

<b>Rojas v Barrett Bonacci &amp; Van Weele, P.C.</b>
2021 NY Slip Op 33214(U)
September 13, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609551/18
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

----- TRIAL/IAS PART 30  
NASSAU COUNTY

MAREL DEJESUS VARGAS ROJAS,

Plaintiff,

Index No.: 609551/18

Motion Seq. No.: 06

-against-

Motion Date: 05/11/2021

BARRETT BONACCI & VAN WEELE, P.C.,  
ABOVE ALL EQUITIES, INC., UNIQUE FITNESS  
CENTER CORP., LS STEEL, INC. and ABOVE ALL  
STOREFRONTS, INC.,

Defendants.

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ABOVE ALL EQUITIES, INC. and LS STEEL, INC.,

Third-Party Plaintiffs,

-against-

ROMCO STRUCTURAL SYSTEMS CORP.,

Third-Party Defendant.

**The following papers have been read on this motion:**

	<u>Papers Numbered</u>
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Reply Affirmation and Exhibits</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants/third-party plaintiffs Above All Equities, Inc. ("Equities") and LS Steel, Inc. ("LS Steel") move, pursuant to CPLR § 3212, for an order granting summary judgment with respect to their third-party claims for contractual indemnification against third-party defendant.

Third-party defendant opposes the motion.

In support of the motion, counsel for defendants/third-party plaintiffs Equities and LS Steel submits, in pertinent part, that, “[p]laintiff commenced an action against defendants/third-party plaintiffs by way of the service of a Supplemental Summons and amended Verified Complaint on or about July 17, 2018.... Issue was joined by defendants/third-party plaintiffs, ABOVE ALL EQUITIES and LS STEEL, INC., by service of an answer on or about November 19, 2018.... Plaintiff served a Verified Bill of Particulars on or about November 26, 2018.... Plaintiff appeared for a deposition of (*sic*) July 29, 2019.... On July 30, 2019, Steven Smith appeared for a deposition as a witness for defendant/third-party plaintiff, ABOVE ALL EQUITIES.... On July 30, 2019, Mike Stanick appeared for a deposition as a witness for defendant/third-party plaintiff LS STEEL, INC.... On or about October 15, 2019, plaintiff filed a motion for summary judgment as against ABOVE ALL EQUITIES and LS STEEL, INC. with respect to plaintiff (*sic*) claims asserted under Labor Law Sections 240(1) and 241(6). By Order dated February 11, 2020, the court granted plaintiff’s motion. In granting the plaintiff’s motion, the court found that summary judgment was warranted under Labor Law Sections 240(1) and 241(6) as plaintiff fell from a height and was not provided with either a ‘yo-yo’ or other safety device to which he could attach his safety harness.... By Order dated May 5, 2020, plaintiff’s claims against defendant, ABOVE ALL STOREFRONTS, INC. were dismissed.... Plaintiff’s claims against defendants Barrett Bonacci & Van Weele, P.C. and Unique Fitness Center Corp. were voluntarily discontinued.... ABOVE ALL EQUITIES and LS STEEL, INC., commenced a third-party action against ROMCO by service of a Third-Party Summons and Complaint on or about June 11, 2020.... On or about August 14, 2020, issued (*sic*) was joined by third-party defendant ROMCO by way of the service of an answer to the third-party complaint.... Defendants/third-party plaintiffs, ABOVE ALL EQUITIES and LS STEEL, INC., served a

Notice to Admit upon third-party defendant, ROMCO, on or about December 14, 2020.” *See* Defendants/Third-Party Plaintiffs Equities and LS Steel’s Affirmation in Support Exhibits A-M.

Counsel for defendants/third-party plaintiffs Equities and LS Steel further asserts, in pertinent part, that, “[d]efendant/third-party plaintiff, ABOVE ALL EQUITIES, is the owner of the property known as 4890 Veterans Memorial Highway, Holbrook, New York.... Prior to the date of the subject accident, ABOVE ALL EQUITIES hired several contractors for the purpose of constructing a building (for use as a gym) at the subject premises. Among the contractors hired by ABOVE ALL EQUITIES was defendant/third-party plaintiff, LS STEEL, INC.... Mike Stanick is the Vice President of LS Steel. Mr. Stanick testified that Steven Smith of ABOVE ALL EQUITIES hired LS STEEL, INC. to perform structural steel fabrication and installation in conjunction with the construction of a gym at 4890 Veterans Memorial Highway.... Mr. Stanick further testified that while LS STEEL, INC. fabricated the requested structural steel members, the actual installation of the structural steel was performed by third-party defendant ROMCO.... On June 21, 2018, LS STEEL, INC. and ROMCO entered into a written contract for the performance of the work in question. The aforementioned contract (*sic*) contains an indemnification clause running in favor of LS STEEL, INC. and the property owner, ABOVE ALL EQUITIES.... In this regard, the contract provides that, to the fullest extent permitted by law, ROMCO shall indemnify and hold harmless both LS STEEL, INC. and the property owner (ABOVE ALL EQUITIES) against any claims, damages, losses and expenses, arising out of or resulting from the performance of the sub-contracted work, to the extent caused in whole or in part by ROMCO, including injury to the sub-contractors employees. A similar indemnification clause is also contained within the purchase order.... The purchase order between LS STEEL INC. and ROMCO also specifically provides at paragraph ‘5’ that the

sub-contractor (ROMCO) 'shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its work'.... Mike Stanick of LS STEEL, INC. testified that it was ROMCO's responsibility to install and provide safety devices for ROMCO's workers.... Similarly, plaintiff has testified that the job of setting up a wire to hook the safety harness up to was a job that was to be performed by ROMCO workers.... On the date of the subject accident, plaintiff was working at the subject property during the course of his employment with ROMCO. In this regard, plaintiff was working on the third-floor of the building being constructed. At some point while he was working at this height, plaintiff was caused to fall to the ground below. While plaintiff was wearing a safety harness, he testified that his employer, ROMCO, had failed to provided (*sic*) him with a safety cable to hook the safety harness onto. Based upon these factual allegations, plaintiff moved for summary judgment as against both ABOVE ALL EQUITIES and LS STEEL, INC. In granting the plaintiff's motion, the court found that summary judgment under Labor Law Sections 240(1) and 241(6) was warranted as plaintiff fell from a height and was not provided with either a 'yo-yo' or other safety device to which he could attach his safety harness.... As such, it is undisputed that plaintiff was injured while performing work on behalf of ROMCO. Furthermore, it is undisputed that a proximate cause of plaintiff's accident was ROMCO's failure to provide plaintiff with a safety line or other device to hook his safety harness into. Based upon the aforementioned facts and the court's prior finding of liability under Labor Law Sections 240(1) and 241(6), it is respectfully submitted that the indemnification clause contained within both the purchase order and contract between LS STEEL, INC. and ROMCO has been triggered. On or about December 14, 2020 your affirmant served a Notice to Admit upon counsel for third-party defendant, ROMCO. The Notice to Admit requested a judicial admission that purchase order and contract

between LS STEEL, INC. and ROMCO (annexed thereto) was (*sic*) executed on June 21, 2018 and was (*sic*) in effect on the date of plaintiff's accident.... As ROMCO did not deny the statements contained within the Notice to Admit within the time prescribed by the CPLR, the statements contained within the Notice to Admit should properly be considered judicial admissions. [citations omitted]. Accordingly, there can be no dispute that, on the date of the plaintiff's accident, a valid contract containing an indemnification clause, running in favor of LS STEEL, INC. and ABOVE ALL EQUITIES was in effect. As such, it is undisputed both that a (*sic*) indemnification agreement was in place on the date of plaintiff's accident and that an event occurred which triggered ROMCO's contractual obligation to indemnify both LS STEEL, INC. and ABOVE ALL EQUITIES. Accordingly, as the court has already made a determination with respect to the liability issues presented by this case, defendants ABOVE ALL EQUITIES and LS STEEL, INC. should also be awarded summary judgment with respect to their claims for contractual indemnification as against ROMCO." *See* Defendants/Third-Party Plaintiffs Equities and LS Steel's Affirmation in Support Exhibits E-H, M and P.

In opposition to the motion, counsel for third-party defendant submits, in pertinent part, that, "[p]laintiff Marel Dejesus Vargas Rojas, an employee of Romeo, was allegedly injured on June 26, 2018, when he fell approximately 35 feet while working on a construction project (which involved erecting a gym) located at 4890 Veterans Memorial Highway, Holbrook, NY ('Premises'). Defendant/Third-Party Plaintiff, Above All Equities, owned the Premises. Its steel subcontractor, Defendant/Third-Party Plaintiff LS Steel, hired Romeo to install the steel structure at the project. Plaintiff's Complaint contains claims for violation of New York's Labor Law and common-law negligence against Third-Party Plaintiffs. On February 13, 2021, this Court granted Plaintiff's motion for partial summary judgment on his Labor Law Sections 240(1) and 241(6)

claims against Third-Party Plaintiffs. Plaintiff did not move for summary judgment on his negligence claim against them, nor did Third-Party Plaintiffs cross-move for summary judgment dismissing Plaintiff's negligence claim against them. In support of their motion for summary judgment against Romeo for contractual indemnification, Third-Party Plaintiffs point to the indemnification provision in the LS Steel/Romeo Agreement. But they have not established that they are free from negligence in the main action. Indeed, there are issues of fact as to the respective parties' negligence, as there was testimony that LS Steel was supposed to provide the safety wire for Romeo to install but it failed to do so. Accordingly, Third-Party Plaintiffs' summary judgment motion for contractual indemnification against Romeo should be denied. 'In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant.' [citation omitted]. Moreover, 'unless the proposed indemnitee is found to be free from active negligence, conditional summary judgment for ... contractual indemnification against a proposed indemnitor is [likewise] premature.' [citation omitted]. To that end, General Obligations Law § 5-322.1 provides that any construction contract purporting to indemnify a party for its own negligence is void and unenforceable. [citation omitted]. 'Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor.' [citations omitted].... [W]hile Third-Party Plaintiffs in this case point to the indemnification provision in the LS Steel/Romeo Agreement in support of their contractual indemnification claim against Romeo, they have not established that they are free from negligence. To be sure, by Decision and Order dated February 13, 2020, this Court granted Plaintiff's motion for partial

summary judgment on his Labor Law Sections 240(1) and 241(6) claims against Third-Party Plaintiffs; Plaintiff, however, did not move for summary judgment on his negligence claim against them, nor did Third-Party Plaintiffs cross-move for summary judgment dismissing Plaintiff's negligence claim against them. [citation omitted]. There are also issues of fact as to the parties' negligence so as to preclude summary judgment on Third-Party Plaintiffs' contractual indemnification claim against Romeo. Although Plaintiff testified that Romeo would set up the safety wires, he also stated that the 'boss of the job of that worksite' would send someone to do that type of job.... Plaintiff did not say that that responsibility fell on 'Charlie' (i.e., Charles Roman, Romco's president) or 'Tommy' (Romco's foreman).... Plaintiff further testified that when he saw a safety wire set up, it was not something that was done by his coworkers.... Moreover, Plaintiff's coworker, Elser Gamaliel Saavedra Mata, testified that he believed that the framers were going to install the cable.... Mata further testified that LS Steel should have delivered the safety cable to the job and that a cable was brought to the site following the accident (though he did not know by whom).... In fact, LS Steel's owner, Mike Stanick, admitted that LS Steel supplied the material and Romeo installed it.... Stanick would also visit the site to ensure that Romeo performed the work set forth in the contract in a 'prompt' and 'diligent' manner and 'the work rendered had to be of a level of acceptable workmanship.' ... To ensure this, Stanick conducted visual inspections, walked the site to see Romco's progress, and compared the work to the architectural plans.... If the work was not compliant with the contract terms and/or architectural plans, then Stanick advised Charlie Roman, Romco's president, that it had to be corrected.... Stanick could not recall if he saw safety wires set up onsite.... Accordingly, as Third-Party Plaintiffs have not proved themselves free from negligence and there are issues of fact as to who was supposed to provide the safety wires,

Third-Party Plaintiffs' motion for summary judgment on their contractual indemnification claim should be denied."

As to the request for summary judgment on contribution and indemnification grounds, defendants/third-party plaintiffs Equities and LS Steel have not negated a material issue of fact as to their own responsibility to plaintiff under the negligence claims. The Court's prior Decision and Order (Motion Seq. No. 02) only granted partial summary judgment on two (2) of the alleged Labor Law statutory violations.

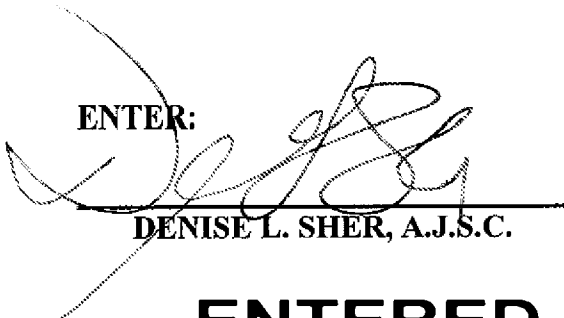
Where a triable issue of fact exists regarding an indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature. *See Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 A.D.3d 298, 781 N.Y.S.2d 339 (1<sup>st</sup> Dept. 2004); *State of New York v Travelers Prop. Cas. Ins. Co.*, 280 A.D.2d 756, 720 N.Y.S.2d 589 (3d Dept. 2001); *Jaminder v. Uniondale Union Free School Dist.*, 90 A.D.3d 612, 934 N.Y.S.2d 437 (2d Dept. 2011). Here, defendants/third-party plaintiffs Equities and LS Steel have not met their initial burden of demonstrating their *prima facie* entitlement to judgment as a matter of law on their contractual indemnification claims against third-party defendant by submitting evidence establishing that they were free from any negligence **and that they can only** be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred (emphasis added).

Therefore, based upon the above, defendants/third-party plaintiffs Equities and LS Steel's motion, pursuant to CPLR § 3212, for an order granting summary judgment with respect to their third-party claims for contractual indemnification against third-party defendant, is hereby **DENIED.**

The remaining parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on November 9, 2021, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

**ENTER:**

A handwritten signature in black ink, appearing to read 'D. Sher', is written over a horizontal line. The signature is fluid and cursive.

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York  
September 13, 2021

**ENTERED**

**Sep 15 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE