Simon v 321 W. 78th St. Corp.
2022 NY Slip Op 33335(U)
September 30, 2022
Supreme Court, Kings County
Docket Number: Index No. 505659/18
Judge: Richard Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of September, 2022.

P R E S E N T:

HON. RICHARD VELASQUEZ,
Justice.

----------X

STEFAN SIMON,
Plaintiff,

-against-

321 WEST 78TH STREET CORP., ANITA I. SEN, PACS ARCHITECTURE and WILLIAM HARRINGTON,

Defendants.

----------X

321 WEST 78TH STREET CORP.,
Third-Party Plaintiff,

-against-

TD RENOVATIONS, INC.,
Third-Party Defendant.

----------X[1]

DECISION AND ORDER

Index No. 505659/18

Mot. Seq. Nos. 2-4

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affirmations, and Exhibits Annexed	42-60; 63-78; 85-97
Affirmations in Opposition	79; 80; 99
Reply Affirmations	81; 100

In this consolidated action to recover damages for personal injuries, the following motion and cross motions have been consolidated for disposition:

In motion sequence (Seq.) number (No.) 2, defendant PC+K Architecture PLLC, doing business as PACS Architecture (incorrectly sued herein as PACS Architecture)

[1] William Harrington was dismissed from the third-party action (but not from the underlying action) by stipulation, dated September 28, 2018.

("PACS"), moves for summary judgment dismissing all claims and cross claims as against it;

In Seq. No. 3, defendant/third-party plaintiff 321 West 78th Street Corp. (the "coop"), defendant Anita I. Sen ("Sen"), and defendant William Harrington ("Harrington" and, collectively, with the coop and Sen, the "coop defendants"), jointly cross-move for: (1) summary judgment dismissing all claims and cross claims as against each of them; and (2) conditional summary judgment for common-law indemnification as against each of PACS and third-party defendant TD Renovations, Inc. ("TD"); and

In Seq. No. 4, plaintiff Stefan Simon ("plaintiff") cross-moves for partial summary judgment on the issue of liability as against the coop under Labor Law § 240 (1) and, in addition, under Labor Law § 241 (6) to the extent predicated on the alleged violation of Industrial Code § 23-1.21 (b) (3) (iv).[2]

Background

Plaintiff was employed as a carpenter by third-party defendant TD, a general contractor, whose owners assigned and supervised his work on (among other days) the day of the incident. Defendants Sen and Harrington (collectively, "Sen-Harrington") had retained TD to renovate their apartment (the "renovation project") in the residential building owned by defendant coop. In addition to TD, Sen-Harrington had retained defendant PACS, a partnership of two registered architects, to provide them, in connection

[2] *See* Supplemental Bill of Particulars, dated January 22, 2021, ¶ 4 (NYSCEF Doc No. 97).

with the renovation project, with certain architectural design services, as more fully set forth in the margin.[3]

On the day of the incident, plaintiff was inside Sen-Harrington's apartment standing on the next-to-the-top step of the four-step A-frame ladder (supplied by TD) installing a drop ceiling. As he was shifting his body weight from right to left while working on the ladder, one of its four legs broke. To avoid a fall from the ladder, he grabbed onto a sharp metal frame at (or above his height) with his left hand. The metal frame cut into his left wrist/elbow, leaving at least two pieces of metal inside his left wrist/elbow, but without otherwise preventing his fall. As plaintiff was falling from the ladder, he landed on the floor on his left side. He underwent surgery on his injured wrist/elbow, with some (but, according to him, allegedly insufficient) pain relief. He was still receiving workers' compensation benefits at the time of his pretrial deposition approximately 15 months after the incident.

According to plaintiff's undisputed pretrial testimony, all three of the A-frame ladders provided by TD at the worksite (including the ladder at issue) "were very old; wiggly and the[ir] legs were twisted, then we [workers] were straightening them up, these legs" (Plaintiff's EBT tr at page 31, lines 18-20). According to plaintiff's likewise

[3] PACS' architectural design services for the renovation project consisted of the following: (1) schematic design; (2) design development/regulatory submission; (3) construction documents; and (4) construction administration, with the last category being further broken down into: (a) attendance at job meetings as necessary for the duration of the renovation project, (b) processing of all shop drawings and submittals required by the construction documents to ensure conformance with them, and (c) upon Sen-Harrington's request, review and approval of monthly payment requisitions (*see* NYSCEF Doc No. 57, Statement of Interest and Understanding, dated February 17, 2017).

undisputed pretrial testimony, he had no choice, if he wanted to continue working for TD, but to use its ladders, despite their obvious instability (*id.* at page 33, lines 14-17).

Post-incident, plaintiff commenced two actions (later consolidated into a single action[4]) against the coop defendants and PACS, asserting claims sounding in violation of Labor Law §§ 240 (1), 241 (6), and 200, as well as common-law negligence. The coop defendants and PACS each joined issue, asserting (with certain exceptions as to Harrington) cross claims as against one another.[5] The coop subsequently impleaded TD. Third-party defendant TD failed to appear or otherwise respond in the third-party action, but no default judgment has been taken against it.

After discovery was substantially completed but before a note of issue was filed, the instant motion and cross motions were served. Thereafter, the Court heard oral argument and reserved decision. Additional facts are noted when relevant to the discussion below. For the sake of clarity, discussion is divided between the uncontested and contested legal issues.

Discussion

I. Uncontested Legal Issues

Uncontested Legal Issue #1: Sen and Harrington's Potential Liability to Plaintiff

Sen and Harrington's joint status as the proprietary lessees of their one-family residence is undisputed. Likewise undisputed is Sen and Harrington's respective pretrial

[4] *See* Consolidation Order, dated May 14, 2020 (Velasquez, J.).

[5] More particularly, the coop has asserted cross claims as against Sen and PACS, by answer, dated May 25, 2018; Sen has asserted cross claims as against the coop and PACS by answer, dated July 13, 2018; and PACS has asserted a cross claim as against the coop and Sen by answer, dated June 20, 2018, and as against Harrington by notice of cross claim, dated May 29, 2020. The coop has asserted no cross claims as against Harrington, nor, in turn, has he asserted any cross claims as against the coop and codefendants.

testimony that neither of them directed or controlled TD's (or plaintiff's) work. Thus, Sen and Harrington are each entitled to the homeowner's exemption from liability under Labor Law §§ 240 (1) and 241 (6) (*see Bates v Porter*, 203 AD3d 792, 793-794 [2d Dept 2022]).[6]

It is further undisputed that Sen-Harrington's "general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Flores v Crescent Beach Club, LLC*, ___ AD3d ___, 2022 NY Slip Op 04901 [2d Dept 2022] [internal quotation marks omitted]). Similarly undisputed is Sen and Harrington's respective pretrial testimony that neither of them possessed the authority to supervise or control the means and methods of plaintiff's work.[7]

Plaintiff, in support of his own cross-motion for partial summary judgment on liability as against the coop, and in opposition to the coop defendants' cross motion, does *not* object to the dismissal of his claims as against Sen and Harrington.[8] Accordingly, dismissal of plaintiff's claims as against Sen and Harrington is warranted.

---

[6] Labor Law § 240 (1) provides, in relevant part, that "[a]ll contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*," etc. In identical language, Labor Law § 241 (6) provides, in relevant part, that "[a]ll contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*," etc. (emphasis added in each instance).

[7] *Compare Ortega v Puccia*, 57 AD3d 54, 62 (2d Dept 2008) ("A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [and under the theory of common-law negligence] *when that defendant bears the responsibility for the manner in which the work is performed*.") (emphasis added).

[8] *See* NYSCEF Doc No. 86, Affirmation in Support of Plaintiff's Cross Motion and in Opposition to Defendant 321 West 78th [Street Corp.]'s Cross Motion, dated January 22, 2021, ¶ 2 ("[P]laintiff opposes that cross-motion *insofar as it seeks to dismiss plaintiff's claims against 321 West 78th [Street Corp.] that are predicated upon Labor Law § 240 [1] and Labor Law § 241 [6]*.") (unnecessary capitalization omitted; emphasis added).

Uncontested Legal Issue #2: The Coop's Potential Liability to Plaintiff Under Labor Law § 200 and Common-Law Negligence

In addition, plaintiff does *not* object to the dismissal of his Labor Law § 200 and common-law negligence claims as against the coop, focusing instead on the latter's potential liability to him under Labor Law §§ 240 (1) and 241 (6).[9] Thus, dismissal of plaintiff's claims, insofar as grounded on Labor Law § 200 and in common-law negligence, as against the coop is also warranted.

Uncontested Legal Issue #3: PACS' Potential Liability to Plaintiff

Further, plaintiff has interposed no opposition to the branch of PACS' motion which is for summary judgment dismissing his claims as against it. Insofar as plaintiff's claims against PACS rest on Labor Law §§ 240 (1) and 241 (6), they are subject to dismissal as a matter of law by reason of the express statutory exemption from liability for "architects . . . who do not direct or control the work for activities other than planning and design" (Labor Law §§ 240 [1] and 241 [9]; *see Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 640 [2d Dept 2006]).[10] In addition, plaintiff's Labor Law § 200 and common-law negligence claims as against PACS are subject to dismissal because PACS has demonstrated, prima facie and without opposition from plaintiff, that it was not responsible

[9] It is worth repeating that in ¶ 2 of the aforementioned Affirmation in Support of Plaintiff's Cross Motion and in Opposition to Defendant 321 West 78th [Street Corp.]'s Cross Motion, dated January 22, 2021, plaintiff specifically limited his claims as against the coop to those predicated on Labor Law § 240 (1) and Labor Law § 241 (6), to the exclusion of Labor Law § 200 and common-law negligence.

[10] In this regard, Labor Law § 240 (1) provides, in relevant part, that "*[n]o liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on . . . architects . . . who do not direct or control the work for activities other than planning and design.* This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law" (emphasis added). The foregoing provision is reiterated, in substantially the same terms, in Labor Law § 241 (9).

for the means and methods of plaintiff's work (*see Zolotar v Krupinski*, 36 AD3d 802, 803 [2d Dept 2007]; *Hatfield v Bridgedale, LLC*, 28 AD3d 608, 610 [2d Dept 2006]).

Uncontested Legal Issue #4: TD's Potential Liability for Common-Law Indemnification

Workers' Compensation Law § 11 prohibits third-party claims for common-law contribution or indemnification against an employer unless the employee has sustained a "grave injury."[11] Plaintiff's latest bill of particulars, as amplified by his pretrial testimony, establishes, beyond peradventure, that he did not sustain a grave injury from the accident.[12] It is further undisputed that plaintiff was still receiving workers' compensation benefits from TD's insurance carrier at the time of his pretrial deposition approximately 15 months after his accident. Accordingly, the coop defendants are *not* entitled to conditional summary judgment for common-law indemnification as against TD (*see*

[11] A "grave injury" under Workers' Compensation Law § 11 means "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

[12] Plaintiff's alleged injuries, as pleaded in his latest bill of particulars, consisted of the following: "[1] Foreign Body in Left Forearm requiring Removal on December 13, 2017; [2] Soft Tissue Swelling at the Lateral to the Left Distal Ulna Shaft; [3] Foreign Body in Left Hand; [4] Two Punctate Metallic Densities with the Soft Tissues along the Medial Aspect of the Left Distal Forearm Consistent with Radiopaque Foreign Bodies; [5] Cellulitis of Upper Extremity; [6] Left Arm Pain; [7] Abrasion to Left Forearm with Surrounding Erythema; [8] Left Median Motor and Left Ulnar Sensorimotor Axonal Neuropathy in the Left Upper Extremity; [9] Numbness to the 4th and 5th Digit of Left Hand; [10] Shooting Pain throughout Upper Left Extremity" (Verified Bill of Particulars as to Harrington, dated January 6, 2020, ¶ 10 (NYSCEF Doc. No. 72) (boldface type omitted).

McIntosh v Ronit Realty, LLC, 181 AD3d 580, 581 [2d Dept 2020]; *Pineda v 79 Barrow St. Owners Corp.*, 297 AD2d 634, 636-637 [2d Dept 2002]).

II. Contested Legal Issues

Contested Legal Issue #1: Coop's Potential Liability to Plaintiff Under Labor Law § 240 (1)

As noted, the coop and plaintiff (as against the coop) each cross-move for summary judgment on his Labor Law § 240 (1) claim. "Labor Law § 240 (1) imposes upon owners . . . a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Guaman v 178 Court St., LLC*, 200 AD3d 655, 657 [2d Dept 2021]). "[T]o prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]).

Here, plaintiff, relying on his pretrial testimony, has established, prima facie, that Labor Law § 240 (1) was violated and that the violation was a proximate cause of his injuries (*see Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 704 [2d Dept 2022]; *Soczek v 8629 Bay Parkway, LLC*, 193 AD3d 1093, 1094 [2d Dept 2021]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097 [2d Dept 2012]; *Melchor v Singh*, 90 AD3d 866, 869-870 [2d Dept 2011]; *Pineda*, 297 AD2d at 636). In opposition, the coop has failed to raise a triable issue of fact, by way of admissible, non-hearsay evidence, as to whether plaintiff either was not injured as a result of a fall from a ladder and/or that his own actions were the sole proximate cause of the incident (*see Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1223 [2d Dept 2019]; *Gomez v Kitchen & Bath by Linda Burkhardt, Inc.*, 170 AD3d 967, 969 [2d Dept 2019]; *Alvarez v Vingsan Ltd. Partnership*, 150 AD3d 1177, 1179 [2d Dept 2017]). Accordingly, the branch of plaintiff's

cross motion which is for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against the coop is *granted*; conversely, the branch of the coop defendants' cross motion which is for summary judgment dismissing that claim as against the coop is *denied*.

Contested Legal Issue #2: Coop's Potential Liability to Plaintiff Under Labor Law § 241 (6)

Furthermore, the coop and plaintiff (as against the coop) each cross-move for summary judgment on his Labor Law § 241 (6) claim, insofar as it is predicated on the alleged violation of Industrial Code § 23-1.21 (b) (3) (iv). Labor Law § 241 (6) "imposes a nondelegable duty upon owners . . . to provide reasonable and adequate protection and safety to construction workers" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). "To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete specifications" (*Rivas-Pichardo v 292 Fifth Ave. Holdings, LLC*, 198 AD3d 826, 829 [2d Dept 2021] [internal quotation marks omitted]).

It is true, as the coop contends (in ¶ 44 of its counsel's opening affirmation), that a plaintiff asserting a Labor Law § 241 (6) claim must allege a violation of a specific and concrete provision of the Industrial Code. It is also true, however, that "the failure to identify the specific Code provision allegedly violated in support of a Labor Law § 241 (6) cause of action either in the complaint or in the bill . . . of particulars is not necessarily fatal" (*Galarraga v City of New York*, 54 AD3d 308, 310 [2d Dept 2008]). "A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241 (6) claim for the first time in opposition to a motion for summary judgment if the allegation

involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendants" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and alterations omitted]). Here, plaintiff's belated citation of Industrial Code § 23-1.21 (b) (3) (iv), in his opposition to the coop defendants' cross motion and in support of his own cross motion, involves no new factual allegations or new theories of liability; nor has it caused unfair prejudice to the coop. The coop was put on sufficient notice (by way of plaintiff's bill of particulars and his pretrial testimony) that his Labor Law § 241 (6) claim related to the flawed or defective ladder (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]; *Kowalik*, 81 AD3d at 784). Moreover, Industrial Code § 23-1.21 (b) (3) (iv), which prohibits the use of a ladder "[i]f it has any flaw or defect of material that may cause ladder failure," sets forth a specific (rather than a general) safety standard, and, as such, is sufficient to support a Labor Law § 241 (6) claim (*see Melchor*, 90 AD3d at 870; *De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 [1st Dept 2001]).

Here, plaintiff again relying on his pretrial testimony, has established, prima facie, that: (1) the A-frame ladder on which he was working at the time of the incident suffered from a flaw or defect of material that caused its failure within the meaning of Industrial Code § 23-1.21 (b) (3) (iv); and (2) the coop (as the building owner charged with the non-delegable statutory duty to provide reasonable and adequate protection to construction workers on its premises) violated this Industrial Code provision (*see Ennis*, 207 AD3d at 705; *Melchior*, 90 AD3d at 871; *see also Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]).

In opposition, the coop has failed to raise a triable issue of fact. Contrary to the coop's contention, plaintiff was not required to demonstrate as part of his prima facie case his freedom from comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 323 [2018]; *Ortega v R.C. Diocese of Brooklyn*, 178 AD3d 940, 942 [2d Dept 2019]).[13] Accordingly, the branch of plaintiff's cross motion which is for partial summary judgment, as against the coop, on the issue of liability on his Labor Law § 241 (6) claim, insofar as it is predicated on Industrial Code § 23-1.21 (b) (3) (iv), is *granted*; conversely, the branch of the coop defendants' cross motion which is for summary judgment dismissing that claim as against the coop is *denied*.

Contested Legal Issue #3: PACS' Potential Liability to the Coop Defendants

Lastly, PACS moves for summary judgment dismissing all claims and cross claims as against it, whereas the coop defendants (or, more precisely, the coop and Sen[14]) cross-move for conditional summary judgment for common-law indemnification as against it. As noted, plaintiff has not objected to the dismissal of his claims as against PACS. This leaves for consideration the viability of the cross claims of the coop and Sen as against PACS.

PACS has met its prima facie burden of establishing entitlement to summary judgment by demonstrating that it was not responsible for the means and methods of plaintiff's work. In opposition, the coop and Sen have failed to raise a triable issue of fact. The pretrial testimony of Aleksander Shkreli, R.A. ("Shkreli"), one of the two partners in

[13] The coop defendants' reliance on *Cardenas v 111-127 Cabrini Apts. Corp.* (145 AD3d 955 [2d Dept 2016]) is unavailing, as *Cardenas* had been issued approximately two years before the Court of Appeals handed down its landmark decision to the contrary in *Rodriguez v City of New York*, 31 NY3d 312 (2018).

[14] As noted, Harrington has asserted no cross claims as against PACS or any other codefendant.

PACS, demonstrated that PACS, by attending weekly status meetings with Sen-Harrington and TD, did not go beyond the function of an architect; that PACS did not direct plaintiff or other workers as to how to perform their work; and that PACS did not supply any materials or equipment to the renovation project.[15] Accordingly, the branch of PACS' motion for summary judgment dismissing all cross claims as against it is *granted*; conversely, the branch of the coop defendants' cross motion for conditional summary judgment for common-law indemnification as against PACS is *denied*, as more fully set forth in the decretal paragraphs below (*see Zolotar*, 36 AD3d at 803; *Boyd v Lepera & Ward P.C.*, 275 AD2d 562, 564 [3d Dept 2000]).

The Court has considered the parties' remaining contentions and found them unavailing.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 2, PACS' motion for summary judgment dismissing all claims and cross claims as against it is *granted*; plaintiff's complaint and all cross claims are *dismissed* as against PACS without costs and disbursements; and the action is severed accordingly; and it is further

ORDERED that in Seq. No. 3, the *initial* branch of the coop defendants' cross motion for summary judgment dismissing all claims and cross claims as against each of them is *granted to the extent* that plaintiff's claims as against Sen and Harrington are

[15] *See* Shkreli EBT tr at page 18, lines 9-20; page 22, line 6 to page 23, line 25; page 27, line 19 to page 28, line 3; page 28, lines 13-18; page 30, lines 13-19; page 43, lines 14-18; page 47, line 15 to page 48, line 3.

dismissed without costs and disbursements; the action is severed accordingly; and the balance of the initial branch of their cross motion is *denied*; and it is further

ORDERED that in Seq. No. 3, the *remaining* branch of the coop defendants' cross motion which is for conditional summary judgment for common-law indemnification as against each of PACS and TD Renovations is *denied*; and it is further

ORDERED that in Seq. No. 4, plaintiff's cross motion for partial summary judgment on the issue of liability as against the coop under Labor Law §§ 240 (1) and 241 (6) is *granted*; and it is further

ORDERED that to reflect the *dismissal* of all claims and cross claims as against PACS, the *dismissal* of plaintiff's claims as against Sen and Harrington, and the *retention* of the coop's cross claims as against Sen, the caption is amended to read in its entirety as follows:

----------X
STEFAN SIMON,
Plaintiff,
-against- Index No. 505659/18

321 WEST 78TH STREET CORP.,
Defendant.
----------X
321 WEST 78TH STREET CORP.,
Cross Claim Plaintiff,
-against-
ANITA I. SEN,
Cross Claim Defendant.
----------X
321 WEST 78TH STREET CORP.,
Third-Party Plaintiff,
-against-

TD RENOVATIONS, INC.,
Third-Party Defendant.
----------X

; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision, order, and judgment with notice of entry on defendants' respective counsel, as well as on third-party defendant TD Renovations, Inc., and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the remaining parties are reminded of their scheduled *in-person* appearance in JCP-1 on December 6, 2022 at 10:00 a.m.

The foregoing constitutes the decision, order, and judgment of the Court.

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

SEP 30 2022