

**Villamar v HP Jamaica 94th Ave.  
Hous. Dev. Fund Co., Inc.**

2023 NY Slip Op 32845(U)

August 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 512901/19

Judge: Wavny Toussaint

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At an IAS Term, Part 70 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 9th day of August, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

-----X  
PAOLA DEL CARMEN MILLAN VILLAMAR,

Plaintiff,

-against-

Index No.: 512901/19

IIP JAMAICA 94TH AVENUE HOUSING DEVELOPMENT FUND COMPANY, INC., THE 148TH STREET JAMAICA CONDOMINIUM, THE BOARD OF MANAGERS OF THE 148TH STREET JAMAICA CONDOMINIUM, 94TH AVENUE JAMAICA, LLC and 94TH AVENUE JAMAICA LI LLC,

**DECISION AND ORDER**

Defendants.

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

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>32-33, 49</u>
Opposing Affidavits/Answer (Affirmations) _____	<u>51</u>
Affidavits/ Affirmations in Reply _____	_____
Other Papers: _____	_____

Upon the foregoing papers, defendants IIP Jamaica 94th Avenue Housing Development Fund Company, Inc., (individually, HP Jamaica), 94th Avenue Jamaica, LLC and 94th Avenue Jamaica LI LLC (collectively, the Owner Defendants) move (Seq. 02) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing the

complaint as against them. Plaintiff Paola Del Carmen Millan Villamar (Plaintiff) opposed the motion.

The Owner Defendants' motion (Seq. 02) is granted to the extent that Plaintiff's causes of action, premised on common-law negligence and Labor Law §§ 200 and 240 (1), are dismissed. Plaintiff's Labor Law § 241 (6) cause of action is also dismissed to the extent that Plaintiff relies on Industrial Code (12 NYCRR) §§ 23-1.5 (a), (b); 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.30; 23-2.1 (a) (2); 23-5.1; 23-5.2; 23-5.6; 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-6.1; 23-6.2; and 23-6.3. The motion is denied with respect to Plaintiff's § 241 (6) cause of action premised on a violation of Industrial Code (12 NYCRR) § 23-2.1 (a) (1).

### Background

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 and 241 (6), Plaintiff alleges that, on January 16, 2018, while she was clearing construction debris from a hallway located in a building under construction, she was injured when pieces of wood that had been left leaning against the wall of the hallway fell on her left foot. The building at issue was owned by 94th Avenue Jamaica, LLC.<sup>1</sup> 94th Avenue Jamaica, LLC, contracted with non-party Artimus Construction, Inc. (Artimus) to be the general contractor for the project involving the construction of a 25 story, 380-unit, apartment building. Plaintiff was employed by Artimus as a cleaner to sweep and clear

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<sup>1</sup> It is unclear from the record whether HP Jamaica or 94th Jamaica LI LLC had an ownership interest in the building or underlying land at the time of the accident. In moving, however, neither HP Jamaica nor 94th Jamaica LI LLC seek dismissal of the action as against them on this basis.

light construction debris from the building during the project. As of the accident date, the building's superstructure had been completed, and the building's interior spaces were being built.

According to her deposition testimony, at approximately 12:30 p.m. on the date of the accident, Plaintiff was directed by her Artimus supervisor to go to the third or fourth floor of the building to clean construction debris which included wood, boards, and thick wooden sticks. The accident happened at some time between 2:00 p.m. and 3:00 p.m., shortly after Plaintiff picked up an approximately two-foot-long piece of wood with a nail in it. At that point, some thick pieces of wood that were taller than Plaintiff, that had been taken out of the elevator and left leaning against the wall of the hallway, fell onto Plaintiff's left foot. Plaintiff could not remember how many of the pieces fell onto her foot and she did not know what caused the pieces of wood to fall onto her. Plaintiff, however, asserts that the pieces that fell had not been sitting or resting on the piece of wood Plaintiff had picked up and that her body had not come into contact with the wood leaning against the wall before they fell. After they fell, Plaintiff was able to move them off her foot on her own.

### Discussion

Initially, although the Owner Defendants' notice of motion states that they are moving for summary judgment pursuant to CPLR 3211 (a) (the statutory basis for dismissal), the Court will overlook this mistake because the motion was made after joinder of issue. The notice of motion clearly states that the motion was for summary judgment, and Plaintiff, who was able to oppose the motion under the summary judgment standard

pursuant to CPLR 3212, has not been prejudiced by the reference to CPLR 3211 (a) (*Schultz v Estate of Sloan*, 20 AD3d 520, 520 [2d Dept 2005]; *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1171 [2d Dept 2017]; *Moon v Tupler*, 110 AD3d 486, 487 [1st Dept 2013]; *CPLR 2001*).

Regarding Plaintiff's Labor Law § 240 (1) cause of action, § 240 (1)<sup>2</sup> imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be both the "direct consequence of the application of the force of gravity to an object or person" and "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-604 [2009]; *Wilinski*, 18 NY3d at 10; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]).

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<sup>2</sup> As is relevant here, Labor Law § 240 (1) provides: "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."

With respect to accidents involving falling objects, the “plaintiff must show more than simply that an object fell causing injury to a worker” (*Narducci*, 96 NY2d at 268; *Fabrizi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that at the time the object fell, it was “being hoisted or secured” (*Narducci*, 96 NY2d at 268) or “required securing for the purposes of the undertaking” (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell “because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci*, 96 NY2d at 268; *Fabrizi*, 22 NY3d at 663; *Wilinski*, 18 NY3d at 10-11).

The weight of the falling object and the force it may generate is also a factor for consideration by a court, as a heavy object can generate considerable force in a short distance (*Wilinski*, 18 NY3d at 10; *Runner*, 13 NY3d at 605; *Gonzalez v Madison Sixty, LLC*, 216 AD3d 1141, 1142 [2d Dept 2023]; *see also* (*Connor v AMA Consulting Engrs. PC*, 213 AD3d 483, 484 [1st Dept 2023] (Holding that the fall of a single eight foot tall and two to four foot wide sheetrock panel, stored leaning against its short side, did not involve a significant weight giving rise to an extraordinary danger contemplated by § 240 (1).)<sup>3</sup>

The fact that the wood pieces were at the same level as Plaintiff does not necessarily preclude the Court from finding that there was a significant elevation differential for

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<sup>3</sup> Although not expressly mentioned in the First Department’s decision (*Connor*, 213 AD3d at 483-484), the Supreme Court, in its decision, noted that the sheetrock panel had been left standing on its shorter side (*Connor v AMA Consulting Engrs. PC*, 72 Misc 3d 1215[A], 2021 NY Slip Op 50747[U], \*2 [Sup Ct, New York County 2021]).

purposes of Labor Law § 240 (1) (*Wilinski*, 18 NY3d at 9-10; *Natoli v City of New York*, 148 AD3d 489, 489 [1st Dept 2017]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]). Nevertheless, the Second Department, has generally declined to find the existence of significant elevation differentials for similar accidents arising from falling sheetrock or other such material that had been stored leaning on edge or which had been moved or stored in carts or dollies (*Parrino v Rauert*, 208 AD3d 672, 673 [2d Dept 2022]; *Ortega v Fourtrax Contr. Corp.*, 214 AD3d 666, 668 [2d Dept 2023]; *Chuqui v Amna, LLC*, 203 AD3d 1018, 1020-21 [2d Dept 2022]; *Simmons*, 165 AD3d at 726-727). Storage in this manner does not require the use of a § 240 (1) securing device (*Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115 [2d Dept 2016]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]).

Here, nothing in Plaintiff's deposition testimony suggests that the pieces of wood that fell were especially heavy, and Plaintiff was able to move them off of her foot without assistance. The facts here are thus readily distinguishable from cases finding significant elevation differentials based on the weight of the falling object despite falls of only short distances (*cf. Runner*, 13 NY3d at 605 [fall of a 800 pound wire reel]; *Gonzalez v Madison Sixty, LLC*, 216 AD3d 1141, 1142 [2d Dept 2023] [fall of a 300 pound compressor]; *McCallister*, 92 AD3d at 928-929 [fall of a 450 to 500 pound stack of scaffolds]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 731 [2d Dept 2011] [fall of a 300 to 350 pound motor]; *Gutman v City of New York*, 78 AD3d 886, 886-887 [2d Dept 2010] [fall of a 1300 pound rail]).

Accordingly, this court finds that the Owner Defendants have demonstrated, prima facie, that the accident here did not involve a significant elevation differential (*Parrino*, 208 AD3d at 673; *Connor*, 213 AD3d at 484) and that a Labor Law § 240 (1) securing device was not required at the time of the accident (*Millette*, 144 AD3d at 1115; *Seales*, 142 AD3d at 1156). Since Plaintiff has failed to demonstrate an issue of fact in this respect, the Owner Defendants are entitled to dismissal of Plaintiff's Labor Law § 240 (1) cause of action as against them.

Turning to Plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, the Owner Defendants have demonstrated, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.5 (a), (b); 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.30; 23-2.1 (a) (2); 23-5.1; 23-5.2; 23-5.6; 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-6.1; 23-6.2; and 23-6.3 allegedly violated by them, fail to state specific standards or are inapplicable to the facts of this case (*see generally Rizzuto*, 91 NY2d at 349-350; *Honeyman*, 154 AD3d at 821). As Plaintiff has abandoned reliance on these regulations by failing to address them in her opposition papers, the Owner Defendants are entitled to dismissal of the Plaintiff's Labor Law § 241 (6) cause of action to the extent that it is predicated on Industrial Code (12 NYCRR) §§ 23-1.5 (a), (b); 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.30; 23-2.1 (a) (2); 23-5.1;

23-5.2; 23-5.6; 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-6.1; 23-6.2; and 23-6.3 (*Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

On the other hand, the Court finds that the Owner Defendants have failed to demonstrate, prima facie, that Industrial Code (12 NYCRR) § 23-2.1(a) (1) is inapplicable here. Section 23-2.1(a) (1), which has been found to state a specific standard (*Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [2d Dept 1997]), provides that, “[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.” The term “building material” is not defined in the Industrial Code. In view of the usual meaning of the word material, which has been defined as “the elements, constituents, or substances of which something is composed or can be made” (Merriam-Webster Online Dictionary, material [<https://www.merriam-webster.com/dictionary/material>] [note: online free version]; *Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016] [dictionary definitions are useful guideposts in determining the meaning of a word or phrase]), the fact that the wood pieces at issue were to be disposed of does not automatically remove them from being considered building material (*Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150, 1152 [3d Dept 2016]). Plaintiff’s testimony that the pieces had been removed from the elevator and left leaning against the hallway wall suggests that they were being stored, at least temporally, and were not simply wood scraps or debris resulting from ongoing work that had been left lying on the floor.

Given the absence of any binding caselaw holding that § 23-2.1 (a) (1) would be inapplicable under the circumstances here (*cf. Ascencio v JP Morgan Chase Bank, N.A.*, 34 Misc.3d 1226[A], 2012 NY Slip Op 50261[U], \*3-4 [Sup Ct, Queens County 2012] [demolition debris and tools left on scaffold were not being stored]), and given that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]), this Court finds that there are factual issues as to whether § 23-2.1(a) (1) is applicable and whether the wood pieces were safely stored within the meaning of § 23-2.1(a) (1) (*Parrino*, 208 AD3d at 675; *Hebbard*, 135 AD3d at 1152; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]).

Relevant to Plaintiff’s common-law negligence and Labor Law § 200 causes of action was the testimony of Eytan Benyamin, a witness for the Owner Defendants. Mr. Benyamin testified that he was the only representative of the Owner Defendants who visited the construction site and that he only did so once or twice a quarter. This testimony and that of Dennis Normile, Plaintiff’s supervisor at Artimus, and that of Plaintiff herself, demonstrate, *prima facie*, that the Owner Defendants did not exercise the requisite supervision or control of the construction site or the manner in which Plaintiff performed her work, sufficient to establish liability (*Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). Further, particularly in view of Plaintiff’s testimony that the wood pieces at issue had been removed from the elevator - suggesting that the pieces had not been left standing in the hallway very long - their

placement in the hallway was part of the ongoing work and, thus the accident was a result of the means and methods of the injury producing work, did not constitute a dangerous property condition (*Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016]; *Giglio v Turner Constr. Co.*, 190 AD3d 829, 830 [2d Dept 2021]; *Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012], *lv dismissed* 19 NY3d 1020 [2012]; *Cody v State of New York*, 82 AD3d 925, 926-927 [2d Dept 2011]).

Further, nothing in the record indicates the Owner Defendant created or had actual or constructive notice of any dangerous condition relating to the placement of the wood pieces in the hallway (*Seales*, 142 AD3d at 1158; *Hamm v Review Assoc., LLC*, 202 AD3d 934, 938-939 [2d Dept 2022]; *cf. Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046-1047 [2d Dept 2012]). Plaintiff, who did not oppose this aspect of the Owner Defendants' motion, has failed to demonstrate the existence of a factual issue warranting denial of the motion in this respect. The Owner Defendants are thus entitled to dismissal of Plaintiff's common-law negligence and Labor Law § 200 causes of action.

This constitutes the decision and order of the court.

ENTER



J.S.C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

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