

Santacruz v 58 Gerry St LLC
2025 NY Slip Op 35272(U)
January 2, 2025
Supreme Court, Bronx County
Docket Number: Index No. 23434-2019E
Judge: Myrna Socorro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 9

-----X
JOSE ORLANDO ESTELA SANTACRUZ,
Plaintiff

Index No. 23434-2019E
Motions seq #5, 6, 7 and 8

-against-

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

58 GERRY ST LLC, 33 BARTLETT LLC, GERRY STREET
HOLDINGS LLC and PARKVIEW BUILDERS LLC, BT
GENERAL BUILDERS INC., and BT GENERAL BUILDERS
INC., d/b/a PREFERRED BUILDERS,
Defendants

-----X
58 GERRY ST LLC, 33 BARTLETT LLC, GERRY STREET
HOLDINGS LLC and PARKVIEW BUILDERS LLC,
Third-Party Plaintiffs,

-against-

CAPITAL CONCRETE NY INC.,
Third-Party Defendant.

-----X
58 GERRY ST LLC, 33 BARTLETT LLC, GERRY STREET
HOLDINGS LLC and PARKVIEW BUILDERS LLC,
Second Third-Party Plaintiffs,

-against-

ACCREDITED SURETY AND CASUALTY COMPANY,
INC., AXIS SPECIALTY INSURANCE COMPANY, ARCH
INSURANCE COMPANY, ENDURANCE AMERICAN
SPECIALTY INSURANCE COMPANY and THE NORTH
RIVER INSURANCE COMPANY a/k/a NORTH RIVER
INSURANCE COMPANY,
Second Third-Party Defendants.

-----X
58 GERRY ST LLC, 33 BARTLETT LLC, GERRY STREET
HOLDINGS LLC and PARKVIEW BUILDERS LLC,
Third Third-Party Plaintiffs,

-against-

GREAT MAINTENANCE NY INC,
Third Third-Party Defendant.

-----X
CAPITAL CONCRETE NY INC.,
Fourth Third-Party Plaintiff,

-against-

DUNN CO. SAFETY LLC,
Fourth Third-Party Defendant.

-----X

The following papers were read on the motion by the plaintiff (Seq. No. 5) for **summary judgment** noticed for November 22, 2023, and submitted on June 10, 2024; on the motion by third third-party defendant Great Maintenance NY Inc. (Seq. No. 6) for **summary judgment** noticed for December 20, 2023, and submitted on June 10, 2024; on the motion by third-party defendant/fourth third-party plaintiff Capital Concrete NY Inc. (Seq. No. 7) for **summary judgment** noticed for December 20, 2023, and submitted on June 10, 2024; and on the motion by defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders (Seq. No. 8) for **summary judgment** noticed for January 26, 2024, and submitted on June 10, 2024.

Papers	NYSCEF Doc. No.
Motion seq #5	
Notice of Motion by Plaintiff – Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support and Exhibits	# 181-203
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.’s Affirmation in Opposition and Exhibits	# 333-351
Third Third-Party Defendant Great Maintenance NY Inc.’s Affirmation in Opposition	# 375
Defendants 58 Gerry St LLC’s, 33 Bartlett LLC’s, Gerry Street Holdings LLC’s, Parkview Builders LLC’s, B T General Builders Inc.’s, and B T General Builders Inc.’s, d/b/a Preferred Builders’ Affirmation in Opposition, Response Statement of Material Facts, Memorandum of Law in Opposition and Exhibits	# 376-384
Fourth Third-Party Defendant Dunn Co. Safety LLC’s Affirmation in Opposition, Response to Statement of Material Facts, and Memorandum of Law in Opposition	# 386-388
Plaintiff’s Reply Affirmation to Third Third-Party Defendant Great Maintenance NY Inc.	# 396-397
Plaintiff’s Reply Affirmation to Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc	# 398-399
Plaintiff’s Reply Affirmation to Fourth Third-Party Defendant Dunn Co. Safety LLC	# 400-401
Plaintiff’s Reply Affirmation to Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders	# 402-403
Motion seq #6	# 204-245
Notice of Motion by Third Third-Party Defendant Great Maintenance NY Inc. – Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, and Exhibits	
Plaintiff’s Affirmation in Opposition, Statement of Material Facts, Memorandum of Law in Opposition, and Exhibit	# 326-330

Affirmation in Opposition by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders, and Response to Statement of Material Facts	# 331-332
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Affirmation in Opposition and Exhibits	# 352-359
Fourth Third-Party Defendant Dunn Co. Safety LLC's Affirmation in Opposition and Memorandum of Law in Opposition	# 391-392
Third Third-Party Defendant Great Maintenance NY Inc.'s Reply Affirmation to Plaintiff and Exhibits	# 412-415
Third Third-Party Defendant Great Maintenance NY Inc.'s Reply Affirmation to Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc. and Exhibits	# 419-421
Third Third-Party Defendant Great Maintenance NY Inc.'s Reply Affirmation to Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders and Fourth Third-Party Defendant Dunn Co. Safety LLC	# 422
Motion seq #7	# 246-277
Notice of Motion by Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc. – Affirmation in Support, Memorandum of Law in Support, and Exhibits	
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, and Statement of Material Facts	# 318-321
Affirmation in Opposition by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders, and Exhibits	# 370-374
Third Third-Party Defendant Great Maintenance NY Inc.'s Affirmation in Response	# 393
Fourth Third-Party Defendant Dunn Co. Safety LLC's Affirmation in Partial Opposition and Memorandum of Law in Opposition	# 394-395
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Reply Affirmation to Fourth Third-Party Defendant Dunn Co. Safety LLC	# 416
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Reply Affirmation to Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders	# 417
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Reply Affirmation to Plaintiff	#418
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Reply Affirmation to Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.	# 419

Motion seq #8	# 278-303
Notice of Motion by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders – Affirmation in Support, Memorandum of Law in Support, and Exhibits	
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, and Statement of Material Facts	# 322-325
Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc.'s Affirmation in Opposition and Exhibits	# 360-369
Third Third-Party Defendant Great Maintenance NY Inc.'s Affirmation in Opposition	# 385
Fourth Third-Party Defendant Dunn Co. Safety LLC's Affirmation in Partial Opposition and Memorandum of Law in Opposition	# 389-390
Reply Affirmation by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders to Fourth Third-Party Defendant Dunn Co. Safety LLC, and Exhibit	# 404-405
Reply Affirmation by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders to Plaintiff, Response to Statement of Material Facts, and Exhibit	# 406-408
Reply Affirmation by Defendants 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders to Third-Party Defendant/Fourth Third-Party Plaintiff Capital Concrete NY Inc. and Third Third-Party Defendant Great Maintenance NY Inc. and Exhibits	# 409-411

Motion by the plaintiff (Seq. No. 5), for an order pursuant to CPLR §3212, granting judgment on the Labor Law §240(1) and §241(6) claims against the defendants; motion by third third-party defendant Great Maintenance NY Inc. ("Great Maintenance") (Seq. No. 6), for an order pursuant to CPLR §3212, dismissing the third third-party complaint by defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs 58 Gerry St LLC, 33 Bartlett LLC, Gerry Street Holdings LLC, Parkview Builders LLC (collectively "the 58 Gerry St defendants") and dismissing all counterclaims and cross-claims against it; motion by third-party defendant/fourth third-party plaintiff Capital Concrete NY Inc. ("Capital Concrete") (Seq. No. 7), for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint and dismissing the 58 Gerry St defendants' third-party complaint; and motion by the 58 Gerry St defendants, B T General Builders Inc., and B T General Builders Inc., d/b/a Preferred Builders (Seq. No. 8), for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint and all cross-claims, judgment on their third-party claim for contractual indemnification against Capital Concrete as well as a declaration that Capital Concrete has a primary non-contributory obligation to indemnify them, and conditional judgment

on their third third-party claim against Great Maintenance for common-law indemnification, are decided as follows:

According to the plaintiff's testimony, on the day of the accident, he was employed by third-party defendant/fourth third-party plaintiff Capital Concrete and third third-party defendant Great Maintenance to work at a project located at 58 Gerry Street, Kings County. Plaintiff testified that he worked at the subject site for six months before his accident occurred and that he first worked for Capital Concrete by obtaining a job through a Capital Concrete supervisor. He further testified that he received instructions for his work only from Capital Concrete foremen. He testified that he was tasked to perform concrete and carpentry work on the elevator, including the walls around it. Plaintiff testified that the task involved creating forms, pouring concrete and stripping the forms from the ground floor up to where his accident occurred on the sixth floor. He testified that he wore a tool belt containing a hammer, crowbar, measuring tape, and safety harness. The plaintiff testified that he never made a complaint about any condition at the work site before his accident occurred. He testified that on the sixth floor, he worked with the same Capital Concrete employees stripping the elevator, and that no other trades or subcontractors were working in the building at the time of the accident. The plaintiff testified that he also did not identify anyone associated with the owners of the premises. He testified that he was removing a form out of the wall with his hands after he removed a pin and while holding the form with both hands, a "jack" came from behind and/or fell from above and struck him in the head, neck, shoulder and back, pressed him against the wall and cut three of his fingers. At his deposition in March 2021, when asked why the jack or post fell, the plaintiff testified that he "imagine[d]...it was not secured well." (NYSCEF Doc No. 265, plaintiff's tr at 227). At a deposition in June 2021, the plaintiff testified that he believed the accident occurred because the subject post lacked a wooden cross brace required to secure it. (NYSCEF Doc No. 265, plaintiff's tr at 307-308). The plaintiff testified that none of his coworkers witnessed the accident but that they came to his assistance after the accident.

In response to plaintiff's notice to admit, defendant 58 Gerry St LLC admitted ownership of the subject premises on the date of the alleged incident. According to the 58 Gerry St defendants, defendant Parkview Builders LLC was hired by the premise owner to serve as a general contractor briefly before defendants BT General Builders d/b/a Preferred Builders ("Preferred") took over and was subsequently retained to serve as construction manager of the project. Pursuant to a subcontract, Preferred hired Capital Concrete to perform concrete foundation and structure at the site. Plaintiff testified that he received his direct deposits for his work from Great Maintenance. Pursuant to a construction agreement with Preferred, Dunn was retained to perform site safety management of the project.

In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, deposition testimonies of the plaintiff, Chaim Fuchs (owner of Preferred), Juda Klein (principal and owner of Parkview Builders), and Edgardo Ortiz (Capital Concrete coworker), the construction managing contract between 58 Gerry St LLC and Preferred, the construction contract between Gerry Street Holdings LLC/58 Gerry LLC and Parkview Builders, the subcontract between Preferred and Capital Concrete, and the contract between Preferred and Dunn for site safety management. The plaintiff contends that the defendants violated Labor Law §240(1) by failing to provide adequate safety devices to the plaintiff to secure a jack or post from falling on him while performing his work of stripping and removing concrete forms. He also contends that the defendants are liable under Labor Law §241(6) by violating Industrial Codes 12 NYCRR §23-1.27(d) and (e), with respect to the use of jacks, and §23-2.2(a) as to concrete work.

In support of its motion for summary judgment, third third-party defendant Great Maintenance submitted, *inter alia*, deposition testimonies of the parties and non-party witnesses Edgar Ortiz (Capital Concrete coworker) and Carmen Espinoza (physician assistant at Woodhull Hospital on the date of the accident), the subcontract between Preferred and Capital Concrete, a sworn affidavit of Leib Halberstam (who performed risk management for Capital Concrete and Great Maintenance), a copy of the workers compensation insurance policy issued to Great Maintenance, a sworn affidavit of Karen Cauthen (vocational rehabilitation specialist), a copy of a report of neuropsychological evaluation by David M. Erlanger, Ph.D., a sworn affidavit by neuroradiologist, Gordon Sze, M.D., and medical records of the plaintiff. Great Maintenance argues that as plaintiff's employer, the plaintiff did not sustain a "grave injury" as defined by Workers' Compensation Law §11 and therefore, all claims against it are barred as a matter of law. It further contends that Great Maintenance never entered into a written agreement to indemnify the 58 Gerry St defendants.

In support of its summary judgment motion, Capital Concrete submits, *inter alia*, the Capital Concrete subcontract, a copy of its commercial general liability (CGL) policy, a copy of the CGL tender response, certificates of insurance, a copy of its excess policy, a copy of the incident report, hospital records relating to the alleged incident, a copy of the Workers' Compensation Board decision disallowing the traumatic brain injury claim, and a sworn expert engineering affidavit by Bernard P. Lorenz, P.E. Capital Concrete argues that the plaintiff's complaint should be dismissed as the plaintiff was the sole proximate cause of his injuries. As to Labor Law §240(1), any allegations by plaintiff that he was struck in the head by a falling shoring post is incredible as a matter of law. Lorenz opined in his affidavit that securing a drophead post would be impracticable for the task. Inasmuch as none of the Industrial Codes alleged by the plaintiff apply to the facts, Capital Concrete argues that Labor Law §241(6) should be dismissed. It further contends that the Labor Law §200 claim should be dismissed as the plaintiff's removing of a shoring post by striking

it with a hammer to release the drophead was in compliance with industry standards. Finally, it seeks to dismiss the Labor Law §241-a claim where the facts in this case do not pertain to a fall through an elevator shaft. It also argues that any third-party claims against it for common-law indemnification and/or contribution should be dismissed as the plaintiff did not suffer a “grave injury” within the meaning of Workers’ Compensation Law §11 as the plaintiff’s special employer. As to the third-party claim for breach of contract for failure to procure insurance, Capital Concrete argues that it complied with any contractual obligation to procure insurance by annexing copies of its commercial general liability and excess policies accompanied with a blanket endorsement for additional insureds. Moreover, it claims the anti-subrogation rule bars any third-party claim for contractual indemnification by the 58 Gerry St defendants.

In support of their motion for summary judgment, the 58 Gerry St defendants, B T General Builders Inc., and Preferred submit, *inter alia*, deposition testimonies of the parties and non-parties, Woodhull Hospital records, a contract between the owners and Parkview Builders, the Preferred construction management agreement, the Capital Concrete subcontract, and the Dunn site safety agreement for the premises. They contend that the Labor Law §240(1) claim should be dismissed as the plaintiff’s incident did not involve a gravity-related risk; that the Labor Law §200 claim should be dismissed as the plaintiff’s work was exclusively controlled, directed, and supervised by Capital Concrete, plaintiff’s employer; and that the Labor Law §241(6) should be dismissed as the plaintiff cites to Industrial Codes that are insufficiently specific or not applicable to the facts herein. The 58 Gerry St defendants seek a declaration that Capital Concrete has a primary non-contributory obligation to indemnify them because Capital Concrete’s excess insurer has not agreed in writing that it will abide by the subcontract terms. Further, they seek judgment on their claim for common-law indemnification against Great Maintenance if the plaintiff is found to have sustained a “grave injury.”

Summary Judgment Standard

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 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 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 face 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) and §241(6)

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].

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].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §23-1.27(d) and (e) (Mechanical, hydraulic and pneumatic jacks; Loads; Use) and §23-2.2(a) (concrete work), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

This court finds the conflicting evidence in the record raised material issues of fact, and whether the defendants can be held liable under Labor Law §240(1) and §241(6) insofar as it is predicated on the aforementioned Industrial Code provisions. *See Ruiz v Roosevelt Terrace Coop., Inc.*, 212 AD3d 487 [1st Dept 2023]; *see also Singh v New York City Hous. Auth.*, 211 AD3d 496 [1st Dept 2022]. The plaintiff testified that while performing the stripping or removal of concrete forms, a jack or drophead struck him sustaining alleged injuries to his head, back, shoulders, and three fingers. However, other evidence in the record suggests that the plaintiff may not have sustained an injury arising out of an elevated-related risk, i.e., Workers' Compensation Board decision that disallowed any alleged traumatic brain injury and hospital records from the date of the accident indicating the plaintiff's chief complaint was a finger injury. Even assuming the plaintiff's accident involved a gravity-related risk within the ambit of Labor Law §240(1), triable issues of fact remain as to whether the plaintiff was provided an adequate safety device "so constructed, placed and operated as to give proper protection" (Labor Law §240[1]). *See Hartigan v Gilbane Bldg. Co.*, 228 AD3d 487 [1st Dept 2024]. Based on plaintiff's inconsistent testimony as to why and how his accident happened, the plaintiff failed to establish "that there is a safety device of kind enumerated in section 240(1) that could have prevented his fall, because liability is contingent upon the failure to use, or the inadequacy of such a device". . *See id; Ortiz v Varsity Holdings LLC*, 18 NYS 3d 335; 937 NYS 2d 157 (2011).

Moreover, it will also require a jury to determine whether the plaintiff's own conduct of removing or stripping the concrete forms improperly was the sole proximate cause of his accident. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022] [citing *Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601 [1st Dept 2022]].

Labor Law §200/Common-Law Negligence

Any summary judgment motion seeking to dismiss the Labor Law §200 and common-law

negligence claims as against them is denied. Although the record demonstrates that the 58 Gerry St defendants, B T General Builders or Preferred did not direct, supervise, or direct the means and methods of the plaintiff's work, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. Said defendants failed to establish *prima facie* that they neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law §200 and common-law negligence claims against them. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022]. The defendants submitted no evidence of when the work site was last inspected as part of their moving papers. *See id.*; *see also Kolakowski v 10839 Assoc.*, 185 AD3d 427 [1st Dept 2020]; *Pereira v New Sch.*, 148 AD3d 410 [1st Dept 2017]. Moreover, at least one construction contract identifies all of the defendants as owners and/or general contractors. Therefore, to the extent that any defendant argues that it is not a proper Labor Law defendant, this remains a triable issue of fact.

The 58 Gerry St Defendants' Third Third-Party Complaint Against Great Maintenance

Great Maintenance seeks to dismiss the 58 Gerry St defendants' third third-party complaint and the 58 Gerry St defendants request judgment against Great Maintenance on their claim for common-law indemnification and/or contribution.

First, Great Maintenance demonstrated its *prima facie* entitlement to dismissal of the third third-party claims for contractual indemnification and breach of contract for failure to procure. The 58 Gerry St defendants failed to raise a triable issue of fact as they concede in their opposition papers that there is no written agreement between the 58 Gerry St defendants and Great Maintenance.

With respect to the third third-party claims for common-law indemnification and/or contribution, the evidence in the record demonstrates that the plaintiff did not suffer a "grave injury" as defined in Workers' Compensation Law §11. Great Maintenance satisfied its *prima facie* burden of demonstrating that plaintiff did not sustain a "grave injury" by submitting evidence that the plaintiff presented at the hospital after his accident with no head injury and that his chief complaint was a finger injury coupled with medical findings by a neuropsychologist, neuroradiologist, and a vocational rehabilitation expert that the plaintiff did not suffer from cognitive defects, no evidence of traumatic brain injury, and that plaintiff is capable of returning to work on light duty. *See Rucinski v More Restoration Co. Inc.*, 210 AD3d 604 [1st Dept 2022]. However, the court finds there are triable issues of fact as to the employer relationship between the plaintiff, Great Maintenance, and Capital Concrete to preclude summary judgment in favor of any party with respect to the 58 Gerry St defendants' claim for common-law indemnification and/or contribution against Great Maintenance. *See Mullins v Ctr. Line Studios*, 194 AD3d 421 [1st Dept 2021].

The 58 Gerry St Defendants' Third-Party Complaint Against Capital Concrete

Capital Concrete seeks to dismiss the 58 Gerry St defendants' third-party complaint as against it. The 58 Gerry St defendants seek an order granting judgment on their third-party claim for contractual indemnification against Capital Concrete pursuant to the indemnification provision in the rider of the Capital Concrete subcontract, which provides, in relevant part, as follows:

Indemnity. In consideration of the Contract agreement, and to the fullest extent permitted by law, the Subcontractor [Capital Concrete] shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required to indemnify and hold harmless, the Owner of the property, and all entities the owner is required to indemnify and the officers, directors, agents, employees, successors and assigns of each of them, all entities the Owner is required indemnify and hold harmless 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 or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties.

(NYSCEF Doc No. 253 at 22)

The rider to the subcontract identifies the "Indemnified Parties" and additional insured parties as defendants Gerry Street Holdings LLC, 58 Gerry St LLC, 33 Bartlett LLC (collectively, owners) and defendants Parkview Builders and B T General Builders Inc d/b/a Preferred (collectively, general contractors or construction managers). (NYSCEF Doc No. 253 at 23).

Here, there has been no determination of liability as to the owners and general contractor (the 58 Gerry St defendants, Parkview Builders, B T General Builders Inc, and Preferred) or the subcontractor (Capital Concrete). Therefore, the 58 Gerry St defendants' claim for indemnification from Capital Concrete is premature. Moreover, there are triable issues of fact as to whether the plaintiff's accident arose out of the work or a dangerous condition that the defendants created or caused to create. Therefore, the 58 Gerry St defendants' claim of an entitlement to indemnification is also premature. *See Greenwich Ins. Co. v City of New York*, 122 AD3d 470 [1st Dept 2014]; *see also Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872 [1st Dept 2009].

Although it has been found that the plaintiff did not suffer a “grave injury,” triable issues of fact remain as to the employer relationship between the plaintiff, Great Maintenance, and Capital Concrete to preclude summary judgment in favor of any party with respect to the 58 Gerry St defendants’ claim for common-law indemnification and/or contribution against Capital Concrete. *See Mullins v Ctr. Line Studios*, 194 AD3d 421 [1st Dept 2021].

Further, Capital Concrete failed to establish *prima facie* that it procured the insurance as required by the subcontract notwithstanding that it appended copies of the commercial general liability insurance and excess policies that were effective on the date of the accident. *See Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555 [1st Dept 2022]. The subcontract required Capital Concrete to obtain excess insurance with “[l]imits of \$5,000,000 for all subcontractors and limits of \$10,000,000 for contractors engaged in exterior work” (NYSCEF Doc No. 253, Capital Concrete excess policy at 23).

Here, Capital Concrete appended a copy of its commercial general liability policy that was effective on the date of the accident, which included a blanket endorsement that covered its obligations to provide insurance to the owner and contractor as additional insureds, within acceptable limits. However, Capital Concrete failed to demonstrate that it complied with its contractual obligation to procure the required limits of excess insurance coverage. Accordingly, Capital Concrete’s request to dismissal of the third-party claim for breach of contract for failure to procure, is denied.

Finally, there was no opposition to the branch of Capital Concrete’s summary judgment motion seeking dismissal of the Labor Law §241-a claim as there was no allegation of a fall from an elevator shaft. Accordingly, the branch of Capital Concrete’s summary judgment motion seeking dismissal of the Labor Law §241-a claim, 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 branch on motion seq #5 by plaintiff seeking judgment on the Labor Law 240(1) is **DENIED**; and it is further

ORDERED that the branch on motion seq #7 and #8 by defendants seeking dismissal of plaintiff's Labor Law §241(6) is **GRANTED IN PART** in that all Industrial Codes abandoned by plaintiff are dismissed, except for 12 NYCRR §23-1.27(d) and (e); and 12 NYCRR §23-2.2(a); and it is further

ORDERED that the branch of motion seq #5 by plaintiff seeking judgment on the Labor Law §241(6) as to Industrial Codes 12 NYCRR §23-1.27(d) and (3) and 12 NYCRR §23-2.2(a) is **DENIED**; and it is further

ORDERED that the branch in motion seq #7 and #8 by defendants seeking dismissal of plaintiff's Labor Law §200/common law negligence is **DENIED**; and it is further

ORDERED, that the branch of motion in motion seq #6 by Great Maintenance seeking dismissal of the 58 Gerry St defendants' third third-party claims for contractual indemnification and breach of contract for failure to procure is **GRANTED**; and it is further

ORDERED that the remaining branches of motion in seq #6 by Great Maintenance seeking dismissal of the 58 Gerry St defendants third third-party claims for common law indemnification and contribution is **DENIED**; and it is further

ORDERED, that the summary judgment motion by Capital Concrete (Seq. No. 7) seeking dismissal of the plaintiff's complaint, including Labor Law §241-a, and dismissal of the 58 Gerry St defendants' third-party complaint, is **GRANTED IN PART** in that the Labor Law §241-a claim is dismissed and all other relief requested is **DENIED**; and it is further

ORDERED that motion seq #8 by 58 Gerry St. Defendants is **DENIED WITH LEAVE TO**

RENEW as it is premature;

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

This constitutes the decision and order of this Court.

Dated: January 2, 2025

A handwritten signature in black ink, consisting of stylized initials 'MS' enclosed within a circular scribble.

HON. MYRNA SOCORRO, J.S.C.