *see also Motors Insurance Corp. v Africk*, 55 AD3d 571 [2008]; *Lodovichetti v Baez*, 31 Ad3d 718 [2006].) As noted herein, however, triable issues of fact exist regarding whether third-party defendant Falco obtained the requisite type and amount of insurance in accordance with the terms of the subject subcontract with defendants/third-party plaintiffs Tully/Posillico. In addition, the anti-subrogation rule would apply only to the policy limits of the general liability insurance policies at issue and claims for indemnification beyond the limits of common insurance policies would not be barred. (*See ELRAC, Inc. v Ward*, 96 NY2d 58, 78 [2001]; *see also Porter v Annabi*, 65 AD3d 1322 [2009]; *Lodovichetti v Baez, supra.*)

In light of the foregoing triable issues, the branch of the motion of defendants/third-party plaintiffs Tully/Posillico for summary judgment in their favor and against third-party defendant Falco on their third-party claim for contractual indemnification is also denied.

Accordingly, the branch of the motion by defendants/third-party plaintiffs Tully/Posillico for summary judgment dismissing the Labor Law § 240 (1) cause of action is granted, without opposition, and the cause of action pursuant to Labor Law § 240(1) is dismissed.

The branch of the motion by defendants/third-party plaintiffs Tully/Posillico for summary judgment dismissing the cause of action based upon violation of Labor Law § 241

(6) is denied to the extent such claim is based upon a violation of Industrial Code Section 23-9.10 (b).

The branch of the motion by defendants/third-party plaintiffs Tully/Posillico for summary judgment dismissing the causes of action based upon violation of Labor Law § 200 and common-law negligence is granted, and the causes of action pursuant to Labor Law § 200 and common-law negligence are dismissed.

The branches of the motions by third-party defendant Falco to dismiss the causes of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint for common-law indemnification and contribution are granted.

The branches of the motions by third-party defendant Falco to dismiss the cause of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint for failure to procure insurance are denied.

The branches of the motions by third-party defendant Falco for summary judgment dismissing the cause of action in defendants/third-party plaintiffs Tully/Posillico's third-party complaint for contractual indemnification are denied.

The branch of the motion of defendants/third-party plaintiffs Tully/Posillico for summary judgment in their favor and against third-party defendant Falco on their third-party claim for contractual indemnification is denied.

Dated: January 20, 2015

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HON. CARMEN R. VELASQUEZ, J.S.C.