

Brito v City of New York

2025 NY Slip Op 34236(U)

November 6, 2025

Supreme Court, New York County

Docket Number: Index No. 150436/2017

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

STALIN BRITO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING
AUTHORITY,

Defendant.

-----X

NEW YORK CITY HOUSING AUTHORITY

Plaintiff,

-against-

JACOBS PROJECT MANAGEMENT CO.

Defendant.

-----X

NEW YORK CITY HOUSING AUTHORITY

Plaintiff,

-against-

UNIVERSAL CONSTRUCTION RESOURCES, INC.

Defendant.

-----X

NEW YORK CITY HOUSING AUTHORITY

Plaintiff,

-against-

WARREN PANZER ENGINEERS, PC

Defendant.

-----X

INDEX NO. 150436/2017

**MOTION DATE 06/16/2025,
06/16/2025,
06/16/2025,
06/16/2025**

**MOTION SEQ. NO. 008 009 010
011**

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596173/2019

Second Third-Party
Index No. 595759/2020

Third Third-Party
Index No. 595244/2023

The following e-filed documents, listed by NYSCEF document number (Motion 008) 381, 382, 383, 384, 385, 386, 482, 486, 490, 491, 492, 493, 494, 495, 496, 497, 537

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 483, 487, 514, 515, 516, 517, 518, 519, 520, 521, 522, 527, 528, 535, 536, 538, 539, 540, 541

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 484, 488, 498, 499, 500, 501, 502, 503, 504, 505, 523, 524, 525, 526, 543, 544, 545

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 485, 489, 506, 507, 508, 509, 510, 511, 512, 513, 529, 530, 531, 532, 533, 534, 542

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

This action arises out injuries sustained by plaintiff at a construction project.

Defendant/third-party plaintiff¹, New York City Housing Authority (“NYCHA”), now moves for summary judgment, motion sequence 008, on its contractual and common law indemnity claims as against Jacobs Project Management Co. (“Jacobs”) and seeks dismissal of all crossclaims and counterclaims asserted by second and third third-party defendants, Universal Construction Resources Inc. (“Universal”) and Warren Panzer Engineers PC (“Warren Panzer”).

Third-party defendant, second third-party defendant and third third-party defendant all separately move to dismiss the third-party complaints asserted against them. The Court will discuss each motion in turn.

Background

Plaintiff was employed by Universal and was injured when he was struck by a fence.

¹ NYCHA is also the first, second and third third-party plaintiff, for simplicity, the Court will only refer to it as either NYCHA or the defendant/third-party plaintiff.

Universal was hired by the NYCHA to do asbestos abatement work at NYCHA's Mariners Harbor Houses in Staten Island, New York. Jacobs was retained by NYCHA to provide construction management services at the site. Warren Panzer was retained by Jacobs to provide hazmat consulting and air monitoring services during the asbestos abatement.

Standard of Review

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

Motion Sequence 008

Indemnification

NYCHA contends that plaintiff's accident occurred as a result of Jacobs' conduct, specifically it failed to monitor Universal's work, thus triggering the indemnification provision of the contract, between it and Jacobs. NYCHA seeks both contractual and common law indemnification from Jacobs.

In opposition, Jacobs contends that because it did not control the means and methods of Universal's employees work, it did not direct, or control Universal's employees work and was

not permitted on the work site during the asbestos work, plaintiff's accident did not arise out of Jacobs' work.

The law is clear that for a party to establish entitlement to common-law indemnification, “a party must show that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of NY*, 94 AD3d 1, 10 [1st Dept 2012] internal citations omitted).

The parties both rely on section 2.2.12 of the contract entitled ‘Safety’, which reads in pertinent part

The CMA shall require the CC's to submit their site specific safety program and the CMA shall serve as a central role in dissemination of safety related information between the CC's and NYCHA. The CMA shall not be responsible for CC's means, methods, techniques, sequences, or procedures, and/or for safety precautions and programs in connection with the work of the CCs, since these are solely the CC's responsibility. The CMA shall however, have the requirement and right to implement an immediate stop work order or a corrective action to the CCs on behalf of NYCHA in the event of an unsafe work condition. The CMA shall notify NYCHA immediately after the event has been mitigated. The CMA shall not be responsible for CCs' failure to carry out the work in accordance with the CCs safety programs, and/or applicable safety rules and regulations. Nevertheless, the CMA shall promote safety and endeavor to guard against the creation of unsafe conditions by any CC.

See NYSCEF Doc. 186².

The Court finds that based on the plain reading of this provision alongside the indemnification provision, NYCHA has failed to establish that it is entitled to indemnification from Jacobs. Specifically, the indemnification provision provides that indemnification is owed

² The contract defines CMA as the construction manager, here Jacobs, and CC is defined as Construction Contractor, here Universal.

“arising out of or resulting from any work or Services provided by the Consultant [...] in conjunction with the Agreement, or arising out of any other act, error or omission of the Consultant [...]” The Court finds NYCHA’s argument regarding the cause of the accident based on Jacobs’ not issuing a stop work order to be a red herring, when the contract specifically provides that Jacobs is not responsible for the conduct of Universal.

Notably, the Court relies on the First Department’s decision, specifically finding that “[p]laintiff established that at the time the fence panels fell onto him, they were not tied down to a bulkhead or parapet wall or secured by heavy sandbags and/or metal plates, as had been the protocol for the general contractor to follow in safeguarding the fencing” (*Brito v City of NY*, 238 AD3d 508, 509 [1st Dept 2025]). The Court is constrained to follow what the First Department has determined to be the cause of the plaintiff’s accident, and that is the general contractor’s failure to follow its protocol and safeguard the fencing. Accordingly, the Court finds that NYCHA has failed to establish it is entitled to either common law or contractual indemnification from Jacobs.

Crossclaims and Counterclaims

NYCHA contends that because it was found not to be negligent all crossclaims asserted against it by Universal and Warren Panzer must be dismissed as a matter of law (*Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]). This portion of NYCHA’s motion has not been opposed and thus is granted without opposition.

Motion Sequence 009

First third-party defendant, Jacobs, seeks dismissal of the third-party complaint and in the alternative seeks summary judgment as to its contractual indemnity claims against Warren Panzer and Universal.

Based on the reasons that the Court declines to grant NYCHA summary judgment on its contractual indemnification claims, the Court grants Jacobs summary judgment dismissing the third-party complaint. Here, Jacobs has established, and the record before this Court is clear that the accident did not arise out of the services provided by Jacobs, as plaintiff was performing work directed by his employer, Universal, and the fence was erected and later moved by Universal. Moreover, as the Court notes above, the contract between Jacobs and NYCHA specifically prevents liability from attaching to Jacobs as a result of any work done by Universal.

Because the Court grants Jacobs' application for summary judgment seeking dismissal of the third-party complaint, it does not reach Jacobs' alternate request for relief.

Motion Sequence 010

Second third-party defendant, Universal, seeks dismissal of the second third-party complaint asserted against it, as well as dismissal of any and all counterclaims and crossclaims. Universal's main argument in support of its motion is that the Worker's Compensation Law bars the complaint because plaintiff did not suffer a grave injury.

Worker's Compensation Law §11 provides, in relevant part, "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean [...]acquired injury to the brain caused by an external physical force resulting in permanent total disability." The Court of Appeals has held that a determination of permanent total disability within the statute, is "one of employability in any capacity" (*Rubeis v Aqua Club Inc.*, 3 NY3d 408, 417 [2004]).

In support of its motion, Universal has provided plaintiff's deposition testimony and expert reports, to support its contention that plaintiff has not suffered a permanent total disability rendering him unemployable.

In opposition, NYCHA contends that there is a question of fact as to whether plaintiff sustained a traumatic brain injury. Notably, plaintiff has not submitted opposition to Universal's motion nor provided an affirmation to oppose a determination that plaintiff has not suffered a grave injury. NYCHA does not rebut Universal's showing that although a brain injury may have occurred, and not conceding the same, the evidence establishes that plaintiff is not unemployable.

Here, the Court is satisfied that Universal has established that second third-party complaint is barred by the Worker's Compensation Law as plaintiff's has undeniably not suffered a grave injury. Additionally, Universal has established that the crossclaims asserted against it must also be dismissed, as there is not contractual privity between it and Jacobs and the common law claims are barred by the Worker's Compensation Law.

Motion Sequence 011

Third third-party defendant Warren Panzer seeks dismissal of the third third-party complaint, as well as all crossclaims, asserting both common law and contractual indemnification causes of action.

As has been previously discussed by this Court, it has been established that the cause of the accident was failure to secure the fence. Warren Panzer has established, and it is un rebutted, that was not within the purview of its contract or responsibilities. Accordingly, it is hereby

ORDERED that motions sequence 009, 010, and 011 are granted, in that the first, second and third third-party complaints are dismissed in their entirety; and it is further

ORDERED that all crossclaims asserted as against all third-party defendants are dismissed; and it is further

ADJUDGED that NYCHA's motion for summary judgment is denied.

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11/6/2025

DATE

LYLE E. FRANK, 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