

Estela v Big Dream Devs. LLC

2025 NY Slip Op 35150(U)

March 10, 2025

Supreme Court, Bronx County

Docket Number: Index No. 34608-2019E

Judge: Myrna Socorro

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#4,5,6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9

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Ayedeli Estela,	:	Index No. 34608-2019E
Plaintiff	:	Motion seq #4, 5, and 6
	:	
-against-	:	
	:	<u>DECISION & ORDER</u>
Big Dream Developers LLC, Vernon & Marcy LLC, and Waterfront Property Management LLC,	:	Hon. Myrna Socorro, J.S.C.
Defendants	:	
	:	
	X	
Big Dream Developers LLC,	:	
Third Party Plaintiff:	:	
	:	
-against-	:	
	:	
Capital Concrete NY, Inc.,	:	
Third Party Defendant:	:	
	X	

The following papers were read on the motion by defendant Big Dream Developers LLC (“Big Dream”) (Seq. No. 4) for **summary judgment** ; on the motion by plaintiff (Seq. No. 5) for **summary judgment**; and on the motion by defendant Big Dream (Seq. No. 6) for **summary judgment**, all motions marked submitted on August 1, 2024.

Papers	NYSCEF Doc. No.
Motion seq #4	
Notice of Motion by Defendant/Third-Party Plaintiff Big Dream Developers LLC – Affirmation in Support and Exhibits	#100-104
Plaintiff’s Affirmation in Opposition	# 105
Third-Party Defendant Capital Concrete NY, Inc.’s Affirmation in Opposition and Exhibits	# 148-151
Reply Affirmations	# 106, 152
Motion seq #5	
Notice of Motion by Plaintiff – Affirmation in Support, Statement of Material Facts, and Exhibits	# 115-128
Defendant/Third-Party Plaintiff Big Dream Developers LLC’s Affirmation in Opposition and Response Statement of Material Facts	# 132-133
Reply Affirmation	# 143-144
Motion seq #6	
Notice of Motion by Defendant/Third-Party Plaintiff Big Dream Developers LLC – Affirmation in Support, Statement of Material Facts, and Exhibits	# 135-139

Plaintiff's Affirmation in Opposition and Reply to Statement of Facts	# 140-142
Reply Affirmation	# 145-146

Motion by defendant Big Dream (Seq. No. 4), for an order pursuant to CPLR §3212, granting judgment on its third-party claims against third-party defendant Capital Concrete NY, Inc. ("Capital Concrete") and dismissing Capital Concrete's counterclaim as against it; motion by the plaintiff (Seq. No. 5), for an order pursuant to CPLR §3212, granting judgment on his Labor Law §240(1) claim; and motion by defendant Big Dream (Seq. No. 5), for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint, are decided as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained as a result of an accident at a construction project located at 597 Marcy Avenue, Kings County while being employed by third-party defendant Capital Concrete as a flagger and cleaner. The premises were owned by defendant Vernon & Marcy LLC. Defendant Big Dream was allegedly the general contractor that hired Capital Concrete to perform the construction on the project. Plaintiff testified that part of her job duties was to lift materials and clean or move traffic as a flagger. She testified that she worked at the project for nearly four months before the accident occurred. She further testified that her immediate foreman ("Atillo") gave her the responsibilities each day and the general foreman ("Alfredo") hired all of the workers and checked the progress of the work from time to time. Plaintiff testified that she occasionally lifted heavy materials by hand. She also testified that she occasionally observed a hoist or carts would be available to lift heavy materials. Plaintiff testified that on the date of the accident, Atillo instructed her to remove carpet from the floor to allow other workers to perform their work. She testified that she and two other workers were removing materials, including a long heavy beam that Atillo instructed them to move to another location when the accident occurred. Plaintiff testified that the subject beam measured ten feet long and weighing approximately 200 pounds. She testified that they lifted the beam from the floor and proceeded to move it when one of the other workers let go of the beam without warning, resulting in the beam falling and striking plaintiff which caused her to fall to the floor and sustain injury. Plaintiff testified that at the time of the accident, there were no available carts and did not observe a hoist to lift the beam. She testified that she advised her boss that the beam should be lifted by a hoist but was still instructed to lift and move the beam by hand. She further testified that she wore a hard hat, boots, gloves, and a vest on the date of the accident.

Preliminarily, counsel for plaintiff withdrew the Labor Law §241(6) claim at oral argument on August 1, 2024. Therefore, this court will not further address the merits of plaintiff's Labor Law §241(6) claim.

In support of its motion for summary judgment seeking judgment on its third-party claims, Big Dream argues that it is entitled to contractual indemnification against Capital Concrete on the grounds that plaintiff's accident arose out of and in connection with the performance of the work under the subcontract. Big Dream further argues that it is free from negligence and that the indemnity provision does not violate the General Obligations Law. It contends that it is entitled to common-law indemnification and contribution against Capital Concrete based on the evidence demonstrating that Big Dream did not supervise or direct the work of Capital Concrete or plaintiff and that plaintiff's accident arose out of the acts or omissions on the part of Capital Concrete as plaintiff's supervisor. As for the breach of contract claim for failure to procure, Big Dream contends that Capital Concrete failed to comply with their contractual obligations with respect to obtaining the required insurance pursuant to the subcontract. Moreover, it argues that Capital Concrete's counterclaim should be dismissed as Big Dream was not negligent for the happening of plaintiff's accident, and therefore, Capital Concrete is not entitled to indemnification.

In support of the motion for summary judgment, plaintiff argues that she is entitled to judgment on his Labor Law §240(1) claim as she was struck by an unsecured falling object from a height that was not *de minimis*. Plaintiff therefore contends that she was not provided with an adequate safety device to protect her from a 200-pound beam from falling and striking her as she and her coworkers attempted to move it.

In support of the motion seeking dismissal of plaintiff's complaint, defendant Big Dream argues that Labor Law §240(1) does not apply as plaintiff's accident was not the direct consequence of a failure to provide a proper safety device against a risk arising out of a physically significant elevation differential. Big Dream also argues that the Labor Law §200 and common-law negligence claims should be dismissed as the evidence demonstrates that Big Dream did not supervise or control the plaintiff's work and did not possess actual or constructive notice of an alleged hazardous condition.

Summary Judgment Review

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility (*see Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC*, 157 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508 [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 [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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851 [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 (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *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]; *see Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999], holding “[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists”).

Here, the court finds the plaintiff established her *prima facie* entitlement to judgment on her Labor

Law §240(1) claim as the evidence shows that her injuries were caused by the failure to provide her with an adequate safety device to properly hoist a heavy wood beam from one area to another (*Jara-Salazar v 250 Park, L.L.C.*, 231 AD3d 674 [1st Dept 2024]). The record demonstrated that there were no safety devices to afford plaintiff protection against a beam of that size and weight falling and striking her as she and her coworkers attempted to manually lift and move the beam to another location (*see Iuculano v City of New York*, 214 AD3d 535 [1st Dept 2023]).

Labor Law 200/Common-Law Negligence

Moreover, the branch of defendant Big Dream's summary judgment motion to dismiss the Labor Law §200 and common-law negligence claims as against it is granted. Plaintiff's accident in this case arose out of the means and methods of the work, which was directed, controlled, and supervised by her employer (Capital Concrete) (*Carranza v Memorial Hosp. for Cancer & Allied Diseases*, 225 AD3d 536 [1st Dept 2024]; *Siegel v Delta Airlines, Inc.*, 227 AD3d 516 [1st Dept 2024]). Any general supervisory authority as conferred on Big Dream by any construction agreement is insufficient to support these claims (*see id.*).

Big Dream's Third-Party Complaint against Capital Concrete

With respect to Big Dream's contractual indemnification claim against Capital Concrete, the relevant indemnification provision contained in the subcontract between the parties provides, in pertinent part, as follows:

- 1. Indemnity.** In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor [Capital Concrete] shall defend and indemnify, and hold harmless, at Subcontractor's [Capital Concrete's] sole expense, the Contractor [Big Dream], all entities the Contractor [Big Dream] is required [to] indemnify and hold harmless, the Owner of the property...from and against all liability or claimed liability for bodily injury or death to any person(s)...arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor [Capital Concrete] or by anyone for whose acts the Subcontractor [Capital Concrete] may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties.

(NYSCEF Doc No. 104 at 2).

"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].

Here, the subcontract’s broad indemnification provision was triggered by plaintiff’s accident in the course of Capital Concrete’s work (*Asian v Flintlock Constr. Servs., LLC*, 225 AD3d 462 [1st Dept 2024]). The subject indemnification provision also does not run afoul of General Obligations Law § 5-322.1 as it sufficiently contains the appropriate savings clause “to the fullest extent permitted by law” (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]). The court finds that Big Dream is entitled to summary judgment on its contractual indemnification claim against Capital Concrete as Big Dream can only be found vicariously liable for plaintiff’s accident. In opposition, Capital Concrete failed to raise a triable issue of fact.

To the extent that Big Dream seeks judgment on its claims sounding in common-law indemnity and/or contribution against Capital Concrete, plaintiff’s employer, Big Dream failed to demonstrate its *prima facie* entitlement to judgment on said claims as they are barred by Workers Compensation Law § 11 since the plaintiff’s injuries are not “grave” within the meaning of the statute (*Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 [1st Dept 2019]).

As a party moving for summary judgment on its claim for breach of contract for failure to procure insurance, Big Dream failed to satisfy its *prima facie* burden of demonstrating that Capital Concrete failed to comply with a contract provision requiring procurement of insurance via submission of evidence tendered in admissible form to that effect (*Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). Therefore, Big Dream’s request for judgment on its breach of contract claim for failure to procure against Capital Concrete, is denied.

Capital Concrete’s Counterclaim against Big Dream for Indemnification

As plead in its third-party answer, Capital Concrete appears to allege a common-law indemnification claim against Big Dream (NYSCEF Doc No. 122 at 6).

“To establish a claim for common-law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident’” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Priestly v Montefiore Med. Ctr.*, 10 AD3d 493, 495, [1st Dept 2004]).

Liability for common-law indemnification may not be imposed against parties that are not negligent

and do not exercise actual supervision and control over the injury-producing work (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]; see *Ausby v 365 W. End LLC*, 135 AD3d 481 [1st Dept 2016]).

Here, where the Labor Law §200 and/or common-law negligence claims are dismissed against Big Dream for the reasons set forth above, Big Dream can no longer be found negligent for the plaintiff's accident. Therefore, Capital Concrete can no longer maintain its counterclaim against Big Dream for common-law indemnification. Accordingly, the branch of Big Dream's summary judgment motion seeking dismissal of Capital Concrete's counterclaim against it for indemnification is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by any movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that the motion by defendant/third-plaintiff Big Dream (Seq. No. 4) seeking summary judgment on its third-party complaint against Capital Concrete, and for dismissal of Capital Concrete's counterclaim for indemnification, is **GRANTED IN PART**; and it is further

ORDERED, that Big Dream is entitled to contractual indemnification against Capital Concrete; and it is further

ORDERED, that Capital Concrete's counterclaim against Big Dream for indemnification, is dismissed; and it is further

ORDERED, that the summary judgment motion by plaintiff (Seq. No. 5) seeking judgment on the Labor Law §240(1) claim, is **GRANTED**; and it is further

ORDERED, that the summary judgment motion by defendant/third-party plaintiff Big Dream (Seq. No. 6) seeking dismissal of plaintiff's complaint, is **GRANTED IN PART**; and it is further

ORDERED, that the Labor Law §200 and/or common-law negligence claims against Big Dream are dismissed; and it is further

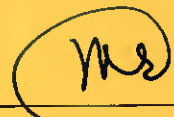
ORDERED, that plaintiff's Labor Law §241(6) claim are dismissed as plaintiff withdrew said

claim; and it is further

ORDERED, the movants of each motion shall serve and file a Notice of Entry of this Decision and Order upon all parties within twenty (20) days from the date herein.

This constitutes the decision and order of this court.

Dated: March 10, 2025



HON. MYRNA SOCORRO, J.S.C.