

<b>Daly v Metropolitan Transp. Auth.</b>
2021 NY Slip Op 31435(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 153542/2017
Judge: J. Mabelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62**

*Justice*

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**INDEX NO. 153542/2017**

DANIEL DALY, ERICA DALY,  
  
Plaintiff,

**MOTION DATE 01/08/2021,  
01/19/2021**

- v -

**MOTION SEQ. NO. 007 008**

METROPOLITAN TRANSPORTATION AUTHORITY, CITY  
OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,  
JUDLAU CONTRACTING INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 289, 290

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 259, 260, 261, 262, 263, 264, 265, 291, 292

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

There are currently two motions pending before the court. The first is Motion #007, wherein plaintiff seeks summary judgment under New York State Labor Law Section 240(1). The second is Motion #008, wherein all defendants (collectively, "defendants") seek an order:

a. Pursuant to CPLR § 3212, granting defendants summary judgment dismissing plaintiffs' complaint in its entirety on the grounds that plaintiffs fail to make out a prima facie case regarding a Labor Law § 240(1) claim; and

b. Pursuant to CPLR § 3212, granting defendants summary judgment dismissing plaintiffs' complaint in its entirety on the grounds that plaintiffs fail to make out a prima facie case regarding a Labor Law § 241(6) claim; and

c. Pursuant to CPLR § 3212, granting defendants summary judgment dismissing plaintiffs' complaint in its entirety on the grounds that plaintiffs fail to make out a prima facie case regarding a Labor Law §200 claim; and

d. Pursuant to CPLR § 3212, granting defendants summary judgment dismissing plaintiffs' complaint in its entirety on the grounds that plaintiffs fail to make out a prima facie case regarding a common law negligence claim.

Upon the foregoing documents, Motion #007 is DENIED and Motion #008 is GRANTED IN PART.

#### Background

In the underlying action plaintiff, a journeyman union ornamental ironworker by trade, allegedly sustained serious injury when he fell from an unsecured A-frame ladder (the "Ladder") on December 2, 2016 while performing work in conjunction with the new Second Avenue subway line, specifically at the pedestrian entrance on 72nd Street and Second Avenue in Manhattan.

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1<sup>st</sup> Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the

evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

#### The Labor Law § 240(1) Claim

Plaintiffs move for summary judgment on the Labor Law § 240(1) claim against defendants, and defendants move for summary judgment dismissing the same.

Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part:

“All contractors and owners and their agents . . . 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.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (John v Baharestani, 281 AD2d 114 [1st Dept. 2001]). Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed” (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693 [2nd Dept. 2006]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace” (Makarius v Port Auth. of N.Y. & N. J., 76 AD3d 805 [1st Dept. 2010]). Instead, liability “is contingent upon the

existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (Narducci v Manhasset Bay Assoc., 96 NY2d 259 [NY Ct. of Appeals 2001]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 [NY Ct. of Appeals 2004]).

Here, plaintiff, Daniel Daly, has established prima facie entitlement to summary judgment in his favor on the Labor Law § 240(1) claim, as he testified that while working from a height on the ladder, it slid out from underneath him and fell to the floor, causing him to fall with it (*see* Garcia v Church of St. Joseph of the Holy Family of City of N.Y., 146 AD3d 524 [1st Dept. 2017] [“Plaintiff’s testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240 (1)”]).

“Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection.” (Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept. 2004] 2004); Cuentas v Sephora USA, Inc., 102 AD3d 504 [1st Dept, 2013] [“It is well settled that [the] failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)”]). In addition, “a presumption in favor of plaintiff arises when a . . . ladder collapses or malfunctions for no apparent reason” (Quattrocchi v F.J. Sciamè Constr. Corp., 44 AD3d 377 [1st Dept. 2007]). “Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials” (Nelson v Ciba-Geigy, 268 AD2d 570 [2nd Dept. 2000]; Peralta v American Tel. & Tel. Co., 29 AD3d 493 [1st Dept. 2006] [unrefuted evidence that the unsecured ladder moved, and that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]).

In opposition, defendants argue that plaintiff was the sole proximate cause of the accident. Specifically, defendants argue that plaintiff was never instructed to use that particular ladder, and that plaintiff alone made the decision to do so. Defendants also argue that any A-frame ladder was unsafe in that area, and that an extension ladder, which was available, should have been used instead. Defendants further argue that plaintiff was a highly experienced worker who had numerous safety certifications, and that plaintiff was aware of the other safety equipment available, including safety harnesses, and that plaintiff chose not to use them.

“A fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection” (Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593 [1st Dept. 2014]). A defendant “would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction” (Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441 [1st Dept. 2012]).

In response, plaintiff argues that he was not given specific instructions that morning, as his supervisor was running late, but that plaintiff had been given instructions the day before as to what he was to work on. Further, plaintiff alleges that the ladder was already set up for him when he arrived; that there were no extension ladders available; and that he was never told to use any other safety equipment in that area.

The conflicting arguments with regard to the testimony raises questions of fact as to the proximate cause of the accident, and also raises questions as to what instructions plaintiff was, or was not, actually given. The resolution of such issues is inappropriate on summary judgment (Asabor v Archdiocese of N. Y., 102 AD3d 524 [1st Dept. 2013] [“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”]). For all of the aforementioned reasons, plaintiff is not entitled

to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants and defendants are not entitled to summary judgment dismissing the same.

### The Labor Law § 241(6) Claim

Defendants move for summary judgment dismissing the Labor Law § 241(6) claims against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors “to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [NY Ct. of Appeals 1998]. Importantly, to sustain a Labor Law §241(6) claim, it must be shown that the defendant violated a specific, “concrete” regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety, and such violation must be a proximate cause of the plaintiff’s injuries (Annicaro v Corporate Suites, Inc., 98 AD3d 542 [2d Dept. 2012]).

Here, plaintiff has pled a plethora of Industrial Code provisions which he claims were violated, including Sections 23-1.5 [General responsibility of employers], 23-1.7 [Protection from General Hazards], 23-1.8 [Personal Protective Equipment], 23-1.15 [safety railing], 23-1.16 [safety belts, harnesses, tail lines and lifelines], 23-2.1 [Maintenance and Housekeeping], 23-1.21 [ladders and ladderways], 23-1.30 [Illumination]. However, except for Industrial Code 23-1.21

[ladders and ladderways], plaintiff does not oppose the dismissal of the alleged Industrial Code violations. Thus, they are deemed abandoned (Kempisty v 246 Spring St., LLC, 92 AD3d 474 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

As such, defendants are entitled to summary judgment dismissing those parts of plaintiff’s Labor Law §241(6) claim predicated on those abandoned provisions, and the court need only address Industrial Code 23-1.21 [ladders and ladderways].

Industrial Code Section 23-1.21 provides in pertinent part, the following:

§ 23-1.21 Ladders and Ladderways

(b) General requirements for ladders.

(1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

(iv) If it has any flaw or defect of material that may cause ladder failure.

(4) Installation and use.

(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

(iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.

As noted above, defendants argue that plaintiff should not have been using the subject ladder in question, but plaintiff testifies that the ladder was set up for his intended use. Given this factual disparity, defendants are not entitled to summary judgment dismissing that portion of the Labor Law §241(6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.21.

### The Common-Law Negligence and Labor Law §200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law §200 claims against them.

Labor Law §200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (Singh v Black Diamonds LLC, 24 AD3d 138, 139 [1st Dept. 2005]). Labor Law §200(1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

There are two distinct standards applicable to Section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see e.g.* Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 AD3d 446 [1st Dept. 2013]).

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law §200 unless it had the authority to supervise or control the performance of the work” (Soller v Dahan, 173 AD3d 803 [2nd Dept. 2019]).

Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (Naughton v City of New York, 94 AD3d 1 [1st Dept. 2012]; *see also* Hughes v Tishman Constr. Corp., 40 AD3d 305 [1st Dept. 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

However, where an injury stems from a dangerous condition inherent in the premises, an owner may be liable in common-law negligence and under Labor Law §200 ““when the owner [or contractor] created the dangerous condition [causing an injury] or when the owner [or contractor] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice”” (Bradley v HWA 1290 III LLC, 157 AD3d 627 [1st Dept. 2018]).

Here, the accident was allegedly caused by the means and methods of the work – i.e. the use of the ladder for plaintiff to reach the scaffold from which he was to perform his work. However, as described above, there are questions as to the proximate cause of the accident and what instructions plaintiff was, or was not, actually given. Thus, defendants are not entitled to summary judgment dismissing the common-law negligence and Labor Law §200 claims against them.

Conclusion

IT IS HEREBY ORDERED that Motion #007 is DENIED.

IT IS HEREBY ORDERED that Motion #008 is GRANTED IN PART only to the extent that defendants are awarded summary judgment with respect to plaintiff's Labor Law §241(6) claim as based on Industrial Code Sections 23-1.5 [General responsibility of employers]; 23-1.7 [Protection from General Hazards]; 23-1.8 [Personal Protective Equipment]; 23-1.15 [safety railing]; 23-1.16 [safety belts, harnesses, tail lines and lifelines]; 23-2.1 [Maintenance and Housekeeping]; and 23-1.30 [Illumination]. The motion is otherwise DENIED.

4/28/2021  
DATE

  
J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE