

Ponce v Victory One Hous. Dev. Fund Corp.

2025 NY Slip Op 35100(U)

December 4, 2025

Supreme Court, Bronx County

Docket Number: Index No. 24733/2020E

Judge: Ashlee Crawford

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

PRESENT: HON. ASHLEE CRAWFORD

PART 21

Justice

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INDEX NO. 24733/2020E

RENE PONCE,
Plaintiff,

MOTION DATE 06/03/2024,
06/04/2024

- v -

MOTION SEQ. NO. 005 006

VICTORY ONE HOUSING DEVELOPMENT FUND CORPORATION, CAMBER PROPERTY GROUP LLC., SIXTH AVENUE BUILDERS LLC., ROCK GROUP NY CORP., HARLEM CONGREGATIONS FOR COMMUNITY IMPROVEMENT, INC., NEW YORK CITY HOUSING AUTHORITY, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, THE CITY OF NEW YORK, WIN 118TH STREET HOUSING DEVELOPMENT FUND CORPORATION, WOMEN IN NEED INC., VICTORY PLAZA HOUSING DEVELOPMENT FUND CORP., and DARCON CONSTRUCTION, INC.,

DECISION + ORDER ON MOTION

Defendants.

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VICTORY ONE HOUSING DEVELOPMENT FUND CORPORATION, CAMBER PROPERTY GROUP LLC., FIFTH AVENUE BUILDERS LLC., ROCK GROUP NY CORP., HARLEM CONGREGATIONS FOR COMMUNITY IMPROVEMENT, INC., NEW YORK CITY HOUSING AUTHORITY, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, THE CITY OF NEW YORK, WIN 118TH STREET HOUSING DEVELOPMENT FUND CORPORATION and WOMEN IN NEED INC.,

Third-Party Plaintiffs,

-against-

DARCON CONSTRUCTION, INC.

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 87-102, 128, 130-148, 154-155

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 105-129, 149-153 were read on this motion to/for JUDGMENT - SUMMARY.

ASHLEE CRAWFORD, J.:

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants Victory Plaza Housing Development Fund Corporation (“Victory Fund”), Victory Plaza Owner LLC (“Victory Owner”), and Fifth Avenue Builders LLC (“Fifth Avenue”) (mot. seq. 005).

Defendants/third-party plaintiffs Camber Property Group LLC, Fifth Avenue, Harlem Congregations for Community Improvement, Inc., New York City Housing Development Corp., New York City Department of Housing Preservation and Development, The City of New York, and Women in Need Inc. oppose plaintiff’s motion and cross-move for summary judgment dismissing the complaint, including the claims under Labor Law §§ 200, 240 (1), 241 (6), and for common law negligence. Plaintiff only opposes that part of the cross-motion directed to his claim under Labor Law § 240 (1).

Defendant/third-party defendant Darcon Construction, Inc. (“Darcon”) moves pursuant to CPLR 3012 (d) for leave to serve and file their answer to plaintiff’s complaint, to allow a defense on the merits, and compelling all parties to accept Darcon’s answer; and pursuant to CPLR 3212 for summary judgment dismissing the complaint, third-party complaint, and any cross-claims and counterclaims (mot. seq. 006).¹ Defendants/third-party plaintiffs Victory Fund, Victory Owner, Camber Property Group LLC, Fifth Avenue, Harlem Congregations for Community Improvement, Inc., New York City Housing Development Corp., New York City Department of

¹ No cross-claim or counterclaim is asserted against Darcon.

Housing Preservation and Development, The City of New York, and Women in Need Inc. filed untimely opposition to the motion. Plaintiff does not oppose.

Motion sequence nos. 005 and 006 are consolidated for disposition herein.

BACKGROUND

On December 13, 2019, plaintiff was injured while performing stucco work on the exterior of a building at 11 West 118th Street, New York, New York.²

Victory Fund and Victory Owner owned the subject property. Fifth Avenue was the general contractor on the project (Leibel Tr. at 101:11-16 [NYSCEF Doc. 100]). Plaintiff was employed by non-party RSC Group, LLC.

Plaintiff's supervisor, Manual Morocho, gave plaintiff instructions the day before and provided that plaintiff was to use a boom lift with an aerial basket to complete his work (Ponce 50-H Tr. at 19:19-21:25 [NYSCEF Doc. 97]; Ponce 12/16/21 Tr. at 40:6-45:6 [NYSCEF Doc. 98]).

Plaintiff wore a harness, which he connected directly to the aerial basket during his work in the lift (Ponce 12/16/21 Tr. at 45:14-47:5). The boom lift has lights and alarms to provide alerts about the machine's stability, which were failing from the first day (*id.* at 62:8-16, 63:3-70:24). The ground was neither level nor firm enough for a heavy machine like the boom lift (Ponce 50-H Tr. at 26:3-29:13; Ponce 12/16/21 Tr. at 62:17-21, 68:23-69:16). Plaintiff testified that he put the lift in a position where it should not need to be moved (Ponce 12/16/21 Tr. at 89:3-16). At the time of the accident, plaintiff lowered the basket and the arm of the lift to retrieve more material, when the machine sunk into the ground and tilted (Ponce 12/16/21 Tr. at 89:17-90:2, 98:19-99:23). The lift then went into the trench, and the aerial basket, with plaintiff

² Plaintiff was operating the lift at an adjacent property at 15 West 118th Street, owned by non-party West 118 Acquisition LLC. Plaintiff was there pursuant to a license agreement to permit access to the lot.

and his coworker inside, fell into the neighboring building (Ponce 50-H Tr. at 40:18-41:20). The machine was already in an emergency situation before alarm system sounded (Ponce 12/16/21 Tr. at 65:2-6).

In plaintiff's experience, when the basket is above ten feet, the wheels of the lift can no longer be move (Ponce 6/16/22 Tr. at 8:23-9:9 [NYSCEF Doc. 99]).

Darcon is a foundation and concrete subcontractor (Leibel Tr. at 66:2-15 [NYSCEF Doc. 100]; Senese Tr. at 14:5-18 [NYSCEF Doc. 101]). Darcon's scope of work was to excavate, pour concrete, and backfill the foundation (Senese Tr. at 27:12-20, 41:11-14, 45:10-23; Leibel Tr. at 69:7-73:7; Darcon Contract, Ex. A at pp. 37-57 [NYSCEF Doc. 125]). Senese testified that it was not Darcon's responsibility to backfill the lot that the lift ultimately fell into (Senese Tr. at 77:19-24). Darcon finished its work "many months" before the accident, and was not working at the site at the time of the accident (Leibel Tr. at 66:20-25).

DISCUSSION

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (id.). Summary judgment is a drastic remedy and must be denied if there is any doubt as to the existence of a triable issue of material fact (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

I. Leave to File Late Answer

That part of Darcon's motion seeking leave to file and serve a late answer is granted without opposition. The Court notes that no party rejected Darcon's answer, filed on June 3, 2024 (NYSCEF Doc. 103), and no resulting prejudice is alleged or established.

II. Timeliness of Cross-Motion

Cross-movants argue that their motion is timely because an existing motion on identical grounds is pending. The Court agrees and will consider the cross-motion (Filannino v Triborough Bridge and Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006], app dismissed 9 NY3d 862 [2007]).

III. Abandoned Claims & Untimely Papers

Plaintiff does not oppose dismissal of any claims against Darcon, or of his Labor Law §§ 200 and 241 (6) and common law negligence claims against Victory Fund, Victory Owner, Camber Property Group LLC, Fifth Avenue, Harlem Congregations for Community Improvement, Inc., New York City Housing Development Corp., New York City Department of Housing Preservation and Development, The City of New York, and Women in Need Inc. By not opposing dismissal of these claims, plaintiff is deemed to have abandoned them and they are dismissed (see Gamez v Sandy Clarkson LLC, 221 AD3d 453, 454-455 [1st Dept 2023]; Martin Assoc., Inc. v Illinois Natl. Ins. Co., 188 AD3d 572, 573 [1st Dept 2020]; Saidin v Negron, 136 AD3d 458, 459 [2016], lv dismissed 28 NY3d 1069 [2016], cert denied 583 US 842 [2017]).

Third-party plaintiffs filed opposition to Darcon's motion about three days after the deadline (see NYSCEF Doc. 152). While Darcon argues that the opposition should not be considered, and the third-party complaint should be dismissed as abandoned, the Court notes that the minor three-day delay still provided Darcon with an opportunity to respond, and public

policy favors resolving this dispute on the merits (Lauren v Hotel Pennsylvania, 232 AD3d 473, 474 [1st Dept 2024]). Therefore, third-party plaintiffs' opposition will be considered.

IV. Labor Law § 240 (1)

Labor Law § 240 (1) provides in relevant part that where there is erecting, repairing or altering of a building, contractors and owners “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 statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work” (Barreto v Metropolitan Transp. Auth., 25 NY3d 426, 433 [2015]). “[W]here an accident is caused by a violation of the statute, the plaintiff’s own negligence does not furnish a defense; however, where a plaintiff’s own actions are the sole proximate cause of the accident, there can be no liability” (id. [internal quotation marks omitted]). “Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury” (id.). Labor Law § 240 (1) is to be liberally construed so as to accomplish its legislative purpose of protecting workers (Stoneham v Joseph Barsuk, Inc., 41 NY3d 217, 221 [2023]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]).

“Not 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)” (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). “[L]iability 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” (*id.*, citing Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]).

“To raise a triable issue of fact as to whether plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained” (Nacewicz v Roman Catholic Church of the Holy Cross, 105 AD3d 402, 402-03 [1st Dept 2013]; see Biaca-Neto v Boston Road II Housing Dev. Fund Corp., 34 NY3d 1166, 1167-1168 [2020]).

Plaintiff has met his *prima facie* burden under Labor Law 240 (1).

Relying on surveillance video, defendants contend that plaintiff’s misuse of the equipment – purportedly, driving the lift when the aerial basket was in an elevated position, when he knew he should not do so – was the sole proximate cause of the accident. However, the surveillance video does not show that plaintiff was driving the lift at the time of the accident and plaintiff testified that the wheels of the lift could not be moved when the basket was at a certain height (see Pl. 6/7/23 Tr. at 30:16-31:5). Therefore, plaintiff’s motion seeking partial summary judgment as to liability under Labor Law § 240 (1) against Victory Fund and Victory Owner, as owners, and against Fifth Avenue, as general contractor, is granted. Defendants’ motions seeking judgment dismissing that claim are denied.

V. Contractual and Common Law Indemnification & Contribution

Darcon seeks dismissal of the third-party claims of contractual and common law indemnification and contribution. Third-party plaintiffs oppose.

“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] [citation omitted]). “The right to contractual indemnification depends upon the specific language of the contract” (DiBrino v Rockefeller Ctr. N., Inc., 230 AD3d 127, 136 [1st Dept 2024] [citation omitted]). “Indemnification provisions are strictly construed and a promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (Madison Hospitality Mgt. LLC v Acacia Network Hous., Inc., 230 AD3d 1063 [1st Dept 2024] [internal quotation marks and citation omitted]).

“To be entitled to common-law indemnification, a party must show (1) 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 New York, 94 AD3d 1, 10 [1st Dept 2012]).

To establish their claim for contribution, third-party plaintiffs must show that Darcon contributed to plaintiff’s injuries by breaching a duty to plaintiff or defendants/third-party plaintiffs (Jehle v Adams Hotel Assocs., 264 AD2d 354, 355 [1st Dept 1999]).

Plaintiff testified that the accident arose due to the faulty boom lift he was using and shifting ground. There is no evidence demonstrating that Darcon’s excavation and backfill work, months earlier, created a dangerous condition, nor that this condition was a proximate cause of the accident. Accordingly, the subject accident did not “arise out” of Darcon’s work (see GFE Jerome Ave. LLC v Steph-Leigh Assoc., LLC, 193 AD3d 435, 436 [1st Dept 2021]; Darcon Contract at p. 15 ¶ 8.1). Further, Darcon has met its burden of showing it was not negligent, nor did Darcon exercise actual supervision over the injury producing work. Therefore, summary

judgment dismissing the third-party claims for contractual and common law indemnification and common law contribution is granted.

VI. Breach of Contract – Failure to Procure Insurance

Darcon seeks dismissal of the third-party claim for breach of contract for failure to procure insurance. Third-party plaintiffs oppose.

“A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with” (Benedetto v Hyatt Corp., 203 AD3d 505, 506 [1st Dept 2022]). “The burden then shifts to the opposing party, who may raise an issue of fact by tendering the procured insurance policy in opposition to the motion” (id.). “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (Quadrant Structured Prods. Co., Ltd. v Vertin, 23 NY3d 549, 559-560 [2014]).

Darcon concedes it did not procure insurance on behalf of the third-party plaintiffs. However, any such coverage, even if obtained, would not have been triggered because plaintiff’s claims do not arise out of Darcon’s operations or work (see Nicholson v Sabey Data Ctr. Properties, LLC, 205 AD3d 620, 622 [1st Dept 2022]). Therefore, Darcon’s motion for summary judgment dismissing the third-party claim for breach of contract is granted.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants Victory Plaza Housing Development Fund Corporation, Victory Plaza Owner LLC, and Fifth Avenue Builders LLC (“Fifth Avenue”) is GRANTED (motion seq. 005); and it is further

ORDERED that the cross-motion for summary judgment by defendants/third-party plaintiffs Victory Fund, Victory Owner, Camber Property Group LLC, Fifth Avenue, Harlem Congregations for Community Improvement, Inc., New York City Housing Development Corp., New York City Department of Housing Preservation and Development, The City of New York, and Women in Need Inc. is GRANTED IN PART to the extent that plaintiff's claims under Labor Law §§ 200 and 241 (6) and for common law negligence are DISMISSED as abandoned, and the cross-motion is otherwise DENIED (motion seq. 005); and it is further

ORDERED that the motion by defendant/third-party defendant Darcon Construction, Inc. for leave to file and serve an answer to plaintiff's complaint, to allow a defense on the merits, and compelling all parties to accept Darcon's answer; and for summary judgment dismissing the complaint, third-party complaint, and any cross-claims and counterclaims (mot. seq. 006) is GRANTED, such that: (i) that part of Darcon's motion seeking leave to file and serve a late answer is GRANTED without opposition; (ii) plaintiff's claims against Darcon are DISMISSED as abandoned; and (iii) summary judgment dismissing the third-party complaint is GRANTED; and it is further

ORDERED that all parties shall appear for a pre-trial conference to be calendared by the Clerk of the Court.

This constitutes the decision and order of the Court.

<u>12/4/2025</u>			<u>HON. ASHLEE CRAWFORD, J.S.C</u>	
DATE				
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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE