

**Scrubb v 589 11th Mgt. Corp.**

2025 NY Slip Op 32063(U)

May 8, 2025

Supreme Court, Bronx County

Docket Number: Index No. 32793-2018E

Judge: Myrna Socorro

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-9**

-----X

Andre Scrubb,

Plaintiff

Index No. 32793-2018E  
Motion seq #2 and #3

-against-

589 11<sup>th</sup> Mgt. Corp., ICS Builders Inc.,

Defendants

-----X

ICS Builders Inc.,

Third Party Plaintiff,

**DECISION & ORDER**  
**Hon. Myrna Socorro, JSC**

-against-

Fitzcon Construction Inc.,

Third Party Defendant

-----X

589 11<sup>th</sup> Mgt. Corp., and ICS Builders Inc.,

Second Third Party Plaintiffs

-against-

Fitzcon Construction Inc.,

Second Third Party Defendant

-----X

Fitzcon Construction Inc.,

Third Third Party Plaintiff

-against-

ESCO HIRF Co., Inc.,

Third Third Party Defendant

-----X

589 11<sup>th</sup> Mgt Corp., and ICS Builders Inc.,

Fourth Third Party Plaintiffs

-against-

ESCO HIRF Co., Inc.,

Fourth Third Party Defendant

-----X

The following e-filed documents, listed by NYSCEF documents: (Motion seq #2): 64-77; 106-108; and 115-177; and (Motion seq #3): 83-105; and 109-114 both for summary judgment.

According to the plaintiff, on the day of the accident: he was employed by Fitzcon Construction,

however, his checks came from Esco; plaintiff was tasked by his supervisor Henry, an employee of Fitzcon, to erect an interior wall for an elevator shaft; he was directed to use a scaffold that had already been erected; while on the scaffold, the scaffold platform tipped down, moved and collapsed, which caused him to fall to the ground below about 7 to 8 feet.

Defendant 589 11<sup>th</sup> Mgt Corp. (“589 11<sup>th</sup> Mgt.”) owned the subject premises. Defendant ICS Builders, Inc. (“ICS”) was the general contractor for the construction project. ICS hired Fitzcon Construction, Inc. (“Fitzcon”) for masonry work.

In motion sequence no. 2, plaintiff moves for partial summary judgment as to liability on his Labor Law §240(1) claim arguing that he fell from a height of approximately 7 to 8 feet due to defendants’ failure to provide an adequate scaffold and planks.

589 11<sup>th</sup> Mgt and ICS oppose plaintiff’s motion. They argue that the plaintiff’s expert affidavit is conclusory and unsupported. They further argue that the incident report prepared by plaintiff’s supervisor, Henry Montes, states that plaintiff slipped at the time of the accident, “which clearly deviates from plaintiff’s claim that a plank dislodged from the pipe scaffolding.” Thus, 589 11<sup>th</sup> Mgt and ICS argue that there is a question of fact as to how the accident occurred, which precludes summary judgment.

In reply, plaintiff argues that the purported incident report submitted by moving defendants is not admissible and should therefore not be considered by this Court.

In motion sequence no. 3, 589 11<sup>th</sup> Mgt and ICS move for summary judgment on their contractual indemnification claim as against Fitzcon and as against Esco. However, by notice filed on May 22, 2023 (NYSCEF Doc. No. 112), 589 11<sup>th</sup> Mgt and ICS withdrew their motion as against Fitzcon only. As to Esco, 589 11<sup>th</sup> Mgt and ICS argue that they are entitled to indemnification by Esco, as Fitzcon entered into a sub subcontract with Esco wherein Esco agreed to erect the subject scaffold and Esco agreed to indemnify owner and its agents for any claims arising out of their work.

### **Summary Judgment**

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 [1<sup>st</sup> Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508 [1<sup>st</sup> 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 [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 [2014]. If the movant fails to make such prima facie 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 (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 [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 [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 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d

494 [1993].

This Court finds the plaintiff established his *prima facie* burden of a Labor Law §240(1) violation as he demonstrated that defendants failed to supply him with an adequate safety device in the form of a scaffold, a failure of which proximately caused his accident. See *Sanchez v 1 Burgess Rd., LLC*, 195 AD3d 531 [1st Dept 2021], holding that plaintiff's testimony that he fell to the ground when scaffold planks on which he was working broke or came loose showed *prima facie* that his injuries were proximately caused by a violation of Labor Law §240(1).

In opposition, 589 11<sup>th</sup> Mgt and ICS submit a document titled "General Liability- Incident Report" in support of their argument that there is a question of fact as to how the subject accident occurred. A review of the incident report reveals that it was prepared by an "S. Vlahakis" as superintendent and contains a statement made by Henry Montes. Thus, the statement being relied upon by moving defendants (i.e. Mr. Montes' statement) is hearsay, and the moving papers do not establish that the hearsay statement falls within any exception to the hearsay rule. Therefore, this Court cannot consider said incident report as it is not in admissible form. Thus, moving defendants have failed to raise an issue of fact.

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim is **GRANTED**.

### **Indemnification**

As a preliminary matter, in its opposition, Esco argues that 589 11<sup>th</sup> Mgt and ICS's motion for summary judgment on its indemnification claim must be denied for its failure to submit a statement of material facts. However, pursuant to this Court's part rules, a statement of facts as outlined in Uniform Civil Rules for Supreme Court 202.8 is not required, unless the Court specifically provides an Order for one to be filed. Such an Order has not been filed in this matter.

Furthermore, Esco argues that the purported contract between Fitzcon and Esco has not been authenticated with regard to Esco as the Fitzcon witness was only able to identify the signature for Fitzcon on the contract. Therefore, they argue that the Court should not consider the contract. In response, 589 11<sup>th</sup> Mgt and ICS note that Esco's attorneys have previously represented that they have been unable to contact anyone associated with the company and they have failed to provide any documents in response to demands served. Esco has also failed to produce a witness. Thus, 589 11<sup>th</sup> Mgt and ICS argue that they cannot authenticate documents/information that Esco itself has failed to provide.

A review of the subcontract between Fitzon and Esco (NYSCEF Doc. No. 104) shows that the project address subject to the contract is 580 11<sup>th</sup> Avenue, New York, NY. The subject accident occurred at 589 11<sup>th</sup> Avenue, New York, NY. Thus, even though the Court is considering the submitted contract, there is no mention in the moving papers on how the submitted contract on 580 11<sup>th</sup> Avenue, New York, NY relates to the subject property. Therefore, this Court finds that 589 11<sup>th</sup> Mgt and ICS have failed to establish *prima facie* that they are entitled to contractual indemnification from Esco.

Accordingly, it is hereby

**ORDERED**, that the summary judgment motion (motion sequence no. 2) by the plaintiff seeking judgment on the Labor Law §240(1) is **GRANTED**; and it is further

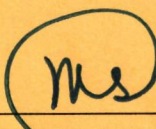
**ORDERED**, that the summary judgment motion by 589 11<sup>th</sup> Mgt and ICS (motion sequence no. 3) seeking judgment as against Esco on its contractual indemnification claim is **DENIED**; and it is further

**ORDERED**, that the Clerk of the Court is directed to enter judgment accordingly; and it is further

**ORDERED**, plaintiff's counsel shall serve and file a copy of this order with notice of entry within twenty (20) days from the date of this Decision and Order.

This constitutes the decision and order of this court.

Dated: May 8, 2025

  
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HON. MYRNA SOCORRO, J.S.C.