

**Islas v Rocano Gen. Constr., Inc.**

2025 NY Slip Op 31564(U)

April 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 507201/2021

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 507201/2021  
**Seqs.** 008-10

Part LL1

**DECISION/ORDER**

HERIBERTO RODRIGUEZ ISLAS,

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>1-3</u>
Order to Show Cause and Affidavits Annexed . . . .	<u>      </u>
Answering Affidavits . . . . .	<u>4-9</u>
Replying Affidavits . . . . .	<u>10-12</u>
Exhibits . . . . .	<u>      </u>
Other . . . . .	<u>      </u>

ROCANO GENERAL CONSTRUCTION, INC., FOLOR INC.,  
AND EVANGELICAL CRUSADE OF FISHERS OF MEN  
CORP.,

Defendants.

ROCANO GENERAL CONSTRUCTION, INC.,

Third-Party Plaintiffs,

against

FULL TAPING CONSTRUCTION CORP.,

Third-Party Defendant.

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 008), Folor Inc. (Folor)'s motion for summary judgment (Seq. 009), and Rocano General Construction, Inc. (Rocano)'s motion for summary judgment (Seq. 010) are decided as follows:

**Procedural Posture**

Plaintiff commenced this action to recover for damages he claims to have sustained on October 22, 2019, when he fell from a height while working at a construction site located at 557 East 31st Street, Brooklyn, NY. The following is undisputed: The premises was a church owned by Evangelical Crusades of Fishers of Men Corp. (ECFM). Folor was hired as the general contractor at the site. Folor hired Rocano as a sub-contractor, and Rocano retained third-party

defendant Full Taping Construction Corp. (Full Taping) as a sub-sub-contractor. Full Taping employed the plaintiff.

### **Facts**

Plaintiff testified as follows: On October 22, 2019, plaintiff was performing demolition work in the basement of the premises (Islas EBT at 84–86). Specifically, plaintiff was demolishing concrete walls in the basement of the church (*id.*). To perform this demolition work, it is undisputed that plaintiff was using a small electric jackhammer and a large manual jackhammer. “Javier,” plaintiff’s foreman, directed him to stand on an elevator car in the basement in order to demolish the concrete elevator bank wall above it (*id.* at 88–92, 109). The record contains authenticated photographs of the area. While standing on the roof of the elevator car performing demolition work, the roof of the car collapsed, and plaintiff fell through to the floor of the car (*id.* at 95–96, 100).

### **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)**

The plaintiff moves only on Labor Law § 240 (1). Liability under Labor Law § 240 (1) is “absolute” where the failure or absence of a safety device enumerated by the statute (*e.g.* a scaffold or elevated platform) is a 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)]).

As an initial matter, there is no dispute that Folor is a proper Labor Law defendant. In *Walls v Turner*, the Court of Appeals held: “When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor” (4 NY3d 861, 864 [2005]).

The plaintiff argues that Rocano directed his employer, Full Taping’s work, and that Rocano was responsible under its contract with Folor. That contract obligates Rocano to, *inter alia*, “provide all safety equipment, materials, tools and personal protection equipment necessary to perform the work in a safe, healthful, and workmanlike manner.” Based on the record, plaintiff has made out his prima facie showing that Rocano had authority over the work and was a proper Labor Law defendant. In opposition, Rocano failed to raise an issue of fact.

With respect to defendants’ liability, Labor Law § 240 (1) applies when a worker is standing on an elevated platform that is being used as the “functional equivalent” of a scaffold (*Lazo v New York State Thruway Auth.*, 204 AD3d 774 [2d Dept 2022]). Plaintiff has made out his prima facie case that the elevator car was being used as a functional equivalent of a scaffold to reach the cement walls that he was instructed to demolish. Scaffolds, and in this case, scaffold substitutes, must be so constructed and placed that they “prevent a foreseeable external force from causing a worker to fall from an elevation” (*Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484 [2d Dept 2006]; *see also Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762 [2d Dept 2006]). Here, the force generated by demolition activities was foreseeable, and the elevator

car's failure to support the plaintiff is evidence that it was an inadequate safety device for the job.

In opposition, defendants fail to raise an issue of fact. First, defendants provide the affidavit of an expert engineer, William Meyer. Mr. Meyer opines that elevator cars are designed to support elevator inspectors. Defendants argue that the elevator car's collapse was, therefore, not a foreseeable failure of a safety device. This argument is unavailing because plaintiff was neither responsible for inspecting the elevator, nor using the elevator for its actual purpose. Plaintiff was directed by his foreman to use the roof of the elevator as a platform substitute. In doing so, the elevator then became a "foreseeable elevation-related hazard" (*Sanchez v Congregation of Emanuel of Westchester*, 228 AD3d 893 [2d Dept 2024]).

Next, defendants argue that the elevator car was a permanent structure, not a safety device. However, defendants' contentions are insufficient to rebut plaintiff's showing that this case is akin to *Lazo, supra*, and that the elevator car was being used as a functional equivalent of a scaffold. Folor attempts to rely on *Bonura v KWK Assoc.*, 2 AD3d 207 (1st Dept 2003). Even if the court were to elect to follow a First Department case, *Bonura* is distinguished on its facts. There, an elevator mechanic stepped on and fell through the escape hatch on the roof of an elevator. Here, plaintiff was not inspecting an elevator but was instead using the elevator as a work platform to reach an elevated work area. A hatch – especially an escape hatch – is designed to open and close, while a platform is not.

Finally, defendants argue that that plaintiff was not performing elevation-related work because the bricks he was removing were at his eye level in the elevator shaft. This argument, if adopted, would exclude from the purview of Labor Law § 240 (1) every case where a worker

was standing on a scaffold and at eye-level with the elevated working area and subsequently fell. It is, therefore, clearly erroneous (*see e.g. Singh v Eisen*, 260 AD2d 363 [2d Dept 1999]).

Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim.

#### **Labor Law § 241 (6)**

Defendants move for summary judgment on this claim; plaintiff does not. In order to prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) a proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). The plaintiff opposes the motion as to Industrial Code 23-1.22 (c) (1) and various sub-sections of Rule 23-3.3. The remaining alleged Code violations are deemed abandoned.

Rule 23-1.22 (c) (1) which requires that "Any platform used as a working area ... shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength." There is no testimony in the record about the strength of the roof of the elevator, and by extension no testimony as to whether or not the elevator roof was sufficiently strong to satisfy the requirements of Rule 1.22 (c) (1). Defendants' motion is therefore denied as to this provision due to questions of fact.

Rule 23-3.3 regulates demolition by hand. The relevant sub-sections are:

(b) (2) Masonry shall not be loosened nor permitted to fall in such masses as to endanger the structural stability of any floor or structural support which such masonry may strike in falling.

(b) (3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

(b) (4) Employers shall not suffer or permit any person to work while such person is standing on top of a wall or any similar elevated structure of small area.

(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

In the only case of which the court is aware implicating Rule 3.3 (b) (2), the First Department found the rule to be sufficiently specific to support a cause of action under Labor Law § 241 (6) (*Kaminski v 53rd St. and Madison Tower Dev., LLC*, 70 AD3d 530, 531 [1st Dept 2010]). Here, as in *Kaminski*, there are questions of fact about whether debris from demolition damaged the platform on which plaintiff was standing, “endangering its stability” (*id.* at 531). Defendants’ motion is therefore denied as to this alleged violation.

Rules 3.3 (b) (3) and (4) are inapplicable to the instant facts as there is no evidence that the plaintiff was struck by unguarded masonry nor that plaintiff was standing on a “wall”—the testimony indicates that the elevator car spanned the elevator shaft and was not therefore an “elevated structure of small area” akin to a wall. Finally, Rule 23-3.3 (c) is inapplicable where, as here, the instability was caused by performance of the demolition work and not structural instability caused by the progress of the demolition (*Smith v New York City Housing Authority*, 71 AD3d 985 [2d Dept 2010]).

Therefore, defendants’ motion is granted with respect to every Industrial Code provision except Rules 1.22 (c) (1) and 3.3 (b) (2).

### **Labor Law § 200**

Defendants move with respect to this claim; plaintiff does not. 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]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Here,

plaintiff's opposition only addresses the "dangerous condition" standard of Labor Law § 200; the "means and methods" standard is therefore deemed abandoned. "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (id.).

Here, it is undisputed that Folor's superintendent Danny Seccafino was on-site every day. Furthermore, Mr. Rocano testified that he was the foreman for Rocano and that if he saw Full Taping workers doing unsafe things he would call the worker's supervisors (Rocano EBT at 46). In light of the evidence that Folor and Rocano both had representatives at the site on a regular basis, there is a question of fact as to whether the defendants had actual or constructive notice of the dangerous condition of the elevator car on which plaintiff was instructed to work.

Defendants' motion is therefore denied on this claim.

#### **Indemnification and Contribution**

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]). A party also cannot obtain summary judgment on its common-law indemnification and contribution claims if it has not shown itself free of negligence, as those claims are not yet ripe for summary judgment (*McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011]).

Here, there are questions of fact about both Rocano's and Folor's negligence in causing plaintiff's injury. Therefore, both Folor's motion and Rocano's cross-motion for summary judgment are denied on these claims.

### **Conclusion**

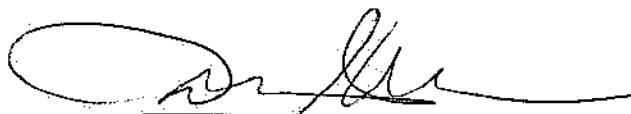
Plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim (Seq. 008) is granted.

Defendant Folor's motion for summary judgment (Seq. 009) is granted to the extent of dismissing plaintiff's § 241(6) claims as to all Industrial Codes, except those predicated upon Rules 23-1.22 (c)(1) and 23-3.3 (b)(2); the motion is otherwise denied.

Defendant Rocano's cross-motion (Seq. 010) is granted to the extent of dismissing plaintiff's § 241(6) claims as to all Industrial Codes, except those predicated upon Rules 23-1.22 (c)(1) and 23-3.3 (b)(2); the motion is otherwise denied.

This constitutes the decision and order of the court.

\_\_\_\_\_  
April 11, 2025  
DATE

  
\_\_\_\_\_  
DEVIN P. COHEN  
Justice of the Supreme Court