

<b>Bustamente v At Home Stores, LLC</b>
2021 NY Slip Op 32719(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 157317/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

-----X

COLETON BUSTAMENTE,  
  
Plaintiff,

**INDEX NO. 157317/2018**

**MOTION DATE 12/15/2021**

**MOTION SEQ. NO. 002**

- v -

AT HOME STORES, LLC, AXIOM DR CONSTRUCTION,  
LLC D/B/A AXIOM CONSTRUCTION COMPANY, LLC, DJ  
HEATING & AIR CONDITIONING, LNC., USA FLOOR-TEC,  
INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

AXIOM DR CONSTRUCTION, LLC D/B/A AXIOM  
CONSTRUCTION COMPANY, LLC

Third-Party  
Index No. 595064/2019

Plaintiff,

-against-

P&H LOW VOLTAGE, LLC

Defendant.

-----X

AT HOME STORES, LLC

Second Third-Party  
Index No. 595101/2019

Plaintiff,

-against-

P&H LOW VOLTAGE, LLC.

Defendant.

-----X

AXIOM DR CONSTRUCTION, LLC D/B/A AXIOM  
CONSTRUCTION COMPANY, LLC

Third Third-Party  
Index No. 595122/2020

Plaintiff,

-against-

DJ HEATING & AIR CONDITIONING, INC., USA FLOOR-TEC,  
INC.

Defendants.

-----X

AT HOME STORES, LLC

Fourth Third-Party  
Index No. 595134/2020

Plaintiff,

-against-

DJ HEATING & AIR CONDITIONING INC., USA FLOOR-TEC  
INC.

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 242, 243, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendant/second third-party plaintiff/fourth third-party plaintiff At Home Stores, LLC (“At Home”) for summary judgment on its claims for common law indemnification, contractual indemnification, breach of contract for failure to procure insurance against defendant/third-party plaintiff/third third-party plaintiff Axiom DR Construction LLC, (“Axiom”), third party defendant/second third-party defendant P&H Low Voltage, LLC (“P&H”) and defendant/third third-party defendant/fourth third-party defendant USA Floor-Tec Inc. (“Floor-Tec”) and for summary judgment dismissing plaintiff’s Labor Law § 200 claim is denied.

The cross-motion by plaintiff for summary judgment on his Labor Law §§ 240(1) and 241(6) claims is granted in part and denied in part.

The cross-motion by Floor-Tec for summary judgment is denied.

## Background

In this Labor Law case, plaintiff contends that he was working at a construction site with low voltage cable when he was injured. Specifically, plaintiff was working for P&H to run internet and phone cabling at a job site in Middletown, NY owned by At Home. Axiom was the general contractor. Plaintiff testified at the time of the accident that he was using a scissor lift that was about fifteen feet off the ground (NYSCEF Doc. No. 204 at 29). He claimed that “So as I’m roughly 15 feet pulling the cabling through the trusses in the ceiling, unbeknownst to me I guess there was an electrical charge somewhere around me. When I had touched the metal truss in the ceiling, I was electrically shocked and knocked unconsciousness [sic]. That when I was told by John that I had fallen and hit the ground out of the scissor bucket lift” (*id.* at 33).

## Plaintiff’s Cross-Motion

Plaintiff cross-moves for summary judgment on his Labor Law § 240(1) and Labor Law § 241(6) claims. He claims this was clearly a gravity related injury (a 240[1] claim). With respect to 241(6), alleged Industrial Code violations, plaintiff points to 12 NYCRR 23-1.13, a section concerning Electrical Hazards.

In opposition, At Home argues that plaintiff failed to show that the lift he was using did not provide adequate protection. It points out that the bucket at the top of the lift had a four-foot tall and four-sided railing that provided the necessary protection. At Home insists that the Industrial Code section relied upon by plaintiff focuses on his employer—not on the owner of the job site.

Floor-Tec (a concrete subcontractor) joins in At Home’s opposition as does defendant Axiom (the general contractor).

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The central issue concerning potential Labor Law § 240(1) liability is the application of the Court of Appeals’ decision in *Nazario v 222 Broadway, LLC*, (28 NY3d 1054, 43 NYS3d 251 (Mem) [2016]). In that case, the Court of Appeals reversed a decision granting plaintiff partial summary judgment on his Labor Law § 240(1) claim where he fell off an A-frame ladder after receiving an electrical shock (*id.*). The decision asserted that “Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices” (*id.* at 1055).

A subsequent decision by the First Department attempted to distinguish *Nazario* and emphasized that “[t]he plaintiff in *Nazario* fell while holding the ladder, which remained in an open, locked position when it landed. Thus, there was no evidence that the ladder was defective or that another safety device was needed. Here, on the other hand, it is undisputed that the ladder

provided was not fully open and locked, nor was it otherwise secured, as plaintiff's expert opined it ought to have been" (*Cutaia v Bd. of Managers of 160/170 Varick St. Condominium*, 172 AD3d 424, 425-26 [1st Dept 2019], *rearg granted sub nom.* 24, 2021 WL 1215854 and *rearg granted*, 36 NY3d 1084 [2021]). The First Department observed that "The Court of Appeals in *Nazario* never suggested that all elevated falls following electrical shocks were carved out of the protections of the statute" (*id.* at 426).

Here, the Court finds that *Nazario* compels the Court to deny this branch of plaintiff's cross-motion. Unlike in *Cutaia*, where the ladder wobbled and moved after plaintiff came into contact with the live wire, the plaintiff here does not know exactly how he got to the ground after he was shocked. There is no evidence that there was anything wrong with the scissor lift or the bucket that plaintiff was in when he received the shock; therefore, this Court cannot find as a matter of law that the scissor lift was an inadequate safety device. The Court also observes that in *Cutaia*, the ladder was both unsecured and unsupported (*id.* at 425), which makes it distinguishable from the instant situation.

However, the Court grants the branch of plaintiff's cross-motion that seeks partial summary judgment on his Labor Law § 241(6) claim based on a violation of Industrial Code 12 NYCRR 23-1.13.

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation

must also be applicable to the facts and be the proximate cause of the plaintiff's injury" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Section 1-1.13 mandates that certain steps be taken to protect workers from electrical hazards. This Industrial Code specifically requires that circuits be de-energized and ground or to take other protective steps. The record here demonstrates that plaintiff suffered an electrical shock that rendered him unconscious and he fell 15 feet from the bucket. While it is unclear exactly what caused plaintiff to suffer the electric shock (he claims he simply touched a metal truss), that does not prevent him from obtaining summary judgment. Plaintiff need not prove which defendant is liable on his cross-motion.

The extent to which defendants argue that the duty to protect workers on the job site from electrical shocks was delegated to other defendants (as At Home argues), that argument is belied by the caselaw cited above. Defendants also failed to cite a material issue of fact that could compel the Court to deny this branch of the motion. That someone inspected the subject cable after the accident and didn't see any damage to cable/wire at issue does not rebut plaintiff's account. It merely raises an issue of fact about which defendant is potentially liable.

### **At Home's Motion & Floor Tec's Cross-Motion**

At Home (the owner) moves for summary judgment on its claims for common law and contractual indemnification. It claims that it is entitled to relief from Axion (the general contractor) and from both P&H (plaintiff's employer) and from Floor-Tec. At Home argues that it had no control over plaintiff's work (that was P&H) and that Axion had control of the job site, including the ability to stop the work.

At Home also relies upon its agreement with Axiom and seeks contractual indemnification along with defense costs. At Home claims that Axiom failed to procure insurance as required under the agreement. Finally, At Home seeks dismissal of plaintiff's Labor Law § 200 claim.

In opposition, Floor-Tec claims it was doing concrete resurfacing at the worksite and was hired by Axiom. Floor-Tec admits that it used machines that were powered by electricity and that power was run through several extension cords. But Floor-Tec stresses that plaintiff was also running cable when he was hurt. It also emphasizes that there were no issues with its cords prior to the accident.

Floor-Tec also cross-moves for summary judgment and emphasizes that it was not on site at the time of the accident. It points out that there were no eyewitnesses to the accident and no witness with any firsthand knowledge about what caused the accident. Floor-Tec also observes that no expert (regarding causation) has been disclosed by any party. Floor-Tec attaches the affidavit of its purported expert engineer, Mr. Orosz, who asserts that Floor-Tec's power cord did not cause plaintiff's electric shock (NYSCEF Doc. No. 249).

Axiom also offers opposition. It claims that it did procure insurance and that there is no proof sufficient to merit a finding of summary judgment in At Home's favor. Axiom points out that plaintiff was working in the middle of the night at P&H's insistence and that plaintiff was under the supervision of someone at P&H when the accident occurred.

P&H argues that there are issues of fact surrounding exactly how plaintiff's accident occurred. It emphasizes that plaintiff did not know exactly what caused him to be electrocuted. P&H insists that plaintiff's supervisor (Mr. Stillman) found a frayed electrical cord that purportedly belonged to Floor-Tec that allegedly caused the lift to become electrified.

As an initial matter, the Court grants the branch of At Home’s motion that seeks dismissal of plaintiff’s Labor Law § 200 claim against it. But the Court denies Floor-Tec’s cross-motion to the extent it seeks the same relief.

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecoverly against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

There is no evidence that At Home supervised or controlled plaintiff’s work on the job site. However, this claim remains against Floor-Tec because there was a cord, allegedly belonging to Floor-Tec, right near the accident scene. It may or may not be that Floor-Tec is responsible for the electric shock, but the Court cannot dismiss this claim as a matter of law based on the facts presented in these papers.

“In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

“Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). “[I]n the case of 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” (*Correia*, 259 AD2d at 65).

The Court denies At Home’s motion and Floor-Tec’s cross-motion as to the remaining relief requested, including to the extent they seek indemnification. The fact is that the exact cause of plaintiff’s accident is unknown and it would be premature to resolve indemnification issues at this point. As Floor-Tec point out, the accident was essentially unwitnessed; plaintiff claimed he touched the metal truss and was knocked unconscious due to some electrical shock. And his supervisor, Mr. Stillman, only offered his guess as to what happened; he did not witness what occurred.

Moreover, Floor-Tec’s expert witness raises even more doubt as he claims that Floor-Tec’s wire was not the cause of the accident. Clearly, some current was running through the lift and plaintiff completed the circuit when he touched a metal object. It is an issue of fact regarding the exact cause and which party might be liable. The Court cannot resolve the parties’ potential indemnification obligations before liability has been determined among the defendants and third-party defendants. The Court also observes that At Home’s claim for failure to procure insurance is belied by Axiom’s claim that it did, in fact, procure insurance as directed in the contract.

Accordingly, it is hereby

ORDERED that the motion by defendant At Home Stores, LLC is granted only to the extent that plaintiff’s Labor Law § 200 claim is severed and dismissed and denied as to the remaining relief requested; and it is further

ORDERED that the cross-motion by defendant USA Floor-Tec, Inc. is denied; and it is further

ORDERED that the cross-motion by plaintiff is granted only to the extent that he is awarded summary judgment on liability only with respect to his Labor Law §241(6) claim and the remaining requests for relief are denied.

12/20/2021  
DATE

  
ARLENE BLUTH, J.S.C.

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