

**Owczarek v J.T. Magen & Co. Inc.**

2023 NY Slip Op 34144(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 152601/2020

Judge: Sabrina Kraus

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

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

-----X

MICHAEL OWCZAREK,

Plaintiff,

- v -

J.T. MAGEN & COMPANY INC.,919 GROUND LEASE  
LLC,METROPOLITAN 919 3RD AVENUE LLC,

Defendant.

-----X

J.T. MAGEN & COMPANY INC., 919 GROUND LEASE LLC,  
METROPOLITAN 919 3RD AVENUE LLC

Plaintiff,

-against-

STATEWIDE CONTRACTING GROUP CORP.

Defendant.

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INDEX NO. 152601/2020

MOTION DATE 07/28/2023

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595702/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 124, 127, 140, 141, 142, 143, 147, 148, 149, 156, 157

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

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, 125, 128, 130, 131, 132, 133, 134, 150, 151, 152, 153, 154, 155, 164, 165

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 126, 129, 135, 136, 137, 138, 139, 144, 145, 146, 158, 159, 160, 161, 162, 163

were read on this motion to/for JUDGMENT - SUMMARY.

### **BACKGROUND**

Plaintiff commenced this action against defendants J.T. Magen & Company, Inc. (“Magen”), 919 Ground Lease LLC (“Ground”), and Metropolitan 919 3rd Avenue LLC (“Metropolitan,” and collectively, “defendants”) for injuries sustained on May 31, 2017 while on the job when he tripped and fell due to a protruding object. He asserts causes of action for negligence, violations of Labor Law §§ 200, 240(1), 241a, and 241(6), and OSHA.

Defendants commenced a third-party action against Statewide Contracting Group Corp. (“Statewide”) asserting causes of action for contribution, common law and contractual indemnity, and for failure to procure insurance. Statewide asserts cross claims against defendants for contractual and common law indemnification and contribution.

### **PENDING MOTIONS**

On May 31, 2023, Statewide moved for an order pursuant to CPLR § 3212 granting it summary judgment dismissing all claims asserted against it and dismissing plaintiff’s OSHA and Labor Law §§ 240(1), 241a, and 241(6) claims. (Mot. Seq. 1).

On May 31, 2023, Plaintiff moved for an order pursuant to CPLR § 3212 granting it summary judgment on the issue of liability on its Labor Law § 241(6) claim. (Mot. Seq. 2)

On May 31, 2023, defendants moved for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff’s Labor Law §§ 240(1), 200 and common law negligence claims and granting summary judgment on their contractual indemnification claim against Statewide and dismissing its crossclaims against them. (Mot. Seq. 3).

The motions are consolidated herein for determination as set forth below.

### **ALLEGED FACTS**

Plaintiff, an electrician employed by Forest Electric, at the time of the accident was working on a construction project to renovate nine floors of the building at 919 Third Avenue, New York, New York (“premises”), for use by the law firm, Schulte Roth & Zabel (“tenant”), who leased the premises. Defendants Ground and Metropolitan acknowledge an ownership interest in the premises but do not explicitly concede ownership. Defendant Magen was the general contractor for the project pursuant to a contract with tenant. Statewide was a demolition subcontractor on the project.

#### Plaintiff's Testimony

Plaintiff testified that his accident occurred on the 21st floor of the premises. Pre-existing walls had been demolished, and the space was pretty much wide open except for electric closets and elevator shafts in the middle of the floor. He observed and complained that there were many nails protruding from the floor. He provided written notice to Magen of this issue at the beginning of his time on the job on December 1, 2016, and later complained verbally to his foreman John Pulizotto a day or two before the accident. Shortly after the verbal complaint, he observed Magen laborers pulling and grinding nails at the jobsite. At the time of his accident on May 31, 2017, plaintiff was carrying a piece of pipe from a pipe bending machine to an electric closet when he tripped on a nail protruding from the floor and fell. He was looking ahead, not at the floor, at the time of the fall and did not see the nail before he tripped on it.

Plaintiff took photos of the jobsite several days after the accident showing several nails sticking out of the floor and identified one as the one that he believed he tripped on, although at a later deposition he stated that he did not remember which nail he tripped on. He stated that the nail stuck out about half-an-inch out of the ground.

#### Other Deposition Testimony

Pauric McGill, an assistant superintendent for Magen, testified that as general contractor, Magen was responsible for day-to-day management of the jobsite, including site safety and hiring, scheduling and assigning work to subcontractors. It employed site safety officers who had the authority to tell subcontractors to stop working and to remediate any conditions resulting from their work. He was on the site daily and was present during plaintiff's accident. While he did not see it, he heard a pipe fall while in his office, and when he went over saw plaintiff picking up the pipe. He confirmed that plaintiff had noted his concerns over the protruding nails, in writing, as part of his orientation on the job but could not state whether he or anyone else had actually looked at this document. He confirmed that Statewide had performed demolition work on the 21st floor, including the removal of walls, and confirmed that daily reports reflected that the last time Statewide was on the 21st floor was April 28, 2017. He stated that the nails or screws "would have been shot down from the bottom track of the walls that would have been demoed" and after the accident, Magen contacted Statewide to remove the nails that hadn't been removed during demolition.

Andrew Carson, plaintiff's co-worker, testified that he was walking about five feet behind plaintiff when the accident occurred. He saw plaintiff trip, drop the pipe he was carrying, stumble, and land on a convector. Although at his deposition in 2022 he could not recall what caused plaintiff to fall, he set forth in an affidavit in 2018 that, "[h]e tripped over a screw that was protruding from the floor. The screw was from a set of screws that had remained from some walls or partitions that had been demolished." He additionally confirmed in his affidavit that complaints were made to J.T. Magen about the screws one to two days prior to the accident, and that some but not all had been removed.

Joseph Musso, project manager for Statewide, testified that Statewide was hired by Magen on the project to remove existing walls, ceilings and carpeting. They cut the walls in sections. If there were anchors, nails or any other devices still in the ground as a result of the removal of drywall, it would not have been within the scope of Statewide's work to remove them.

## **DISCUSSION**

### **SUMMARY JUDGMENT STANDARD**

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

### **PLAINTIFF'S LABOR LAW §§ 240(1), 241-a and OSHA CLAIMS**

As plaintiff states that he is withdrawing his Labor law § 240(1) claim, that claim is dismissed. Additionally, as he does not oppose dismissal of his claims pursuant to OSHA and Labor Law §241a, which are not set forth in the complaint but are asserted in plaintiff's verified bill of particulars, those claims are deemed abandoned.

### **PLAINTIFF'S LABOR LAW § 241(6) CLAIM**

Labor Law §241 sets forth in relevant part that:

All contractors and owners and their agents... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements... [subsection] (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241(6) “imposes a nondelegable duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting all areas in which construction, excavation or demolition work is being performed.” *Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 348 (1998); *see also, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 (1978). The owners and contractors’ duty under Labor Law § 241(6) is nondelegable, “regardless of their control or supervision of the jobsite.” *Whalen v City of New York*, 270 AD2d 340, 342 (2d Dept 2000); *see also Allen*, 44 NY2d at 300.

To support a cause of action pursuant to Labor Law §241(6), plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v Skanska USA Building Inc.*, 99 AD3d 139 (1st Dept 2012); *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 (2d Dept 2006).

Plaintiff clarifies that he is now only basing his Labor Law §241(6) claim on Industrial Code § 23-1.7(e), which sets forth that:

(e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and

from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

As it is uncontroverted that plaintiff's injury occurred in an open area as opposed to a passageway, § 23-1.7(e)(1) is inapplicable.

A nail or screw protruding from the floor, while not constituting an “accumulation of dirt and debris,” constitutes a “sharp projection” under § 23-1.7(e)(2). *Lenard v 1251 Americas Assoc.*, 241 AD2d 391 (1st Dept 1997) (door stop which caused plaintiff to trip constituted sharp projection); *McGovern v CBRE, Inc.*, 2022 WL 845415 (Sup Ct, New York County 2022) (single nail or pin protruding from the floor constitutes sharp projection); *c.f. Mooney v BP/CG Center II, LLC*, 179 AD3d 490 (1st Dept 2020) (single screw did not constitute accumulation of debris or sharp object where it did not protrude from ground and was not sharp in sense of being “clearly defined or distinct”); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003) (bolt protruding from floor not a “sharp projection” under the statute).<sup>1</sup>

Thus, defendants and Statewide<sup>2</sup> fail to meet their burden for dismissing plaintiff's labor law § 241(6) claim to based on Industrial Code § 23-1.7(e)(2). However, as plaintiff and the only other eyewitnesses, while initially testifying as to the exact cause of the accident, later stated that they could not identify the exact cause, there remain material issues of fact as to whether plaintiff's fall was in fact caused by a protruding nail or screw precluding summary judgment in plaintiff's favor.

### **PLAINTIFF'S LABOR LAW § 200 and COMMON LAW NEGLIGENCE CLAIMS**

The duty to provide a safe worksite imposed upon owners, general contractor and their agents are based upon supervision and control. “The purpose of the [Labor Law] is to protect

<sup>1</sup> That the cause of accident was alternatively described by witnesses as a nail and a screw is of no moment.

<sup>2</sup> The court notes that while only Statewide moves for summary judgment dismissing this claim, despite plaintiff not asserting any direct claims against it, defendants assert that they would join in their application as to them.

workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor instead of the workers themselves.” *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). Labor Law § 200 is the codification of the common-law duty of owners, general contractors and their agents to protect the health and safety “of all persons employed therein or lawfully frequenting such places.” *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 299 (1978). An implicit precondition of this duty “is that the party charged with that responsibility has the authority to control the activity bringing about the injury.” *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981).

Labor Law § 200 applies where workers are injured as a result of dangerous or defective premises conditions at a worksite or where a worker is injured due to the way the work is performed. When a premises condition is at issue, the owner or general contractor may be held liable for a violation of the statute if they created the condition that caused the accident or had actual or constructive notice of the dangerous condition. *See Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 AD3d 446 (1st Dept 2013); *Singh v Black Diamonds LLC*, 24 AD3d 138 (1st Dept 2005). When the means and manner of the work are at issue, “a plaintiff must show that the owner or agent have the authority to control the activity bringing about the injury to enable it to avoid or correct any unsafe condition.” *Lemanche v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422 (1st Dept 2021); *see Rizzuto v L.A. Wegner Contr. Co.*, 91 NY2d 343 (1998).

Plaintiff argues that defendants are liable under either theory of liability. However, plaintiff fails to allege that the manner of the work that should have been performed differently. Thus, there is no basis for liability under a means and manner theory.

There is no allegation or evidence that Magen created the condition that caused plaintiff's accident. However, as it is uncontroverted that plaintiff complained multiple times about protruding nails at the jobsite, including shortly before the accident, and as Magen attempted to remove the nails as a result, it can be charged with actual notice of the dangerous premises condition. Thus, defendants are not entitled to summary judgment on this cause of action. However, as stated above, as there remain material issues of fact as to the precise cause of plaintiff's accident, he is not entitled to summary judgment.

Additionally, defendants argue that Ground and Metropolitan cannot be liable as out of possession landlords.<sup>3</sup> "It is well settled that an out-of-possession owner who retained the right to reenter the premises for repairs and inspections cannot be held liable under a theory of constructive notice in the absence of 'a significant structural or design defect that is contrary to a specific safety provision'" *Torres v West Street Realty Co.*, 21 AD3d 718, 721 (1st Dept 2005), quoting *Mcdonald v Riverbay Corp.*, 308 AD2d 345 (1st Dept 2003). Here, it is uncontroverted that the construction was undertaken for the benefit of Tenant, and plaintiff fails to allege any structural defect, as he himself contends that the nails or screws were exposed as part of the construction process. Thus, plaintiff's Labor Law § 200 and common law negligence claims against Ground and Metropolitan are dismissed.

### **DEFENDANTS' THIRD-PARTY CLAIMS**

#### **Failure to Procure Insurance and Common Law Contribution**

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<sup>3</sup> In opposing summary judgment, defendants assert that plaintiff failed to prove that Ground and Metropolitan owned the premises. However, their contention in support of their summary judgment motion that "the record is clear that 919 GROUND LEASE LLC and METROPOLITAN 919 3RD AVENUE LLC were out-of-possession landlords" belies this point.

As defendants do not oppose the portion of Statewide's motion seeking to dismiss their claim for breach of contract for failure to procure insurance and for common law contribution, the claims are deemed abandoned.

Indemnification

Statewide seeks dismissal of defendants' common law and contractual indemnification claims against them, arguing that there is no evidence of its negligence, and that there is evidence that Magen was negligent. Defendants seek summary judgment on their contractual indemnification claim.

In order to find common law liability against Statewide for plaintiff's injuries, they must have caused, created, exacerbated, or "launche[d] a force instrument of harm." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 (2002). Here, there is uncontroverted testimony that it was Statewide's work that led to protruding nails or screws at the jobsite. There is also uncontroverted testimony that the removal of nails or screws was outside of the scope of its contracted work.<sup>4</sup> However, even where a subcontractor is not expressly obligated to remediate a condition resulting from its contracted work, it may still be found liable for causing or creating a dangerous condition. *Farrugia v 1440 Broadway Associates*, 163 AD3d 452 (1st Dept 2018).

Statewide contends that the lapse of over a month from when it completed work on the project, and the fact that Magen accepted that work and continued active work on the jobsite during that period demonstrates that it is not responsible for plaintiff's accident. While potentially probative, this does not sufficient to avoid liability as a matter of law. *See Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414 (1st Dept 2014) (subcontractor who installed fence

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<sup>4</sup> The fact that Magen asked Statewide to remove the screws after the accident is not probative.

five months prior to accident not entitled to summary judgment where it failed to proffer evidence of proper installation).

Thus, as Statewide fails to meet its burden of proving that it is free of negligence, its motion to dismiss defendants' common law indemnification claim is denied.

The contract between Magen and Statewide states, in pertinent part that:

To the fullest extent permitted by law, [STATEWIDE] agrees to fully indemnify, defend and hold harmless JTM, Owner, their officers, directors, agents and employees, Building Owner, Landlord, Managing Agent, Lender and all applicable additional indemnitees, if any, their respective agents, officers, directors, employees and partners (hereinafter collectively "Indemnitees") from and against any and all claims, loss, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements, whether arising before or after completion of [STATEWIDE]'s work, related to death, personal injuries, property damage(including loss of use thereof) or the alleged violation of any environmental laws, statutes, rules or ordinances brought or assumed against any of the Indemnitees by any person, entity or firm, arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work as well as any additional work, extra work or add-on work, whether or not caused in whole or in part by [STATEWIDE] or any person or entity employed, either directly or indirectly, by [STATEWIDE] including any sub-subcontractors and sub tier contractors thereof and their employees or (b) any breach of this agreement. The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault of the indemnitees whether by statute, operation of law or otherwise. Where partial indemnity is provided under this agreement, attorneys' fees, costs, court costs, expenses and disbursements shall be indemnified in a pro rata basis.

While the provision entitles Magen, as well as "Building Owner" to indemnify for injuries arising out of its work, there remain issues of fact as to the cause of plaintiff's accident. Thus, there remain issues of fact precluding summary judgment for either Statewide or defendants on defendants' contractual indemnification claim.

### **STATEWIDE'S CROSS CLAIMS**

Defendants seek dismissal of Statewide's cross claims for contractual and common law indemnification and contribution. As Statewide asserts no arguments in opposition of dismissal of its cross claims, they are deemed abandoned.

### CONCLUSION

Accordingly, it is hereby:

ORDERED that third-party defendant Statewide Contracting Group Corp.'s motion for partial summary judgment (mot. seq. 1) is granted, to the extent that plaintiff's OSHA and Labor Law §§ 240(1) & 241a claims and defendants third-party claims for breach of contract for failure to procure insurance and common law contribution are dismissed, and is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment (mot. seq. 2) is denied; and it is further

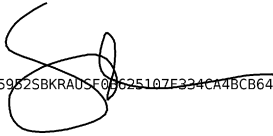
ORDERED that defendants J.T. Magen & Company, Inc., 919 Ground Lease LLC, and Metropolitan 919 3rd Avenue LLC's motion for summary judgment (mot. seq. 3) is granted, to the extent that plaintiff's OSHA and Labor Law §§ 240(1) and 241a claims and Statewide's cross claims against it are dismissed, and is otherwise denied; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

This constitutes the decision and order of this court.

  
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11/29/2023  
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE