Dilipchand v TMG Constr. Corp.
2025 NY Slip Op 33378(U)
September 9, 2025
Supreme Court, New York County
Docket Number: Index No. 152270/2022
Judge: Mary V. Rosado

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33M

Justice

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JAMEEL DILIPCHAND,

Plaintiff,

- v -

TMG CONSTRUCTION CORP., HALSTEAD MANAGEMENT, LLC,166 PERRY STREET PH LLC,

Defendant.

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INDEX NO. 152270/2022

MOTION DATE 09/04/2024, 08/30/2024, 09/05/2024, 09/05/2024

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

166 PERRY STREET PH LLC

Plaintiff,

-against-

TMG CONSTRUCTION CORP.,

Defendant.

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Third-Party
Index No. 595485/2023

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 149, 151, 155, 159, 167, 168, 171, 172, 173, 174, 190, 191
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 150, 156, 160, 175, 176, 180, 181, 182
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 152, 157, 161, 165, 166, 169, 170, 177, 178, 183, 184, 185, 186
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 147, 148, 153, 158, 162, 163, 164, 179, 187, 188
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Motion Sequences 004 through 007 are consolidated for disposition and decided as follows: Plaintiff Jameel Dilipchand's ("Plaintiff") motion ("Mot. Seq.

004") for summary judgment on the issue of liability with respect to his Labor Law § 240(1) claim against Defendant/Third-Party Defendant TMG Construction Corp. ("TMG Construction") and Defendant/Third-Party Plaintiff 166 Perry Street PH, LLC ("166 Perry") is granted.

Defendant Halstead Management, LLC's ("Halstead") motion ("Mot. Seq. 005") for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification crossclaim against 166 Perry is granted.

166 Perry's motion ("Mot. Seq. 006") for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification and breach of contract for failure to procure insurance claims against TMG Construction is granted in part and denied in part.

TMG Construction's motion ("Mot. Seq. 007") for summary judgment dismissing Plaintiff's Complaint asserted against it is denied.[1]

I. Background

On September 14, 2021, non-party Perfectaire employed Plaintiff in the penthouse unit of a condominium building at 166 Perry Street, New York, New York, (the "Premises") and instructed him to insulate a duct (NYSCEF Doc. 112 at 23; 29; 31). Plaintiff used an A-frame ladder to reach the duct and was descending the ladder, on the rung closest to the ground, when the ladder suddenly shifted, and Plaintiff fell (*id.* at 8-10). Halstead managed the Premises (NYSCEF Doc. 98). 166 Perry is a limited liability company that purchased the penthouse and contracted for its renovation (NYSCEF Doc. 118 at 16). TMG Construction was the general contractor and subcontracted HVAC work Perfectaire (NYSCEF Doc. 115 at 17; 19-20; 28; 78).

[1] Motion Sequences 004 through 007 each were marked fully submitted on June 3, 2025.

In Mot. Seq. 004, Plaintiff moves for summary judgment on his Labor Law § 240(1) claim against 166 Perry and TMG Construction. In Mot. Seq. 005, Halstead moves for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification crossclaim asserted against 166 Perry. In Mot. Seq. 006, 166 Perry moves for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification and breach of contract for failure to procure insurance claims asserted against TMG Construction. In Mot. Seq. 007, TMG Construction moves for summary judgment dismissing Plaintiff's Complaint. The motions are consolidated for disposition and decided as follows.

II. Discussion

A. Plaintiff's Motion (Mot. Seq. 004)

Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim against Defendants 166 Perry and TMG Construction is granted. Plaintiff was engaged in work protected by Labor Law § 240(1). Moreover, Plaintiff met his burden of showing a Labor Law § 240(1) violation through his uncontroverted testimony that as he was descending an unsecured ladder, the ladder shifted, causing him to fall and twist his knee in an uncovered ditch in the floor. It is well established that when a ladder shifts, slips, or collapses, a Labor Law § 240(1) violation is established (*Sanchez v MC 19 East Houston* LLC, 216 AD3d 443, 443 [1st Dept 2023]; *Castillo v TRM Contracting 626, LLC*, 211 AD3d 430, 430 [1st Dept 2022] citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *see also Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]).

In opposition, 166 Perry and TMG Construction fail to raise a triable issue of fact. Their argument that Plaintiff was the sole proximate cause of his accident is without merit as it is impossible for a Plaintiff to be the sole proximate cause of his accident where a Labor Law

§ 240(1) violation is established (*Quiroz v Memorial hospital for Cancer and Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022]). 166 Perry and TMG Construction's argument that Labor Law § 240(1) does not apply because Plaintiff was on the bottom rung of the ladder is insufficient. Plaintiff was injured when the ladder shifted, causing Plaintiff to lose his balance, fall, and step into an uncovered ditch in the floor (*Carpio v Tishman Const. Corp. of New York*, 240 AD2d 234 [1st Dept 1997]; *Limauro v City of New York Dept. of Environmental Protection*, 202 AD2d 170, 170-71 [1st Dept 1994]). Labor Law § 240(1) applies because the uncontroverted facts show Plaintiff's injury was caused due to the ladder shifting and the height differential between the bottom rung of the ladder and the uncovered ditch in the floor (*see Limauro, supra*). TMG Construction's reliance on *Vasiliades v. Lehrer McGovern & Bovis, Inc.*, 3 A.D.3d 400 (1st Dept 2004) is misplaced. There, the plaintiff was injured not due to a ladder shifting, but because he slipped on a wet condition on the floor – inapposite to the facts of the case at bar.

Nor is the burden upon Plaintiff to identify any defect in the ladder to meet his prima facie burden (*Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016] citing *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014]). TMG Construction's expert affidavit, which admits Plaintiff stepped into the uncovered ditch because the ladder shifted, does not raise an issue of fact. Further, his opinion that there was no Labor Law § 240(1) violation contradicts First Department precedent (*Llach v L.I.C.C. Realty Co.*, 232 AD3d 548, 548 [1st Dept 2023] [injuries sustained after worker lost balance on unsecured ladder that shifted was a Labor Law § 240(1) violation] *see also Caceres v Standard Realty Associates, Inc.*, 131 AD3d 433, 433-34 [1st Dept 2015]; *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289 [1st Dept 2002]). 166 Perry's expert affidavit is similarly insufficient, as well as conclusory, and speculative (*see Cibrowski v 228 Thompson Realty, LLC*, 189 AD3d 428, 429 [1st Dept 2020]).

Finally, 166 Perry's argument that it should be excepted from liability under the homeowner exception is without merit. The Premises were purchased and renovated by 166 Perry, a limited liability company operated by employees of non-party Algin Management, a company involved in property development with over 4500 units and hundreds of thousands of square feet of real estate in its portfolio (NYSCEF Doc. 118 at 13-4; 38). Sean and Susan Paroff, who are neither parties to this lawsuit nor owners of 166 Perry, live in the Premises. 166 Perry is not owned by the residents of the Premises, but by a trust.

Moreover, at the time of Plaintiff's accident, the Premises were not used as a residence. Bennet Schonfeld, who does not live in the Premises and is an employee of Algin Management, acted as an authorized agent for 166 Perry and negotiated contracts related to the renovation project on behalf of 166 Perry (NYSCEF Doc. 118 at 37-38). 166 Perry, a corporate entity intertwined with a massive real estate company, which purchased the Premises for almost $20,000,000, and which is not owned by the residents of the Premises, is not a "single family homeowner" for purposes of being excepted from Labor Law § 240(1). Thus, Plaintiff's motion for summary judgment is granted.

B. Halstead's Motion (Mot. Seq. 005)

Halstead's motion for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification crossclaim asserted against 166 Perry is granted.

Plaintiff does not oppose dismissal of Halstead's motion for summary judgment dismissing Plaintiff's Labor Law §§ 240(1) and 241(6) asserted against it. Therefore, these claims are dismissed as abandoned. TMG Construction does not oppose Halstead's motion dismissing TMG Construction's crossclaims asserted against it, so TMG Construction's crossclaims against

Halstead are dismissed. 166 Perry does not oppose Halstead's motion seeking dismissal of 166 Perry's crossclaims, therefore 166 Perry's crossclaims against Halstead are dismissed.

Plaintiff's remaining claims against Halstead, alleging common law negligence and a violation of Labor Law § 200, are dismissed. Plaintiff's sole opposition is that Halstead should have inspected the Premises and noticed the uncovered ditch. However, Halstead was the managing agent for the condominium board, and was not an agent of 166 Perry, who owned the penthouse where Plaintiff was injured. Halstead was neither a general contractor nor an owner of the Premises and thus cannot be liable for a dangerous condition on the Premises pursuant to Labor Law § 200 (*see, e.g. Torres-Quito v 1711 LLC*, 227 AD3d 113, 119 [1st Dept 2024]; *Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018]).

Halstead's motion for summary judgment on its crossclaim for contractual indemnification against 166 Perry is granted. In the paragraph 8 of the alteration agreement (NYSCEF Doc. 102), 166 Perry agreed to indemnify Halstead:

> "against any loss, cost, claim, damage or expense arising out of or related to the [renovation project] or any act or omission of [166 Perry], the General Contractor or any Subcontractors…including reasonable attorney's fees and disbursements incurred by [Halstead] in the defense of any such claim or any suit, action or proceeding based thereon."

The indemnification clause was triggered because Halstead was sued due to Plaintiff being injured during the renovation because of acts or omissions of 166 Perry, TMG Construction, and/or TMG Construction's subcontractor, Perfectaire. 166 Perry's opposition that the agreement is not enforceable because it was executed by 166 Perry but not Halstead, is without merit (*see Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 368 [2005]; *see also Shala v Park Regis Apartment Corporation*, 192 AD3d 607 [1st Dept 2021]). 166 Perry is a signatory, and the record is clear that Halstead would not have allowed the renovation to move forward if it did not intend

to be bound by the terms of the indemnification agreement, which run in its favor (*see also Kowalchuk v Stroup*, 61 AD3d 118, 125 [1st Dept 2009] [unsigned contract may be enforceable where there is objective evidence establishing the parties intended to be bound]).

166 Perry's argument that there is an issue of fact as to whether the indemnification clause is triggered because Plaintiff may have been injured outside the scope of his work as a subcontractor has no basis in the record. Therefore, Halstead's motion for summary judgment on its contractual indemnification crossclaim against 166 Perry is granted. Because Halstead is entitled to contractual indemnification under the alteration agreement, whether Halstead is also entitled to contractual indemnification under the bylaws is moot.

C. 166 Perry's Motion (Mot. Seq. 006)

166 Perry's motion for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and summary judgment on its contractual indemnification claim against TMG Construction, is granted in part and denied in part. In Mot. Seq. 004, the Court rejected 166 Perry's argument that it is excepted from liability under the homeowner exception and granted Plaintiff summary judgment on the issue of liability on his Labor Law § 240(1) claim against 166 Perry. Therefore, 166 Perry's motion for summary judgment dismissing Plaintiff's Labor Law § 240(1) claim is denied, and its motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim is denied as academic (*Perez v 1334 York, LLC*, 234 AD3d 455, 457 [1st Dept 2025]).

However, 166 Perry's motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims asserted against it is granted. 166 Perry did not control the means or methods of Plaintiff's work, and there is no evidence that it created the uncovered ditch. Nor is there evidence 166 Perry was present at the site at or around the time the dangerous

condition was created such that 166 Perry could be charged with notice (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 626 [1st Dept 2015]). The unrefuted evidence shows 166 Perry relied on TMG Construction to be present during construction and to ensure safety protocols were followed. 166 Perry's agents were rarely, if ever, on the Premises during the renovation.

166 Perry's motion for summary judgment dismissing Halstead's crossclaims is granted in part and denied in part. Halstead was granted summary judgment on its contractual indemnification crossclaim asserted against 166 Perry in Mot. Seq. 005, therefore the motion to dismiss the contractual indemnification crossclaim is denied. Because Halstead is entitled to contractual indemnification from 166 Perry, the motion to dismiss Halstead's common law indemnification crossclaim is denied as academic.

166 Perry failed to meet its prima facie burden of dismissing Halstead's crossclaim alleging breach of contract for failure to procure insurance. 166 Perry was contractually required to ensure that it, its contractors, and its subcontractors obtained insurance coverage naming Halstead as an additional insured, amongst other things (*see* NYSCEF Doc. 144 at ¶ 3[d]). However, in support of its motion, 166 Perry only submitted a certificate of insurance from TMG Construction (NYSCEF Doc. 145). A certificate of insurance may raise an issue of fact as to whether the requisite insurance was obtained to defeat summary judgment, but a certificate of insurance alone, without a copy of the applicable insurance policy, is insufficient to show conclusively the requisite coverage exists (*Ruisech v Structure Tone Inc.*, 208 AD3d 412, 417 [1st Dept 2022]; *Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]).

However, 166 Perry's motion to dismiss Halstead's contribution crossclaim is granted. Plaintiff's Complaint against Halstead has been dismissed. Moreover, Plaintiff's Labor Law § 200 and common law negligence claims against 166 Perry have been dismissed. 166 Perry is held liable

purely through vicarious liability under Labor Law § 240(1). Thus, there is no basis for Halstead to maintain a contribution claim against 166 Perry. 166 Perry's motion for summary judgment dismissing TMG Construction's crossclaim for contractual indemnification is dismissed without opposition. Likewise, as there is no evidence that 166 Perry was actively negligent, TMG Construction's crossclaims for contribution and common law indemnification asserted against 166 Perry are dismissed.

166 Perry's motion for summary judgment on its contractual indemnification claim against TMG Construction is granted. In § 9.15.1 of the contract entered between 166 Perry and TMG Construction (NYSCEF Doc. 136), TMG Construction agreed it would:

> "indemnify and hold harmless [166 Perry]…from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the [renovation project], provided that such claim, damage, loss or expense is attributable to bodily injury…but only to the extent caused by the negligent acts or omissions of [TMG Construction], a [s]ubcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

The indemnification clause was triggered because Plaintiff, employed by TMG Construction's subcontractor, was injured while working on the renovation because of TMG Construction's and/or Perfectaire's failure to provide him with adequate safety devices and a safe working environment. TMG Construction's argument that it does not have to indemnify 166 Perry because Plaintiff was the sole proximate cause of his accident is without merit. While TMG Construction argues Plaintiff's accident occurred due to Perfectaire's negligence, this is immaterial as TMG Construction agreed to indemnify 166 Perry for the acts and omissions of TMG Construction's subcontractors. TMG Construction's argument that Plaintiff's accident did not "arise out of" TMG Construction's work is unsupported, as it is undisputed Plaintiff was injured

during the renovation which TMG Construction was contracted to complete. Therefore, 166 Perry is granted summary judgment against TMG Construction on its contractual indemnification claim.

166 Perry's motion for summary judgment against TMG Construction on its breach of contract for failure to procure insurance claim is denied. A party moving for summary judgment for failure to procure insurance must show correspondence from the insurer of the party against whom summary judgment is sought indicating that the moving party was not named as an insured on any policies issued (*Dorset v 285 Madison Owner LLC*, 214 AD3d 402 [1st Dept 2023]). 166 Perry has not met its burden. It failed to annex any of the applicable insurance policies or communications from insurers declining coverage. There is only annexed a tender letter from 166 Perry to TMG Construction's insurer (NYSCEF Doc. 140).

D. TMG Construction's Motion (Mot. Seq. 007)

TMG Construction's motion for summary judgment dismissing Plaintiff's Complaint is denied. TMG Construction's reference to statements attributed to Plaintiff in medical records annexed to a motion to vacate a default judgment (motion sequence 003), which were not included or annexed to any of the four motions which are the subject of this Decision and Order, is improper. Moreover, the medical records are uncertified, and the statements attributed to Plaintiff are hearsay. TMG Construction's motion to dismiss Plaintiff's Labor Law § 240(1) claim is denied as Plaintiff was granted summary judgment on his Labor Law § 240(1) claim against TMG Construction. Because Plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim, TMG Construction's motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim is denied as academic (*Perez v 1334 York, LLC*, 234 AD3d 455, 457 [1st Dept 2025]).

TMG Construction's motion for summary judgment dismissing Plaintiff's common law negligence and Labor Law § 200 claims is denied. TMG Construction failed to eliminate issues of

fact as to notice of the uncovered ditch as TMG Construction's witness admitted that either a TMG Construction employee or an outside labor group that TMG Construction hired was present at the Premises every working day (NYSCEF Doc. 115 at 21-22). Nonetheless, TMG Construction failed to produce any records indicating when and how the Premises were inspected to prevent and to remediate unsafe conditions (*Jackson v Hunter Roberts Construction, L.L.C.*, 205 AD3d 542, 543-44 [1st Dept 2022]; *Pawlicki v 200 Park, L.P.*, 199 AD3d 578 [1st Dept 2021]). Moreover, whether the uncovered ditch was open and obvious is an issue of fact and is non-dispositive.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment (Mot. Seq. 004) against Defendants TMG Construction and 166 Perry Street on the issue of liability with respect to his Labor Law § 240(1) claim is granted; and it is further

ORDERED that Defendant Halstead's motion for summary judgment (Mot. Seq. 005) dismissing Plaintiff's Complaint and all crossclaims asserted against it, and for summary judgment on its contractual indemnification crossclaim asserted against Defendant 166 Perry is granted; and it is further

ORDERED that 166 Perry's motion for summary judgment (Mot. Seq. 006) dismissing Plaintiff's Complaint and all crossclaims asserted against it and seeking summary judgment on its contractual indemnification claim against TMG Construction, is granted to the extent that 166 Perry is granted summary judgment on its contractual indemnification claim asserted against TMG Construction, and Plaintiff's Labor Law § 200 and common law negligence claims asserted against 166 Perry, Halstead's contribution crossclaim asserted against 166 Perry, and TMG Construction's crossclaims asserted against 166 Perry are dismissed, and the remainder of 166 Perry's motion, which sought summary judgment seeking dismissal of Plaintiff's Labor Law §§ 240(1) and 241(6)

claims, Halstead's contractual indemnification, common law indemnification, and breach of contract to procure insurance claims, and summary judgment against TMG Construction for breach of contract for failure to procure insurance, is denied;[2] and it is further

ORDERED that TMG Construction's motion for summary judgment (Mot. Seq. 007) dismissing Plaintiff's Complaint is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/9/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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

[2] Dismissal of Plaintiff's Labor Law § 241(6) claim and Halstead's common law indemnification claim is denied as academic in lieu of Plaintiff's entitlement to summary judgment under Labor Law § 240(1) against 166 Perry and Halstead's entitlement to contractual indemnification from 166 Perry.