

<b>Urquia v Deegan 135 Realty LLC</b>
2023 NY Slip Op 35077(U)
September 21, 2023
Supreme Court, Bronx County
Docket Number: Index No. 22340/2019E
Judge: Lucindo Suarez
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  
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 4, 5, 6, 7

JOSE LUIS URQUIA,

Index No.: 22340/2019E

Plaintiff,

- against -

**DECISION and ORDER**

DEEGAN 135 REALTY LLC, CHESS PROPERTIES LLC,  
CGS BUILDERS INC., and CHESS BUILDERS LLC,

Defendants.

and Third-Party action.

	<u>PAPERS NUMBERED</u>
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 86-101
Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC's and Chess Properties LLC's Notice of Cross-Motion, Affirmation in Opposition to Plaintiff's Motion/Support, Memorandum of Law in Opposition to Plaintiff's Motion/Support, Response to Statement of Material Facts, Statement of Material Facts, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 137-162
Third-Party Defendant Capital Concrete NY Inc.'s Affirmation in Opposition, Response to Statement of Material Facts, Memorandum of Law in Opposition, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 116-136
Plaintiff's Affirmation in Opposition to Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC's and Chess Properties LLC's Cross-Motion, Memorandum of Law in Opposition, Response to Statement of Material Facts, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 230-237, 260, 262
Third-Party Defendant Capital Concrete NY Inc.'s Notice of Motion, Affirmation in Support, Exhibits (Mtn. Seq. No. 5)	NYSCEF Doc. No. 163-176, 228
Plaintiff's Affirmation in Opposition, Exhibits (Mtn. Seq. No. 5)	NYSCEF Doc. No. 249-253
Third-Party Defendant Capital Concrete NY Inc.'s Reply Affirmation (Mtn. Seq. No. 5)	NYSCEF Doc. No. 268
Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC's and Chess Properties LLC's Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits (Mtn. Seq. No. 6)	NYSCEF Doc. No. 177-199
Third-Party Defendant Capital Concrete NY, Inc.'s Affirmation in Opposition, Memorandum of Law in Opposition, Exhibits, Response to Statement of Material Facts (Mtn. Seq. No. 6)	NYSCEF Doc. No. 242-248, 263
Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC's and Chess Properties LLC's Reply Affirmation (Mtn. Seq. No. 6)	NYSCEF Doc. No. 266-267
Third-Party Defendant Capital Concrete NY, Inc.'s Notice of Motion, Statement of Material Facts, Affirmation in Support, Exhibits, Memorandum of Law in Support (Mtn. Seq. No. 7)	NYSCEF Doc. No. 201-227
Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC's and Chess Properties LLC's Affirmation in Partial Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts (Mtn. Seq. No. 7)	NYSCEF Doc. No. 238-241
Plaintiff's Affirmation in Opposition, Response to Statement of Material Facts, Memorandum of Law in Opposition, Exhibit (Mtn. Seq. No. 7)	NYSCEF Doc. No. 254-259, 261
Third-Party Defendant Capital Concrete NY, Inc.'s Reply Affirmation (Mtn. Seq. No. 7)	NYSCEF Doc. No. 264

Upon the enumerated papers<sup>1</sup>, and due deliberation had thereon, this Court finds:

<sup>1</sup> 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 Defendants/Third-Party Plaintiffs Deegan 135 Realty LLC and Chess Properties LLC to do so, this

The threshold issue is whether non-party witness Alexander Diaz Ordaz, Plaintiff's coworker, should be held in civil contempt pursuant to Judiciary Law § 753[A][5] and CPLR 2308 for failure to submit to an examination before trial pursuant to a so-ordered subpoena, and precluding said non-party witness, pursuant to CPLR 3126, from offering evidence, testimony at the time of trial and/or submitting an affidavit in support or in opposition to any motion.

This Court finds Deegan, Chess, and Capital Concrete failed to establish their entitlement to hold Alexander Diaz Ordaz in contempt of court and/or to preclude Mr. Ordaz from offering evidence at the time of trial or an affidavit in opposition or in support of any motion. There is a triable issue of fact as to whether Alexander Diaz Ordaz was properly served with the so-ordered subpoena and/or the motions for contempt.

The issue in Plaintiff's summary judgment motion is whether he demonstrated his entitlement to judgment as to liability against Defendants/Third-Party Plaintiffs Deegan and Chess under Labor Law 240(1) and 241(6), and whether Defendants/Third-Party Plaintiffs Deegan and Chess demonstrated their entitlement to dismissal of Plaintiff's complaint with respect to the Labor Law 240(1), 200 and 241(6) claims<sup>2</sup>.

The Court finds there are triable issues of fact regarding Plaintiff's Labor Law 240(1) and 241(6) claims precluding summary judgment in favor of Plaintiff and Defendants/Third-Party Plaintiffs Deegan and Chess.

---

Court declines to review or address the contentions raised in the reply papers submitted by said movants to their cross-motion [NYSCEF Doc. No. 270]. [CPLR 2214].

To the extent that Third-Party Defendant Capital Concrete NY, Inc. submitted a supplemental expert affidavit [NYSCEF Doc. No. 265] in its reply papers, the arguments set forth with respect to the expert's findings were improperly raised for the first time on reply. Therefore, the supplemental expert affidavit and the arguments set forth in connection therewith will not be addressed by the Court herein.

<sup>2</sup> Plaintiff did not oppose the branch of the summary judgment motion by Defendants/Third-Party Plaintiffs Deegan and Chess seeking dismissal of the Labor Law 200 claim. Therefore, the branch of the summary judgment motion by Defendants Deegan and Chess seeking dismissal of the Labor Law 200 claim, is granted, without opposition, and will not be further discussed herein.

The next issue in Defendants/Third-Party Plaintiffs Deegan's and Chess' summary judgment motion is whether they demonstrated their *prima facie* entitlement to judgment on their third-party claims for contractual indemnification and breach of contract for failure to procure as against Third-Party Defendant Capital Concrete NY Inc. ("Capital Concrete")<sup>3</sup>.

The issue in Third-Party Defendant Capital Concrete's summary judgment motion is whether it established its entitlement to dismissal of Defendants/Third-Party Plaintiffs Deegan's and Chess' third-party complaint sounding in claims for contractual indemnification, common-law indemnification, contribution, and breach of contract for failure to procure insurance against Capital Concrete<sup>4</sup>.

The Court finds Defendant/Third-Party Plaintiff Chess demonstrated its *prima facie* entitlement to judgment on its third-party claims for contractual indemnification and breach of contract for failure to procure against Third-Party Defendant Capital Concrete. The Court also finds Capital Concrete demonstrated its entitlement to dismissal of the common-law indemnification and contribution third-party claims asserted by Deegan and Chess.

According to Plaintiff, on the day of the accident, he was employed by Third-Party Defendant Capital Concrete NY Inc. ("Capital Concrete") as a carpenter to perform concrete work at a construction project located at 198 East 135th Street, Bronx County. Capital Concrete was hired by Chess, the general contractor, to perform the concrete structure work for the project. Plaintiff testified that a general foreman at Capital Concrete ("Tortuga") assigned the work to be

---

<sup>3</sup> Third-Party Defendant Capital Concrete did not oppose the branch of the summary judgment motion by Defendants/Third-Party Plaintiffs Deegan and Chess seeking dismissal of all cross-claims and counterclaims asserted by Third-Party Defendant Capital Concrete. Therefore, the branch of the summary judgment motion by Defendants Deegan and Chess seeking dismissal of all cross-claims and counterclaims asserted by Third-Party Defendant Capital Concrete, is hereby granted, without opposition, and will not be further discussed herein.

<sup>4</sup> This Court shall not consider Third-Party Defendant Capital Concrete's summary judgment motion as it seeks dismissal of "Plaintiff JOSE LUIS URQUIA's Verified Complaint in its entirety" as Plaintiff's claims are not asserted against Capital Concrete. Moreover, the arguments regarding dismissal of the Labor Law 240(1), 241(6), and 200 claims were raised and decided in Defendants/Third-Party Plaintiffs Deegan's and Chess' summary judgment motion and cross-motion.

performed by Capital Concrete employees at the site and that Tortuga and three other foremen supervised Plaintiff's work. He further testified that Capital Concrete supplied the tools he used as well as two eight-foot A-frame ladders present at the site.

Before the incident occurred, Plaintiff was stripping ceiling forms in the basement level with the intention to bring them to the third floor of the subject premises. To perform this task, Plaintiff testified that ladders have to be set up before workers can climb up and take down beams. At the time of the accident, Plaintiff was standing on the fourth or fifth rung of an eight-foot A-frame ladder in order to reach the ten- to eleven-foot high ceiling. He testified that he and another co-worker ("Cesar") removed metal safeties from a big beam to be lowered from the ceiling when other beams gave way and fell about six- to seven-feet onto Plaintiff causing him to sustain injury. According to Plaintiff's sworn affidavit, he did not fall off the ladder but the impact of the beams caused the ladder to tip and he "hit [his] back against one of the columns" resulting in additional injury. Plaintiff claims that the accident occurred as a result of the beams not being properly secured with safeties which would have locked them into each other as well as an inadequate safety device to perform his work at the ceiling level.

Labor Law 240(1) imposes a nondelegable duty upon owners, contractors, and their agents to provide safety devices to protect workers from risks inherent in elevated work sites. *McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]. The statute applies to both falling worker and falling object cases. *See Harris v City of New York*, 83 AD3d 104 [1st Dept. 2011]. Plaintiff must demonstrate both a violation of the statute and that the violation was a proximate cause of the injury. *See Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY2d 280 [2003]. "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]. The doctrine of comparative negligence is not applicable. *See Lopez v Boston Props., Inc.*, 41 AD3d 259 [1st Dept. 2007].

This Court finds there are triable issues of fact as to whether the beams that fell from the ceiling was a load that required securing for the purposes of the undertaking pursuant to Labor Law 240(1). *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept. 2022]. Plaintiff's testimony that he was stripping forms or beams and required the removal of the safeties that secured the beams raised a triable issue of fact as to whether Plaintiff's task of removing and relocating the beams to another floor level required the assistance of any of the safety devices listed in Labor Law 240(1). *See Taopanta v 1211 6th Ave. Prop. Owner, LLC.*, 212 AD3d 566 [1st Dept. 2023]; *see also Greene v Raynors Lane Prop. LLC*, 194 AD3d 520 [1st Dept. 2021].

Labor Law 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors, and their agents "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. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept. 1995].

Plaintiff's summary judgment motion seeks judgment on his Labor Law 241(6) claim as predicated on Industrial Codes 12 NYCRR §23-1.5 [general responsibility of employers], 12 NYCRR §23-1.7[a] [overhead hazards], and 12 NYCRR §23-2.2 [concrete work].

To the extent that Plaintiff's Labor Law 241(6) claim is predicated on Industrial Code 12 NYCRR §23-1.5, it has been held that this provision is too generic to support a Labor Law 241(6) claim. *See Mouta v Essex Mkt. Dev. LLC*, 103 AD3d 505 [1st Dept. 2013]. Therefore, Plaintiff's

Labor Law 241(6) claim as predicated on a violation of Industrial Code 12 NYCRR §23-1.5 is dismissed.

This Court finds Industrial Code 12 NYCRR §23-1.7[a] to be a sufficient predicate to the applicable facts in this case. However, as to overhead hazards, there are triable issues of fact as to whether Plaintiff's assigned work area was "normally exposed to falling material or objects." *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 [1st Dept. 2007].

12 NYCRR §23-2.2 provides in relevant part that forms, shores, and reshores as to concrete work must be "structurally safe and shall be properly braced or tied together" to maintain their position and shape. The Court finds there are triable issues of fact as to whether §23-2.2 applies to Plaintiff's work of stripping forms as compared to the assembly of forms or the concrete pouring stage of the work. *See Morris v Pavarini Constr.*, 22 NY3d 668 [2014].

In addition, Third-Party Defendant Capital Concrete's summary judgment motion seeks dismissal of Defendants/Third-Party Plaintiffs Deegan's and Chess' third-party claim sounding in common-law indemnity and contribution. This Court holds Capital Concrete demonstrated its *prima facie* entitlement to dismissal of 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 Capital Concrete's negligence in causing or contributing to Plaintiff's accident.

With respect to Defendants/Third-Party Plaintiffs Deegan's and Chess' third-party claim sounding in contractual indemnification from Third-Party Defendant Capital Concrete, Chess has established its *prima facie* burden for judgment as to its third-party contractual indemnity claim against Capital Concrete as it is undisputed that the incident arose out of Capital Concrete's

contracted work whereby Plaintiff, employed by Capital Concrete, was instructed to strip forms at the time of the accident. The record evidence demonstrated that Capital Concrete was hired by Chess to perform concrete structure work pursuant to the subcontract at the subject premises. To the extent that Capital Concrete contends that Deegan's and Chess' third-party claim for contractual indemnity is barred by the anti-subrogation rule, said rule only bars indemnification after the insurance limits of the particular policy have been exhausted. *See Bosquez v Rxr Realty Llc*, 195 AD3d 536 [1st Dept. 2021]; *see also New York City Dept. of Transp. v Petric & Assoc., Inc.*, 132 AD3d 614 [1st Dept. 2015].

Moreover, the Court finds there are triable issues of fact as to whether Deegan is entitled to contractual indemnification from Capital Concrete pursuant its construction contract with Chess. The indemnification provision in the Capital Concrete-Chess subcontract provides, in relevant part, as follows:

INDEMNIFICATION:

- (a) To the fullest extent permitted by law Subcontractor agrees for itself, and to cause its subcontractors, to indemnify, defend and hold harmless Contractor, , Owner's managing agent, Owner's lender (if applicable), and their respective affiliates, principals, partners, members, stockholders, officers, directors, agents, employees, servants, successors and assigns (hereinafter collectively referred to as "Owner parties") from and against any and all claims of third parties resulting in liabilities, losses,...in connection with and/or arising from or out of the following ("Indemnified Matters"): (i) any negligent, willful or wrongful act resulting in bodily injury (including death)...by Subcontractor, its respective officers, employees, servants, agents, suppliers, invitees, successors or assigns...(ii) the Work or any breach of this Agreement or infringement of any patent right, by any Contractor Party; or (iii) any statutorily imposed liability for injury to employees or failure to comply with any laws or regulations affecting the Work.

Although the evidence in the record demonstrates that Deegan is the owner of the subject premises, the "Contractor" and "Owner parties," and not "Owner," is specifically identified as the parties to be indemnified by Capital Concrete. *See Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508 [1st

Dept. 2020]. Absent any clear explanation for excluding the “Owner” from the indemnification provision, Deegan and Capital Concrete failed to prove their respective *prima facie* burdens with respect to Deegan’s and Chess’ third-party claim for contractual indemnity from Capital Concrete.

As for Defendants/Third-Party Plaintiffs Deegan’s and Chess’ third-party claim for breach of contract for failure to procure against Third-Party Defendant Capital Concrete, Capital Concrete failed to establish that it procured the insurance as required by the subcontract notwithstanding that Capital Concrete appended a copy of the Commercial General Liability Insurance policy. *See Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555 [1st Dept. 2022]. The Capital Concrete-Chess subcontract requires Capital Concrete to obtain an umbrella/excess insurance policy with a \$10,000,000 each occurrence limit and in the policy aggregate with subcontractor limits of \$3,000,000 per occurrence and in the aggregate. Capital Concrete previously exchanged an Affidavit of No Excess (NYSCEF Doc. No. 198) and otherwise failed to raise a triable issue of fact regarding the procurement of an umbrella or excess policy. As there is a triable issue of fact as to whether Deegan is a party that Capital Concrete was contractually required to indemnify, Defendant/Third-Party Plaintiff Chess demonstrated its entitlement to conditional summary judgment on its third-party claim for breach of contract for failure to procure against Capital Concrete.

Accordingly, it is

ORDERED, that Plaintiff’s summary judgment motion (Mtn. Seq. No. 4) seeking judgment on his Labor Law 240(1) and 241(6) claims, is denied; and it is further

ORDERED, that Defendants/Third-Party Plaintiffs Deegan’s and Chess’ cross-motion (Mot. Seq. No. 4) for summary judgment, is granted in part; and it is further

ORDERED, that Plaintiff's Labor Law 241(6) claim as predicated on a violation of Industrial Code 12 NYCRR §23-1.5, is dismissed; and it is further

ORDERED, that Third-Party Defendant Capital Concrete's motion (Mtn. Seq. No. 5) to hold non-party witness Alexander Diaz Ordaz in civil contempt and to preclude said non-party witness from testifying at the time of trial, is denied; and it is further

ORDERED, that Defendants/Third-Party Plaintiffs Deegan's and Chess' summary judgment motion (Mot. Seq. No. 6), is granted in part; and it is further

ORDERED, that Plaintiff's Labor Law 200 claim against Deegan and Chess is dismissed; and it is further

ORDERED, that Chess is entitled to contractual indemnity from Capital Concrete; and it is further

ORDERED, that Chess is entitled to judgment against Capital Concrete on its third-party claim sounding in breach of contract for failure to procure; and it is further

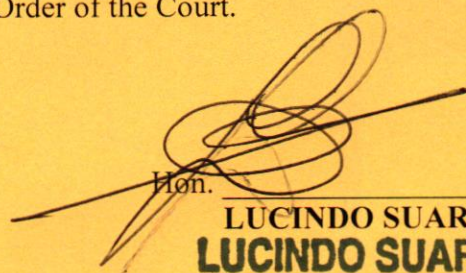
ORDERED, that all cross-claims and counterclaims asserted by Capital Concrete against Deegan and Chess are dismissed; and it is further

ORDERED, that Third-Party Defendant Capital Concrete's summary judgment motion (Mtn. Seq. No. 7), is granted in part; and it is further

ORDERED, that Defendants/Third-Party Plaintiffs Deegan's and Chess' third-party claims for common-law indemnity and contribution against Capital Concrete are dismissed.

This constitutes the Decision and Order of the Court.

**Dated: September 21, 2023**

  
Hon. \_\_\_\_\_  
**LUCINDO SUAREZ, J.S.C.**  
**LUCINDO SUAREZ, J.S.C.**