

<b>Aungst v 20 Broad St. Owner LLC</b>
2022 NY Slip Op 33643(U)
October 24, 2022
Supreme Court, New York County
Docket Number: Index No. 155858/2019
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

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**INDEX NO. 155858/2019**

GERALD L. AUNGST,

Plaintiff,

- v -

**MOTION SEQ. NO. 001, 002 and 003**

20 BROAD STREET OWNER LLC, NEW YORK STOCK EXCHANGE BUILDING COMPANY, NEW YORK STOCK EXCHANGE LLC, 20 BROAD GC LLC, COLLABORATIVE CONSTRUCTION MANAGEMENT, LLC, and EVEREST SCAFFOLDING INC.,

**DECISION + ORDER ON MOTION**

Defendants.

-----X

20 BROAD STREET OWNER LLC, 20 BROAD GC LLC, COLLABORATIVE CONSTRUCTION MANAGEMENT, LLC

Third-Party  
Index No. 596076/2019

Plaintiff,

-against-

CLIFTON ARCHITECTURAL GLASS & METAL

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 109, 112, 113, 114, 125, 126, 127, 134, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 110, 115, 116, 117, 118, 128, 129, 130, 131, 135, 152, 153, 154

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 111, 119, 120, 121, 122, 123, 124, 132, 133, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, defendant Everest Scaffolding Inc. (Everest) moves, pursuant

to CPLR 3212, for an order granting it summary judgment dismissing the complaint against it, granting it summary judgment on its cross claims for contractual indemnification and breach of contract against co-defendant 20 Broad Street Owner LLC (owner), and awarding it costs and expenses against Owner. (mot. seq. 001). Owner, 20 Broad GC LLC (GC), and Collaborative Construction Management, LLC (CCM) (collectively, Owner defendants), plaintiff, and New York Stock Exchange LLC (NYSE) oppose the motion.

Plaintiff moves, pursuant to CPLR 3212, for an order granting him partial summary judgment on liability on his Labor Law § 240(1) claim against defendants owner, NYSE, GC, and CCM. (mot. seq. 002). Owner defendants and NYSE oppose the motion.

Defendant NYSE moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against it, granting it summary judgment on cross claims for contractual and common-law indemnification against owner, including costs, and granting it summary judgment on cross claims for common law indemnification against GC, CCM, and Everest. (Mot. seq. three). Owner defendants oppose the motion and plaintiff opposes dismissal of the complaint against NYSE.

### I. BACKGROUND

The parties' statements and counter-statements of material fact (NYSCEF 57; 85; 102; 113; 116; 121; 126; 129; 133; 142; 147) reflect that the following pertinent facts are undisputed:

This action arises from injuries suffered by plaintiff while performing construction work at a building owned, managed, and/or leased by defendants. NYSE owned the land on which the building at issue stands, and leased it to owner. NYSE did not enter into any agreements related to the work, nor did it supervise, direct, or control plaintiff or his work. The lease between NYSE and Owner required Owner to indemnify NYSE for injuries occurring at the building and to

procure an insurance policy naming NYSE as an additional insured.

Owner retained GC to perform the construction work for the project, and GC hired plaintiff's employer, Clifton Architectural (Clifton), to provide certain work. CCM, the construction manager for the project, was responsible for design compliance inspections but did not control any work at the site.

On January 13, 2014, non-party Vornado Office Management LLC hired Everest to install a sidewalk bridge at 20 Broad Street in Manhattan, and on January 21, 2014, Everest erected the bridge. Following the installation, an Everest Estimator/Project Manager, who is also a Certified New York City Department of Buildings (DOB) Construction Superintendent, inspected the bridge/shed and issued a Code Compliance Letter confirming the shed was installed in accordance with the relevant drawings and as per DOB Codes.

On November 19, 2015, Everest and owner c/o Metro Loft Management entered into an agreement pursuant to which "20 Broad Street Owner LLC ("Customer") agree[d] to Take Over the Sidewalk Bridge contract originally held between Everest Scaffolding Inc. & Vornado Office Management" ("the takeover contract"). Pursuant to the paragraph 6 of the takeover contract, owner agreed "[t]o the fullest extent permitted by law . . . to indemnify, defend and hold harmless Everest . . . from any and all claims . . . arising out of or in connection with the Project, including but not limited to the use and/or operation of the [sidewalk bridge]." Owner also agreed to name Everest as an additional insured and to require any contractors or subcontractors to do the same, and to provide Everest with an indemnification and hold harmless agreement. The contract further required that any requests for repairs to the sidewalk bridge be made in writing. Everest was not contractually required to perform regular maintenance on the sidewalk bridge and made no repairs to it before plaintiff's accident.

Everest received no complaints about the condition of the bridge before plaintiff's accident, and was unaware of any bridge planks cracking or breaking. CCM's project manager observed the sidewalk bridge 5 to 10 times before plaintiff's accident, and saw no defective or unsafe conditions and nothing wrong with the planks. Nor did CCM receive any complaints about the bridge before the accident.

Plaintiff's employer, Clifton, was a subcontractor responsible for installing glass in the storefronts on the first and second floors. Clifton's owner and project managers were the only people at the site responsible for supervising Clifton employees. Plaintiff's accident occurred when he climbed out of a second-floor window, stepped onto the sidewalk bridge, and his left foot broke through a plank, causing his leg to sink through the bridge for several feet. After the accident, CCM's project manager prepared an accident report.

Plaintiff's co-worker had not observed any dangerous condition with respect to the planks before plaintiff's accident. Nor had plaintiff, who had inspected the bridge before the first time that he stepped out of the window, seen any cracks or broken boards. Although plaintiff observed that the planks looked "weathered" prior to the incident, he made no complaints about them to anyone. Plaintiff had also previously walked on the bridge several times without incident.

## II. EVEREST'S MOTION

### A. Dismissal of the Complaint

#### 1. Contentions

Everest denies that it is liable for plaintiff's accident since it had no duty to maintain the bridge after it was installed and had no notice of any unsafe condition related thereto before plaintiff's accident. Thus, it asserts, it is entitled to dismissal of plaintiff's Labor Law § 200 and

common law negligence claims. Additionally, Everest contends that, since it was neither an owner, general contractor, or an agent of one, nor did it supervise or direct plaintiff or his work, plaintiff's Labor Law claims must be dismissed against it. (Doc. 55).

In opposition, defendants assert that Everest had a continuing duty to maintain and inspect the bridge, and the fact that plaintiff fell through a plank establishes that Everest either failed to install the bridge correctly or to maintain it over the years. And, while the contract may not have required Everest to maintain the bridge, it had a statutory duty to do so, having placed the bridge on a public sidewalk. (Docs. 112; 125). Plaintiff also argues that Everest violated the Industrial Code by using a plank which was unable to support his weight. (Doc. 144).

In reply, Everest observes that the Building Code requires the contractor using the bridge, and not it, to maintain and inspect the bridge, and otherwise denies defendants' allegations. (Doc. 149).

## 2. Analysis

Everest establishes, *prima facie*, that it had no contractual duty to maintain and inspect the bridge after it was built, that it never received a request to make a repair to it during the more than five years between the time it installed the bridge and plaintiff's accident, and that it had no notice of an unsafe condition as no one at the site observed any defective or unsafe condition on the bridge before the accident. (*See Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012] [affirming dismissal of common law negligence and Labor Law § 200 claims absent evidence defendants had actual or constructive notice of hazardous condition on sidewalk bridge; plaintiff testified that he did not notice defects in bridge before accident]).

Moreover, Everest neither controlled nor directed plaintiff or his work, and thus may not be held liable under the Labor Law. (*See Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [1st

Dept 2005] [scaffolding company not liable for Labor Law violations as it was neither owner nor contractor as it had no control over use of sidewalk bridge, no duty to maintain it, and was not present at site after it installed bridge]; *see also Calogrides v Spring Scaffolding, Inc.*, 89 AD3d 434 [1st Dept 2011] [since scaffolding company was not owner, general contractor, or agent, Labor Law §§ 241(6) and 240(1) claims should have been dismissed against it]).

The contention by the owner defendants, NYSE, and plaintiff that, because the plank in the bridge broke when plaintiff stepped on it, it must have been installed incorrectly by Everest more than five years earlier, is speculative and unsupported by any evidence. On the contrary, the relevant testimony establishes that no one observed any defect with the planks before the accident. (*See Calogrides*, 89 AD3d at 434 [negligence claims dismissed absent evidence that defendant's initial installation of sidewalk bridge was negligent or defective]; *compare Ryan v Trustees of Columbia Univ. in City of New York, Inc.*, 96 AD3d 551 [1st Dept 2012] [claims against sidewalk bridge company should not have been dismissed as there was evidence that company did not inspect bridge before entering into new lease for it, and that lumber used in bridge was rotted and bridge was not properly installed]).

The cases cited by defendants for the proposition that Everest has a statutory duty to maintain and inspect the bridge in perpetuity are inapposite. (*See e.g., Gerdowsky v Crain's New York Business*, 188 AD2d 93 [1st Dept 1993] [since defendant was contractor hired to install, clean and repair machines, and its agreement required no inspections and it only had duty to repair if requested, and as it was never asked to make repair, it had no control over unsafe machine and thus could not be held liable for accident]).

Since the owner defendants and plaintiff fail to raise a triable issue in opposition to Everest's motion, all claims and cross claims against Everest must be dismissed.

### B. Judgment on Counterclaims against the Owner Defendants

Having shown that it was not negligent with respect to the sidewalk bridge and/or plaintiff's accident, and given the broad indemnification provision in the takeover agreement, which requires the owner to indemnify Everest from any claims arising out or connected to the project, including the use and/or operation of the sidewalk bridge, Everest establishes, *prima facie*, that owner is required to indemnify it.

However, Everest fails to establish that owner breached its agreement to procure insurance naming Everest as an additional insured, since it submits no evidence to support its allegation and relies solely on the fact that it tendered its defense to owner's insurance company but received no response. In any event, in opposition, owner provides a copy of the applicable insurance policy which meets the requirements of the agreement (Doc. 127).

### III. PLAINTIFF'S MOTION

#### A. Contentions

Plaintiff argues that the fact that the bridge plank broke under his foot suffices to establish a *prima facie* violation of Labor Law § 240(1), for which the owner defendants and NYSE must be held liable. He maintains that he was provided with no safety devices to prevent him from falling through the broken plank, and/or to the extent that the bridge was the provided safety device, it failed to protect him from harm. (Doc. 83).

NYSE contends that it may not be held liable pursuant to Labor Law § 240(1) since it only owns the land upon which the building at issue is located and was not involved in the construction of the building, and the statute governs owners who contract for work on buildings or structures. Nor was it involved in contracting for any work at the building and it did not supervise or control plaintiff or his work. (Doc. 118).

Owner defendants argue that Labor Law § 240(1) is not implicated since plaintiff's accident did not result from an elevation-related risk. Specifically, they maintain that there was no chance that he would or could have fallen through the bridge to the ground below. Rather, they maintain, his foot and leg fell through the crack but the plank did not break completely or collapse under him. They also contend that issues of fact remain regarding which entity may be liable as an owner and/or contractor, observing that the relationship between defendants, the land, and the building are unclear. (Doc. 128).

Additionally, the owner defendants assert that there remain triable issues regarding which entity exercised supervision and control over plaintiff and his work. GC contends that it had no employees or presence at the job site and was created merely to sign the pertinent construction contract, while CCM only coordinated the trades at the site and ensured that the work was performed in compliance with design standards. (*Id.*).

In reply, plaintiff argues that there is no dispute that owner leased the building from NYSE, GC was the general contractor, and CCM was one of the contractors working at the site. According to plaintiff, relevant deposition testimony establishes that CCM supervised and directed the subcontractors' work and had the authority to stop unsafe work practices, and that GC entered into the subcontract with plaintiff's employer. Plaintiff also insists that he was exposed to an elevation-related risk since he fell through the plank for several feet and was able to halt his fall by holding onto an adjacent window sill. Additionally plaintiff argues, for the first time, that defendants violated Labor Law § 241(6). (Doc. 152).

#### B. Analysis

It is well settled that a party moving for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate

any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*See CPLR 3212*). In deciding the motion, a court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of a material issue of fact (*See Vega v Restani Constr. Corp.*, *supra*).

Labor Law § 240(1) provides that:

[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises].

The duty imposed by Labor Law § 240(1) is nondelegable, and an owner or contractor which breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Additionally, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]).

### 1. NYSE'S Liability

By establishing that it owns the land on which the building stands, but not the building itself, and that it did not contract for the construction work at issue, supervise plaintiff or his work, or have any authority or duty related to the sidewalk bridge, NYSE establishes that it may not be held liable as an "owner" under Labor Law § 240(1). (*See Paul v Vil. of Quogue*, 178 AD3d 942 [2d Dept 2019] [town, as owner of land on which building at issue stood, could not be

held liable for accident as it did not contract for construction work, had no authority to supervise or control work being performed, and did not have sufficient nexus to plaintiff or his work as it did not own pole and wire on which plaintiff was working when he was injured]; *Gordon v City of New York*, 164 AD3d 1110 [1st Dept 2018] [defendants not liable as owners under Labor Law § 240(1) as they did not own tunnel where accident occurred, did not contract for work at issue, and did not supervise or control work]).

## 2. Liability of the Owner Defendants

It is undisputed that a plank on the sidewalk bridge collapsed when plaintiff stepped on it, causing him to fall through the bridge for several feet. Thus, he demonstrates a *prima facie* violation of Labor Law § 240(1). (*See Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437 [1st Dept 2022] [plaintiff's fall from sidewalk bridge after he stepped on rotted plank which broke under him resulted from violation of Labor Law § 240(1); regardless of how accident happened, plank he stepped on broke and he was not provided with harness to keep him from falling]; *Barraco v First Lenox Terrace Assocs.*, 25 AD3d 427 [1st Dept 2006] [plaintiff's accident covered by Labor Law § 240(1) as he fell when part of sidewalk bridge collapsed as he walked on it]).

Plaintiff also establishes that owner and GC, as the owner and general contractor of the site and project, and CCM, as an agent thereof, may be held liable regardless of whether they supervised or controlled plaintiff of his work (*Barraco*, 25 AD3d at 428 [contractor could be held liable as statutory agent to owner and general contractor as there was evidence it had supervisory control over workers and their safety]).

In opposition, owner defendants fail to raise a triable issue of fact. That plaintiff did not actually fall through the plank to the ground does not demonstrate that he was not exposed to an

elevation-related risk (*see eg, Militello v Landsman Dev. Corp.*, 133 AD3d 1378 [4th Dept 2015] [Labor Law § 240(1) applied to accident as plaintiff was working from height on scaffold, even though he did not fall to ground]; *Gramigna v Morse Diesel, Inc.*, 210 AD2d 115 [1st Dept 1994] [that plaintiff did not fall to ground does not preclude application of Labor Law § 240(1)]), and defendants cite no authority to the contrary. Nor do they raise an issue as to which entities were the owner and contractors for the project, given their admissions during discovery as well as the parties' statements of undisputed facts.

Plaintiff's arguments related to Labor Law § 241(6) are not considered as they are raised improperly for the first time in reply. (*4069 Rosen Assocs., LLC v Tournamentone Corp.*, 206 AD3d 464 [1st Dept 2022]). In any event, having been granted judgment on his Labor Law § 240(1) claim, plaintiff's Labor Law § 241(6) claim need not be addressed. (*See Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011] [as plaintiff prevailed on Labor Law § 240(1) claim, remaining Labor Law and common law negligence did not have to be addressed, as damages were same under all claims]).

#### IV. NYSE'S MOTION

##### A. Liability of NYSE

NYSE has established that it may not be held liable for plaintiff's accident. (*Supra*, III.B.1).

##### B. NYSE'S Cross Claims Against Owner

Absent an agreement between NYSE and Owner, naming and signed by both of them, NYSE's cross claim for contractual indemnity against owner is denied. However, since NYSE has demonstrated that it is free from negligence, and plaintiff has established that owner is liable for a violation of Labor Law § 240(1) (*supra*, III.), NYSE is granted judgment on its cross claim

for common-law indemnification against owner.

C. NYSE's Cross Claim Against GC, CCM, and Everest

As GC and CCM are liable for a violation of Labor Law § 240(1) (*supra*, III.), NYSE is entitled to common law indemnification from them. However, since Everest is not liable (*supra*, II.), NYSE's cross claim for common law indemnification against it is denied.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment by defendant Everest Scaffolding Inc. (mot. seq. 001) is granted to the extent of:

- (1) severing and dismissing all claims and cross claims asserted against it; and
- (2) granting it judgment on its cross claim for contractual indemnification against co-defendant 20 Broad Street Owner LLC; and it is further

ORDERED, that the branch of the motion by Everest seeking summary judgment on its cross claim for breach of contract to procure insurance against 20 Broad Street Owner LLC is denied; and it is further

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim (mot. seq. 002) is granted as against defendants 20 Broad Street Owner LLC, 20 Broad GC LLC, and Collaborative Construction Management, LLC, and denied as to defendant New York Stock Exchange LLC, and plaintiff's Labor Law § 240(1) claim is severed and dismissed as to defendant New York Stock Exchange LLC; and it is further

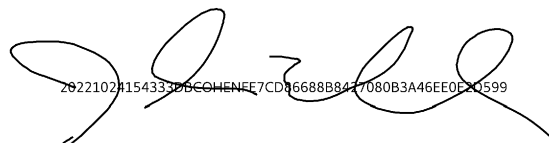
ORDERED, that defendant New York Stock Exchange LLC’s motion for summary judgment (mot. seq. 003) is granted as follows:

(1) all claims and cross claims asserted against it are severed and dismissed;

(2) judgment is denied on its cross claim for contractual indemnification against 20 Broad Street Owner LLC and granted on its cross claim for common-law indemnification against defendants 20 Broad Street Owner LLC, 20 Broad GC LLC, and Collaborative Construction Management, LLC; and

(2) judgment is denied on its cross claim against defendant Everest Scaffolding Inc., and its cross claim against it is severed and dismissed.

10/24/2022  
DATE

  
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DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: