

Sandoval v 201 W. 16 Owners Corp.

2023 NY Slip Op 34861(U)

May 10, 2023

Supreme Court, Bronx County

Docket Number: Index No. 31594/2018E

Judge: Lucindo Suarez

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

Mtn. Seq. # 6

BAYRON SANDOVAL and VANESSA CASTILLO,

Index No.: 31594/2018E

Plaintiffs,

- against -

DECISION and ORDER

201 WEST 16 OWNERS CORP.,

Defendant.

and Third-Party actions.

	<u>PAPERS NUMBERED</u>
Defendant 201 West 16 Owners Corp.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits	NYSCEF Doc. No. 110-128
Plaintiffs' Notice of Cross-Motion, Affirmation in Support, Exhibits	NYSCEF Doc. No. 153-165
Third-Party Defendant/Second Third-Party Plaintiff EDRAS Group Corp.'s Affirmation in Partial Opposition, Response to Statement of Material Facts, Memorandum of Law in Opposition, Exhibits	NYSCEF Doc. No. 140-148
Plaintiffs' Affirmation in Opposition, Response to Statement of Material Facts, Exhibit	NYSCEF Doc. No. 149-152
Defendant 201 West 16 Owners Corp.'s Reply Affirmation to Third-Party Defendant/Second Third-Party Plaintiff EDRAS Group Corp.'s Affirmation in Partial Opposition	NYSCEF Doc. No. 170-171
Defendant 201 West 16 Owners Corp.'s Reply Affirmation to Plaintiffs' Affirmation in Partial Opposition	NYSCEF Doc. No. 172-173
Defendant 201 West 16 Owners Corp.'s Affirmation in Opposition to Cross-Motion	NYSCEF Doc. No. 167
Third-Party Defendant/Second Third-Party Plaintiff EDRAS Group Corp.'s Affirmation in Opposition to Cross-Motion	NYSCEF Doc. No. 168

Upon the enumerated papers¹, and due deliberation, this Court finds:

This Court finds Plaintiffs demonstrated their *prima facie* entitlement to judgment on the Labor Law 240(1) claim,² and Defendant/Third-Party Plaintiff 201 West and Third-Party Defendant/Second Third-Party Plaintiff EDRAS Group Corp. ("EDRAS") failed to raise triable issues of fact precluding summary judgment in favor of Plaintiffs. Likewise, this Court holds Defendant/Third-Party Plaintiff 201 West failed to demonstrate its *prima facie* entitlement to

¹ As the CPLR or Uniform Rule 202.8-b(e) do not expressly recognize the right to serve a reply on a cross-motion, and no prior leave of court was sought by Plaintiffs to do so, this Court declines to review or address the contentions raised in the reply papers submitted by Plaintiffs to their cross-motion (NYSCEF Doc. No. 169). [CPLR 2214].

² Plaintiff did not oppose the branch of Defendant/Third-Party Plaintiff 201 West's summary judgment motion seeking dismissal of the Labor Law 240(2), 240(3), 241(6), and 200 claims. Therefore, the branch of Defendant/Third-Party Plaintiff 201 West's summary judgment motion seeking dismissal of the Labor Law 240(2), 240(3), 241(6), and 200 claims, is granted, without opposition, and will not be further discussed herein.

judgment on its third-party claims for common law indemnity, contribution, contractual indemnity, and breach of contract for failure to procure against Third-Party Defendant EDRAS.

According to Plaintiffs, on the day of the accident, Plaintiff Bayron Sandoval was working for EDRAS as a laborer to perform construction work at the site of a residential building located at 201 West 16th Street undergoing façade renovation. On the morning of the accident, Plaintiff was instructed by an EDRAS foreman to report to a sidewalk bridge to lift new stones to the bridge. At the time of the accident, Plaintiff was using ropes with a foreman (Vincente) assigned to Second Third-Party Defendant New Era Restoration Inc. to lift façade stones from street level to the sidewalk bridge. Plaintiff testified that he and Vincente stood about six feet apart, facing the street, and that they were proceeding to lift the last stone. As they lifted the stone about two feet high, Plaintiff testified that Vincente allegedly let go of the line or released his grip causing the nearly 300-pound stone to descend pulling Plaintiff towards and making contact with a wooden barrier of the sidewalk bridge resulting in injury.

It is undisputed that 201 West was the owner of the subject building undergoing exterior façade renovation, and 201 West entered into a contract with EDRAS to serve as general contractor. EDRAS subsequently contracted with New Era Restoration Inc. as subcontractor to provide labor and materials for the work in connection with the façade restoration.

Plaintiff alleges that he was not provided an adequate safety device in the form of a mechanical hoist or lift in order to properly lift the subject stone.

This Court finds Plaintiffs established their *prima facie* burden of a Labor Law 240(1) violation as they demonstrated that 201 West failed to supply Plaintiff with an adequate safety device to prevent an uncontrolled descent of the subject stone, where the rope, as provided, proved

inadequate to perform the task at hand. *See Medouze v Plaza Constr. LLC*, 199 AD3d 465 [1st Dept. 2021]; *see also Mayorga v 75 Plaza LLC*, 191 AD3d 606 [1st Dept. 2021].

In opposition, Defendant 201 West's argument that Plaintiff's accident is not actionable under Labor Law 240(1) where the rope neither broke or that Plaintiff was not struck by the stone is unpersuasive. To the extent that Plaintiff was pulled down rather than struck by the stone is of no moment, as his alleged injuries flowed directly from the application of the force of gravity to the stone. *See Medouze*, 199 AD3d at 466.

As to 201 West's summary judgment motion seeking judgment on its third-party claim sounding in common law indemnity and contribution against EDRAS, Plaintiff's employer, this Court finds it failed to demonstrate a *prima facie* entitlement to said claims as they are barred by Workers Compensation Law §11 since Plaintiff's injuries are not "grave" within the meaning of the statute. *See Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 [1st Dept. 2019]. The Court also finds there are triable issues of fact as to EDRAS' negligence in causing or contributing to Plaintiff's accident.

With respect to 201 West's summary judgment motion seeking judgment on its third-party claim for contractual indemnity from EDRAS, there was sufficient evidence to establish that there was a meeting of the minds sufficient to give rise to an enforceable indemnity agreement based upon: (1) EDRAS' performance of the terms of the contract by providing "all labor, materials, equipment and tools required to perform the Work;" 2) EDRAS' receipt and execution of the subject contract agreeing to be bound by the terms and conditions set forth in the contract documents including two indemnity provisions between 201 West's principal, Edward S. Lewis and the sole owner of EDRAS', Diego Tome; and (3) the authentication of their signatures on the

contract when Mr. Lewis and Mr. Tome appeared for their respective examinations before trial. *See Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363 [2005].

Article 9.12 of the construction contract provides: “To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect,...and agents and employees of any of them from and against claims, damages, losses and expenses...arising out of or resulting from performance of the Work...but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them...”

Article 21.6(d) of the construction contract provides in relevant part: “In addition to Article 9.12..., and to the fullest extent permitted by law, Contractor hereby agrees to defend, indemnify and hold harmless each of the Owner, Managing Agent...(i) from and against any all claims, losses, damages or liability arising out of or in connection with the operations and performance of the Work...under this Contract or...under any sub-contract...including but not limited to (A) the negligence or willful misconduct of Contractor, its agents, employees or subcontractors...”

The aforementioned provisions, when read together, requires EDRAS to indemnify 201 West from and against claims and damages arising out of the work to the extent that EDRAS was negligent in causing Plaintiff’s accident. Whereas here, there are triable issues of fact as to whether EDRAS was negligent based on Mr. Tome’s testimony that he was only present at the job site once a week or bi-weekly; that EDRAS did not perform any actual work; and denied that EDRAS supervised, directed, or controlled the means and methods of how the stones were transported to the intended areas of the job site. Therefore, 201 West is not entitled to contractual indemnity from EDRAS at this juncture.

Additionally, notwithstanding that EDRAS did not append the relevant commercial general liability and/or excess policies that were effective on the date of the accident, Defendant 201 West failed to make out a *prima facie* entitlement to judgment on its third-party claim for breach of contract for failure to procure insurance. 201 West, in essence, failed to provide an affidavit or some other form of admissible evidence demonstrating that no liability insurance was obtained by EDRAS. *See Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497 [1st Dept. 2004].

Accordingly, it is

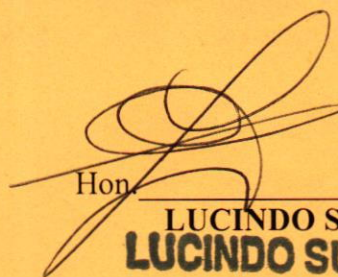
ORDERED, that Defendant 201 West's summary judgment motion seeking dismissal of the Labor Law 240, 241, and 200 claims, and judgment on its third-party claims for contractual indemnity, common law indemnity, and contribution, is granted, in part; and it is further

ORDERED, that the Labor Law 241, 200, 240(2), and 240(3) claims as against 201 West are dismissed; and it is further

ORDERED, that Plaintiffs' cross-motion for summary judgment seeking judgment on their Labor Law 240(1) claim against Defendant 201 West, is granted; and it is further

This constitutes the Decision and Order of the Court.

Dated: May 10, 2023.


Hon. _____
LUCINDO SUAREZ, J.S.C.
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