

**Araujo v Monadnock Constr., Inc.**

2023 NY Slip Op 34918(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 527715/19

Judge: Peter P. Sweeney

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At an IAS Term, Part 73 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 7<sup>th</sup> day of December 2023.

P R E S E N T:

HON. PETER P. SWEENEY,  
Justice.

-----X  
HELIO ARAUJO,

Plaintiff,

-against-

Index No. 527715/19

MONADNOCK CONSTRUCTION, INC.,  
DUNN CO SAFETY LLC and EAST HARLEM  
MEC PARCEL B WEST, LLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	83-99, 100-120
Opposing Affidavits (Affirmations) _____	121-133, 134-144
Affidavits/ Affirmations in Reply _____	145, 146-148
Other Papers: _____	_____

Upon the foregoing papers, plaintiff Helio Araujo moves (in motion [mot.] sequence [seq.] number [no.] 7) for an order, pursuant to CPLR 3212, granting partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim.

Defendants Monadnock Construction, Inc., (Monadnock) and East Harlem MEC Parcel B West, LLC (East Harlem) (collectively, defendants) move (in mot. seq. no. 8) for summary judgment dismissing plaintiff's claims arising under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence.

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### *Background and Procedural History*

East Harlem is the owner of property located on 125<sup>th</sup> Street in Manhattan at which a project involving the construction of a new building was taking place in 2019. East Harlem hired Monadnock to act as the general contractor for the project. Monadnock, in turn, subcontracted with non-party, Highbury Concrete, Inc. (Highbury), for the performance of concrete superstructure work at the site. Plaintiff was employed by Highbury as a carpenter. He testified that on October 9, 2019, he was tasked with plugging holes in two 12-13 foot-high concrete retaining walls in the basement of the building in preparation for a concrete pour. This was accomplished by affixing 2 x 4 pieces of wood to the wall over the hole. Plaintiff and a co-worker, Izaias, would first plug the holes on the outside of the building. They utilized a 13-foot, A-frame ladder to reach the holes. Next, plaintiff and his co-worker would plug the holes on the interior side of the wall in the basement. Plaintiff testified that a 9-foot ladder was the only ladder available at the time of the accident that would fit inside the basement due to space constraints, which included poles and 2 x 4 supports. He further testified that it was not possible to fully open the ladder in certain sections of the basement due to the presence of support posts and 2 x 4s that ran across those posts from the ground upward. In addition, plaintiff testified that in the basement area, it was very dark, the ground was wet and filled with debris (NYSCEF Doc No. 89, plaintiff tr at 42, lines 5-7).

On October 9, 2019, plaintiff and his co-worker Izaias had plugged the last hole on the outside of the building and then proceeded inside to close the hole from that side. Plaintiff testified that on the inside of the basement there was a 20-foot long plywood

platform or deck that was suspended from the ceiling, located approximately 9 feet above the ground. Izaias attempted to open the 9-foot ladder that was inside the basement and had been utilized the day prior but was unable to do so due to the presence of the support posts and 2x 4s and debris on the floor. Izaias then placed the ladder in the closed and leaning position and climbed it to get on to the platform. Plaintiff then ascended the closed, leaning ladder to a height of approximately 3-4 feet. He testified that he was carrying a piece of wood to be used to cover the hole in one hand and his cell phone in the other, with the light on so that he could see as the area was dark. As plaintiff was reaching up with the wood in one hand, intending to place it on the platform which was adjacent to the ladder, “the ladder wobbled” and moved to the right side, causing him to fall backward, hitting his head and striking his back on a tripod that was supporting a post. He states that he attempted to grab a post to steady himself during his fall, but he was unable to see because it was dark. Plaintiff alleges that the ladder was also caused to move and fall because the ground was wet and slippery where its feet were placed. He also testified that it was the only ladder available to use.

On or about December 20, 2019, plaintiff commenced this action against defendants, alleging claims for negligence and the violation of Labor Law §§ 200, 240(1) and 241(6). Defendants joined issue via the service of a Verified Answer dated February 21, 2020. The parties engaged in discovery and plaintiff filed his Note of Issue and Certificate of Readiness on February 8, 2023. The following motions are timely in accordance with a Stipulation “So Ordered” by this court on June 12, 2023, which extended the deadline for summary judgment motions to July 28, 2023.

Plaintiff's Motion (MS-7)

Plaintiff moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor on his Labor Law § 240 (1) claim. He argues that defendants violated Labor Law §240 (1) by failing to provide him the proper equipment and protection to perform his job. In this regard, he notes that he was caused to work on an unsecured ladder in the closed position due to the configuration of the space and the obstructions on the floor where the ladder was placed. Moreover, plaintiff testified that the floor was wet due to rainwater. He also contends that there was insufficient lighting in the basement.

In support of his motion, plaintiff submits an affidavit from his co-worker, Izaias, who witnessed the accident and corroborates plaintiff's version of the events that transpired prior to and at the time of the accident. Specifically, he states that the floor was wet and slippery, that the ladder was unstable and that the area in which they were working was too tight to allow for the ladder to be fully opened. Moreover, Izaias states that the area was poorly illuminated.

In further support of his motion, plaintiff submits an affidavit from Herman Silverberg, a licensed professional engineer. Mr. Silverberg affirms that prior to rendering his expert opinion in this matter he reviewed the pleadings in this action; plaintiff's Bills of Particulars; all of the deposition testimony and the exhibits marked at all of the depositions; and the affidavit of Izaias. In addition, on March 16, 2022, he performed a physical inspection of the ladder that was involved in this accident, which had been preserved and maintained by Monadnock in the same condition following plaintiff's accident. Mr. Silverberg states that he "observed that the feet of the ladder, which had rubber treads

attached, were worn unevenly, such that when the ladder was opened, it wobbled and was unstable. In addition, when he attempted to open and lock the spreaders on the ladder, he observed that they did not operate properly, and could not be locked securely in place (NYSCEF Doc No. 98 Silverberg aff at ¶ 17). Thus, he opined that the ladder was unsuitable for the work plaintiff was performing because it could not be fully opened in the basement area, and that even if it could, the unevenly worn feet rendered it unstable. Mr. Silverberg further opined that an A-frame ladder was not the appropriate device as plaintiff was required to lean or reach to his side to hand the materials to his co-worker and an A-frame ladder should be used perpendicular to a work area in order that a worker's center of gravity remain over the ladder. He opines that a better device would have been a small chainfall or similar type of hoist. Mr. Silverberg opined, to a reasonable degree of professional engineering certainty, that plaintiff "was not provided with safe and appropriate elevation safety devices for the work he was performing at the time of the accident, as required by Labor Law § 240(1) . . . [and] that this failure was a substantial factor in causing his fall and resultant injuries" (*id* at ¶ 25).

In opposition to plaintiff's motion, and in support of that branch of their motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, defendants contend that plaintiff's misuse of the ladder was the sole proximate cause of his accident. In support of their motion, defendants submit an affidavit from construction and safety expert Michael Cronin, a professional engineer. Mr. Cronin affirmed that he reviewed plaintiff's Bills of Particulars; photographs; deposition testimony and exhibits; manufacturer specifications for the Werner PD6206 ladder of the type involved in

plaintiff's accident; an incident report and statements. Additionally, he stated that he conducted an inspection of the subject ladder and scene of the accident on October 11, 2019. Mr. Cronin contends that plaintiff's accident occurred solely as a result of his failure to comply with his employer's directives and the instruction label on the ladder in question directing that the ladder only be used in the fully open position. He notes that he examined the ladder, opened it fully and measured it. Mr. Cronin states that he found that the ladder was stable on all four feet with no instability. He examined the feet of the ladder and found they were "in good order with proper ridges that increase surface area to promote non-skid qualities as publicized by Werner in their materials" (NYSCEF Doc No. 103, Cronin aff at ¶ 36). Additionally, Mr. Cronin states that he examined the floor in the basement where plaintiff's accident occurred and found that it was constructed of rough concrete which is a slip resistant surface. He opines that the ladder with its rubber feet would not be caused to slip on the rough concrete and that it was plaintiff's use of it in the closed position while carrying a 2 X 4 that caused the ladder to topple as the feet of the ladder were a fulcrum. Mr. Cronin further states that he examined the scene of the accident and determined that there was sufficient space to fully open the ladder and perform plaintiff's work. He opines "to a reasonable degree of construction safety and engineering safety certainty that the Werner podium ladder utilized by plaintiff at the time of the occurrence was a proper safety device and if used properly would have provided proper protection for plaintiff" (*id* at ¶ 32).

In reply, and in further support of plaintiff's motion seeking partial summary judgment on his Labor Law § 240 (1) claim, plaintiff argues that the record demonstrates

that his accident was caused by defendants' failure to provide him with safe and appropriate protective devices for the elevated work he was required to perform. Additionally, he contends that he cannot be deemed to be the sole proximate cause of the accident under these circumstances where he was unable to fully open the ladder.

### ***Discussion***

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact’” (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). “The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d , 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 836, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing

papers (*see Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

***Labor Law § 240 (1)***

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 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 cases involving falling workers, “[w]hether 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]). Thus, the collapse of a ladder or scaffold constitutes prima facie evidence of a Labor Law § 240 (1) violation (see *Exley v Cassell Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022]; *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] injuries”). As relevant herein, “this rule pertains to a fall from a ladder in a closed position where, as here, the conditions of the workplace make it impossible for the worker to place the device in an open, secure position” (*Castillo v TRM Contr. 626, LLC*, 211 AD3d 430, 430-431 [1<sup>st</sup> Dept 2022]; see *Howard v Turner Constr. Co.*, 134 AD3d 523, 524 [1st Dept

2015]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653-654 [2d Dept 2014] [court held that “plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability [on his Labor Law § 240 (1) claim] by demonstrating that he was injured when the unsecured, closed A-frame ladder fell backwards as he descended it”]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 [1st Dept 2013] [the plaintiff was entitled to partial summary judgment on his section 240(1) claim where he was injured falling from an A-frame ladder that he was unable to open fully due to the presence of debris in the work area]).

The court finds that plaintiff has established his prima facie entitlement to partial summary judgment in his favor on his Labor Law § 240 (1) claim as he demonstrated that defendants failed to provide him with a properly secured ladder or other appropriate safety device to perform his work. However, defendants have raised an issue of fact in their opposition. In this regard, the conflicting expert engineer affidavits proffered by the parties raise issues of fact as to whether the ladder provided adequate protection to the plaintiff in the area in which he was required to perform his work and whether the space provided allowed the ladder to be used in the open position (*see Morera v New York City Transit Auth.*, 182 AD3d 509, 510 [1st Dept 2020] [plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim denied where conflicting expert testimony raised issue of fact as to whether other adequate devices could have been provided]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]).

In addition, the court finds that the recalcitrant worker defense has no application here as defendants have failed to present any evidence demonstrating that plaintiff

disobeyed a direct order with regard to the use of a particular safety device (*see Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815-16 [2d Dept 2018]; *Silvas v Bridgeview Inv'rs, LLC*, 79 AD3d 727, 731 [2d Dept 2010]; *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 809 [2d Dept 2010], citing *Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker “disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device”]).<sup>1</sup>

Accordingly, in light of the forgoing issue of fact, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim is denied, and that branch of defendants' motion for summary judgment dismissing said claim is also denied.

#### **Defendants' Motion (MS-8)**

The court now turns to those branches of defendants' motion which seek to dismiss plaintiff's claims arising under Labor Law §§ 241 (6), 200 and common law negligence. As discussed above, in support of their motion, defendants rely upon the affidavit from construction and safety expert Michael Cronin, who opines, “to a reasonable degree of construction safety and engineering safety certainty that the Werner podium ladder utilized by plaintiff at the time of the occurrence was a proper safety device and if used properly would have provided proper protection for plaintiff” (NYSCEF Doc No. 103 at ¶ 32). In addition, Mr. Cronin states that he reviewed the testimony of Anatoliy Yanush, Highbury's

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<sup>1</sup>“While an injured worker's comparative negligence is not a defense to a Labor Law § 240 (1) cause of action, the “recalcitrant worker” defense may allow a defendant to avoid liability under the statute “where a plaintiff's own actions are the sole proximate cause of the accident” (*Robinson v National Grid Energy Mgt., LLC*, 150 AD3d 910, 912 [2d Dept 2017], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *see Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]).

concrete safety manager at the time of plaintiff's accident, which reveals that he performed daily inspections consistent with the Industrial Code requirements and that the lighting in the basement was adequate. In this regard, Mr. Cronin notes that he also found that the lighting was adequate when he inspected the accident site. Accordingly, he opines that defendants did not violate any of the Industrial Code provisions cited by plaintiff in support of his Labor Law § 241 (6) claim.

Defendants further point to the testimony of Mr. Yanush indicating that he did not observe any debris on the floor where plaintiff's accident occurred on any of his daily inspections of the area. Defendants argue that all of plaintiff's claims should be dismissed as a matter of law because plaintiff's action in failing to properly utilize the ladder was the sole proximate cause of his accident; that none of the Industrial Code sections he cites in support of his Labor Law § 241 claim are applicable; and that defendants did not have the requisite degree of control over plaintiff's work and did not cause, create or have notice of any condition that caused plaintiff's accident.

In opposition, plaintiff argues that the branch of defendants' motion seeking dismissal of his Labor Law § 241 (6) claim should be denied as defendants violated Industrial Code §§ 23-1.21, 23-1.7 (d) and 23-1.30.

***Labor Law § 241 (6)***

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 Moscati 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]).

In his bill of particulars, plaintiff alleges violations of Industrial Code §§ 23-1.7, 23-1.21, 23-1.30, 23-2.1, 23-2.2, and 23-2.4. As an initial matter, defendants have made a prima facie showing that 12 NYCRR 23-2.1, 23-2.2, 23-2.4 are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances of the accident. In any event, plaintiff has not discussed these regulations in his opposition papers and has therefore abandoned his Labor Law § 241 (6) claim to the extent it is based upon alleged violations of these provisions (*see Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [1<sup>st</sup> Dept 2012] [holding that “[w]here 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”]).

Turning to the remaining Industrial Code regulations, 12 NYCRR 23-1.7 (d) requires that “[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.” Defendants argue that this section is not applicable because the incident herein occurred because the ladder tipped and not because it slipped.

In opposition, plaintiff points to his own testimony that the floor was wet at the time of his accident and full of debris (NYSCEF Doc No. 136, plaintiff’s tr at 42, lines 6-7). In addition, he testified that the ladder moved because the ground was slippery (*id.* at 73, lines 3-6). Finally, plaintiff points to the deposition testimony of Mr. Yanush, who testified that the floor where plaintiff was working was wet (NYSCEF Doc No. 93 at 109, lines 3-8).

Industrial Code § 23-1.7 (d) is specific enough to support a Labor Law § 241 (6) claim as it “mandates a distinct standard of conduct” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]). However, defendants have failed to demonstrate, *prima facie*, that this regulation was inapplicable, not violated, or that the alleged violation was not a proximate cause of the plaintiff’s injuries (*see Toalongo v Almarwa Ctr., Inc.*, 202 AD3d 1128, 1132 [2d Dept 2022]; *Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 1089 [2d Dept 2021]). Accordingly, that branch of defendants’ motion seeking summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-1.7 (d) is denied.

Industrial Code § 23-1.21 which relates to ladders provides in subsection (b) (3), in pertinent part, as follows:

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

- (i) If it has a broken member or part.
- (ii) If it has any insecure joints between members or parts.
- (iv) If it has any flaw or defect of material that may cause ladder failure.

Industrial Code § 23-1.21 (b) (3) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430, 431 [1<sup>st</sup> Dept 2015]; *Kozlowski v Ripin*, 60 AD3d 638, 639 [2d Dept 2009]). Defendants assert that this section was not violated pointing to Mr. Cronin's affidavit in which he affirms that the ladder's footings were proper, the locking mechanism worked and that it would have provided proper protection had plaintiff not misused it.

In opposition, plaintiff points to the affidavit of his expert, Mr. Silverberg, who opined, after examining the ladder at issue, that it had "unevenly worn feet that rendered it unstable and caused it to wobble when tested" [NYSCEF Doc No.98, Silverberg Aff. ¶ 21]. He further observed that "the feet of the ladder, which had rubber treads attached, were worn unevenly, such that when the ladder was opened, it wobbled and was unstable" [Id. at ¶ 17]. Mr. Silverberg also observed that the spreaders could not be properly locked.

Although defendants, through the submission of their expert's affidavit, have established that this regulation was not violated, plaintiff has raised an issue of fact in this regard through the submission of his expert's affidavit. Accordingly, that branch of

defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-1.21 is denied.

Defendants further argue that Industrial Code § 23-1.30, which requires sufficient illumination in areas where persons are required to perform construction work, is not applicable as Mr. Yanush testified to sufficient illumination in the area in which plaintiff was working. Further, defendants point to Mr. Cronin's affidavit in which he states that he visited the site and found the lighting to be adequate. Moreover, he opined that given the nature of the occurrence, lighting did not play a role in the occurrence of his accident and thus was not a proximate cause.

In opposition, plaintiff points to his own testimony and the affidavit from Izaias indicating that the lighting was not sufficient. He points to his testimony that as he began to fall, he attempted to try to stop his fall by reaching out for a post to steady himself but was unable to because it was so dark.

Initially, the court notes that Industrial Code section 23-1.30 is sufficiently specific to support a Labor Law § 241 (6) cause of action (*Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1<sup>st</sup> Dept 2004]; *Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 1267 [4<sup>th</sup> Dept 2003]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [2d Dept 1997]).

Here, defendants have established through the submission of their expert affidavit and Mr. Yanush's testimony, that this section was not violated. In opposition, plaintiff fails to raise a question of fact regarding whether a violation of this code provision was a proximate cause of his accident. Although plaintiff testified that after the ladder wobbled, he attempted to grab a post to steady himself but was unable to do so because it was too

dark to see it, he does not assert that the ladder fell due to inadequate lighting. Thus, plaintiff has failed to raise a triable issue of fact establishing that the lighting in the area where the accident occurred fell below the statutory requirement and that insufficient lighting was the proximate cause of his accident. Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-1.30 is granted.

***Labor Law § 200/Common-Law Negligence***

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 L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]). On the other hand, “[w]here 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.

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]; see *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], *affd on other grounds* 15 NY3d 869 [2010]; *Torre v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]).

Here, defendants argue that plaintiff’s Labor Law § 200 and common law negligence claims should be dismissed as they did not have the requisite authority to control the work that plaintiff was performing at the time of his accident and did not cause, create or have notice of any condition that allegedly caused plaintiff’s accident. Specifically, they contend that this is a means and methods case and note that plaintiff’s work was directed and supervised by a Highbury foreman and that the ladder he was using was provided by his co-worker Izaias. Accordingly, defendants assert that the means and methods of plaintiff’s work were controlled by his employer Highbury. Defendants further argue that to the extent that plaintiff may claim that his accident was caused by a dangerous premises condition, the record demonstrates that defendants did not have notice of any such condition. In this regard, they point to the testimony of Highbury supervisor, Mr. Yanush,

that he had inspected the area prior to plaintiff's work and following his accident and did not observe any hazards.

In opposition, plaintiff argues that material questions of fact exist with respect to defendants' notice of a dangerous premises condition in the area in which his accident occurred, both with respect to the lighting and the wet floor. In this regard, plaintiff points to the testimony of defendant Monadnock's general superintendent Eric Rizzo, who testified as follows:

Q. Before the date of the accident in this case, do you recall seeing the cellar floor wet; yes or no?

A. Yes.

Q. Do you recall seeing it wet for several days before the date of the accident or just one or two days before? Or give us your best recollection.

A. Before the date of the accident, the cellar floor was basically outdoor space, so whenever it rained, it was wet.

Q. So as far as you can recall, before the date of the accident, it was always wet?

A. Not always, but if it rained, it was wet. If it was a 100-degree sunny day, it was dry.

Q. So it was always wet when it rained?

A. It was always wet when it rained (NYSCEF Doc No.10, Rizzo tr at 58, lines 5-24).

Plaintiff also asserts that Mr. Rizzo's testimony establishes that Monadnock exercised extensive supervision and control over the worksite and was responsible for maintaining safety at the site.

Here, the court finds that although plaintiff has failed to raise an issue of fact with regard to whether defendants exercised the requisite degree of supervision of the injury producing work in order to impose Labor Law § 200 and common law negligence liability upon them, plaintiff has raised an issue of fact with regard to whether defendants had notice

of the wet condition of the floor that plaintiff alleges caused or contributed to his accident. Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's claims as based upon a violation of Labor Law § 200 and common law negligence is denied (*see Estrella v ZRHLE Holdings, LLC.*, 218 AD3d 640 [2d Dept 2023]; *Toalongo*, 202 AD3d at 1131 [2d Dept 2022]; *Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]).

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

**ORDERED** that plaintiff's motion seeking partial summary in his favor on the issue of liability under his Labor Law § 240 (1) claim is denied, and it is further

**ORDERED** that those branches of defendants' motion for summary judgment dismissing plaintiff's claims arising under Labor Law §§ 240 (1), 200 and common law negligence are denied; that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted to the extent said claim is predicated upon Industrial Code §§ 23-1.30, 23-2.1, 23-2.2 and 23-2.4, and denied to the extent that said claim is predicated upon Industrial Code §§ 23-1.7 (d) and 23-1.21 (b) (3).

This constitutes the decision, order, and judgment of the court.

E N T E R,



J. S. C.

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KINGS COUNTY CLERK  
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