

Ichapanta v East Side Home Stead, LLC

2024 NY Slip Op 34985(U)

August 22, 2024

Supreme Court, Bronx County

Docket Number: Index No. 812540/2021E

Judge: Myrna Socorro

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9**

-----X
LUIS J. TIGSILEMA ICHAPANTA,
Plaintiff,

Index No. 812540/2021E
Motion seq #2, 3 and 4

-against-

DECISION & ORDER

**EAST SIDE HOME STEAD, LLC, TACONIC
BUILDERS, INC, and JVA INDUSTRIES,
INC.,**
Defendants.

Hon. Myrna Socorro, J.S.C.

-----X
EAST SIDE HOMESTEAD, LLC,
Third-Party Plaintiff,

-against-

JVA INDUSTRIES, INC.,
Third-Party Defendant.

-----X
The following papers were read on the motion by defendant/third-party defendant JVA Industries, Inc. (Seq. No. 2) to **amend caption/pleadings** noticed for November 15, 2023, and submitted on March 26, 2024; on the motion by defendant Taconic Builders Inc. (Seq. No. 3) for **summary judgment** noticed for November 15, 2023, and submitted on March 26, 2024; on the motion by defendant/third-party plaintiff East Side Homestead, LLC (Seq. No. 4) for **summary judgment** noticed for February 1, 2024, and submitted on March 26, 2024; and on the cross-motion by defendant/third-party defendant JVA Industries, Inc. (Seq. No. 4) for **summary judgment** noticed for February 1, 2024, and submitted on March 26, 2024.

Papers	NYSCEF Doc.
Motion seq #2	
Notice of Motion by Defendant/Third-Party Defendant JVA Industries, Inc. – Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts and Exhibits	# 46-60
Defendant Taconic Builders, Inc.’s Affirmation in Opposition, Response Statement of Material Facts and Exhibits	# 66-71
Plaintiff’s Affirmation in Opposition and Exhibit	# 79-81

Defendant/Third-Party Plaintiff East Side Homestead's # 100-104 Affirmation in Partial Opposition, Response Statement of Material Facts, Counter Statement of Material Facts and Exhibits
Defendant/Third-Party Defendant JVA Industries, Inc.'s Reply # 107-108 Affirmation and Exhibit
Motion seq #3 Notice of Motion by Defendant Taconic Builders, Inc. – # 72-78 Affirmation in Support, Statement of Material Facts, and Exhibits
Defendant/Third-Party Defendant JVA Industries, Inc.'s # 86-94 Affirmation in Opposition, Memorandum of Law in Opposition, Response Statement of Material Facts, and Exhibits
Motion seq #4 Notice of Motion by Defendant/Third-Party Plaintiff East Side # 117-131 Homestead – Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Affirmations, and Exhibits
Notice of Cross-Motion by Defendant/Third-Party Defendant # 137-155 JVA Industries, Inc. – Affirmation in Support, Memorandum of Law in Support, and Exhibits
Plaintiff's Affirmation in Opposition and Exhibit # 165-167
Defendant/Third-Party Plaintiff East Side Homestead's Reply # 168 Affirmation

Motion by defendant/third-party defendant JVA Industries, Inc. ("JVA") (Seq. No. 2), for an order, pursuant to CPLR §3025(b), amending JVA's answer, and upon said amendment, for an order, pursuant to CPLR §3212, dismissing the plaintiff's complaint as against it with prejudice as well as all cross-claims without prejudice; the motion by defendant Taconic Builders Inc. ("Taconic Builders") (Seq. No. 3), for an order pursuant to CPLR §3212, granting judgment in favor of Taconic Builders declaring that JVA is obligated to defend and indemnify Taconic Builders pursuant to written contract; on the motion by defendant/third-party plaintiff East Side Homestead, LLC

(“East Side”) (Seq. No. 4), for an order pursuant to CPLR §3212, dismissing the plaintiff’s complaint and all cross-claims; and on the cross-motion by defendant/third-party defendant JVA (Seq. No. 4), for an order, pursuant to CPLR §3212, *inter alia*, dismissing East Side’s third-party claims for common-law indemnity and contribution, are decided as follows:

Preliminarily, defendant/third-party defendant JVA’s cross-motion (Seq. No. 4) for summary judgment seeking, *inter alia*, dismissal of defendant/third-party plaintiff East Side’s third-party claims for common-law indemnity and contribution was withdrawn per stipulation, dated February 8, 2024 (NYSCEF Doc No. 156). Therefore, defendant/third-party defendant JVA’s cross-motion will not be further addressed herein.

The court notes that there was no opposition submitted to the branch of East Side’s summary judgment motion (Seq. No. 4) seeking dismissal of all cross-claims against it. Therefore, East Side’s summary judgment motion seeking dismissal of all cross-claims against it, is granted, without opposition.

According to the plaintiff, on the day of the accident, he was employed by defendant/third-party defendant JVA as a carpenter at a construction site at a seven-story building, owned by East Side, located at 50 East 69th Street, New York, New York. Taconic Builders was retained by East Side to serve as general contractor on the project, which involved a conversion of a former commercial bank or medical building. The plaintiff testified that he was instructed by his foreman to bring sheets of plywood from the first floor to the third floor after they were delivered. The plaintiff testified there was no elevator and that he and his foreman would place the plywood onto a makeshift box lift in the elevator shaft to be hoisted up to the third floor where other workers would receive the plywood. He further testified that on one of the last trips up, he was instructed “to put in as much as possible” into the makeshift elevator-like structure. The accident occurred when he attempted to walk away from the elevator shaft as the load was being lifted up, the makeshift lift suddenly and without warning collapsed causing sheets of plywood to fall and injure plaintiff. The plaintiff testified that he believed the makeshift lift “didn’t resist the weight and the whole thing, everything came down.” (NYSCEF Doc No. 124, plaintiff’s TR-30).

In support of its motion for summary judgment, defendant/third-party defendant JVA submitted, *inter alia*, a sworn affidavit of Joseph Alfano (president and owner of JVA), a copy of the JVA accident report, a copy of the workers’ compensation policy issued to JVA and copies of plaintiff’s W-2 and paystubs showing JVA as plaintiff’s employer. Alfano avers in his affidavit that JVA did not own, operate or control the subject premises at any time, and that the plaintiff was employed by

JVA at the time of the accident. Alfano also avers that it was his understanding that the plaintiff submitted a claim to JVA's workers' compensation carrier and received workers' compensation benefits as a result of said claim. JVA therefore contends that the plaintiff's complaint against it should be dismissed with prejudice pursuant to Workers' Compensation §11 as the evidence in the record demonstrates that plaintiff was employed by JVA at the time of his accident.

There was no opposition to the branch of JVA's motion seeking an order granting JVA leave to amend its answer to assert an affirmative defense that the instant action should be dismissed based on Workers' Compensation Law §11. Therefore, the branch of JVA's motion seeking amendment of its answer to assert an additional affirmative defense based on Workers' Compensation Law §11, is granted, without opposition.

Plaintiff through counsel, at oral argument, as well as, Taconic Builders and East Side, on their papers, did not oppose that branch of JVA's summary judgment motion seeking dismissal of the plaintiff's complaint. Therefore, the branch of JVA's summary judgment motion seeking dismissal of the plaintiff's complaint, is granted, without opposition.

In support of its motion for summary judgment, defendant Taconic Builders submits, *inter alia*, a sworn affidavit of Peter Kennedy (Taconic Builders superintendent), a sworn affidavit of Tom Ryan (president of Taconic Builders), and a copy of the subcontract between Taconic Builders and JVA. Pursuant to the Taconic Builders-JVA subcontract, Taconic Builders argues that JVA is obligated to defend and indemnify it and reimburse it for all fees, disbursements and costs incurred in the defense of this action.

In opposition, JVA contends that Taconic Builders failed to demonstrate its *prima facie* entitlement to judgment. It contends that Taconic Builders fails to sufficiently demonstrate that it was not negligent for the happening of the accident which warrants denial of Taconic Builders' motion with respect to contractual indemnity.

In support of its motion for summary judgment, defendant/third-party plaintiff East Side submits, *inter alia*, the deposition testimony of plaintiff, a copy of the deed to subject property, an uncertified copy of a building permit for the renovation project, a copy of the construction contract between East Side and Taconic Builders, and the affirmations of Evan Zemsky ("a professional at HRS Management LLC") and Corey Strauss (senior counsel to HRS Management LLC). East Side contends that the homeowner's exemption applies as the proof it submitted demonstrates the intent of the construction project was to convert the former commercial building into a single-family

residence. Zemsky and Strauss, both of whom are employed by HRS Management LLC which manages assets owned by East Side, affirm that East Side owns the subject premises for a non-commercial purpose and that the purpose and intent of the renovation project at the property is “to convert it from its prior use to single-family residential use.” (NYSCEF Doc Nos. 128 & 129).

In opposition, the plaintiff contends through counsel that East Side cannot benefit from the homeowner’s exemption as the premises is a seven-story commercial bank purchased and owned by East Side intending to develop and convert the building into residential apartments when it entered into a construction contract with Taconic Builders to perform the work at the site.

Summary Judgment Standard

The court’s function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC*, 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]; Friends of Thayer Lake LLC v. Brown*, 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 (1985)

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the

erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

Defendant East Side’s sole argument with respect to Labor Law §240(1) is that it cannot be a proper Labor Law defendant, as it was a homeowner seeking conversion of a building into a residential single-family home who contracted for, but did not direct or control the work and therefore, falls under an exemption to Labor Law §240(1) liability known as the homeowner’s exemption (Labor Law §240[1]).

The homeowner exemption of the Labor Law was intended by the Legislature to shield homeowners from the strict liability of the Labor Law, because a typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure proper insurance. *See Bartoo v Buell*, 87 NY2d 362, 367 [1996]. [“As stated by the Law Revision Commission [at the time], ‘an exemption for one and two family dwelling owners is needed’ because ‘the theory of dominance of the owner over the subcontractor or worker breaks down at this level’”] [citation omitted]). More specifically, the homeowner’s exemption “was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability imposed by section 240 (1)” (*Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

The homeowner’s exemption, however, does not apply where a homeowner uses the premises for commercial purposes. A defendant will have made out a *prima facie* showing of its “entitlement to the homeowner’s exemption by demonstrating that [its] property consisted of a one-family dwelling,

not used for a commercial purpose, and that [it] did not direct [] or control plaintiff's work." *Ramirez v Hansum*, 202 AD3d 605, 606 [1st Dept 2022].

To determine whether the construction work was for a residential or commercial purpose, a determination must be made as to (1) the intended use of the property and (2) whether the purpose of the work was predominately residential or commercial. *See Davis v Maloney*, 49 AD3d 385 [1st Dept 2008].

Here, East Side established its *prima facie* entitlement to judgment by demonstrating that the site and purpose of the construction work was solely connected to the renovation and conversion of a commercial building into a single-family and residential space, "not creating or enhancing a commercial usage." *Khela v Neiger*, 85 NY2d 333, 338 [1995]. The construction contract between East Side and Taconic Builders as well as the building permit for the project both indicate that the scope of the work is to convert the building from a medical office to a 1 to 2 family residential use. (NYSCEF Doc No. 127, construction contract at 16; NYSCEF Doc No. 126, building permit at 4). In opposition, plaintiff failed to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]; *Russo v 491 W. St. Corp.*, 176 AD2d 672 [1st Dept 1991]. Specifically, the plaintiff failed to raise an issue of fact that East Side intended to use the subject building solely for commercial or investment purposes. *See Ramirez v Hansum*, 202 AD3d 605 [1st Dept 2022]; *cf. Rivera v Matiz Architecture, PLLC*, 217 AD3d 552, 553 [1st Dept 2023] [plaintiff raised a factual issue as to whether the property was to be used solely for commercial purposes by producing documentation showing defendant-owner previously undertook similar projects for commercial purposes]. The plaintiff also failed to object to the admissibility of East Side's documents, effectively waiving that objection. *See Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019] ["[A]s a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion..." [internal citation omitted]]. Further, the plaintiff's argument that the homeowner's exemption does not apply to a limited liability company is unavailing where the Appellate Division, First and Second Departments, have not precluded application of this statutory exemption to a corporation or limited liability company, as opposed to an individual homeowner, which holds title to a qualifying one-to-two-family dwelling. *See Rivera v Matiz Architecture, PLLC*, 217 AD3d 552 [1st Dept 2023]; *see also Assevero v Hamilton & Church Proprs., LLC*, 131 AD3d 553, [2d Dept 2015]. Accordingly, the plaintiff's Labor Law 240(1) claim against East Side is not viable in light of the homeowner's exemption.

Accordingly, defendant East Side's motion to dismiss plaintiff's Labor Law §240(1) is granted.

Labor Law §241(6)

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. See *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998].

Defendant East Side also moves for summary judgment dismissing the Labor Law §241(6) claim against it under the homeowner's exemption. For the same reasons discussed with respect to Labor Law 240(1), its motion to dismiss the Labor Law 241(6) claim is granted.

Labor Law §200 and/or Common-Law Negligence Claims

Defendant/third-party plaintiff East Side moves for summary judgment dismissing the Labor Law §200 and/or common-law negligence claims against it.

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. See *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]. Under this statute, the plaintiff's accident is the result of either the means and methods used by a contractor to perform its work or the result of a dangerous condition inherent on the premises. See *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013]. Here, the plaintiff's accident was caused by the means and methods of the work, i.e., the manner in which the plaintiff was instructed to load a makeshift lift with as many pieces of plywood before it was raised to an upper floor, and liability cannot be imposed on an owner or general contractor unless it can be "shown that it exercised some supervisory control over the work." *DaSilva v Haks Engrs.*, 125 AD3d 480 [1st Dept 2015]. The record is devoid of any evidence that East Side had the authority to supervise or control the performance of the injury-producing work. The plaintiff testified that he only received instructions from a JVA foreman and that he never saw the owner or heard of East Side. Plaintiff further testified that he did not know what the building was going to become when the project was completed. Defendant/third-party plaintiff East Side is therefore entitled to summary judgment dismissing the Labor Law §200 and/or common-law negligence claims as against it.

Dismissal of Cross-Claims Against Defendant/Third-Party Defendant JVA Without Prejudice

Although there will no longer be a direct action pending against JVA, upon dismissal of the plaintiff's complaint against it, any viable cross-claims against JVA alleging contractual

indemnification, common-law indemnification, and/or contribution may be maintained in a third-party action. *See Poulin v Ultimate Homes, Inc.*, 166 AD3d 667 [2d Dept 2018]. Accordingly, the branch of JVA's summary judgment motion seeking dismissal of the cross-claims against it without prejudice, is granted.

JVA's Obligation to Defend and Indemnify Taconic Builders

Taconic Builders moves for summary judgment seeking an order declaring that JVA is obligated to defend and indemnify it pursuant to the subcontract entered into between the parties as well as for reimbursement for all fees, disbursements and costs incurred in the defense of this matter.

The court finds, however, that Taconic Builders' request for judgment declaring that JVA is obligated to defend and indemnify pursuant to written contract is premature at this juncture as there has been no determination as to whether the plaintiff's accident arose out of the performance of the Taconic Builders-JVA subcontract to trigger the indemnity provision. Moreover, Taconic Builders, at oral argument, did not oppose dismissal of all cross-claims against JVA without prejudice, which includes Taconic Builders' cross-claim for contractual and/or common-law indemnification.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by any of the movants or cross-movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

ORDERED that the branch of JVA's motion seq #2 seeking amendment of its answer to assert an additional affirmative defense based on Workers' Compensation Law § 11, is **GRANTED**, without opposition; and it is further

ORDERED that JVA's proposed Answer (NYSCEF Doc. #47) is deemed filed *nunc pro tunc*; and it is further

ORDERED that branch of JVA's motion seq #2 seeking summary judgment to dismiss plaintiff's complaint, with prejudice is **GRANTED**; and it is further

ORDERED that the Clerk is hereby directed to enter a dismissal of plaintiff's complaint with prejudice as against JVA; and it is further

ORDERED that branch of JVA's motion seq #2 seeking summary judgment to dismiss all cross claims against JVA without prejudice is **GRANTED**; and it is further

ORDERED that the Clerk is hereby directed to enter a dismissal of cross claims without prejudice as against JVA; and it is

ORDERED, that the summary judgment motion by Taconic Builders (Seq. No. 3) seeking a declaration that JVA is obligated to defend and indemnify Taconic Builders, is **DENIED with leave to renew**; and it is further

ORDERED that East Side's branch of motion (Seq No. 4) to dismiss plaintiff's Labor Law §240(1); §241(6) and §200 and common law negligence claims is **GRANTED**; and it is further

ORDERED that the Clerk is hereby directed to enter a dismissal of plaintiff's complaint with prejudice as against defendant East Side; and it is further

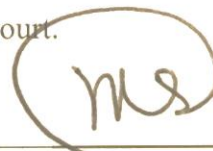
ORDERED that East Side's branch of motion (Seq No. 4) to dismiss all cross claims against it is **GRANTED**; and it is further

ORDERED that the Clerk is hereby directed to enter a dismissal of all cross claims against East Side; and it is further

ORDERED, the movants of each motion shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this court.

Dated: August 22, 2024



Hon. Myrna Socorro, J.S.C.