

<b>Salazar v BE &amp; YO Realty Inc.</b>
2021 NY Slip Op 33278(U)
March 26, 2021
Supreme Court, Orange County
Docket Number: Index No. EF006653/2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at 285 Main Street  
Goshen, New York 10924 on the 26th day of March, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

\_\_\_\_\_  
LUIS ALBERTO HERNANDEZ SALAZAR,

Plaintiff,

-against-

BE & YO REALTY INC,

Defendant.

\_\_\_\_\_  
BE & YO REALTY, INC.,

Third-Party Plaintiff,

-against-

UPRISE IMPROVEMENTS INC., JMG  
IMPROVEMENTS INC and NEW YORK  
STUCCO & GENERAL CONSTRUCTION, LLC,

Third-Party Defendants.

\_\_\_\_\_  
SAMUEL SCHWARTZ and ESTHER SCHWARTZ,

Second Third-Party Plaintiffs,

-against-

UPRISE IMPROVEMENTS, INC., JMG  
IMPROVEMENTS, INC., and NEW YORK STUCCO &  
GENERAL CONSTRUCTION, LLC,

Second Third-Party Defendants.

\_\_\_\_\_  
BE & YO REALTY INC.,

Fourth-Party Plaintiff,

-against-

URIEL PAREDES and PM TRI-STATE PROJECTS,  
LLC,

Fourth-Party Defendants.

\_\_\_\_\_  
VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for  
appeals as of right (CPLR 5513 [a]),  
you are advised to serve a copy of  
this order, with notice of entry, on all  
parties.

**DECISION & ORDER**  
INDEX #EF006653/2018  
Motion date: 11/30/2020  
Motion Seq. #4, 5, 6 & 7

The following papers numbered 1 - 19 were read on plaintiff’s motion for partial summary judgment on the issue of defendant’s liability under Labor Law §240(1) (Mot Seq. #4); motion for summary judgment by Third-Party Defendant, New York Stucco & General Construction, LLC (hereinafter “NYSG”) dismissing the Third-Party Complaint as against them, as well as any and all cross-claims for contractual indemnification, contribution, and common law indemnification (Mot Seq. #5); motion for summary judgment by Third-Party Defendant JMG Improvements, Inc. (hereinafter “JMG”) dismissing the Third-Party Complaint as against them (Mot. Seq. #6); and the motion by Fourth-Party Plaintiff, BE & YO Realty Inc. (hereinafter “BE & YO”), for a conditional default judgment as against Uriel Paredes and PM Tri State Projects, LLC (hereinafter “PM Tri State”) in the event and to the extent that Judgment is entered as against defendant, BE & YO on plaintiff’s complaint. The motions are consolidated for purposes of this decision:

**Mot. Seq. #4**

Notice of Motion, Affirmation (Payne), Exhibits A-K. . . . . 1 - 3  
 Affirmation in Opposition (Bass), Exhibits A&B. . . . . 4 - 5  
 Reply Affirmation. . . . . 6

**Mot Seq. #5**

Notice of Motion, Affirmation (Gizzo), Exhibits A-Q. . . . . 7 - 9  
 Affirmation in Opposition (Bass), Exhibits A-F. . . . . 10 - 11  
 Affirmation in Opposition (Norton), Memorandum of Law. . . . . 12 - 13  
 Reply Affirmation, Exhibits A&B. . . . . 14 - 15

**Mot. Seq. #6**

Notice of Motion, Affirmation (Bass), Exhibits A-H. . . . . 16 - 17

**Mot. Seq. #7**

Notice of Motion, Affirmation (Bass), Exhibits A-G. . . . . 18 - 19

Plaintiff commenced this action against defendant alleging common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The complaint alleges that, on April 14, 2016, plaintiff was working at a private residence on Chevron Road in Monroe, New York. Plaintiff alleges he was instructed to dismantle the scaffold located at the work site. Plaintiff was on the top of the scaffold attempting to pull out the left side column when he fell to the ground and was injured.

BE & YO was the general contractor for the project. UPRISE supplied the material and JMG supplied the labor. JMG was hired to work at 33 Chevron Road and it in turn subcontracted the work out to NYSG. NYSG began work at the site about four days before the accident and had erected the subject scaffold which was comprised of two levels and was approximately fourteen feet high. Plaintiff alleges defendant did not provide any safety devices as required by Labor Law §240(1).

Plaintiff now moves for summary judgment on the issue of liability on so much of the complaint as alleged a violation of Labor Law § 240(1). Plaintiff contends that defendant was strictly liable under the section for having failed to provide any safety equipment such as harnesses, guardrails or anything else to tie him off to prevent his fall.

The plaintiff met his prima facie burden of establishing a violation of Labor Law § 240(1), and that such violation was a proximate cause of his accident (*see Robertti v. Powers Chang*, 227 A.D.2d 542, 543 [2d Dept 1996]; *Richardson v. Matarese*, 206 A.D.2d 353 [2d Dept 1994]; *Clute v. Ellis Hosp.*, 184 A.D.2d 942, 944 [3d Dept 1992]).

In opposition, defendant has raised a triable issue of fact as to whether the plaintiffs' "own conduct rather than any violation of Labor Law § 240(1) was the sole proximate cause of the

accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Quattrocchi v F. J. Sciamè Const. Corp.*, 11 NY3d 757 [2008]). In particular, defendant submitted the transcript of Uriel Paredes, an employee of NY STUCCO and the person who contacted plaintiff to work with him at the job site. Mr. Paredes testified that he directed plaintiff to refrain from working on the scaffold and plaintiff confirmed that he would not be on the scaffold at any time raising an issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law §240(1), was the sole proximate cause of his accident" (*Pearson v Wallace*, 140 AD3d 1731 [4th Dept 2016], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Third-Party Defendant, NYSG, moves to dismiss BE & YO's Third-Party Complaint against them contending that there was no contract between them and because plaintiff did not sustain a "grave injury" as defined by Workers' Compensation Law §11. In addition, NY Stucco also seeks to dismiss Co-Third-Party Defendants JGM and UPRISE cross-claims for contractual indemnification as well as for contribution and common law indemnification. NYSG contends that their claims are based upon a fraudulent document whereby the principal of NYSG, Juan Paredes', signature has been illegally and fraudulently affixed on the "Subcontract Agreement Rider" document.

As amended in 1996, Workers' Compensation Law §11 permits an employer to be held liable for contribution or indemnity only where the third-party plaintiff proves through competent medical evidence that the employee sustained a "grave injury". "The term 'grave injury' has been defined as a 'statutorily defined threshold for catastrophic injuries...and includes only those injuries which are listed in the statute and determined to be permanent'" (*Ibarra v. Equipment Control*, 268 A.D.2d 13, 17-18 [2d Dept 2000], quoting *Kerr v. Black Clawson Co.*, 241 A.D.2d

686 [3d Dept 1997]). It is undisputed that plaintiff's injury to his lumbar spine does not qualify as a "grave injury" under §11 of the Workers' Compensation Law. Accordingly, in the same way the law prohibits a plaintiff from bringing a cause of action directly against his employer unless he/she has sustained a "grave injury", absent a contractual obligation, a defendant also may not institute a third-party cause of action against plaintiff's employer (*Curran v Auto Lab Service Center, Inc.*, 280 AD2d 636 [2d Dept 2001]).

In their opposition, BE & YO attempts to argue that NYSG was not plaintiff's employer but the evidence submitted is insufficient to raise a question of fact. Plaintiff himself testified on October 7, 2019 that at some point approximately two years before his accident he began working for Juan Paredes, President/Owner of NY Stucco and that Juan Paredes supplied him with certain tools and equipment for work at the various job sites. Plaintiff later appears to equivocate on this point in response to a Notice to Admit served on him four years later by NYSG but this is clearly an attempt by BE & YO to cast doubt on plaintiff's admission regarding his employer. Plaintiff responded to NYSG's Notice to Admit by stating he "believes he was employed by Uriel Paredes" and denied the truth and accuracy of the Workers' Compensation Notice of Retainer and Appearance that he signed on April 26, 2016 that listed NYSG as his employer while admitting that he did sign it. Plaintiff never specifically stated that he was **not** employed by NYSG. This is nothing more than an after-the-fact attempt to undercut the truth of plaintiff's initial testimony by creating a "feigned factual issue" (*Israel v Fairharbor Owners Inc.*, 20 AD3d 392 [2d Dept 2005]). BE & YO attempts to create this factual issue by their interpretation of plaintiff's responses and nothing more.

Other arguments raised by BE & YO in their opposition papers, together with exhibits,

also provide no support for their claim that plaintiff was not employed by NYSG but by PM Tri State. NYSG, in response to BE & YO's discovery request, provided daily work logs for shifts dating from February 25, 2016 through March 2, 2016 where Uriel Paredes is listed as an employee as well as a 1099 Tax Form in the amount of \$42,010, issued by NYSG to Uriel Paredes. (*See* documents attached to BE & YO's opposition papers as Exhibit "F") Such documents establish that Uriel Paredes was employed by NYSG. Therefore, BE & YO's attempt to extract from these documents proof that Uriel Paredes was operating as a subcontractor under his PM Tri State company is clearly unfounded and belied by the evidence.

Uriel Paredes himself testified at his deposition that Juan Paredes was his cousin and that he went to work for him as an employee of NYSG. Uriel Paredes also unequivocally stated that he never worked with Juan Paredes under the corporate entity PM Tri State. He confirms that on the day of the accident he was working for NYSG and he further stated that he formed PM Tri State in 2015 with the intent to contract for future work – but that he never intended to form said company for the purposes of contracting work from NYSG and that it was never a subcontractor for NYSG. Accordingly, the mere fact that plaintiff worked alongside Uriel Paredes and Juan Paredes in no way proves that plaintiff was employed by PM Tri State. To draw any other conclusion, as BE & YO is attempting to do, is belied by the record.

As it is their position that NYSG was not plaintiff's employer, BE & YO argues that the issue of the existence of a written contract of indemnity is essentially moot. They fail to address the issue of the forged indemnification agreement.

Similarly, UPRISE/JMG's opposition fails to establish that NYSG was not plaintiff's employer and avoids the issue of the forged indemnification agreement. Not only has

UPRISE/JMG failed to come forward with sufficient proof that counters the overwhelming testimony and documentation establishing that plaintiff was employed by NYSG, they also have failed to counter the serious allegations of forgery with any reasonable explanation, or expert opinion, that would challenge the conclusions put forward by NYSG's handwriting expert, Robert Baier.

BE & YO commenced a third-party action against UPRISE/JMG, asserting, *inter alia*, a cause of action for contractual indemnity and now moves for summary judgment on that cause of action. "The right to contractual indemnification depends upon the specific language of the contract" (*George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 930 [2d Dept 2009]; see *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 808 [2d Dept 2009]; *Canela v. TLH 140 Perry St., LLC*, 47 A.D.3d 743, 744 [2d Dept 2008]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v. Marshalls of MA, Inc.*, 61 A.D.3d at 930; see *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491-492 [1989]). In addition, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662 [2d Dept 2009]; see General Obligations Law § 5-322.1; *Reisman v. Bay Shore Union Free School Dist.*, 74 A.D.3d 772, 773 [2d Dept 2010]; see also *Dalvano v. Racanelli Constr. Co., Inc.*, 86 A.D.3d 550, 551 [2d Dept 2011]).

Here, it is undisputed that there was a written executed agreement between BE & YO and JMG in which JMG agrees to hold BE & YO harmless against claims, damages, losses and expenses arising out of or resulting from the work covered by the Agreement to the extent such

work was performed by or contracted through the JMG or by anyone for whose acts the JMG may be held liable. BE & YO has eliminated the existence of all triable issues of fact regarding their negligence. No opposition has been submitted.

Fourth-Party Plaintiff, BE & YO also moves for a conditional order of default judgment as against Fourth-Party Defendants, Uriel Paredes and PM Tri State Projects, LLC. It is alleged that the Fourth- Party Summons and Verified Complaint was served upon Mr. Paredes and PM Tri State Projects, LLC. Proof of service upon PM Tri State Projects, LLC was submitted with the motion. The New Jersey Corporation via the New York Secretary of State pursuant to Section 304 of the New York Limited Liability Company Law and then service was completed by Certified Mail, Return Receipt Requested, pursuant to New Jersey Court Rule 4:4-4 (b) (1)(c) (3). No appearance has been made, to date, by PM TRI-STATE PROJECTS, LLC. Although it is alleged that the Fourth-Party Summons and Verified Complaint was served upon Mr. Paredes, BE & YO has failed to submit proof of such service.

“ ‘An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear’ ” (*U.S. Bank N.A. v. Dorestant*, 131 A.D.3d 467, 469 [2d Dept 2015], quoting *U.S. Bank, N.A. v. Razon*, 115 A.D.3d 739, 740 [2d Dept 2014]; see CPLR 3215[f]). Here, in support of its motion, the Fourth-Party Plaintiff has satisfied these requirements as to PM Tri State Projects, LLC but not as to Mr. Paredes. (*US Bank Nat Ass'n v Wolnerman*, 135 AD3d 850 [2d Dept 2016])

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for partial summary judgment is denied (Mot.

Seq.#4); and it is further

**ORDERED** that Third-Party Defendant, New York Stucco and General Construction, LLC's motion for summary judgment is granted (Mot. Seq. #5); and it is further

**ORDERED** that Third-Party Complaint is dismissed as against, Third-Party Defendant NEW YORK STUCCO AND GENERAL CONSTRUCTION LLC, as well as any and all cross-claims as against said Third-Party Defendant, and it is further

**ORDERED** that Third-Party Plaintiff, BE & YO Realty Inc.'s motion for summary judgment is granted as unopposed, conditioned upon plaintiff obtaining judgment as against defendant, BE & YO Realty, Inc. (Mot. Seq. #6); and it is further

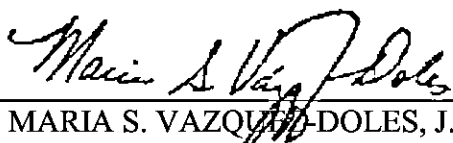
**ORDERED** that Fourth-Party Plaintiff, BE & YO Realty Inc.'s, motion for conditional default judgment is granted as against Fourth-Party Defendant, PM TRI STATE PROJECTS, LLC only and is denied as against the individual Fourth-Party Defendant, URIEL PAREDES (Mot. Seq. #7).

The remaining parties shall appear for a pre-trial virtual conference on **May 3**, 2021 at 2:30 pm.

This decision constitutes the order of the Court.

Dated: March 26th, 2021  
Goshen, New York

**ENTER:**

  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF