

<b>Koshelev v Mortar Architecture PLLC</b>
2026 NY Slip Op 31562(U)
March 27, 2026
Supreme Court, Kings County
Docket Number: Index No. 509857/2022
Judge: Devin P. Cohen
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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 509857/2022  
Seqs. 004-007

Part LL1M

SERGEY KOSHELEV,  
Plaintiff,  
against

MORTAR ARCHITECTURE PLLC, 91 DIAMOND  
MANAGEMENT LLC, MORTAR DEVELOPMENT  
LLC, AND LAKH CORP.,  
Defendants.

**DECISION/ORDER**

MORTAR DEVELOPMENT LLC AND 91 DIAMOND  
MANAGEMENT LLC,  
Third-Party Plaintiff,

against

DCD CONSTRUCTION LLC AND SIBERIAN  
ARCHER INC.,  
Third-Party Defendant.

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 54-140.

Upon the foregoing papers,<sup>1</sup> defendant Mortar Architecture PLLC (Mortar Architecture)'s motion for summary judgment (Seq. 004), defendant/third-party plaintiff Mortar Development LLC (Mortar Development)'s motion for summary judgment (Seq. 005), plaintiff's motion for summary judgment against defendant 91 Diamond Management LLC (Diamond)

<sup>1</sup> The caption of the third-party action is hereby amended to reflect 91 Diamond Management LLC as a third-party plaintiff. When the actions were consolidated, the second-third party pleadings were inadvertently overlooked. This amendment corrects that scrivener's error. All pleadings from the second third-party action are incorporated under this index number as third-party claims.

(Seq. 006), and defendant/third-party plaintiff Diamond's motion for summary judgment against third-party defendant DCD Construction LLC (DCD) (Seq. 007) are decided as follows:

### **Procedural Posture**

Plaintiff commenced this action to recover for damages he claims to have sustained on April 8, 2019, while performing concrete work on the roof of 91 Diamond Street, Brooklyn, NY (the premises). The claims against G&F Drywall (G&F) were discontinued by stipulation without prejudice on November 18, 2021. Lakh Corp. failed to appear and a default judgment was entered against it on August 3, 2020. Third-party defendant Siberian Archer Inc. (Siberian) is a corporation started by plaintiff, and the plaintiff is the sole member (plaintiff EBT at 139–141). The plaintiff originally filed suit against Diamond, Mortar Development, Lakh, and G&F in Bronx County Supreme Court. That action was consolidated into this index number on December 5, 2023.

### **Factual Background**

It is undisputed that the premises were owned by Diamond. Diamond hired Mortar Development to provide project management services. Diamond also hired DCD to serve as the general contractor for the work. DCD hired Lakh Corporation as the site safety management company. The plaintiff was employed as a foreman by third-party defendant DCD.

Diamond also hired Mortar Architecture to serve as the architect for the project. Mortar Architecture's contract contains provisions stating that Architecture did not have authority, control, and responsibility for the performance of the work or for site safety. However, as noted below, there are provisions of other contracts in this action which ascribe powers and responsibilities to Architecture.

Anthony Morena is a principal of Diamond and Mortar Architecture, and the sole owner and employee of Mortar Development. Mr. Morena was deposed on behalf of all three entities. Morena testified as follows: Mortar Development is an owner's representative company for real estate development projects (Morena, Diamond and Mortar Development EBT, at 20, 22). Mortar Architecture created design drawings for filing with the building department. Mr. Morena testified that he did not personally prepare the drawings for the premises, but that another architect or team at Mortar Architecture worked on this project (Morena, Mortar Architecture EBT, at 25). Denis Portaev, DCD's owner, testified that Mr. Morena would walk the jobsite from time to time to check the progress for the progress statements (Portaev EBT at 104).

Although plaintiff was a DCD foreman, he was supervised by Alexei Karpov, DCD's project manager (Portaev EBT at 134). The plaintiff testified as follows: On the date of the incident, plaintiff was instructed by Mr. Karpov to use a concrete leveling machine on the second floor (Koshelev EBT at 63).<sup>2</sup> While using the machine, plaintiff fell through an unprotected opening in the floor (Koshelev EBT at 96-97). A staircase was intended to be constructed in the opening, which led from the first floor to the basement (*id.* at 97). The opening was approximately five-feet-by-three-feet (*id.* at 98). The plaintiff fell approximately twenty feet from the first floor to the floor of the basement (*id.* at 103). Plaintiff identified photographs of the area where his incident took place. Plaintiff testified that the wooden protection and orange netting in the photograph were not present when he fell (*id.* at 127).

Plaintiff further testified that harnesses at the site were hanging in a "special place" (*id.* at 122). Plaintiff observed approximately four on the date of his accident (*id.* at 134). There were

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<sup>2</sup> Plaintiff's depositions transcripts employ continuous pagination.

lanyards “packaged with the harness[es]” (*id.* at 123). Although plaintiff was instructed during his OSHA training to use a harness when working at a height over six feet (*id.* at 204), he was never instructed to wear a harness at this jobsite (*id.* at 124), despite working near a greater-than-six-foot drop (*id.* at 202). Plaintiff testified that, in other areas at the site, plaintiff had connected his harness to “either metallic cables stretched around the perimeter or there were hooks on the ceiling on which you could hook” (*id.* at 206). However, in this area, plaintiff did not use the harness because there was “nothing to hook it on. There was no sense in using it” (*id.* at 205).

Mr. Portaev testified that he had personal knowledge that there were places to connect the harnesses on the second floor on the date of plaintiff’s accident “because we installed the steel extension to the steel columns, that always hold for the bolts in the steel structure that could be used to tie up the harness, to connect the harness” (Portaev EBT at 77). When asked how he knew that the structures were present on the date of plaintiff’s incident, Mr. Portaev testified his knowledge was based on “the general progress of the site and what was installed then” (*id.* at 78). Mr. Portaev was not present on site and did not personally observe the steel supports.

### 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]).

### **Mortar Architectures Status Under the Labor Law**

Mortar Architecture argues that it was a proper Labor Law defendant. Although architects are generally not statutory defendants under the Labor Law, that general rule does not

apply in cases where an architect becomes an agent of the owner or the general contractor with authority to direct or control the means and methods of the work being performed (*cf. Chavarria v Bruce Nagel & Partners Architects, P.C.*, 230 AD3d 1286 [2d Dept 2024]).

Plaintiff argues that the contract between Diamond and DCD empowers Mortar Architecture to “advise and consult with the contractor”; “make recommendations to Owner in connections with such proposals”; “have access to the work at the project site, and on the basis of its on site observations endeavor to advise owner of defects and deficiencies in the work”; “assist owner in judgment the performance of the contractor.” Section 13.03 also expressly allows the owner to appoint Architecture to “designate or appoint, to act on behalf of Owner.”

Additionally, since Mr. Morena was a signatory to the contract and was a principal of Architecture, he cannot logically disavow the terms of the contract placing responsibility on Architecture. In light of questions of fact arising out of the contractual authority retained by Mortar Architecture at the premises and the overlapping control Mr. Morena exercised over the interrelated entities involved in this case, Mortar Architecture’s motion for summary judgment is denied (*see Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782 [2d Dept 2021]).

#### **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 harness and lanyard) 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 *Haines 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 plaintiff only seeks summary judgment against Diamond. Plaintiff has demonstrated his prima facie entitlement to summary judgment based on his testimony that he was exposed to

an elevation-related risk, that there were no safe anchorage points for a fall-arrest system and no guardrails or netting around the opening, and that the lack of protection was a proximate cause of the incident.

In opposition, Diamond failed to raise a triable issue of material fact. Mr. Portaev's testimony that there were places for plaintiff to tie-off based on Mr. Portaev's knowledge of the general "progress of the construction site" is speculative and insufficient to rebut plaintiff's testimony. In any event, plaintiff's testimony that he was never instructed at this jobsite to use a harness and lanyard is un rebutted. Therefore, plaintiff cannot have been a recalcitrant worker, irrespective of his sophistication or prior training (*see Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39–40 [2004]).

Plaintiff did not move for summary judgment against Mortar Development or Mortar Architecture on this claim. In light of the foregoing analysis, and issues of fact concerning whether these entities are statutory defendants under the Labor Law, both parties' motions are denied with respect to Labor Law § 240 (1).

#### **Labor Law §§ 241 (6) and 200**

The plaintiff did not interpose opposition to Mortar Development's motion, and did not advance arguments in his own motion as to his Labor Law § 241 (6) and § 200 claims. Therefore, Mortar Development's motion is granted with respect to these claims.

#### **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]).

#### Mortar Development's Contractual Indemnification Claims

Mortar Development is not named as an indemnitee in the Diamond-DCD contract. Therefore, Mortar Development bases its contractual claims on DCD's indemnification obligation, which is located in ¶ 24.12 of the Diamond-DCD contract. In that provision, DCD agrees to indemnify Diamond and its "members, shareholders, officers, directors, employees, subsidiaries, affiliates, successors, assigns, representatives and servants." Mortar Development contends that it qualifies as one of these additional indemnitees.

In opposition, DCD argues that Mortar Development has not provided evidence sufficient to demonstrate that it was in the class of indemnitees, and in the face of ambiguity, summary judgment should not be granted on a contractual indemnification claim. The Diamond-DCD contract obligates DCD to cooperate with Diamond's other contractors, but requires those contractors to obtain their own insurance certificate. DCD contends that this shows that the intent of the agreement was not to make DCD indemnify any entity with which DCD elected to contract. Additionally, the Diamond-Mortar Development contract requires Mortar Development to function as an independent contractor and to not hold itself out as an agent of the Owner (*see* ¶ 5.2).

In light of the lack of a clear indemnification obligation in favor of Mortar Development, Mortar Development's motion for summary judgment on its claim against DCD is denied.

Mortar Development also seeks summary judgment on its contractual indemnification against Diamond. It is undisputed that Diamond owed Mortar Development indemnification unless Mortar Development was negligent. In light of Mortar Development's contractual

authority to observe the work and report to the owner, and Mr. Morena's presence and authority at the site, there are material issues of fact that preclude awarding Mortar Development summary judgment.

Diamond's Contractual Indemnification Claim

Diamond also seeks contractual indemnification against DCD. It is undisputed that DCD owed Diamond indemnification under the contract. However, DCD argues that there are questions of fact about Diamond's negligence, particularly in light of the evidence that Mortar Architecture may have served as Diamond's agent and may have controlled the work at the site. There are additional issues, as noted above, of Mr. Morena's authority and activity at the site, and his relationship with the various entities involved in this lawsuit. Therefore, Diamond's motion for summary judgment is denied.

Conclusion

Architecture's motion for summary judgment (Seq. 004) is denied.

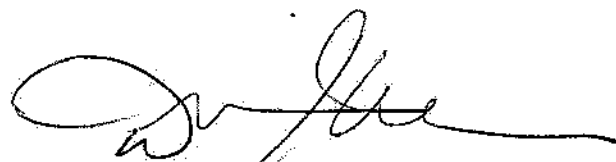
Development's motion for summary judgment (Seq. 005) is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) and § 200 claims against it; the motion is otherwise denied.

Plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim against Diamond (Seq. 006) is granted.

Diamond's motion for summary judgment (Seq. 007) is denied.

March 27, 2026

DATE



DEVIN P. COHEN

Justice of the Supreme Court