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| <b>Siguencia v 1536 Third Realty, LLC</b>                                                                                                                                                                                      |
| 2024 NY Slip Op 35357(U)                                                                                                                                                                                                       |
| September 25, 2024                                                                                                                                                                                                             |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 704382/2019                                                                                                                                                                                           |
| Judge: Frederick D.R. Sampson                                                                                                                                                                                                  |
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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31

Justice

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SEGUNDO SIGUENCIA,

Plaintiff,

-against-

Index No.: 704382/2019

Motion Date: 04/03/2024

Mot. Seq. Nos.: 3, 4, 5

Mot. Cal. Nos.: 46, 47, 48

1536 THIRD REALTY, LLC, RECESS  
REALTY, LLC, ORPHEUS MANAGEMENT  
CORP., THIRD AVENUE 1536 PARTNERS,  
LLC, AND SCHIMENTI CONSTRUCTION  
COMPANY, LLC, AND CHICK FIL-A INC

Defendants.

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THIRD AVENUE 1536 PARTNERS, LLC, and  
SCHIMENTI CONSTRUCTION COMPANY,  
LLC,

Third-Party Plaintiffs,

-against-

PRECISE SERVICES CORP., and SILVER  
STAR SERVICE GROUP, CORP.,

Third-Party Defendants.

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1536 THIRD REALTY, LLC and ORPHEUS  
MANAGEMENT CORP.,

Second Third-Party Plaintiff,

-against-

PRECISE SERVICES CORP and SILVER SERVICES  
GROUP, CORP.,

Second Third-Party Defendant.

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The following numbered papers read on this motion by defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiff 1536 Third Realty, LLC (1536 Third Realty), Orpheus Management Corp. (Orpheus), Schimenti Construction Company, LLC (Schimenti), and Chick-Fil-A Inc. (Chick-Fil-A) for summary judgment dismissing the complaint against them and for summary judgment in their favor on the third-party claims for contractual indemnification and breach of contract to procure insurance against third-party defendant/second third-party defendant/third third-party defendant Precise Services Corp. (Precise); and on this motion by plaintiff for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) against 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A and on the issue of liability under Labor Law § 200 against Schimenti; and on this motion by third-party defendants/second third-party defendants/third third-party defendants Precise and Silver Services Group, Corp. (Silver) for summary judgment dismissing all third-party claims against them and for an order striking plaintiff's amended/supplemental verified bill of particulars dated October 26, 2023 pursuant to CPLR 3042, 3043, and 3126.

|                                                 | <u>Papers<br/>Numbered</u>                             |
|-------------------------------------------------|--------------------------------------------------------|
| Notices of Motion - Affidavits - Exhibits ..... | EF 113 - 144<br>EF 145 - 178<br>EF 180 - 208           |
| Answering Affidavits - Exhibits .....           | EF 216<br>EF 217 - 220<br>EF 225 - 231<br>EF 233 - 236 |
| Reply Affidavits .....                          | EF 237 - 240<br>EF 247 - 248                           |

Upon the foregoing papers it is ordered that the motions are determined as follows:

On November 19, 2018, plaintiff, while carrying demolition debris consisting of pieces of concrete mixed with metal mesh, was allegedly injured when he slipped and fell going down a staircase from the second floor to the first floor of the building located at 1536 Third Avenue in New York, New York. The property was owned by 1536 Third Realty and leased by Chick-Fil-A. Schimenti, the general contractor on the subject construction project, subcontracted with Precise to perform demolition work. It is alleged that Precise had an oral agreement with Silver to provide containers to cart away demolition debris.

Plaintiff subsequently commenced separate actions (index Nos. 704382/19 and 720047/21) against defendants under Labor Law §§ 240 (1), 241 (6), and 200 and common-law negligence. By an order of this court dated March 1, 2022, the two actions were consolidated for all purposes under index No. 704382/19. It is further noted that, pursuant to a stipulation of discontinuance dated April 7, 2020, the action was discontinued without prejudice against defendant Recess Realty, LLC.

On May 17, 2019, defendant/third-party plaintiff Third Avenue 1536 Partners, LLC and Schimenti commenced a third-party action against Precise and Silver alleging causes of action for common-law indemnification, contribution, contractual indemnification, and breach of contract to procure insurance. On November 30, 2021, 1536 Third Realty and Orpheus brought a second third-party action against Precise and Silver and, on October 26, 2022, Chick-Fil-A instituted a third third-party action against Precise and Silver alleging similar claims.

That branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment dismissing plaintiff's claim under Labor Law § 240 (1) is granted, and that branch of plaintiff's motion for partial summary judgment in his favor on said cause of action against 1536 Third Realty, Schimenti, and Chick-Fil-A is denied. To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Application of Labor Law § 240 (1) is limited to injuries occasioned by elevation-related hazards "where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]).

In this case, plaintiff, at the time of the accident, allegedly slipped and fell on debris when he was carrying a piece of concrete debris as he descended a permanent staircase at the subject construction site and, thus, was not engaged in work which exposed him to an elevation-related risk contemplated by Labor Law § 240 (1) (*see Verdi v SP Irving Owner, LLC*, 227 AD3d 932 [2d Dept 2024]). The permanent staircase on which plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk (*see Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955 [2d Dept 2018]; *Linkowski v City of New York*, 33 AD3d 971 [2d Dept 2006]; *Gallagher v Andron Constr. Corp.*, 21 AD3d 988 [2d Dept 2005]).

Next, the court will address that branch of plaintiff's motion for partial summary judgment in his favor on the Labor Law § 241 (6) claim against 1536 Third Realty, Schimenti, and Chick-Fil-A and those branches of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment dismissing said cause of action against them. To recover under Labor Law § 241 (6), a plaintiff must demonstrate the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross*, 81 NY2d at 502-505). In the bill of particulars and supplemental bill of particulars, plaintiff herein alleged violations of Industrial Code provisions 12 NYCRR 23-1.7 (d), 23-1.7 (e), 23-1.30, 23-2.1, 23-2.7 (e), 23-3.3 (e), and 23-5.1 (a-k) and various OSHA regulations. In support of his motion, however, plaintiff predicates his Labor Law § 241 (6) cause of action solely on the alleged violation of 12 NYCRR 23-1.7 (d) and 23-3.3 (e). Plaintiff's motion for partial summary judgment on his claim under Labor Law § 241(6) does not address the other sections of the Industrial Code previously cited by him in the bill of particulars and supplemental bill of particulars and, thus, the court deems abandoned the Labor Law § 241 (6) claim predicated on a violation of 12 NYCRR 23-1.7 (e); 23-1.30; 23-2.1; 23-2.7 (e); and 23-5.1 (a-k) and OSHA regulations.

The court concludes that 12 NYCRR 23-1.7 (d), which prohibits work on a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition, is inapplicable to the facts of the instant case. At his deposition, plaintiff testified that he slipped on the staircase as a result of demolition debris, which is not the type of foreign substance contemplated by 12 NYCRR 23-1.7 (d) (*see Verdi*, 227 AD3d at 936-937; *Nankervis v Long Is. Univ.*, 78 AD3d 799 [2d Dept 2010]).

With respect to 12 NYCRR 23-3.3 (e), it is noted that plaintiff alleged a violation of this regulation for the first time in his supplemental bill of particulars, which was served on the same date as his summary judgment motion and two days after the summary judgment motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A. Nevertheless, plaintiff may make such a delayed allegation of an Industrial Code violation in support of a Labor Law § 241 (6) claim if the allegation "involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants" (*Kelleir v Supreme Indus. Park*, 293 AD2d 513 [2d Dept 2002]). "Mere lateness is not a barrier" to amendment, absent prejudice (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

Specifically, 12 NYCRR 23-3.3 (e) provides,

"[w]here the demolition of any building or other structure is being performed by hand, debris, bricks and any other materials shall be removed as follows:

- (1) By means of chutes constructed and installed in compliance with this Part (rule);
- (2) By means of buckets or hoists; or
- (3) Through openings in the floors of the building or other structure in compliance with this section.”

Based on the record presented, including the bill of particulars, supplemental bill of particulars, and the deposition testimony of the parties, this court finds that plaintiff’s belated identification of a violation of 12 NYCRR 23-3.3 (e) was not shown to involve new factual allegations, raise new theories of liability, or cause prejudice to defendants because all parties have long been aware that plaintiff claimed that he was allegedly injured while carrying demolition debris down a staircase at the subject construction site. In any event, a careful review of the evidence in the record, including the deposition testimony of plaintiff, plaintiff’s co-worker, Edwin Fabian Cantos, Ciro D’Amato, president of Silver, and Eugene Errico, owner of Precise, reveals issues of fact, at least, as to whether plaintiff was engaged in demolition by hand at the time of the accident and, if so, whether the provision of chutes, buckets, hoists, or openings in the floor would have been appropriate or possible to remove the large and heavy pieces of debris plaintiff was tasked with carrying. Therefore, that branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment dismissing the Labor Law § 241 (6) claim is granted only to the extent that it is based on a violation of 12 NYCRR 23-1.7 (d), and that branch of plaintiff’s motion for summary judgment on the Labor Law § 241 (6) cause of action is denied. In addition, that branch of Precise and Silver’s motion seeking to strike plaintiff’s amended/supplemental verified bill of particulars dated October 26, 2023 is denied.

That branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them and that branch of plaintiff’s motion for summary judgment on said causes of action against Schimenti are denied. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Lane v Fratello Constr. Co.*, 52 AD3d 575 [2d Dept 2008]). Where, as here, a plaintiff’s injuries stem from a dangerous condition on the premises and not from the manner in which the work was being performed, a contractor may be liable under Labor Law § 200 if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it (*see Keener v Cinalta Constr. Corp.*, 146 AD3d 867 [2d Dept 2017]; *Rocha v GRT Constr. of N.Y.*, 145 AD3d 926 [2d Dept 2016]).

In this case, plaintiff alleges that the debris on the staircase upon which he slipped and fell constituted a defective condition of the premises. Based on a thorough review of the evidence in the record, including, but not limited to, the deposition testimony of plaintiff and

Mr. Cantos, there are issues of fact as to how long the debris was present on the staircase prior to the accident and, thus, whether Schimenti, the general contractor on the site, had actual or constructive notice of the allegedly dangerous condition of the staircase. According to plaintiff's deposition testimony, Schimenti's site superintendent directed plaintiff's foreman that debris could not be thrown down the stairs and plaintiff and his co-workers were instructed to carry the debris down the staircase by hand. Although plaintiff and Mr. Cantos both testified that the staircase was not cleaned while they were working, there is insufficient evidence demonstrating the length of time the debris existed prior to plaintiff's fall.

Furthermore, in opposition and in support of their motion, 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A failed to point to any relevant evidence on the issue of whether they lacked notice of the allegedly defective condition of the subject staircase that contributed to plaintiff's accident. Rather, 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A primarily contend that the Labor Law § 200 and common-law negligence claims must be dismissed against them because plaintiff cannot identify the cause of his fall. However, plaintiff testified at his deposition that small pieces of the demolition debris he was carrying fell on the staircase throughout the day and that, as he was descending the stairs, he felt like he stepped on something with his right foot and that his foot did not come down flat on the heel, which caused his right foot to slide and he fell down the staircase (*see Deutsch v Green Hills [USA], LLC*, 202 AD3d 909 [2d Dept 2022]).

Turning to the motion by Precise and Silver for summary judgment dismissing the third-party claims for common-law indemnification, contribution, contractual indemnification, and breach of contract to procure insurance, this court concludes that all third-party claims against Silver must be dismissed. In support of their motion, Precise and Silver presented evidence demonstrating that Silver merely provided the container for debris removal and had no other presence at the work site where plaintiff's accident occurred. While plaintiff testified at his deposition that he was employed by Silver, his remaining testimony indicates that, when asked, plaintiff was unclear about the distinction between Precise and Silver. Moreover, plaintiff's testimony is belied by the documentary evidence, including W-2 forms, payroll records, and the C-3 Workers' Compensation Board employee claim form, all of which name Precise as plaintiff's employer. In opposition, 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A failed to raise a triable issue of fact.

As to the branches of Precise and Silver's motion for summary judgment dismissing the third-party causes of action for common-law indemnification and contribution against Precise, plaintiff's employer, they established their prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a "grave injury" as defined in Workers' Compensation Law § 11 (*see Fried v Always Green, LLC*, 77 AD3d 788 [2d Dept

2010]; *Dechnik v Fortunato Sons, Inc.*, 58 AD3d 793 [2d Dept 2009]). 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A did not oppose Precise and Silver's motion on these grounds and, thus, failed to raise a triable issue of fact. Therefore, in the absence of a "grave injury," the third-party causes of action seeking common-law indemnification and contribution against Precise are dismissed.

That branch of Precise and Silver's motion for summary judgment dismissing the third-party causes of action for contractual indemnification against Precise is denied, and that branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment on those claims is granted. The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2005]). Here, the indemnification clause contained in Article 8.1 of the subcontract between Precise and Schimenti provides, in pertinent part,

"To the fullest extent permitted by law, the Subcontractor shall indemnify, defend and hold harmless the Contractor, Owner, Architect, Architect's consultants, and the members, agents and employees of any of them (hereinafter "Indemnitees") from and against all injuries, claims, damages, losses, liabilities, obligations, settlements, costs and expenses, whether direct, indirect or consequential (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals and all court and arbitration costs) arising out of or in any way connected with the performance or lack of performance of the Work under the Subcontract and/or any change orders or additions to the Work, provided that any such injury, claim, damage, loss, liability, obligation, settlement, cost or expense is attributable to bodily injury, sickness, disease or death, or physical injury to or destruction of tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured, and caused in whole or in part by any actual or alleged:

1. Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
2. Violation of any statutory duty, regulation, ordinance, rule or obligation by an Indemnatee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the Work under the Subcontract."

Contrary to Precise and Silver's contention, this broad indemnification provision does not require a finding of negligence on the part of Schimenti but rather obligates Precise to

indemnify Schimenti, and the owner entities, for all injuries and claims “arising out of or in any way connected with the performance or lack of performance of the Work under the Subcontract.” The clause “arising out of,” such as the one at bar, is interpreted broadly by focusing not on the precise cause of the accident but on the general nature of the work in the course of which the injury was sustained (*see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). In this case, the record shows that plaintiff’s accident arose out of or in connection with the performance of Precise’s work under the subcontract between Schimenti and Precise because plaintiff, an employee of Precise, was allegedly injured while carrying demolition debris on a staircase at the subject construction site.

Finally, that branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment on the third-party causes of action for breach of contract to procure insurance against Precise is denied, and that branch of Precise and Silver’s motion for summary judgment dismissing those claims is granted. Pursuant to Article 8.3 of the subcontract between Precise and Schimenti, Precise was required to purchase,

“1. Commercial General Liability (CGL) coverage with limits of insurance of not less than \$1,000,000 for each occurrence and \$2,000,000 annual aggregate, subject to the following terms:

(c) The Contractor, Owner and all other parties that the Contractor is required to name as additional insured pursuant to any agreement shall be included as insureds on the CGL . . . .”

In support of their motion, Precise and Silver submitted a copy of Precise’s insurance policy with Accredited Surety and Casualty Company, Inc. for the period of November 20, 2017 through November 20, 2018, which includes a blanket endorsement for contractually designated additional insureds (*see e.g. Matter of Amelio v Hoffman*, 2017 NY Slip Op 30591[U] [Sup Ct, NY County 2017]). Precise and Silver, therefore, offered sufficient evidence demonstrating that Precise complied with the insurance procurement provision of its subcontract with Schimenti. In opposition and on their separate motion, 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A failed to submit any evidence raising a triable issue of fact.

Accordingly, that branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment dismissing the Labor Law § 240 (1) cause of action is granted. In addition, that branch of 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A’s motion for summary judgment dismissing the Labor Law § 241 (6) claim is granted only to the extent that it is based on a violation of 12 NYCRR 23-1.7 (d). That branch of the motion by 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A for summary judgment

on their third-party claims for contractual indemnification against Precise is also granted. In all other respects, 1536 Third Realty, Orpheus, Schimenti, and Chick-Fil-A's motion is denied. Plaintiff's motion is denied in its entirety. Those branches of Precise and Silver's motion for summary judgment dismissing all third-party claims against Silver, the third-party causes of action seeking common-law indemnification and contribution against Precise, and the third-party claims for breach of contract to procure insurance against Precise are granted. In all other respects, the motion by Precise and Silver is denied.

Dated: September 25, 2024



JSC

