Hernandez v 10 W. 66th St. Corp.
2026 NY Slip Op 31446(U)
March 27, 2026
Supreme Court, Kings County
Docket Number: Index No. 516564/2022
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 516564/2022
Seqs. 004, 006, 007, 008

Part LL1M

ANDRES HERNANDEZ,

Plaintiff,

against

10 WEST 66TH STREET CORPORATION, SPRING SCAFFOLDING LLC, YATES RESTORATION GROUP LTD, ARSENAL SCAFFOLDING INC., WEST 66TH SPONSOR LLC, AND EXTEL DEVELOPMENT COMPANY,

Defendants.

SPRING SCAFFOLDING LLC,

Third-Party Plaintiff,

against

MD SCAFFOLDING INC.,

Third-Party Defendant.

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10 WEST 66TH STREET CORPORATION,

Second Third-Party Plaintiff,

against

DESIGN DEVELOPERS GROUP LTD, MD SCAFFOLDING INC., ARSENAL SCAFFOLDING INC., WEST 66TH SPONSOR LLC, AND EXTEL DEVELOPMENT COMPANY,

Second Third-Party Defendants.

YATES RESTORATION GROUP LTD,

Third Third-Party Plaintiff,

against

DESIGN DEVELOPERS GROUP LTS,

Third Third-Party Defendant.

DECISION/ORDER

1

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this motion, by reference to the New York State Courts Electronic Filing System docket numbers: NYSCEF 196–246, 276–281, 284–287, 290– 325, 329–413,

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 004), defendants/third third-party plaintiffs Yates Restoration Group (Yates)'s motion for summary judgment (Seq. 006), Design Developers Group (DDG)'s cross-motion to dismiss (Seq. 007), and DDG's cross-motion for summary judgment (Seq. 008) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on April 27, 2022, while working on a construction site located at 10 West 66th Street, New York, NY (the premises). It is undisputed that: The premises were owned by 10 West 66th Street Corporation (10 West). Yates was retained by 10 West to serve as the general contractor for façade repair work being performed at the premises. Yates sub-contracted DDG to perform façade restoration work. DDG employed the plaintiff.

West 66th Street Sponsor (Sponsor) owns 50 West 66th Street (50 West), the building adjacent to the premises where plaintiff's incident allegedly occurred. Extel Development Company (Extel) was the general contractor for work that was being performed at 50 West. Sponsor and 10 West entered into an agreement requiring Sponsor to provide roof protection for 10 West's building during the work being performed at 50 West. Philip Joseph Susi, president of Arsenal Scaffolding Inc. (Arsenal), testified that Arsenal constructed the stair tower and sidewalk shed at 10 West as roof protection due to the ongoing work at the adjacent premises (Susi EBT at 11–12, 17). Michael Yates, the president of Yates, testified that he had communicated with Extel prior to commencing the work at 10 West 66th Street and ensured that Yates and DDG employees were allowed to use Extel's stair tower to perform their work (Yates EBT at 73–75).

The plaintiff testified as follows: On the date of the incident, plaintiff was employed by DDG as a scaffold helper responsible for carrying materials or equipment to other workers on the scaffold (Hernandez EBT at 24–25). Plaintiff was descending from the third floor to the second floor of the exterior scaffold while carrying a wound spool of electrical cable on his shoulder (*id.* at 44, 67–68). While descending the stairs, "the handrail broke off," causing plaintiff to lose his balance and fall (*id.* at 69). Plaintiff had previously asked for help carrying the materials because they were heavy, and his supervisor told him no (*id* at 78–79). Plaintiff could not identify that supervisor and did not know who he worked for (*id.* at 79). The plaintiff denied that his accident was caused by the connector or cable becoming caught on the railing or any part of the stairs (*id.* at 152).

Plaintiff also offers a photograph of scaffold stairs that are missing a handrail. Plaintiff confirmed that the photograph depicted the second floor of the scaffold (*id.* at 62). Plaintiff testified that the female EMS responder took the photograph on her phone, and that he took a picture of her phone while in the ambulance (*id.* at 87). Plaintiff claims that the handrail is not in the picture because "the one in charge picked up the bar and put it where the handle is" (*id.* at 103); however, plaintiff did not witness this happen, but rather was told that it happened by the same EMS responder who purportedly took the photograph (*id.* at 141).

Mr. Susi testified that every scaffold staircase would be installed with two handrails (Susi EBT at 17–18). The handrails would have set screws to hold them in place, and removal ordinarily required two people to lift simultaneously on both sides (*id.* at 18–19). Arsenal was not called to come inspect the stairs or re-install the handrail after plaintiff's alleged incident (Susi EBT at 21).

Yates employed a project supervisor, Eliazar Abreau, and a project manager, Richard Daniels. Mr. Abreau claims the following in his affidavit: After the plaintiff fell, Mr. Abreau was called to the site and observed plaintiff lying on the ground (Abreau aff. at ¶ 2). While he was present, Mr. Abreau did not observe "any repairs, reinstallation, or adjustments to any handrail on the temporary stair tower" (*id.* at ¶ 3). Mr. Abreau also authenticated an accident report, prepared by Crispin Areas, which states that plaintiff "was carrying an electrical cable down a stair tower when the cable got stuck on the railing and allegedly ended [sic] tripping on the cable" (accident report; Abreau aff. at ¶ 6). However, the record does not describe how Mr. Areas obtained this account of plaintiff's accident. Finally, Yates received a Department of Buildings citation for "failure to safeguard" on the stairwell after the accident; the report does not mention the handrails.

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 is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 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 NY2d 494, 500 (1993)]). "The single decisive question [when assessing liability under Labor Law § 240 [1]] is

whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Here, plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim. Plaintiff testified that the handrail failed, causing him to fall to the ground. Plaintiff also testified that he had asked for help moving the heavy materials, but that the request was denied. Both the failure of the temporary staircase (*see Jaimes-Gutierrez v 37 Raywood Dr., LLC*, 233 AD3d 761 [2d Dept 2024]) and being pulled down stairs while transporting a heavy load due to inadequate hoisting equipment (*Cagua v Bushwick Holdings, LLC*, 238 AD3d 698 [2d Dept 2025]) constitute violations of Labor Law § 240 (1). Where there are multiple plausible accounts of how plaintiff's accident occurred, but each presents a scenario where the plaintiff prevails on his Labor Law § 240 (1) claim, summary judgment is appropriate (*see Keen v Tishman Construction Corporation of New York*, 233 AD3d 1001 [2d Dept 2024]).

In opposition, defendants have failed to raise triable issues of material fact. Mr. Abreau did not witness the accident and was not immediately present; therefore, his speculation about whether or not the handrail was replaced does not rebut plaintiff's prima facie showing. In any event, even if the accident report presented by the defendants is accepted *arguendo*, the plaintiff still prevails under Labor Law § 240 (1).

Therefore, plaintiff's motion is granted on this claim.

Labor Law § 241 (6)

Only defendants move with respect to 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) a proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff does not oppose dismissal of his claims pursuant to Rules 23-1.7(d), 23-1.7(e)(1), 23-1.8, 23-1.21 nor 23-1.30. Therefore, these alleged Industrial Code violations are dismissed as abandoned (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Plaintiff does oppose defendants' motion with respect to Rules 23-1.5 (c) (3) (general safety equipment), 1.7 (f) (obligation to provide vertical passageways), 2.7 (e) (safety railings on temporary and permanent staircases), 1.15 (e) (specifics of handrails on stairways), 1.7 (e) (2) (tripping based on a sharp projections), 1.16 (personal fall arrest system devices). Plaintiff has demonstrated a material issue of fact as to whether these 23-1.5 (c) (3), 1.7 (f), 2.7 (e), and 1.15 (e) were violated. At a minimum, there are issues as to whether the handrail failed and whether the plaintiff should have been provided with a personal fall arrest system while working at a height. Additionally, defendants' accident report raises question of fact about whether plaintiff's accident was caused by a "sharp projection," in violation of Rule 23-1.7 (e) (2). However, plaintiff did not raise a substantive argument as to how the alleged violation of Rule 1.16 was a proximate cause of the incident. Therefore, defendants' motion is granted with respect to the alleged violation of Rule 1.16; the remainder of the motion is denied.

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]).

Yates did not seek dismissal of plaintiff's Labor Law § 200 claim. The record contains allegations that Yates controlled the work that resulted in plaintiff's accident. Additionally, plaintiff filed opposition to Yates' motion raising the issue of negligence, and Yates' did not substantively respond. Instead, Yates claimed that the issue of negligence was outside the scope of its motion. However, this contention is untrue; Yates is obligated to demonstrate that it was free from negligence to receive summary judgment on its contractual indemnification claim. In light of the outstanding issue of Yates' negligence, it cannot prevail on its motion for summary judgment on its contractual indemnification claim. Due to outstanding issues of fact, Yates' motion is denied with respect to this claim.

Duty to Defend

"[T]he duty to defend is broader than the duty to indemnify . . . A duty to defend is triggered by the allegations contained in the underlying complaint" (*Gem-Quality Corp. v Colony Ins. Co.*, 209 AD3d 986, 990 [2d Dept 2022]). The Yates-DDG contract obligates DDG to "defend Yates in any action or proceeding which involves a claim of workmanship by the Contractor, and to pay any legal fees, costs, and expenses incurred or expended by Yates in this connection" (contract at ¶ 7). DDG did not oppose Yates' motion with respect to Yates' claim that DDG had a duty to defend. Therefore, Yates' motion is granted with respect to this claim.

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]).

It is undisputed that DDG procured an insurance policy that complied with its contractual obligations (*see* United Specialty Policy No. PSS2201524). The issue of whether Yates is covered may be the subject of a declaratory judgment action; it is not the basis for a breach of contract claim (*see Reliance Ins. Co. of New York v. Garsart Bldg. Corp.*, 122 AD2d 128 [2d Dept 1986]). Therefore, DDG's motion is granted with respect to Yates' breach of contract claim.

Common Law Indemnification and Contribution

Workers Compensation Law § 11 prohibits a third-party from bringing common-law claims against a plaintiff's employer unless the employee suffered a grave injury (*Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]). In this action, there is no allegation of any grave injury either directly or by reference to the underlying complaint, as defined by WCL §11 (*see NY Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501 [2014]). Yates did not oppose this portion of DDG's motion. Therefore, DDG's motion for summary judgment on Yates' common law indemnification and contribution claims is granted.

Conclusion

Plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim (Seq. 004) is granted.

Yates' motion for summary judgment (Seq. 006) is granted to the extent that DDG is found to have a duty to defend Yates in this action; the motion is otherwise denied.

DDG's motion for summary judgment on the breach of contract, contractual indemnification, and contribution claims against it (Seq. 007) is granted.

DDG's cross-motion to dismiss plaintiff's Labor Law § 241 (6) claim (Seq. 008) is granted to the extent of dismissing the alleged violations of 12 NYCRR 23-1.7 (d), 23-1.7 (e) (1), 23-1.8, 23-1.21, 23-1.16, and 23-1.30 only; the motion is otherwise denied.

This constitutes the decision and order of the court.

March 27, 2026
DATE

DEVIN P. COHEN
Justice of the Supreme Court