

<b>Orue v Homeport I LLC</b>
2022 NY Slip Op 32168(U)
January 10, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151235/2017
Judge: Charles M. Troia
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
WALTER ORUE,

IAS 1

Plaintiff,

Present:  
Hon. Charles M. Troia

-against-

HOMEPORT I LLC, AND  
CLAIRE CONSTRUCTION CORP.,

DECISION and ORDER  
Index No. 151235/2017  
Motion Nos. 004, 005

Defendants.  
-----X

The papers numbered 1 through 3 were marked fully submitted on the 22nd day of October, 2021.

Papers Numbered

Plaintiff’s Notice of Motion for Partial Summary Judgment on Liability under Labor Law §240(1) (dated June 21, 2021).....	1
Plaintiff’s Affirmation in Support of Motion (dated June 21, 2021).....	2
Plaintiff’s Memorandum of Law in Support of Motion (dated June 21, 2021).....	3
Defendant Homeport I LLC’s Affirmation in Opposition (dated July 16, 2021).....	4
Defendant Homeport I LLC’s Memorandum of Law in Opposition (dated July 16, 2021).....	5
Defendant Claire Construction Corp.’s Affirmation in Opposition (dated October 7, 2021).....	6
Plaintiff’s Affirmation in Reply to Homeport I LLC’s Opposition (dated October 15, 2021).....	7
Plaintiff’s Affirmation in Reply to Claire Construction Corp.’s Opposition (dated October 15, 2021).....	8
Homeport I LLC’s Notice of Motion for Summary Judgment (dated June 23, 2021).....	9
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Defendant Homeport I LLC’s Memorandum of Law in Support of Motion  
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Plaintiff’s Affirmation in Opposition  
(dated July 16, 2021).....12

Defendant Claire Construction Corp.’s Affirmation in Opposition  
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Defendant Homeport I LLC’s Affirmation in Reply to Plaintiff’s Opposition  
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Defendant Homeport I LLC’s Affirmation in Reply to  
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Stipulation of Discontinuance of Homeport I LLC’s  
Third-Party Action against HP Services Inc. and Shallan G. Haddad  
(dated May 17, 2021).....16

Stipulation of Discontinuance of Claire Construction Corp’s  
Second Third-Party Action against HP Services Inc. and Shallan G. Haddad  
(dated May 7, 2021).....17

Upon the foregoing papers, plaintiff’s motion (Seq. No. 004) for partial summary judgment on liability under Labor Law §240(1) cause of action is granted.

The motion (Seq. 005) of defendant Homeport I, LLC for, *inter alia*,

- (1) summary judgment dismissing the cross claims of Claire Construction Corp.,
- (2) summary judgment on its cross claims against Claire Construction Corp. for
  - (i) contractual indemnification,
  - (ii) common law indemnification/contribution;
  - (iii) for attorneys’ fees, costs and expenses;
- (4) summary judgment dismissing plaintiff’s causes of action as against Homeport I LLC
  - (i) under Labor Law §240(2), §240(3), §240(3), §241(6), §200,

(ii) common law negligence, and

(iii) violations of Rule 23 of the of the Industrial Code of the State of New York,

is granted, in part, and denied, in part, in accordance with the forgoing.

### BACKGROUND

Plaintiff Walter Orue commenced this action to recover damages for personal injuries sustained in the course of his employment as an HVAC duct installer for HP Services Inc. (hereinafter, "HP Services"). At the relevant time, a project was underway for the construction of a mixed-use building consisting of residential apartments and commercial units at 8 Navy Pier Court, Staten Island, New York. Defendant Homeport I LLC, the owner of the subject property, retained defendant Claire Construction Corp. (hereinafter, "Claire") as the general contractor for the construction of a Mexican restaurant on the ground floor of the building. In turn, Claire hired HP Services as a subcontractor to perform plumbing work and HVAC duct installation. On May 2, 2017, plaintiff and his co-worker were assigned to work together cutting HVAC duct that was attached to the ceiling of the building. Plaintiff ascended an A-frame ladder that was approximately 12 feet high. He was standing on the third step down from the top cap of the ladder with both feet on the same rung. It is undisputed that the ladder was unsecured, no one was holding it in position while plaintiff was performing his work. After plaintiff had been cutting the duct for approximately 10 to 15 minutes, the ladder allegedly moved "suddenly" and "tilted forward", causing plaintiff to fall to the concrete floor below. As a result of the accident, plaintiff allegedly sustained serious and permanent injuries including but not limited to a comminuted fracture of the left foot which necessitated surgical intervention and has required continued treatment to date.

**Motion Sequence No. 004**  
**Plaintiff's Motion Pursuant to CPLR 3212**  
**for Summary Judgment on his Labor Law 240(1) Cause of Action**

Plaintiff moves for an order pursuant to CPLR 3212 for summary judgment as against defendants Homeport and Claire on the issue of liability on his Labor Law 240(1) cause of action. Plaintiff maintains that Homeport and Claire, as the owner of the subject premises and general contractor for the construction project, failed to “furnish or erect, or cause to be furnished or erected for the performance of the labor...ladders and other devices which were so constructed, placed and operated as to give proper protection” from the elevation related hazard of the work plaintiff was engaged in at the time of the incident (*see* Labor Law 240[1]). Movant further maintains the statute imposes absolute liability upon Homeport and Claire (as the owner and general contractor, respectively) since the breach of their non-delegable duty imposed by Labor Law 240(1) was a proximate cause of his injuries.

In support of the motion, plaintiff alleges the uncontroverted facts in the record establish, prima facia, that the unsecured A-frame ladder “suddenly moved and tilted forward” causing him to fall onto the concrete floor. He relies on the holdings in *Salinas v. 64 Jefferson Apartments, LLC*, 170 AD3d 1216 [2d Dept 2019]; *Cabrera v. Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Vicuna v. Vista Woods, LLC*, 168 AD3d 1124 [2d Dept 2019]; *Cassasola v. State of New York*, 129 AD3d 758 [2d Dept 2015] which supports his position that through his deposition testimony, *i.e.*, that the unsecured ladder on which he was working moved and shifted for no alleged reason, he has established that the ladder was inherently defective since it moved out of position and/or was inadequately secured against movement.

Movant claims he met his burden of demonstrating there was a clear violation of Labor Law 240(1) and is entitled to judgment as a matter of law as against Homeport and Claire on the issue of liability for their violation of Labor Law §240(1).

In opposition to the motion Homeport maintains Mr. Orue’s testimony demonstrates that the ladder he used was not defective, and accordingly, there was no violation of Labor Law 240(1).

Claire's Incident Report and the deposition testimony of Claire's president, Carmine Comitini, who was at the scene but did not witness the accident, indicate the accident occurred because plaintiff's work boots were untied. Defendant points out that plaintiff's employer provided scissor-lifts and safety harnesses on site which plaintiff failed to use while performing his work. Pertinently, Homeport emphasizes it did not provide any materials or equipment for the construction project; nor did it oversee safety, nor supervise and control the means and methods of plaintiff's work. Movant claims that this evidence raises triable issues of fact as to whether Mr. Orue's own actions were the sole proximate cause of the accident thereby precluding summary judgment on liability under Labor Law §240(1).

The general contractor, codefendant Claire, also opposes plaintiff's motion for summary judgment on his Labor Law 240(1) cause of action. Claire adopts the arguments of defendant Homeport, particularly with regard to the issue of the sole proximate cause of the happening of the accident. Claire reiterates it is undisputed that Mr. Orue was performing work solely for his employer at the time of the accident; the ladder in question was supplied by his employer; and there is no evidence it was defective. As such, Claire maintains there is insufficient evidence to establish, prima facie, that it is liable pursuant Labor Law §240(1) for Mr. Orue's injuries.

#### ANALYSIS

"Labor Law §240(1) imposes a nondelegable duty and absolute liability upon owners [general contractors, and their agents] for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Majerski v. City of New York*, 193 AD3d 715, 715 [2d Dept 2021]; see *McCarthy v. Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Orellana v. 7 West 34<sup>th</sup> Street, LLC*,

173 AD3d 886, 887 [2d Dept 2019]). “To prevail on a Labor Law 240(1) cause of action, a plaintiff must establish “there was a violation of the statute, and the violation must be a proximate cause of the plaintiff’s injury” (*Cioffi v. Target Corporation*, 188 AD3d 788, 790 [2d Dept 2020]; see *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v. Neighborhood Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Orellana v. 7 West 34<sup>th</sup> Street, LLC*, 173 AD3d at 887).

Mr. Orue’s deposition testimony is uncontroverted. His employer, HP, provided the ladder in question which was owned by HP’s master plumber, Shalan Haddad. Plaintiff’s work was directed solely by his supervisors, Steve and Joe, who were employed by HP and Haddad. Mr. Orue testified that he inspected the A-frame ladder before using it. “[T]he support system was in place and it was straight and . . . wasn’t moving, the piece of rubber on the bottom of the legs of the ladder were in place and it was all level.” Plaintiff opened the ladder all the way and locked the metal hinges into place. He made sure all four feet of the ladder were on the ground which was flat and level. He used the ladder on prior occasions and never had any problems with it. To his knowledge, it was in good working order. However, the ladder was not tied down nor held in position by a co-worker. While plaintiff was cutting the ductwork, both of his feet were on the same rung of the ladder. His co-worker, Chris Rodriguez, was standing on a nearby scaffold facing Mr. Orue to assist him. Plaintiff testified that as he was cutting the ductwork, the ladder “moved”; he did not step off the ladder or slip on the step before it moved. According to plaintiff, he felt the ladder “move forward towards the ductwork.” Mr. Orue does not know why the ladder moved.

Plaintiff’s co-worker, Chris Rodriguez, testified that he was working with Mr. Orue to install the duct on the day of the accident. Mr. Rodriguez was standing a scaffold directly in front of plaintiff, “face-to-face”, while plaintiff was cutting the duct. He witnessed the accident. The ladder fell forward towards Mr. Rodriguez. He testified that Mr. Orue was not standing improperly. Both feet were on the same rung and he was not extending himself to one side or the other, or

stretching his body; he was facing the duct and cutting around it. According to Mr. Rodriguez, the ladder fell forwards towards him causing Mr. Orue to fall backwards.

Pertinently, Claire's Incident Report Form indicates that Mr. Orue "fell due to dilapidated and untied boots". Claire's president, Carmine Comitini, testified that he was at the scene of the accident and observed that Mr. Orue's boots were untied. However, he did not witness the accident. In contrast, however, plaintiff testified that he was wearing new construction boots and tied the laces "all the way to the top [of the boots] to cover his whole ankle."

It is well established that plaintiff's burden on a Labor Law §240(1) motion can be satisfied by demonstrating that the device collapsed slipped, tipped or moved for no apparent reason causing him to fall (*see Salinas v. 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *Vicuna v. Vista Woods, LLC*, 168 AD3d 1124, 1125 [2d Dept 2019]; *Cabrera v. Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Joseph v. 210 West 18<sup>th</sup>, LLC*, 189 AD3d 1384, 1385 [2d Dept 2020]).

Consonant with the foregoing, the Court finds Mr. Orue has met his burden of establishing his entitlement to summary judgment on the issue of liability as against Homeport and Claire on his Labor Law §240(1) cause of action by the submission of his uncontroverted deposition testimony and the corroborating deposition testimony of his co-worker (*see Salinas v. Jefferson Apartments*, 170 AD3d at 1222; *Vicuna v. Vista Woods, LLC*, 168 AD3d at 1125; *Cabrera v. Arrow Steel Window Corp.*, 163 AD3d at 759-760). As such, "the burden shifts to the defendant, who may defeat plaintiff's motion for summary judgement only if there is a plausible view of the evidence – enough to raise – that there was no statutory violation *and* that plaintiff's own acts or omissions were the sole proximate cause of the accident" (*Salinas v. Jefferson Apartments*, 170 AD3d at 1222).

For example, where the plaintiff falls from a ladder because the plaintiff lost his balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law §240(1) is not imposed since plaintiff's actions were the sole proximate cause of the accident. By contrast, in this case there is uncontroverted evidence that the A-frame ladder in question was inadequately secured and/or suddenly moved forward out of position for no apparent reason (*see Salinas v. 64 Jefferson Apartments, LLC*, 170 AD3d at 1222; *Vicuna v. Vista Woods, LLC*, 168 AD3d at 1125 [2d Dept 2019]; *Cabrera v. Arrow Steel Window Corp.*, 163 AD3d at 759-760 [2d Dept 2018]; *cf. Joseph v. 210 West 18<sup>th</sup>, LLC*, 189 AD3d 1384, 1385 [2d Dept 2020]).

Homeport's attempt to defeat summary judgment by raising a triable issue of fact as to whether Mr. Orue's actions were the sole proximate cause of the accident is unavailing. More particularly, defendant contends that the inferior condition of Mr. Orue's work boots was the sole proximate cause of the accident. Homeport's reliance on Claire's allegation regarding plaintiff's "dilapidated and united boots" is insufficient to defeat plaintiff's prima facie showing of a violation. Evidence of comparative fault is not a defense to the absolute liability imposed by the statute (*see Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39; *Blake v. Neighborhood Servs. of N.Y. City*, 1 NY3d at 289-290; *Orellana v. 7 West 34<sup>th</sup> Street, LLC*, 173 AD3d at 887). Moreover, the Court is not persuaded by Homeport's contention that certain purported discrepancies in the parties' testimony, *inter alia*, as to the height of the ladder, where plaintiff was standing on the ladder and other potential causes of the accident, raise triable issues of fact regarding the imposition of Labor Law §240(1) liability. Since the Court has determined the unsecured ladder moved out of position and was a "substantial factor in causing plaintiff's injuries" (*see Cioffi v. Target Corporation*, 188 AD3d 788, 791 [2d Dept 2020]; *Deserio v. City of New York*, 171 AD3d 867, 867-868 [2d Dept 2019]), the existence of other purported proximate causes is irrelevant. In order to establish absolute liability under Labor Law §240(1) it must only be shown that the

violation was a proximate cause of the plaintiff's injuries, as opposed to the *sole* proximate cause (see *Cioffi v. Target Corporation*, 188 AD3d at 790). Thus, Homeport's proposition that triable issues of fact regarding *sole* proximate cause is legally insufficient to defeat plaintiff's prima facie showing of a Labor Law §240(1) violation.

**Motion Sequence No. 005**  
**Defendant Homeport's Motion Pursuant to CPLR 3212**

Plaintiff does not oppose the branch of Homeport's motion for summary judgment dismissing his Labor Law §200 [and likewise, common law negligence], §240(2) and §240(3) causes of action. In addition, plaintiff withdraws his claims predicated upon Industrial Code sections 23-1.7, 23-1;7(f), 23-1.15; 23-1.17; 23-1.21(b)(4)(iv); and 23-2.5. As such, Homeport's motion to dismiss plaintiff's causes of action pursuant to Labor Law §200 [and likewise, common law negligence], §240(2) and §240(3) is granted without opposition. The branch of the motion to dismiss plaintiff's Labor Law §241(6) causes of action based on Industrial Code sections 23-1.7, 23-1;7(f), 23-1.15; 23-1.17; 23-1.21(b)(4)(iv); and 23-2.5 is denied.

As for the balance of the motion, Homeport seeks summary judgment (1) dismissing Claire's cross claims for (i) common law indemnification and contribution, (ii) contractual indemnification, (iii) attorneys' fees, costs and expenses in the defense of this action; and (2) dismissing plaintiff's causes of action for violations under Labor Law §241(6) predicated upon Industrial Code sections 23-1.5; 23-1.5(c)(3) 23-1.16, 23-1.16(a)(b); 23-1.21; 23-1.21(b)(3)(i); 23-1(3)(i); 23(b)-1.21(b)(4)(ii); 23-1.21(b); 23-1.21(e); and 23-1.24.<sup>1</sup>

**ANALYSIS**

**Labor Law 241(6) and the Industrial Code**

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<sup>1</sup> Sections 23-1(3)(i) and 23-1.5(c)(3) are not among the alleged violations of the Industrial Code cited in plaintiff's Bill of Particulars. Therefore, they are not properly before the Court.

“Labor Law §241(6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to construction workers” (*Kefaloukis v. Mayer*, 197 AD3d 470, 471 [2d Dept 2021], citing *Aragona v. State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). To establish liability under Labor Law §241(6), a plaintiff must prove that (1) defendant violated a concrete specification of the State Industrial Code as opposed to a general safety standard, (2) the provision applies to the facts of the case, and (2) such violation was a proximate cause of the injuries (*see Rizzuto v. L.A. Wenger Contracting Co.*, 91 NY2d 343, 343 [1998]; *Kefaloukis v. Mayer*, 197 AD3d at 472; *Majerski v. City of New York*, 193 AD3d at 716, 717). New York’s Industrial Code is the only statutory basis to establish liability under Labor Law §241(6).

Consonant with the foregoing, the Court finds the following alleged provisions of the Industrial Code are specific and applicable to the facts of this case, therefore, they may serve as the statutory basis to establish liability under Labor Law § 241(6):

Sections 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), and 23-1.21(b) regulate the requirements for ladders, e.g., strength, maintenance, replacement and insecure joints; Section 23-1.16(b) regulates the use of safety belts and harnesses which were available at the jobsite. Homeport’s motion to dismiss the foregoing provisions of the Industrial Code is denied.

However, the following sections of the Industrial Code are not actionable:

Section 23-1.21(e) entitled “Stepladder footing” is not applicable; Section 23-1.5 entitled “General Responsibility of Employers” and Section 23-1.16 entitled “Safety belts, harnesses, tail lines and lifelines” is not sufficiently concrete; Sections 23-1(3)(i), 23-1.5(c)(3) and 23-1.24 (which applies to work on roofs) are not set forth in plaintiff’s Bill of Particulars and/or do not apply to the facts of this case. Thus, Homeport’s motion seeking dismissal of the foregoing Industrial Code violations is granted.

### **Contractual Indemnification**

It is undisputed that the construction contract between Homeport and Claire was executed post-accident. As such, a contractual obligation on the part of Claire to indemnify Homeport did not exist at the time of the incident. Unarguably, the contract does not contain an express provision wherein the parties' agreement was made effective as of a pre-accident date.

An indemnification agreement executed by a party after plaintiff's accident occurred will not be applied retroactively "unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations". (*Zalewski v. MH Residential 1, LLC*, 163 AD3d 900, 902 [2d Dept 2018], citing *Mikulski v. Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Claire contends there is no proof the parties' intended that the terms of the contract would apply to a pre-accident date. Homeport insists there is evidence of the parties' intention that the executed agreement applied retroactively. In view of the triable issues of fact regarding the parties' intention that the agreement would apply retroactively, movant his not entitled to summary judgment on its claim for contractual indemnification from codefendant.

### **Common Law Indemnification**

"[A] party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. But a party's (*e.g.*, a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common law indemnification. Liability for indemnification may only be imposed against those parties (*i.e.*, indemnitors) who exercise actual supervision. Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actual directed and supervised the work, a common law indemnification claim will not lie against

that party on the basis of its contractual authority alone” (*McCarthy v. Turner Constr., Inc.*, 17 NY3d at 377-379).

In the case at bar, defendant Claire argues that although it had the contractual authority to supervise plaintiff’s employer on the job site, two other entities *actually* supervised the means and methods of plaintiff’s work, *i.e.*, plaintiff’s employer (HP) and codefendant Homeport. Claire relies on the testimony of its president, Carmine Comitini, wherein he indicated Claire never instructed the employees of either HP Services or Haddah Plumbing, and that Homeport’s employee, Tony Nemati, assumed that role. He had an office on site and regularly held meetings with the subcontractors. In view of the issues of fact regarding whether Claire exercised “actual supervision” over the work plaintiff performed, Homeport’s motion for summary judgment on its cross claim for common law indemnification from co-defendant must be denied.

Furthermore, pursuant to General Obligations Law §5-322.1, any construction project purporting to indemnify a party for its own negligence is void and unenforceable. Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence. To any extent that the negligence of such party contributed to the accident it cannot be indemnified therefore. In the instant matter, the negligence, if any, of the parties to the construction contract at issue has yet to be determined.

#### **Attorney’s fees**

The branch of Homeport’s motion for an award of attorneys’ fees, costs and expenses from Claire in the defense of this action is denied as moot. Claire maintains that Homeport has been defended in this lawsuit under the post-accident policy of insurance. Notably, the issue of whether there is coverage for plaintiff’s accident is currently the subject of a pending matter in the United States District Court for the Eastern District. As the Federal action has not been resolved, a motion

for summary judgment in this matter would be premature. In any event, Claire maintains its insurer claims to have paid Homeport's attorneys' fees which renders this branch of Homeport's motion moot.

Accordingly, it is

ORDERED, plaintiff' Walter Orue's motion for partial summary judgment on the issue of liability as against defendants Homeport I LLC and Claire Construction Corp. under Labor Law §240(1) is granted; and it is further

ORDERED, the branch defendant Homeport I LLC's motion which is for summary judgment dismissing the cross claims of co-defendant Claire Construction Corp. for (i) contractual indemnification, (ii) common law indemnification/contribution and (iii) attorneys' fees, costs and expenses in the defense of this action is denied; and it is further

ORDERED, the branch defendant Homeport I LLC's motion which is for summary judgment as against co-defendant Claire Construction Corp. for contractual indemnification is denied; and it is further

ORDERED, the branch defendant Homeport I LLC's motion which is for summary judgment as against co-defendant Claire Construction Corp. for common law indemnification is denied; and it is further

ORDERED, the branch defendant Homeport I LLC's motion which is for summary judgment as against codefendant Claire for attorney's fees, costs and expenses in the defense of this action is denied as moot;

ORDERED, the branch of Homeport I LLC's motion which is for summary judgment dismissing plaintiff Walter Orue's causes of action under Labor Law §240(2), §240(3), §200 and common law negligence is granted without opposition; and it is further

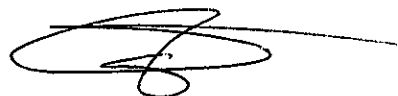
ORDERED, the branch of Homeport I LLC's motion which is for summary judgment dismissing plaintiff's cause of action under Labor Law §241(6) and Industrial Code Sections 23-23-1.21(e), 23-1.5, 23-1.16, and Sections 23-1(3)(i), 23-1.5(c)(3) and 23-1.24 is granted; and it is further

ORDERED, the branch of Homeport I LLC's motion which is for summary judgment dismissing plaintiff's cause of action under Labor Law §241(6) and Industrial Code Sections 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), 23-1.21(b) and 23-1.16(b) is denied; and it is further

ORDERED, the Clerk shall mark his records accordingly.

ENTER,

Dated: January 10, 2022



A.J.S.C.

Hon. Charles M. Troia  
Acting Supreme Court Justice