

**Mattson v City of New York**

2021 NY Slip Op 31655(U)

May 17, 2021

Supreme Court, New York County

Docket Number: Index No. 153184/2016

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 52

Justice

-----X

JOSEPH MATTSON,

Plaintiff,

- v -

CITY OF NEW YORK, SCALAMANDRE FAMILY LIMITED PARTNERSHIP I, SCALAMANDRE AND SONS, SEA CREST CONSTRUCTION CORP., TDX CONSTRUCTION CORPORATION,

Defendant.

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TDX CONSTRUCTION CORPORATION

Plaintiff,

-against-

CALLAHAN PIPING, LLC

Defendant.

-----X

SEA CREST CONSTRUCTION CORP.

Plaintiff,

-against-

CALLAHAN PIPING, INC.

Defendant.

-----X

INDEX NO. 153184/2016

MOTION DATE 04/14/2021, 04/14/2021

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

Third-Party Index No. 595248/2017

Second Third-Party Index No. 595896/2018

The following e-filed documents, listed by NYSCEF document number (Motion 005) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 173, 174, 175, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 222, 223, 224, 225, 226, 229, 230, 231, 232, 233, 234, 235

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 172, 176, 177, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 227, 228, 236, 237, 238, 239

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

This action arises out of injuries allegedly sustained by plaintiff, an employee of Callahan Piping LLC (Callahan), on May 27, 2015 while at a worksite. Plaintiff alleges that while walking down the stairs to retrieve materials from the basement, a stair tread dislodged, causing him to slip and fall.

Plaintiff's accident occurred at the Manhattan Psychiatric Center, where his employer, Callahan, was performing renovations. The State of New York retained TDX Construction Corporation (TDX) to serve as construction manager for the project and the State retained Sea Crest Construction Corp. as the general contractor to demolish and repair/replace flooring at the site and to perform asbestos abatement. The building is owned by the City of New York (City).

Preliminarily, it must be noted that as to the motions seeking dismissal of Labor Law Section 240(1) claims, those portions are granted without opposition and claims pursuant to this section are dismissed. As there are cross-motions in addition to the underlying motions, the Court will address each motion in turn.

#### DISCUSSION

##### Labor Law Section 200 and Common Law Negligence

Labor Law Section 200 codifies the common-law duties of owners and contractors to provide workers on their premises with a safe place to work. See *Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290 [1992]. The case law is abundant that to be liable under the Labor Law, the construction manager must have had oversight of the injury causing activity. See *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998] (without controlling the injury producing work, a construction manager cannot be held liable under Labor Law). General oversight is insufficient.

##### Labor Law Section 241(6)

It is well settled law that for there to be liability pursuant to Labor Law Section 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

The Industrial Code Section plaintiff relies on is 23-1.7(f) which deal with vertical walkways.<sup>1</sup> Section 23-1.7(f) states in pertinent part:

Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

“12 NYCRR 23-1.7(f) imposes a duty upon a defendant to provide a safe staircase, free of defects.” *Vasquez v Urbahn Assocs. Inc.*, 79 AD3d 493 [1st Dept 2010].

### **Motion Sequence 5**

Defendants, Scalamandre Family Limited Partnership I, Scalamandre and Sons (collectively Scalamandre), and defendant/second third-party plaintiff, Sea Crest Construction Corp (Sea Crest), move for summary judgment dismissing plaintiff’s complaint and all cross-claims against Sea Crest and Scalamandre and summary judgment on its claims for contractual indemnification and breach of contract against third-party defendant/second third-party defendant Callahan.

In opposition to this motion and the motion by TDX, plaintiff cross moves for summary judgment against defendants City of New York<sup>2</sup>, TDX and defendant/second third-party plaintiff Seacrest. Third-party defendant/second third-party defendant opposes Seacrest’s motion as to

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<sup>1</sup> At oral argument, all counsel agreed that all other Industrial Code provisions cited by plaintiff are inapplicable to this case.

<sup>2</sup> The Court notes that while a cross-motion against a non-moving party is generally improper, here for the sake of judicial economy and the lack of prejudice to the City, the Court will entertain the cross-motion.

the breach of contract claims. TDX also opposes the instant motion and cross-motion. The motion as to defendant Scalamandre was unopposed, accordingly that portion of the motion is granted without opposition and the complaint and all cross-claims are dismissed as against that entity. For the reasons set forth below defendant/second third-party plaintiff, Sea Crest's motion for summary judgment is denied, and plaintiff's cross-motion for summary judgment as to Labor Law Section 241(6) as to defendants City and Sea Crest is granted.

It appears not in dispute that the staircase where the plaintiff was alleged to have fallen was unsafe. Defendants provide several arguments in support of their contention that nonetheless 23-1.7(f) does not apply to the facts of the instant case. The arguments include that the staircase where plaintiff is alleged to have fallen was a permanent staircase, that the location where he was going at the time of his fall was not a working area, and that there was an alternate external staircase plaintiff could use. The case law makes it clear that the counter arguments regarding the permanence of the staircase are unavailing. "Inasmuch as plaintiffs have plainly demonstrated the unsafe nature of the staircase as the means of access to different working levels, summary judgment is properly granted in their favor." *McGarry v CVP 1, LLC* 55 AD3d 441, 442 [1st Dept 2008]. Moreover, the plaintiff was using the stairs at the time of his accident to get materials to perform his work. The Court agrees with the plaintiff that cases cited to the contrary are distinguishable from the instant matter. Finally, the argument that there was another staircase that could have been used to traverse the location is simply unavailing. While there is no case law cited for this proposition by defendants, it seems to be straining logic for a fall on a defective staircase to not be actionable just because there is another staircase that may or may not be safe nearby.

As to Labor Law Section 200, claims arising under that section are dismissed as to the City<sup>3</sup> as the City was simply the owner of the building and was not involved with the subject renovations. As to Sea Crest and TDX, there does appear to be a question of fact as to liability of these entities. While the defendants make the point that no work was being done on these stairs, Sea Crest admits having previously fixed one of the stairs prior to the accident at the request of TDX. Moreover, it is alleged that Sea Crest's safety director exclaimed "I told you to have this fixed" just after the accident.

Finally, the motion for summary judgment on the breach of contract claim by Sea Crest as against Callahan is denied as there is a question of fact as to whether there was a breach of the underlying contract. It is undisputed that insurance was procured by Callahan, however it is unclear from the record whether the insurance procured was insufficient pursuant to the contract.

#### **Motion Sequence 6**

Defendant/third-party plaintiff, TDX, moves for summary judgment dismissing plaintiff's complaint and all cross-claims. Alternatively, TDX seeks summary judgment as against defendant Sea Crest Construction Corp. on its claim for contractual indemnification. Based on the reasons set forth below TDX's motion is granted in part.

The motion by TDX for summary judgment as to Labor Law Section 241(6) is granted. While there may be some question as to supervision and control by TDX, that entity was neither the owner nor the general contractor of the site, and thus liability does not attach to TDX pursuant to Labor Law Section 241(6).

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<sup>3</sup> Again, the Court notes that the City is not a movant however the Court may search the record and grant the appropriate relief.

The motion for summary judgment for contractual indemnity by TDX against Sea Crest is denied. As noted above, there are questions of fact regarding negligence by Sea Crest and TDX that preclude summary judgment. Accordingly, it is hereby

ORDERED that motion sequence 5 is granted to the extent that the complaint and all cross-claims are dismissed as against defendants Scalamandre Family Limited Partnership I and Scalamandre and Sons, and otherwise denied; and it is further

ORDERED that motion sequence 6 is granted in part, to the extent that TDX Construction Corporation is granted summary judgment as to Labor Law Section 241(6) claims; and it is further

ORDERED that plaintiffs cross-motion pursuant to Labor Law Section 241(6) claims is granted as against the City of New York and Seacrest Construction Corp.; and it is further

ORDERED that the breach of contract issue in motion sequence 5 will be held in abeyance until the resolution of the underlying matter, at which time a hearing will be held, and a determination made as to the breach of contract claim; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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5/17/2021  
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE