

Orsini v 9 Dekalb Owner LLC

2025 NY Slip Op 30542(U)

February 10, 2025

Supreme Court, Kings County

Docket Number: Index No. 532738/2021

Judge: Gina Levy Abadi

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This opinion is uncorrected and not selected for official publication.

At Part 73 of the Supreme Court of the State of New York, held in and for the County of Kings, at the courthouse located at 360 Adams Street, Brooklyn, New York, on the 10th day of February, 2025

PRESENT: GINA LEVY ABADI, JSC

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LUZ ORSINI,

Plaintiff,

Index No.: 532738/2021

Cal #42

-against-

MS #2, 3

9 DEKALB OWNER LLC, JDS CONSTRUCTION GROUP LLC, JDS DEVELOPMENT GROUP LLC, and 9 DEKALB FEE OWNER LLC,

DECISION/ORDER

Defendants.

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9 DEKALB OWNER LLC, JDS CONSTRUCTION GROUP LLC, JDS DEVELOPMENT GROUP LLC and 9 DEKALB FEE OWNER LLC,

Third-Party Plaintiffs,

- against -

TOOLS & TIARAS INC.,

Third-Party Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers, 38-51, 53-70, 74-80, 84-86, 88 the motions are decided as follows:

In this personal injury action, Plaintiff LUZ ORSINI alleges she was seriously and permanently injured on July 16, 2021 while touring an active construction site located at 9 Dekalb Avenue, Brooklyn New York. This property is also known as 340 Flatbush Ave Ext., Brooklyn, New York (block: 149 lot: 100). The tour was open to teenage girls, volunteers and organization members of defendant Tools and Tiaras. Plaintiff, who works in the industry, volunteered to accompany the teens to demonstrate women in the construction field. Plaintiff claims she tripped on a piece of wood sticking out of a hole while on the 37th floor.

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In **motion sequence #2**, Third-Party Defendant TOOLS & TIARAS (hereinafter “T&T”) moves for an order pursuant to CPLE 3212 (1) dismissing Defendants/Third-Party Plaintiffs’ cause of action for contractual indemnity because there is no contractual agreement between Defendants/Third-Party Plaintiffs and T&T; (2) dismissing Plaintiff’s cause of action for breach of contract for failure to procure insurance because there is no contractual agreement between the parties requiring the procurement of any insurance; (3) dismissing Defendants/Third-Party Plaintiffs’ cause of action for contribution because T&T had no duty to safeguard the premises nor any role in causing Plaintiff’s accident; (4) dismissing Defendants/Third-Party Plaintiffs’ cause of action for implied indemnification because Tools & Tiaras was not at fault for Plaintiff’s injury; and (5) any other and further relief as this Court deems proper. Defendants/Third-Party Plaintiffs oppose only that part of T&T’s motion that seeks dismissal of its contribution and implied indemnification claims. As such, T&T’s motion to dismiss the contractual indemnity and breach of contract claims is GRANTED without opposition. The motions are consolidated for disposition.

Motion Sequence #2

Contribution

In support of summary judgment dismissing the cause of action for contribution, T&T submits, among other things, Plaintiff’s deposition transcript.

Plaintiff testified in relevant part as follows:

Q: Well, Ms. Orsini, was anyone from Tools & Tiaras guiding the tour on the date of the accident – the incident?

A: Not once we arrived at the site.

Q: How about on the 37th floor?

A: No.

(Orsini tr, 150:18-20)

T&T also provides the deposition transcripts of JDS Development Group employee, Antonia Devine, and of JDS Development Group LLC employee, Robert Fini, who identified Patrick Feehan as his Project Manager at the site.

Antonia Devine testified in relevant part as follows:

Q: In the course of your employment with JDS, did you give a tour of the 37th floor at 9 Dekalb on July 16, 2021?

A: I can't remember the exact Floor, but yes.

Q: In the course of your employment with JDS, you gave a tour which included Luz Orsini, correct?

A: Correct.

(Devine tr, 19:3-11)

Q: The tour that included Ms. Orsini on July 16, 2021, do you recall what building that tour was at?

A: Yes.

Q: What was that building?

A: 9 Dekalb.

Q: Was that at 9 Dekalb Avenue in Brooklyn?

A: Yes

Q: Did you select the floor that the group was going to?

A: Yes.

(Devine tr, 19:3-20)

Robert Fini testified in relevant part as follows:

Q: Your job on July 16, 2021 was a construction supervisor with JDS Development Group, correct?

A: Correct.

Q: What were your job duties and responsibilities for that job?

A: Generally I oversee whatever trades are assigned to me.

Q: And who would assign those trades to you?

A: One of my project managers.

Q: And how many project managers did you have at the time?

A: One.

Q: And who was that?

A: Patrick Feehan.

(Fini tr, 11:13-25; 12:2-5)

Q: Beside Miss Divine and about 20 teenagers was anybody else part of the group?

A: Yes.

Q: Who else?

A: Patrick Feehan.

(Fini tr, 24:21-25)

Q: Was Mr. Feehan giving the tour?

A: Yes.

Q: Was anyone else giving the tour beside Mr. Feehan?

A: Miss Divine.

Q: Did you give any portions of the tour?

A: No.

Q: What was the purpose of your presence at the tour?

A. Just to escort them, that's all.
(Fini tr, 35:14-24).

T&T also proffers an affidavit from Judaline Cassidy, the Founder and Chief Visionary Officer of T&T (see NYSCEF Doc No. 51). Cassidy attested that T&T was not responsible for any maintenance at the 9 Dekalb premises; T&T was not responsible for any safety programs at the premises; T&T was not required to safeguard the premises for the purposes of the tour. T&T's submissions demonstrate it has established prima facie entitlement to summary judgment.

In opposition, Defendants/Third-Party Plaintiffs failed to raise any issue of fact.

In the first instance, Movants failed to show that T&T had a duty to them or to Plaintiff or that T&T contributed to Plaintiff's alleged injuries. Regarding contribution, "The critical requirement . . . is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). "A party seeking contribution must show that the party from whom contribution is sought owes a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries" (*Crimi v. Black*, 219 A.D.2d 610, 611 [2d Dept 2015]).

Defendants/Third-Party Plaintiffs also argue that T&T participated in operating the tour of the site. To trigger a duty by a tour guide, it must be established that the tour operator directed the tour participant to proceed in a particular manner (*Maraia v. Church of Our Lady of Mount Carmel*, 36 A.D.3d 766, 767 [2007]). Defendants/Third-Party Plaintiffs did not establish that T&T directed the group to proceed in any particular manner. Rather, the submissions established that it was solely Defendants/Third Party Plaintiffs' employees who were in charge of the tour. Nor did Defendants/Third-Party Plaintiffs show through submission of evidentiary proof that T&T is liable due to placing Plaintiff in a vulnerable position. Accordingly, T&T has established entitlement to dismissal of the claim for contribution.

Common-law/Implied Indemnification

T&T established, prima facie, that it had no role in causing the accident or Plaintiff's injuries.

In opposition, Defendants/Third-Party Plaintiffs failed to show that they were without fault in the happening of the accident. "[A] party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]" (17

Vista Fee Assoc., 259 AD2d 75, 80 [1st Dept 1999]). “To be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.” (17 *Vista Fee Assoc.*, 259 AD2d at 80). Defendants/Third-Party Plaintiffs did not establish that it gave up responsibility for the duties giving rise to Plaintiff’s accident. Nor did they establish that they did not participate in creating the allegedly hazardous condition. Thus, the cause of action for implied indemnification must be dismissed.

Motion sequence #3

Movants argue that Defendant, 9 Dekalb Owner LLC, was the owner of the subject premises located at 9 DeKalb Avenue, Brooklyn, New York before the date of loss of July 16, 2021. This entity transferred ownership to Defendant, 9 Dekalb Fee Owner LLC, on April 22, 2019. As such, 9 Dekalb Owner, LLC is not a proper party to this action. In support, Movants provide the Automated City Register Information System (“ACRIS”) record of the deed transfer. (see NYSCEF Doc No. 58). See *Juman v Cape Church Assoc., LLC*, ___ NYS3d ___ (1st Dept. 2025)(finding that a Court may take judicial notice of documents downloaded from Acris).

Defendants/Third-Party Plaintiffs move for summary judgment dismissing the negligence cause of action as against 9 Dekalb Owner LLC, JDS Construction Group LLC, JDS Development Group LLC, and 9 Dekalb Fee Owner LLC. Movants contend that Plaintiff’s testimony establishes that the condition that caused her injury was open and obvious, not inherently dangerous, and that Plaintiff assumed the risk of the recreational activity for which she volunteered.

Movants failed to establish its entitlement to summary judgment dismissing the negligence cause of action, as its submissions on its motion, failed to eliminate all triable issues of fact as to whether the protruding piece of wood upon which Plaintiff tripped was open and obvious and whether it was inherently dangerous (*see Basturan v NYC Transit Authority*, 231 AD3d 528, 529 [1st Dept 2024]). Movants further failed to submit any liability waiver signed by Plaintiff, an adult. Since conjecture is not proof, the failure to submit the waiver is fatal to Movants’ assertions on this issue.

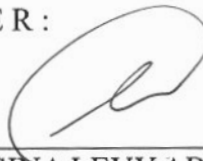
Accordingly,

It is hereby ORDERED, motion sequence #2 is GRANTED in its entirety; it is further ORDERED, the branch of motion sequence #3 for summary judgment dismissing the negligence cause of action (and therefore the complaint) as against 9 Dekalb Owner LLC is GRANTED; the motion is in all other respects DENIED.

This constitutes the decision and order of the Court.

Dated: February 10, 2025

ENTER:



HON. GINA LEVY ABADI

KINGS COUNTY CLERK
FILED
2025 FEB 13 A 10:00