

**Ortega v Trinity Hudson Holdings LLC**

2018 NY Slip Op 33361(U)

November 7, 2018

Supreme Court, Bronx County

Docket Number: 303059/2015

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X

JOAO ORTEGA,

Plaintiff,

-against-

TRINITY HUDSON HOLDINGS LLC, TST 375  
HUDSON LLC, TISHMAN SPEYER HUDSON  
LIMITED PARTNERSHIP, TISHMAN SPEYER  
PROPERTIES LP,

Defendants

Index No: 303059/2015

**DECISION AND ORDER**

**Present:**

**HON. KENNETH L. THOMPSON, JR.**

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TRINITY HUDSON HOLDINGS LLC,

Thirty-Party Plaintiff,

-against-

WESTERN WATERPROOFING COMPANY, INC.,

Third-Party Defendant

**Third-Party Index: 83866/2016**  
**(Action discontinued 6/27/2017)**

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\_\_\_\_\_ X

The following papers numbered 1 to 5 read on this **motion for summary judgment**

No	On Calendar of <b>September 7, 2018</b>	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	-----	<u>1, 4</u>
Answering Affidavit and Exhibits-----	-----	<u>3, 5</u>
Replying Affidavit and Exhibits-----	-----	_____
Affidavit-----	-----	_____
Pleadings -- Exhibit-----	-----	_____
Memorandum of Law-----	-----	<u>2</u>
Stipulation -- Referee's Report --Minutes-----	-----	_____
Filed papers-----	-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on liability for his Labor Law 240(1) cause of action. Defendants, Trinity Hudson Holdings LLC, (Trinity), TST 375 Hudson LLC, (TST), and Tishman Speyer Properties, LP, (Tishman), move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The motions are hereby consolidated for purposes of decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff while working at a construction site. TST is the owner and ground lessee of the subject property, Tishman was the managing agent that contracted with plaintiff's employer, former third-party defendant, Western Waterproofing Company, Inc. (Western),<sup>1</sup> to perform façade repairs.

#### LABOR LAW 240(1)

Labor Law § 240 (1) provides in relevant part:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

At the time of plaintiff's injuries, plaintiff was installing tiebacks to a scaffold that had already been erected. At that time the scaffold toppled over and crushed plaintiff's hand. The scaffold had 2,000-2,400 pounds of counterweights on the lower level of the scaffold. The counterweights keep the scaffold balanced. Plaintiff was not atop the scaffold at the time the scaffold toppled.

The controlling question...[is] whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident. We noted in *Blake* that "[e]ven when a worker is not 'recalcitrant' . . . there can be no liability under section 240 (1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident" (1 NY3d at 290).

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<sup>1</sup> The third-party action against Western was discontinued by stipulation.

*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39–40 [2004]).

There is some evidence that the scaffold tipped as a result of plaintiff over tightening of the tieback. (The Osha Report and expert report of Bernard P. Lorenz, P.E.). Lorenz opined that if the scaffold were static just before it toppled, it would not tip upward due to the “law of physics, which states that a body at rest remains at rest unless acted upon by an external force.” (Lorenz report par. 7). With respect to the OSHA report “in opposing a motion for summary judgment, hearsay evidence may be utilized as long as it is not the only evidence submitted (*Koren v Weihs*, 201 AD2d 268, 269).” (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1<sup>st</sup> Dept 1999]).

However, Errol McBean, (McBean), testified that at the time the scaffold collapsed there was slack in the tieback in plaintiff’s hand and plaintiff had not yet tied the cable to the exterior of the building. (McBean deposition, p. 33). McBean was near plaintiff and assisting with the tiebacks when the scaffold collapsed. Plaintiff testified that he did not know what caused the scaffold to tip over. (deposition, p. 46).

“It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination.” (*Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]). There are fact issues, inter alia, as to how this accident happened, and whether plaintiff was the sole proximate cause of this accident.

Accordingly, the plaintiff’s motion and the branch of the defendants’ motion that seeks dismissal of plaintiff’s Labor Law 240(1) claim are denied.

## LABOR LAW 200 AND COMMON LAW NEGLIGENCE

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.

*(Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 877*

[1993]) (citations omitted).

Plaintiff testified that no other person gave him any supervision other than the foreman from Western Chris Freij. (p. 113).

Accordingly, that branch of defendants' motion that seeks to dismiss the Labor Law 200 and common law negligence causes of action is granted.

## LABOR LAW 241(6)

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

N.Y. Lab. Law § 241(6) (McKinney)

With respect to the Industrial Code Section 23-1.5(c)(1) and 23-1.5(c)(2) both are relevant to the facts advanced by plaintiff. With respect to 23-5. (h), there

is an issue of fact as to whether the actions of plaintiff were under supervision as required by the rule, as the foreman, Chris Freij was not present when the scaffold toppled. Defendants did not move for the dismissal of 23-5.1(d).

There is no opposition to the dismissal of the remaining provisions of the Industrial Code or the OSHA Code, ANSI code, or the Administrative Code provisions cited in the plaintiff's bill of particulars.

### CONCLUSION

Plaintiff's motion is denied. That branch of defendants' motion that seeks dismissal of plaintiff's labor law 240(1) claim is denied. Defendants' motion is granted to the extent that the Labor Law 200 and the common law negligence action are dismissed. That branch of defendants' motion that seeks dismissal of plaintiff's Labor Law 241(6) cause of action is denied with respect to Section 23-1.5(c)(1), 23-1.5(c)(2), 23-5. (h), and 23-5.1(d). The remaining sections of the industrial code listed in plaintiff's paragraph 5 of the bill of particulars are dismissed. The OSHA code, ANSI code and Administrative Code sections in paragraph 5 of the bill of particulars are hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 11/7/2018

  
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KENNETH L. THOMPSON JR. J.S.C.