

**Melendez v 1595 Broadway LLC.**

2023 NY Slip Op 34115(U)

November 3, 2023

Supreme Court, Bronx County

Docket Number: Index No. 30238/2018E

Judge: Lucindo Suarez

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C 003

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

Mtn. Seq. # 3

ANDRES JAMIE MELENDEZ

Index No.: 30238/2018E

Plaintiff,

- against -

**DECISION and ORDER**

1595 BROADWAY LLC., BAWBEH UNITED, LLC.,  
and TRIPLE C BUILDERS LLC.

Defendants.

And Third-Party Actions.

	PAPERS NUMBERED
Defendants/second third-party and fourth third-party Plaintiffs 1595 Broadway and Triple C Builders, LLC.'s Notice of Motion, Affirmation in Support, Affirmation of Good Faith, Statement of Material Facts, Memorandum of Law in Support, Exhibits	NYSCEF Doc. No. 115-141
Third-Party Defendant/Third Third-Party Plaintiff/Fourth Third-Party Defendant PCC Cleaning Solutions INC.'s Affirmation in Opposition, Statement of Material Facts, Exhibits, Memorandum of Law	NYSCEF Doc. No. 141-174
Plaintiff's Affirmation in Opposition, Exhibits	NYSCEF Doc. 176-183
Defendants/second third-party and fourth third-party Plaintiffs 1595 Broadway and Triple C Builders, LLC.'s Memorandum of Law in Reply, Exhibits	NYSCEF Doc. 184-189

Upon the enumerated papers:

This Order to Show cause by defendants/second third-party and fourth third-party Plaintiffs' 1595 Broadway and Triple C Builders, LLC, (collectively "1595 Broadway and Triple C") for an order: (1) striking plaintiff's Note of Issue, permitting movant, additional time to conduct discovery regarding plaintiff's alleged claims of injuries as delineated in his third and fourth supplemental bill of particulars; and (2) permitting "1595 Broadway and Triple C", to conduct discovery specified in CPLR § 3043(b), including but not limited to, an orthopedic and neurological independent medical examination ("IMEs"); or alternatively (3) compelling plaintiff to appear for a orthopedic and neurological Independent Medical Examinations ("IMEs"); and (4) grant "1595 Broadway and Triple C" motion for summary judgment on their fourth third-party complaint against PCC CLEANING SOLUTIONS INC., for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance; or (5) grant "1595 Broadway and Triple C" leave of the court on good cause shown and deem the herein motion for summary judgment on their fourth third-party complaint against PCC CLEANING SOLUTIONS INC., for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance filed *nunc pro tunc* is GRANTED in part as indicated herein.

On August 31, 2018, 1595 Broadway, Brooklyn, N.Y., 11207 was under construction of a new, seven-story residential and commercial building ("subject premises").

Defendant 1595 Broadway LLC owned the "subject premises". 1595 Broadway LLC (hereinafter "1595 Broadway") hired Triple C Builders (hereinafter "Triple C") to be the general

contractor for the construction project. Triple C subcontracted with PCC Cleaning Solutions, Inc. (“PCC”), to perform debris removal.<sup>1</sup>

Plaintiff’s accident purportedly occurred when he and his coworker, Jonathan, were clearing debris from the building’s sidewalk bridge and while plaintiff attempted to descend from the building’s sidewalk bridge by use of an aluminum extension ladder, he fell when the bottom of the ladder slid away from the sidewalk bridge.

On or about January 19, 2023, Triple C and 1595 Broadway commenced a fourth third-party action against PCC, to replead their third-party causes of action against PCC. On or about February 6, 2023, PCC answered Triple C and 1595 Broadway’s fourth third-party complaint.

By Decision and Order entered March 30, 2023, this matter was returned from the Appellate Division, First Department granting plaintiff’s motion for summary judgment on the issue of Labor Law § 240(1) liability.<sup>2</sup>

On or about August 3, 2021, as it relates to the IME and Note of issue, Plaintiff served his third “supplemental” bill of particulars. Plaintiff’s third “supplemental” bill of particulars alleged new injuries and damages including a tear of the plaintiff’s right shoulder rotator cuff, tear of the plaintiff’s right shoulder supraspinatus tendon and tear of the plaintiff’s right shoulder labrum. As a result, plaintiff underwent right shoulder arthroscopy surgery on May 25, 2021.

On August 11, 2021, Plaintiff filed his Note of Issue and Certificate Readiness.

In light of plaintiff’s third “supplemental” bill of particulars, plaintiff and prior counsel entered into a August 20, 2021 “so ordered” stipulation agreement whereby plaintiff agreed, inter alia, to appear for a further deposition regarding Plaintiff shoulder surgery and appear for the rescheduled IMEs following plaintiff’s further deposition.

Following, Plaintiff served his fourth “supplemental” bill of particulars, which alleged new injuries and damages including disc herniations to his lumbar spine at the L4-L5 region and L5-S1 region. As a result, on February 9, 2022, plaintiff underwent a lumbar laminectomy procedure.

On or about July 19, 2022, Plaintiff’s continued EBT was held, however, plaintiff did not reschedule the IMEs.<sup>3</sup>

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<sup>1</sup> PCC retained its laborers, including plaintiff, from SCL Services Corp. (“SCL”). To date, SCL has not answered nor appeared in this action. On or about January 17, 2023, PCC commenced a third third-party action against SCL.

<sup>2</sup> The Plaintiff moved for summary judgment as to liability under his Labor Law §§ 200, 240(1), and 241(6) causes of action. The Bronx County Supreme Court denied plaintiff’s motion for summary judgment and the First Department reversed; granting plaintiff’s motion for summary judgment on the issue of liability on the Labor Law § 240(1) claim.

<sup>3</sup> Defendants’ current lawyers substituted in as counsel for Defendants 1595 Broadway and Triple C on November 11, 2022 and Outgoing counsel provided no notice to incoming counsel regarding the status of plaintiff’s

Generally vacating a note of issue and certificate of readiness returns the case to the pre-note discovery stage. A certificate of readiness which asserts that all discovery is complete when, in fact, it is not should be vacated, albeit beyond the 20-day window for a party to file a vacate motion, as it is *void ab initio* because of its falsehood. See Title 22 NYCRR 202.21(e).

Accordingly, although filed over two years ago, that portion of the motion to vacate the note of issue and certificate of readiness is granted and it shall be refiled only upon completion of all discovery. That renders moot that portion of Defendants' application which sought *nun pro tunc* treatment of its summary judgment motion as it commences anew the 120 days for dispositive motions to be filed by the parties.

Accordingly, Plaintiff is directed to attend and not limited to, an orthopedic and neurological independent medical examination ("IMEs"). Defendants to designate within 30 days from notice of entry of this order.

Defendants "1595 Broadway and Triple C" are Not entitled to summary judgment on their third-party contractual indemnification claims against PCC, that portion of the motion for summary judgment is premature, as a matter of evidence those claims have not matured.

On August 14, 2018, Triple C and PCC entered into a subcontractor agreement whereby PCC agreed to indemnify Triple C ("Contractor") and 1595 Broadway ("Owner") for all economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from PCC's debris removal for the construction:

The "Work" set forth in the subcontractor agreement between Triple C and PCC is debris removal. PCC is bound by the terms of the indemnity agreement in the subcontractor agreement for claims arising out of PCC's debris removal operation. The indemnification provision was enforceable though the completion of PCC's Work. PCC also agreed to obtain contractual liability coverage and additional insured coverage for the benefit of Triple C ("Contractor") and 1595 Broadway ("Owner").

This Court finds 1595 Broadway and Triple C are NOT entitled to summary judgment on its fourth third-party complaint claims against PCC for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance as 1595 and Triple C have not demonstrated that they are free from negligence in conjunction with plaintiff's accident.

Accordingly, it is

ORDERED, Plaintiff' Note of Issue and Certificate of Readiness is vacated; and it is further

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rescheduled IMEs. Only after the transfer of the legal file, did the incoming counsel become aware of the need to reschedule plaintiff's IME.

ORDERED, Defendants 1595 Broadway and Triple C” are entitled to conduct an orthopedic and neurological independent medical examination (“IMEs”) of Plaintiff and Defendants are to designate within 30 days from notice of entry of this order; and it is further

ORDERED, that Defendants “1595 Broadway and Triple C” ‘s motion for summary judgment on their fourth third-party complaint against PCC CLEANING SOLUTIONS INC., for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance is denied as premature.

The clerk of the court shall enter judgment accordingly.

This constitutes the decision and order of the court.

**Dated: November 3, 2023**

Hon.

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