

**Kllogjeri v New York City Hous. Auth.**

2024 NY Slip Op 31463(U)

April 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 504092/2021

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 504092/2021  
Seqs. 003, 005

Part LL1

**DECISION/ORDER**

ENVER KLOGJERI,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1-2</u>
Order to Show Cause and Affidavits Annexed. . . .	<u>      </u>
Answering Affidavits . . . . .	<u>3-6</u>
Replying Affidavits . . . . .	<u>7-9</u>
Exhibits . . . . .	<u>      </u>
Other . . . . .	<u>      </u>

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF  
NEW YORK, TECHNICO CONSTRUCTION SERVICES, INC.,

Defendants.

Upon the foregoing papers, defendant New York City Housing Authority (NYCHA)'s motion for summary judgment (Seq. 003) and plaintiff's motion for partial summary judgment (Seq. 005) are decided as follows:

**Procedural History and Factual Background**

Plaintiff commenced this action to recover for damages he contends he sustained on December 18, 2019, when he fell from a ladder while performing roof and bulkhead renovations. NYCHA admits it owned a complex of buildings called the Red Hook Houses (*see* <https://www.nyc.gov/assets/nycha/downloads/pdf/27-RedHookHouses.pdf>; referred to by the parties as the Red Hook Housing complex). NYCHA contracted Technico Construction Services (Technico) to perform the work, and Technico sub-contracted USA Roofing to replace the bulkheads (Joy Sinderband, vice president of NYCHA, EBT at 13–15, 24; sub-contract

agreement). NYCHA also hired a construction management consultant, LiRO, as a site-safety manager (Rasem Abso, on behalf of LiRO, aff. at ¶ 2).

Plaintiff was employed by USA Roofing and was working on a renovation project to replace the bulkheads and roofs within the complex (Kllogjeri 50-h hearing at 10–11). Plaintiff testified that he received instructions only from USA Roofing and Technico employees while working at the site (Kllogjeri EBT at 45–49).

Plaintiff testified as follows: On December 18, 2019, the plaintiff arrived at the job site and was instructed by the USA Roofing foreman and superintendent, Juan Rodriguez and “Kushtrim,” that he was to install flashing to the chimney (Kllogjeri EBT at 23–24, 28–29). Plaintiff climbed an A-frame extension ladder, which was already set up, to drill holes for the flashing and was told to do it quickly by Kushtrim and Mr. Rodriguez (*id.* 23–24, 32–33).

Plaintiff testified that once he arrived at the ladder he noticed that there was ice underneath it and that ice covered the roof (*id.* at 27–28, 36–37, 84). On December 17, 2019, the day before plaintiff’s accident, weather reports from John F. Kennedy Airport provided by the defendant showed that the temperatures did drop below freezing and that there was freezing rain and ice pellets during the morning of December 17, 2019. Plaintiff further testified that he asked about securing the ladder and the foreman responded, “Don’t worry, just finish fast” (*id.* at 35–36). Plaintiff also testified that he requested a scaffold instead of a ladder due to the icy conditions (*id.* at 37). The ladder plaintiff was instructed to use was not tied off (*id.* at 44–45). While plaintiff was working on the ladder to drill holes in the chimney, the ladder slid out from under plaintiff and he fell to the ground (*id.* at 101, 119).

NYCHA retained contractual authority to conduct walk-throughs of the premises and retained the authority to stop the work if safety violations were observed (Sinderband EBT at

15–16). NYCHA contends that its last inspection was one week prior to the plaintiff’s accident (Sinderband aff. at ¶ 8). However, Ms. Sinderband also stated that NYCHA inspectors would make unannounced visits to the site “to look at the quality of the work performed and to observe whether there were any immediate safety hazards” (*id.*).

### **Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

#### **Labor Law § 240 (1)**

Liability under Labor Law § 240 (1) is “absolute” where the failure of a safety device enumerated by the statute (*e.g.* a ladder) is the proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

In the instant action, plaintiff testified that he asked for alternative safety devices (*e.g.* means of securing the ladder and/or a scaffold) and was not provided with them. Plaintiff then testified that, while working on the ladder he was instructed to climb, the ladder shifted, and the plaintiff suffered harm when he fell. Plaintiff’s testimony that the ladder he was working on shifted, and that he was not provided with any alternative safety device, is sufficient to make out prima facie entitlement on his Labor Law § 240 (1) claim (*see Cabrera v Arrow Steel Window Corp.*, 163 A.D.3d 758, 759–760 [2d Dept. 2018]; *Alvarez v Vingsan Ltd. Partnership*, 150

AD3d 1177, 1179–1180 [2d Dept. 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747–748 [2d Dept. 2016]).

In opposition, defendants contend plaintiff was the sole-proximate cause of the occurrence because he was told, at toolbox talks, to tie off ladders and he was told where to find the rock salt for when it was icy. However, plaintiff provides un rebutted testimony that he was directly instructed to climb the ladder despite his complaints about the conditions in order to “finish fast”; defendants do not deny that this conversation between the plaintiff and his foreman took place. Moreover, plaintiff was not the one who set up the ladder on which he was working. Plaintiff cannot, therefore, have been the sole proximate cause of the occurrence and defendants do not otherwise provide evidence sufficient to resist plaintiff’s motion as to this claim.

#### **Labor Law § 241 (6)**

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscatti v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

Defendant seeks summary judgment dismissing all of plaintiff’s allegations regarding violations of the Industrial Code. Plaintiff does not oppose dismissal of Industrial Code §§ 23-1.5(a), 1.5(b), 1.5(c), 1.7 (b), 1.16, 1.17, 2.1 (a), 5.1, 5.1(b), 5.1 (c), 5.1 (f), 5.1 (j) (1), 5.3, 5.4 and 5.5. The remaining alleged violations are Industrial Code §23-1.7 (d) (requiring remediation of hazards posed by slippery conditions in working areas) and § 23-1.21 (b) (4) (ii) (prohibiting the use of “slippery surfaces” as ladder footings). Plaintiff contends that there were icy conditions on the roof where he was working, which constituted a slipping hazard and therefore a violation of Industrial Code § 23-1.7 (d) and 1.21 (b) (4) (ii). Plaintiff’s testimony sufficiently

makes out a prima facie case for summary judgment on this claim (*see Ennis v Noble Construction Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022]).

Defendants predicate their arguments on two pieces of proposed evidence. First, defendants provide photographs purportedly depicting the area where plaintiff's accident occurred and contend that these photographs do not depict any ice. The admissibility of photographs is dependent upon a properly laid foundation, "which generally requires proof that the photographs were taken close in time to the accident and fairly and accurately represent the conditions as they existed on the date of the accident" (*Davidow v CSC Holdings, Inc.*, 156 AD3d 682, 682 [2d Dept 2017]). Here, there is not testimony that the photographs provided fairly and accurately depict the conditions at the time the accident.<sup>1</sup> The photographs are therefore not properly authenticated and are inadmissible.

Defendants next offer climatological reports from John F. Kennedy airport for the day preceding and the day of plaintiff's accident. The report shows that on:

- December 17, from 12:11am to 4:00am the minimum temperature was 32 degrees Fahrenheit;
- December 17, from 4:43 am to 11:51pm the minimum temperature was 33 degrees Fahrenheit;
- December 18, from 12:51 to 4:00pm the minimum temperature was 33 degrees Fahrenheit.

The plaintiff's accident occurred between 8:00am and 10:00am on December 18. The climatological report therefore indicates that the minimum temperature for a period prior to and after plaintiff's accident was at or above the freezing point for water. Climatological data showing that "weather conditions would preclude the existence of snow or ice at the time of the

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<sup>1</sup> Moreover, while not necessary to determine the admissibility of the photographs, it is noteworthy that no party was able to identify who took these photographs (*see Kosta Gioulis, Technico's superintendent, EBT at 89-90; Kllogjeri EBT at 197-198*).

accident” can serve to resist summary judgment (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 566 [1st Dept 2011] [cited favorably by *Schumacher v Pucciarelli*, 161 AD3d 1205 (2d Dept 2018)]). Therefore, because plaintiff argues that the slippery conditions which violated Industrial Code §§ 23-1.7 (d) and 1.21 (b) (4) (ii) and defendants have raised an issue of fact as to whether the weather at the time of plaintiff’s accident would have permitted an icy condition, plaintiff and defendant are both denied summary judgment as to Labor Law § 241 (6) as predicated on these violations.<sup>2</sup>

### **Labor Law § 200**

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work” (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). “[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*id.* at [internal citations omitted]).

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<sup>2</sup> This determination does not alter the court’s analysis as to Labor Law § 240 (1), as defendants’ liability there rests upon the failure of the ladder to protect the plaintiff while he performed covered work, which is not contingent on the existence of an icy or slippery condition.

Defendant NYCHA seeks summary judgment on plaintiff's Labor Law § 200 claim, arguing that it did not direct or control the plaintiff's means and manner of work and had neither actual nor constructive notice of the alleged dangerous condition. Plaintiff's testimony about the existence of the icy condition and the climatological data that the temperature was around freezing for multiple days prior to the accident are sufficient to raise a question of fact about constructive notice for the owner and general contractor. Additionally, NYCHA's reservation of contractual authority and actual practice to inspect the site and stop work when necessary is sufficient to raise questions of fact about NYCHA's authority to direct and control the work. Because questions of negligence are ordinarily fact-specific, they do not usually warrant summary judgment (*see Ugarriza v Schmieder*, 46 NY2d 471 [1979]), NYCHA's motion is therefore denied as to Labor Law § 200 due to the existence of triable issues of fact.

#### **Contractual Indemnification**

The right to contractual indemnification is established by the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Given the triable questions of fact about its negligence contemplated above, NYCHA's motion for summary judgment on its contractual indemnification claim is denied.

#### **Conclusion**

Defendant's motion for summary judgment (Seq. 003) is granted to the extent that plaintiff's allegations about Industrial Code violations are dismissed except as to § 23-1.7 (d) and

1.21 (b) (4) (ii); the motion is otherwise denied. Plaintiff's motion for summary judgment (Seq. 005) is granted as to his Labor Law § 240 (1) claim; the motion is otherwise denied.

This constitutes the decision and order of the court.

April 18, 2024

**DATE**



**DEVIN P. COHEN**

Justice of the Supreme Court