

Diaz v Consolidated Edison Co. of N.Y., Inc.

2025 NY Slip Op 33789(U)

October 2, 2025

Supreme Court, New York County

Docket Number: Index No. 160667/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

RUBEN DIAZ,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ROBERTO JIMENEZ DIAZ,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

MEXICANA CORP., RIGGS DISTLER & COMPANY, INC.

Defendants.

-----X

INDEX NO. 160667/2019
MOTION DATE 06/13/2025, 06/13/2025
MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

Third-Party Index No. 595325/2023

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 165, 166, 176, 177, 178, 194, 195, 196, 197, 198, 199, 200

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 169, 170, 171, 172, 173, 174, 175, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 201, 202

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

Upon the foregoing documents, it is

Motion Sequence 006

In motion sequence 6, defendant, Consolidated Edison Company of New York, Inc. ("ConEd") moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's Labor Law §§ 200 and 241(6) causes of action as asserted against it. ConEd further moves for summary

judgment on its cross-claim for common law indemnity against co-defendant Roberto Jimenez Diaz, and on its third-party cause of action for contractual indemnification as against, Riggs Distler & Company, Inc. (“Riggs”).

As a preliminary matter, ConEd argues that the complaint should be dismissed as against it because it is not a proper Labor Law defendant. ConEd argues that it was not the owner of the Yonkers city street where plaintiff’s accident occurred, nor was it a general contractor within the meaning of the Labor Law. However “[a]lthough the [ConEd] defendant[] w[as] not title owner[] of the property, [it] had an interest in the site and fulfilled the role of owner by contracting to have work performed for [its] benefit” (*Winkler v Halmar Intl., LLC*, 199 AD3d 598 [1st Dept 2021]). Here, it is undisputed that ConEd contracted with Riggs to install a gas main and service connections (NYSCEF Doc No 184 at 13:3 – 13:6; NYSCEF Doc No 193) Therefore, ConEd is a proper Labor Law defendant and the complaint will not be dismissed on these grounds.

ConEd argues that plaintiff’s Labor Law § 200 cause of action should be dismissed because it did not actively supervise plaintiff’s work. “Liability under Labor Law § 200 and common-law negligence may be based on either the means or methods by which the work is performed or a dangerous premises condition” (*Sandoval-Morales v 164-20 N. Blvd., LLC*, 231 AD3d 501, 503 [1st Dept 2024]). “Where a defect is not *inherent* but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018] [emphasis provided]). Here, plaintiff’s alleged injuries were caused when he was struck by a car, which according to plaintiff occurred because there was not proper signage, or workers directing traffic. Thus, the alleged injury was not the

result of a defect *inherent* in the property but rather, the means and methods by which plaintiff was performing his work.

“Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Castro v Brito*, 235 AD3d 527, 529 [1st Dept 2025]). “[G]eneral supervisory authority over plaintiffs’ work, which is insufficient to establish liability under Labor Law § 200 or common-law principles” (*James v Alpha Painting & Const. Co., Inc.*, 152 AD3d 447, 451 [1st Dept 2017]). Here it is undisputed that Riggs and not ConEd supervised and controlled plaintiff’s work. While, Chief Construction Inspector, David Vigue testified that ConEd had the authority to direct a contractor to correct an unsafe practice, (NYSCEF Doc No 184 at 33:4 – 33:8), this general supervisory authority is insufficient to impose liability under Labor Law § 200. Accordingly, plaintiff’s Labor Law § 200 cause of action as against ConEd will be dismissed.

ConEd also argues that plaintiff’s Labor Law § 241(6) cause of action must be dismissed because the alleged Industrial Code violations cited by plaintiff are either irrelevant to plaintiff’s alleged injuries, or are an insufficient predicate to assign liability to ConEd. Plaintiff alleges violations of Industrial Code §§ 23-1.5(c)(3); 23-1.29(a); and 23-1.29(b).¹ Section “23–1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241(6)” (*Kochman v City of New York*, 110 AD3d 477, 478 [1st Dept 2013]). Industrial Code §§ 23-1.29(a) and (b) provides:

- (a) Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road,

¹ While, in his Bill of Particulars, plaintiff also alleges violations of Industrial Code §§ 23- 1.15; 23-1.30; and 23-1.33 (a)(1)(2)(3), (b)(1)(i)(iii)(iv), and (c)(1)(2)(3), plaintiff fails to submit opposition to ConEd’s arguments for dismissal of the claims predicated on these sections and therefore will be deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.

- (b) Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand.

A violation of section 23-1.29 is sufficiently specific to support a Labor Law § 241(6) cause of action (*Bucci v City of New York*, 223 AD3d 453 [1st Dept 2024]). Plaintiff alleges that while working on the gas main installation project, he traversed the roadway to get to a construction truck to obtain more supplies when he was struck by a vehicle (NYSCEF Doc No 182 at 63:19 – 66:4). Plaintiff alleges that there was not a “flagman” directing traffic at the time of his accident and that represented a violation of Industrial Code § 23-1.29. While, ConEd argues that the street where plaintiff was struck by the car was not within the worksite and thus the site was not subject to the requirements of § 23-1.29, the accident occurred directly in the roadway in front of the project site, ConEd’s permit for the project includes the section of street where plaintiff’s accident occurred (NYSCEF Doc Nos 187 and 188; *see also McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005] (“[T]he work that plaintiff was involved in at the time of his injury constituted an integral part of the construction project and occurred within the work site as performed ‘on or in close proximity to a street’ and is therefore within the purview of the statute and the regulation”).

While ConEd argues that the statute was complied with and they had a flagger on site, plaintiff's testimony that there was no flagger present at the time of his accident raises a triable issue of fact and this portion of the motion must be denied.

ConEd is entitled to summary judgment on its common law indemnity claim as asserted against co-defendant Jiminez Diaz, the alleged driver of the vehicle that struck plaintiff. "Common-law indemnification is generally available in favor of who is held responsible solely by operation of law because of his relation to the actual wrongdoer" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 375 [2011]). Here, as stated above, ConEd did not actively direct or supervise plaintiff's work, and thus any potential liability would come from operation of law. Jiminez Diaz has failed to appear in this action, and thus this portion of ConEd's motion is unopposed. Accordingly, ConEd will be granted summary judgment on its common law indemnity cross-claim.

Further, ConEd is entitled to summary judgment on its third-party contractual indemnification claim as asserted against Riggs. While Riggs argues that the accident occurred outside the work area and thus, outside the purview of the contractual indemnification clause, which provides that Riggs will hold ConEd harmless for liability "arising in whole or in part from, or connected with, the performance of the Work" (NYSCEF Doc No 162 at p 39), it is undisputed that the accident occurred while plaintiff was obtaining supplies from a construction truck and thus was actively performing work for Riggs in furtherance of its contract with ConEd. Thus, ConEd is entitled to summary judgment on its contractual indemnification cause of action (*see Estevez v SLG 100 Park LLC*, 215 AD3d 566, 570 [1st Dept 2023] "[Indemnification agreements, ... with a scope- or performance-of-the-work clause are indeed broad and will be triggered solely by virtue of an accident occurring in the course of the indemnitor's work]").

Motion 005

In Motion Sequence #5, Riggs moves for summary judgment dismissing ConEd's third-party claims for common law indemnity, contractual indemnity, and breach of contract for failure to procure insurance claims. As stated above, summary judgment will be granted in favor of ConEd on its contractual indemnification cause of action and accordingly summary judgment will be denied.

Riggs is entitled to summary judgment dismissal of the common law indemnification claim asserted against it as this claim is "precluded by the exclusive remedy of the Workers' Compensation Law" (*Galeno v Everest Scaffolding, Inc.*, 202 AD3d 433, 435 [1st Dept 2022]), and there is no evidence here that plaintiff suffered a "grave injury" to meet the exception from the exclusive remedy bar of Workers' Compensation law § 11.

Riggs is also entitled to summary judgment dismissal on ConEd's breach of contract for a failure to procure insurance claim as Riggs submitted documentary evidence that it did procure the insurance policy required by the contract (NYSCEF Doc No 137).

Accordingly it is,

ORDERED that the portion of ConEd's summary judgment motion (MS #6) seeking dismissal of plaintiff's Labor Law § 200 claim is granted; and it is further

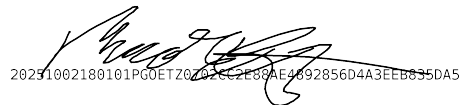
ORDERED that the portion of ConEd's summary judgment motion (MS #6) seeking dismissal of plaintiff's Labor Law § 241(6) claim is denied; and it is further

ORDERED that the portion of ConEd's motion (MS #6) seeking summary judgment on its cross-claim for common law indemnification as against co-defendant Roberto Jeminez Diaz is granted; and it is further

ORDERED that the portion of ConEd’s motion (MS #6) seeking summary judgment on its third-party claim for contractual indemnification as against Riggs is granted; and it is further

ORDERED that the portion of Riggs’s motion (MS #5) seeking summary judgment dismissal on ConEd’s common law indemnification and breach of contract claims is granted; and it is further

ORDERED that the portion of Riggs’s motion (MS #5) seeking summary judgment dismissal on ConEd’s contractual indemnification claim is denied.


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10/2/2025
DATE

PAUL A. GOETZ, 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