

Vergara v Broadway Constr. Group LLC

2026 NY Slip Op 30286(U)

January 13, 2026

Supreme Court, Kings County

Docket Number: Index No. 504105/2022

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 504105/2022
Seqs. 004, 005

Part LL1M

JUAN CARLOS CALLE VERGARA,

Plaintiff,

against

BROADWAY CONSTRUCTION GROUP LLC AND 171 NORTH
FIRST STREET LLC,

Defendants.

BROADWAY CONSTRUCTION GROUP LLC AND 171 NORTH
FIRST STREET LLC,

Third-Party Plaintiffs,

against

T SILVA, INC.,

Third-Party Defendant.

DECISION/ORDER

T SILVA, INC.,

Second Third-Party Plaintiff,

against

ZAFIR CONSTRUCTION CORP.,

Second Third-Party Defendant.

BROADWAY CONSTRUCTION GROUP LLC AND 171 NORTH
FIRST STREET LLC,

Third Third-Party Plaintiffs,

against

EXPO CONCRETE, LLC,

Third Third-Party Defendant.

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: 76-122, 126-144

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 004) and defendants/third-party plaintiffs Broadway Construction Group LLC (Broadway) and 171 North First Street LLC (North First)'s motion for summary judgment (Seq. 005) are decided as follows:

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on October 12, 2021, when he fell from a job-built wooden ladder at a construction site located at 171 North First Street, Brooklyn, NY. It is undisputed that the premises was owned by Broadway and that North First was the general contractor. Third-party defendant T Silva, Inc. (T Silva) was sub-contracted to perform concrete and super-structure work at the premises, and T Silva employed the plaintiff as a carpenter (Vergara EBT at 40, 45).

The plaintiff testified as follows: Plaintiff was supervised at the site by Magno Silva (*id.* at 47). On the date of the accident, the first, second, and third floors of the premises had been completed (*id.* at 64). Plaintiff and his co-workers were preparing the "decks" and forms into which the cement for the fourth floor would be poured (*id.*). Plaintiff descended from the fourth-floor level toward the basement via a job-built wooden ladder to gather tools for his work (*id.* at 64-65, 68). The ladder ran through what would ultimately be the elevator shaft for the building from the basement to the fourth floor and was "enclosed," and a second ladder ran parallel to the first inside the shaft (*id.* at 69). Plaintiff did not know who constructed the ladders (*id.* at 70), and the record does not indicate who built the ladders. The ladders would sometimes move "sideways" and "a little bit backwards" (*id.* at 73).

While descending the ladder from the second floor to the first floor, when the plaintiff's foot was on the fourth step from the top and his hands were on the second step from the top, "one of the steps came off and [he] went backward" (*id.* at 86). Plaintiff hit his head on the wall behind him and "woke up on the concrete floor with a lot of people around [him]" (*id.*). The plaintiff fell onto the floor of the first floor (*id.*). The step that detached was the second one from the top (*id.*).

Lorenzo Agostino, a construction superintendent at the site, testified on behalf of Broadway. The Broadway incident report notes that there was "missing handrail on stair" between the first floor and the cellar (Agostino EBT at 84–85, 97), and the Department of Buildings issued a stop-work order based on the missing handrail (*id.* at 103). The plaintiff testified that the ladder did not have railings (Vergara EBT at 87).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute (*e.g.* a ladder) is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Here, the plaintiff's testimony is sufficient to establish his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim. Plaintiff claimed that he was descending a ladder which materially failed, that he was not provided with any kind of personal fall arrest system or other safety equipment, that there was no handrail on the ladder, and that he fell from the ladder.

In opposition, the defendants have failed to demonstrate a triable issue of material fact. Defendants contend that the subsequent inspections do not include any mention of a missing or broken step and that the plaintiff did not cooperate with the investigation. However, defendants do not produce a witness with actual knowledge who contradicts plaintiff's testimony that the step broke causing him to fall. The only incident report provided by the defendants acknowledges that there was a missing handrail between the first floor and the cellar. The report and daily logs are silent as to the location of plaintiff's fall. The absence of information is not the same as information that rebuts plaintiff's testimony, and the violation location discussed in the accident report does not actually contradict plaintiff's testimony that there was not a handrail in the location where he fell. Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff only

advances substantive argument with respect to Rule 1.7 (f)¹ and Rules 1.21 (b) (1) and (3) (i), (ii), and (iv). Therefore, the remaining alleged Industrial Code violations² are deemed abandoned (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Rule 1.7 (f) requires “stairs, ramps, or runways” be provided to workers to access elevated work platforms. Here, it is undisputed that a ladder was provided, which satisfies the applicability of the rule. Defects in the means of ascent are governed by other provisions of the Industrial Code, including those previously alleged by plaintiff and analyzed below. Therefore, plaintiff’s requests to amend and for summary judgment on this code provision are denied.

Rule 1.21 (b) (1) requires that a ladder must be able to bear four times the maximum load intended to be placed on it; Rule 1.21 (b) (3) prohibits the use of a ladder “(i) If it has a broken member or part; (ii) if it has any insecure joints between members or parts; ... [or] (iv) if it has any flaw or defect of material that may cause ladder failure.” The testimony provided indicates that the ladder was unable to bear the statutorily required weight and that it had a broken or insecure member in the form of a step that failed. Therefore, plaintiff’s motion is granted with respect to his Labor Law § 241 (6) claim as predicated on the violation of Rules 1.21 (b) (1) and 1.21 (b) (3).

¹ Within plaintiff’s opposition, he introduces what he characterizes as a “cross-motion” to amend his Bill of Particulars to specific sub-section (f) of Rule 1.7. An affirmative motion cannot be dropped into a document styled as an affirmation in opposition absent either an Order to Show Cause or a Notice of Motion (CPLR 2215; *see also Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept 2013]). However, since the plaintiff did allege Rule 23-1.7 in his Bill of Particulars, the defendant was on notice of the claim against it. The court will therefore consider the arguments on the merits.

² 12 NYCRR §§ 23-1.5, 23-1.16, 23-1.11 (c), 23-1.21 (a), 23-1.22 (b) (c), 23-6.2, and subsections of 23-1.7 other than (f).

Labor Law § 200

Plaintiff withdrew his request for summary judgment on his Labor Law § 200 claim via stipulation dated June 16, 2025, and did not interpose opposition to defendants' motion for summary judgment on this claim. Additionally, T Silva did not contest the dismissal of plaintiff's Labor Law § 200 claim against Broadway or North First. Therefore, defendants' motion for summary judgment on Labor Law § 200 is granted without opposition and in the absence of any effort by any party to claim that Broadway or North First was negligent.

Contractual Indemnification

The right to contractual indemnification is established by the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "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" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Broadway and North First have demonstrated their entitlement to summary judgment on their contractual indemnification claim. The sub-contract between the parties included a provision requiring T Silva to indemnify the movants for damages "arising out of . . . the Work" (sub-contract at ¶ 12.3) and contains the language required by General Obligation Law 5-322.1 exempting indemnification of parties for their own negligence.

As an initial matter, T Silva's opposition was untimely filed without prior authorization or excuse five days after the deadline provided in the court's briefing order. In any event, T Silva's opposition is insufficient on its merits to resist summary judgment here. T Silva's opposition to Broadway and North First's motion relies on "[the allegations] in plaintiff's

summary judgment motion of the labor law violations . . . [which demonstrate that] third-party plaintiffs are . . . [actively] negligent” (aff. in opp. at ¶ 9). However, plaintiff withdrew that portion of his motion, and Broadway and North First prevailed on their summary judgment claim for Labor Law § 200 without opposition, including any opposition from T Silva. T Silva also alleges that the indemnification provision violates the General Obligations Law, but provides no evidentiary basis for this claim.

Therefore, Broadway and North First’s motion for contractual indemnification is granted.

Breach of Contract

“[A] party seeking damages for breach of an agreement to procure insurance naming it as an additional insured must demonstrate that a contract provision required that such insurance be procured naming it as an additional insured and that the provision was not complied with” (*Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 619 [2d Dept 2024]).

Here, it is undisputed that T Silva was obligated to procure insurance policies in the primary amount of \$1 million per occurrence and \$10 million in excess. T Silva provided certificates of insurance from Accredited Surety and Casualty Company, Inc. indicating that it procured a primary policy in the amount of \$2 million per occurrence and two excess policies which total \$8 million. Although T Silva exceeded its obligation with respect to primary insurance coverage, it breached its obligation with respect to excess insurance coverage. Even combining the amount of coverage, there is still a \$1 million shortfall between T Silva’s total contractual obligation and the actual insurance procured. Therefore, Broadway and North First’s motion is granted to the extent that I find that T Silva failed to procure the contractually agreed amount of excess insurance coverage. The issue of damages for breach is reserved for the time of trial.

T Silva's Counterclaims

T Silva does not oppose dismissal of its counterclaims, and there is no evidence in the record that they are meritorious; therefore, these claims are also dismissed.

Conclusion

Plaintiff's motion (Seq. 004) is granted to the extent of awarding him summary judgment on his Labor Law § 240 (1) claim and his Labor Law § 241 (6) claim as predicated on Industrial Codes 23-1.21 (b) (1) and (b) (3); the motion is otherwise denied.

Defendants/Third-Party Plaintiff's motion (Seq. 005) is granted to the extent of dismissing plaintiff's Labor Law § 200 claim without opposition and plaintiff's Labor Law § 241 (6) claim as predicated on the unopposed Industrial Code provisions; dismissing T Silva's counterclaims against Broadway and North First; awarding Broadway and North First summary judgment on their contractual indemnification; and determining that T Silva breached its contractual obligation to procure adequate excess insurance coverage without reaching the issue of damages for the breach; the motion is otherwise denied.

January 13, 2026

DATE



DEVIN P. COHEN

Justice of the Supreme Court