| **Rochdale Ins. Co. v T.G. Nickel & Assoc., LLC** |
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| 2024 NY Slip Op 33123(U) |
| September 5, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 156326/2019 |
| Judge: Richard G. Latin |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. RICHARD G. LATIN** **PART** **46M**

***Justice***

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**INDEX NO.** 156326/2019

ROCHDALE INSURANCE COMPANY, AS ASSIGNEE OF,

Plaintiff,

**MOTION DATE** 04/24/2023, 04/24/2023

- v -

**MOTION SEQ. NO.** 003 004

T.G. NICKEL & ASSOCIATES, LLC,DYNAMIC MECHANICAL INC.,NAS INTERNATIONAL, INC.,L & L BOND ST., LLC,TP LIC LLC,

Defendant.

**DECISION + ORDER ON MOTION**

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T.G. NICKEL & ASSOCIATES, LLC, NAS INTERNATIONAL, INC., L & L BOND ST., LLC, TP LIC LLC,

Plaintiff,

Third-Party Index No. 595761/2020

-against-

DOMESTIC PLUMBING CORPORATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 101, 105, 107, 109, 111, 112, 113, 114, 115, 116, 117

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 102, 103, 104, 106, 108, 110, 118

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

Upon the foregoing cited papers, motion sequence numbers 003 and 004 are hereby consolidated for disposition and determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff-assignor German Padilla on February 7, 2017, when, while working at a construction site located at 27-19 44th Drive, Queens, New York ("the Premises"), a column he was lifting fell on his foot.

In motion sequence number 003, defendants/third-party plaintiffs T.G. Nickel & Associates, LLC n/k/a Consigli & Associates, LLC ("TG Nickel"), NAS International, Inc. ("NAS"), and TP LIC LLC ("TP") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them, as well as for summary judgment in their favor on their third-party contractual indemnification claim against third-party defendant Domestic Plumbing Corporation ("Domestic") (together, "defendants").[1,2]

In motion sequence number 004, Domestic moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

## BACKGROUND

On the day of the accident, the Premises was owned by TP. TP hired TG Nickel to provide construction management services for a project at the Premises that entailed the new construction of a high-rise building ("the Project"). TG Nickel hired Domestic to provide plumbing work on the Project. Padilla was an employee of Domestic.

Plaintiff Rochdale Insurance Company ("Rochdale") was the workers compensation insurer for Domestic. It provided coverage for Padilla's injuries. Padilla then assigned his rights to recover to Rochdale.

***Padilla's Testimony (NYSCEF Doc. No. 63)***

Padilla testified that on the day of the accident, he was employed by Domestic (Padilla tr at 17). His duties included "pulling pipes" and carrying materials (*id.* at 24). He primarily helped the plumbers with their work. He had several supervisors, all of whom were Domestic employees.

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[1] In motion sequence 001, plaintiff moved for a default judgment against defendant Dynamic Mechanical Inc. By decision and order dated February 16, 2021, that motion was granted (NYSCEF Doc. No. 27).

[2] By stipulation dated December 21, 2020, plaintiff discontinued this action as against defendant L&L Bond St. LLC (NYSCEF Doc. No. 44).

He could only recall the name of one supervisor, "Rafael" (*id.* 24). The Domestic supervisors were the only people who ever gave Padilla work (*id.* at 26).

At the time of the accident, Padilla was directed by a coworker, "Alfredo" (*id.* at 34) to join with 14-15 other workers to "lift[] some sort of a base upwards" (*id.* at 26). Padilla did not know if the base was a part of Domestic's work, or if he was assisting another trade (*id.* at 37), though he later indicated that the "base" was likely a steel support column (*id.* at 37), which was not the kind of material that Domestic installed (*id.* at 37 ["It was neither a pipe, nor a tube"]) (hereinafter, the "base" will be referred to as the "Column"). The Column was approximately 10-11-feet tall and three feet wide and "weighed 2,500 pounds" (*id.* at 27-28). It was intended to be installed as a structural support. To install the Column, the 14-15 workers were told to manually lift it up from the ground to the ceiling (*id.* at 31). The group was able to lift the column "approximately four feet" (*id.* at 34). They realized that they could not lift it the entirety of the way up and, as a group, decided to lower the Column back to the ground (*id.* at 37). "On the way down, it landed on [his] foot" (*id.* at 38). It was "three or four inches" from the ground when it fell on his foot (*id.* at 39).

Padilla was unsure if all of the workers trying to lift the object were Domestic workers (*id.* at 34). He did not recognize approximately half of them. He did not know what company was responsible for installing the Column (*id.* at 82).

After the accident, Padilla found his supervisor, Rafael, and informed him of the accident. Rafael prepared an accident report. Padilla reviewed the form, but testified that he does not read well, so he did not know what it said.

***Deposition Testimony of Emidio Buono (Domestic's Owner) (NYSCEF Doc. No. 64)***

Emedio Buono testified that on the day of the accident, he was Domestic's owner (Buono tr at 13). TG Nickel hired Domestic to provide plumbing installation work on the Project (*id.* at 16). He was unfamiliar with Padilla. He was also unfamiliar with Padilla's accident (*id.* at 23), and he had never seen any accident report about the accident (*id.* at 33).

***Deposition Testimony of John Homler (TG Nickel's Assistant Superintendent) (NYSCEF Doc. No. 65)***

John Homler testified that on the day of the accident, he was employed by TG Nickel as an assistant superintendent (Homler tr at 35). He was not involved with the subject Project until September 2017 (seven months after the accident) (*id.* at 12).

Homler testified that TG Nickel was the construction manager for the Project (*id.* at 12). TP LLC was the owner of the Premises (*id.* at 12). TG Nickel's duties included coordinating with the owner and the subcontractors to maintain project focus and meet goals (*id.* at 13). TG Nickel had employees on site every day (*id.* at 15). TG Nickel also hired subcontractors for the Project, including Domestic (*id.* at 21-22).

TG Nickel hired a site safety manager for the Project. Homler could not recall who was hired, as there was no safety manager at the Premises when he began working there (*id.* at 17-18). TG Nickel's employees had the authority to stop work if they witnessed an unsafe condition (*id.* at 28).

Homler was familiar with Padilla's accident and knew the basics of what happened. Homler had not been assigned to the Premises as of the day of the accident. He did not get assigned to the Project until the punch-list phase (*id.* at 17). Homler testified that the subcontractors would direct and supervise their own work, including the means to lift heavy objects, and that TG Nickel's role was to "ensure that the operation is happening safely" (*id.* at 43).

**DISCUSSION**

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

***The Labor Law § 241 (6) Claim (Motion Sequence Number 003)***

Defendants move for summary judgment dismissing the Labor Law § 241 (6) claim as against them. Notably, plaintiff "does not contest Defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claims" (plaintiff's memorandum of law in opposition, at 8; NYSCEF Doc. No. 117). Accordingly, defendants are entitled to summary judgment dismissing said claim.

***The Common-Law Negligence and Labor Law § 200 Claim (Motion Sequence Number 003)***

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; *DaSilva v Toll First Ave., LLC,* 199 AD3d 511, 513 [1st Dept 2021]; *Andino v Wizards Studios N. Inc.*, 223 AD3d 508, 509 [1st Dept 2024]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created

the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the accident occurred when Padilla was helping to raise and then lower the 2,500-pound steel support Column by hand. As it was lowered, the column landed on Padilla's foot. Therefore, the accident was caused by the means and methods of the work being performed (*see e.g. Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018] ["Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises"]).

Padilla's testimony establishes that his coworker, Alfredo, directed him to help lift the Column by hand (Padilla tr at 26). There is, however, no testimony as to who directed Alfredo to gather Domestic workers to assist with lifting the Column by hand. Similarly, there is no witness testimony as to what contractor was responsible for lifting or installing the Column, or what entity affirmatively directed, controlled, or supervised the raising of the Column.

Defendants argue that they only had a general authority to supervise and control, and therefore they cannot be liable for any accident under a means and methods analysis (*Balcazar v Commet 380, Inc.*, 199 AD3d 403, 404-405 [1st Dept 2021] ["coordinating and scheduling of trades at work sites do not rise to the level of supervision and control necessary to impose liability" under the common-law or section 200]). This argument is unavailing at this time. Defendants have not sufficiently established in the record that they only provided general supervision or control over the injury producing work – the lifting of the Column.

Specifically, the record contains no testimony from someone with knowledge of TG Nickel's work or activities at the time of the accident, nor testimony of anyone that TG Nickel did not actually direct Domestic's workers to undertake such a task (*see e.g. Lemache v MIP One Wall St. Acquisition, LLC,* 190 AD3d 422, 424 [1st Dept 2021] [finding a question of fact as to whether the general contractor was liable under section 200 where testimony established, *inter alia,* that the general contractor "directed plaintiff and his coworkers to move the [object] in question"]). Notably, Homler was not assigned to the Project until several months after the accident (Homler tr at 12), when principal construction was complete. Further, Homler's testimony acknowledged that he had no personal knowledge of TG Nickel's work on the Project prior to that date, or any personal knowledge of the accident itself or what led to it.

Given the foregoing, defendants have failed to establish that they did not direct Domestic's workers to perform that work (and therefore have the authority to actually control the means and methods of the work done). Accordingly, defendants have not met their prima facie burden and are not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

***Defendants' Third-Party Contractual Indemnification Claims against Domestic (Motion Sequence Number 003 and 004)***

Defendants move for summary judgment in their favor on their third-party contractual indemnification claims against Domestic. Domestic moves for summary judgment dismissing the same.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d

82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia,* 259 AD2d at 65; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

*Additional facts relevant to this claim*

TG Nickel and Domestic entered into a Subcontract Agreement dated September 24, 2015, for the Project (defendants' notice of motion, exhibit B; NYSCEF Doc. No. 80) (the Agreement). It contains an indemnification provision, which provides the following:

> "To the fullest extent permitted by law . . . [Domestic] shall indemnify . . . [TG Nickel], [TP] . . . from and against all claims . . . arising out of or resulting from any performance of and/or failure to perform [Domestic's] Work, acts or omissions of [Domestic], its lower-tier sub-subcontractors, and others for whom [Domestic] is responsible . . . but only to the extent caused by the acts and/or omissions or a breach of contract of [Domestic], a Sub-Subcontractor to [Domestic], and anyone any person or entity directly or indirectly employed by them"

(*id.* § 4.6).

Defendants argue that this provision applies to the subject accident because Padilla was an employee of Domestic who was at the Premises performing work for Domestic at the time of the accident (*see e.g. Worth Constr. Co., Inc. v. Admiral Ins. Co.,* 10 NY3d 411, 415 [2008] ["The

phrase 'arising out of' has been interpreted by this Court to 'mean originating from, incident to, or having connection with . . . and requires 'only that there be some causal relationship between the injury and the risk . . ."]). Domestic argues that plaintiff's accident did not arise out of Domestic's work as the accident did not fall within Domestic's scope of work. Specifically, Domestic argues that structural steel installation was outside the scope of Domestic's work under the Agreement.

It is uncontested that Domestic's work did not include the installation of structural steel. Accordingly, Padilla's accident – which occurred when he was told to help lift a structural steel column – does not directly arise from Domestic's defined scope of work. That said, questions of fact remain as to whether Padilla's accident arose from Domestic's acts.

As discussed above, the record does not establish what entity actually directed Padilla to assist with lifting the subject Column. Specifically, questions of fact remain as to what entity ultimately was responsible for directing Padilla to perform the work that led to the accident, regardless of whether it fell within the specific scope of Domestic's work. To that end, Domestic's owner, Buono, was entirely unfamiliar with Padilla's accident (Buono tr at 23), and TG Nickel's project manager (who was not assigned to the Project until several months after the accident) was unable to testify about the circumstances surrounding the installation of the Column.

Given the foregoing, defendants are not entitled to summary judgment in their favor on their claim for contractual indemnification against Domestic and Domestic is not entitled to summary judgment dismissing the same.

The parties remaining arguments have been considered and were unavailing.

## CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

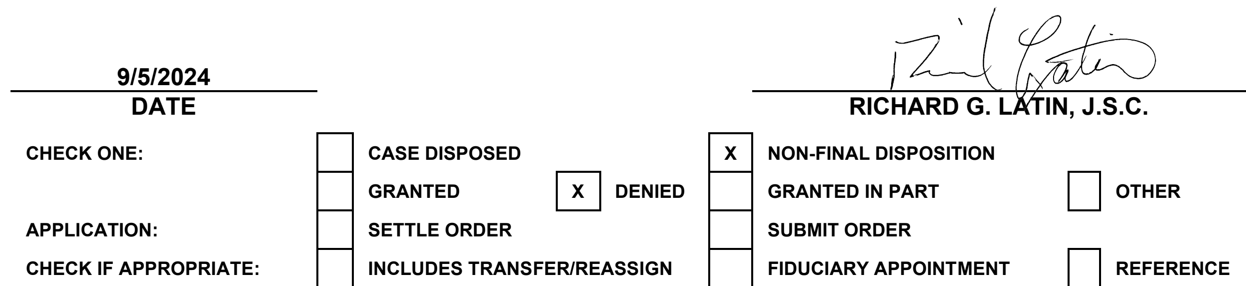
**ORDERED** that the branch of the motion of defendants/third-party plaintiffs T.G. Nickel & Associates, LLC n/k/a Consigli & Associates, LLC (TG Nickel), NAS International, Inc. (NAS), and TP LIC LLC (TP) (collectively, defendants) (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent that the Labor Law § 241 (6) claims against them are dismissed, and the motion is otherwise denied; and it is further

**ORDERED** that the branch of defendants' motion, pursuant to CPLR 3212, for summary judgment in their favor on their third-party claims for contractual indemnification against third-party defendant Domestic Plumbing Corporation (Domestic) is denied; and it is further

**ORDERED** that Domestic's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing defendants' third-party contractual indemnification claims against it is denied; and it is further

**ORDERED** that the remainder of this action shall continue.

This constitutes the decision and order of the court.



9/5/2024
DATE

RICHARD G. LATIN, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | ☐ | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | | |
| | ☐ | GRANTED | X | DENIED | ☐ | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | | ☐ | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | | ☐ | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |