

**Jing Yuan Zhao v NHS Community Dev.  
Corp.**

2007 NY Slip Op 32430(U)

August 7, 2007

Supreme Court, Kings County

Docket Number: 0011493/2004

Judge: James G. Starkey

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CIVIL TERM, PART 6  
HON. JAMES G. STARKEY

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JING YUAN ZHAO,

Plaintiff,

**DECISION**

-against-

INDEX NO.: 11493/2004

NHS COMMUNITY DEVELOPMENT CORP.,  
NEIGHBORHOOD HOUSING SERVICES OF NEW YORK  
CITY, INC., and CENTRAL DEVELOPMENT CORP.,

Defendants.

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Dated: August 7, 2007

APPEARANCES OF COUNSEL

For the Plaintiff(s):  
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For the Defendant: NHS Community Development Corp. and  
Neighborhood Housing Services of New York City, Inc.  
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For the Defendant: Central Development Corp.  
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**Caption: Zhao v. NHS Community Development Corp., et al. Index No.: 1493/2004**

By notice of motion dated February 21, 2007, plaintiff Jing Yuan Zhao seeks summary judgment pursuant to Labor Law §240(1). By notice of cross motion dated March 22, 2007, defendants NHS Community Development Corp. and Neighborhood Housing Services of New York seek summary judgment dismissing plaintiff's Labor Law §200, 240(1), 241(6) and negligence claims against defendant Neighborhood Housing Services of New York, and summary judgment against defendant Central Development Corp. on its cross claims for common law and contractual indemnification.

The parties appeared in Part 6 of this Court for oral argument on the motion and cross motion on June 13, 2007 and decision was reserved.

#### ***FACTS AND PROCEDURAL BACKGROUND***

Plaintiff commenced this action for personal injuries on April 9, 2004 by filing a summons and verified complaint. The complaint alleges violations of Labor Law § 200, § 240(1), § 241(6), and negligence. Issue was joined by defendant NHS Community Development Corp. and Neighborhood Housing Services of New York City, Inc.'s verified answer dated June 17, 2004 and by defendant Community Development Corp.'s verified answer dated April 26, 2005.

Plaintiff's complaint, verified bill of particulars and deposition testimony allege that on February 2, 2004, plaintiff was injured when a ladder he was directed to use while performing construction work at the premises known as 754 Jackson Avenue, Bronx, New York, slipped out from underneath him causing him to fall and sustain personal injury. On that day, plaintiff was employed by Wah Sun Construction, Inc. (hereinafter "Wah Sun") to perform cement tile work at this premises described as a legal three family dwelling. Wah Sun was hired by defendant Central Development Corp. (hereinafter "CDC"), the general contractor, pursuant to a contract CDC had

with the owner, NHS Community Development Corp. (hereinafter “NHS”)<sup>1</sup>.

As plaintiff was climbing the ladder from the first floor to the second floor – while holding a bucket of cement – the ladder slid backwards causing him to fall approximately eight feet. This aluminum ladder did not have any rubber footings, was not secured, and appeared to be the top portion of a disconnected extension ladder. It has been conceded that defendant NHS was the owner of the premises at the time of the accident, and that CDC was the general contractor, who was responsible for the supervision, direction and control of the work on behalf of the owner pursuant to a contract.

### ***LAW AND APPLICATION***

Summary judgment is a drastic remedy, and should be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v. Citibank*, 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772 (2003). A failure to make that showing requires the denial of the motion, regardless of the adequacy of the opposing papers. *Ayotte v. Gervasio*, 81 NY 2d 1062, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez v. Prospect Hospital, supra*, at 324.

Plaintiff seeks summary judgment solely on his cause of action based upon Labor Law § 240(1), which reads as follows:

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<sup>1</sup> Defendant NHS Community Development Corp. is the wholly owned subsidiary of defendant Neighborhood Housing Services of New York City, Inc. On the date of the accident, title to the premises was solely in the name of NHS Community Development Corp.

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Plaintiff avers that the ladder provided, which was the sole access between the first and second floors of the premises, was defective. Particularly, the ladder provided plaintiff was the disconnected top portion of an aluminum extension ladder which did not have any rubber footings nor properly secured with any other statutory device. Further, it is alleged that the collapse of this ladder was the proximate cause of his injury. “On a claim pursuant to Labor Law § 240(1), a claimant must prove both that the statute was violated and the violation was a proximate cause of his injuries (see *Bland v. Manocherian*, 66 N.Y.2d 452; *Lightfoot v. State of New York*, 245 A.D.2d 488; *Skalko v. Marshall’s Inc.*, 229 A.D.2d 569). Proof of a collapse of a safety device constitutes a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker’s injuries, thereby establishing the claimant’s entitlement to judgment as a matter of law on the issue of liability.” *Santos v. State of New York*, 300 A.D.2d 424, 751 N.Y.S.2d 577 (2<sup>nd</sup> Dept. 2002); see also *Boles v. Dormer Giant*, 5 A.D.3d 417, 772 N.Y.S.2d 612 (2<sup>nd</sup> Dept. 2004), *aff’d*, 4 N.Y.3d 235, 792 N.Y.S.2d 375, 825 N.E.2d 590 (2005). Clearly, plaintiff has made a prima facie case under the statute.

Defendants argue that (1) plaintiff was the sole proximate cause – and ultimately responsible– for his own accident by misuse or repeated use of the aforesaid ladder; and (2) plaintiff was a “recalcitrant worker” for failing to use other ladders allegedly available at the work site. Defendants urge that plaintiff is precluded on either or both of those bases from

summary judgment. However, the court finds no support in the record to substantiate either claim. Specifically, plaintiff testified that the ladder was previously positioned at the job site by another person; that it was the only method of obtaining access to the second floor; and that he was directed to use the ladder by his employer to carry the cement buckets to the second floor. This testimony was undisputed by defendants.

Absent testimony that plaintiff was directed to utilize one of the other ladders at the job site, and that he disregarded such a directive to his own detriment, he cannot be labeled a recalcitrant worker. *Jastrzebski v. North Shore School District*, 223 A.D.2d 677, 637 N.Y.S.2d 439 (2<sup>nd</sup> Dept. 1996). Further, and merely because the plaintiff repeatedly used the ladder – as directed – over a course of time before the ladder finally gave way, does not make plaintiff the proximate cause of his accident nor raise a triable issue of fact. *Ernest v. Pleasantville Union Free Sch. Dist.*, 28 A.D.3d 419, 811 N.Y.S.2d 573 (2<sup>nd</sup> Dept. 2006). Therefore, plaintiff's motion for summary judgment as against NHS and CDC is appropriate. However, plaintiff has failed to establish any connection – as either owner or contractor – of defendant Neighborhood Housing Services of New York City, Inc. to the premises, and therefore the action against this defendant is dismissed pursuant to the cross motion.

Finally, since defendant NHS has been found liable to plaintiff and the contract specifically provided for indemnification in such circumstances, their cross motion seeking contractual indemnification from co-defendant CDC is granted.

### ***CONCLUSION***

In light of the above, plaintiff's motion for summary judgment is granted, as is defendant NHS's cross motion for dismissal of all claims against defendant Neighborhood Housing Services of New York City, Inc., and for contractual indemnification from co-defendant CDC.

This constitutes the decision and order of the court.

Plaintiff is directed to settle Order in accordance with this decision on notice.

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J.S.C.