Marryshow v 2400 Amsterdam Ave. Realty Corp.
2025 NY Slip Op 32777(U)
August 5, 2025
Supreme Court, New York County
Docket Number: Index No. 157299/2016
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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IVOR MARRYSHOW,

Plaintiff,

- v -

2400 AMSTERDAM AVE. REALTY CORP., TELECOM ENGINEERING GROUP INC.,T MOBILE USA, INC.,

Defendant.

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INDEX NO. 157299/2016

MOTION DATE 01/14/2025, 01/14/2025, 01/14/2025

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON MOTION

T MOBILE USA, INC.

Plaintiff,

-against-

BIG GREEN GROUP, LLC

Defendant.

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Third-Party
Index No. 595051/2017

T MOBILE USA, INC.

Plaintiff,

-against-

ERICSSON INC.

Defendant.

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Second Third-Party
Index No. 595225/2021

BIG GREEN GROUP, LLC

Plaintiff,

-against-

ERICSSON INC.

Defendant.

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Third Third-Party
Index No. 595364/2021

BIG GREEN GROUP, LLC

Fourth Third-Party

Index No. 596146/2021

Plaintiff,

-against-

NETWORK BUILDERS, INC.

Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 010) 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 469, 472, 475, 479, 484, 485, 508, 509, 510, 511, 512, 516, 519, 522, 528

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 470, 473, 476, 480, 517, 520, 523, 525, 526, 529, 532

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 471, 474, 477, 478, 481, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 513, 514, 515, 518, 521, 524, 527, 530, 531

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of alleged injuries sustained at a work site. Defendants/third-party plaintiffs and third-party defendant now move for summary judgment. Plaintiff opposes the motions, cross-moves for summary judgment on its Labor Law § 240 (1) claims and during oral argument withdrew its claims pursuant to Labor Law § 241 (6). The Court will address each motion in turn.

Background

Defendant, 2400 Amsterdam Realty Corp. ("2400 Amsterdam") is the owner of the premises where the accident occurred. Defendant/third-party plaintiff T-Mobile, leased space from 2400 Amsterdam to store its antennas.

Plaintiff was employed by third-party defendant Big Green Group LLC ("BGG") and was engaged in work related to the subject antenna on 2400 Amsterdam's roof when the accident occurred. On the date of the incident, plaintiff climbed onto the antenna array and the structure collapsed causing plaintiff's injuries.

Standard of Review

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]. The First Department has held that liability pursuant to Labor Law § 200 only attaches where the owner or contractor had the "authority to control the activity bringing about the injury

to enable it to avoid or correct an unsafe condition"(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012] internal citations omitted).

Labor Law §240(1)

Labor Law §240(1) states in pertinent part as follows:

> "All contractors and owners and their agents … 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 statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury. *Gordon v Eastern Railway Supply, Inc*., 82 NY2d 555, 559 [1993]; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co*., 78 NY2d 509, 513 [1991].

It is well established law that an accident alone does not establish a Labor Law § 240 (1) violation or causation. (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]; *Rudnik v Brogor Realty Corp*., 45 AD3d 828 [2d Dept 2007]; *Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept 2009]). Rather, the protections afforded by this section are invoked only where plaintiff demonstrates that he was engaged in an elevation-related activity and the failure to provide him with a safety device was the proximate cause of his injuries. *See id*.

Motion Sequence 010

Landlord 2400 Amsterdam moves to dismiss plaintiff's complaint in its entirety as asserted against it and seeks contractual indemnification from T-Mobile. The crux of 2400 Amsterdam's motion is that plaintiff was not engaged in work protected by the labor law, rather plaintiff was engaged in routine maintenance and therefore the labor law inapplicable. 2400

Amsterdam further argues that it is not subject to labor law § 200 claims because it did not have notice of a defect. 2400 Amsterdam maintains that the lease between it and T-Mobile provide it will be indemnified for any accidents that occurred on the leased space, the rooftop. T-Mobile submits a partial opposition to this motion averring that General Obligations Law § 5-322.1 invalidates the lease because there is no savings clause. Plaintiff opposes the instant motion, together with its cross-motion for summary judgment on its Labor Law § 240(1) claims, in response to T-Mobile's motion for summary judgment, motion sequence 012, and is discussed in further detail below.

In support of the position that plaintiff was not engaged in work protected by the labor law, 2400 Amsterdam relies on plaintiff's deposition testimony wherein he describes the work he was engaged in as routine maintenance. Although 2400 cites to cases wherein courts have held that work was routine maintenance and not covered by the labor law, those cases cited are distinguishable from the instant matter, specifically as it pertains to the scope of plaintiff's assigned work. Thus, without reaching plaintiff's opposition to this portion of the motion, the Court finds that based on the submitted evidence and arguments in support, 2400 Amsterdam has failed to establish its prima facie showing that plaintiff was not engaged in work protected by the labor law.

Next, the Court will address the portion of 2400 Amsterdam's motion that seeks contractual indemnification. The lease provided that: "[t]he premises may be used by Tenant for, among other things, the transmission and reception of radio communication signals and for the construction, installation, operation, maintenance, repair, removal or replacement of related facilities, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities." Further, the lease prohibits the 2400 Amsterdam from interfering with the

operations of T-Mobile and deems such interference as a material breach of their agreement and requires T-Mobile to indemnify 2400 Amsterdam for any claims arising out of the tenant's use of the premises.

The Court rejects T-Mobile's argument that the indemnification provision is void pursuant to GOL § 5-322.1, this provision of the general obligations law does not apply to commercial leases. Contrary to T-Mobile's assertions, 2400 Amsterdam has established that it neither cause or created the alleged defect that cause the accident, nor was it on notice of the defect, there has been no admissible evidence to raise a triable issue of fact. Accordingly, 2400 Amsterdam has established entitlement to contractual indemnification from T-Mobile as it pertains to the Labor Law § 240(1) claims asserted against it. Accordingly, 2400 Amsterdam's motion for summary judgment is denied as to the portion seeking dismissal of plaintiff's Labor Law § 240(1) claims, granted as to dismissal of plaintiff's Labor Law § 200 claims asserted against it and granted as to its claim for contractual indemnification from T-Mobile.

Motion Sequence 011

Third-party defendant BGG, plaintiff's employer, moves for summary judgment to dismiss defendant/third-party plaintiff's complaint. BGG seeks dismissal of T-Mobile's breach of contract claim for failure to procure insurance, on the grounds that it did in fact procure the necessary insurance. Further, BGG contends that T-Mobile's claim for common law indemnification/ contribution is barred by the Workers' Compensation Law, and that T-Mobile's claim against it for contractual indemnification should be dismissed because the indemnity provision in their written agreement is violative of the General Obligations Law ("GOL") § 5-322.1.

Preliminarily, the Court agrees that BGG has established that it procured the appropriate insurance and required by the contract between the parties. Contrary to T-Mobile's contention, BGG has not failed to include T-Mobile as an additional insured. Specifically, the certificate of insurance identifies T-Mobile as an additional insured. *See* NYSCEF Doc. 441. As such BGG has established entitlement to dismissal of the breach of contract cause of action asserted against it.

Next, BGG avers that the contract between the parties contains an indemnification provision that requires BGG to indemnify T-Mobile for T-Mobile's negligence and is therefore invalid. GOL § 5-322.1 voids indemnification provisions that indemnify general contractors for their own negligence. *See* (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]): GOL § 5-322.1. The indemnification provision reads

> Contractor hereby agrees to indemnify, defend, and hold Owner and each of its officers, shareholders, directors, members, partners, and employees harmless form and against any and all claims, damages, losses, and expenses, including but not limited to reasonable attorneys' fees and disbursements, arising out of or resulting from any claims, action, or other proceeding that is based on or relates to: (a) Contractor's breach of this Agreement; (b) the conduct or actions of Contractor within the scope of this Agreement, including, but not limited to, conduct or actions that result in injuries sustained by Contractor, its employees, agents or subcontractors; (c) any negligent act or omission or willful misconduct of Contractor; (d) any failure to comply with any obligation enumerated in this Agreement related to Owner Information; or, (e) any professional malpractice claim resulting from the actions of any subcontractor employed by Contractor.

See NYSCEF Doc. 437.

BGG contends that the indemnification provision does not contain limiting language, specifically language that does not require it to indemnify if any portion of the claim that is caused by the indemnitee's own active negligence and is therefore violative of GOL § 5-322.1.

In opposition, T-Mobile avers, and this Court agrees, that a plain reading of the indemnification provision does not require BGG to indemnify T-Mobile for T-Mobile's negligence, rather the indemnification provision identifies the instances when the contractor, here BGG, will be required to indemnify the owner, here T-Mobile. Accordingly, the Court finds that the indemnification provision does not violate GOL § 5-322.1, and therefore BGG is not entitled to summary judgment on this issue.

Lastly, BGG contends that the common law indemnification claims must fail because there is no evidence that the safety equipment provided to plaintiff failed or was inadequate and/or caused or contributed to plaintiff's injuries and that plaintiff did not suffer a grave injury. BGG asserts that it provided the plaintiff with all proper and adequate safety equipment, including a helmet, gloves, ladder, safety harness, belt and lanyard and contends that the evidence establishes that BGG was free of negligence and T-Mobile was not.

Here, the Court finds that there are questions of fact with respect to the adequacy of the safety devices provided. Whether or not it was BGG's ladder, or a ladder found on the roof, plaintiff did not fall from the ladder, which BGG alleges is an appropriate safety device, rather plaintiff was injured because he could not access the work area by using the ladder and stepped onto equipment that subsequently collapsed. Therefore, there is at least a question of fact with respect to the adequacy of the devices provided to plaintiff on the date of the incident. Further, at this juncture it is undisputed that the plaintiff's bill of particulars alleges a grave injury thereby creating an exception to the Workers' Compensation bar. Accordingly, the portion of BGG's motion for summary judgment that seeks dismissal of the breach of contract claim is granted and the remainder of the motion is denied.

Motion Sequence 012

Defendant/third-party plaintiff T-Mobile moves for summary judgment dismissing plaintiff's second cause of action for violations of Labor Law §§ 200, and 240(1); and granting summary judgment on the third-party complaint against BGG for defense, indemnification and insurance procurement. BGG opposes the instant motion, and plaintiff opposes and cross moves on its Labor Law § 240(1) against defendants 2400 Amsterdam and T-Mobile.

Preliminarily, as discussed above, the portion of the motion that seeks summary judgment as to the breach of contract claim against BGG is denied. T-Mobile seeks dismissal of plaintiff's claims based on the same theory 2400 Amsterdam attempted to advance, that plaintiff was not involved in work protected by the labor law, rather plaintiff was engaged in routine maintenance, thus the labor law in inapplicable.

Plaintiff testified that before he began working on the antennas, he and his supervisor inspected the area for any potential hazards, including trip and fall hazards and the instability of the equipment. *See* NYSCEF Doc. 459, Exhibit "J" p. 31, lines 3-19.

BGG's president, Michael Dennis, testified that plaintiff should have never stepped on the array. However, plaintiff testified that he thought he was permitted to step on the array when necessary as it was his belief that the arrays can "carry up to 5,000 pounds".

Plaintiff argues that it was not conducting routine maintenance, and its employers work was "necessarily intertwined with the installation because, without their contribution to the project as a whole, the antenna did not function." Further, in support of its position that plaintiff was not engaged in routine maintenance, plaintiff cites to *Hartrum v Montefiore Hosp. Hous. Section II Inc.*, 237 AD3d 429 [1st Dept 2025]. However, plaintiff's reliance on *Hartrum* is

misplaced, as the issue in *Hartrum* was plaintiff being struck by a failing object, not whether there was a significant physical change to the structure. *Id*.

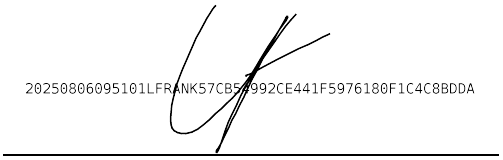
The plethora of case law cited to by the parties varies and not one case is factually analogous to the instant action. However, the Court notes that in many of the cases the Frist Department and the Court of Appeals have focused on the scope of work, not necessarily the specific work plaintiff was engaged in at the time of the accident, (*see Rodriguez v Riverside Ctr. Site 5 Owner LLC*, ___AD3d___, 235 NYS3d 55, 2025 NY Slip Op 04221, *1 [2025]). Because there is no undisputed evidence of the scope of BGG's work on the date of the incident, and multiple witnesses, including plaintiff's, inconsistent testimony regarding the scope of work, the Court finds that there is a question of fact regarding the applicability of the labor law.

The Court finds that the testimony that relates to the work done by plaintiff on the date of the accident is speculative and inconsistent, which requires credibility determinations to be made by the finder of fact. The Court has reviewed the parties remaining contentions and finds them unavailing. Consequently, plaintiff's cross-motion for partial summary judgment is denied and T-Mobile's motion for summary judgment is denied and it is hereby

ORDERED that motion sequence 010, is granted in part in that 2400 Amsterdam's motion for contractual indemnification is granted and that plaintiff's Labor Law § 200 claims against it are dismissed, the motion is otherwise denied; and it is further

ORDERED that motion sequence 011, is granted in part in that the breach of contract cause of action asserted in the third-party complaint is dismissed, the motion is otherwise denied; and it is further

ORDERED that motion sequence 012 and its accompanying cross-motion is denied.



8/5/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**