

**Weidtman v Tremont Renaissance Hous. Dev. Fund
Co., Inc.**

2023 NY Slip Op 35185(U)

April 5, 2023

Supreme Court, Bronx County

Docket Number: Index No. 20106/2018E

Judge: Lucindo Suarez

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

Mtn. Seqs. # 7, 8

GREGORY WEIDTMAN,

Index No.: 20106/2018E

Plaintiff,

- against -

DECISION and ORDER

TREMONT RENAISSANCE HOUSING DEVELOPMENT
FUND COMPANY, INC., TREMONT RENAISSANCE
LLC, TREMONT RENAISSANCE AFFORDABLE, LLC,
MASTERMIND DEVELOPMENT LLC, KZA REALTY
GROUP, JOY CONSTRUCTION CORPORATION,
URBAN PRECAST LLC, and NEWBURGH IRON LLC,

Defendants.

and Third-Party actions.

	PAPERS NUMBERED
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 7)	NYSCEF Doc. No. 221-253
Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Notice of Cross-Motion, Statement of Material Facts, Response to Statement of Material Facts, Affirmation in Support, Exhibits (Mtn. Seq. # 7)	NYSCEF Doc. No. 272-298
Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Notice of Cross-Motion, Response Statement of Material Facts, Statement of Material Facts, Memorandum in Opposition and in Support of Cross-Motion, Affirmation in Opposition and in Support of Cross-Motion, Exhibits (Mtn. Seq. # 7)	NYSCEF Doc. No. 329-361
Plaintiff's Affirmation in Opposition, Response to Statement of Material Facts	NYSCEF Doc. No. 254-255
Defendant Newburgh Iron LLC's Affirmation in Opposition, Response to Statement of Material Facts, Exhibit, Memorandum of Law in Opposition (Mtn. Seq. # 7)	NYSCEF Doc. No. 299-303
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Reply Affirmation to Plaintiff's Affirmation in Opposition (Mtn. Seq. # 7)	NYSCEF Doc. No. 375
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Reply Affirmation and Affirmation in Opposition to Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Affirmation in Opposition and Cross-Motion (Mtn. Seq. # 7)	NYSCEF Doc. No. 376-379
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Reply Affirmation and Affirmation in Opposition to Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Affirmation in Opposition and Cross-Motion, Response to Statement of Material Facts (Mtn. Seq. # 7)	NYSCEF Doc. No. 380-381
Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Reply Affirmation and Affirmation in Opposition to Defendant Newburgh Iron LLC's Affirmation in Opposition and Notice of Motion, Response to Statement of Material Facts (Mtn. Seq. # 7 & 8)	NYSCEF Doc. No. 382-383
Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Affirmation in Partial Opposition to Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Cross-Motion, Response to Statement of Material Facts (Mtn. Seq. # 7)	NYSCEF Doc. No. 362-363

Defendant Newburgh Iron, LLC's Affirmation in Opposition to Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Cross-Motion, Exhibits, Response to Statement of Material Facts (Mtn. Seq. # 7)	NYSCEF Doc. No. 369-374
Defendant Newburgh Iron, LLC's Affirmation in Response to Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Cross-Motion, Response to Statement of Material Facts (Mtn. Seq. # 7)	NYSCEF Doc. No. 366-368
Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Memorandum of Law in Opposition, Response to Statement of Material Facts (Mtn. Seq. # 7)	NYSCEF Doc. No. 384-385
Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Memorandum of Law in Partial Opposition to Defendant Newburgh Iron, LLC's, Response to Statement of Material Facts (Mtn. Seq. # 8)	NYSCEF Doc. No. 386-387
Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Affirmation in Partial Opposition to Defendant Newburgh Iron, LLC's Motion (Mtn. Seq. # 8)	NYSCEF Doc. No. 388
Defendant Newburgh Iron, LLC's Reply Affirmation to Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC's Affirmation in Opposition (Mtn. Seq. # 8)	NYSCEF Doc. No. 389
Defendant Newburgh Iron, LLC's Reply Affirmation to Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's Affirmation in Opposition (Mtn. Seq. # 8)	NYSCEF Doc. No. 390
Defendant Newburgh Iron, LLC's Reply Affirmation to Defendants/Third-Party Plaintiffs Tremont Renaissance Housing Development Fund Company, Inc.'s, Tremont Renaissance LLC's, Tremont Renaissance Affordable LLC's, and Joy Construction Corporation's Memorandum of Law in Opposition (Mtn. Seq. # 8)	NYSCEF Doc. No. 391

Upon the enumerated papers,¹ and due deliberation had thereon, this Court finds:

Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban Precast, LLC's ("Urban") summary judgment motion² is denied as Urban³ failed to demonstrate its *prima facie* entitlement to dismissal of the Labor Law 241(6) claim. This Court also holds there are triable issues of fact concerning the Labor Law 200 claim and the cross-claims for contractual indemnification, common law indemnification, and contribution against Urban that preclude summary judgment in favor of Urban. Lastly, Urban demonstrated its entitlement to dismissal of

¹ Further, 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 Tremont and Joy and Second Third-Party Defendant NYC Crane to do so, this Court declines to review or address the contentions raised in the reply papers submitted by Tremont, Joy, and NYC Crane to their cross-motions (NYSCEF Doc. Nos. 392 & 393). [CPLR 2214].

² Although Urban moved for an order pursuant to CPLR 3211 and 3212, a review of the papers indicate that the movant fashioned its papers as one for summary judgment and not for CPLR 3211 dismissal of Plaintiff's amended complaint and any cross-claims, and will be addressed as such herein.

³ The Court, on March 23, 2022, previously granted Plaintiff's summary judgment motion seeking judgment as to liability on his Labor Law 240(1) claim against Defendants Tremont Renaissance Housing Development Fund Company, Inc., Tremont Renaissance LLC, Tremont Renaissance Affordable LLC (collectively "Tremont"), Joy Construction Corporation ("Joy"), and Urban.

Tremont's and Joy's cross-claim for breach of contract for failure to procure insurance as against it.

That portion of Urban's summary judgment motion on its cross-claims for contractual indemnification against Defendant Newburgh Iron, LLC ("Newburgh") and Second Third-Party Defendant NYC Crane Hoist & Rigging, LLC ("NYC Crane") is denied as there are triable issues of fact concerning the cross-claims for contractual indemnification asserted against Newburgh and NYC Crane precluding summary judgment in favor of Urban.

Defendants/Third-Party Plaintiffs Tremont's and Joy's cross-motion for summary judgment on their claims for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance against Defendants Urban, Newburgh, and NYC Crane⁴ is denied as there are triable issues of fact concerning the claims for contractual indemnification, common law indemnification, and contribution to preclude summary judgment in favor of Tremont and Joy.⁵

Second Third-Party Defendant NYC Crane's cross-motion for summary judgment sounding in contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance as asserted against it⁶ is granted to the extent NYC

⁴ Plaintiff did not oppose the branch of Defendants/Third-Party Plaintiffs Tremont's and Joy's cross-motion for summary judgment seeking dismissal of the Labor Law 241(6) and 200 claims. Therefore, that branch of Defendants/Third-Party Plaintiffs Tremont's and Joy's cross-motion is granted, without opposition, and will not be further addressed herein.

⁵ The secondary issue in Defendants/Third-Party Plaintiffs Tremont's and Joy's cross-motion for summary judgment is whether they established their entitlement to dismissal of any and all cross-claims and counterclaims asserted against them. There being no opposition, the branch of Defendants/Third-Party Plaintiffs Tremont's and Joy's cross-motion for summary judgment seeking dismissal of any and all cross-claims and counterclaims asserted against them, is granted.

⁶ Although NYC Crane cross-moved for an order pursuant to CPLR 3211 and 3212, a review of the papers indicate that the movant fashioned its papers as one for summary judgment and not for CPLR 3211 dismissal of all claims and cross-claims sounding in contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance, and will therefore be addressed as such herein.

Crane only demonstrated its entitlement to dismissal of any contractual indemnification claim brought by Tremont and Joy as against it.

Defendant Newburgh's summary judgment motion to dismiss Plaintiff's complaint and any and all cross-claims and third-party claims for contractual indemnification, common law indemnification, contribution, and failure to procure insurance⁷ is granted to the extent that Defendant Newburgh is entitled to dismissal of any claim for contractual indemnification as asserted by Tremont and Joy.

According to Plaintiff, on the date of the incident, he was employed as a signalman for NYC Crane during crane operations at a construction site owned by Defendant Tremont and at which Defendant Joy was serving as the general contractor. Plaintiff allegedly was caused to fall from an open or unprotected edge of an elevated work area at the subject premises resulting in injuries. He further alleges that at the time of the incident, he was instructing the crane operator on the radio on where to set a plank when it struck Plaintiff while being hoisted, caused him to trip on scattered debris, and fall from an elevation. Joy hired Urban as a precast concrete subcontractor. Urban hired Newburgh as the structural steel subcontractor and retained NYC Crane as the crane operator.

The duty to provide the required "proper protection" against elevation-related risks pursuant to Labor Law 240(1) and 241(6) is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts*,

⁷ Plaintiff did not oppose the branch of Defendant Newburgh's summary judgment motion seeking dismissal of Plaintiff's complaint. Therefore, the branch of Defendant Newburgh's summary judgment motion seeking dismissal of Plaintiff's complaint is granted, without opposition, and will not be further addressed herein.

Inc., 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law 240(1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept. 2019]).

This Court finds Defendant/Third-Party Defendant/Second Third-Party Plaintiff Urban failed to establish its *prima facie* burden for dismissal of the Labor Law 241(6) claim as it neither addressed nor discussed which Industrial Code provisions or regulations were not applicable or were not violated by Urban. As the Court previously held that Urban is one of the defendants liable to Plaintiff under Labor Law 240(1), the Court need address the merits of whether Urban is a proper defendant for the purposes of strict liability under the Labor Law.

As to the Labor Law 200 and common negligence claims, this Court finds that there are triable issues of fact as to whether the accident arose out of work performed by Tremont, Joy, Urban, Newburgh or NYC Crane workers. There are also issues of fact as to whether Tremont, Joy, Urban, Newburgh, and NYC Crane were on notice of a potential hazard of an unprotected opening or edge that required fall protection or had authority to control the means and methods of any trade responsible for the happening of the accident. *See Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept. 2018]; *see also Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805 [1st Dept. 2010].

Moreover, this Court finds Defendants/Third-Party Plaintiffs Tremont and Joy did not establish their *prima facie* burden for judgment as to their cross-claims and/or third-party claims for contractual indemnity against Urban, Newburgh, or NYC Crane as there are triable issues of fact concerning whether the incident arose out of, in connection with, or as a result of Tremont's and Joy's contracted work. Further, Urban failed to establish its *prima facie* burden for judgment as to its cross-claims for contractual indemnity against Newburgh and NYC Crane as there are

triable issues of fact as to which contracted work Plaintiff's accident arose out of. Defendants Tremont, Joy, and Urban failed to demonstrate their freedom from negligence, and therefore, are not entitled to contractual indemnity from the parties of which they seek this remedy.

Moreover, a party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right. *See Alicea v New York*, 145 AD2d 315 [1st Dept. 1988]. To the extent that Tremont and Joy argue that they are third-party beneficiaries of the agreement between Urban and Newburgh and the agreement between Urban and NYC Crane, Tremont and Joy have not pointed to any provision in either agreement that clearly evidences an intent to permit enforcement by them. Therefore, Tremont and Joy are not entitled to contractual indemnification based on a third-party beneficiary theory.

Liability for common law indemnification and contribution may not be imposed against parties that are not negligent and do not exercise actual supervision and control over the injury-producing work. *See McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]; *see also Ausby v 365 W. End LLC*, 135 AD3d 481 [1st Dept. 2016]). Thus, even if a party has the contractual authority to direct and supervise work, if the party never exercises that authority and subcontracts its contractual duties to an entity that actually directs and supervises the work, then the party with contractual authority may not be held liable for common-law indemnification and contribution. *See McCarthy*, 17 NY3d at 378. As there are triable issues of fact as to whether any of the trades were negligent in causing or contributing to Plaintiff's incident, a determination on liability for common law indemnification and contribution is premature at this juncture. Therefore, any party seeking judgment on or dismissal of its cross-claims and/or third-party claims for common law indemnification and contribution is respectfully denied. *See Naughton v City of New York*, 94

AD3d 1 [1st Dept. 2012]; *see also Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635 [1st Dept. 2010].

Further, since Tremont and Joy failed to provide an affidavit or some other form of admissible evidence demonstrating that no liability or excess insurance was obtained by Urban, NYC Crane, or Newburgh, they therefore, failed to make a *prima facie* showing of entitlement to summary judgment on their cross-claims and/or third-party claims for breach of contract for failure to procure insurance. Notwithstanding Tremont's and Joy's failure to meet their burden, Urban demonstrated that it complied with its contractual obligation to procure insurance by appending commercial general liability and excess policies that were effective on the date of the accident, which included a blanket endorsement that covered any obligation by Urban to provide insurance to an additional insured. Thus, whether the insurer refused to indemnify Tremont and Joy does not alter the fact that Urban complied with its contractual obligations. *See Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497 [1st Dept. 2004].

The Court also finds NYC Crane did not demonstrate its *prima facie* entitlement to dismissal of any claims or cross-claims asserted by Tremont, Joy, and Urban for breach of contract for failure to procure insurance. NYC Crane has not made a showing that it complied with its contractual obligations to Urban and/or Tremont and Joy to obtain excess insurance or add the owner (Tremont) and general contractor (Joy) as additional insureds.

Additionally, the Court finds Newburgh did not demonstrate its *prima facie* entitlement to dismissal of any claim or cross-claim asserted by Urban for breach of contract for failure to procure insurance. Newburgh did not make a showing that it complied with its contractual obligations to Urban to obtain excess insurance that was effective on the date of the accident.

Accordingly, it is

ORDERED, that Urban's summary judgment motion (Mtn. Seq. No. 7) is granted in part; and it is further

ORDERED, that Tremont's and Joy's cross-claim for breach of contract for failure to procure insurance as against Urban, is dismissed; and it is further

ORDERED, that Tremont's and Joy's cross-motion to dismiss and for summary judgment (Mtn. Seq. No. 7) is granted in part; and it is further

ORDERED, that the Labor Law 241(6) and 200 claims are dismissed as to Tremont and Joy; and it is further

ORDERED, that NYC Crane's cross-motion for summary judgment and dismissal of all claims and cross-claims asserted by Tremont, Joy, and Urban as against it (Mtn. Seq. No. 7), is granted in part; and it is further

ORDERED, that Tremont's and Joy's claim for contractual indemnification asserted against NYC Crane, is dismissed; and it is further

ORDERED, that Newburgh's summary judgment motion (Mtn. Seq. No. 8) seeking dismissal of Plaintiff's complaint and any and all claims of co-defendants and third-party defendants against it, is granted in part; and it is further

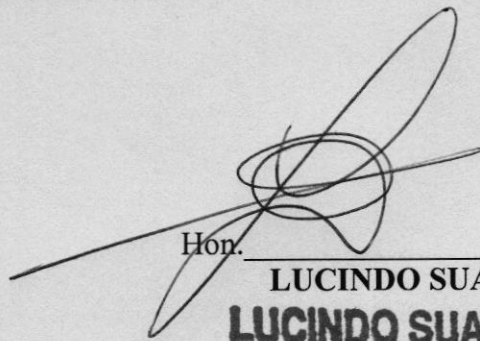
ORDERED, that the Labor Law 240(1), 241(6), and 200 claims are dismissed as to Newburgh; and it is further

ORDERED, that Tremont's and Joy's claim for contractual indemnification asserted against Newburgh, is dismissed; and it is further

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: April 5, 2023


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