

**Milligan v Tutor Perini Corp.**

2020 NY Slip Op 31030(U)

April 22, 2020

Supreme Court, New York County

Docket Number: 162126/2014

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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GEORGE MILLIGAN,
Plaintiff,

INDEX NO. 162126/2014

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 003 004 004

- v -

TUTOR PERINI CORPORATION, TUTOR PERINI BUILDING CORP., METROPOLITAN TRANSPORTATION AUTHORITY, LEGACY YARDS TENANT LLC, LEGACY YARDS LLC, HUDSON YARDS DEVELOPMENT CORPORATION, THE RELATED COMPANIES, INC.,

DECISION + ORDER ON MOTION

Defendant.

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TUTOR PERINI CORPORATION, TUTOR PERINI BUILDING CORP., METROPOLITAN TRANSPORTATION AUTHORITY, LEGACY YARDS TENANT LLC, LEGACY YARDS LLC, HUDSON YARDS DEVELOPMENT CORPORATION, THE RELATED COMPANIES, INC.

Third-Party
Index No. 595330/2015

Plaintiff,

-against-

FIVE STAR ELECTRIC CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 101, 102, 103, 104, 105, 106, 107, 121, 122, 126

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 124, 127, 130

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 124, 127, 130

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

**ORDER**

Upon the foregoing documents, it is

ORDERED that plaintiff George Milligan's motion for summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and (2) is denied; and it is further

ORDERED that defendant Five Star Electric's motion for summary judgment dismissing the third-party complaint is denied.

**DECISION**

Motion sequence numbers 003 and 004<sup>1</sup> have been consolidated for disposition.

In motion sequence 003, plaintiff George Milligan (plaintiff) moves, pursuant to CPLR 3212, for an order granting summary judgment on the issue of liability as to Labor Law §§ 240 (1) and (2).<sup>2</sup>

In motion sequence 004, third-party defendant Five Star Electric Corp. (Five Star) moves, pursuant to CPLR 3212; for an

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<sup>1</sup> Motion sequence numbers 003 and 004 were each fully submitted on April 29, 2019, the date of oral argument.

<sup>2</sup> Although by notice of motion, plaintiff seeks partial summary judgment as to liability on both Labor Law §§ 240 (1) and (2), plaintiff addresses Labor Law § 240 (1) only.

order granting summary judgment dismissing the third-party complaint, cross-claims, and counter claims.

FACTUAL ALLEGATIONS

Plaintiff George Milligan's deposition

Plaintiff testified that he was injured on August 23, 2014, while working for Five Star at a construction project located at the Hudson Yards site on 33rd Street, between 10th and 11th Avenues. Plaintiff's foreman at the job was Thomas D'Angelo (D'Angelo). When plaintiff arrived at the premises, the construction reached from the basement level to the 10th floor. Plaintiff maintains that everything was exposed and open to the elements. Plaintiff testified that there were beams in place, but that the sides of the building remained open.

Plaintiff testified that he had been working for about a week at the site performing temporary lighting. He was shown how to perform the work by another Five Star employee. Plaintiff recalls taking an elevator to the tenth floor and climbing up a makeshift ladder to the eleventh floor. Plaintiff believes that the subject ladder was constructed of wood and was leaning against an open hatch. Plaintiff testified that the ladder was slippery and wet because it had been raining for a couple of days. Plaintiff did not advise anyone on that day that the

ladder was damp or slippery. He maintains that if it rained, the job site remained active.

Plaintiff testified that it was raining when he exited the elevator. When plaintiff finished his work, he descended from the eleventh floor to the tenth floor down the same ladder. While he was located about two to three steps down the ladder, he proceeded to slip and fall. Plaintiff landed on his heels and then fell onto his backside and hands. He remained on the ground for several minutes. Following his accident, plaintiff walked down a metal staircase because the elevator workers were already gone for the night. He received a ride home from his wife.

On the Monday following his accident, plaintiff reported the incident by phone to D'Angelo. Thereafter, he visited his primary care doctor to whom he reported pain in his lower back, legs, neck, shoulder and wrist.

#### Affidavit of Plaintiff George Milligan

Plaintiff submits an affidavit dated February 15, 2019, which states that the eleventh floor of the building was a concrete slab which was exposed to the elements and had no walls or roof. Plaintiff states that to move between the tenth and eleventh floors, he had to use a wet, slippery, and steep ladder.

Plaintiff states that the ladder was completely exposed to the elements and that the general contractor did nothing to protect the ladder from the weather. He states that the wooden ladder was built and installed by Tutor. Plaintiff states that the rungs were slippery and were like walking on ice. Plaintiff states that he fell about 10 feet to the concrete floor.

Vesselin Bijev's deposition

Vesselin Bijev (Bijev) testified that on the date of plaintiff's accident, he worked for Tutor Perini (Tutor) as a superintendent at 10 Hudson Yards which was located at 10th Avenue and 30th Street. His duties included producing work schedules, monitoring manpower, and ensuring that there were no obvious safety hazards. Bijev was assigned to work on the third, fourth, and fifth levels of the building. Bijev testified that he hired Five Star and that the owner of the building was Related Companies.

Bijev testified that Five Star's work involved every floor of the building and that temporary lighting was provided for all levels. He did not know the specifics of what type of lighting was utilized on the top level of the building. Bijev maintains that the temporary lighting was constantly on.

Bijev testified that he was at the project every day, but that he did not recall how many levels were constructed as of August of 2014. He was not the superintendent for Tutor for the tenth or eleventh floors. Bijev testified that Tutor would have had superintendents to supervise the top deck and the deck below. He maintains that Tutor inspected the work of the subcontractors to ensure sure that they were performing the work in a safe and timely manner.

Bijev testified that Tutor was responsible as the general contractor to ensure that the workers had safe access to and from each work level. Bijev maintains that Tutor provided various types of ladders to the trades to get from one work level to another. He testified that located on the top deck were wooden gang ladders which he believes were built by Tutor. Bijev maintains that because there were no stairs, elevators, or hoists to reach the top deck, the ladders had to be utilized by all trades, including Five Star.

Bijev testified that Tutor determined that the ladders were the sole means of access to the top deck. He maintains that there were always two gang ladders to access the top deck from the deck below. In August of 2014, he was not aware of where the ladders were located, but was aware that they were both made of wood. Bijev did not recall if the ladders included slip

resistance or slip protection. He maintains that the ladders were either nailed or strapped down and that Tutor would inspect the ladders daily.

Bijev testified that safety personnel from Tutor and the superintendent on the floor were responsible for performing inspections. Bijev maintains that on the top deck level, there was no overhead roofing. He did not know if the gang ladders were exposed to rain on the date of plaintiff's accident.

Bijev was not aware of any rules in place which limited the use of ladders at night or in rainy weather. He testified that Tutor had the authority to stop the work due to weather issues. He maintains that if a wet ladder was needed to be utilized to reach his work area, he would put the ladder to use.

#### Affidavit of Vesselin Bijev

Bijev submits an affidavit dated March 5, 2019. He states that at the request of counsel, he reviewed the "TPBC Daily Project Field Reports" for the time period of August 16, 2014, through and including August 23, 2014. He concludes that as of August 23, 2014, there existed floors or decks above the 11th floor. Bijev states that he was shown a photograph of the subject building while it was under construction. He states that

based upon his review, the photograph shows the existence of a 12th floor deck.

Thomas D'Angelo's deposition

D'Angelo testified that he is a foreman employed by Five Star. He testified that Five Star is an electrical contractor and that Tutor was the general contractor of the subject project. D'Angelo was not present on the date of plaintiff's accident, but did provide plaintiff with his work instructions. He maintains that plaintiff was assigned to walk the building to make sure that all of the lights were on.

D'Angelo testified that deck ladders, which had to be utilized to reach the top deck, were constructed by Tutor and varied in height dependent on what floor they were being utilized. He testified that the rungs of the ladders were made of wood. D'Angelo did not recall anyone complaining about the ladders during the month prior to plaintiff's accident. He maintains that the ladders were secured by nails with banded iron on the top and a footing nailed to the floor. D'Angelo testified that the electricians had no responsibility for the

ladders. D'Angelo testified that at the site, Five Star had A-frame ladders and extension ladders made of wood and fiberglass.

D'Angelo maintains that Five Star's electricians were not required to wear fall protection unless they were using a lift or were located above six feet on a ladder. D'Angelo had used deck ladders, but did not experience any personal problems with the ladders. He recalls that two days after the subject accident, he received a call from plaintiff. Based upon what plaintiff had told him, D'Angelo visited the tenth floor of the building, but he did not see anything which he thought caused plaintiff's injury. He maintains that no one instructed himself not to utilize the ladders because of the weather conditions.

D'Angelo testified that he did not recall if the deck ladders had any type of slip resistance and believes that the rungs were made of raw lumber. He does not believe that there was any method to block the ladders from the weather other than the construction of new decks which created overhead protection. He maintains that by necessity, the top deck had to be exposed to the elements. D'Angelo testified that if Five Star felt that it was unsafe to use the ladders in inclement weather, the workers would be directed not to utilize the ladders.

D'Angelo observed ladders which were exposed to the rain and would subsequently use those ladders. He did not make any complaints to anyone at Tutor or any safety company regarding the ladders being wet. D'Angelo was not aware of precautions or safety measures which were taken by Tutor to protect the ladders from rain. D'Angelo testified that in order to protect workers during inclement weather, the site would be shut down.

Affidavit of Steven Roberts

Steven Roberts (Roberts) submits an affidavit in opposition to plaintiff's motion. Roberts is a Certified Consulting Meteorologist and was asked to provide a site specific weather analysis for August 23, 2014 for the subject premises. He concluded that from August 21, 2014 through August 23, 2014, a total of .42 inches of rain fell. Roberts also states that on the date of plaintiff's accident, 1/100th of an inch of rain fell, with the precipitation stopping almost 2 ½ hours before plaintiff's accident.

In summary, Plaintiff contends that summary judgment must be granted as to his claim of a violation of Labor Law § 240 (1) because defendants failed to provide plaintiff with a safe ladder to climb between the tenth and the eleventh floors. Plaintiff argues that it is undisputed that his injuries were the direct result of the application of gravity to his body

because he slipped and fell about 10 feet from the ladder which was wet. He maintains that the ladder which was constructed and placed by defendants was the only means of access to and from the eleventh floor. He contends that the ladder was exposed to rain throughout the evening of his injury. He contends that no safety measures or precautions were taken to prevent the ladder from getting wet and slippery. He maintains that nothing was done to correct the condition such as shutting down the work on the eleventh floor. Plaintiff further argues that he was not provided with any safety devices such as a safety harness, a safety belt, or a guardrail.

On the other hand, Tutor Perini Corporation, Tutor Perini Building Corp., Legacy Yards Tenant LLC, Legacy Yards LLC, Hudson Yards Development Corporation, The Related Companies, Inc., Hudson Yards Construction LLC and ERY Tenant LLC (the Tutor defendants) oppose plaintiff's motion for summary judgment as to the alleged violation of Labor Law § 240 (1). They contend that material issues of fact exist relating to plaintiff's credibility which requires a denial of the motion.

The Tutor defendants argue that plaintiff's testimony that the ladder was exposed to rain is disputed. They contend that there were floors or a deck constructed above the 11th floor which suggests that the ladder was not exposed to the elements

and would not be slippery from rain. The Tutor defendants argue that D'Angelo testified that based upon a review of a photograph of the premises, the 11th floor was not the highest deck because of the existence of vertical wooden posts on the right side. Defendants contend that D'Angelo's testimony is corroborated by the affidavit of Bijev which states that work was being performed above the 11th floor.

The Tutor defendants also argue that based upon daily logs, there were at least two floors built above the 10th floor which would have sheltered the ladder. They maintain that while plaintiff's affidavit describes the ladder as being slippery, he did not provide such a description at his deposition. Defendants also contend that plaintiff embellished upon the contributing factors as to what caused his accident by stating in his affidavit that the ladder was steep. Defendants argue that the inconsistencies between plaintiff's version of how the accident occurred and the evidence submitted by defendants question the credibility of plaintiff.

The Tutor defendants also contend that there is an issue of fact regarding the amount of rainfall which allegedly fell. Defendants contend that while plaintiff maintains that it was raining before and during the time of his accident, this testimony is refuted by the affidavit of Roberts who states that

on the day of plaintiff's accident, rain concluded 2 ½ hours prior to his accident. They also argue that the rainwater would have had to travel through two stories of constructed floors to reach plaintiff's ladder.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metro. Museum of Art, 27 AD3d 227, 228 (1st Dept 2006).

Labor Law § 240 (1) provides in part:

"[a]ll 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."

"The failure to provide safety devices constitutes a per se violation of the statute that subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from [an] accident." Cherry v Time Warner, Inc., 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 (2001) citing Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (1993); see also O'Brien v Port. Auth of N.Y. & N.J., 29 NY3d 27, 33 (2017) (holding "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law 240 (1)").

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." S. J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); see

also Psihogios v Stavropoulos, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Here, defendants urge that an issue of fact exists as to the adequacy of the ladder, whether it provided sufficient protection to plaintiff, and whether it was exposed to rain.

As to the ladder's exposure to rain, in reversing the trial court's denial of partial summary judgment of liability on similar facts, the First Department, held in Robinson v Nab Construction Corp., 210 AD2d 836 (1<sup>st</sup> Dept. 1994) that "(e)vidence of rain, or other 'concurrent cause', at the time of the accident does not create a triable issue of fact as to proximate cause where plaintiff has met her burden in establishing her § 240(1) claim".

Thus, the proper query, here, at this juncture, is whether plaintiff has met his burden in establishing that the ladder was an insufficient safety device.

As the Court of Appeals found in O'Brien, 29 NY3d at 33, ". . . the present case is distinguishable from 'cases involving ladders or scaffolds that collapse or malfunction for no apparent reason' where we have applied 'a presumption that the ladder or scaffolding device was not good enough to afford

proper protection'". Although plaintiff avers that there was an absence of guardrails, such device relates only to the use of scaffolding under Labor Law § 240(2), and not ladders, and plaintiff makes no claim that scaffolding would have been the proper device. Moreover, neither plaintiff nor the defendants submit an expert report which demonstrates the adequacy or inadequacy of the ladder. Therefore, as in O'Brien, supra, which involved the issue of the adequacy of a staircase, plaintiff has not met his burden to show that the ladder was designed in a manner that was inadequate to provide him proper protection.

As plaintiff has failed to prima facie establish that the ladder was an inadequate safety device, plaintiff's motion for summary judgment as to the alleged violation of Labor Law § 240(1) must be denied.

In motion sequence 004, Five Star contends that its motion for summary judgment dismissing the Tutor defendants' third-party complaint must likewise be denied. The third-party complaint alleges causes of action for common law and contractual indemnification, contribution, and breach of contract for failing to obtain and maintain an insurance policy to cover third-party plaintiffs for personal injury claims.

Five Star argues that despite the Tutor defendants' causes of action for common law indemnification and contribution, the evidence establishes that Five Star was not negligent. Five Star argues that it was responsible for performing electrical work on the Hudson Yards project on the date of plaintiff's accident and that the testimony of Bijev clarifies that Tutor built, installed, routinely inspected, and determined the location of the ladders utilized on the project. Five Star maintains that Bijev also testified that he was required to conduct walkthroughs of the building and that Tutor had the authority to stop work if any area of the site was deemed unsafe.

The Tutor defendants oppose Five Star's motion for summary judgment and contend that Five Star was negligent. They argue that Five Star was contractually obligated to provide material, scaffolding, ladders, tools, equipment, and supplies for the protection and completion of the electric work. The Tutor defendants maintain that Five Star was obligated to ensure the ladder's integrity and failed to do so. They contend that Five Star failed to comply with contractual obligations, the Industrial Code, and OSHA requirements.

The Appellate Division, First Department, has held that "[t]he principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of

another to recover from the wrongdoer the damages it paid to the injured party." 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 80 (1st Dept 1999). "To establish a claim for common law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.'" Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 (2d Dept 2005), quoting Correia v Professional Data Mgmt., Inc., 259 AD2d 60, 65 (1st Dept 1999).

Furthermore, contribution may be available "where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person." Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61 (2d Dept 2003) (citations and quotations omitted).

Here, a question of fact exists as to whether the Tutor defendants and/or Five Star were actively negligent pursuant to claims interposed by plaintiff under Labor Law §§ 200 and 241(6).

As a question of fact exists as to whether Five Star was negligent, the part of its motion seeing to dismiss the causes

of action for common law indemnification and contribution must be denied.

Five Star contends that the Tutor defendants' cause of action for contractual indemnification must be dismissed. It argues that the trade contract between Hudson Yards and Five Star identifies the Tutor defendants as indemnitees. Five Star maintains that a party seeking contractual indemnification must prove itself free from negligence. Five Star argues that the Tutor defendants failed to demonstrate that they were not negligent as Tutor constructed the temporary ladders, had the authority to stop work, and failed to do so.

In opposition, the Tutor defendants contend that the indemnification agreement between itself and Five Star is valid and enforceable and that a finding of negligence against Five Star is not required to trigger its indemnification obligations.

"A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." Masciotta v Morse Diesel Int'l, Inc., 303 AD2d 309, 310 (1st Dept 2003) (internal quotation marks and citation omitted). "[T]he one seeking

indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability." De La Rosa v Philip Morris Mgmt. Corp., 303 AD2d 190, 193 (1st Dept 2003) (citation omitted).

The indemnification clause in the Trade Contract between Five Star and Hudson Yards Construction LLC, states that the Five Star "shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee's negligence." (Five Star's motion for summary judgment, exhibit E, at 41-42).

As it remains undetermined whether the Tutor defendants were negligent in causing the accident as they provided the ladder, the claim for contractual indemnification cannot be dismissed at this time.

Finally, the court notes that Five Star fails to address the Tutor defendants' cause of action for breach of contract for its alleged failure to obtain and maintain an insurance policy. Therefore, such cause of action shall not be dismissed.

04/22/2020  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE