

**Beckley v J.E. Levine Bldr. Inc.**

2025 NY Slip Op 30225(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 153509/2020

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LISA S. HEADLEY PART 28M**

*Justice*

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STEVEN BECKLEY, JESSICA BECKLEY,  
Plaintiff,

**INDEX NO. 153509/2020**

**MOTION DATE 10/03/2024**

**MOTION SEQ. NO. 004**

- v -

J.E. LEVINE BUILDER INC. D/B/A LEVINE BUILDERS,  
REGAL RECONSTRUCTION CORP., WEST SIDE 11TH &  
29TH LLC, DD WEST 29TH LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

J.E. LEVINE BUILDER INC. D/B/A LEVINE BUILDERS, WEST  
SIDE 11TH & 29TH LLC, DD WEST 29TH LLC

Third-Party  
Index No. 595092/2023

Plaintiff,

-against-

TOTAL SAFETY CONSULTING, LLC, D/B/A TOTAL SAFETY  
CONSULTING

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 160, 162, 170, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 192 were read on this motion to/for JUDGMENT - SUMMARY.

On May 27, 2020, plaintiffs, Steven and Jessica Beckley (“plaintiffs”), commenced this action with the filing of a Summons and Complaint against defendants, J.E. Levine Builder Inc. d/b/a Levine Builders, Regal Reconstructions Corp.<sup>1</sup>, West Side 11<sup>th</sup> & 29<sup>th</sup> LLC, and DD West 29<sup>th</sup> LLC (collectively, referred to as “Defendants Levine” or “third-party plaintiffs/defendants”). (See, NYSCEF Doc. No. 100). On November 18, 2020, Defendants Levine filed an Answer. (See, NYSCEF Doc. No. 101). Plaintiff Steven Beckley, who was employed by non-party, Moretrench, alleges that he sustained an injury while working at the defendants’ worksite.

<sup>1</sup> Co-defendant, Regal Reconstruction Corp, was discontinued from this action, without prejudice, pursuant to the Stipulation dated March 30, 2021. (See, NYSCEF Doc. No. 175).

On January 31, 2023, Defendants Levine commenced a third-party action against Total Safety Consulting, LLC (“Total Safety”). (*See, NYSCEF Doc. No. 103*). The first cause of action in the third-party complaint asserts that if Defendants/Third-Party Plaintiffs are found liable to Plaintiffs, they are entitled to common law indemnification and/or contribution from Total Safety. The second cause of action asserts that Defendants/Third-Party Plaintiffs are entitled to defense contractual indemnification, attorney’s fees and disbursements, and any other costs reasonably incurred by Levine in defending this action, and the third cause of action is for breach of contract. On February 7, 2023, Total Safety filed an Answer to the third-party complaint. (*See, NYSCEF Doc. No. 104*).

Before the Court is the motion filed by Third-party Defendant, Total Safety, for an Order, pursuant to *CPLR §3212*, to dismiss the third-party claims and cross-claims asserted against Total Safety. (*See, NYSCEF Doc. No. 96 -120*). Third-party Plaintiffs/Defendants, Levine, filed opposition. (*See, NYSCEF Doc. No. 172*).

“[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 sufficiency of the opposing paper.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Under *CPLR §3212*, “[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *See, CPLR §3212*. “Summary judgment is a drastic remedy, to be granted only where the moving party has rendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) [*internal citation and quotation marks omitted*].

In support of the motion, Total Safety, submits, *inter alia*, Total Safety’s site safety manager, Mr. Giarraputo’s affidavit and deposition transcript (*NYSCEF Doc. No. 118, see, Exh S and Doc. No. 112, see, Exh. M*), Total Safety’s contract with Levine (*NYSCEF Doc. No. 107, see, Exh. H*), the accident prepared by Mr. Giarraputo dated August 8, 2019. (*See, NYSCEF Doc. No. 56*), and the deposition transcript of Dominick Bove, Levine’s project superintendent, (*NYSCEF Doc. No. 111, see, Exh. L*).

In the motion, Total Safety argues that the evidence demonstrates that its safety site manager did not direct, supervise or control the means and methods of plaintiff’s work. Total Safety contends that it did not act negligently and did not otherwise cause or create the condition involved in the plaintiff’s accident. Total Safety further argues that “New York state courts have consistently held that a site safety manager on a construction project providing services similar to those provided by Total Safety...does not rise to the level of an ‘agent’ of either the owner or the general contractor for the purposes of applying the Labor Law and imposing liability for a worker’s accident.” *Citing to Martinez v. 342 Property LLC*, 89 A.D.3d 468, 932 N.Y.S.2d 454 (1st Dep’t 2011); *see also, Hanley v. McCluer Corp.*, 63 A.D.3d 453, 881 N.Y.S.2d 400 (1st Dep’t 2009).

In opposition, Levine argues, *inter alia*, that summary judgment should be denied because there are questions of fact as to whether Total Safety performed its duties under the contract. Levine argues that Total Safety failed to inspect the site and to ensure the project complied with the Site Safety Plan, including reporting unsafe work. Total Safety's site safety manager was responsible for monitoring safety and safety compliance at the project and had the authority to stop work if work was being performed in an unsafe manner or if there was some other safety issue. (*Ex. G, pp. 23-24*). Levine acknowledged that Mr. Giarraputo did not observe the accident and does not know how it occurred. (*Ex. H, pp. 49-50*). However, Levine argues Total Safety offers no justification as to why Mr. Giarraputo, the site safety manager, did not observe the Moretrench (plaintiff's employer) workers either using acetylene torches to cut the sheet pilings due to damage or holding the smaller pieces of sheet piling by hand. Levine submits Plaintiff's testimony that the project safety representative who told him to attach the small sheet to the large sheet, but never explained how that was to be done, and Mr. Giarraputo testified he was present at the site when plaintiff's accident occurred.

Based on the record, Total Safety entered into a contract with Levine to work as the site safety management pursuant to a contract dated July 15, 2019. (*NYSCEF Doc. No. 107, see, Exh. H*). Per the contract, Total Safety was to provide loss control and safety management consulting for the construction project at issue in this action. Total Safety's duties included "daily periodic inspections" of the jobsite, preparing daily safety managers logs, conducting orientations for new workers on site, coordinating weekly safety meetings, and conducting regular safety inspections of the jobsite for compliance with federal, state and local standards, and to notify the client, Levine, of any unsafe acts or conditions observed by Total Safety. *Id.* Total Safety manager's logs state that the safety professional "cannot be at all places at all times, and the inspections do not remove the standing obligations of the general contractor, Levine, and Levine's sub-contractors, to maintain a safe jobsite." *Id.*

This Court finds that Total Safety, as the site safety manager, did not have site safety or general supervisory authority over the plaintiff or other Moretrench workers, as Levine's subcontractor. Similarly, the Court held in *Martinez v. 342 Prop. LLC*, that the site safety manager "advised the general contractor on safety matters and, at most, had the authority to stop unsafe work practices. *Martinez v. 342 Prop. LLC, supra at 469*. At his deposition, Levine's project superintendent, Dominick Bove testified that "Levine was responsible for managing the trade subcontractors on site, and to make sure the subcontractors adhered to the terms of their contract." (*Id., see, Ex. L, pp. 12-13*). Mr. Bove testified that he did not know whether Mr. Giarraputo, as the site safety manager, had the ability to stop work in the event of unsafe work practices, however, Safety site safety manager could make safety recommendations to subcontractor management. (*NYSCEF Doc. No. 111, see, Exh. L, pp. 23-24*). However, Mr. Giarraputo testified that he was not authorized to stop work on the project for safety reasons, and if he observed any unsafe practice or condition, he would bring it to the attention of the Levine superintendent, and on occasion the foreman for the trade involved. (*See, NYSCEF Doc. No. 112, see, Exh. M, pp. 20-22, 60, 62, 109*).

Here, the site safety manager lacked the control over the conduct of work at the project necessary to impose liability upon it under *Labor Law §200* or common-law negligence.” *See also, Martinez v. 342 Prop. LLC*, 89 A.D.3d 468, 469 (1st Dep’t 2011) (internal citations omitted). As to the plaintiff’s accident, Mr. Giarraputo testified that he was onsite on August 1, 2019, however, he did not witness the plaintiff’s accident, and he was informed of the accident a few days later by the Moretrench foreman, Eric Weiberth. (*Id. at pp. 47-50*). Mr. Giarraputo further attests that when he observed any work that was non-compliant with safety rules, he would report that to Levine either verbally or in his log, or both. (*Id., see Exh M, pp. 27-28, 62, 109*). Mr. Giarraputo testified that while he observed the projects being performed by Moretrench workers, including picking up the pile sheet, vibrating it, and driving it into the perimeter of the building (*Id., see Exh. M, pp. 33, 35-36*), he was never informed and never observed workers torch-cutting off the tops of steel piles due to damage and holding pieces of sheet piling while the pile driving machine was being lowered. (*Id., see Exh. M, p. 42*). Mr. Giarraputo attests that had he seen this activity, he would have informed the Levine superintendent that it was an unsafe act. (*Id. at 42-44*). Thus, the record demonstrates that Total Safety lacked the control over the plaintiff’s work.

This Court also finds that Total Safety is entitled to summary judgment as to the defendants/third-party plaintiff’s contribution and common-law indemnity claims. Levine argues that there are questions of fact as to whether Total Safety can be held liable for common-law contribution and/or indemnification based on its failure to observe and report allegedly unsafe work. However, Total Safety argues that it had no notice of the isolated and dangerous work practice of the plaintiff placing his hands in close proximity to the RTG pile-driving machine while in operation, therefore, any claims for indemnity or contribution against Total Safety should be dismissed. Here, the indemnity provisions in the contract with Levine “call for a showing of negligence on the part of Total Security to trigger indemnity, and since there is no evidence that Total Security acted negligently or in breach of contract, the third-party claims for contractual indemnity and contribution should be dismissed.” (*See, Exh. "H", p. 4, para. 8.1*). Based on the testimony and evidence, Total Safety lacked control over plaintiff’s work, and there is no evidence of negligence on its part. Thus, Total Safety is entitled to summary judgment dismissing defendants/third-party plaintiffs’ contractual indemnification claim. *See, Torres-Quito v. 1711 LLC*, 227 A.D.3d 113, 119 (1st Dep’t 2024). Furthermore, the evidence does not demonstrate that Total Safety breached the terms of the contract with Levine, thus summary judgment shall be entered in favor of the movant-Total Safety.

Accordingly, it is hereby

**ORDERED** that the summary judgment motion filed by Third-party Defendant, Total Safety Consulting, LLC, for an Order, pursuant to *CPLR §3212*, to dismiss the third-party complaint and all crossclaims asserted against Total Safety is GRANTED; and it is further

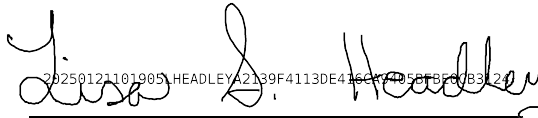
**ORDERED** that the Clerk of the Court is directed to enter judgment in favor of defendant Total Safety Consulting, LLC dismissing the third-party complaint and all cross-claims; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

1/21/2025

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE