

<b>Minicone v New Line Structures Inc.</b>
2022 NY Slip Op 31055(U)
February 2, 2022
Supreme Court, New York County
Docket Number: Index No. 150874/2017
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS** **PART 57TR**

*Justice*

-----X

STEPHEN MINICONE, LORNA MINICONE,  
Plaintiff,

- v -

NEW LINE STRUCTURES INC., 33 BEEKMAN OWNER  
LLC, 33 BEEKMAN GROUND LESSEE LLC,  
Defendant.

-----X

NEW LINE STRUCTURES INC., 33 BEEKMAN OWNER LLC,  
33 BEEKMAN GROUND LESSEE LLC  
Plaintiff,

-against-

BAYPORT CONSTRUCTION CORP.  
Defendant.

-----X

**INDEX NO.** 150874/2017

**MOTION DATE** 01/25/2022,  
01/25/2022

**MOTION SEQ. NO.** 007 008

**ORDER - SUMMARY  
JUDGMENT**

Third-Party  
Index No. 595334/2017

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 176, 179, 180, 181, 182, 183, 184, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 207, 208, 209, 227, 228 were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 185, 186, 187, 188, 189, 190, 206, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 229, 230 were read on this motion to/for SUMMARY JUDGMENT.

**BACKGROUND**

Plaintiffs commenced this action seeking damages under the Labor Law for injuries Stephen Minicone (Minicone) sustained while working on a construction site at 33 Beekman Street in Manhattan on March 24, 2014.

New Line Structures Inc. (New Line) was the general contractor for the construction.

Bayport Construction Corp. (Bayport) was the subcontractor of New Line. 33 Beekman Owner LLC (33 Beekman) is the owner of the subject building.

### **PROCEDURAL HISTORY**

Plaintiffs commenced the instant action by the filing the Summons and Verified Complaint on or about January 26, 2017; thereafter, New Line, 33 Beekman, and 33 Beekman Ground Lessee LLC (Defendants) joined issue by service of their answer.

On April 21, 2017, Beekman and New Line filed the Third-Party Complaint against Bayport.

On November 30, 2018, Bayport filed the Third-Party Answer.

On May 18, 2021, Plaintiff filed the Note of Issue for the first time; it was vacated by stipulation of all parties dated July 16, 2021. Plaintiff filed the Note of Issue for the second time on September 13, 2021, at the direction of the court.

By Stipulation dated October 1, 2021, the parties hereto entered a Stipulation to complete discovery post-Note of Issue.

### **PENDING MOTIONS**

#### *Motion Seq 7*

On December 14, 2021, Defendants moved for:

Summary judgment and dismissal of plaintiff's claims under Labor Law § 200, general negligence, Labor Law §§ 240 and 241; and

Dismissal of the derivative consortium claims of plaintiff Lorna Minicone; and

Summary judgment on their claims for contractual indemnity and breach of contracts as against Bayport Construction Corp; and

Leave to amend this summary judgment motion when outstanding discovery is complete.

On January 25, 2022, plaintiff cross-moved for partial summary judgment on the issue of liability pursuant to Labor Law §241(6) as against Newline and 33 Beekman.

***Motion Seq 8***

On December 16, 2021, Bayport moved for summary judgment and dismissal of plaintiffs' claims under Labor Law §240(1); dismissal of the third party complaint and all other third-party claims, cross-claims and counterclaims asserted against Bayport, and for an order extending the time to file summary judgment motions or allowing for the supplementation and amendment of this motion pending completion of discovery.

On January 25, 2022, the motions were fully briefed and marked submitted. The motions are consolidated herein for determination and, with the exception of dismissal of plaintiffs' Labor Law §240(1) claim, are denied in their entirety.

**ALLEGED FACTS**

On the date of the accident, Minicone was employed by Bayport, a masonry contractor, as a general supervisor at a project for the construction of a brand-new dormitory building at 33 Beekman Street for Pace University, in lower Manhattan. Bayport was performing the work pursuant to a trade contract with New Line. Minicone was a supervisor for the "block work" in the building. Bayport had been working at the site for approximately one to two weeks prior to the accident date. New Line was the general contractor for the project and New Line's superintendent on the project site was Caimin Clancy (Clancy). Clancy's job duties included performing walkthroughs of the site and Clancy had the authority to stop the work if he observed an unsafe condition someone working in an unsafe manner.

The accident occurred on March 24, 2014 at 6:45 a.m. in the basement of the building. At the time of the accident, Minicone was inspecting the tags on door bucks that were stacked

against a wall of the basement. A door buck is a frame for a doorway that is made of steel. Bayport was going to install door bucks, that day. It is not clear who had stacked the door bucks. As Minicone was inspecting the tags on the door bucks, two or three of them fell over and struck him on his left shoulder, knocking him to the floor. When the accident occurred Minicone was standing underneath the door bucks.

Minicone testified that he had made prior complaints to Clancy about door bucks being stored by leaning them up against a wall, and further alleges the door bucks should have been placed on their sides with the tags on the top. Minicone described the area of the basement where the door bucks were leaning against the wall as a pathway or passageway between rows of stacked materials. Minicone also testified that on occasion he received work instructions from Clancy.

Minicone alleges that as a result of the accident, he sustained injuries including, but not limited to, a tear of the meniscus and tear of the anterior cruciate ligament of the left knee which required him to undergo surgery.

### **DISCUSSION**

#### ***Plaintiff's Claim Pursuant to Labor Law §240(1) Is Dismissed***

Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks. *see Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, (1993). Said liability attaches regardless of whether the owner or contractor supervised or controlled the work.

New York Courts have consistently held that where items are stored at a ground level and tip over onto a plaintiff, also at ground level, as in the present matter, there is no violation of

Labor Law Section 240. *See eg Oakes v. Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31 (3d Dept. 2012); *Wiley v. Marjam Supply Co., Inc.*, 166 AD3d 1106 (3d Dept. 2018).

It is not disputed that during plaintiff's deposition, on July 12, 2018, plaintiff's counsel agreed to withdraw this claim. Plaintiff has submitted no opposition to the portion of the motion seeking dismissal of this claim.

Based on the foregoing, Defendants' motion and Bayport's motion seeking dismissal of this claim is granted.

***The Parties' Motions as To Liability Under Labor Law §241(6) Are Denied as There Are Material Questions of Fact Which Must Be Determined at Trial***

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 (1998); *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 (1993). To sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Ross*, 81 NY2d at 505.

Plaintiffs argue Defendants violated the requirements of 12 NYCRR §23-2.1(a)(1) in that the door bucks that were left leaning against the wall in the basement were stored unsafely and were not adequately secured from falling. Plaintiffs argue that the fact that the door bucks fell and struck Minicone, as he was inspecting the tags on them, establishes *prima facie* that the Defendants are in violation of §23- 2.1(a)(1) and that said violation was a proximate cause of the accident and plaintiff's injuries.

Sections 23-2.1(a) (1) of the Industrial Code states in relevant part:

§23-2.1 Maintenance and housekeeping. (a) Storage of material or equipment. (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

However, the cases relied upon by plaintiffs do not support their request for summary judgment on this issue.

Plaintiffs rely heavily on two First Department cases *Rodriguez v. DRLD Development Corp.*, 109 A.D.3d 409 (1st Dep't 2013) and *Castillo v. 3440 LLC*, 46 A.D.3d 382 (1st Dep't 2007). Plaintiff is correct that both these cases apply Sections 23-2.1(a) (1) of the Industrial Code irrespective of whether the accident occurred in a passageway, and thus these cases do support denial of Defendants' motion for summary judgment on that point. However, contrary to plaintiffs' argument that the door bucks falling is *prima facie* evidence of liability, the court in *Rodriguez* held that the fact that the items fell created a question of fact as to whether they were stored in a safe and ordinary manner (*id.*). While the court in *Santiago* did award summary judgment, it was based on the unrefuted expert opinion of a professional engineer who found that the items leaning against the wall were unsafely stored and inherently unstable in violation of the applicable provision. No such expert opinion is offered on the motion for summary judgment pending before the court.

Based on the foregoing, the parties' motions for summary judgment as to the plaintiff's claim pursuant to Labor Law §241(6) are denied.

***Defendants Motions to Dismiss the Claims Asserted Under Labor Law §200 Are Denied***

Labor Law § 200(1) provides in pertinent part:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

N.Y. Lab. Law § 200 (McKinney). This provision codifies the theory of common law negligence.

Minicone alleges his injury arose due to the dangerous condition of how the door bucks were stacked and stored. In such a case, a property owner or general contractor will be liable under Labor Law § 200, “when the owner created the dangerous condition causing (the) injury or when the owner failed to remedy (the) dangerous or defective condition of which he or she had actual or constructive notice” (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]; see *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349 [2003]).” *Bridges v. Wyandanch Cmty. Dev. Corp.*, 66 A.D.3d 938, 940 (2009). Defendants argue that there was no defective condition, but it was the manner in which plaintiff proceeded that caused the door bucks to fall. They alternatively argue that if the stacking of the door bucks did create a dangerous condition, it was not their responsibility because they did not stack the door bucks, and they had no authority to supervise or control the work, pointing the finger at Bayport instead.

In *Barillaro v. Beechwood RB Shorehaven, LLC*, 69 A.D.3d 543 (2d Dep't 2010) the Second Department held that the lower court improperly dismissed the plaintiff's Labor Law §200 and common-law negligence claims, where the defendant owner failed to prove as a matter of law that it did not have actual or constructive notice of the uncapped rebar which caused the plaintiff's injury. See also *Acquitera v. Pistilli Const. & Development Corp.*, 63 A.D.3d 763 (2d Dep't 2009); *Schultz v. Hi-tech Construction & Management Services, Inc.*, 69 A.D.3d 701 (2d Dep't 2010).

In this case, there is evidence which, if credited by the fact finder, would support a finding that Defendants had constructive notice. Minicone testified that he had made complaints

to Clancy about the way door bucks were being stored on the project site. Minicone further testified that he sometimes received his work instructions from Clancy.

Additionally, Minicone found the door bucks leaning up against the basement wall when he went to inspect the tags on them at approximately 6:45 a.m., it may be reasonably inferred that the door bucks had been placed and left in that position for one or more days prior to the accident. A triable issue of fact therefore exists as to how long the door bucks had been stored leaning against the wall in this location and position, and whether it was long enough to have been discovered upon a reasonable inspection.

In *Quigley v. Port Authority of New York*, 168 A.D.3d 65 (1st Dep't 2018) the plaintiff was injured when he slipped on a pile of snow-covered pipes that were located directly outside the entrance door of his employer's shanty. The First Department held that the motion court properly denied the defendants' motion seeking dismissal of the plaintiff's common-law negligence and Labor Law §200 claims because the defendants did not satisfy their initial burden of showing that they did not create or have knowledge of the dangerous condition that caused the accident:

The evidence did not establish who left the pipes in front of the shanty for several weeks prior to the accident, and defendants did not provide any evidence to show the last time they inspected the work site (see *Ladignon v. Lower Manhattan Dev. Corp.*, 128 A.D.3d 534, 535, 10 N.Y.S.3d 28 [1st Dep't 2015]). Defendants focus almost exclusively on the snow that covered the pipes when arguing that they did not have notice of the dangerous condition-ignoring testimony suggesting that the pipes themselves, and their placement adjacent to the shanty, was the dangerous condition that caused the accident.

Here, a triable issue of fact exists as to whether Defendants had notice of the unsafe placement and storage of the door bucks that were leaned up against the basement wall. Nor does the summary judgment record indicate who stacked the door bucks in that manner. Moreover, as with the defendants in *Quigley*, Defendants here have presented no evidence as to when the

basement area was last inspected (*see also McClean v. 405 Webster Ave. Assocs.*, 98 A.D.3d 1090 (2d Dep't 2012)).

Additionally, Clancy's testimony that he performed regular walk-throughs of the site and that he had the authority to direct the contractors to correct any unsafe condition also creates a triable issue of fact [*Mott v. Tromel Const. Corp.*, 79 A.D.3d 829 (2d Dep't 2010)].

Based on the foregoing, the court finds that Defendants have failed to meet their burden of establishing judgment as a matter of law and the motions to dismiss the claims under common law negligence and Labor Law §200 are denied.

***The Parties' Motions for Summary Judgment on  
The Contractual Indemnity Claim Are Denied***

Bayport entered a trade contract with New Line to perform various masonry work at the Project. This subcontract included a contractual indemnification provision. Specifically, the agreement reads in pertinent part:

19.1 To the fullest extent permitted by applicable law, Trade Contractor shall indemnify, defend (if requested by Owner and/or Construction Manager), and hold harmless 33 Beekman Owner LLC, NEW LINE STRUCTURES INC. .... for personal or bodily injury, sickness, disease or death or injury to or destruction of tangible property including loss of use arising from, or in connection with, the performance of the services by Trade Contractor under this Agreement irrespective of the cause and/or type of such injury, cost, damage or loss. This indemnification shall survive completion of the Project and/or earlier termination of this Agreement. With regard to any and all claims or lawsuits against Owner and/or Construction Manager or their respective parents, subsidiaries or affiliated companies by any employee or independent contractor of Trade Contractor or employee of Trade Contractor's subcontractor, consultant or vendor or brought by anyone for whose acts either Trade Contractor or its subcontractors, consultants or vendors may be liable, the indemnification obligation under this Agreement shall not be limited in any way by the amount or type of damages, compensation or benefits payable by or for Trade Contractor or its subcontractors, consultants or vendors under workers' compensation acts, disability benefit acts or other employee benefit acts. Owner and/or Construction Manager reserve the right to have separate legal counsel (chosen by Owner and/or Construction Manager) retained for their defense, which costs shall be borne by Trade Contractor under its defense obligation under this Section.

Such clauses are enforceable, absent negligence on the part of the party being indemnified. As held by the court in *Giangarra v. Pav-Lak Contracting, Inc.*, 55 A.D.3d 869, 870–71 (2008):

.... (while) an indemnification agreement that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such an agreement does not violate the General Obligations Law if it authorizes indemnification “to the fullest extent permitted by law,” as the subject agreement does here (*see Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2006]; *Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2006]). Moreover, an indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2007])

In this case, there are questions of fact as to whether New Line and Bayport were negligent in regard to the stacked door bucks. Bayport alleges that it was the responsibility of New Line to take delivery of the door bucks and store them. Minicone testified that he had seen New Line employees leaning door bucks against the wall. Additionally, Clancy was allegedly on actual and constructive notice of the stacked door bucks, which he testified he did not regard as a dangerous condition. The case law cited by New Line only supports summary judgment on indemnity in the established absence of negligence on the part of the General Contractor, a fact not yet established in this case.

Bayport has equally failed to establish judgment as a matter of law on the indemnity claim. Bayport’s argument is that they were not negligent so they should not be liable on the indemnity claim. Initially, it has not yet been established that Bayport was not negligent. Bayport relies on the testimony of Minicone to say that the door bucks were not stacked by Bayport, but in fact Minicone did not see who stacked the door bucks that were involved in this incident. Moreover, even if the absence of negligence by Bayport had been established, its’ argument still fails as a matter of law. As held by the Court of Appeals an agreement by a sub-contractor to assume liability incurred by contractor for personal injuries arising out of the

performance of the work required subcontractor to indemnify contractor for its liability even though there was no evidence of negligence on the subcontractor's part (*Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172 (1990)).

Based on the foregoing, both Bayport's and New Line's motions for summary judgment on the indemnity claims are denied.

Similarly, the Court finds that New Line failed to establish a right to summary judgment on the breach of contract claim. As pointed out by Bayport, while they annex a copy of the contract to the motion papers, New Line annexes no proof that Bayport failed to procure insurance, nor do they provide any evidence that it sought coverage from, or filed a claim with, Bayport's carrier and the motion is supported with only an attorney's affirmation, which is insufficient to demonstrate New Line's entitlement to summary judgment.

### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that plaintiffs' Labor Law §240(1) claims are dismissed and all other relief sought herein is denied in its entirety; and it is further

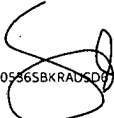
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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**SABRINA KRAUS, J.S.C.**

2/2/2022  
**DATE**

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLER ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE