

<b>Medina v CBP 441 Ninth Ave. Owner, LLC.</b>
2022 NY Slip Op 30584(U)
February 23, 2022
Supreme Court, New York County
Docket Number: Index No. 151026/2019
Judge: James d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES D'AUGUSTE PART 55**

*Justice*

-----X

MELVIN CHEVEZ MEDINA,  
  
Plaintiff,

- v -

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI  
MCGOVERN, LLC,  
  
Defendant.

INDEX NO. 151026/2019

MOTION DATE 02/01/2022,  
02/01/2022

MOTION SEQ. NO. 002 003

**ORDER - AMENDED (MOTION  
RELATED)**

-----X

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI  
MCGOVERN, LLC  
  
Plaintiff,

Third-Party  
Index No. 595766/2019

-against-

REGULATOR CONSTRUCTION, INC., CITY SAFETY  
COMPLIANCE CORPORATION  
  
Defendant.

-----X

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI  
MCGOVERN, LLC  
  
Plaintiff,

Second Third-Party  
Index No. 595146/2021

-against-

REGULATOR CONSTRUCTION CORP.  
  
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 112, 121, 123, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183, 187

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 115, 116, 117, 118, 119, 120, 122, 124, 170, 181, 188

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

The plaintiff's motion for summary judgment (MS002) and the defendant's motion for summary judgment (MS003) have been consolidated for this decision.

Plaintiff Melvin Bartolo Chevez Medina was employed as a laborer by Regulator Construction Corp., who was hired by defendant CBP 441 Ninth Avenue Owner LLC, who owned, operated, maintained and controlled the premises where he was employed. In an amended complaint, Medina claims Pavarini McGovern LLC directed, controlled and managed all construction and renovation of the subject premises. Medina asserts Pavarini, as the general contractor, entered into a contract with CBP to provide Pavarini labor, material and services regarding certain construction work at the premises.

Medina argues that he was seriously injured when he fell from an elevated height while performing his work, alleging CBP and Pavarini violated New York State Labor Law §§200, 240(1), and 241(6), and the Industrial Code, violating non-delegable duties by failing to cure all defective or dangerous conditions or provide him with proper safety devices. Medina alleges such violations resulted in his severe and permanent personal injuries and prevent him from participating in his usual vocation and duties, requiring medical care and treatment potentially for the remainder of his life due solely to defendants' negligence.

CBP and Pavarini deny all allegations within Medina's complaint, asserting that any personal injuries that Medina alleges were sustained were primarily a result of his own culpable conduct. CBP and Pavarini assert numerous affirmative defenses, including claiming any injuries to Medina arose from open and obvious risks and dangers known to Medina. Defendants allege

Medina's own conduct was the sole proximate cause of his accident and injuries, thus, they are not liable under any Labor Law or Industrial Code provisions.

Medina, in Motion Sequence 002, moves for summary judgment on the issue of liability against defendants CBP and Pavarini on the Labor Law §240(1) claim, and §241(6) cause of action based on 12 NYCRR §23-1.7(b). Plaintiff alleges that he sustained serious injuries after falling through an uncovered and unguarded floor opening from one level to the level below. His fall occurred while performing cleaning work on the top level of a hi-rise building during a project that included construction of a new building stories above an existing structure. Medina states that it was raining on the day of the accident and the top floor where he was working was open and exposed – resulting in the floor being wet. He stated that a ladder placed over an uncovered opening was removed by someone and there were no railings around this opening. Moreover, the parties have provided no evidence of any adequate anchors nor any directives from a supervisor that the plaintiff was supposed to “tie off” while cleaning.

Medina states that his foot slid near the opening while he worked and he fell into the opening to the lower level, demonstrating that no evidence supports a recalcitrant worker or sole proximate cause defense to liability. Medina recounts that when a ladder was in place in the opening, there was a railing around three sides. However, when the ladder was removed prior to the accident, the railings were also removed. Accordingly, Medina argues summary judgment on the issue of liability is appropriate and should be granted against defendants on the Labor Law §240(1) and §241(6) causes of action.

Pavarini's superintendent, McFadden, testified he walked the site several times a day noting if he saw Regulator employees working near an opening, such as the one Medina fell through, with no ladder or railing, he immediately stopped them and instructed them to cover the

hole and tie-off with a harness or create a controlled-access area so no one may walk in that location. McFadden also stated that a slippery floor is considered a safety issue on the site, as Medina alleges occurred on the date of the subject accident from the rain. In addition, site safety manager, Cavaliere, employed by City Safety, testified that if there is an uncovered floor opening without railings this would be considered a safety issue and a danger. He states that if a ladder was removed from the subject opening "to pass materials down," workers must be tied off to a secure anchor. Cavaliere admits that he has no knowledge if there were any appropriate anchors for tying off in the area of the accident, noting it was unlikely there were any as it was the top floor without a ceiling.

In Motion Sequence 003, defendants move to dismiss, with prejudice, Medina's common law negligence claims, and Labor Law §§200, 240(1) and 241(6) causes of action. Defendants argue Medina's claim he fell 17 feet, was helped by several unidentified, un-deposed individuals, who assisted him down several sets of ladders, then took a hoist to the ground level, is patently not credible and cannot be believed. Defendants highlight that Medina did not call an ambulance and took a train home from Manhattan to Long Island, stating his unreported accident cannot be substantiated.

The Court rejects defendants' argument that Medina's assertions are patently not credible as the accident could not have occurred in the manner Medina described. There is no admissible evidence supporting this contention. There is also no evidence supporting the assertion that the accident did not occur because Medina fell through an uncovered opening. It is not inherently implausible that a person may fall from approximately one floor in height and depart the accident scene without immediate medical attention. Defendants failed to submit any expert evidence supporting this contention of inherent implausibility.

Next, defendants argue that Medina's claims should be dismissed as Pavarini was a construction manager, not an owner or general contractor, and neither CBP nor Pavarini controlled, supervised or directed Medina's work at the time of the alleged accident. In addition, defendants argue that there were adequate safety devices available at the jobsite with places to securely tie off, and Medina's accident occurred as he improperly descended down a ladder. Therefore, Medina would be the sole proximate cause of the alleged incident.

Contrary to defendants' claims, the testimony of Pavarini's own witnesses support the conclusion that Pavarini is subject to potential liability under Labor Law §240(1). See *Walls v Turner Construction Co.* 4 NY 3d 861 (2005). Here, defendants are the owner and a contractor of the subject site with supervisory and safety authority. Yet, they failed to adequately protect Medina from a hazardous condition, to wit, the opening in the premises of the top floor of the building in which he worked. The Court also finds Medina is not a recalcitrant worker nor the sole proximate cause of his accident wherein he sustained serious injuries, ruling such defense unavailable to §240(1). There is no evidence Medina received "immediate or active direction" not to use a device, as required to establish a recalcitrant worker defense, nor is he the sole proximate cause of his accident as no evidence establishes that he misused, removed or failed to use any available safety device or chose to use an inadequate device.

Additionally, the Court finds Medina is entitled to summary judgment against defendants on his Labor Law §241(6) cause of action predicated on 12 NYCRR §23-1.7(b)(1), "hazardous openings," because the subject opening was not covered nor guarded. The subject opening through which Medina fell was wholly uncovered, unguarded and no proper protections provided to prevent Medina from falling into it as he performed his cleaning work, such as adequate anchors. Defendants' conclusory assertions there was a railing in place at the time of accident

simply because undisclosed witnesses allege there was a railing in place at other times is pure conjecture. There is no evidence proffered that railings were in place at the time of Medina's accident. Hence, such allegations are insufficient to raise any issue of fact. In the end, Medina has demonstrated defendants' liability under Labor Law §240(1) because they failed to provide him with adequate safety devices, which is the proximate cause of the accident, entitling him to summary judgment on the issue of liability.

The Court concludes defendants fail to raise any issues of fact precluding summary judgment to Medina on the issue of liability on his Labor Law §§200, 240(1) and 241(6) causes of action.

CBP and Pavarini, in Motion Sequence 003, move for summary judgment on their third-party claims against City Safety for contribution, common law indemnification, contractual indemnification and breach of contract for failing to procure insurance as defendants were not negligent.

Defendants note construction manager, Pavarini, hired a site safety manager, City Safety, for the project who was required to be on the site full time. City Safety's responsibilities, according to defendants, included monitoring safety and ensuring everyone worked safely. It is alleged there were one or two City Safety employees working at the site, including site safety manager, Cavaliere. City Safety had authority to stop a worker and correct a situation if it observed someone working in an unsafe manner.

Cavaliere claims Medina's incident was not reported to him. He also notes that Medina's employer, Regulator, constructed the ladders on the jobsite that were in the openings between floors and secured by being nailed to a piece of wood on the floor. Cavaliere asserts he never observed the ladders removed from the openings between the floors. Yet, he notes if the ladders

were removed from the openings, Regulator was responsible for putting them back in place, or if the opening was exposed, guardrails were supposed to surround the opening and the opening would be a controlled access setup with signs, ropes or barricades to warn people they must be tied off and anchored. Further, Cavaliere alleges if a floor was being worked on, Regulator was responsible in preventing floors from becoming too slippery, noting no complaints were ever made to him of openings being unprotected.

Defendants allege City Safety, as the site safety contractor, was required to conduct inspections, including means of egress on the site. Thus, it claims as defendants were not negligent, and City Safety's own negligence caused the alleged incident, defendants are entitled to contribution and common law indemnification from City Safety. Defendants also allege entitlement to contractual indemnification from City Safety as the contract between Pavarini and City Safety provides City Safety will indemnify, defend and hold harmless, owner, Pavarini and their agents and employees as an additional insured against claims arising or resulting from City Safety's performance under the contract whether or not such claim is caused by a party indemnified here due to City Safety's negligence or willful conduct.

City Safety alleges while its job involved making recommendations to Pavarini based on its inspections of the property, Pavarini ultimately controlled and was "in charge of" implementing safety policies. City Safety claims its safety manager, Cavaliere, performed walk-throughs of the jobsite and recorded any violations observed, but responsibilities relating to safety matters were on Pavarini. City Safety further alleges Pavarini hired another contractor, Anfield, to provide "safety protection" and "temporary safety construction," including railings and perimeter fall protection, on a daily basis.

City Safety argues it provided conforming insurance and excess insurance liability coverage to defendants, naming all required parties as additional insureds. Also, City Safety notes while the policy contained an exclusion for certain bodily injuries, it excludes only injuries “arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services,” stating there are no allegations herein that the underlying claims arise from the rendering or failure to render such services. City Safety also notes defendants are currently being defended under a commercial general liability insurance policy from Axis Insurance—procured by Regulator and naming defendants as additional insured—thus, have coverage available to them in the underlying matter exceeding what City Safety agreed to provide.

The duty to defend is broader than the duty to indemnify. Thus, as Medina is granted summary judgment on his Labor Law claims as defendants failed to adequately protect him from a hazardous condition, and City Safety admitted the contract was in full force and effect on the incident date, City Safety would be required to at least provide a defense to defendants under the parties’ contract.

However, as the Court finds triable issues of fact exist whether the City Safety’s defense and indemnity obligations within the parties’ contract provisions are triggered by the instant incident, and questions also exist whether defendants, City Safety, Regulator, or Anfield were negligent in the performance of their respective duties, any attempts by defendants to be indemnified for their own potential negligence is unsupported by language in the parties’ contract. Therefore, summary judgment on the contractual indemnification claim is inappropriate or premature, and defendants’ motion for same against City Safety is denied.

On the issue of contribution, the Court notes defendants fail to establish that City Safety is a joint tortfeasor as to Medina. As City Safety points out, defendants repeatedly insisted in their motion papers the jobsite was safe, therefore, arguing City Safety was at fault in providing safety consulting services is, at the very least, disingenuous. Also, the Court notes questions exist whether City Safety, Regulator, Anfield or defendants were negligent in the occurrence of Medina's accident. Further, no prong under *Espinal v. Melville Snow Contractors Inc.*, (98 NY 2d 136 [2002]) appears applicable to City Safety's provision of their services and they owed no duty under *Espinal*. Even if it can be argued City Safety owed such a duty to Medina based on contractual obligations to Pavarini, defendants do not show City Safety breached such duty, or any potential breach caused Medina's accident. Thus, defendants are denied summary judgment on their contribution cause of action against City Safety.

While the Court finds City Safety may potentially be held vicariously liable for Medina's injuries as a result of defendants' actual fault via statutory violations, issues of fact of actual negligence exist to be determined by a trier of fact on defendants' common law indemnity claim against City Safety, and summary judgment in defendants' favor is inappropriate, and denied. Accordingly, the Court concludes triable issues of fact preclude granting defendants' motion for summary judgment on the contribution, common law indemnification, and contractual indemnification causes of action against City Safety, and same is denied. Also, as City Safety has shown it procured insurance and excess insurance, and named CBP and Pavarini as additional insureds, as required, defendants' motion for breach of contract against City Safety for a failure to procure insurance is denied.

Accordingly, it is,

ORDERED that plaintiff's application seeking summary judgment against defendants, CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC, on the Labor Law §240(1) cause of action, and the Labor Law §241(6) cause of action is granted, and it is further,

ORDERED that CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC's application seeking dismissal of plaintiff's common law negligence claims, as well as Labor Law §§200, 240, and 241(6) claims is denied, and it is further,

ORDERED that CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC's application seeking summary judgment is denied.

ORDERED that CBP 441 Ninth Avenue Owner LLC and Pavarini McGovern LLC's motion as to City Safety for summary judgment is denied.

This constitutes the decision and order of the Court.

2/23/2022

DATE



JAMES D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE