

Espinoza v 793-801 Bedford Realty LLC

2025 NY Slip Op 31984(U)

June 2, 2025

Supreme Court, Kings County

Docket Number: Index No. 502970/2021

Judge: Anne J. Swern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 2nd day of June 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

ADRIAN ESPINOZA,

Plaintiff,

-against-

793-801 BEDFORDREALTY LLC, THE BOARD OF MANAGERS OF THE 801 BEDFORD AVENUE CONDOMINIUM, AND ON STAR MANAGEMENT, LLC,

Defendants.

(and third-party actions)

DECISION & ORDER

Index No.: 502970/2021

Calendar No.: 11, 12 & 13

Motion Seq.: 7, 8 & 9

Recitation of the following papers as required by CPLR 2219(a):

| | Papers Numbered |
|---|----------------------------|
| MS 007 793-801 Bedford Realty LLC and The Board of Managers' Notice of Motion, Affirmations, and Exhibits (NYSCEF 170-198)..... | 1, 2 |
| Big Apple Designers' Affirmation in Opposition (NYSCEF 254-255)..... | 3 |
| Reply Affirmation (NYSCEF 259)..... | 4 |
| MS 008 Trogon Interiors, Inc.'s Notice of Motion, Affirmations, and Exhibits (NYSCEF 200-246)..... | 5, 6 |
| Big Apple Designers' Affirmation in Opposition (NYSCEF 256-257)..... | 7 |
| Reply Affirmation (NYSCEF 260)..... | 8 |
| MS 009 Plaintiff's Notice of Motion, Affirmations, and Exhibits (NYSCEF 223-241)..... | 9, 10 |
| 793-801 Bedford Realty LLC and The Board of Managers' Affirmation in Opposition with Exhibit (NYSCEF 251-253)..... | 11 |
| Reply Affirmation (NYSCEF 258)..... | 12 |

Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:

This is an action for personal injuries sustained by plaintiff on 1/29/2021 during his employer-employee relationship with third-party defendant Big Apple Designers (Big Apple).¹ Plaintiff's accident happened when he fell from a ladder that was being held by his co-worker.

The accident occurred on the property owned by defendant 793-801 Bedford Realty LLC (Bedford) during a construction project that was converting the second-floor parking area of a six-story, mixed use building, into office space. Bedford contracted with Big Apple for the project who then subcontracted with second third-party defendant Trogon Interiors (Trogon). Trogon sub-contracted work to second third-party defendant Magella Construction Corp. (Magella). Magella has not appeared in this action.

Plaintiff testified during the hearing before the Workers Compensation Board (WCB) and his deposition that he was an employee of Big Apple. He never heard of a company named Magella.² However, his testimony was inconsistent that "Ariel" was his foreman on the date of the accident.³ It was also his testimony that Isaac "Eddels" was a manager or "boss" for Big Apple. Isaac was the only one who would tell plaintiff what "to do that day."⁴ Isaac would pick-up plaintiff at about 7:00 a.m. to 8:00 a.m. to work for Big Apple at different places.⁵ Isaac and plaintiff brought the ladder with them to the job site.⁶

The witness on behalf of Big Apple, Jona Landau, was an independent claims manager for Big Apple who did not have personal knowledge of the testimony elicited during his

¹ The Workers Compensation Board determined that plaintiff was an employee of Big Apple and discharged and removed Magella Construction Corp. from the proceeding (NYSCEF 252). This determination is binding on the parties to this action (Workers Compensation Law § 118-A). Plaintiff's Material Statement of Facts incorrectly states that plaintiff testified he was employed by Magella (*see infra*).

² NYSCEF DOC. 231, p.31; DOC. 232, pp.36-39, 58; DOC. 252, p.2

³ NYSCEF DOC. 232, p.59 and DOC. 252, p.2

⁴ NYSCEF DOC. 232, pp.40, 48; DOC. 233, pp.23, 59; and DOC. 252, p.2

⁵ NYSCEF DOC. 233, p.32

⁶ *Id.* at pp.41-46

deposition.⁷ He testified that Isaac “Eidlis” managed and supervised the work of the subcontractors at the job site, but was unsure if Isaac conducted inspections.⁸ Landau testified that “Ariel” and plaintiff worked for Magella.⁹

Shloimy Landau testified on behalf of Trogan. It was his testimony that he would oversee Isaac who managed the employees who were performing the work covered by Trogan’s subcontract with Big Apple.¹⁰

Plaintiff’s Motion for Summary Judgment (MS 009)

Plaintiff has moved for summary judgment on his Labor Law § 240 [1] cause of action against the owner, Bedford. Plaintiff argues that when his co-worker walked away from the ladder, the ladder shifted causing him to fall. Therefore, the ladder was not properly stabilized or secured, and he was not provided with adequate safety devices. This failure is a violation of the statute (*see Boe v Gammarti*, 26 AD3d 351 [2d Dept 2006]).

In opposition to the motion, Bedford argues that the Court cannot infer as a matter of law that the ladder shifted or failed to provide proper protections because the co-worker walked away, leaving the ladder unsecured without additional safety measures and protections in place. Plaintiff did not observe the co-worker walking away. Instead, plaintiff only observed the co-worker walking towards him several minutes following the accident. It is argued that under these circumstances, the issues of whether the ladder [by itself] afforded proper protection or additional safety devices were necessary is a question of fact for the jury (*see, Cutaita v Board of Mgrs. of 160/170 Varick St. Condo.*, 38 NY3d 1037 [2022]). The Court agrees.

⁷ *Id.* at pp.13, 85-86.

⁸ NYSCEF DOC. 233, pp.39, 58-59

⁹ *Id.* at pp.42, 73.

¹⁰ NYSCEF DOC. 212, pp.17-18, 25-26

“An accident alone does not establish a violation of Labor Law § 240 [1]” (*Blake v Neighborhood Hous. Svcs. of NYC*, 1 NY3d 280, 289 [2003]). Therefore, as a matter of law, plaintiff must demonstrate that (1) the ladder failed to provide proper protection, (2) he should have been provided with additional safety devices, and (3) the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of his accident (*Cutaia v Board of Mgrs. of 160/170 Varick St. Condo.*, 38 NY3d 1039, citing *Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016] [quotations omitted]). Additionally, “plaintiff must establish that there is a safety device of the kind enumerated in section 240 (1) that could have prevented his fall” (*id.*, citing *Jones v Nazareth Coll. of Rochester, LLC*, 147 AD3d 1364, 1365 [4th Dept 2017] [“Plaintiff, who received an electric shock while standing on an A-Frame ladder that was ‘folded shut and leaning against the wall,’ was not entitled to summary judgment.”]).

Under the facts presented, plaintiff's motion is denied. Plaintiff has not demonstrated, as a matter of law, the foregoing criterion for an award of summary judgment. Therefore, these questions must be answered by a jury (*Cutaia v Board of Mgrs. of 160/170 Varick St. Condo.*, *Nazario v 222 Broadway, LLC*, and *Jones v Nazareth Coll. of Rochester, LLC*, *supra.*).

Bedford's Motion for Contractual Indemnification against Big Apple and Trogon's Motion to Dismiss Big Apple's Second Third-Party Complaint (MS 007 & 008)

a) Contractual and Common Law Indemnification

To impose liability for contractual indemnification against an indemnitor, they must *actually* exercise supervision and control over the work; contractual authority standing alone is insufficient (*McCarthy v Turner Construction, Inc.*, 17 NY3d 369, 378 [2011]; and *Chapa v. Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept. 2023]). An indemnitee's right to contractual indemnification also “depends upon the specific language of the contract” (*Chapa v. Bayles Props., Inc.*, 221 AD3d 857). The contractual language must not violate General Obligations Law

§ 5-322.1, which “permits a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence” (*Feliz v Citnalta Constr. Corp.*, 217 AD3d 750, 752 [2d Dept 2023] [internal citations omitted]; *Caracciolo v SHS Ralph, LLC*, 226 AD3d 861, 864 [2d Dept 2024]; *Brooks v Judlau Constr. Inc.*, 11 NY3d 204, 207 [2008]).

The right to indemnification turns on a triggering event under the contract (*Agurto v One Boerum Dev. Partners, LLC*, 221 AD3d 442, 444 [1st Dept 2023] [The accident resulted from an act of negligence on behalf of the indemnitor or its subcontractors.]; *Torres-Quito v 1711 LLC*, 227 AD3d 113, 119 [1st Dept 2024] and *Gervasi v FSP 787 Seventh, LLC*, 228 AD3d 459, 461 [1st Dept 2024] [The accident arose out of the indemnitor’s work or its subcontractors without regard to actual negligence.]).

Common law indemnification is generally available to indemnitee “who is held responsible solely by operation of law because of [its] relation to the actual wrongdoer” (*McCarthy v Turner Construction, Inc.*, 17 NY3d 376). The indemnitee cannot obtain common-law indemnification “unless it has been held vicariously liable without proof of any negligence or actual supervision on its own part” (*McCarthy v Turner Construction, Inc.*, 17 NY3d 378). Therefore, if a party is found liable to some degree, the indemnitee cannot obtain common law indemnification (*Board of Managers of Olive Park Condominium v Maspeth Properties, LLC*, 170 AD3d 645, 647 [2d Dept 2019]).

b) Workers' Compensation Law § 11 [2] and § 118-A

In 2022, the Legislature passed the Justice for Injured Workers Act (L. 2022, ch. 835) that amended Workers Compensation Law § 11 to add subsection 2¹¹ and created Workers Compensation Law § 118-a.¹² Now, a determination by the Workers Compensation Board concerning an employer-employee relationship is given collateral estoppel effect in any other action or proceeding arising out of the same occurrence. However, to obtain the benefit of collateral estoppel, the proponent must demonstrate that the party to be charged “was a party to or in privity with a party to the Workers Compensation Board (WCB) proceeding... [because] they are not automatically entitled to collateral estoppel effect without the need to meet the elements of the doctrine” (*Guayara v. H.P.S.O.N.Y., Inc.*, __ AD3d __, 231 NYS3d 490, 2025 NY Slip Op. 02722 [1st Dept 2025] [internal citations and quotations omitted]).

The statute is retroactive and applies to accidents prior to its enactment because the Legislative purpose for the amendment was to correct an injustice to injured workers caused by giving collateral estopped effect to decisions reached in the swift and cursory context of a workers' compensation hearing. By doing so, injured workers were deprived of their constitutional right to a jury trial. (*Garcia v Monadnock Construction, Inc.*, 235 AD3d 96, 99 [1st Dept 2025], citing Senate Memo in Support, Bill Jacket, L 2022, ch. 835 [internal citations omitted]; *Nunez v CH Housing Development Fund Corporation*, 234 AD3d 600 [1st Dept 2025]).

¹¹ Workers Compensation Law § 11. Alternative remedy.

2. Determination by the board shall not be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer-employee relationship.

¹² Workers Compensation Law, Art. 7, § 118-A. Effect of Findings and Determinations in Subsequent Proceedings: With respect to an action for a workers' compensation claim permissible under this chapter, no finding or decision by the workers' compensation board, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer-employee relationship.

c) **Trogon's Motion for Summary Judgment against Big Apple (MS 008)**

The second third-party complaint seeks common law and contractual indemnification against Trogon. The contractual indemnification clause in the contract between Big Apple and Trogon provides that Trogon shall indemnify and hold harmless to the fullest extent permitted by law the Contractor and Owner, "from and against all liability or claimed liability for bodily injury [and] all attorney fees, disbursements and related costs, *arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable...*"¹³.

Trogon argues that summary judgment on common law indemnification is warranted because Big Apple was actively negligent and therefore cannot obtain the benefit of the doctrine. Summary judgment on contractual indemnification must also be granted since plaintiff was Big Apple's employee and received his work assignments from and was supervised by Isaac, the manager for Big Apple. Therefore, plaintiff's accident did arise from the work performed by Trogon or its subcontractors.

In opposition, Big Apple argues that there are questions of fact concerning (1) whether plaintiff was employed by Magella or Big Apple and (2) whether Magella's foreman Ariel was his supervisor. Therefore, since a question of fact exists as to plaintiff's employer and who supervised the work site, this raises a further question of fact whether the accident occurred through the work of Trogon's subcontractor Magella.

¹³ NYSCEF DOC. 218

The motion is denied as to contractual and common law indemnification (*McCarthy v Turner Construction, Inc.*, 17 NY3d 378; *Board of Managers of Olive Park Condominium v Maspeth Properties, LLC*, 170 AD3d 647).

Big Apple is collaterally estopped from asserting that plaintiff was not its employee (*Guayara v. H.P.S.O.N.Y., Inc.*, __ AD3d __, 231 NYS3d 490). After Big Apple participated in the WCB hearing and cross-examined plaintiff, the WCB determined that plaintiff was Big Apple's employee. The fact that Big Apple was represented by different attorneys at the WCB does not preclude the effect of collateral estoppel. Big Apple has not introduced evidence that it filed for an administrative appeal challenging this determination. Jona Landau's testimony concerning plaintiff's employer cannot impeach the WCB's determination. However, any findings by the WCB as to who had direction and control over plaintiff's work is not binding in this third-party action (*Nunez v CH Housing Development Fund Corporation*, 234 AD3d 600; Workers Compensation Law § 11 [b] and §118-A). Due to the conflicting testimony of all parties in this action, questions of fact exist as to who supervised and controlled the work on the job site (*Vega v Restani Construction Corp.*, 18 NY3d 499, 505 [2012] and *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). A jury may find that plaintiff's accident occurred as a result Trojon's admitted joint oversight of the construction project (*Torres-Quito v 1711 LLC*, 227 AD3d 119 and *Gervasi v FSP 787 Seventh, LLC*, 228 AD3d 461). The conflicting testimony and credibility of the parties cannot be determined upon a motion for summary judgment (*Vega v Restani Construction Corp.*, 18 NY3d 505 and *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 175).

d) **Bedford's Motion for Summary Judgment (MS007)**

Bedford's motion is likewise denied. It has not been established as a matter of law that plaintiff's accident occurred through the negligence of Big Apple or the subcontractors. A jury must determine whether plaintiff was not provided with adequate safety protections before indemnification may attach because Big Apple's obligation to indemnify Bedford is triggered when a claim results from, in whole or in part, "by negligent acts or omissions" of Big Apple or its subcontractors (*Agurto v One Boerum Dev. Partners, LLC*, 221 AD3d 444).¹⁴

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby


ORDERED that the motion for summary judgment 793-801 BEDFORD REALTY LLC and THE BOARD OF MANAGERS OF 801 BEDFORD AVENUE CONDOMINIUM is denied (MS 007), and it is further

ORDERED that TROGON INTERIORS, INC.'s motion for summary judgment is denied (MS 008), and it is further

ORDERED that plaintiff's motion for summary judgment is denied (MS 009).

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.
Dated: 06/02/2025

¹⁴ NYSCEF DOC. 173