Kennedy v Pioneer Works Art Found.
2025 NY Slip Op 33380(U)
September 10, 2025
Supreme Court, New York County
Docket Number: Index No. 153919/2022
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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COLBERT A. KENNEDY,

Plaintiff,

- v -

PIONEER WORKS ART FOUNDATION, NY TEMPERING LLC,PIONEER & KING I LLC

Defendant.

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INDEX NO. 153919/2022

MOTION DATE 10/17/2024, 11/06/2024, 11/20/2024

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 86, 103, 106, 107, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 140, 141

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 104, 108, 109, 110, 111, 112, 113, 114, 142, 143

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 137, 138, 139

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Appearances:
Plaintiff: Kelner & Kelner (Gail S. Kelner, Esq.)
Defendants Pioneer Works Art Foundation and Pioneer & King I LLC: Smith Mazure PC (Jeffrey Pepe, Esq.)
Defendant NY Tempering LLC: Law Office of Eric D. Feldman (Michael Kozoriz, Esq.)

Upon the foregoing documents, and after oral argument, which took place on June 10, 2025, motion sequences 001 through 003 are consolidated for disposition and decided as follows:

A. Defendant NY Tempering LLC's ("NY Tempering") motion for summary judgment dismissing Plaintiff Colbert A. Kennedy's ("Plaintiff") Amended Complaint and all crossclaims asserted against it ("Mot. Seq. 001") is granted.

B. Plaintiff's motion for summary judgment on the issue of liability on his Labor Law §§ 240(1), 241(6), and 200 claims against Defendants Pioneer Works Art Foundation ("Pioneer Works") and Pioneer & King I LLC ("Pioneer & King") (collectively "Pioneer Defendants") ("Mot. Seq. 002") is granted in part and denied in part.

C. The Pioneer Defendants' motion for summary judgment dismissing Plaintiff's Amended Complaint and all cross claims asserted against it and seeking summary judgment on its common law indemnification crossclaim against NY Tempering ("Mot. Seq. 003") is granted in part and denied in part.

I. Background

On June 7, 2021, Plaintiff, an artist, was constructing an exhibit called "The Box" in the garden of 169 Pioneer Street, Brooklyn, New York (the "Premises") (NYSCEF Docs. 60 and 61 at 80; 82).[1] NY Tempering delivered glass required to construct "The Box" (NYSCEF Doc. 61 at 100). Using a forklift, Pioneer employees unloaded the glass onto an A-frame cart (NYSCEF Doc. 61 at 120-24). Plaintiff was providing support and guidance to Pioneer employees as the A-frame cart was moved (NYSCEF Doc. 61 at 136-138). Suddenly, the A-frame cart tipped over, and the cart and glass fell onto Plaintiff (NYSCEF Doc. 61 at 138). Plaintiff testified the cart tipped over because it was unstable due to the weight and size of glass placed on it (NYSCEF Doc. 61 at 139). Gabriel Florenz Mollin, a Pioneer employee who assisted moving the A-frame cart, expressed concerns about the safety of the cart and admitted the cart was top heavy due to the glass (NYSCEF

[1] "The Box" is a large, transparent box made of glass surrounded by a metal frame meant to reflect conditions of solitary confinement. It is a tribute to Kalief Browder, who, in 2010, was wrongfully imprisoned at the age of seventeen and incarcerated at Riker's Island where he was subjected to over 700 days in solitary confinement, alongside physical and mental abuse from correction officers and inmates. Tragically, Mr. Browder committed suicide in 2015 (*see* pioneerworks.org/exhibitions/coby-kennedy-kalief-browder-the-box (last accessed September 7, 2025).

Doc. 65 at 72-73). Mr. Mollin testified the glass was too big for the A-frame cart used, and a larger A-frame cart or a flat ground cart would have been safer (NYSCEF Doc. 65 at 92; 117-18).

Pioneer & King owns the Premises and Pioneer Works leases the Premises (NYSCEF Doc. 65 at 14). Pioneer Works contracted Plaintiff to construct "The Box" on the Premises (NYSCEF Doc. 62) and also contracted NY Tempering to deliver the glass (NYSCEF Docs. 63 and 65 at 40). Each of the parties moves for summary judgment. The motions are consolidated for disposition and decided as follows.

II. Discussion

A. NY Tempering's Motion (Mot. Seq. 001)

NY Tempering's motion for summary judgment is granted. NY Tempering, which was contracted by the Pioneer Defendants to deliver glass, is not a proper Labor Law Defendant. It is neither an owner, general contractor, or statutory agent for purposes of imposing liability under Labor Law §§ 240(1) and 241(6) (*see Villanueva v 80-81 & First Associates*, 141 AD3d 433, 434 [1st Dept 2016]; *Kennan v Simon Property Group, Inc.*, 106 AD3d 586, 589 [1st Dept 2013]). Nor is there evidence NY Tempering exercised supervision or control over the means and methods of Plaintiff's work (*Cappabianca v Skanska USA Bldg., Inc.,* 99 AD3d 139, 143-44 [1st Dept 2012]). The undisputed evidence establishes that once the glass was delivered, it was the Pioneer Defendants' responsibility to transport the glass within the Premises. Indeed, it is undisputed that the accident occurred more than fifteen minutes after NY Tempering's glass delivery was completed, and the Pioneer Defendants admit that it was their responsibility to transport the glass on the Premises once delivered (NYSCEF Doc. 107 at ¶ 8).

Even crediting Plaintiff's version of events that NY Tempering instructed the glass be unloaded onto an A-frame cart, this does not change the undisputed fact that transportation of the

glass once delivered was within the responsibility and control of the Pioneer Defendants, who could have moved the glass onto any device they deemed fit. Indeed, the Pioneer Defendants used their own forklift to remove the glass from NY Tempering's truck and onto the A-frame cart, despite Pioneer Defendants' own witnesses admitting the A-frame cart was inadequate. Thus, there is no basis to hold NY Tempering liable under Labor Law § 200 or based on common law negligence (*see Dibrino v Rockefeller Center North, Inc.*, 230 AD3d 127, 132-33 [1st Dept 2024] citing *Espinal v Melville Snow Contrs., Inc.,* 98 NY2d 136, 138 [2002]).

The Pioneer Defendants do not oppose dismissal of their crossclaims alleging contractual indemnification and breach of contract. Thus, these crossclaims are dismissed as abandoned. Because Plaintiff's direct claims are dismissed against NY Tempering, these is no basis for the Pioneer Defendants' crossclaims alleging contribution and common law indemnification – therefore these crossclaims are also dismissed.

B. Plaintiff's Motion (Mot. Seq. 002)

Plaintiff's motion for summary judgment on the issue of liability with respect to his Labor Law §§ 240(1), 241(6), and 200 and common law negligence claims against the Pioneer Defendants is granted in part and denied in part. Plaintiff's motion is granted with respect to his Labor Law § 240(1) claim. The Court is mindful of the Court of Appeals instruction to interpret Labor Law §240(1) liberally to accomplish its purpose of ensuring workers are properly protected against elevation related hazards (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). For purposes of Labor Law § 240(1), a "structure" means "a production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Dos Santos v Consolidated Edison of New York, Inc.*, 104 AD3d 606, 608 [1st Dept 2013] quoting *Smith v Shell Oil Co.*, 85 NY2d 1000, 1001-002 [1995]).

Given the language of Labor Law § 240(1) and keeping the Court of Appeals' instruction to construe § 240(1) liberally, the Court finds Plaintiff met his *prima facie* burden of establishing his work of constructing "The Box" was protected by Labor Law § 240(1). Specifically, the multi-day project of constructing a large glass and metal structure in the Premises' garden, which involved multiple workers welding a metal frame and installing large sheets of glass, constituted the erection of a structure within the meaning of Labor Law § 240(1) (*see, e.g. Perez v Beach Concerts, Inc.*, 154 AD3d 602, 602 [1st Dept 2017] [truss system constituted structure where it was comprised of several interlocking parts that required use of a forklift and several people to construct it] citing *Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 943 [telephone pole constituted structure]; *see also McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 14-17 [2d Dept 2012] [chupah made of interconnected pipes 10 feet long and 3 inches wide, secured to steel metal bases, requiring ladder and hand tools to assemble and disassemble, constituted structure]).

Moreover, there is no dispute that the Pioneer Defendants are proper Labor Law defendants, and it is undisputed that Plaintiff was injured when several glass sheets fell on him from a height after the A-frame cart he was using tipped over (*see also Nyanteh v. 590 Madison Avenue, LLC*, 238 AD3d 643, 643 [1st Dept 2025] [Labor Law § 240(1) violation established when heavy metal sheets on A-frame cart tipped over and fell onto plaintiff]). The undisputed testimony establishes the A-frame cart used was insufficient to secure properly the glass sheets. Thus, Plaintiff met his *prima facie* burden of establishing a Labor Law § 240(1) violation, and the burden now shifts to the Pioneer Defendants to raise a triable issue of fact.

In opposition, the Pioneer Defendants fail to raise a triable issue of fact. The Pioneer Defendants' argument that Plaintiff was not engaged in work covered by Labor Law § 240(1) has

already been rejected. The Pioneer Defendants' argument that Plaintiff's accident was not caused by an elevation related hazard is belied by the Pioneer Defendants' own statements that the A-frame cart was insufficient and caused 8-foot-high glass sheets to fall down on Plaintiff from a height (NYSCEF Docs. 84-85). This height differential, given the weight of the load which required securing, is sufficient to establish a Labor Law § 240(1) violation (*Nyanteh, supra*, *see also Touray v HFZ 11 Beach Street LLC*, 180 AD3d 507. 507 [1st Dept 2020]).

The Pioneer Defendants' argument that Plaintiff was the sole proximate cause of his accident is without merit. It is conceptually impossible for a plaintiff to be the sole proximate cause of his or her accident when the plaintiff establishes a Labor Law § 240(1) violation (*Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513, 513 [1st Dept 2025]). Moreover, the unrefuted testimony establishes Plaintiff argued against placing the glass sheets on the A-Frame cart, and that the glass sheets were placed on the A-Frame cart by Pioneer Defendants' employee's using a forklift.[2] The testimony that Plaintiff allegedly tried to turn the A-frame cart just before his injury amounts to at most comparative negligence, which is no bar to summary judgment under Labor Law § 240(1). Thus, there being no triable issues of fact, Plaintiff is entitled to summary judgment on the issue of liability on his Labor Law § 240(1) claim. Considering the foregoing, Plaintiff's motion for summary judgment on his Labor Law § 241(6) claim is denied as academic (*Pimentel v DE Frgt. LLC*, 205 AD3d 591, 593 [1st Dept 2022]).

Contrary to the Pioneer Defendants' argument, they did exercise sufficient control over the means and methods of Plaintiff's work to give rise to liability under Labor Law § 200. In particular, the Pioneer Defendants provided Plaintiff with the materials and tools to construct "The Box" and

[2] There is no testimony from any Pioneer Defendants' witness contradicting Plaintiff's testimony that the glass sheets were placed on the A-frame Cart at the decision of the Pioneer Defendants. The NY Tempering witness testified he could not remember any conversation he had with Plaintiff or the Pioneer Defendants on the date of the accident.

provided Plaintiff with other workers to assist in constructing "The Box". The Pioneer Defendants selected NY Tempering as the glass supplier and provided the A-frame cart. The Pioneer Defendants admitted the A-frame cart was not the correct equipment to use for the size of the glass (NYSCEF Doc. 85) yet continued to move the glass on the inadequate A-frame, rather than instructing everyone to stop until a safer device could be used (NYSCEF Doc. 81 at 98). Based on these undisputed facts, namely that the Pioneer Defendants exercised the requisite control and supervision over Plaintiff's work, and that they knew the A-frame cart was insufficient but continued to use it anyway, Plaintiff is entitled to summary judgment on his Labor Law § 200 claim and common law negligence claims (*see Hewitt v NY 70th Street LLC*, 187 AD3d 574 [1st Dept 2020]).

C. The Pioneer Defendants' Motion (Mot. Seq. 003)

As Plaintiff is granted summary judgment against the Pioneer Defendants on the issue of liability with respect to his Labor Law §§ 240(1), 200, and common law negligence claims, the Pioneer Defendants' motion for summary judgment dismissing these claims is denied. Pioneer Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim is denied as academic. Because Pioneer Defendants are liable to Plaintiff for common law negligence and a violation of Labor Law § 200, they are not entitled to summary judgment on their common law indemnification claim against NY Tempering (*see Attia v Slazer Enterprises, LLC*, 215 AD3d 413, 414 [1st Dept 2023]).

The Pioneer Defendants are entitled to summary judgment dismissing NY Tempering's cross claims for contractual indemnification and breach of contract for failure to procure insurance as there is no evidence of any contractual agreement where the Pioneer Defendants agreed to indemnify and procure insurance on behalf of NY Tempering. Moreover, NY Tempering's

crossclaims for common law indemnification and contribution are dismissed as academic as Plaintiff's direct claims have been dismissed against NY Tempering in motion sequence 001.

Accordingly, it is hereby,

ORDERED that NY Tempering's motion for summary judgment is granted, and Plaintiff's Amended Complaint and all crossclaims asserted against it are hereby dismissed; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of liability with respect to his Labor Law §§ 240(1), 200, and common law negligence claims against Defendants Pioneer Works Art Foundation and Pioneer & King I LLC is granted, and the branch of the motion which sought summary judgment on his Labor Law § 241(6) claims is denied as academic; and it is further

ORDERED that the Pioneer Defendants' motion for summary judgment dismissing Plaintiff's Amended Complaint is denied, but the branch of the Pioneer Defendants' motion for summary judgment dismissing NY Tempering's crossclaims asserted against them is granted; 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.

9/10/2025
DATE

Mary V Rosado J.S.C.
HON. MARY V. ROSADO, J.S.C.

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