

**Cabrera v Borinquen Ct. Assoc., L.P.**

2017 NY Slip Op 32636(U)

November 3, 2017

Supreme Court, Bronx County

Docket Number: 301170/14

Judge: Julia I. Rodriguez

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

-----X **Index No. 301170/14**

Cesar Cabrera,  
Plaintiff,

-against-

**DECISION & ORDER**

Borinquen Court Associates, L.P. et al.,  
  
Defendants.

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

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Galaxy G.C. Group, LLC s/h/a Galaxy  
General Contracting Corp.,  
Third-Party Plaintiff,

-against-

SC Prime Energy, Ltd. And  
Prime Energy Group, Ltd.,  
Third-Party Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion for partial summary judgment, defendants' cross-motion for summary judgment, third-party plaintiffs' motion for summary judgment, and third-party defendants' motion for summary judgment.

<u>Papers Submitted</u>	<u>Numbered</u>
<b>Pls. Notice of Motion, Affirmation &amp; Exhibits</b>	<b>1</b>
<b>Affirmation in Opposition &amp; Exhibits</b>	<b>2</b>
<b>Affirmation in Opposition</b>	<b>3</b>
<b>Pls. Reply Affirmations</b>	<b>4,5</b>
<b>Galaxy Notice of Cross-Motion, Affirmation &amp; Exhibits</b>	<b>6</b>
<b>Memorandum of Law</b>	<b>7</b>
<b>Pls. Affirmation in Opposition</b>	<b>8</b>
<b>Borkowski Affidavit in Opposition &amp; in Support of Prime Energy's's Cross-Motion</b>	<b>9</b>
<b>Galaxy Reply Affirmation</b>	<b>10</b>
<b>Prime Energy's Notice of Cross-Motion</b>	<b>11</b>
<b>Prime Energy's Notice of Motion, Affirmation &amp; Exhibits</b>	<b>12</b>
<b>Prime Energy's Affirmation in Support/in Reply to Plaintiff's Opposition</b>	<b>13</b>
<b>Plaintiff's Affirmation in Opposition</b>	<b>14</b>
<b>Galaxy Affirmation in Opposition</b>	<b>15</b>

In the instant action, plaintiff alleges he was injured when a fence fell on him at a construction site where he was working. The complaint alleges causes of action for common law negligence and for violations of Labor Law §§200, 240(1) and 241(6). In the third-party complaint against SC Prime Energy Ltd (“SC Prime”) and Prime Energy Group, Ltd. (“Prime Energy”), Galaxy G.C. Group, LLC seeks indemnity and/or contribution in connection with plaintiff’s action.

Plaintiff now moves for partial summary judgment, pursuant to CPLR 3212, as to liability with respect to his Labor Law §240(1) claims.

Defendants Borinquen Court Associates, L.P., West Side Federation For Senior And Supportive Housing, Inc. And Galaxy G.C. Group, LLC s/h/a Galaxy General Contracting Corp. (“Galaxy”) cross-move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff’s Labor Law §240(1) claim.

Third-Party Defendant SC Prime now moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff’s Labor Law §240(1) claim, and all claims asserted against SC Prime for contractual indemnification, common-law indemnification, contribution, apportionment and breach of contract.

Defendant/Third-Party Plaintiff Galaxy now moves for summary judgment, pursuant to CPLR 3212, in its favor, on its cross-claims and third-party complaint claims against SC Prime and Prime Energy for contractual indemnification and defense costs.

Third-Party Defendant Prime Energy cross-moves for summary judgment, pursuant to CPLR 3212, dismissing all claims and cross-claims asserted against it in the third-party complaint.

The undisputed facts are as follows: On December 20, 2013, plaintiff was struck by a piece of temporary chain-link fencing at a construction site while working for his employer, SC Prime or Prime Energy.<sup>1</sup> The construction project involved the renovation of a building.

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<sup>1</sup>SC Prime and Prime Energy share common ownership and do business out of the same location. Both companies perform heating, ventilation and air-conditioning work (HVAC). One company employs union workers and the other company employs nonunion employees. It is unclear whether plaintiff was working for SC Prime or Prime Energy at the time of the accident.

Borinquen Court Associates, L.P. (“Borinquen”) owned the property. Galaxy was the general contractor for the project. Galaxy contracted with Prime Energy<sup>2</sup> to perform HVAC work at the site. Immediately prior to the accident, plaintiff had exited the building and was walking to a parking lot to get supplies/tools out of a vehicle. After he took a few steps, he was struck by a piece of temporary chain-link fencing to his right. The fencing was eight feet high and bordered a temporary pathway to and from the building. The fencing also enclosed an area for the storage of equipment and materials. Each section of fencing was normally tied to posts on both sides at three places -- the top, middle and bottom. On the date of the accident, prior to the accident, a section of the fencing had been untied at one end by a Galaxy employee to allow access to the storage area. It remained untied until plaintiff’s accident. The piece of fencing that struck plaintiff weighed approximately 80 pounds. Galaxy installed, maintained, and inspected the fencing on a daily basis. Neither SC Prime nor Prime Energy had any involvement with the erection, maintenance or inspection of the fence.

At his deposition, plaintiff testified that a “door, pretty big in metal, like a fabric metal, metal fabric” fell on top of him and he ended upon on the ground with the door on top of him. There were no witnesses to the accident. At his deposition, John Iliakostas, a Galaxy supervisor who responded to the scene, testified that plaintiff told him that “the fence hit him” and that “the wind came by and must have pushed it.” Iliakostas also testified that the fence “didn’t really fall” but it “kind of leaned over.” According to Iliakostas, “it was windy that day and the fence was still tied up.” Iliakostas further testified that the fence “didn’t completely fall on top of the guy. It actually just moved over while he was walking by.”

The subcontract for the HVAC work includes an indemnification provision which provides, in part, that “Subcontractor agrees to defend, indemnify . . . the Contractor and Owner,

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A Capital One direct deposit information sheet for plaintiff indicates a “Company Name” of Shlomo Chacm, an owner of both companies, as the payor.

<sup>2</sup>The subcontract for the HVAC work is between Galaxy and Prime Energy Work Ltd. Shlomo Chacm, President of both SC Prime and Prime Energy, testified at his deposition that he signed the contract on behalf of both SC Prime and Prime Energy.

from and against any claim . . . or liability . . . attributable to bodily injury . . . caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor.” A separate Indemnification Agreement attached to a Rider to the subcontract provides, in part, that the “Subcontractors shall and will indemnify . . . the Contractor, the Owner . . . for and against any and all loss . . . and liability by reason of injury . . . to persons . . . caused solely by any act, occurrence, or sole neglect of the Subcontractor.” This Agreement also provides that the “Subcontractor waives any right which may accrue to it to claim indemnity and/or contribution from contractor, the Owner . . . for or on account of any and all loss . . . and liability which may be incurred by the Subcontractor by reason of injury to . . . persons whomsoever including the Subcontractor’s employees and the Contractor’s employees.”

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“Not every worker who falls at a construction site and not every object that falls on a worker gives rise to the extraordinary protection of Labor Law §240(1).” *See Narducci v. Manhasset Bay Associates*, 91 N.Y.2d 259, 267, 727 N.Y.S.2d 37 (2001). The special hazards to which §240(1) applies are limited to such specific gravity related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured for the purpose of the undertaking. *See Fabrizi v. 1095 Ave. of the Ams., LLC*, 22 N.Y.3d 658, 663, 985 N.Y.S.2d 416 (2014); *Narducci, supra*; *Ross v. Curtis-Palmer Hydra Electric Company*, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49 (1993). In order to prevail on a Labor Law §240(1) claim, a plaintiff must show that the object fell while being hoisted or secured because of the absence or inadequacy of a safety device of the kind enumerated in the statute. *See Narducci, supra*, at 268.

Here, the wire tie that attached the fencing to its post is not a safety device of the kind enumerated in §240(1). Whichever version of the accident you credit, plaintiff’s accident is the type of ordinary peril a construction worker is exposed to at a construction site and not an elevation related risk subject to the safeguards prescribed by Labor Law §240(1). *See Misseritti v. Mark Four Construction Company*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995).

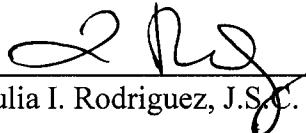
Based upon the plain language of the indemnification provisions, since neither SC Prime nor Prime Energy had any involvement in the erection, maintenance or inspection of the subject

fencing, it is not obligated to defend or indemnify any of the defendants with respect to plaintiff's lawsuit.<sup>3</sup> Also, as it is clear that neither SC Prime nor Prime Energy was negligent, it cannot be held liable under theories of common law indemnification, contribution or apportionment. Further, it is undisputed that plaintiff did not sustain a "grave injury" within the meaning of the Workers' Compensation Law. As such, his employer may not be held liable for contribution or indemnity to third parties under Workers' Compensation Law §11.

However, neither SC Prime nor Prime Energy has established that it procured the requisite insurance under the subcontract with Galaxy naming Galaxy and Borinquen as additional insureds.

Based upon the foregoing, plaintiff's motion for partial summary judgment, pursuant to CPLR 3212, on its Labor Law §240(1) is **denied**. The cross-motion of defendants Borinquen Court Associates, L.P., West Side Federation For Senior and Supportive Housing, Inc. and Galaxy G.C. Group, LLC s/h/a Galaxy General Contracting Corp. for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's Labor Law §240(1) claim, is **granted**. Third-party defendant SC Prime's motion for summary judgment, pursuant to CPLR 3212, is **granted solely to the extent that** plaintiff's Labor Law §240(1) and all claims and cross-claims asserted against it for contractual and/or common law indemnification, contribution and apportionment are hereby dismissed. Defendant/third-party plaintiff Galaxy's motion for summary judgment, pursuant to CPLR 3212, in its favor, on its cross-claims and third-party complaint claims against SC Prime and Prime Energy for contractual indemnification and defense costs is **denied**. Third-party defendant Prime Energy's cross-motion for summary judgment, pursuant to CPLR 3212, is **granted to the extent that** all claims and cross-claims asserted against it for contractual and/or common law indemnification, contribution and apportionment are hereby dismissed.

Dated: Bronx, New York  
November 3, 2017

  
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Hon. Julia I. Rodriguez, J.S.C.

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<sup>3</sup>The Court notes that defendant Borinquen Court Housing Development Fund is not a party to the subcontract.