

Bokiev v 13th Ave. Retail Holdings 35, LLC
2022 NY Slip Op 30642(U)
February 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 515721/19
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of February, 2022.

P R E S E N T: HON. INGRID JOSEPH, JSC
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
ALISHER BOKIEV,

Plaintiff,

Index No. 515721/19

-against-

13TH AVENUE RETAIL HOLDINGS 35, LLC and KINGS
COUNTY DEMOLITION, INC.,

Defendants.

-----X
13TH AVENUE RETAIL HOLDINGS 35, LLC and KINGS
COUNTY DEMOLITION, INC.,

Third Party Plaintiffs,

-against-

BEST BUILD NYC, INC., and MUHAMMADJON
CONSTRUCTION, INC.,

Third Party Defendants

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____ 70-79, 82-96

Opposing Affidavits (Affirmations) _____ 110-113, 114-115
Affidavits/ Affirmations in Reply _____ 119, 120

Other Papers: _____

Upon the foregoing papers, plaintiff Alisher Bokiev (“plaintiff”) moves (Motion Seq. 5), for an order, pursuant to CPLR § 3212, granting summary judgment on the issue of liability on his claims arising under Labor Law §§ 240 (1), 241 (6), and 200 as asserted against defendants/third-party plaintiffs 13th Avenue Retail Holdings 35, LLC (“13th Avenue Retail”) and Kings County Demolition, Inc., (“Kings County”) (collectively, “defendants”).

Defendants move (Motion Seq. 6) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff’s common-law negligence and Labor Law §§ 200 and 241 (6) claims as asserted against them.

13th Avenue Retail was the owner of a building, located at 4502 13th Avenue, in Brooklyn. Kings County was hired by 13th Avenue Retail to be the general contractor of a renovation and construction project at the building. 13th Avenue Retail hired the subcontractors that worked on the project including third-party defendant Muhammad Jon Construction, Inc. (“MCI”). Plaintiff, an undocumented worker, was employed by MCI as a helper. On September 27, 2017, plaintiff was helping to install large masonry stones to the exterior of the building. He was working between the second and third floors when he was informed by his supervisor, Misha, that someone had fallen on the fifth floor, and that everyone needed to evacuate the building as inspectors were coming to investigate. Plaintiff testified that as he was exiting down exterior stairs on the 13th Avenue side of the building, he was stopped by a man who informed him that he could not continue using the stairs because a City inspector was arriving. Plaintiff further testified that this man informed him that he would have to exit the premises by using an A-frame ladder located at the end of a sidewalk bridge on the 13th Avenue side of the

building. The A-frame ladder was in the closed position resting upon the sidewalk bridge. Plaintiff proceeded to climb approximately four or five steps down the ladder when it shook and collapsed, causing him and the ladder to fall to the ground. Plaintiff testified that no one was holding the bottom of the ladder as he descended.

Plaintiff commenced the instant action by filing a summons and verified complaint on July 18, 2019. Defendants joined issue by filing a verified answer on October 16, 2019. On or about November 18, 2019, plaintiff served his verified bill of particulars. On July 20, 2020, defendants commenced a third-party action against third-party defendants Best Build NYC, Inc., and MCI, neither of which have answered or appeared in this action. Plaintiff was deposed on January 7, 2021, and January 15, 2021, and defendants appeared for their examinations before trial on February 18, 2021. On April 20, 2021, plaintiff filed his note of issue and the following timely motions ensued.

Plaintiff moves for summary judgment on the issue of liability on his claims arising under Labor Law §§ 240 (1), 241 (6) and 200 and common-law negligence as asserted against defendants. Defendants move for summary judgment dismissing plaintiff's Labor Law §§ 241 (6) and 200 claims.

Plaintiff argues that he is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim asserted against 13th Avenue Retail as the owner of the premises and Kings County as the general contractor. Plaintiff maintains he was engaged in an enumerated activity protected under Labor Law § 240 (1). In this regard, he notes that he was performing masonry work at the site when he was forced to use an unsecured, closed A-frame ladder to get between the second and first floors of the project to exit the building. He argues that the ladder should have been placed in its open position from

below and a worker should have been provided to hold the ladder steady. Plaintiff contends that the failure to do so was a violation of Labor Law § 240 (1) which proximately caused his accident. In addition, plaintiff asserts that his actions in using a closed A-frame ladder were not the sole proximate cause of his injuries. In this regard, he notes that he was specifically instructed to use the ladder and that it was impossible for him to open the closed A-frame ladder from atop the sidewalk bridge.

In opposition, defendants contend that this branch of plaintiff's motion should be denied as this is not a case involving a worker who was injured while performing actual work at the premises but, rather, plaintiff was injured as he tried to flee a jobsite that he had been working at illegally. Moreover, defendants argue that plaintiff was not engaged in an enumerated activity at the time of his accident and, thus Labor Law § 240 (1) is inapplicable. Further, they contend that plaintiff was not required to use a ladder to perform his work and was finished working for the day and leaving the site as he was directed to do by his supervisor prior to the occurrence of his accident. Defendants maintain that even if the court determined that Labor Law § 240 (1) applies, an issue of fact exists as to whether the ladder was in proper working order and/or whether plaintiff was the sole proximate cause of the accident. They assert that plaintiff has failed to provide the following: any photographs of the ladder allegedly involved in his accident, the identity of the owner of the ladder, the identity of the individual that placed the ladder, the make and model of the ladder or any other identifying information for the subject ladder which would demonstrate a Labor Law violation. Moreover, defendants contend that they lack any knowledge of this ladder and maintain that plaintiff has failed

to demonstrate that his misuse of the ladder in the closed position was not the proximate cause of his accident.

In reply, plaintiff argues that a person employed as a construction worker is afforded the protections of the Labor Law even when the accident occurs when they are not specifically performing their work activity at that moment, pointing out that the statute's protections have been extended to workers entering or exiting a work site, and while on a coffee or lunch break. Thus, plaintiff maintains that defendants' failure to provide him with a safe, secured ladder that would reasonably protect him from falling to the sidewalk below constitutes a violation of Labor Law § 240 (1). He maintains that his actions in using the ladder in the closed position was not the sole proximate cause of his accident as he had the tacit approval of his superiors to use the closed A-frame ladder, and was specifically directed to use it to exit the premises.

Labor Law § 240 (1), states, in relevant part, that:

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 . . .

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501

[1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], *quoting Ross*, 81 NY2d at 501).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, *citing Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept

2006], *citing Blake*, 1 NY3d at 290). “In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, ‘the single decisive question is whether [the] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential’” (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Plaintiff’s testimony reveals that his Labor Law § 240 (1) claim arises out of his fall off an unopened and unsecured A-frame ladder that he was directed to use to exit the construction site. “Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials” (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Specifically, “with regard to accidents involving ladders, ‘liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiffs injuries’” (*id.*, quoting *Caws v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012]; *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 996-997 [2d Dept 2017]). Moreover, “[t]o establish a violation under Labor Law § 240 (1), ‘[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiffs injuries’” (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020], quoting *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). “Where, for instance, the plaintiff falls from a

ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach” (*id.*). However, “where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation” (*id.*, citing *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; see also *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624, 625 [2d Dept 2008]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124, 1125 [2d Dept 2019]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]).

Here, it is undisputed that the ladder that plaintiff was directed to use to exit the site was unopened and inadequately secured and that the failure to secure the ladder was a substantial factor in causing plaintiff’s accident. Accordingly, the court finds that plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim (see *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653-654 [2d Dept 2014] [with regard to his Labor Law § 240 (1) claim, the court held that “plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when the unsecured, closed A-frame ladder fell backwards as he descended it”). The court finds no merit to defendants’ argument in opposition that Labor Law § 240 (1) does not apply as plaintiff was not performing work at the moment of his accident but rather, was exiting the worksite. Plaintiff testified that he was employed by MCI as a helper and had been installing large masonry stones to the exterior of the building just prior to his accident, which occurred as he was directed to exit the building (see *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*,

100 AD3d 431, 432 [1st Dept 2012] [holding that “the fact that plaintiff was in the process of exiting the job site did not remove him from the protections of Labor Law § 240”]; *Beharry v Public Stor., Inc.*, 36 AD3d 574, 574 [2d Dept 2007] [court held that Labor Law § 240 (1) applied where plaintiff was injured while returning from a coffee break]; *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004], quoting *Prats v Port Auth. of N.Y. and N.J.*, 100 NY2d 878, 881 [2003] [holding that “[t]o myopically focus on a job title or the plaintiff’s activities at the ‘moment of the injury’ would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the ‘spirit of the statute’”]).

Finally, the court finds no merit to defendants’ argument that there is an issue of fact as to whether plaintiff’s injury was caused by some “inadequacy of the ladder or was solely attributed to the manner in which plaintiff used the ladder.” Contrary to defendants’ assertion, they fail to raise a triable issue of fact as to whether the plaintiff’s decision to use the ladder to exit the premises, rather than the staircase, was the sole proximate cause of his injuries. Here, based upon plaintiff’s testimony and affidavit, he was instructed to exit the site via the closed, unsecured A-frame ladder and it was not possible for him to open it himself from above. Accordingly, any actions of plaintiff could not be the sole proximate cause of his accident (*see Przyborowski*, 120 AD3d at 653-654; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Naciewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402,403[1st Dept 2013]; *Kin v State of New York*, 101 AD3d 1606, 1607-1608 [4th Dept 2012]).

Accordingly, that branch of plaintiff’s motion seeking summary judgment in his favor on his Labor Law § 240 (1) claim is granted.

Plaintiff also argues that he is entitled to summary judgment in his favor on the issue of liability for his Labor Law § 241 (6) claim. Conversely, defendants contend that plaintiff's Labor Law § 241 (6) claim should be dismissed.

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

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscatti v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Here, plaintiff moves for summary judgment on his Labor Law § 241 (6) claim as predicated on defendants' violation of Industrial Code §§ 23-1.21 (b) (1), 23-1.21 (b) (3) (iv), 23-1.21 (b) (4) (ii), 23-1.21 (b) (4) (iv), and 23-1.21 (e) (2). Plaintiff argues that these provisions are specific, applicable and were violated.

Industrial Code § 23-1.21 (b), which contains the general requirements for ladders at construction sites, provides in pertinent part as follows:

- (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. 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. (ii). All ladder footings shall be firm. (iv). When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means.

In addition, plaintiff contends that Industrial Code § 23-1.21 (e) (2), which provides that “[w]hen in use every stepladder shall be opened to its full position and the spreader shall be locked,” was violated, as the ladder he was required to use to exit the site was not opened.

At the outset, plaintiff points out that all of the Industrial Code sections he cites in support of his Labor Law § 241 (6) claim are sufficiently specific to support said claim (*see Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011][Industrial Code §§ 23-1.21 (b) (3) (iv) and 1.21 (b) (4) (ii) & (iv)]; *Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008] [§§ 23-1.21 (b) (1) and (3) (iv)]; *Martinez v St-Dil LLC*, 192 AD3d 511,513 [1st Dept 2021] [§§ 23-1.21 (b) (4) (ii) and (iv)]; *Przyborowski*, 120 AD3d at 652 [§ 23-1.21 (e) (2)]).

Specifically, plaintiff argues that Industrial Code § 23-1.21 (b) (1) was violated as the ladder he was caused to use failed to remain stable under his weight which is far less

than four times the ladder's maximum load. Thus, he contends that the fact that the ladder shook and fell to the ground under his weight demonstrates that this provision was violated and can serve as a predicate for his Labor Law § 241 (6) claim.

Plaintiff also argues that Industrial Code § 23-1.21 (b) (3) (iv) was violated as he was provided with a flawed, defective ladder that was shaky, unsecured and closed, which caused his accident. Further, he contends that there were violations of Industrial Code §§ 23-1.21 (b) (4) (ii) and (iv), because he was not provided with a ladder with firm footing, or another a worker, who could hold the ladder as plaintiff was descending from the second floor level down to the sidewalk. Finally, plaintiff contends that Industrial Code § 23-1.21 (e) (2) was violated, because there was a failure to open the ladder fully and lock the spreaders as required by this section, resulting in the collapse of the ladder causing him to fall and sustain injuries. Plaintiff maintains that the violation of each of these code provisions can serve as a basis for his Labor Law § 241 (6) claim.

In opposition, and in support of that branch of their motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, defendants argue that there is no evidence of a causative violation of § 23-1.21 in this case. The court notes that defendants do not specifically address the applicability of each of the subsections cited by plaintiff. Additionally, defendants assert that plaintiff's inability to produce the ladder renders him unable to demonstrate any such violation of § 23-1.21, and therefore this section and all subparts relied upon by plaintiff are inapplicable. Further, defendants argue that even if the court finds this provision applicable, this branch of plaintiff's motion should be denied as there is an issue of fact as to whether the ladder was in proper working order had it been used the way in which it was designed and intended to be used.

Finally, defendants contend that plaintiff was contributorily negligent in that he made the choice to listen to a man, who by his own admission, he did not know and/or recognize and to use a ladder which he knew was unsafe and not opened properly instead of using the open and available stairway to exit. Thus, defendants assert that the court should deny this branch of the motion as issues of fact regarding plaintiff's comparative negligence preclude a grant of summary judgment. Alternatively, defendants seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code § 23-1.21.

Here, the court finds that plaintiff has failed to make a prima facie showing that violations of Industrial Code §§ 23-1.21 (b) (1), (3) (iv), 4 (ii) and (iv) proximately caused his accident. Plaintiff has failed to present evidence that any component of the ladder broke, dislodged or loosened in violation of § 23-1.21(b) (1). Nor did plaintiff demonstrate that there was a flaw or defect in the ladder that caused or contributed to his accident in violation of Industrial Code § 23-1.21 (b) (3) (iv) (*id.* at 594). Additionally, plaintiff failed to demonstrate that the ladder lacked firm footings, or that 23-1.21 (b) (4) (iv) was applicable (*see Cordova v 653 Eleventh Ave. LLC*, 190 AD3d 637, 637-638 [1st Dept 2021], *quoting Arigo v Spencer*, 39 AD3d 1143, 1145 [4th Dept 2007] [holding that this Industrial Code provision applies "only when work is being performed from a ladder"]; *Kin v State of New York*, 101 AD3d 1606,1608 [holding that this section was inapplicable as the plaintiff was not performing work from a ladder; but was using it to gain access to a scaffold from which she intended to perform her assigned work]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 462 [2d Dept 2008]).

The defendants seek summary judgment regarding the above-referenced subdivisions of section 23-1.21. However, the court finds that the defendants have failed to establish prima facie that those sections of the Industrial Code are inapplicable under the facts of this case, or that they were not violated. Accordingly, neither the plaintiff nor the defendants are entitled to a summary determination of the Labor Law § 241 (6) claims based upon Industrial Code §§ 23-1.21 (b) (1), (3) (iv), 4 (ii) and (iv).

However, as to Industrial Code § 23-1.21 (e) (2), the court finds that plaintiff has demonstrated, through his deposition testimony and affidavit, that the ladder he was instructed to use to exit the site was not opened to its full position with its spreaders in the locked position as required. Accordingly, the court finds that plaintiff has made a prima facie demonstration of his entitlement to summary judgment on the issue of liability on so much of his Labor Law § 241 (6) cause of action as is predicated upon a violation of Industrial Code § 23-1.21 (e) (2). Defendants fail to raise an issue of fact in opposition. Moreover, defendants' contention that an issue of fact as to the plaintiff's comparative negligence precludes summary judgment in plaintiff's favor is without merit (*see Wein v East Side 11th & 28th, LLC*, 186 AD3d 1579, 1581 [2d Dept 2020], *quoting Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 719 [2d Dept 2019] [holding that “[a]ny comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6)”]; *Rodriguez v City of New York*, 31 NY3d 312, 324 [2018]; *Quizhpi v South Queens Boys & Girls Club, Inc.*, 166 AD3d 683, 685 [2d Dept 2018]; *Quinn v Whitehall Props., II, LLC*, 69 AD3d 599, 601 [2d Dept 2010]; *Owen v Schulmann Constr. Corp.*, 26 AD3d 362, 363 [2d Dept 2006]).

Additionally, the defendants have demonstrated, prima facie, that 12 NYCRR 23-3.3 (c), which was alleged in plaintiff's bill of particulars as a predicate for Labor Law § 241 (6), is inapplicable herein. In this regard, section 23-3.3 (c) pertains to required inspections during hand demolition work. Here, it is undisputed that the plaintiff was assisting in the installation of masonry stones to the building's exterior, and thus not involved in any demolition work prior to the accident (*see Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]). Plaintiff has failed to raise an issue of fact in this regard. Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted to the extent said claim is predicated upon an alleged violation of Industrial Code § 23-3.3 (c).

Section 200 of the Labor Law statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Where "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it"

(*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira v City of New York*, 120 AD3d 1163,1164 [2d Dept 2014]; see *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2d Dept 2017]; *Marquez v I. & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]).

Moreover, “the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (*Marquez*, 141 AD3d at 698, quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], *aff’d on other grounds* 15 NY3d 869 [2010]; see *Torre v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]).

Plaintiff argues that he was injured due to a dangerous premises condition, specifically the closed, unsecured A-frame ladder, and that 13th Avenue Retail had constructive notice of the ladder and failed to remove it from the work site. In support of this position, plaintiff points to the testimony of 13th Avenue Retail’s representative, Ben Piller, who testified that he visited the site twice a week during the time of plaintiff’s accident. Plaintiff contends that Mr. Piller “confirmed the presence of the sidewalk bridge and confirmed seeing ladders all over the construction site” (NYSCEF Doc No. 71 at ¶58). Thus, plaintiff maintains that Mr. Piller had notice of the dangerous, closed A-frame ladder and should have removed it from the premises. Accordingly, plaintiff avers

that 13th Avenue Retail failed to provide him with a safe place to work in violation of Labor Law § 200.

In opposition, and in support of that branch of their own motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims, defendants argue that plaintiff fails to establish that 13th Avenue Retail had actual or constructive notice of the allegedly defective ladder and point out that Mr. Piller visited the site to check the progress of the work, not to inspect ladders. In addition, defendants point to Mr. Piller's affidavit, annexed to defendants' own motion for summary judgment, in which he states that he did not have any direct or indirect knowledge of the presence, placement or existence of any allegedly defective, closed, leaning A-frame ladders at the site (NYSCEF Doc No. 94, Piller aff at ¶7). Thus, defendants assert that plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed as asserted against them as plaintiff has failed to establish notice of the alleged condition. Defendants further note that plaintiff does not seek to hold Kings County liable pursuant to Labor Law § 200 or based upon a claim of common-law negligence.

A careful reading of Mr. Piller's testimony reveals that, contrary to plaintiff's assertion, he actually testified to seeing ladders on the inside of the building during the project (NYSCEF Doc. No. 107, Piller's tr at p.39, lines 22-25; p.40, lines 2-22, p. 42, lines 6-12), and that he did not recall seeing ladders on the outside of the building (Piller's tr at p. 41, lines 9-20). The court finds that plaintiff has failed to meet his burden of establishing his prima facie entitlement to summary judgment as a matter of law with respect to his common-law negligence and Labor Law §200 causes of action (*see Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v. City of New*

York, 49 NY2d 557, 562 [1980]). Although 13th Avenue Retail, as the owner of the premises, had a duty to maintain the site so as to provide plaintiff with a safe place to work, plaintiff has failed to establish that defendants breached that duty. Accordingly, that branch of plaintiff's motion seeking summary judgment in his favor on his Labor Law §200 and common law negligence claims is denied.

The defendants, in support of that branch of their motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, submit affidavits from Mr. Piller and Rostislav Goldenberg, the sole owner of Kings County. Defendants contend that said affidavits demonstrate that they did not have notice of a closed A-frame ladder leaning against scaffolding for the purpose of ingress or egress at the site. Both assert that they did not create the alleged dangerous condition, did not supply or place the subject ladder, and that they did not observe a ladder being used in this manner at the site.

Defendants argue that should the court find that the closed, leaning A-frame ladder constituted a dangerous condition that contributed to plaintiff's accident, there can be no liability imposed upon them as they had no duty to warn him about the closed ladder which was readily observable by reasonable use of his senses in light of his age, intelligence, and experience. In this regard, defendants point to plaintiff's testimony that he observed the closed, leaning A-frame ladder prior to descending it and had observed other contractors use A-frame ladders and was aware of how they were opened and set up (NYSCEF Doc No.87, plaintiff's tr at 48, lines 15-23). Moreover, they point to his testimony that the ladder may have moved and shaken because it was closed, further demonstrating his understanding that the ladder should have been opened before use

(NYSCEF Doc No. 87, plaintiff's tr at 48, lines 3-7). Thus, defendants argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed because the alleged dangerous condition was observed by plaintiff as open and obvious.

In the instant case, the court finds that there is no evidence that defendants created the alleged dangerous condition (unopened and unsecured ladder), or that they had any notice of it (*see Filarakos v St. John the Baptist Greek Orthodox Church*, 169 AD3d 489, 490 [1st Dept 2019]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-131 [2d Dept 2008]; *Kesselbach v Liberty Haulage*, 182 AD2d 741, 742 [2d Dept 1992]). Thus, defendants have established their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, through the submission of Mr. Piller and Mr. Goldenberg's affidavits and the deposition testimony of Mr. Piller, which demonstrates that defendants had neither actual nor constructive notice of the ladder which caused plaintiff's accident (*see Mitchell*, 167 AD3d at 867; *Abelleira*, 120 AD3d at 1164; *Shaughnessy*, 147 AD3d at 997; *Marquez*, 141 AD3d at 698; *Doto*, 129 AD3d at 663; *Martinez*, 73 AD3d at 998). Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is granted and said claims are dismissed as asserted against defendants.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot. Accordingly, it is

ORDERED, that the branch of plaintiff's motion (Motion Seq. 5) for summary judgment in his favor on the issue of liability for his Labor Law § 240 (1) claim is granted, as is that branch of his motion for summary judgment on his Labor Law § 241

(6) claim but only to the extent that the claim is based upon a violation of Industrial Code § 23-1.21 (e) (2), the remaining portions of plaintiff’s motion raise issues of fact for trial; and it is further

ORDERED, that the branch of defendants’ motion (Motion Seq. 6) seeking summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims is granted and said claims are dismissed as against 13th Avenue Retail and Kings County; that branch of the defendants’ motion to dismiss plaintiff’s Labor Law § 241 (6) claim is granted solely to the extent that such claim is predicated upon Industrial Code § 23-3(c). The remainder of the defendants’ motion is denied.

This constitutes the decision and order of the court.

E N T E R,



HON. INGRID JOSEPH, J. S. C.

**Hon. Ingrid Joseph
Supreme Court Justice**