

<b>Delacruz v 1725 St Marks Ave LLC</b>
2020 NY Slip Op 32142(U)
July 1, 2020
Supreme Court, Kings County
Docket Number: 520074/2016
Judge: Debra Silber
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At an IAS Term, Part 9, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of July, 2020.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

DANIEL ZENON DELACRUZ,

Plaintiff,

-against-

Index No.: 520074/2016

Mot. Seq. 5, 6, 7

1725 ST MARKS AVE LLC, B & H MANAGEMENT  
US LLC, PARK PREMIUM ENTERPRISE INC., and  
PARK DEVELOPERS & BUILDERS, INC.,

Defendants,

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1725 ST MARKS AVE LLC and B & H MANAGEMENT  
US LLC,

Third-Party Plaintiffs,

-against-

COLORADO USA, CORP.,

Third-Party Defendant

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The following e-filed papers were read herein:

NYSCEF Nos.:

Notice of Motion/Cross Motion and Affidavits (Affirmations)			
Annexed _____	<u>102-103,147</u>	<u>118,120</u>	<u>152-153</u>
Opposing Affidavits (Affirmations) _____	<u>153</u>	<u>150,153</u>	<u>172,175</u>
Affidavits/ Affirmations in Reply _____	<u>172</u>	<u>174,175</u>	<u>176</u>
Other Papers: <u>Memorandum of Law</u> _____		<u>119</u>	

Upon the foregoing papers, defendant Park Premium Enterprise Inc. (Park) moves in motion sequence (mot. seq.) 5 for an order, pursuant to CPLR 2004, extending its time to file a motion for summary judgment until discovery is completed and for an order, pursuant to CPLR 3212, granting summary judgment in its favor.

Defendants third-party plaintiffs 1725 St Marks Ave LLC (St Marks) and B&H Management US LLC (BH) move in mot. seq. 6 for an order extending the deadline to file motions for summary judgment and for summary judgment in their favor dismissing plaintiff's claims and/or upon their cross claims and third-party claims.

Finally, plaintiff cross-moves in motion sequence (mot. seq.) 7 for partial summary judgment in his favor on his Labor Law § 241(6) claims.

### **Background Facts and Procedural History**

This action arises out of a July 25, 2016 construction site accident at which plaintiff sustained injuries. Plaintiff was injured when a tool he was using to cut a tree branch injured him. It is not disputed that he was attempting to cut a tree branch with a DeWalt grinder which was fitted with an oversized blade and with the grinder's safety guard removed. The underlying project involved the gut renovation of a commercial building. St Marks was the owner of the property. It is alleged that B&H was its managing agent. Park<sup>1</sup> was the general contractor. Colorado USA, Corp. (Colorado), plaintiff's employer, was subcontracted to do the interior carpentry work.

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<sup>1</sup> According to Park's principal, Aaron Lebovits, defendant Park Developers & Builders, Inc. (PDB) is a d/b/a of Park (Lebovits tr. 8:17-9:3). This is reflected in the contract with St Marks and the subcontract with Colorado (Doc. 115). However, they are registered with the NYS

At his deposition, plaintiff testified that he was hired by Colorado approximately six months before the accident (plaintiff tr. 11:12-16) and had been working on the site for approximately one month (Id. 15:12-15). He was supervised by Kleber Leon (Leon) and Gary Weil (Weil), employees of Colorado, and received his work assignments from them (*id.* 16:17-17:7; Jara tr. 21:20-25; Weil tr. 15:16-16:14). At the time of the accident, he and a colleague, Alfredo, were installing through-the-wall air conditioner sleeves in openings in the walls that had been previously cut, on the first floor of the building (plaintiff tr. 21:10-22:10). They were apparently unable to properly level one of the sleeves, and, upon further inspection, found that there was a tree outside the building which was obstructing it (*id.* 22:11-23:9).

Plaintiff testified that he first went to the gang box, which was where the workers stored their tools, and removed the grinder, and then went outside to cut the branch which was in the way (*id.* 27:6-20). He testified that in the course of cutting the branch, he sliced his finger (and the power cord), which caused him to drop the grinder (*id.* 33:9-34:18). Plaintiff claims he injured his shoulder when he dropped the tool (*id.* 33:16-19). While it is undisputed that plaintiff was allowed to use the grinder, there is contradictory testimony as to 1) whether he was permitted to cut the tree (*id.* 36:3-14; Weil 18:14-25) and 2) whether he removed the blade guard and inserted an oversized blade or whether he found the grinder that way (plaintiff tr. 28:3-29:13; Weil tr. 19:2-12, 23:6-24:7, 35:18-36:7).

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Department of State, Division of Corporations as two distinct corporations. Mr. Lebovits is listed on the State's website as the CEO of both.

By summons and complaint filed November 14, 2016, plaintiff commenced the instant action against BH, Park and PDB. The complaint alleges that the defendants violated Labor Law §§ 200 and 241(6)<sup>2</sup> and that these Labor Law violations proximately caused plaintiff's injuries. An amended complaint was then filed and served, adding St Marks as a defendant. Thereafter, St Marks and BH jointly answered and interposed cross claims against Park and PDB seeking contribution, common law indemnification, contractual indemnification, and/or damages for breach of contract. Park answered the complaint, but PDB did not. Therefore, as it is now three years after service of the summons and complaint on PDB, and plaintiff has not moved for a default judgment against PDB, this action was abandoned by plaintiff as against PDB and the complaint must be dismissed as against PDB. If St Marks and BH wish to pursue their cross claims, they will need to commence a third-party action against PDB to assert them.

In July of 2018, St Marks and BH filed a third-party complaint against Colorado, plaintiff's employer, seeking contractual and/or common law indemnification and/or damages for breach of contract. Colorado, which is apparently no longer in business (Jara tr. 8:3-13), did not answer the third-party complaint.

Following a discovery-related motion, a preliminary conference was held on August 9, 2017 and a discovery schedule set. A compliance conference order was entered into five months later, setting a further discovery schedule. The final pre-note order was signed on August 17, 2018, reflecting that there was still open discovery.

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<sup>2</sup> The complaint also lists §240(1) amongst the Labor Law sections violated. However, that alleged violation is not substantiated anywhere and plaintiff consents to its dismissal in his reply papers.

Plaintiff filed a note of issue on December 19, 2018. The defendants filed motions (mot. seq. 2-4) seeking to vacate the note of issue and for an extension of time to file motions for summary judgment. By order dated February 28, 2019, the Honorable Lizette Colon denied all three motions, declining to vacate the note of issue but setting a schedule for continued discovery and granting leave to renew before the IAS judge the portions of the motions which sought to extend their time to seek summary judgment.

Park was the first to seek summary judgment, filing its instant motion on September 24, 2019. Noting the prematurity of the note of issue and that discovery was still significantly incomplete, Park asserts that its time to move should be extended. It further argues that plaintiff's Labor Law 200 claims against it must fail, as it did not supervise or control the plaintiff's work, nor did it direct the means and methods of plaintiff's work. Park claims that it had no notice of any allegedly dangerous condition. As to plaintiff's Labor Law 241(6) claims, it suggests that the Industrial Code sections that were supposedly violated are overbroad and/or inapplicable to the facts at hand. Park also argues that plaintiff was the sole proximate cause of his own injuries, absolving it of any potential liability.

A month later, St Marks and BH filed their motion for summary judgment, raising similar arguments for the dismissal of plaintiff's claims. They also seek summary judgment on their cross claims against Park and PDB and ask the court to determine that Park is contractually obligated to defend and indemnify them, and that Park breached its contract by failing to obtain and/or provide liability insurance coverage. St Marks and BH also ask for an order awarding them the legal fees and disbursements they have

incurred thus far. Further, with regard to their third-party action against Colorado, they ask the court to grant them summary judgment [sic] against Colorado, as, they aver, that Colorado was both contractually obligated to defend and indemnify them and that it breached its contract by failing to obtain and/or provide liability insurance coverage.

In February of 2020, plaintiff cross-moved for summary judgment in his favor on his Labor Law § 241(6) claims only. Limiting himself to two Industrial Code sections pertaining to equipment maintenance, plaintiff focuses on the oversized blade and the lack of a safety guard on the grinder.

#### Discussion

CPLR 3212(a) provides that “[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made.” The Court of Appeals made clear in *Brill v City of New York*, 2 NY3d 648, 652 [2004] that a court may not permit such motions if untimely absent a satisfactory, rather than non-existent or perfunctory, explanation for the untimeliness. It is undisputed that here a note of issue was filed on December 19, 2018 and that, per Kings County UCTR Rule C, 6, “motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue” and that “the above time limitation may only be extended by the Court upon good cause shown.” The parties are correct, however, that there was significant discovery outstanding at the time when the note of issue was filed (and sixty days thereafter). As such, the Court finds that good cause for the delay in moving has been shown and will consider the merits of the pending

motions<sup>3</sup> (see *Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740, 741 [2d Dept 2012]); *Sclafani v Washington Mut.*, 36 AD3d 682 [2d Dept 2007]).

It is well settled that “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 demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also, *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

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<sup>3</sup> As noted by Park, plaintiff waited significantly longer than the other parties to move for summary judgment and has not shown good cause (or any explanation, for that matter) for doing so. Nonetheless, as all the issues raised by plaintiff’s motion were already before the Court in Park’s and St Marks’/BH’s motions, the Court will also consider the plaintiff’s cross-motion (see *McCallister v. 200 Park, L.P.*, 92 AD3d 927, 928 [2d Dept 2012]).

### Plaintiff's Labor Law § 241(6) Claim

Labor Law § 241(6) provides, in pertinent part, that:

“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 persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents, to comply with the specific safety rules set forth in the Industrial Code (*see Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable, given the circumstances of the accident, and which sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.*, at 502; *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]).

While plaintiff previously asserted that ten sections of the Industrial Code (IC) were violated, in his moving papers (which also appear in his opposition to the defendants' motions) he has narrowed his arguments down to two subsections, IC 23-1.5[c] and 23-9.2[a]. As he has abandoned his arguments based on the other eight, the Court need not address them.

The Court of Appeals held in *Misicki v Caradonna*, (12 NY3d 511, 515 [2009]) that the third sentence of IC 23-9.2[a], which requires any structural defect or unsafe condition in the equipment subject to that section to be remedied upon discovery, that this section applies to power-operated *heavy equipment or machinery* such as excavating machines, pile drivers and motor trucks, rather than to hand tools subject to other provisions of the Code such as IC 23-1.10 [b]. It is undisputed that the grinder at issue here is a hand tool rather than heavy machinery and, thus, IC 23-9.2[a] is inapplicable.

Contrary to Park's contentions, IC 23-1.5[c] is not too general to support a Labor Law § 241(6) claim. While it is true that *Spence v Island Estates at Mt. Sinai II, LLC*, (79 AD3d 936, 937 [2d Dept 2010]) states that IC 23-1.5 "is not a regulation sufficiently specific to support a cause of action under the statute, but merely establishes a general safety standard," that decision has been abrogated in light of *Misicki* as to 23-1.5(c) (*see Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). As it is undisputed that the grinder, in the configuration plaintiff was using it, was not in safe working condition at the time that plaintiff was injured, and that the blade guard was not attached at that time, a violation of IC 23-1.5[c] has been demonstrated.

The defendants argue, however, that they are not liable as plaintiff was the sole proximate cause of his injury – and, thus, the alleged violations of the Industrial Code were not the proximate cause thereof (*see Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 24-25 [2d Dept 2016]; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 290[2003]). Plaintiff, however, argues that, even if he was partially at fault, he was provided with a grinder with an oversized blade and no safety

guard, and, thus, he was not the *sole* proximate cause of the accident. If his version of the events proves to be factually accurate, plaintiff is correct.

Issues of fact remain, however. It is unclear whether the grinder was placed in the gang box with a smaller blade and the safety guard on and then plaintiff was the one to render it unsafe (as claimed by Weil), or if Weil put it in the tool box with the oversized blade and without a safety guard for use by the carpenters (as claimed by plaintiff). There is also a dispute as to whether plaintiff was specifically instructed not to attempt to cut the tree, but to move on to a different A/C sleeve until a tree removal service could be engaged (as claimed by Weil), or whether he was not given any instructions and undertook to cut the branch so he could install the sleeve (as plaintiff claims).

If plaintiff disobeyed a specific directive from his supervisor and altered the grinder in a manner which rendered it unsafe, he clearly would have been the proximate cause of his injuries. If that was not what occurred, however, a contrary outcome could result. As even these facts are disputed, summary judgment as to the plaintiff's Labor Law § 241(6) claims must be denied.

#### **Plaintiff's Labor Law § 200/ Common Law Negligence Claims**

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "Where a

premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*id.*) On the other hand, “when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*id.*). General supervisory authority to oversee the progress of the work is insufficient to impose liability. Rather, “[a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed” (*Ortega*, 57 AD3d at 62). Further, “the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence” (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2] [internal quotation marks omitted]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law” (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

Each of the defendants argues that it lacked control over the means and methods of plaintiff’s work (and the job site in general) and that it lacked actual or constructive notice of any hazardous premises condition. That is borne out by the record. Plaintiff

admits that he was supervised and instructed solely by Colorado's employees. The grinder was the property of Weil and was stored in a Colorado gang box. Colorado also provided the blades and other attachments for it. No one claims that St Marks or BH had any presence at the work site or involvement in the day-to-day construction activities. While Park's principal, Lebovits, occasionally visited the site, both he and Weil attest to his limited supervisory involvement. Further, the tree was not a hazardous premises condition. While it may have been in the way of the future air conditioner, it was not a dangerous condition in and of itself. As such, plaintiff's Labor Law § 200 and general negligence claims are dismissed.

### **Indemnification**

"The right to contractual indemnification depends upon the specific language of the contract" and "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Alfaro v 65 West 13th Acquisition, LLC*, 74 AD3d 1255, 1255-1256 [2d Dept 2010]). In addition, a party seeking contractual indemnification must prove itself free from negligence (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 774 [2d Dept 2010]).

It is undisputed that Park's insurance carrier and counsel accepted the tender of St Marks' defense but not that of BH, arguing that BH had not shown itself to be an agent of St Marks so as to be covered by the indemnity. As a result, St Marks' counsel has continued to defend it and BH. It is clear, however, that Lebovits believed that BH was the owner of the property and/or agent of St Marks and that he dealt with and contracted with BH in that capacity (Leibovitz tr. 38:12-40:11, 75:19-21, 101:9-103:12, 106:3-

107:12). Further, the emails between Park's counsel and carrier reflect that they believed that BH was a corporation created by St Marks to manage the property. As such, the tender as to BH should have been accepted. Park is obligated to defend and indemnify both BH and St Marks.

The sub-contract with Colorado also reflects an obligation to indemnify the owner of the property and its agent. It also provides for the sub-contractor to provide liability insurance covering the owner and its agent. Though Jara claimed that Colorado carried such a policy, no evidence thereof has been proffered. As such, St Marks and BH are entitled to a default judgment on their third-party claims against Colorado. An inquest on damages will have to abide the trial with respect to the other defendants.

### Conclusions

Accordingly, it is

**ORDERED** that the branch of Park's motion for an extension of time to file a motion for summary judgment is granted and the instant motion is deemed timely, and the branch of Park's motion for summary judgment is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claims are dismissed as to Park; and it is further

**ORDERED** that the branch of St. Marks' and BH's motion for an extension of time to file a motion for summary judgment is granted and the instant motion is deemed timely, and the branch of St. Marks' motion for summary judgment is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claims are dismissed as to St Marks and BH, and the branch of their motion for summary judgment on their

claims for indemnification and breach of the contract to procure insurance against Park is granted and Park is required to indemnify both St Marks and BH, and their damages on the breach of contract claim will not be determined until after the trial or any settlement of this matter. The branch of their motion for a default judgment on their claims for indemnification and breach of the contract to procure insurance against Colorado is granted and Colorado is required to indemnify both St Marks and BH, and an inquest on damages will have to abide the trial or any settlement of this matter, and it is further

**ORDERED** that plaintiff's cross-motion for summary judgment is denied, and it is further


**ORDERED** that this action is dismissed as abandoned as against defendant Park Developers & Builders, Inc.

**IT IS FURTHER ORDERED**, that any dispute as to the amount of the attorneys' fees and costs which any party granted indemnification pursuant to this decision and order claims to be entitled to, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and costs to be awarded to such party.

The court, having considered the parties remaining contentions finds them unavailing. All relief not expressly granted herein is denied.

The foregoing constitutes the decision, order and judgment of the court.

ENTER:

  
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Hon. Debra Silber, J.S.C.  
**HON. DEBRA SILBER**  
**JSC**