

**Kolano v Structure Tone Global Servs., LLC**

2024 NY Slip Op 34590(U)

December 23, 2024

Supreme Court, New York County

Docket Number: Index No. 152101/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

PIOTR KOLANO,

Plaintiff,

- v -

STRUCTURE TONE GLOBAL SERVICES,
LLC, STRUCTURE TONE, LLC, BOSTON PROPERTIES,
INC., INTEGRATED HOLDING GROUP LP,

Defendant.

-----X

STRUCTURE TONE, LLC, BOSTON PROPERTIES, INC.

Plaintiff,

-against-

NEWPORT PAINTING AND DECORATING CO. INC.

Defendant.

-----X

INDEX NO. 152101/2021

MOTION DATE 10/18/2023,
03/08/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595753/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43,
44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74,
75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102,
103, 104, 105, 106, 107, 108, 109, 114, 115, 139

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 119, 120, 121, 122,
123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 142, 145

were read on this motion to/for JUDGMENT - SUMMARY

There are two motions pending in this labor law action arising from personal injuries sustained at
a construction site, which are hereby consolidated for the court's consideration and disposition in
this single decision/order.

In motion sequence 1, plaintiff moves for summary judgment pursuant to CPLR §3212 on the

issue of liability as to: (1) his Labor Law § 240(1) claim; and his Labor Law § 241(6) claim predicated upon Industrial Code §§ 23-1.5(c)(3), 23-1.21 (b)(3)(i), (ii), (iv), 23-1.21(b)(8), and §23-1.21(e)(2). Defendants Structure Tone, LLC (Structure Tone), Boston Properties, Inc. (Boston Properties) and Integrated Holding Group LP (Integrated) cross-move for summary judgment dismissing plaintiff's complaint and for an order conditionally granting Structure Tone and Boston Properties summary judgment on their cause of action for contractual indemnification against third-party defendant Newport Painting and Decorating, Inc. (Newport). Newport opposes both the motion and cross-motion and plaintiff opposes the cross-motion insofar as defendants seek relief against him.

In motion sequence 2, Newport moves for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims as they are asserted against the defendants as well as the third-party action against Newport. In a written stipulation dated May 13, 2024, defendants and Newport agreed to discontinue the third-party action against Newport. Therefore, motion sequence 2 as well as defendants' cross-motion seeking relief against Newport is denied as moot. The court considers the balance of motion sequence 1.

The relevant facts are as follows. Plaintiff is suing for injuries he sustained on January 4, 2021 while working at a construction project on the tenth floor of the premises owned by Boston Properties. Structure Tone was the general contractor for the work being performed at the project, and Integrated was the commercial tenant on the tenth floor of the subject premises.

On the date of the accident, plaintiff was on an A-frame ladder owned by Newport that unexpectedly collapsed beneath him. According to plaintiff, the ladder was old, and although the braces were supposed to be in the locked position, they were "popped" and thus open. Surveillance video depicting the accident has been provided to the court. It shows plaintiff using a ladder, then dismounting the ladder. Plaintiff swings the ladder around a few feet away and rapidly ascends the ladder up to the second from the top rung, when the ladder fell forward and plaintiff fell backwards.

Plaintiff maintains that he has demonstrated a prima facie case of defendants' liability under both Labor Law §§ 240(1) and 241(6). Defendants argue that plaintiff was the sole proximate cause of his accident in failing to secure the ladder and Plaintiff's arguments regarding the allegedly insufficient height of the ladder "are purely speculative." They have provided the affidavit of their expert, who inspected the actual ladder from which this action arises, and opines that it was in working condition and not otherwise defective. Defendants further contend that the Industrial Code provisions which plaintiff relies upon are either inapplicable or were not violated and that plaintiff's Labor Law § 200 and common law negligence claims must be dismissed because defendants did not control the means and methods of plaintiff's work nor have notice of any dangerous condition with respect to Newport's ladder.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

#### Section 240(1)

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from “extraordinary elevation risks” and not “the usual and ordinary dangers of a construction site” (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). “Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)” (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240(1) must be used to prevent injuries from either “a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Labor Law §240(1) is violated where a ladder malfunctions for no apparent reason (*Rom v Eurostruct, Inc.*, 158 AD3d 570, 571 [1st Dept. 2018]). Here, plaintiff testified that he properly used the ladder, but that the braces popped open not because plaintiff failed to secure them but because it was an old ladder that was otherwise defective. Thus, plaintiff has established that the sole ladder provided to him to perform his work on the tenth floor of the subject premises was an inadequate safety device and failed to afford plaintiff adequate protection from the gravity-related risks of the work he was tasked to perform.

In turn, although defendants have raised a triable issue of fact on whether the ladder unexpectedly popped open as plaintiff claims (*cf. Sanchez v. Walton Ave. Realty Assoc. LLC*, 215 AD3d 506 [1st Dept 2023]), the court disagrees that defendants have established that plaintiff was the sole proximate cause of his own accident on this record. Defendants' expert inspected the ladder and claims that it remained locked when it was swung around as depicted in the video of plaintiff's accident. Defendants have therefore raised a triable issue of fact as to whether the ladder was defective as plaintiff contends. Defendants have not, however, demonstrated that plaintiff was the sole proximate cause of his accident, because a jury must weight plaintiff's credibility and determine whether to credit plaintiff's account of the accident, and further, whether the ladder was indeed an inadequate safety device. Accordingly, plaintiff's motion and defendants' cross-motion with respect to plaintiff's Section 240(1) claim are both denied.

#### Section 241(6)

Labor Law § 241(6) imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll 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 the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241(6) is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57<sup>th</sup> Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code §§ 23-1.5(c)(3), 23-1.21 (b)(3)(i), (ii), (iv), 23-1.21(b)(8), and 23-1.21(e)(2) were violated as a matter of law.

At the outset, any alleged Industrial Code violation which plaintiff has not specifically raised an opposition to defendants' motion on is deemed abandoned. Section 23-1.5(c)(3) mandates that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." While plaintiff concedes that it is at least an open question whether this provision applies to ladders, the court disagrees. The language of this provision, "sound and operable", given with clear caselaw which only finds this provision applicable to power equipment (*Canty v 133 E. 79th St., LLC*, 167 AD3d 548 [1st Dept 2018]).

Since the court's role on a motion for summary judgment is issue finding, not issue determination, defendants are not entitled to summary judgment dismissing plaintiff's Section 241(6) claim premised upon any of the remaining industrial code provisions cited above. Assuming *arguendo* that plaintiff has established that Industrial Code § 23-1.21 (b)(3)(i), (ii) and (iv) were violated, since the brace allegedly popped open unexpectedly which would mean that the ladder was broken, insecure, and otherwise had a flaw or defect of material that may cause ladder failure, defendants have raised a triable issue of fact on whether this provision was violated through their expert's affidavit. Based upon the same reasoning, plaintiff is also not entitled to summary judgment in connection with the alleged violations of Sections 23-1.21(b)(8), and 23-1.21(e)(2).

Accordingly, defendants' motion with respect to plaintiff's Section 241(6) premised upon a violation of Section 23-1.5(c)(3) of the Industrial Code is granted and plaintiff's motion and defendants' cross-motion with respect to plaintiff's Section 241(6) claim are both otherwise denied.

#### Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from

the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Contrary to defendants' contention, there is a triable issue of fact as to whether Structure Tone supervised or controlled the means and methods of the injury-producing work, insofar as a Structure Tone employee escorted plaintiff around the work area, pointing out areas that needed paint touch ups, immediately preceding plaintiff's accident. While the court does not find that this precludes summary judgment on notice of the allegedly defective condition of the ladder, it remains for a jury to determine whether Structure Tone exercised the requisite supervisory control over plaintiff before he was injured. Accordingly, defendants' motion is granted only to the extent that plaintiff's Section 200 and common law negligence claim against Boston Properties and Integrated are severed and dismissed.

### **Conclusion**

In accordance herewith, it is hereby

**ORDERED** that motion sequence 1 is decided as follows:

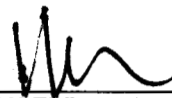
- (1) plaintiff's motion is denied;
- (2) defendants' cross-motion insofar as they seek relief against plaintiff is only granted to the extent that plaintiff's Labor Law § 241(6) premised upon a violation of Industrial Code § 23-1.5(c)(3) is severed and dismissed and plaintiff's Labor Law §200 and common law negligence claims against Boston Properties and Integrated are severed and dismissed; and

(3) defendants' cross-motion insofar as they seek relief against Newport is denied as moot.

And it is further **ORDERED** that motion sequence 2 is denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/23/2024  
DATE



LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: