

Garces v Barr & Barr, Inc.

2025 NY Slip Op 33383(U)

September 10, 2025

Supreme Court, New York County

Docket Number: Index No. 158885/2020

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

ANDEL GARCES, Plaintiff, - v - BARR & BARR, INC., BLUESTEEL GROUP USA INC., GENETECH BUILDING SYSTEMS INC., Defendant. INDEX NO. 158885/2020 MOTION DATE 10/17/2024, 10/25/2024, 10/17/2024, 10/18/2024, 10/25/2024 MOTION SEQ. NO. 005 006 007 008 009

DECISION + ORDER ON MOTION

BARR & BARR, INC. Plaintiff, -against- JPR MECHANICAL, INC. Defendant. Third-Party Index No. 595958/2021

The following e-filed documents, listed by NYSCEF document number (Motion 005) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 239, 244, 297, 298, 299, 300, 301, 302

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 235, 236, 237, 238, 243, 248, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 285, 286, 287, 325

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 240, 245, 282, 283, 290, 291, 326

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 241, 246, 249, 250, 251, 252, 253, 254, 255, 256, 257, 284, 288, 289, 303, 304, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 009) 229, 230, 231, 232, 233, 234, 242, 247, 273, 274, 275, 276, 277, 278, 279, 280, 281, 292, 293, 294, 295, 296, 305, 306, 309, 310, 321, 322, 323, 324

were read on this motion to/for

JUDGMENT - SUMMARY

Appearances:

Plaintiff: Zaremba Brown PLLC (Mark Mascolo, Esq.)

Defendant/Third-Party Plaintiff Barr & Barr, Inc.: Maroney O'Connor LLP (Demetrios M. Stratis, Esq.)

Defendant BlueSteel Group USA Inc.: Lester Schwab Katz & Dwyer, LLP (John Sandercock, Esq.)

Defendant Genetech Building Systems Inc.: Black Marjeh & Sanford LLP (Mark E. Jordan-Poinsette, Esq.)

Third-Party Defendant JPR Mechanical, Inc.: Barry McTiernan & Moore LLC (Edoardo Maffia, Esq.)

Upon the foregoing documents, and after oral argument which took place on June 10, 2025, motion sequence 005 through 009 are consolidated for disposition and decided as follows:

- A. Plaintiff Andel Garces' motion for summary judgment ("Mot. Seq. 005") on the issue of liability with respect to his Labor Law §§ 241(6) and 200, and his common law negligence claims against Defendants Barr & Barr, Inc. ("Barr & Barr"), Bluesteel Group USA Inc. ("Bluesteel") and Genetech Building Systems Inc. ("Genetech") (collectively "Defendants") is denied.
- B. Defendant Bluesteel's motion for summary judgment ("Mot. Seq. 006") dismissing Plaintiff's Complaint and all crossclaims asserted against it, and seeking contractual indemnification against Genetech is granted in part and denied in part.
- C. Third-Party Defendant JPR Mechanical, Inc.'s ("JPR Mechanical") motion for summary judgment ("Mot. Seq. 007") dismissing Barr & Barr's Third-Party Complaint is granted.
- D. Barr & Barr's motion for summary judgment ("Mot. Seq. 008") dismissing Plaintiff's Complaint and all crossclaims asserted against it, and seeking summary judgment on their claims for contractual indemnification and breach of contract for failure to procure

insurance claims against Bluesteel, Genetech, and JPR Mechanical, and seeking an order granting Barr & Barr common-law indemnity and/or common law contribution is granted in part and denied in part.

E. Genetech's motion for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it is granted in part and denied in part.

I. Background

On July 18, 2019 JPR Mechanical employed Plaintiff as an assistant at a construction project at 34 North Loop Road, Roosevelt Island, New York (the "Premises") (NYSCEF Doc. 179 at 24-26; 113). Plaintiff went to JPR Mechanical's shanty to retrieve hardware and plans (NYSCEF Doc. 179 at 55-56). After Plaintiff exited the shanty, he tripped over a curtain wall brace and fell (NYSCEF Doc. 179 at 58). The accident was reported to Barr & Barr, the construction manager at the Premises (NYSCEF Doc. 181 at 76-77). BlueSteel was contracted to complete the façade of the Premises, and BlueSteel subcontracted its work to Genetech (NYSCEF Doc. 181 at 48-49). The brace which injured Plaintiff was used for façade work (NYSCEF Doc. 179 at 71-72; NYSCEF Doc. 181 at 77-78).

According to BlueSteel's witness, Genetech was responsible for the curtain wall brace, and Genetech moved it around the Premises using a forklift (NYSCEF Doc. 183 at 30-31). Genetech's witness, Michael Tedesco, did not know how the curtain wall brace ended up in the area where Plaintiff was injured (NYSCEF Doc. 184 at 61). Mr. Tedesco also testified that Barr & Barr used Genetech's lull¹ to move heavy equipment without Genetech's permission (NYSCEF Doc. 184 at 72-73). According to William Connors, JPR Mechanical's witness, the curtain wall brace had been in the way of JPR Mechanical's shanty all day (NYSCEF Doc. 185 at 40-41). In motion sequences

¹ A lull is a four-wheeled piece of heavy machinery, similar to an excavator, with a large mechanical arm that can be used to lift heavy equipment, such as the curtain wall brace at issue.

005 through 009, each party moves for summary judgment. The motions are consolidated for disposition and decided as set follows.

II. Discussion

A. Plaintiff's Motion (Mot. Seq. 005)

Plaintiff's motion for summary judgment on the issue of liability with respect to his Labor Law §§ 241(6) and 200, and common law negligence causes of action against Defendants Barr & Barr, Bluesteel, and Genetech is denied.

Labor Law § 241(6) imposes a non-delegable duty upon an owner and general contractor to “respond in damages” if a worker engaged in construction is injured due to inadequate safety and protection, even if the worker sustains an injury because of another party's negligence (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 350 [1998]). A general contractor is not absolved of liability for lack of notice or for lack of an opportunity to cure the dangerous condition (*Gallina v MTA Capital Construction Company*, 193 AD3d 414 [1st Dept 2021]). Although Barr & Barr's witness testified it served as a “construction manager” at the site, in opposition to the motion Barr & Barr does not dispute that it served as the functional equivalent of a general contractor making it a proper Labor Law § 241(6) defendant.

However, as subcontractors, Bluesteel and Genetech may be held liable under Labor Law § 241(6) only if they “had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor's statutory agent” (*see Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 192-93 [1st Dept 2011]). Viewing the facts in the light most favorable to Bluesteel and given issues of fact raised by the deposition testimony submitted by Plaintiff, the Court cannot rule as a matter of law and fact that Bluesteel exercised supervision and control over the storage and placement of the curtain wall

brace to give rise to liability under Labor Law § 241(6). Indeed, in the contract between Bluesteel and Genetech, Bluesteel is referred to solely as a fabricator, while Genetech, as the installer was “responsible for the storage, safety, transport, protection and installation” of the materials and tools used to complete the work (NYSCEF Doc. 191 at ¶ 1[b]). According to Bluesteel’s witness, Genetech was responsible for storing and moving the curtain wall brace (NYSCEF Doc. 183 at 30-31; 35). He further testified that it was between Genetech and Barr & Barr to decide where to store tools and equipment (NYSCEF Doc. 183 at 36). Thus, there are issues of fact as to whether Bluesteel exercised the requisite control over the placement of the curtain wall brace to make it a proper Labor Law § 241(6) defendant.

As to Genetech, there is no dispute that it had the authority to decide where and how to store its tools and equipment, as Genetech independently requested a shanty from Barr & Barr (NYSCEF Doc. 184 at 42). Genetech would stage materials closest to the area where they were to complete work (*id.* at 51; 62), and Genetech made the decision to store their equipment to the side of the building (*id.* at 61; 67). Thus, for purposes of Labor Law § 241(6) liability, Genetech exercised sufficient supervision and control over the allegedly injury producing work to be considered a statutory agent of the owner and general contractor (*see, e.g. Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 476 [1st Dept 2020]).

Plaintiff’s motion for summary judgment on the issue of liability with respect to his Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(1) is denied. This provision is limited to tripping hazards in passageways, which the First Department has described as “a typically long narrow way connecting parts of a building” or “an interior or internal way of passage inside a building” (*see Quigley v Port Authority of New York*, 168 AD3d 65, 67 [1st Dept 2018]). Here, there is no dispute that Plaintiff fell outside in an open courtyard, which is not a

passageway within the meaning of Industrial Code § 23-1.7(e)(1) (*cf. Zyskowski v Chelsea-Warran Corp.*, 238 AD3d 498, 500 [1st Dept 2025]). Moreover, in an analogous case, the First Department held there is an issue of fact as to whether the area between an interior workspace and an outdoors material storage location constitutes a “working area” within the meaning of Industrial Code § 23-1.7(e)(2) (*see Smith v Hines GS Properties, Inc.*, 29 AD3d 433 [1st Dept 2006]; citing *Muscarella v Herbert Const. Co., Inc.*, 265 AD2d 264 [1st Dept 1999]).

While Plaintiff moves for summary judgment pursuant to Labor Law § 241(6) predicated on a violation of Industrial Code § 23-2.1(a)(1), this provision is inapplicable because it requires building materials to be stored in a safe and orderly manner. However, Plaintiff’s accident was not caused by building materials, but due to an allegedly improperly stored tool – namely the curtain wall brace. Likewise, Industrial Code § 23-3.3(k)(1)(ii) is inapplicable for that provision covers demolition activities, while in this case there was no ongoing demolition related to Plaintiff’s injury. Therefore, Plaintiff’s motion for summary judgment on his Labor Law § 241(6) claim is denied. Plaintiff’s motion for summary judgment on his Labor Law § 200 and common law negligence claims is also denied. Assuming the placement of the curtain wall brace constituted a dangerous condition, Plaintiff failed to meet his heavy burden on summary judgment that any of the Defendants had actual or constructive notice of the danger posed by the curtain wall brace and had sufficient time to ameliorate the allegedly dangerous condition (*see, e.g. DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 626 [1st Dept 2015]).

Plaintiff’s argument that any affirmative defense that alleges comparative fault should be dismissed is without merit. Comparative negligence is a defense to damages under Labor Law § 241(6) and 200, and Plaintiff admitted he was injured after walking into a large curtain wall

brace that was “hard to miss.” Thus, Plaintiff’s own negligence in failing to look where he was walking remains a viable defense at trial.

B. BlueSteel’s Motion (Mot. Seq. 006)

BlueSteel’s motion for summary judgment dismissing Plaintiff’s Amended Complaint and all crossclaims asserted against it, and for contractual indemnification against Genetech, is granted in part and denied in part. Plaintiff does not oppose dismissal of his Labor Law § 240(1) claim, therefore, this claim is dismissed as abandoned. Genetech does not oppose dismissal of its crossclaims asserted against Bluesteel, therefore these crossclaims are dismissed as abandoned.

There is no dispute that Plaintiff’s fall in the open courtyard while walking from his shanty to the interior of the Premises did not constitute a fall within a passageway pursuant to Industrial Code § 23-1.7(e)(1), therefore the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(1) is dismissed (*see Quigley v Port Authority of New York*, 168 AD3d 65, 67 [1st Dept 2018]; *see also Smith v Hines GS Properties, Inc.*, 29 AD3d 433, 433 [1st Dept 2006]) However, there remain issues of fact as to whether Plaintiff fell in a “working area” pursuant to Industrial Code § 23-1.7(e)(2) (*see Gallina v MTA Capital Construction Co.*, 193 AD3d 414 [1st Dept 2021]; *Smith, supra* at 433-434).

The Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a)(1) is dismissed because that statute requires building materials to be stored in a safe and orderly manner, while Plaintiff’s accident was not caused by building materials, but due to a tool – namely the curtain wall brace. Likewise, Industrial Code § 23-3.3(k)(1)(ii) is inapplicable for that provision covers demolition activities, while in this case there was no ongoing demolition related to Plaintiff’s injury. Plaintiff has not opposed dismissal of his Labor Law § 241(6) claims predicated on any other alleged violations of the Industrial Code; therefore, those claims are all

dismissed as abandoned. Thus, Plaintiff's Labor Law § 241(6) claim is dismissed in its entirety except for the portion predicated on a violation of Industrial Code § 23-1.7(e)(2).

Issues of fact preclude dismissal of the Labor Law § 200 and common law negligence claims against BlueSteel. The record is unclear over who owned the curtain wall brace at the time of Plaintiff's injury, who had control over where it was placed, and who had notice of where it was left at the construction site. Therefore, depending on the evidence presented at trial, a jury may find BlueSteel created and/or had notice of an allegedly dangerous condition created by the placement of the curtain wall brace.

Because there remain open questions as to BlueSteel's own negligence, summary judgment dismissing Barr & Barr's contractual indemnification, contribution, and common law indemnification crossclaims is denied. Likewise, BlueSteel failed to meet its burden on summary judgment of proving it procured the requisite insurance (*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]). BlueSteel has failed to even produce a certificate of insurance, let alone an applicable insurance policy showing the requisite coverage was obtained. Likewise, as there has not been any active finding of negligence against Genetech, summary judgment on BlueSteel's contractual indemnification crossclaim against Genetech is premature. "An indemnification clause does not apply to the mere assertion of claims" (*Healy v 169 E. 69th Street Corp.*, 189 AD3d 680, 681 [1st Dept 2020] quoting *JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 575-76 [1st Dept 2012]). Therefore, the cross motion is denied, without prejudice, with leave to renew upon a finding of negligence against Genetech (*see also Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447, 448 [1st Dept 2008]).

C. JPR Mechanical's Motion (Mot. Seq. 007)

JPR Mechanical's motion for summary judgment dismissing Barr & Barr's Third Party Complaint is granted. There is no evidence that JPR Mechanical was in any way negligent, as JPR Mechanical had no responsibility for the placement of other trade's equipment, nor did JPR Mechanical have any control over where its shanty was placed. Indeed, Plaintiff does not even oppose dismissal of JPR Mechanical from the case. The only party to oppose JPR Mechanical's motion is Barr & Barr, yet this party fails to point to any evidence of JPR Mechanical's involvement in the accident other than it employed Plaintiff on the site and asked him to go to the shanty – but this alone is insufficient to impose any liability on JPR Mechanical. Thus, as there is no evidence that JPR Mechanical was negligent, there is no basis for the contribution or common law indemnification claims asserted against it. Nor is there any negligence for which JPR Mechanical must indemnify Barr & Barr, nor is there any event which would trigger JPR Mechanical's duty to insure Barr & Barr. Therefore, JPR Mechanical's motion is granted.

D. Barr & Barr's Motion (Mot. Seq. 008)

Barr & Barr's motion for summary judgment is granted in part and denied in part. Barr & Barr's motion for summary judgment dismissing Plaintiff's Labor Law § 240(1) claim is granted without opposition. Moreover, for the same reasons stated in Mot. Seq. 006, Barr & Barr's motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claims is granted except as to Plaintiff's Labor Law § 241(6) predicated on an alleged violation of Industrial Code § 23-1.7(e)(2). Moreover, for the reasons stated in Mot. Seq. 005 and 006, issues of fact surrounding notice, supervision, and control preclude summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims asserted against Barr & Barr.²

² Although Barr & Barr moved for dismissal of all crossclaims asserted against it, it made no arguments in its motion papers in support of that relief. Therefore, to the extent this language was not included as boilerplate in a notice of

For the reasons stated in Mot. Seq. 007, Barr & Barr's motion for summary judgment on its third-party claims against JPR Mechanical is denied as the third-party complaint asserted against JPR Mechanical has been dismissed. Barr & Barr's motion for summary judgment on its contractual indemnification claim against BlueSteel and Genetech is denied, without prejudice, as premature, as there has not yet been any finding of negligence against BlueSteel. Barr & Barr's motion for summary judgment on its claims for breach of contract for failure to procure insurance against Genetech and BlueSteel 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]). Barr & Barr has not met its burden. It failed to annex any of the applicable insurance policies or communications from insurers declining coverage.

E. Genetech's Motion (Mot. Seq. 009)

Genetech's motion for summary judgment is granted in part and denied in part. Plaintiff's Labor Law § 240(1) claim is granted without opposition. Moreover, for the same reasons stated in Mot. Seqs. 006 & 008, Genetech's motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claims is granted except as to Plaintiff's Labor Law § 241(6) predicated on an alleged violation of Industrial Code § 23-1.7(e)(2). Moreover, for the reasons stated in Mot. Seqs. 005, 006, & 008, issues of fact surrounding notice, supervision, and control preclude summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims asserted against Genetech. Genetech's motion to dismiss JPR Mechanical's crossclaim for contribution is

motion, dismissal of all crossclaims asserted against Barr & Barr is denied for failure to meet its heavy burden on summary judgment.

granted JPR Mechanical has been dismissed from this case in Mot. Seq. 007, thus there is no basis for any contribution claim asserted by JPR Mechanical.

Genetech's motion to dismiss BlueSteel and Barr & Barr's crossclaims is denied. As there remain open questions as to Genetech's negligence, BlueSteel and Barr & Barr maintain viable contribution, contractual indemnification, and common law indemnification crossclaims against Genetech. Moreover, Genetech failed to produce any evidence showing it obtained the requisite insurance to sustain its burden on summary judgment dismissing BlueSteel and Barr & Barr's crossclaims for breach of contract for failure to procure insurance.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety and Plaintiff's Labor Law §§ 240(1) claims and 241(6) claims are dismissed, except for Plaintiff's Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-1.7(e)(2); and it is further

ORDERED that BlueSteel's motion for summary judgment is granted to the extent that Plaintiff's claims for Labor Law §§ 240(1) and 241(6) claims are dismissed as described in the preceding paragraph and Genetech's crossclaims asserted against BlueSteel are dismissed as abandoned, and the remainder of BlueSteel's motion is denied; and it is further

ORDERED that JPR Mechanical's motion for summary judgment is granted in its entirety, and the third-party complaint and all crossclaims asserted against JPR Mechanical are hereby dismissed; and it is further

ORDERED that Barr & Barr's motion for summary judgment is granted to the extent that Plaintiff's claims for Labor Law §§ 240(1) and 241(6) claims are dismissed as described in the preceding paragraphs, and the remainder of Barr & Barr's motion is denied; and it is further

ORDERED that Genetech’s motion for summary judgment is granted to the extent that that Plaintiff’s claims for Labor Law §§ 240(1) and 241(6) claims are dismissed as described in the preceding paragraphs³, and the remainder of Genetech’s motion is denied; and it is further

ORDERED that within ten days of entry, counsel for JPR Mechanical 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 JDC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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

³ For the sake of clarity, Plaintiff maintains a viable Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-1.7(e)(2) against Genetech, Barr & Barr, and BlueSteel.