

**Licona-Rubio v COA 200 E 34th LLC**

2023 NY Slip Op 33085(U)

September 6, 2023

Supreme Court, New York County

Docket Number: Index No. 805360/2021

Judge: Erika M. Edwards

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.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS PART 10M**  
*Justice*

-----X  
JUAN CARLOS LICONA-RUBIO, INDEX NO. 805360/2021  
Plaintiff, MOTION DATE 08/31/2023,  
08/31/2023,  
08/31/2023  
- v - MOTION SEQ. NO. 002 003 004

COA 200 E 34<sup>TH</sup> LLC, MARINE PLUMBING 7  
MECHANICAL, INC., MONCON, INC., NOBLE  
CONSTRUCTION GROUP, LLC, REAL PLUMBING CORP.,  
and NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X  
COA 200 E 34<sup>th</sup> LLC, and NOBLE CONSTRUCTION  
GROUP, LLC,  
Third-Party Plaintiff,

-v-  
CORE SCAFFOLD SYSTEMS INC.,  
Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 81, 108, 109, 110

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 111

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and after oral argument held before the court on August 31, 2023, for the reasons stated on the record and set forth herein, the court grants motion

sequences 002, 003 and 004 and dismisses Plaintiff Juan Carlos Licona-Rubio's ("Plaintiff") complaint and all cross-claims and counter-claims, if any, as against Defendants Moncon, Inc. ("Moncon"), Real Plumbing Corp. ("Real Plumbing") and Marine Plumbing 7 Mechanical, Inc. ("Marine Plumbing") with prejudice and without costs to any party.

This matter involves a consolidated case involving a Kings County alleged construction accident and subsequent New York County medical malpractice action. This court previously granted Defendant New York City Health & Hospitals Corporations motion to consolidate both actions and to transfer the consolidated action to the New York County Supreme Court. A subsequent third-party action was filed.

In his Amended Complaint, Plaintiff's construction accident claims include negligence, and violations of Labor Law §§ 200, 240(1) and 246(1). Plaintiff alleges in substance that on December 2, 2020, he was employed by Core Scaffold Systems Inc. at a construction site located at 200 East 35<sup>th</sup> Street, New York, New York when he was injured. Defendant COA E. 34<sup>th</sup> LLC is the alleged owner of the premises and Defendant Noble Construction Group, LLC ("Noble") is the alleged general contractor/construction manager of the project. Defendants Moncon, Real Plumbing and Marine Plumbing are subcontractors.

The Kings County court previously denied Defendants Moncon's and Real Plumbing's motions to dismiss the complaint against them. At the time that the motions were filed, Plaintiff had not yet served his Bill of Particulars and had not yet provided the details about how the accident occurred and on which floor it had occurred. Plaintiff subsequently served his Bill of Particulars and indicated in substance that Plaintiff was injured when he was on top of an exterior hoist elevator and his head and other body parts got caught in the rotary tracks, mechanism and machinery. There is also a New York City Department of Buildings' Overview

of Complaint document which indicates in substance that Plaintiff's accident occurred on the second story of the building during a hoist maintenance operation.

Under motion sequence 002, Defendant Moncon now moves for summary judgment dismissal of Plaintiff's complaint and all claims and cross-claims filed against it. Defendant Moncon argues in substance that it was hired by Defendant Noble to erect the concrete superstructure for the premises and that on the date of the incident it was not working on the second floor of the premises.

Under motion sequence 003, Defendant Real Plumbing now moves for summary judgment dismissal of Plaintiff's complaint, all cross-claims and counter-claims filed against it. Defendant Real Plumbing argues in substance that it was hired by Noble to install a sprinkler system and that at the time of Plaintiff's alleged accident, its employees were working on the fourth and fifth floors of the building and not on the second floor.

Under motion sequence 004, Defendant Marine Plumbing now moves for summary judgment dismissal of Plaintiff's complaint, cross-claims and counter-claims filed against it. Defendant Marine Plumbing argues in substance that it was hired by Noble to conduct various plumbing work at the premises. On the date of the incident, it was performing gas welding and gas piping layout on the eleventh and twenty-first floors and that it was not working on the second floor of the building. It also argues in substance that Noble produced a contract indicating that Noble retained Core Scaffold as a hoist and scaffold contractor.

Defendants Moncon, Real Plumbing and Marine Plumbing all generally argue in substance that dismissal is warranted because at the time of the alleged accident they owed no duty to Plaintiff, they did not breach any duty to Plaintiff, they did not employ Plaintiff and they were not the owner of the premises, nor the general contractor of the project. Therefore,

Plaintiff's negligence and Labor Law claims all fail. The movants also argue in substance that Plaintiff's Labor Law § 200 and negligence claims must fail because the movants did not direct, control or supervise Plaintiff's work; they did not direct the means and methods of Plaintiff's work or activities; they had no obligation to provide Plaintiff with any safety equipment; they did not cause or create any defective condition; they did not have notice of any defective condition; they were not working on the floor where Plaintiff was allegedly injured; and they did not own, operate, maintain, or control the exterior hoist elevator. Therefore, they argue that they had nothing to do with the alleged exterior hoist elevator, nor Plaintiff's alleged accident.

Plaintiff opposes the motions and argues in substance that collateral estoppel applies since the Kings County Supreme Court previously denied Defendants Moncon and Real Plumbing's motions to dismiss based on the same arguments; the movants relied upon inadmissible evidence and impermissible hearsay; they failed to provide certified copies of all of their supporting documents; they failed to provide affidavits from individuals with personal knowledge; the affidavits failed to address all of the allegations set forth in Plaintiff's complaint and Bill of Particulars; and questions of fact remain.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

It is well settled that Labor Law § 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). General contractors may be held liable for unsafe premises conditions if they created or had actual or constructive notice of the condition and had control of the place where the injury occurred (*Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1<sup>st</sup> Dept 2004]).

Labor Law § 240(1) states that all contractors, owners and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed" (Labor Law § 240[1]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v*

*Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). Such duty extends to the safety of persons employed in or lawfully frequenting, all areas in which construction is being performed (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 348 [1998]).

Here, the court grants all three summary judgment motions and dismisses Plaintiff's complaint, all cross-claims and counter-claims against Defendants Moncon, Real Plumbing and Marine Plumbing. The court finds that the movants demonstrated their entitlement to summary judgment in their favor as a matter of law and that Plaintiff failed to raise any material issues of disputed facts sufficient to defeat this motion.

Even though discovery is at its early stage, it is clear that none of the movants employed Plaintiff, they did not own, operate or maintain the premises and they were not the general contractor. They were all subcontractors who had nothing to do with directing, supervising or managing Plaintiff's work, and they were not responsible for providing Plaintiff with any safety devices or equipment. Additionally, they had nothing to do with the exterior hoist elevator. On the date of the accident, none of the movants were performing work on the second floor, nor did they work on the exterior hoist elevator. Therefore, they owed no duty to Plaintiff and were not

responsible for Plaintiff's alleged accident or injuries under common law negligence, nor any of the alleged Labor Law provisions.

Plaintiff's arguments to the contrary are unpersuasive.

Therefore, the court dismisses Plaintiff's complaint, all cross-claims and counterclaims filed against Defendants Moncon, Real Plumbing and Marine Plumbing.

The court has considered all additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that, as to motion sequence 002, the court grants Defendant Moncon, Inc.'s motion for summary judgment, the court dismisses Plaintiff Juan Carlos Licona-Rubio's complaint and any claims and cross-claims filed against Defendant Moncon, Inc., and the court directs the Clerk of the Court to enter judgment in favor of Defendant Moncon, Inc. as against Plaintiff Juan Carlos Licona-Rubio, with prejudice and without costs to any party; and it is further

ORDERED that, as to motion sequence 003, the court grants Defendant Real Plumbing Corp.'s motion for summary judgment, the court dismisses Plaintiff Juan Carlos Licona-Rubio's complaint and any cross-claims and counter-claims filed against Defendant Real Plumbing Corp., and the court directs the Clerk of the Court to enter judgment in favor of Defendant Real Plumbing Corp. as against Plaintiff Juan Carlos Licona-Rubio, with prejudice and without costs to any party; and it is further

ORDERED that, as to motion sequence 004, the court grants Defendant Marine Plumbing 7 Mechanical, Inc.'s motion for summary judgment, the court dismisses Plaintiff Juan Carlos

Licona-Rubio's complaint and any cross-claims and counter-claims filed against Defendant Marine Plumbing 7 Mechanical, Inc., and the court directs the Clerk of the Court to enter judgment in favor of Defendant Marine Plumbing 7 Mechanical, Inc. as against Plaintiff Juan Carlos Licona-Rubio, with prejudice and without costs to any party; and it is further

ORDERED that the court amends the caption to reflect these dismissals and directs the Clerk of the Court to amend the caption to the following:

-----X

JUAN CARLOS LICONA-RUBIO,

Plaintiff,

-v-

COA 200 E 34<sup>th</sup> LLC, NOBLE CONSTRUCTION GROUP, LLC and NEW YORK CITY HEALTH & HOSPITALS CORPORATION.

Defendants.

-----X

COA 200 E 34<sup>th</sup> LLC and NOBLE CONSTRUCTION GROUP, LLC,

Third-Party Plaintiffs,

-v-

CORE SCAFFOLD SYSTEMS INC.,

Third-Party Defendant.

-----X

and it is further


ORDERED that within twenty (20) days of entry of this decision and order, counsel for the Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room

119), who are directed to mark the court’s records to reflect the amended caption pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office 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)]; and it is further

ORDERED that the parties are directed to appear for a preliminary conference before the court on September 19, 2023, at 10:00 a.m., in Part 10, located in room 412, at 60 Centre Street, New York, New York, unless otherwise directed by the court.

This constitutes the decision and order of the court.

<u>9/6/2023</u> DATE	 ERIKA M. EDWARDS, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE