

**Tyrrell v MSOS Kwon, Inc.**

2019 NY Slip Op 32719(U)

August 20, 2019

Supreme Court, Suffolk County

Docket Number: 007251/2014

Judge: John H. Rouse

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INDEX NO. 007251/2014

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 12/03/2018  
ADJ. DATE: 06/19/2019  
Mot. Seq. 003-MG

MOTION DATE: 12/03/2018  
ADJ. DATE: 06/19/2019  
Mot. Seq. 004-MG

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ROBERT TYRRELL,

Plaintiff

-against-

**DECISION & ORDER**

MSOS KWON, INC., SINDROME CONSTRUCTION, LLC;  
SINDROME CONSTRUCTION, INC.; and BUILT RITE  
INTERIOR CONSTRUCTION, INC.

Defendants

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**TO:**

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*On February 1, 2019, after Plaintiff's counsel Anthony Gulotta, Esq. submitted this motion for partial summary judgment, Anthony Gulotta, Esq. died. It is with the greatest respect and thanks*

*to Anthony Gulotta, Esq. that this court takes notice of Anthony Gulotta, Esq. 's lifetime of service to the legal community and many others.*

\* \* \*

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff for summary judgment dated October 11, 2018; Affirmation of Anthony J. Gulotta, Esq. affirmed on October 11, 2018 with Exhibits A-G; (2) Affirmation in Support by Anthony J. Gulotta, Esq. affirmed on October 11, 2018 with Exhibits A-K attached thereto; (3) Notice of Cross Motion by Defendant Sindrome Construction, Inc. for conditional contractual indemnification by MSOS Kwon, Inc. if Sindrome Construction, Inc. is found liable for damages in favor of Plaintiff; and for Dismissal of the Plaintiff's Complaint which seek recovery based upon theories of common law negligence and alleged violation of Labor Law § 200; (4) Affirmation in Opposition to Plaintiff's Motion for Summary Judgment for Defendants Sindrome Construction, LLC; Sindrome Construction, Inc. by Gayle A. Rosen, Esq. affirmed on January 2, 2019; (5) Affirmation in Opposition to Defendant MSOS Kwon, Inc.'s cross motion for Summary Judgment for Defendants Sindrome Construction, LLC; Sindrome Construction, Inc. by Gayle A. Rosen, Esq. affirmed on January 2, 2019; (6) Affirmation in Reply and Further Support of MOSOS KWON, INC.'s cross motion by Carlo Sciara, Esq. Affirmed on January 8, 2019; it is:

**ORDERED** that in conformity with *Judiciary Law § 475* and *Littleton v Amberland Owners, Inc.*, 126 A.D.3d 857 (2<sup>nd</sup> Dept. 2015) the Estate of Anthony Gulotta shall have a charging lien upon the proceeds, if any, of any settlement or judgment arising from this action in favor of the Plaintiff and no money shall be paid in satisfaction of such settlement or judgment until the nature and extent of the lien in favor of the Estate of Anthony Gulotta is determined or otherwise settled with a representative of his estate with proper legal authority; and it is further

**ORDERED** that the motion (Seq. #003) by Plaintiff for partial summary judgment on the issue of the liability under Labor Law 240(1) and 241(6) of Defendants MSOS Kwon, Inc., the owner of the premises, and Defendant Sindrome, the general contractor, is granted; and it is further

**ORDERED** that the motion (Seq. #004) by Cross Motion by MSOS Kwon, Inc., the owner of the premises, for contractual indemnification for Defendant Sindrome is granted; and it is further

**ORDERED** that Plaintiff and Defendant MSOS Kwon, Inc. are directed to serve upon all other parties that have appeared in this action with a copy of this decision and order with notice of entry as soon as practicable.

#### **DECISION**

Plaintiff commenced this action by verified complaint on April 8, 2014 to recover for injuries he alleges he sustained in a workplace fall from a ladder on January 16, 2014 at premises located 311 Meritts Avenue, Wyandanch, NY. Defendant Built Rite Interior Construction, Inc. has defaulted in answering and upon motion by the Plaintiff a default judgment was entered against

it. Issue has been joined by the remaining defendants and a note of issue was filed on July 20, 2018 and Plaintiff made this motion for summary judgment on October 18, 2018.

Plaintiff, Robert Tyrrell, moves for partial summary judgment upon his claims under Labor Law §§ 200, 240(1) and 241(6). Plaintiff has made a *prima facie* showing that: Defendant MSOS Kwon, Inc. was the owner of the premises at 311 Meritts Avenue, Wyandanch, NY and that MSOS Kwon, Inc. had contracted with Sindrome Construction, LLC and Sindrome Construction, Inc. (Sindrome<sup>1</sup>) for Sindrome to provide general contracting services with respect to the gut renovation of a building on the subject premises. Sindrome hired Bridge Electrical Construction, Corp. (Bridge Electrical) and Bridge Electrical employed the Plaintiff. An employee of Built Rite Interior Construction, Inc. positioned part of a dismantled extension ladder from the first floor to the second floor mezzanine to allow the Plaintiff to work on the lighting and fire alarms located on the second floor mezzanine. While Plaintiff was descending the ladder from the height of at least fourteen feet above the ground, the bottom of the ladder kicked out and Plaintiff fell to the floor and was injured. The ladder had not been secured by any mechanical means to prevent side slippage and no other workers held the ladder while Plaintiff descended.

Labor Law 240(1) provides:

*“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.”*

Plaintiff has established *prima facie* liability under Labor Law 240(1) in MSOS Kwon, Inc. as the owner of the premises, and Sindrome as the general contractor. *Corchado v 5030 Broadway Props., LLC*, 103 A.D.3d 768 (2<sup>nd</sup> Dept. 2013); and *McCaffery v. Wright & Co. Constr., Inc.*, 71 A.D.3d 842 (2<sup>nd</sup> Dept. 2010). Defendants have failed to raise a material issue of fact accordingly Plaintiff’s motion (003) for partial summary judgment is granted upon his claims under Labor Law § 240(1).

Labor Law 241(6) provides:

*“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when*

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<sup>1</sup>*All of the parties in this litigation treat the Sindrome Construction, LLC and Sindrome Construction, Inc. as a singular entity referred to as Sindrome Construction without distinction.*

*constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:*

*(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."*

Plaintiff identifies two provisions of the New York Industrial Code he contends were violated:

22 NYCRR § 23-1.21 Ladders and ladderways

*"(b) General requirements for ladders...*

*(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: ...*

*(iv) If it has any flaw or defect of material that may cause ladder failure."*

*(4) Installation and use...*

*(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings...*

*(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower*

*end is tied to a secure anchorage or safety feet are used.*

Plaintiff has made a *prima facie* case that he was performing work at a height greater than 10 feet above the ladder footing and that there was neither a person at the footing to hold the ladder nor was there a secure anchorage or safety feet used to prevent the slippage that occurred. Defendants have failed to raise a material issue of fact accordingly Plaintiff's motion (003) for partial summary judgment is granted upon his claim under Labor Law § 241(6).

In view of the fact that the Plaintiff has prevailed on the issue of liability against Defendants Sindrome, the general contractor and MSOS Kwon, Inc., the property owner, Plaintiff's claims under Labor Law § 200 are duplicative, immaterial to it, and are dismissed.

However, the issue of whether MSOS Kwon, Inc., the property owner, was negligent bears upon its claim for contractual indemnification from Defendant Sindrome. An owner seeking contractual indemnification must prove itself free from negligence because to the extent its negligence contributed to the accident, it cannot be indemnified for such negligence. *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662, 871 N.Y.S.2d 654; and *General Obligations Law* § 5-322.1.

Defendant MSOS Kwon, Inc. cross moves for summary judgment upon its claim for contractual indemnification from Defendant Sindrome. In support of its motion MSOS Kwon, Inc. has made a *prima facie* case that Defendant Sindrome contractually agreed to indemnify MSOS Kwon, Inc. and further that MSOS Kwon, Inc. did not exercise control over the work site.

"Labor Law § 200 is a codification of the common-law duty to provide workers with a safe work environment. There are two main types of liability under Labor Law § 200: injuries caused by dangerous or defective conditions, and injuries caused by dangerous or defective equipment at the jobsite. A property owner or general contractor will only be liable under Labor Law § 200 for dangerous or defective equipment that it did not supply if it possessed the authority to supervise or control the means and methods of the work." *Davies v Simon Prop. Group, Inc.*, 2019 N.Y. App. Div. LEXIS 5880 (2<sup>nd</sup> Dept. July 31, 2019).

In opposition Defendant Sindrome has failed to raise a material issue of fact that MSOS Kwon, Inc. exercised any control over the work site or was otherwise negligent. Accordingly, MSOS Kwon, Inc.'s cross motion (004) for summary judgment upon its claim for contractual indemnification is granted. The foregoing shall constitute the decision and order of the court.

Dated: August 20, 2019

  
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JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION