

<b>Guerrero v Bre Park Ave. Tower Owner LLC</b>
2020 NY Slip Op 30656(U)
February 13, 2020
Supreme Court, Kings County
Docket Number: 509589/2016
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 13th day of February 2020

**PRESENT:**

**HON. CAROLYN E. WADE,**

Justice

-----X  
RAUL GUERRERO,

Plaintiff,

Index No. 509589/2016

-against-

BRE PARK AVENUE TOWER OWNER LLC, ALL SAFE, LLC AND SHAWMUT DESIGN AND CONSTRUCTION,

Defendants.

-----X  
BRE PARK AVENUE TOWER OWNER LLC, and SHAWMUT WOODWORKING & SUPPLY INC dba SHAWMUT DESIGN and CONSTRUCTION

Third-Party Plaintiffs,

-against-

AMERICAN SPRAY-ON CORP.

Third-Party Defendant.

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**DECISION and ORDER**

*Seg.'s 8, 9, 10 & 11*

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KINGS COUNTY CLERK  
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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff’s Cross-Motion and Defendants’/Third-Party Plaintiffs’/Third-Party Defendant’s Motions:**

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1-3</u>
Cross-Motion and Affidavits/Affirmations.....	<u>4</u>
Answering Affidavits/Affirmations.....	<u>5-8</u>
Reply Affidavits/Affirmations.....	<u>9-12</u>
Memorandum of Law.....	<u>          </u>

Upon the foregoing cited papers, and after oral argument, **1a)** defendants/third-party plaintiffs Bre Park Avenue Tower Owner LLC, and Shawmut Woodworking & Supply Inc. d/b/a Shawmut Design and Construction, move for an Order granting them summary judgment, and the dismissal of plaintiff’s claims, and all cross-claims, and **1b)** for summary judgment against third-party defendant American Spray-On Corp. (sequence #8); **2)** defendant All Safe, LLC moves for an order granting it summary judgment, and dismissal of the Complaint, and all cross-claims (sequence #9); **3)** third-party defendant American Spray-On Corp., LLC moves for an Order granting it summary judgment, and the dismissal of the Complaint/Third-Party Complaint (sequence #10); and **4)** Plaintiff cross-moves for summary judgment on his Labor Law §§240(1) and 241(6) claims against the defendants (sequence #11).

The underlying action was commenced by plaintiff Raul Guerrero (“Plaintiff), who alleges that he sustained serious personal injuries as a result of a work related accident that occurred on February 13, 2016 at 65 East 55<sup>th</sup> Street, New York, New York (“Subject

Premises”). Plaintiff, an employee of defendant American Spray-On, Corp., LLC (“American Spray-On”), was gathering spray hoses in the lobby when he was allegedly struck by a scaffold owned by his employer. Shawmut Woodworking & Supply Inc dba Shawmut Design and Construction (“Shawmut”) was the general contractor, who retained various subcontractors, including American Spray-On, for the project. Defendant/Third-Party Plaintiff Bre Park Avenue Tower Owner LLC (“Bre Park”) is the owner of the Subject Premises.

***Bre Park and Shawmut’s Motion for Summary Judgment (sequence #8)***

After a meticulous examination of Bre Park and Shawmut’s Motion for Summary Judgment, and the respective submissions, this Court finds as follows:

Labor Law §200 codifies an owner and general contractor’s common law duty to maintain a safe work place (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311 [1981]). The party against whom liability is sought must “have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Rizzuto v. Wenger Contracting Co.*, 91 NY2d 343, 352 [1998]). General instructions and oversight of the quality of the work performed is not enough to impose liability under the statute (*Dalanna v. City of NY*, 308 AD2d 400 [1<sup>st</sup> Dept. 2003]).

“Where the defect or dangerous condition arises from a subcontractor’s methods, and the owner and general contractor exercised no control or supervision over the activity at issue, they will not be held liable under Labor Law 200, even if the same had notice of the sub-contractor’s defective methods or the dangerous condition alleged” [(*Dipalma v. Metro. Transp. Auth.*, 20 Misc3d 1128[A] [Sup Ct, Bronx Cty. 2008]); see also *Comes v. NY State Elec. & Gas Corp.*, 82 NY2d 876 [1993]].

In the instant case, Plaintiff testified unequivocally at his deposition that an American Spray employee named Cores Dick directly supervised him; and that he was the only individual at the jobsite who gave him work instructions (Exhibit "L" of Bre Park and Shawmut's motion, pgs. 24/ line 25, 25/lines 2-6). Plaintiff stated that his employer supplied the scaffold, which he and 2 other American Spray employees assembled (Exhibit "L" of Bre Park and Shawmut's motion, pg. 30/lines 12-22). Cores Dick was in charge of taking down the scaffold (Exhibit "L" of Bre Park and Shawmut's motion, pg. 38/lines 14-18). Thus, this Court determines that Bre Park and Shawmut are free from liability under Labor Law §200/common law negligence.

Labor Law §240(1) requires owners, contractors, and their agents to provide workers with proper safety devices to protect against "such gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). When assessing a Labor Law 240(1) claim, the Second Department in *Simmons v. City of New York*, 2018 NY Slip Op 06585 [2d Dept 2018] stated the following:

In determining whether a plaintiff [is] entitled to the extraordinary protections of Labor Law §240(1), the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential (*Runner v. New York Stock Exch. Inc.*, 13 NY3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279). **Without a significant elevation differential, Labor Law 240(1) does not apply, even if the injury is caused by the application of gravity on an object**

(Christiansen v. Bonacio Constr. Inc., 129 AD3d 1156, 1158, 10  
N.Y.S.3d 683) [emphasis added].

In the instant case, Plaintiff testified that the subject scaffold was nine feet tall. However, there is no deposition testimony as to whether it tipped over at that height. Moreover, there are conflicting statements from Plaintiff as to how the accident occurred. Notably, during the first day of his deposition, Plaintiff stated that he was struck by the baker scaffold when his supervisor tilted it down, instead of properly dismantling it. Bre Park and Shawmut argue that this action was unforeseeable, and constituted "a supervening act that broke any causal connection between any such violation of the statute and plaintiff's injuries." However, Plaintiff recanted this testimony during his continued deposition, and stated that he did not see Cores take down the scaffold (Exhibit "M" of Bre Park and Shawmut's motion, pg. 149-150). He also denied seeing how the scaffold fell because he was bent over working. He stated that his testimony changed because he did not know how to express himself. Consequently, this court determines that there are triable issues of material fact with respect to Bre Park and Shawmut's liability under Labor Law §240(1). Plaintiff's Labor Law §§240(2), (3), and 242(a) claims are dismissed, as he does not refute Bre Park and Shawmut's contentions as their inapplicability.

"Labor Law 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable" (*Fusca v. A & S Construction, LLC*, 84 AD3d 1155 [2d Dept 2011]).

Bre Park and Shawmut challenge the applicability of several Industrial Codes cited in Plaintiff's Bill of Particulars. The following code sections **are hereby dismissed**, as Plaintiff did

not refute the movants' arguments in his opposition papers: 12 NYCRR §§ 23-1.4(45); 23-1.5(a), (b),(c)(1),(2) and (3); 23-1.7(a)(1), (a)(2); (b)(1)(i)(ii)(iii), (d), (e),(f); 23-1.7(d),(e)(1), (e)(2),(f); 23-1.8; 23-1.22(b)(2); 23-1.30; 23-1.32; 23-1.33(a), 23-2.2; 23-3;23-2.5; 23-2.6(a), 23-2.6(a); 23-3.3(b-m); 23-3.2(a-d); 23-3.3(b-m), 23-3.4(a-c), 35-5.1(e)(5),(f),(h),(j)(1); 23-8; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.24; 23-5.2(c)(2); 23-5.3(e); 23-5.4(d); 23-5.2; 23-5.3; and 23-5.9. Moreover, 23 NYCRR §23-5.1(b) is dismissed, as it was not raised in his Bill of Particulars, and was raised for the first time during motion practice.

After a meticulous examination of the respective submissions, the court determines that triable issues of material fact remain as to whether Bre Park and Shawmut are subject to Labor Law § 241(6) liability, as it relates to Industrial Code 12 NYCRR §§ 23-1.7(d). Notably, Plaintiff testified at his deposition, *inter alia*, that when his supervisor pulled down the scaffold, the wheels slipped on wet plastic that was underneath (Plaintiff's cross-motion, Exhibit 1, pg. 42: 18-22) Plaintiff's Bill of Particulars also alleges violations of 12 NYCRR §§ 23-5.18 (b),(f), and (h). However, there was deposition testimony that the scaffold had a safety railing; there were no allegations that the bracing was missing; and the accident did not occur when the scaffold was being moved to another location. As a result, 12 NYCRR §§ 23-5.18 (b),(f), and (h) are inapplicable, and are hereby dismissed against the movants.

With respect to Bre Park's contractual indemnification claim against American Spray-On, the parties entered into a universal subcontract, which states, in pertinent part:

"To the fullest extent permitted by applicable law, Subcontractor [American Spray-On] agrees to defend, indemnify and hold harmless Owner [Bre Park], the Architect/Engineer, Contractor [Shawmut] and anyone else required by the Contract Documents, from and against any

and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor [American Spray-on] or those employed by it, or working under those employed by it at any level [...].”

American Spray-On, in opposition, argues that the indemnification clause should not be enforced because Bre Park has failed to establish that it was negligent, and contributed to the accident. However, Bre Park aptly cites *Bermejo v. New York City Health and Hospitals Corporation*, 119 AD3d 500 [2d Dept. 2014], which involved an indemnification clause similar to the one at bar. The Second Department in *Bermejo* held that the provision, by its terms, did not limit indemnification only to claims arising out of the negligence of the subcontractor or sub-subcontractor. The court further found that in the absence of proof that the general contractor was negligent, the Supreme Court should have awarded it summary judgment on its third-party action for contractual indemnification.

In the instant case, the subject clause did not limit indemnification only to claims arising out of the negligence of American Spray-On. It is applicable to all claims, damages, or loss arising out of or resulting from any work performed by American Spray-On. Notably, Plaintiff's accident arose out of his employer's work at the site; and there has been no evidence which suggests that Bre Park was actively negligent. Consequently, Bre Park is entitled to summary judgment on its third-party contractual indemnification claim against American Spray-On.

Accordingly, based upon the above, Bre Park and Shawmut's motion is granted to the extent that the following claims are **dismissed**: **1)** common law negligence/ Labor Law §§200 240(2), (3), and 242(a); **2)** Labor Law 241(6) claim premised on the following Industrial Codes: 12 NYCRR §§ 23-1.4(45); 23-1.5(a), (b),(c)(1),(2) and (3); 23-1.7(a)(1), (a)(2); (b)(1)(i)(ii)(iii),

(d), (e),(f); 23-1.7(d),(e)(1), (e)(2),(f); 23-1.8; 23-1.22(b)(2); 23-1.30; 23-1.32; 23-1.33(a), 23-2.2; 23-3;23-2.5; 23-2.6(a), 23-2.6(a); 23-3.3(b-m); 23-3.2(a-d); 23-3.3(b-m), 23-3.4(a-c), 35-5.1(e)(5),(f),(h),(j)(1); 23-8; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.24; 23-5.1(b) 23-5.2(c)(2); 23-5.3(e); 23-5.4(d); §§ 23-5.18 (b),(f), and (h); 23-5.2; 23-5.3; and 23-5.9.

**Triable issues of fact remain** as to whether the movants are subject to liability under Labor Law §240(1); and Labor Law §241(6) with respect to Industrial Code 12 NYCRR § 23-1.7(d).

Lastly, summary judgment is **hereby granted** on Bre Park's third-party contractual indemnification against American Spray-On.

***All Safe, LLC's Motion for Summary Judgment (sequence #9)***

All Safe, LLC contends that it is a scaffold rental company that neither owned, operated, maintained or controlled the subject bakers scaffold.. It maintains that it was not responsible for any construction, did not have the authority to enforce safety practices, and was not present at the time of the incident. Plaintiff's cross-motion seeks summary judgment against all of the defendants. However, he did not set forth any specific allegations against All Safe, LLC. Moreover, none of the defendants submitted opposition to the instant motion.

Accordingly, based upon the above, All Safe, LLC's Motion for Summary Judgment is **granted**. The Complaint and any cross-claims against it are hereby **dismissed**.

***American Spray-On's Motion for Summary Judgment (sequence #10)***

Consistent with this Court's ruling on motion sequence #8, this Court finds that there is a triable issue of material fact as to whether the accident occurred from a physically significant elevation differential pursuant to Labor Law § 240(1). Moreover, there is a question of fact as to

whether American Spray-On is subject to Labor Law § 241(6) liability, pursuant to Industrial Code 12 NYCRR § 23-1.7(d). The remaining Industrial Codes cited by Plaintiff in his Bill of Particulars, and in his cross-motion/opposition are dismissed.

“The common law and section 200 [of the Labor Law] impose a duty upon employers to provide their employees with a safe place to work. It applies to owners, contractors or their agents who had control over or supervised the work, or who created the dangerous condition and had actual or constructive notice of it” (*DeGabriel v. Strong Place Realty, LLC*, 29 Misc3d 908 [Sup Ct, Kings Cty. 2010]).

In the instant case, American Spray-On directed Plaintiff and supervised his work. However, as noted earlier, Plaintiff’s deposition transcript reflects that he testified inconsistently about how the accident occurred. Consequently, this Court determines that there are issues of fact as to American Spray-On’s liability pursuant to Labor Law § 200, and common-law negligence.

Accordingly, based upon the above, American Spray-On’s Motion for Summary Judgment is **denied**. Triable issues of material fact remains as to its liability under Labor Law §§ 200/common law negligence, 240(1), and 241(6) as it pertains to Industrial Code 12 NYCRR § 23-1.7(d). Bre Park and Shawmut’s third-party complaint against American Spray-On remains intact.

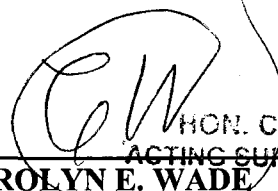
***Plaintiff's Cross-Motion for Summary Judgment (sequence #11)***

Consistent with the court's above rulings, Plaintiff's Cross-Motion for Summary Judgment is **denied in its entirety**. The court further notes that the application is untimely.

All remaining contentions in the aforementioned sequences, have been meticulously examined, and are now rendered meritless and/or moot.

This constitutes the Decision and Order of the court.

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HON. CAROLYN E. WADE  
ACTING SUPREME COURT JUSTICE  
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**ACTING SUPREME COURT JUSTICE**