

**Kerr v New Girl Scouts, Inc.**

2025 NY Slip Op 32913(U)

August 14, 2025

Supreme Court, New York County

Docket Number: Index No. 155538/2020

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

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RICHARD KERR, DONNA KERR,

Plaintiff,

- v -

NEW GIRL SCOUTS, INC., BH 420 5TH LLC, QUALITY BH
420 FIFTH LLC, BH 420 FIFTH INVESTORS LLC, KFIR
CAPITAL 5TH AVE SF LLC, KFIR CAPITAL 5TH AVE JB
LLC, GIRL SCOUTS OF THE UNITED STATES OF
AMERICA, DRYLAND PROPERTIES, GILBANE BUILDING
COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41,
42, 43, 44, 45, 46, 57, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51,
52, 53, 54, 55, 56, 58

were read on this motion to/for JUDGMENT - SUMMARY

DECISION + ORDER ON MOTION

FACTUAL BACKGROUND

This action arises from an August 25, 2017 incident during a renovation project at 420
Fifth Avenue in Manhattan. Plaintiff Richard Kerr, a journeyman electrician employed by non-
party NEAD Electric ("NEAD"), was working on an elevated platform approximately three to
three-and-a-half feet above floor level, installing conduit overhead from a ten-foot A-frame
ladder. He had accessed the platform that morning using a six-foot A-frame ladder provided by
NEAD.

At the end of the workday, Richard Kerr descended from the ten-foot ladder to the
platform and found the six-foot ladder missing. A plastic milk crate was positioned adjacent to

the platform. Mr. Kerr stepped onto the crate, which shifted, causing him to twist his knee. He did not fall to the ground.

Plaintiffs allege violations of Labor Law §§ 240(1), 241(6), and 200, as well as common-law negligence, asserting that defendants failed to provide adequate safety devices and safe access between elevations. Plaintiffs, in Motion Sequence 001, move for partial summary judgment on liability under §§ 240(1) and 241(6). Defendants, in Motion Sequence 002, move for summary judgment dismissing all claims, arguing that plaintiff's own conduct was the sole proximate cause of the accident.

### LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]).

Labor Law §240(1) states "All contractors and owners and their agents...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 statute imposes absolute liability upon owners, contractors, and their agents where a breach of this statutory duty proximately causes an injury. (*See Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 556 [1993]). “[T]he reach of Labor Law §240(1) is limited to such specific gravity-related accidents as [a worker] falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]).

“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. The burden then shifts to the defendant to raise a triable issue of fact” (*Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1301 [2d Dept 2020]). “The extraordinary protections of Labor Law §240(1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (*Parrino v Rauert*, 208 AD3d 672, 673 [2d Dept 2022]).

For Plaintiffs to establish liability pursuant to Labor Law §241(6), a violation of the Industrial Code must be shown (*See e.g. Ross*, 81 NY2d 494) (holding that Labor Law §241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute). To prevail on a claim under Labor Law §241(6), plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision (*See Ares v State*, 80 NY2d 959 (1992)). Here, Plaintiffs’ claim under Labor Law §241(6) is based on violation of Industrial Codes 12 NYCRR 23-1.7(d); and 23-1.7(f) as follows:

- i) 23-1.7(d)  
(d) Slipping hazards. Employers 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.
- ii) 23-1.7(f)  
(f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Labor Law §200 codifies the common law duty of an owner to provide construction workers with a safe place to work (*See Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876 (1993)). Labor Law §200 and common law claims fall under two categories: “those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Under the first group, the owner had to have either created the condition or have actual or constructive notice of it (*Id* at 144). In the second category, the owner or general contractor is liable if “it actually exercised supervisory control over the injury-producing work” (*Id*).

## DISCUSSION

### *Labor Law § 240(1)*

Plaintiffs contend that Defendants violated § 240(1) by failing to provide an adequate safety device to descend from the elevated platform once the six-foot ladder used earlier in the day was removed. They argue that repositioning the ten-foot ladder from the platform to the ground would have been unsafe and contrary to plaintiff’s training, and that no other safe means of descent was present, forcing him to use the milk crate.

Defendants assert that two functioning ladders were provided, that Mr. Kerr had used them safely earlier that day, and that his choice to step onto a plastic crate was the sole proximate cause of his injury. Defendants point to Mr. Kerr's own testimony that the ladders were in good condition, supplied by his employer, and that no defendant directed him to use the crate.

Material factual disputes remain as to whether an adequate, safe means of access to the ground was "provided" within the meaning of the statute at the moment of the incident, whether repositioning the ten-foot ladder posed an unreasonable hazard or conflicted with Mr. Kerr's training, and whether his conduct constituted the sole proximate cause of his injury. These issues cannot be resolved on summary judgment, and as such both Plaintiffs' and Defendants' motions for summary judgment on Labor Law § 240(1) are denied.

*Labor Law § 241(6)*

Plaintiff bases his § 241(6) claim on alleged violations of 12 NYCRR §§ 23-1.7(d) and (f). As to § 23-1.7(d) (slipping hazards), plaintiff claims the crate surface was unstable and contributed to his injury; defendants dispute that any slippery condition existed within the meaning of the regulation. As to § 23-1.7(f) (vertical passage), plaintiffs assert that no stairway, ramp, or compliant ladder was available to descend from the platform. Defendants counter that a compliant ladder was present on the platform and could have been used safely.

There are triable issues of fact as to whether a safe means of vertical passage was provided and whether the crate constituted an unsafe substitute in violation of the cited Industrial Code provisions. The nature and stability of the crate, the feasibility and safety of using the ten-foot ladder for descent, and whether the alleged violations of the Industrial Codes were the proximate cause of the accident causing Plaintiff's injuries are all issues precluding summary judgment pursuant to Labor Law §241(6). (*See Ares v State*, 80 NY2d 959, 960 [1992]).

*Labor Law § 200 and Common-Law Negligence*

Defendants argue they neither supervised nor controlled Plaintiff's work and had no notice of the crate or removal of the six-foot ladder. Plaintiffs point to testimony suggesting that Gilbane coordinated the work of all trades, had site safety oversight, and could direct corrective measures.

These conflicting accounts create questions of fact as to the extent of Defendants' supervisory control over the injury-producing work, and whether they created, knew, or should have known of the condition that allegedly caused the injury (*See Cappabianca*, 99 AD3d 139 at 144).

As issues of material fact remain as to, (1) whether defendants failed to provide a proper safety device under § 240(1), (2) whether defendants violated §§ 23-1.7(d) or (f) and if so, whether such violations were a proximate cause under § 241(6), and (3) whether defendants exercised supervisory control or had notice sufficient for liability under § 200 and common-law negligence; both plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment must be denied.

The court has considered the remaining arguments of the parties and finds such unavailing.

Accordingly; it is hereby

ORDERED that Plaintiffs' motion for partial summary judgment (Motion Sequence 001) pursuant to Labor Law §§ 240(1) and 241(6) is denied; and it is further

ORDERED. Defendants' motion for summary judgment (Motion Sequence 002) dismissing all claims in the complaint, move for summary judgment dismissing all claims is denied.

The foregoing constitutes the decision and order of the Court.

*Leslie A. Stroth*

**HON. LESLIE A. STROTH**  
**J.S.C.**

8/14/2025  
DATE

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE