

**Dibrino v Rockefeller Ctr. N. Inc.**

2022 NY Slip Op 34762(U)

October 18, 2022

Supreme Court, Bronx County

Docket Number: Index No. 27729/2019E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2, 3

DOMINICK DIBRINO and ALISON DIBRINO,

Index No.: 27729/2019E

Plaintiffs,

- against -

**DECISION and ORDER**

ROCKEFELLER CENTER NORTH INC.,  
JRM CONSTRUCTION MGMT LLC, TURNER  
CONSTRUCTION COMPANY, and DAL  
ELECTRICAL CORPORATION,

Defendants.

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 2)	1, 2, 3, 4, 5
Defendants Rockefeller Center North Inc.'s, and JRM Construction Mgmt. LLC's Notice of Cross-Motion, Affirmation in Support/Opposition, Affirmation in Opposition, Counter Statement of Material Facts, Exhibits (Mtn. Seq. # 2)	6, 7, 8, 9, 10
Defendant DAL Electrical Corporation's Affirmation in Opposition to Plaintiff's Motion, Affirmation in Opposition to Cross-Motion, Statement of Material Facts, Exhibits (Mtn. Seq. # 2)	11, 12, 13, 14
Plaintiff's Affirmation in Opposition/Reply to Cross-Motion, Affirmation Opposition to Defendant DAL Electrical Corporation's Opposition (Mtn. Seq. # 2)	15, 16
Defendant DAL Electrical Corporation's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 3)	17, 18, 19, 20
Plaintiff's Affirmation in Opposition, Exhibit (Mtn. Seq. # 3)	21, 22
Defendants Rockefeller Center North Inc.'s, and JRM Construction Mgmt. LLC's Notice of Cross-Motion, Affirmation in Support/Opposition, Exhibits (Mtn. Seq. # 3)	23, 24, 25
Defendant DAL Electrical Corporation's Reply Affirmation to Plaintiff's Opposition, Reply Affirmation to Defendants Rockefeller Center North Inc.'s, and JRM Construction Mgmt. LLC's Cross-Motion (Mtn. Seq. # 3)	26, 27

Upon the enumerated papers; and due deliberation; this court finds:

The issue in Plaintiffs' summary judgment motion is whether they established their entitlement to judgment as to liability on the Labor Law §240(1) claim. Further, the issue in Defendants Rockefeller Center North Inc.'s, and JRM Construction Mgmt. LLC's (collectively "Defendants") respective cross-motions is whether they established their entitlement to dismissal of the complaint and whether they are entitled to judgment concerning their cross-claims for contractual indemnity and breach of contract against Defendant DAL Electrical Corporation

(“DAL”). Lastly, the issue in DAL’s summary judgment motion is whether it demonstrated its entitlement to dismissal of the complaint and Defendants’ cross-claims.

This court holds Plaintiffs established their entitlement to judgment as to liability with respect to the Labor Law §240(1) claim. In addition, Defendants showed their entitlement to dismissal of the Labor Law §241(6) claim premised Industrial Code 12 NYCRR §23-1.21(b)(3)(i) and the Labor Law §200 claim. Furthermore, Defendants demonstrated their entitlement to judgment only as to their cross-claim for contractual indemnity against DAL. Lastly, DAL established its entitlement for dismissal of the Labor Law §§240(1) and 241(6) claims and for dismissal of Defendants’ cross-claim for breach of contract.

According to Plaintiff, Dominick Dibrino, (“Plaintiff”) on the day of the accident he was employed by non-party Jacobson & Company as a carpenter to perform work at the Major League Baseball job site (“job site”). He testified a specialty ceiling had to be installed composed of large pieces of wood and that he was assigned to take measurements for the installation. He further testified that the area where he was required to measure was on the fifth floor of the job site along the bottom of a soffit, which was approximately eight feet off the ground. He alleged that in order to reach the soffit area, he used a six-foot A-frame ladder owned by DAL. He claims the accident occurred as he was standing on the second or third rung taking measurements, when the ladder moved and started to wobble. As the ladder was falling, Plaintiff attempted to jump off to avoid injury, however, his foot got stuck in the rungs of the ladder causing him to fall onto the ground. Upon falling onto the ground, he claims that his snips impaled and punctured his abdomen resulting in injury.

This court finds Plaintiff established his *prima facie* burden of a Labor Law §240(1) violation as he demonstrated that Defendants failed to properly secure the subject ladder, to

ensure that it remained steady and erect while being used, which served as a proximate cause of the accident. *Ping Lin v. 100 Wall St. Prop. L.L.C.*, 193 A.D.3d 650, 148 N.Y.S.3d 71 (1st Dep't 2021); see *Merino v. Cont. Towers Condominium*, 159 A.D.3d 471, 72 N.Y.S.3d 59 (1st Dep't 2018); see also *Wasilewski v. Museum of Modern Art*, 260 A.D.2d 271, 688 N.Y.S.2d 547 (1st Dep't 1999). In opposition, Defendants failed to raise triable issues of fact as their sole proximate cause/recalcitrant worker arguments are unpersuasive due to the lack of evidence that Plaintiff deliberately refused to use a safety device. See *Harris v. Rodriguez*, 281 A.D.2d 158, 721 N.Y.S.2d 344 (1st Dep't 2001). Further Defendants' sole proximate cause argument fails as its statutory violation served as a proximate cause for the accident, thus, Plaintiff cannot be solely to blame for it. See *Blake v. Neighborhood Hous. Servs. of NY City, Inc.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003).

In addition, Plaintiff cites Industrial Codes 12 NYCRR §§23-1.21(b)(3)(i) and 23-1.21(iv) in support of the Labor Law §241(6) claim abandoning all other predicates not raised in his legal arguments. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); see also *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014). This court finds Defendants demonstrated their *prima facie* burden that Industrial Code 12 NYCRR §23-1.21(b)(3)(i) was not violated as the photographic evidence conclusively showed that the subject ladder was not broken and Plaintiff failed to raise triable issues of fact with respect to same. However, Defendants did not demonstrate their *prima facie* burden for dismissal of the Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.21(iv) as the photographic evidence established that the subject ladder had a flaw or defect in that its non-stepping rungs were bent.

Furthermore, Defendants demonstrated their *prima facie* burden for dismissal of the Labor Law §200 claim. In opposition, Plaintiff did not proffer evidence that Defendants supervised or controlled the injury-producing work. Likewise, Plaintiff failed to produce evidence to suggest that Defendants created or that they possessed actual/constructive notice of the subject ladder's dangerous condition. Therefore, the Labor Law §200 claim must be dismissed as to Defendants.

Moreover, this court finds DAL established its *prima facie* burden for dismissal of the of the Labor Law §§240(1) and 241(6) claims as it was uncontroverted that DAL was a subcontractor with no contractual or actual authority to supervise or control the injury-producing work. Therefore, no agency liability could be imposed upon DAL. *See Guevara-Ayala v. Trump Palace/Parc LLC*, 205 A.D.3d 450, 168 N.Y.S.3d 452 (1st Dep't 2022); *see also Blake v. Neighborhood Hous. Servs. of NY City, Inc.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). However, DAL failed to demonstrate its *prima facie* burden for dismissal of the Labor Law §200 and common-law negligence claims as it did not show, as a matter of law, that it did not have actual or constructive notice of the subject ladder's unsafe condition. *See Higgins v. 1790 Broadway Assoc.*, 261 A.D.2d 223, 691 N.Y.S.2d 31 (1st Dept 1999).

Likewise, DAL failed to establish, *prima facie*, their entitlement to dismissal of Defendants' cross-claim for contractual indemnity. It was undisputed that Defendants and DAL entered into a master subcontractor agreement dated March 16, 2015, wherein DAL agreed to indemnify Defendants for "all claims, damages .... as a result of the subcontractor's [DAL] performance of the work ... to the extent caused by the conduct or failure to act by the subcontractor [DAL], the subcontractor's [DAL] employees or anyone for whom the subcontractor [DAL] is responsible or may be liable." Therefore, because it was uncontroverted

that Plaintiff was using DAL's ladder at the time of the accident, this court is not persuaded by DAL's argument that the accident did not arise out of its contracted work performed under the master subcontractor agreement. *See Urbina v. 26 Ct. St. Assoc., LLC*, 46 A.D.3d 268, 847 N.Y.S.2d 67 (1st Dep't 2007). Thus, Defendants are entitled to judgment with respect to their cross-claim for contractual indemnity against DAL.

However, DAL did establish its *prima facie* burden for dismissal of Defendants' cross-claim for breach of contract. It was undisputed that DAL purchased an insurance policy from State National Insurance Company covering the relevant time periods, with Defendants named as additional insureds. Therefore, based on this coverage, DAL is entitled to dismissal of Defendants' cross-claim for breach of contract irrespective of the insurer's refusal to indemnify Defendants and Defendants failed to raise triable issues of fact. *See Perez v. Morse Diesel Intl., Inc.*, 10 A.D.3d 497, 782 N.Y.S.2d 53 (1st Dep't 2004).

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion (Mtn. Seq. # 2) seeking judgment on liability as to the Labor Law §240(1) claim is granted; and it is further

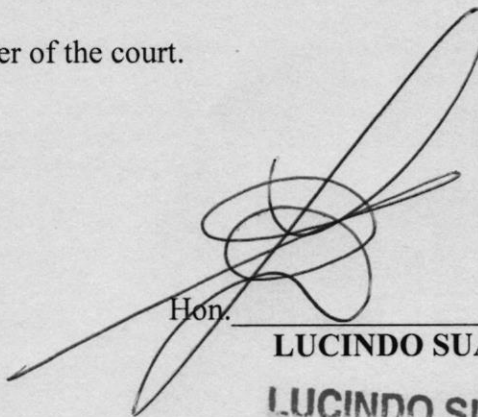
ORDERED, that Defendants' respective cross-motions for summary judgment (Mtn. Seqs. # 2 and 3) is granted in part to the extent it sought: (1) dismissal of the Labor §241(6) claim premised upon 12 NYCRR §23-1.21(b)(3)(i); (2) dismissal of the Labor Law §200 claim; and (3) judgment as to their cross-claim for contractual indemnity against DAL; and it is further

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ORDERED, that DAL's summary judgment motion (Mtn. Seq. # 3) is granted in part to the extent it sought dismissal of the Labor Law §§240(1) and 241(6) claims and Defendants' cross-claim for breach of contract.

This constitutes the decision and order of the court.

**Dated: October 18, 2022**



Hon. \_\_\_\_\_

**LUCINDO SUAREZ, J.S.C.**

**LUCINDO SUAREZ, J.S.C.**