

**De Araujo v Titanium Constr. Servs., Inc.**

2025 NY Slip Op 32817(U)

August 7, 2025

Supreme Court, New York County

Docket Number: Index No. 159366/2021

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 02M

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RODRIGO DE ARAUJO,

Plaintiff,

- v -

TITANIUM CONSTRUCTION SERVICES, INC., 1165  
MADISON AVENUE OWNER, LLC,

Defendant.

**INDEX NO.** 159366/2021

**MOTION DATE** 10/29/2024,  
10/28/2024,  
10/28/2024

**MOTION SEQ. NO.** 004 005 006

**DECISION + ORDER ON  
MOTION**

-----X

TITANIUM CONSTRUCTION SERVICES, INC., 1165  
MADISON AVENUE OWNER, LLC

Plaintiff,

-against-

MANHATTAN CONCRETE, LLC

Defendant.

Third-Party  
Index No. 595136/2022

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 155, 156, 157, 158, 161, 162, 163

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 159, 160, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 178, 179, 182, 183

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 173, 175, 176, 177, 180, 181

were read on this motion to/for

JUDGMENT - SUMMARY

In this action asserting Labor Law §§ 240(1), 241(6), and 200 claims, plaintiff Rodrigo De Araujo (“Plaintiff”) moves for summary judgment on liability under Labor Law § 240(1)

(MS 006). Defendants/third-party plaintiffs Titanium Construction Services, Inc. (“Titanium”) and 1165 Madison Avenue Owner, LLC (“Owner”) (collectively “Defendants/Third-Party Plaintiffs”) move for summary judgment dismissing Plaintiff’s Complaint (NYSCEF Doc. No. 1) in its entirety and granting their contractual indemnity claim as against Third-Party Defendant Manhattan Concrete, LLC (“Manhattan Concrete”) (MS 005). Manhattan Concrete moves for leave to amend its answer and for summary judgment dismissing Defendants/Third-Party Plaintiffs’ Third-Party Complaint (NYSCEF Doc. No. 9) in its entirety (MS 004). All motions are opposed, except for Manhattan Concrete’s motion for leave to amend its answer and to dismiss Defendants/Third-Party Plaintiffs’ common law indemnity and contribution and breach of agreement to procure general liability insurance causes of action. The motions are consolidated herein for disposition.

The Owner engaged Titanium as a construction manager to perform work and manage the construction taking place at the premises located at 1165 Madison Avenue in New York City (“Premises”) (NYSCEF Doc. No. 169, Construction Management Agreement dated March 3, 2021). On February 24, 2021, Titanium and Manhattan Concrete entered into an agreement whereby Manhattan Concrete, as a subcontractor, was to build a concrete superstructure at the Premises (NYSCEF Doc. No. 132, Trade Contract).

Plaintiff, Manhattan Concrete’s employee at the time (NYSCEF Doc. No. 137, Plaintiff’s Deposition at 22), alleges that on September 10, 2021 he was standing on an elevated platform approximately seven to ten feet off the ground lifting metal beams to a platform above him (Complaint ¶ 4-6, Plaintiff’s Deposition at 35-36, 53-60, 68). One of the beams struck him from the platform above causing him to fall to the ground (“Accident”) (NYSCEF Doc. No. 131, Bill of Particulars ¶ 6; Plaintiff’s Deposition at 73, 84). Plaintiff alleges that as a result of the Accident

he suffered injuries to his back, left knee, and shoulder (NYSCEF Doc. No. 145, Bills of Particulars at 1-2, 10-11, 15-16, 20-21, 25-26, 33-35).

Plaintiff commenced this action in October 2021, alleging that the Accident was caused by Defendants/Third-Party Plaintiffs' failure to provide Plaintiff with adequate safety devices, and interposing causes of action based on Labor Law §§ 240(1), 241(6) and 200, as well as common law negligence (Complaint ¶¶ 8-10). In February 2022 Defendants/Third-Party Plaintiffs filed their Third-Party Complaint against Manhattan Concrete, interposing causes of action based on contractual indemnity, common law indemnity and contribution, and breach of agreement to procure general liability insurance (NYSCEF Doc. No. 9).

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff and Defendants/Third-Party Plaintiffs both move for summary judgment under Labor Law § 240(1). The statute "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]). "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate

protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Here, it is undisputed that Plaintiff, while standing on an elevated platform, was struck by a metal beam falling from an even higher platform, and that there was no hoisting mechanism or other safety device to prevent the beam from falling on Plaintiff (NYSCEF Doc. No. 176, Defendants/Third-Party Plaintiffs’ Opposition ¶ 18). In addition, as this work exposed Plaintiff to a height-related hazard and he was not provided an adequate safety device to protect him from the elevation differential, his injury falls within the “kind of foreseeable risk within the contemplation of section 240(1)” (*Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004]). Therefore, Plaintiff has demonstrated prima facie entitlement to summary judgment on his § 240(1) claim.

Defendants/Third-Party Plaintiffs fail to present admissible evidence that would controvert Plaintiff’s account of the Accident. In opposition to the motion, they argue that Plaintiff’s account that he fell off the platform was not raised in the Complaint and Bill of Particulars, and is contradicted by documents, including a C-3 form, hospital records and the accident report prepared by Daniel Saldana, Manhattan Concrete’s safety supervisor. However, it is undisputed that the C-3 form and hospital records were both prepared in English, a language that Plaintiff does not speak or read, and Defendants/Third-Party Plaintiffs did not show that either was prepared with aid of a competent translator (*cf. Kristo v Bd. of Educ. of City of N.Y.*, 134 AD3d 550, 551 [1st Dept 2015]; *Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96 [1st Dept 1999]), and, in any case, an incomplete description of the Accident in the documents does not contradict Plaintiff’s account (*cf. Lourenco v City of NY*, 228 AD3d 577, 581 [1st Dept 2024] citing *Piedra v 111 W. 57th Prop. Owner LLC*, 219 AD3d 1235, 1235 [1st Dept 2023]). Defendants/Third-Party Plaintiffs also failed to raise a

triable issue of fact as to whether Plaintiff was the sole proximate cause of his injuries (*see Cusumano v Super P57 LLC*, 237 AD3d 533, 533 [1st Dept 2025]). Accordingly, Plaintiff's motion is granted, and the corresponding branch of Defendants/Third-Party Plaintiffs' motion is denied.

As to the Labor Law § 241(6), Defendants/Third-Party Plaintiffs' motion to dismiss this cause of action is also denied. Section 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a defendant's liability under Section 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494).

Here, Defendants/Third-Party Plaintiffs argue that, contrary to Plaintiff's allegations in the Bill of Particulars (NYSCEF Doc. No. 131, Bill of Particulars ¶ 7), there has been no violation of the New York Industrial Code §23- 1.7, §23-1.8, §23-2.1, §23-2.2, §23-2.3, §23-2.6, §23-6.1, §23-6.2, and §23-6.3. Plaintiff agrees, as he no longer argues that these sections were violated, and instead alleges a new violation, of New York Industrial Code §23-5.1(j). Defendants/Third-Party Plaintiffs do not claim that this new allegation causes them prejudice or that it entails new issues of fact, even though it has not been raised in the Complaint or the Bill of Particulars (*Burton v CW Equities, LLC*, 97 AD3d 462, 462-463 [1st Dept 2012]; *see also Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 450 [1st Dept 2020]), but dispute the applicability of this regulation. New York Industrial Code §23-5.1(j), requires safety railings in case of scaffold platforms with an elevation of more than seven feet. Plaintiff alleges that the platform on which he stood could have

been exactly seven feet high or higher (Plaintiff's Deposition at 35, 53), while Defendants/Third-Party Plaintiffs assert that this estimate is incorrect (NYSCEF Doc. No. 182 ¶ 17). As it is unclear how high was the platform off which Plaintiff fell, material issues of fact exist as to the applicability of the New York Industrial Code §23-5.1(j), and the Defendants/Third-Party Plaintiffs' motion is denied.

The branches of Defendants/Third-Party Plaintiffs' motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence cause of action, are granted to the limited extent as set forth below. Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). These claims "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca*, 99 AD3d at 144). Where the alleged injury was "caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.*). The "mere presence" of an owner or general contractor's personnel on a worksite is "insufficient to infer supervisory control" (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]). Where the injury results from dangerous conditions existing on the premises, "liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca*, 99 AD3d at 144). Here, there is no evidence that the Owner was exercising supervisory control over Plaintiff's work or created or had actual or constructive notice of any dangerous condition. Accordingly, the Labor Law § 200 and common law negligence causes of action are dismissed as against the Owner.

As to Titanium, Manhattan Concrete had “the sole control over construction means, methods, techniques, sequences and procedures for coordinating” all the work under the Trade Contract (Trade Contract ¶¶ 3.3.1, 19.1), but issues of fact exist as to whether Titanium was in fact exercising supervisory control over Manhattan Concrete’s work. Saldana testified that Manhattan Concrete would submit the means and methods for their work on the site to Titanium for acceptance, and Titanium would oversee the work and intervene if it thought it was not in accordance with the plans or applicable safety regulations or was dangerous (NYSCEF Doc. No. 135, Saldana Deposition at 20, 23-25). Titanium has also failed to show that it did not have notice of the allegedly dangerous conditions of the scaffolding, as under the Construction Management Agreement, it was “solely responsible” for “maintaining and supervising all safety precautions and programs in connection with the Work, including the safety of all persons ... during the performance of the Work” and was obligated to “provide reasonable protection to prevent damage, injury or loss to all employees of [Titanium] and Subcontractors” (Construction Management Agreement ¶ 10.03). This raises triable issues of fact as to both the supervisory powers of Titanium and the notice of allegedly dangerous conditions of the scaffolding, which precludes dismissal of the Labor Law § 200 and common law negligence causes of action as against Titanium at this stage.

As to Defendant/Third-Party Plaintiffs’ contractual indemnity cause of action, the Trade Contract provides that Manhattan Concrete will indemnify Titanium and the Owner for any and all claims related to personal injuries, brought by any person or entity, to the extent that they arise out of or are in connection with the performance of the work under the Trade Contract, with the exception that Manhattan Concrete is not obligated to indemnify for acts of actual negligence of Manhattan Concrete or the Owner (Trade Contract ¶ 13.1). Contrary to Manhattan Concrete’s

contention, this indemnity provision is binding as it satisfies the requirements of Workers' Compensation Law § 11 (see *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005] ["So long as a written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered, it meets the requirements of the statute."]), and, read according to its plain terms, it applies to claims brought by Plaintiff in this proceeding. Accordingly, Defendants/Third-Party Plaintiffs' motion for summary judgment on the contractual indemnity cause of action is granted as to the Owner, given that the Court dismissed all negligence claims as against it, but denied as to Titanium, as to whom the Labor Law §200 and common law negligence causes of action are still pending. Manhattan Concrete's motion to dismiss the contractual indemnity causes of action is also denied.

Manhattan Concrete's motion is granted as unopposed to the extent it seeks dismissal of the causes of action based on common law contribution, common law indemnification, and breach of agreement to procure general liability insurance, as is its motion for leave to amend the answer to the Third-Party Complaint.

Accordingly, it is hereby

ORDERED that Third-Party Defendant Manhattan Concrete, LLC's motion for leave to amend its Answer (MS 004) is granted, and the amended Answer in the proposed form annexed to the motion papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Third-Party Defendant Manhattan Concrete, LLC's summary judgment motion (MS 004) on the common law indemnity and contribution causes of action and breach of agreement to procure general liability insurance cause of action is granted and these causes of action are dismissed; and it is further

ORDERED that Third-Party Defendant’s summary judgment motion (MS 004) on the contractual indemnity cause of action is denied; and it is further

ORDERED that Defendants/Third-Party Plaintiffs’ summary judgment motion (MS 005) on Plaintiff’s Labor Law §§ 240(1) and 241(6) causes of action is denied; and it is further

ORDERED that Defendants/Third-Party Plaintiffs’ summary judgment motion (MS 005) on Plaintiff’s Labor Law § 200 and common law negligence causes of action is granted as to Defendant/Third-Party Plaintiff 1165 Madison Avenue Owner, LLC and these causes of action are dismissed as against 1165 Madison Avenue Owner, LLC; and it is further

ORDERED that Defendants/Third-Party Plaintiffs’ summary judgment motion (MS 005) on Plaintiff’s Labor Law § 200 and common law negligence causes of action is denied as to Defendant/Third-Party Plaintiff Titanium Construction Services, Inc.; and it is further

ORDERED that Defendants/Third-Party Plaintiffs’ summary judgment motion (MS 005) on the contractual indemnity cause of action is granted as to Defendant/Third-Party Plaintiff 1165 Madison Avenue Owner, LLC and denied as to Defendant/Third-Party Plaintiff Titanium Construction Services, Inc.; and it is further

ORDERED that Plaintiff’s summary judgment motion (MS 006) on Defendants/Third-Party Plaintiffs’ liability as to Plaintiff’s Labor Law § 240(1) cause of action is granted.

All other relief sought is denied. This constitutes the Decision and Order of the Court.

8/7/2025  
DATE

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LORI S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE