

**Firstenberg v La Rochelle 751 LLC**

2025 NY Slip Op 33537(U)

September 22, 2025

Supreme Court, New York County

Docket Number: Index No. 157809/2020

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*

-----X

WARREN FIRSTENBERG,  
  
Plaintiff,

- v -

LA ROCHELLE 75 I LLC, PRESERV BUILDING  
RESTORATION MANAGEMENT INCORPORATED, POFI  
CONSTRUCTION CORP.,  
  
Defendant.

INDEX NO. 157809/2020

MOTION DATE 04/15/2025,  
04/15/2025,  
04/18/2025

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON MOTION**

PRESERV BUILDING RESTORATION MANAGEMENT  
INCORPORATED

Plaintiff,

-against-

POFI CONSTRUCTION CORP.

Defendant.

-----X

Third-Party  
Index No. 595105/2022

POFI CONSTRUCTION CORP.

Plaintiff,

-against-

A&B BUILDING SERVICES GROUP INC.

Defendant.

-----X

PRESERV BUILDING RESTORATION MANAGEMENT  
INCORPORATED

Plaintiff,

-against-

A&B BUILDING SERVICES GROUP INC.

Defendant

-----X

Second Third-Party  
Index No. 5953842023

Third Third-Party  
Index No. 595733/2023

The following e-filed documents, listed by NYSCEF document number (Motion 002) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 173, 176, 177, 178, 179, 193, 198, 199, 202, 203, 205

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 175, 184, 185, 186, 187, 188, 189, 190, 191, 195, 196, 197, 200, 201

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 180, 181, 182, 183, 192, 194, 204

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

Upon the foregoing documents, motion sequences 002 through 004 are consolidated for disposition and decided as follows:

- A. Defendant La Rochelle 75 I LLC's ("La Rochelle") motion (Mot. Seq. 002) for summary judgment dismissing Plaintiff Warren Firstenberg's ("Plaintiff") common law negligence claim and all crossclaims asserted against it and seeking summary judgment on its contractual and common law indemnification and contribution claims against Defendant/Third-Party Plaintiff/Third Third-Party Plaintiff Preserv Building Restoration Management Incorporated ("Preserv") is granted in part and denied in part.
- B. Defendant/Third-Party Defendant/Second-Third-Party Plaintiff Pofi Construction Company's ("Pofi") motion (Mot. Seq. 003) for summary judgment dismissing Plaintiff's Labor Law §§ 241(6) and 200, and common law negligence claims, and all crossclaims asserted against it is granted in part and denied in part.
- C. Preserv's motion for summary judgment dismissing Plaintiff's Complaint and all crossclaims asserted against it, and seeking summary judgment on its Third-Party Complaint asserted against Pofi and on its common law indemnification crossclaim asserted against La Rochelle is granted in part and denied in part. Plaintiff's cross motion

for spoliation sanctions against Preserv is denied without prejudice with leave to renew at the time of trial.<sup>1</sup>

### **I. Background**

On January 28, 2019, Plaintiff allegedly tripped and fell on a five-to-six-foot plank of wood on the sidewalk near 57 West 75<sup>th</sup> Street, New York, New York (the “Premises”) (NYSCEF Doc. 145 at 27-29; 43; 44). The plank of wood was allegedly “overflowing” from a nearby construction debris dumpster (NYSCEF Doc. 145 at 45-46). La Rochelle owns the Premises and cleans the sidewalk twice a day (NYSCEF Doc. 146 at 11; 29-30; 56). Preserv was the general contractor overseeing construction work on the Premises’ façade (NYSCEF Doc. 146 at 52; 60; *see also* NYSCEF Doc. 147 at 17). Pofi was a subcontractor that installed and removed suspended scaffolding and performed masonry restoration (NYSCEF Doc. 147 at 38). Pofi subcontracted its work to Third-Party Defendant/Second Third-Party Defendant A&B Building Services Inc. (“A&B Building”) (NYSCEF Doc. 148 at 15-17).<sup>2</sup>

According to Preserv, Pofi was responsible for daily maintenance and clean up (NYSCEF Doc. 147 at 44). But Pofi testified they subcontracted their responsibilities to A&B Building, and none of their employees worked at the Premises, even in a supervisory role (NYSCEF Doc. 148 at 90-91). La Rochelle’s witness admitted there was construction debris being thrown into a dumpster, including bricks, concrete, and wood, but he never saw the dumpster overflow, nor did he ever see wood fall onto the sidewalk (NYSCEF Doc. 146 at 50-51). La Rochelle, Preserv, and Pofi each move for summary judgment, while Plaintiff cross moves for spoliation sanctions against Preserv. The motions and cross motion are decided as follows.

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<sup>1</sup> Mot. Seqs. 002-004 were marked fully submitted on June 23, 2025.

<sup>2</sup> A&B Building has never appeared in this action.

## II. Discussion

### A. La Rochelle's Motion (Mot. Seq. 002)

La Rochelle's motion is granted in part and denied in part. La Rochelle's motion for summary judgment dismissing Plaintiff's common law negligence claim is denied. Although Defendant claims there is no evidence that a wooden plank existed aside from Plaintiff's testimony, they have failed to contradict definitively Plaintiff's sworn testimony, creating a credibility issue for the jury to resolve (*Narvaez v River View Redevelopment Co., LP*, 146 AD3d 722 [1st Dept 2017]). La Rochelle's argument that it did not breach a duty to Plaintiff is without merit – if a jury finds that a wooden plank on the sidewalk in front of La Rochelle's building caused Plaintiff to fall, a jury could likewise find La Rochelle breached its duty to ensure the sidewalks abutting the Premises were in a reasonably safe condition (*see* New York City Administrative Code § 7-210). Likewise, La Rochelle has failed to eliminate issues of fact surrounding notice as there is no testimony as to the last time La Rochelle inspected the sidewalk or for how long the wooden plank remained on the sidewalk (*Henriquez v Appula Mgt. Corp.*, 234 AD3d 592, 593 [1st Dept 2025]).

La Rochelle's argument that the wooden plank was open and obvious is undercut by its own argument that it didn't have notice of the wooden plank and is non-dispositive, as although it may show Plaintiff's comparative negligence, it does not negate La Rochelle's obligation to maintain the Premises in a reasonably safe condition (*Francis v 107-145 West 135<sup>th</sup> Street Associates, Ltd. Partnership*, 70 AD3d 599, 600 [1st Dept 2010]).

Therefore, La Rochelle's motion for summary judgment dismissing Plaintiff's negligence claim is denied. Because issues of fact remain as to La Rochelle's negligence it is not entitled to summary judgment on its claims for indemnification (*York v Tappan Zee Constructors, LLC*, 224 AD3d 527, 529 [1st Dept 2024]; *Bradley v NYU Langone Hospitals*, 223 AD3d 509, 511-512 [1st

Dept 2024]). Moreover, as La Rochelle's negligence remains an issue of fact, dismissal of Preserv and Pofi's contribution crossclaims is denied.

La Rochelle's motion for summary judgment on its claims for breach of contract for failure to procure insurance against Preserv 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]). La Rochelle has not met its burden. It failed to annex any of the applicable insurance policies or communications from insurers declining coverage.

La Rochelle's motion dismissing Pofi's contractual indemnification and breach of contract for failure to procure insurance crossclaims asserted against it is granted, as there is no contract between La Rochelle and Pofi. Likewise, Pofi and Preserve do not have a valid common law indemnification crossclaims against La Rochelle as there is no claim of vicarious liability based on La Rochelle's negligence asserted against Pofi or Preserve. The contract between Preserv and La Rochelle contains an indemnification clause, but indemnification only runs in favor of La Rochelle, therefore Preserv's contractual indemnification claim asserted against La Rochelle is dismissed. Thus, La Rochelle's motion for summary judgment is granted solely to the extent that Preserv and Pofi's crossclaims for contractual and common law indemnification, and breach of contract for failure to procure insurance, are dismissed.<sup>3</sup>

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<sup>3</sup> Although Preserv filed opposition late, the arguments made in opposition were similar to the arguments Preserv raised on its own motion for summary judgment which was filed before Preserv's opposition was due. Because La Rochelle was privy to Preserv's arguments by virtue of Preserv's own motion for summary judgment, La Rochelle cannot claim any serious prejudice from Preserv's late opposition. Therefore, in the interest of resolving this matter on the merits, the Court considers Preserv's late opposition.

### B. Pofi's Motion (Mot. Seq. 003)

Pofi's motion for summary judgment is granted in part and denied in part. As a preliminary matter, Plaintiff, a pedestrian who was wholly unrelated to the Premises or ongoing construction, is not entitled to the protection of Labor Law § 241(6), therefore this claim is dismissed. For the same reason, Plaintiff's Labor Law § 200 claim, which protects employees on construction sites, is dismissed (*see generally Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-77 [1990]; *Spadola v 260/61 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005]; *Morales v 569 Myrtle Ave., LLC*, 17 AD3d 418, 420 [2d Dept 2005]). Nor is Plaintiff's theory of *re ipsa loquitur* applicable as Pofi did not exercise exclusive control over the dumpster.

Although Pofi is correct it did not owe Plaintiff a duty to maintain the sidewalk under New York City Administrative Code § 7-210, Pofi did agree in its contract with Preserv to "protect...the public from possible injury due to the various processes required to accomplish" its work by "provid[ing] all necessary temporary enclosures, covers, guard rails, barricades, safety devices, and all other precautions" (NYSCEF Doc. 165 at ¶ 4). This is buttressed by Preserv's witness' testimony, which claims Pofi was responsible for daily maintenance and clean up (NYSCEF Doc. 147 at 44). Perserv's witness likewise testified Pofi was responsible for monitoring the dumpster and informing Preserv when the dumpster began to overflow (NYSCEF Doc. 147 at 60-61). Given this evidence, there remain issues of fact as to whether Pofi "fail[ed] to exercise reasonable care in the performance of its duties" and "launch[ed] a force or instrument of harm" – namely a large wooden plank from the building or dumpster onto the sidewalk (*see, e.g. Menkin v AAA Superior Pest Control, LLC*, 99 AD3d 571, 572 [1st Dept 2012]; *see also Lopez v New York Life Ins. Co.*, 90 AD3d 446, 447 [1st Dept 2011]).

Because there are issues of fact as to Pofi's negligence, summary judgment dismissing La Rochelle and Preserv's contribution, common law indemnification, and contractual indemnification claims against Pofi is denied. Nor has Pofi demonstrated it procured the requisite insurance to be entitled to summary judgment dismissing the breach of contract for failure to procure insurance claims asserted against it.

### **C. Preserv's Motion and Plaintiff's Cross Motion (Mot. Seq. 004)**

Perserv's motion for summary judgment is granted in part and denied in part.<sup>4</sup> For the reasons stated in Mot. Seq. 003, Plaintiff's Labor Law §§ 241(6) and 200 claims, to the extent they are asserted against Preserv, are dismissed. However, for the same reason Pofi was denied summary judgment dismissing Plaintiff's common law negligence claim, so too is Preserv denied summary judgment dismissing this claim. Preserv promised in its contract with La Rochelle that it would "keep the site orderly and reasonably free of debris" yet, as claimed by Plaintiff, a large wooden plank was allowed to accumulate on the sidewalk abutting the Premises and cause a trip hazard. There is an issue of fact as to whether Preserv allowed the dumpster to overflow with debris, causing the wooden plank to obstruct the sidewalk and cause Plaintiff's injury. Nor has Preserv eliminated issues surrounding notice, as there is no record of when Preserv last visited or inspected the site prior to Plaintiff's injury. These issues require denying Preserv's motion for summary judgment dismissing Plaintiff's common law negligence claim.

As there are issues of fact as to all Defendants' negligence, including Preserv's, the motion for summary judgment on Preserv's contractual indemnification claim against Pofi is denied as premature, with leave to renew upon a finding of negligence against Pofi. For the same reasons, the motion for summary judgment on the common law indemnification claims asserted against

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<sup>4</sup> Preserv's motion was filed one day past the 120-day deadline to file motions for summary judgment. Given the *de minimis* delay, the Court considers the motion.

Pofi and La Rochelle are denied (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581, 585 [1st Dept 2021]). Likewise, issues of fact as to the parties' negligence precludes dismissal of La Rochelle's contractual indemnification claims asserted against Preserv.

Preserv is not entitled to summary judgment dismissing La Rochelle's claims for breach of contract for failure to procure insurance. All that is submitted in support of dismissal of this claim is a certificate of insurance. 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, Preserv is entitled to summary judgment dismissing Pofi's crossclaims for contractual indemnification, breach of contract for failure to procure insurance, and common law indemnification. There is no agreement between Preserve and Pofi wherein Preserv agreed to indemnify and procure insurance on Pofi's behalf. Rather, the indemnification clause in Preserv and Pofi's contract runs in Preserv's favor. Likewise, the allegations do not give rise to any cause of action which seeks to hold Pofi vicariously liable for Preserv's negligence, making the common law indemnification claim inapplicable.

Plaintiff's cross motion for spoliation sanctions against Preserv for failure to maintain its daily logbook is denied, without prejudice, with leave to renew at the time of trial. "[C]ourts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence" including "employing an adverse inference instruction at the trial" (*AIG Property Casualty Company v MTS Power Systems*, 231 AD3d 591, 592 [1st Dept 2024] quoting *Pegasus Aviation I, Inc. v Varig Lostica S.A.*, 26 NY3d 543, 551 [2015]). "A motion court may, in its

discretion, defer to a trial court a determination of ‘whether or what sanction to impose’” (*AIG Property, supra* quoting *Butler v New York City Tr. Auth.*, 192 AD3d 623, 624 [1st Dept 2021]). Here, the Court finds the issue of spoliation is referred to the trial judge who, upon assessing the materiality and relevance of the allegedly destroyed evidence, and the credibility of the witnesses, is in the best position to determine what, if any sanction(s) should be issued.

Accordingly, it is hereby,

ORDERED that La Rochelle’s motion for summary judgment (Mot. Seq. 002) is granted solely to the extent that Preserv and Pofi’s crossclaims for contractual indemnification, breach of contract for failure to procure insurance, and common law indemnification asserted against La Rochelle are dismissed and the remainder of the motion is denied; and it is further

ORDERED that Pofi’s motion for summary judgment (Mot. Seq. 003) is granted solely to the extent that Plaintiff’s Labor Law §§ 241(6) and 200 claims asserted against Pofi are dismissed and the remainder of Pofi’s motion is denied; and it is further

ORDERED that Preserv’s motion for summary judgment (Mot. Seq. 004) is granted solely to the extent that Plaintiff’s Labor Law §§ 241(6) and 200 claims asserted against Preserv and Pofi’s crossclaims for contractual and common law indemnification and breach of contract for failure to procure insurance are dismissed, and the remainder of Preserv’s motion is denied; and it is further

ORDERED that Plaintiff’s cross-motion for spoliation sanctions against Preserv is denied, without prejudice, with leave to renew at the time of trial; 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.

9/22/2025  
DATE

Mary V. Rosado, J.S.C.  
HON. MARY V. ROSADO, 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
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE