Epinoza v Ray Bldrs., Inc.
2025 NY Slip Op 35314(U)
November 13, 2025
Supreme Court, Queens County
Docket Number: Index No. 722417/2020
Judge: Peter J. Kelly
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY IA Part 2
Justice

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EDUARDO ENRIONE EPINOZA,

Plaintiff,

- against – Index No.: 722417/2020

Motion Seq Nos.: 2 & 3

RAY BUILDERS, INC., CACTUS 36-20 STEINWAY LLC C/O JMH DEVELOPMENT, STEINWAY STREET INVESTORS I SUBSIDIARY LLC, STEINWAY STREET LIC, LLC, JMH DEVELOPMENT LLC, METTLE PROPERTY GROUP, LLC and CAPITAL CONCRETE NY INC.,

Defendants.

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RAY BUILDERS, INC., CACTUS 36-20 STEINWAY LLC C/O JMH DEVELOPMENT, STEINWAY STREET INVESTORS I SUBSIDIARY LLC, STEINWAY STREET LIC, LLC, JMH DEVELOPMENT LLC, and METTLE PROPERTY GROUP, LLC,

Third-Party Plaintiffs,

- against –

CAPITOL CONRETE NY INC.,

Third-Party Defendants.

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The following numbered papers read on the motion by the plaintiff for summary judgment on the issue of liability on his Labor Law § 240 (1) claim (Seq. No. 2) and the motion by the defendants/third-party plaintiffs Ray Builders, Inc., Cactus 36-20 Steinway LLC, Steinway Street Investors I Subsidiary LLC, Steinway Street LIC, LLC, JMH Development LLC, and Mettle Property Group, LLC for summary judgment dismissing the complaint and all cross-claims against them and granting their contractual indemnification and common-law indemnification claims against the defendant/third-party defendant Capital Concrete NY Inc. (Seq. No. 3).

	Papers Numbered
Seq. No. 2	
Notice of Motion – Affidavits – Exhibits	EF 71-87
Answering Affidavit – Exhibits (Capital Concrete)	EF 114-115
Answering Affidavit – Exhibits (Defendants)	EF 117-122
Reply Affirmation	EF 126
Seq. No. 3	
Notice of Motion – Affidavits – Exhibits	EF 88-107
Answering Affidavit – Exhibits (Plaintiff)	EF 109-111
Reply Affirmation	EF 125
Answering Affidavit (Concrete Capital)	EF 116
Reply Affirmation	EF 124

Upon the foregoing papers, it is ordered that the motions are considered together for the purpose of a single decision and order and are determined as follows:

On November 10, 2020, the plaintiff allegedly was injured while performing work as a carpenter at a construction site located at 36-20 Steinway Street, Queens, New York (the premises). The plaintiff was on an approximately 15-foot high moveable scaffold performing stripping work. The plaintiff alleges that a piece of plywood detached and hit him on the back, causing him to fall. The plaintiff was wearing a harness which he tied to the scaffold. The plaintiff further alleges that when he fell, the scaffold fell, and he fell to the ground.

At the time of the accident, the defendants Steinway Street Investors I Subsidiary LLC (Steinway Investors) and Cactus 36-20 Steinway LLC (Cactus) were owners of the premises, and the defendant Ray Builders Inc. (Ray Builders) was the general contractor on the subject project. Ray Builders hired Capital Concrete NY Inc. (Capital Concrete) to perform concrete work. Capital Concrete hired SWP Services Corp. (SWP), the plaintiff's employer at the time of the accident.

The plaintiff initially commenced this action against Ray Builders, Cactus, Steinway Investors, Steinway Street LIC, LLC (Steinway LIC), JMH Development LLC (JMH), and Mettle Property Group, LLC (Mettle) (collectively the Steinway defendants) alleging common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The Steinway defendants commenced a third-party action against Capital Concrete as a third-party defendant alleging causes of action for contractual indemnification, breach of contract for failure to procure insurance, and common-law indemnification. The plaintiff subsequently amended his complaint to add Capital Concrete as a defendant alleging common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6) against it.

The plaintiff now moves for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action. The Steinway defendants move for summary judgment dismissing the complaint and all cross-claims against them and granting their contractual indemnification and common-law indemnification claims against Capital Concrete.

First, the court turns to the plaintiff's motion for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action. "Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Von Hegel v*

Brixmor Sunshine Sq., LLC, 180 AD3d 727, 728 [2d Dept 2020] [alteration and internal quotation marks omitted]). "The availability of a particular safety device will not preclude liability 'if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures' " (*Munzon v Victor at Fifth, LLC*, 161 AD3d 1183, 1185 [2d Dept 2018], quoting *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006]). To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must prove that the defendant violated the statute and that such violation was a proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 280-290 [2003]). Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her injuries, there can be no recovery under Labor Law § 240 (1) (*see id.* at 290). "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge & Tunnell Auth.* 4 NY3d 35, 39 [2004]).

In support of his motion, the plaintiff submits, among other things, his deposition testimony and the affidavits of SWP employees Raphael Braga (Braga) and Jesus Gonzalez (Gonzalez). The plaintiff testified that on the date of the accident, he was working with Braga and Gonzalez. The plaintiff further testified that, at the time of the accident, he was on a moveable scaffold removing plywood, among other things, and Braga and Gonzalez were holding the scaffold. The plaintiff stated that he was wearing a harness, however, he tied his harness to the scaffold because there was nowhere else to hook himself to. Braga and Gonzalez each averred that, at the time of the accident, they were waiting for the plaintiff to pass down forms. They also testified that at least one of the wheels of the scaffold did not lock, and that there were no tie-off points for the plaintiff's harness in the area in which they were working. The plaintiff establishes his prima facie entitlement to summary judgment on the issue of liability pursuant to Labor Law § 240 (1) by demonstrating that he was not provided with adequate safety equipment to prevent him from falling, and that the failure to provide such protection was a proximate cause of his injuries (see *Munzon v Victor at Fifth, LLC*, 161 AD3d at 1185, *Yaucan v Hawthorn Village, LLC*, 155 AD3d 924, 925 [2d Dept 2017]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 763).

However, in opposition to the plaintiff's prima facie showing, Capital and the Steinway defendants raise a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of his injuries because he was allegedly using the scaffold in an unsafe and prohibited manner immediately prior to the accident (*see Caban v Plaza Const. Corp.*, 153 AD3d 488, 490 [2d Dept 2017]; *Berenson v Jericho Water Dist.*, 33 AD3d 574, 576 [2d Dept 2003]). Capital and the Steinway defendants submit the deposition testimony of Capital supervisor Ufredo Patino Carchi (Carchi). Carchi testified that he spoke with several witnesses, including Capital general foreman Magno Silva (Silva) and Capital employee Luis Bermeo (Bermeo) following the plaintiff's accident. Carchi further testified that Silva informed him that he gave the plaintiff a broom to clean before he started stripping, however, that the plaintiff failed to do so and the there was dirt and debris on the floor. Carchi stated that Bermeo informed him that the plaintiff fell off the scaffold while it was being moved to a different location with the plaintiff on it, per the plaintiff's instructions, because debris caused the wheels to get stuck, causing the scaffold to fall. He further stated that it is a violation to move a scaffold while a person is on it. Moreover, a site incident report dated November 10, 2020, contains statements of Bermeo, Braga, and Silva. Silva reported that in addition to failing to clean before stripping, the plaintiff failed to properly close the wheel locks on the scaffold. As such, that branch of the plaintiff's motion for summary judgment as to liability on the Labor Law § 240 (1) cause of action is denied.

Next, the court turns to that branch of the Steinway defendants' motion to dismiss the complaint insofar as asserted against Steinway LIC, JMH, and Mettle on the ground that they are

not proper Labor Law defendants since they are not owners, contractors, or agents pursuant to the New York Labor Law. In opposition, the plaintiff does not oppose dismissal of the complaint insofar as asserted against Steinway LIC, JMH, and Mettle. Thus, that branch of the Steinway defendants' motion to dismiss the action insofar as asserted against Steinway LIC, JMH, and Mettle is granted.

Turning to those branches of the Steinway defendants' motion for summary judgment dismissing the plaintiff's common-law negligence and Labor Law § 200 claims, Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*see Mondungo v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820 [2d Dept 2020]; *Moscati v Consolidated Edison Co. Of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a premises condition is at issue, "[f]or liability to be imposed on the property owner, there must be evidence showing the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]). Where the manner of the work is at issue, recovery against the owner cannot be had "unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1006 [2d Dept 2021], quoting *Ortega*, 57 AD3d at 61).

In this case, the plaintiff's accident did not involve any dangerous or defective condition and instead involved the manner in which the plaintiff performed his work. "The allegedly defective scaffold should be … viewed as a device involving the methods and means of the work. Under such circumstances, Labor Law § 200 imposes no liability upon owners, absent evidence of the owner's authority to supervise or control the manner and methods of the work" (*Ortega v Puccia*, 57 AD3d 54, 62-63 [2d Dept 2008] [internal citation omitted]). Here, the Steinway defendants establish, prima facie, that they did not possess the authority to supervise and control the means and methods of the plaintiff's work at the time of the accident (*see Pisculli v Tew*, 238 AD3d 919, 921 [2d Dept 2025]). In opposition, the plaintiff does not oppose those branches of the Steinway defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims insofar as asserted against them. As such, those branches of the Steinway defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims insofar as asserted against them are granted.

Next, the court turns to those branches of the Steinway defendants' motion to dismiss the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. The Steinway defendants' argument that the plaintiff has failed to assert a viable Labor Law § 240 (1) claim based on a falling object is unavailing. Here, the plaintiff does not allege that the piece of plywood that fell onto the plaintiff's back was a "falling object" pursuant to Labor Law § 240 (1). Additionally, the Steinway defendants argue that they are entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims insofar as asserted against them because the plaintiff was the sole proximate cause of the accident and/or a recalcitrant worker. "A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a 'recalcitrant worker,' he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2d Dept 2020]). Here, however, the Steinway defendants fail to establish prima facie that the accident was caused by the manner in which the plaintiff handled the scaffold (*see Bermejo v*

New York City Health and Hosps. Corp., 119 AD3d 500, 502 [2d Dept 2014]). Insofar as the plaintiff testified that there was no point to tie off his harness besides the scaffold, and Braga and Gonzalez averred that at least one of the scaffold wheels did not lock, issues of fact exist as to whether the plaintiff's own conduct was the sole proximate cause of his injuries or whether the Steinway defendants' failed to provide the plaintiff with all safety measures to protect the plaintiff from the risks associated with working on the movable scaffolding (*see Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575, 576 [2d Dept 2004]). As such, those branches of the Steinway defendants' motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims insofar as asserted against them are denied.

With respect to that branch of the Steinway defendants' motion for summary judgment on its contractual indemnification claim against Capital, "[t]he right to contractual indemnification depends upon the specific language of the contract, and the 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" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096 [2d Dept 2018] [internal quotation marks omitted]). In addition, " 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor' " (*Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657 [2d Dept 2012], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, the two subcontracts between Ray Builders and Capital require Capital "[t]o the fullest extent permitted by law," to indemnify the owner and contractor "from and against claims, damages, losses and expenses, ... arising out of or resulting from performance of the Subcontractor's Work under this Subcontract ... but only to the extent cause by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." Thus, based on the language of the subcontracts, the Steinway defendants were required to establish that Capital was negligent as a matter of law in order to demonstrate their entitlement to summary judgment (*see Hirsch v Blake Housing, LLC*, 65 AD3d 570, 571 [2d Dept 2009]). The Steinway defendants fail to do so insofar as they make only the conclusory statement that "[a]s this accident clearly arises out of Capital's work and that of its sub-contractor, the indemnity provision is clearly triggered." Therefore, that branch of the Steinway defendants' motion for summary judgment on its contractual indemnification claim against Capital is denied.

Finally, with respect to that branch of the Steinway defendants' motion for summary judgment on its common-law indemnification claim against Capital, the Steinway defendants fail to establish that that there are no triable issues of fact concerning the degree of fault attributable to the parties (*see Flossos v Waterside Redevelopment Co., L.P.*; 108 AD3d 647, 650 [2d Dept 2017]; *Tama v Garguilo Bros., Inc.*, 61 AD3d 958, 961 [2d Dept 2009]; *Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 489 [2d Dept 2006]).

Accordingly, the plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim is denied.

That branch of the Steinway defendants' motion for summary judgment dismissing the complaint insofar as asserted against Steinway LIC, JMH, and Mettle is granted.

Those branches of the Steinway defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims insofar as asserted against them are granted.

Those branches of the Steinway defendants' motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims insofar as asserted against them are denied.

Those branches of the Steinway defendants' motion for summary judgment on their contractual indemnification and common-law indemnification claims against Capital are denied.

All other relief is denied.

Dated: November 13, 2025

Hon. Peter J. Kelly, J.S.C.