

Dixon v 21-12 LLC

2025 NY Slip Op 35071(U)

September 22, 2025

Supreme Court, Bronx County

Docket Number: Index No. 21809/2020E

Judge: Myrna Socorro

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**Supreme Court of the State of New York
County of Bronx, Part IA-9**

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Oneil Dixon,

Plaintiff,

-against-

**21-12 LLC, Park Premium Enterprise, Inc.,
and Park Developers & Builders, Inc.,
Defendants,**

-----x
**Park Premium Enterprise, Inc.,
Third-Party Plaintiff,**

-against-

**Structure Supreme LLC d/b/a International
Concrete Corp. and Toledo Design, Inc.,
Third-party Defendants.**

**Index No. 21809/2020E
Motion seq #3**

**DECISION & ORDER
Hon. Myrna Socorro, J.S.C.**

The following papers were read on this motion (Seq. # 3) for **SUMMARY JUDGMENT** which was orally argued and marked submitted on **July 26, 2024**.

Papers	NYSCEF Doc #
Plaintiff's Notice of Motion for Summary Judgment, Affirmation in Support, Exhibits, Memorandum of Law and Statement of Material Facts	#74-102
Park Premium Enterprise Inc.'s Affirmation in Opposition, Statement of Material Facts and Memorandum of Law	#105-107
Park Developers & Builders, Inc.'s Affirmation in Opposition, Statement of Material Facts and Memorandum of Law	#108-110
21-12 LLC's Notice of Cross Motion, Affirmation in Support of Cross Motion and in Opposition to Motion, Exhibit, and Response to Statement of Material Facts	#111-114
Park Premium's Affirmation in Opposition to Cross Motion and Statement of Material Facts	#115-116
Plaintiff's Reply Affirmation, Exhibit and Memorandum of Law to 21-12 LLC's Opposition	#117-128
Plaintiff's Reply Affirmation, Exhibits and Memorandum of Law to Park Developer's Opposition	#129-134
21-12 LLC's Reply Affirmation and Affidavit of Service in Further Support of Cross-Motion	#135-136

According to Plaintiff, on the day of the accident on May 17, 2019, at the premises of 21-16 44th

Drive, Long Island City, New York, Plaintiff Oneil Dixon, an employee of Structure Supreme LLC d/b/a International Concrete Corp., (“International Concrete”) was performing cleaning work at a trench. Plaintiff was standing at the top of the trench, one foot away from the edge manually pulling up debris with a rope and bucket. Suddenly the ground underneath Plaintiff collapsed causing him to fall nine feet into the trench, his right foot to hitting the bottom before he fell flat on his back. Plaintiff was wearing a helmet but was not given a harness or any other safety device. The portion of the trench wall at which Plaintiff was working had no bracing in place to shore up the trench and hold up the wall, nor was there fencing to prevent someone from falling in. Two days prior to the accident Plaintiff had been doing the same activity at a location 40 feet away which did have wood bracing.

According to Plaintiff, 21-12 LLC (“21-12”) was the owner of the subject premises, Park Premium Enterprise Inc. (“Park Premium”) was the general contractor for the premises and Park Developers & Builders Inc. and (“Park Developers”) was the d/b/a for Park Premium. International Concrete was contracted to conduct concrete and foundation work at the premises.

Plaintiff now moves pursuant to CPLR §3212 for summary judgment against Defendants 21-12, Park Premium and Park Developers on the issue of liability pursuant to Labor Law §240(1), and §241(6) predicated on Industrial Codes 12 NYCRR §23-1.7(b)(1)(i)(ii)(iii); §23-4.2(a)(e)(h) and §23-4.4(a).

Defendant 21-12 cross-moves pursuant to CPLR §3212 for summary judgment dismissing Plaintiff’s Labor Law §200 claim against it, and for contractual indemnification as against Park Premium and Park Developers (collectively “Park Defendants”).

Summary Judgment

The court’s function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC*, 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]*; *Friends of Thayer Lake LLC v. Brown*, 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving

party.” *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima facie showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 [1985]. Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” “The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

Upon a review of the motion papers, this Court finds that Plaintiff established his *prima facie* burden of a Labor Law §240(1) violation through his testimony that he fell when the unsecured trench he was standing on collapsed. *See Rivas v Seward Park Housing Corporation*, 219 AD3d 59 [1st Dept 2023]; *Bell v Bengomo Realty, Inc.*, 36 Ad3d 479 [1st Dept 2007]; *Trillo v City of New York*, 262 AD2d 121 [1st Dept 1999]. Braces and other shoring devices designed to prevent the cave in of a

trench at work sites are enumerated as a type of protective equipment contemplated by Labor Law §240(1). *See Rivas* at 64, 65; *Misserritti v Mark IV Const. Co., Inc.* 86 NY2d 487 [1995].

In opposition, Defendant 21-12 argues that Plaintiff was a recalcitrant worker and sole proximate cause of the accident because two days prior to the accident Plaintiff performed the same work at a location 40 feet away from the accident site that plaintiff admitted was adequately braced and secured at that time. Defendant 21-12 asserts that, by contrast, on the day of the accident and despite familiarity with workplace safety and being OSHA trained, Plaintiff chose to perform debris removal at a different location Plaintiff knew was not braced.

Any sole proximate cause or recalcitrant worker argument fails if the defendants' statutory violation served as a proximate cause for the accident, thus, the plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. Thus, any alleged negligence by the plaintiff amounts to comparative negligence and would not defeat his Labor Law §240(1) claim. Here, that Plaintiff allegedly chose to knowingly work at a part of the trench that was not secure does not change the fact that his accident was in part the result of an improperly secured trench. Therefore, Plaintiff is entitled to summary judgment on his §240(1) claim as against Defendant 21-12.

As to the Park Defendants, Defendant Park Developers argues that contrary to the assertions of plaintiff, Park Development is not merely a d/b/a of Park Premium, but a distinct legal entity that ceased providing general contractor services years prior. Park Developers asserts rather, that is Park Premium that serves as the general contractor for the premises and that is the entity for which Aaron Lebovitz, as sole shareholder of both Park Defendants, signed the contract to become general contractor. Park Developers further argues that Plaintiff's reliance on the testimony of Mr. Gombo to assert that the Park Defendants are the same is misplaced, as Mr. Gombo testified explicitly that he had zero knowledge of which entity was the general contractor. In reply, Plaintiff asserts that the testimony of Aaron Lebovitz, owner of both Park Defendants, confirmed that Park Developers is a d/b/a of Park Premium. Plaintiff asserts that Park Developers entered the contract as an agent of Park Premium which in turn became a statutory agent of the owner and liable under the Labor Law. A review of the contract and the information available to the Court reveals that "Park Developers" refers to two separate entities: the entity known as "Park Developers & Builders, Inc." and the d/b/a of Park Premium, "Park Developers & Builders." The Court notes that although "Park Developers & Builders, Inc." is the entity which signed the contract with 21-12, Mr. Lebovitz testified that it was Park Premium that received more than \$1 million dollars in payment for the work performed at the premises. Accordingly, there is an issue of fact as to which entity is the general contractor, precluding summary judgment against either Park Defendant.

Therefore, Defendant 21-12 has failed to raise an issue of fact and rebut Plaintiff's *prima facie* entitlement to summary judgment against it, whereas Park Defendants have raised an issue of fact as to which entity is the general contractor, precluding summary judgment against them. Accordingly, Plaintiff's motion for summary judgment on his Labor Law §240(1) claim as against 21-12 is **granted**, and as against Park Defendants is **denied**.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

Plaintiff moves on his Labor Law §241(6) claims predicated under 12 NYCRR §23-1.7(b)(1); §23-4.2(a)(e)(h) and §23-4.4(a), which are discussed individually below. As a preface, for the reasons discussed in the previous section, the issue of fact as to which of the Park Defendant entities is the general contractor precludes summary judgment against them and as such the discussions below are only as to summary judgment against Defendant 21-12.

Industrial Code §23-1.7(b)(1)

Industrial Code §23-1.7(b)(1)(I) provides that "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

Industrial Code §23-1.7(b)(1)(ii) further provides "Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit."

Industrial Code §23-1.7(b)(1)(iii) additionally provides "Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: [a] Two-inch

planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or [b] An approved life net installed not more than five feet beneath the opening; or [c] An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.”

The statute does not provide a definition for what constitutes a “hazardous opening” however the First Department has repeatedly held that Industrial Code §23-1.7(b)(1) applies to openings large enough for a person to fall completely through. *Marte v Tishman Construction Corporation*, 223 AD3d 527 [1st Dept 2024]; *Favaloro v Port Authority of New York & New Jersey*, 191 Ad3d 524]; *Messina v City of New York*, 300 AD2d 121 [1st Dept 2002]. Here, the subject opening was a trench that Plaintiff’s whole body fell into which was the proximate cause of his injuries. That Plaintiff was working with a coworker who was inside the trench is also evidence that the opening was sufficiently sized for a person to fall completely into. *See Bell v Bengomo Realty, Inc.* 36 Ad3d 479 [1st Dept 2007]. It is undisputed by the parties that the section of the trench where plaintiff fell was not shored, braced or fenced. Therefore, Plaintiff is entitled to summary judgment against owner defendant 21-12. Accordingly, Plaintiff’s motion for summary judgment under §241(6) predicated on Industrial Code §23-1.7(b) as against Defendant 21-12 is **granted**.

Industrial Code §23-4.2(a)(e)(h)

Industrial Code §23-4.2(a)(e)(h) relates to trench and area excavations and states in section (a) that “Whenever any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth...” Here, the parties have conflicting testimony regarding the height of the trench. Plaintiff testified that the height he fell was nine feet, however Issac Gombo, project manager for the Park Defendants, testified that the trench was only four feet deep before revising his estimate to six feet deep. Contrary to Defendant 2-12’ assertions, as both estimates are above the five feet threshold, there is no probative issue of fact, and the Industrial Code provision applies as against it. Defendant 21-12’s assertion that §23-4.2 does not apply because Plaintiff was not working in the trench at the time is similarly unavailing as Plaintiff’s work involved trading places in an out of the trench with a co-worker, thus he was “frequenting” the trench. Accordingly, Plaintiff’s motion for summary judgment under §241(6) predicated on Industrial Code §23-4.2 as against Defendant 21-12 is **granted**.

Industrial Code §23-4.4(a)

Industrial Code §23-4.4(a) provides that “Where any excavation is not protected by sloped sides or banks in compliance with Table I of this Subpart, any person in such excavation shall be protected by sheeting, shoring and bracing in compliance with Tables II, III and IV of this Subpart.” The tables referred to in the provision relies upon exact the depth of the excavation, with both alleged

trench depths of six feet and nine feet falling within the 5-10 feet categories of each table. Therefore, the issue of fact noted above regarding the exact trench height is *de minimis* as to this statute and it applies as against Defendant 21-12. Accordingly, Plaintiff's motion for summary judgment under §241(6) predicated on Industrial Code §23-44 as against Defendant 2-12 is **granted**.

Labor Law §200/Common-Law Negligence

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. See *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]. Pursuant to Labor Law 200, "liability for an injury resulting from a dangerous condition at the work site may be imposed on the owner where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition. *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999].

Defendant 21-12 argues that plaintiff's Labor Law §200 claim and common law negligence claims must be dismissed because they did not supervise the means and methods of plaintiff's work. They aver that they did not engage in the supervision of plaintiff's work and that it was exclusively International Concrete that provided all direction, control and instructions for the work that Plaintiff was performing. Plaintiff did not oppose that portion of Defendant 21-12's cross-motion seeking summary judgment dismissing the Labor Law §200 claim. Accordingly, Defendant 21-12's cross-motion for summary judgment on the §200 claim is **granted**.

Contractual Indemnification

A party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotations and citations omitted]). To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity must establish that it was free from any negligence and may be held liable solely by virtue of statutory or vicarious liability (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]). Conversely, "where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (*id.* [internal quotations and citation omitted])

For the reasons discussed in the sections above, there is a question of fact regarding which Park Defendant is the general contractor. Therefore, this Court cannot determine which entity is the general contractor subject to indemnification and thus remains an issue of fact for the jury.

Accordingly, 21-12's cross-motion for summary judgment for contractual indemnification is **denied**.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by Plaintiff Oneil Dixon on his Labor Law §240(1) claim is **GRANTED** as to Defendant 21-12 and is otherwise **DENIED**, and it is further

ORDERED, that the motion for summary judgment by Plaintiff Oneil Dixon on his Labor Law §241(6) claim is **GRANTED** as against Defendant 21-12 and the motion is otherwise **DENIED**, and it is further

ORDERED, that the cross-motion for summary judgment by Defendant 21-12 dismissing Plaintiff's Labor Law §200 claim is **GRANTED**, and it is further

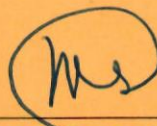
ORDERED, that the cross-motion for summary judgment by Defendant 21-12 for contractual indemnification of the Park Defendants is **DENIED**, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED, that Plaintiff shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the date of this Decision and Order.

This constitutes the decision and order of this court.

Dated: September 22, 2025



HON. MYRNA SOCORRO, J.S.C.