

Cales v Third St. Equities LLC

2025 NY Slip Op 33634(U)

September 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 501960/2022

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 501960/2022
Seqs. 003, 004, 005

Part LL1M

DECISION/ORDER

JOSE CALES,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-3</u>
Order to Show Cause and Affidavits Annexed	<u>4-9</u>
Answering Affidavits	<u>10-12</u>
Replying Affidavits	<u>Var.</u>
Exhibits	<u> </u>
Other	<u> </u>

THIRD STREET EQUITIES LLC, DEVELOPING NY
STATE, LLC, AND CAPITAL CONCRETE NY INC.,

Defendant.

THIRD-STREET EQUITIES LLC AND DEVELOPING NY
STATE, LLC,

Third-Party Plaintiff,

against

CAPITAL CONCRETE NY INC.,

Third-Party Defendant.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 003), defendants/third-party plaintiffs Third Street Equities LLC (Third Street) and Developing NY State, LLC (Developing)’s motion for summary judgment (Seq. 004), and Capital Concrete NY Inc. (Capital)’s motion for summary judgment (Seq. 005) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims he sustained on June 6, 2021, when he fell at a construction site located at 26-35 Third Street a/k/a 3-01 27th Avenue, Queens, New York. The premises was owned by Third Street. Developing was the general contractor for the construction project. Developing sub-contracted with Capital Concrete NY

Inc. (Capital) to perform concrete work at the premises. And Capital sub-sub-contracted with plaintiff's employer, U.S. Concrete, to deliver concrete via cement truck.

Plaintiff testified as follows: On the date of his accident, plaintiff was delivering cement to the site (Cales EBT 20, 37, 51). Capital employees, and specifically a Capital foreman named "Vinny," directed plaintiff where to park the truck (*id.* at 52–53, 58–60, 63, 65). The truck was too close to a scaffold on one side and another cement truck on the other for the extendable metal ladder to be unfolded (*id.* at 80–81). Plaintiff told the Capital workers he needed the ladder to access the cement and was told to "figure it out" (*id.* at 80, 81, 122, 124). Plaintiff climbed up the frame of his truck and released the spigot for the cement (*id.* at 99–104). Then, while descending the folded ladder and stepping back onto the frame of the truck, plaintiff's foot slipped and he fell to the ground (*id.*). The Capital incident report admits that "driver complained he could not properly deploy ladder due to site conditions."

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure or absence of a safety device enumerated by the statute is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes*

v. New York Tel. Co., 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993)].

Capital moved for summary judgment on plaintiff's claim on the basis that Capital is not a proper Labor Law defendant. Capital contends that US Concrete was an independent supplier, not a sub-contractor, and that Capital did not have authority over the work being performed. However, this contention is belied by the testimony from both plaintiff and Yitzchok Katz, a member of Third Street, that "Capital Concrete was in charge of running the operation regarding the concrete trucks at the time" (Katz EBT at 26). Ufredo Orlando Patino, representative of Capital, testified that Capital workers directed traffic while US Concrete was making deliveries and that a Capital foreman coordinated the cement deliveries (Patino EBT at 32, 44, 95). Therefore, since plaintiff did not move for summary judgment on this issue, there is minimally a question of fact as to whether Capital was an agent of the owner or general contractor with authority over the work plaintiff was performing at the time of his accident (*see Russin v Picciano*, 54 NY2d 311 [1981]). Capital's motion is, therefore, denied.

Here, plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim. Plaintiff testified that he could not unfold the extendable ladder on the side of the truck because of where he was directed to park, and that the only way to perform his assigned task was to use the truck as the functional equivalent of a ladder or scaffold. As demonstrated by its failure, the truck's exterior was an inadequate safety device and was a proximate cause of plaintiff's elevation-related accident. In opposition, defendants fail to raise a triable issue of material fact. It is undisputed that Vinny directed plaintiff's parking location and told him to finish the work under the conditions existing at the location; therefore, plaintiff

cannot have been the *sole* proximate cause of his accident or a recalcitrant worker (*Blake*, 1 NY3d at 287).

Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim against Third Street and Developing. Plaintiff did not move for summary judgment against Capital.

Labor Law § 241 (6)

Plaintiff does not oppose the dismissal of his Labor Law § 241 (6) claim. Therefore, this unopposed claim is deemed abandoned, and defendants' motion is granted on this claim (*see Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Liability for dangerous or defective equipment is ordinarily analyzed under the "supervision and control" standard (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011] [referencing *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008)]). Only defendants seek summary judgment on this claim.

Defendants contend that plaintiff's employer was solely responsible for the means and methods of the work, and that plaintiff's Labor Law § 200 claim should be dismissed. Plaintiff does not advance any substantive argument with respect to Third Street; therefore, Third Street's motion is granted and plaintiff's Labor Law § 200 claim is dismissed as to the owner. However, plaintiff does raise a material issue of fact with respect to Developing and Capital. Mr. Katz testified that Developing had authority over coordinating the scheduling and parking of the

trucks at the site (Katz EBT at 25–26). Since plaintiff’s accident was caused in part because of the location where his truck was parked, and there is some evidence that Developing had authority over the coordination of parking, Developing is not entitled to summary judgment on plaintiff’s Labor Law § 200 claim. Capital’s arguments are similarly unavailing; plaintiff testified that he received instructions about where to park from Capital’s foreman, and there is additional testimony from the owner that Capital was running the site.

Indemnification

The right to contractual indemnification is established by the “specific language of the contract” (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]). A party must also show itself free from negligence to prevail on summary judgment for a common-law indemnification claim (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]).

Notably, Capital does not seek summary judgment on the contractual indemnification claims against it; only the common-law indemnification and contribution claims. Third Street and Developing seek summary judgment on the basis of the contract which requires Capital to “indemnify and hold Owner and Contractor free and harmless from any all losses . . . caused by or connected with the performance of this contract by subcontractors [sic], agents, or employees.” Third Street has demonstrated its freedom from active negligence; therefore, its motion is granted with respect to its contractual indemnification claim. In light of its entitlement

to contractual indemnification, Third Street’s common-law indemnification and contribution claims are moot.

However, since there are outstanding questions of material fact concerning Developing’s negligence, its motion is denied with respect to contractual indemnification, common-law indemnification, and contribution. Capital’s motion is also denied, as Capital has failed to demonstrate that it is free from negligence.

Conclusion

Plaintiff’s motion for summary judgment on his Labor Law § 240 (1) claim (Seq. 003) is granted.

Third Street and Developing’s motion for summary judgment (Seq. 004) is granted to the extent that plaintiff’s Labor Law § 241 (6) claim is dismissed; plaintiff’s Labor Law § 200 claim is dismissed as to Third Street only; and Third Street is entitled to contractual indemnification from Capital. The motion is otherwise denied.

Capital’s motion for summary judgment (Seq. 005) is granted to the extent that plaintiff’s Labor Law § 241 (6) claim is dismissed; the motion is otherwise denied.

This constitutes the decision and order of the court.

September 8, 2025

DATE



DEVIN P. COHEN

Justice of the Supreme Court