SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. LETICIA M. RAMIREZ** **PART** **29**

Justice

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THOMAS C. FRIZALONE,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and 18 SIXTH AVENUE OWNER LLC,

Defendants.

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INDEX NO. 155022/2022

MOTION DATE 01/24/2025, 01/24/2025

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 39, 41, 43, 45, 47, 48, 49, 50, 51, 52, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 42, 44, 46, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff moves under motion sequence #1 for an Order pursuant to *CPLR § 3212* granting him, *inter alia*, summary judgment on the issue of liability on his *Labor Law §§ 241, 200*, and common-law negligence claims. In turn, defendants move under motion sequence #2 for an Order pursuant to *CPLR § 3212* dismissing plaintiff's complaint in its entirety. Both parties have submitted opposition papers.

This action was commenced on June 15, 2022, to recover for personal injuries allegedly sustained on August 25, 2021, when plaintiff was an elevator mechanic apprentice working at defendant's premises. After issue was joined on September 13, 2022, a preliminary conference was held on May 4, 2023, a compliance conference on February 29, 2024, and the Note of Issue was filed on September 26, 2024.

Plaintiff argues that summary judgment is warranted on his *Labor Law § 240(1)* claim because defendants violated the statute when they failed to provide plaintiff with proper protection as he descended into the elevator pit, causing him to fall. Plaintiff further argues he is entitled to summary judgment on his *Labor Law § 241(6)* claims predicated on violations of Industrial Code *§§ 23-1.21(b)(4)(ii)* and *23-1.21(b)(4)(iv)* because defendants failed to provide plaintiff a ladder with firm footings and failed to have a person stationed at the foot of the ladder to hold the same in place while plaintiff used it. Lastly, plaintiff contends that defendants' affirmative defenses of sole proximate cause and recalcitrant worker do not apply to this case and should be dismissed.

In opposition, defendants claim that denial is warranted as to plaintiff's *Labor Law § 240(1)* claim where there is an issue of fact as to whether the statute was violated. Specifically, defendants argue that plaintiff was not performing any work at the time of the alleged incident; rather, plaintiff was simply using the ladder to retrieve a headlamp he had dropped into the elevator pit. Defendants further argue that plaintiff's post-incident statement raises an issue of fact as to whether the ladder malfunctioned at all. Regarding plaintiff's *§ 241(6)* claim predicated on Industrial Code *§ 23-1.21(b)(4)(ii)*, defendants contend

that they did not violate this section where the evidence shows that plaintiff stated that the ladder was steady and stationary and that his shoes were resting on a concrete sill. Defendants also contend that the evidence shows they did not violate *§ 23-1.21(b)(4)(iv)* because plaintiff was not working when he used the ladder; rather, he used the ladder to retrieve his headlight from the bottom of the elevator shaft.

In reply, plaintiff asserts that the photograph defendants rely on is unauthenticated and it has not been determined that the ladder depicted therein is the ladder plaintiff used on the date of the accident. Moreover, plaintiff challenges the admissibility of the alleged statement made by plaintiff because the same is unsworn to and its source is unknown. Plaintiff further contends that the statement was not provided during disclosure, and no witness has authenticated the same. Finally, plaintiff contends that defendants' argument that plaintiff was using the ladder for an activity falling outside the scope of his employment has been refuted by caselaw.

Under motion sequence #2, defendants seek an order granting them summary judgment dismissing plaintiff's claims based on, *inter alia*, the same arguments expounded by them in their opposition papers under motion sequence #1. A review of plaintiff's opposition demonstrates that plaintiff seeks denial of defendants' motion based on, *inter alia*, the same arguments submitted by him under motion sequence #1.

On August 1, 2023, plaintiff appeared for a deposition, where he testified he started to work for non-party TEI in August of 2020 (NYSCEF Doc. #30 at 24:22-25:3). Plaintiff's work required him to work in teams, where he was a "helper or apprentice" assisting his mechanic "in whatever the daily task is that day" (*Id.* 30:24-31:3; 31:24-25; 45:14-17). On the date of his accident, plaintiff was working on the freight elevator SC1 at "Pacific Park," a 45-story residential building (*Id.* 45:18-25; 49:18-22; 51:10-16). His job included "handing … tools, handing … hardware, assemble the hardware …, and just [providing] the proper tools to install the elevator cab" (*Id.* 62:19-25). Plaintiff stated that on the date of his accident he would step into the elevator shaft to assist the mechanic he was working with by providing him the tools he needed (*Id.* 63:13-25; 64:17-20). Plaintiff wouldn't have to use a ladder to go into the shaft—"[t]here was a plank out into the platform so [plaintiff] c[ould] just step up onto the platform and walk in and out" to provide the mechanic with the tools he needed (*Id.* 64:2-8).

Plaintiff stated that his accident occurred at the end of the workday when they were already done with their work (*Id.* 65:22-66:9). When everyone had left for the day, plaintiff decided to go down into the pit to retrieve his headlamp (*Id.*). To access the pit, he used an extension ladder (which he found already in place) to climb down and that's when his accident occurred (*Id.*; *Id.*, 70:23-71:2; 71:17-20). Specifically, plaintiff stated that, as he was climbing down the ladder, he was about five feet from the ground or on the fifth rung of the ladder when the ladder wobbled on him and his foot slipped out from him, causing him to fall off the ladder and hit his back on the buffer piston (*Id.* 67:16-68:8). Plaintiff stated that his right foot slipped off the ladder because there was caked in dirt (*Id.* 70:8-12). When plaintiff picked himself up, he realized his finger was broken (*Id.*). His finger had broken when he tried to grab onto the ladder as he was falling (*Id.* 85:19-22). No one had directed plaintiff to use the ladder, plaintiff had not used that ladder before on the date of his accident, and plaintiff did not know who owned the ladder (*Id.* 66:10-13; 67:10-15). Plaintiff found the ladder to be "rocky … just on uneven ground," but it did not fall when he went down; rather, the ladder went to the side after plaintiff fell (*Id.* 121:16-21; 122:18-19; 123:3-9). Plaintiff stated that he found the ladder to be sitting on debris and garbage at the bottom of the pit (*Id.* 128:19-24). Plaintiff had to readjust the ladder to properly align it before climbing back up (*Id.* 124:16-24). Plaintiff reported his accident the following day and stated that it occurred at approximately 2pm (*Id.* 82:13-15; 83:11-17).

On November 29, 2023, the deposition of Kevin McLaughlin was taken (NYSCEF Doc. #33). Mr. McLaughlin was Tishman's Construction Superintendent on the date of plaintiff's accident (*Id.* 13:21-14:4; 14:112-14). He's been employed by Tishman for approximately nine and half years (*Id.* 14:9-11). His

responsibilities included "monitor[ing] day-to-day activity throughout the construction site project" (*Id.* 14:15-19). At the subject project herein, Tishman had an office onsite located on the second floor (*Id.* 16:7-10; 20:18-21). The project was a new building that was going up on an approximately quarter of a block, 50 stories tall (*Id.* 16:15-17:2). On the jobsite, operation was five days a week, sometimes six, and the normal site hours were from 7am to 3:30pm (*Id.* 17:12-24). Other than himself, Tishman had about four to five additional employees onsite (*Id.* 18:4-9).

Mr. McLaughlin stated he had no knowledge of plaintiff's incident other than what was included in the site safety report prepared by the third-party site safety manager onsite, Mr. Anthony Marino (*Id.* 29:22-30:2; 30:24-31:5). However, Mr. McLaughlin testified he would conduct three to four daily walks at the site (*Id.* 20:22-21:6). When asked if the daily walks would include the entire project, Mr. McLaughlin stated that the daily walks would consist of walking the specific trades he was dealing with, such as carpentry, electrical, plumbing, mechanical, and others, where his goal was to look for "daily progress" (*Id.* 21:7-23). Regarding Mr. Marino's roll onsite, Mr. Marino would walk the job daily multiple times, but he would not report any of his findings to Mr. McLaughlin (*Id.* 23:10-25). Rather, if Mr. Marino saw a safety issue at the project, he would report that to Mr. McLaughlin's senior superintendent, Mr. Hamberg (*Id.* 24:2-11).

Tishman held weekly foremen safety meetings, which included reviewing safety measures with trades' foremen, who would then go back to their workers and "go over things" (*Id.* 24:16-24). In these meetings, Mr. Marino would bring up "a prior close-call or incident that happened, and … he would review it with the foremen for the preventative measures[,] so it [wouldn't] happen again" (*Id.* 26:8-16). Mr. McLaughlin would participate in these weekly safety meetings and stated he and the site safety manager had the ability to stop work if they thought a hazardous condition existed at the project (*Id.* 24:25-25:4; 26:16-25). Regarding the subject ladder that caused plaintiff's accident, Mr. McLaughlin did not know who provided the ladder (*Id.* 33:18-24). However, if he would have seen a ladder set up in a way that he thought was unsafe, he would have taken action to correct the situation (*Id.* 33:25-34:5). When asked whether he received any training regarding ladder safety, Mr. McLaughlin stated that he received a four- to six-hour training in ladder safety, which included proper angle to setup the ladder, tying it off at the top, cleaning debris at the bottom where workers would step off (*Id.* 39:13-40:10).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v. Citibank, N.A.*, 64 A.D.3d 477, 478 [1st Dept. 2009]; *see also Sheehan v. Gong*, 2 A.D.3d 166, 168 [1st Dept. 2003]. And "all of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v. Grasso*, 50 A.D.3d 535, 544 [1st Dept. 2008]).

In order to prevail in a Labor Law Section 240 case, a plaintiff must prove that (1) he is a member of the class of workers that the statute was designed to protect, (2) the statute was violated, and (3) the breach of duty was a proximate cause of plaintiff's injuries (*See, Koenig v. Patrick Construction Co.*, 298 N.Y. 313 [1948]; *Crawford v. Leimzider*, 100 A.D.2d 568, 473 N.Y.S2d 498 [2nd Dept. 1984]).

Section 240(1) of the Labor Law 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 Labor Law was enacted to protect workers by placing ultimate responsibility for safety practices on owners and contractors rather than on workers themselves (*See, Panek v. Albany County*, 99 N.Y.2d 452, 457 [2003]; *Martinez v. NYC*, 93 N.Y.2d 322 [1999]). The statute is construed liberally in favor of construction workers (*Rocovich v. Con. Ed.*, 78 N.Y.2d 509 [1991]), because such workers "are scarcely in a position to protect themselves from accidents" (*Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 319 [1948]; *Quigley v. Thatcher*, 207 NY 66, 68 [1912]). Violation of the statute results in absolute liability for injuries proximately caused as a consequence thereof (*Zimmer v. Chemung County Performing Arts, Inc.* 65 N.Y.2d 513 [1985]). The duty imposed by the statute is nondelegable, and when violation of same causes injury to a member of the class for whose benefit the statute was enacted, the owner, general contractor and their agents are liable (*Haimes v. N.Y. Telephone Co.*, 46 N.Y.2d 132 [1978]). This remains true even where the owner exercises no supervision, control or direction of the work (*Id.*).

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 618 NE2d 82, 601 NYS2d 49 [1993]). "Claims for personal injury under the statute and the common law fall into two broad 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, 143-144, 950 NYS2d 35 [1st Dept 2012]). "Where … the accident arises … from a dangerous premises condition, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition … or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9, 919 NYS2d 129 [1st Dept 2011] [internal quotation marks omitted]). "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law (*Lombardi v. Stout*, 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 [1992]). Similarly, where the dangerous condition arises from a subcontractor's methods or materials, "recovery against the … general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*See Reilly v. Newireen Assocs.*, 303 A.D.3d 214, 756 N.Y.S.2d 192 [1st Dept. 2003]).

Labor Law § 241(6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]. "[T]he duty to comply with the Commissioner's regulations is nondelegable" (*Id.*, 81 N.Y.2d 502). "Labor Law § 241 (6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Id.* 81 N.Y.2d 503). Traditionally, provisions that merely incorporate the general common-law standard are treated differently from provisions containing specific commands and standards (*See Ross*, supra at 503). "The latter have been held to create duties that are nondelegable … while the former do not" (*Id.*).

Here, the crux of the matter regarding plaintiff's *Labor Law § 240(1)* is whether plaintiff can avail himself of the statute's protection even though he was not performing an enumerated act at the time of his accident. Plaintiff has cited multiple cases, arguing that the full extent of the work being performed at the project is determinative of whether plaintiff's accident falls within the scope of the statute. Plaintiff's reply papers cite *Prats v. Port Auth.*, 100 N.Y.2d, 800 N.E.2d 351, 768 N.Y.S.2d 178 (2003) as the controlling caselaw. In *Prats*, plaintiff, an assistant mechanic, was readying air handling units for inspection with his co-worker on the date of his accident. When plaintiff's co-worker set up a ladder to inspect an air-conditioning fan about eight feet tall (suspended at a height of approximately 20 feet), the ladder slipped from under plaintiff when plaintiff climbed it to provide his co-worker with a wrench. The Court of Appeals rejected defendants' argument that plaintiff's inspection fell outside of section 240, reasoning that

plaintiff's "work … did not fall into a separate phase easily distinguishable from other parts of the larger construction project" (*Id.* at 100 N.Y.2d 881). The court further held:

> "[p]laintiff's inspection was not in anticipation of [his employer's] work, nor did it take place after the work was done. The inspections were ongoing and contemporaneous with the other work that formed part of a single contract. The employees who conducted inspections also performed other, more labor-intense aspects of the project. Moreover, plaintiff worked for a company that was carrying out a contract requiring construction and alteration—activities covered by section 240(1)" (*Id.*).

The court finally held:

> "[a]lthough at the instant of the injury [plaintiff] was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*Id.* at 100 N.Y.2d 882).

Plaintiff also cites *Traub v. Basketball City N.Y. LLC*, 235 A.D.3d 513, 228 N.Y.S.3d 53 (1st Dept. 2025), where plaintiff, a member of a team of approximately 60 stagehands belonging to a union, was hired to erect a temporary stage for an awards show at Pier 36 in Manhattan. There, plaintiff testified that even though he was assigned to the audio department for the project, stagehands were required to perform all aspects of stage construction, including audio, video, rigging, and carpentry, and thus he received a multitude of assignments throughout the project. On the date of his injury, plaintiff was asked to wire the audio system for a rolling drum riser to be used during the show. While performing this task backstage, plaintiff was holding onto the stage's railing to guide himself when the lights were turned off and on during the lighting test. This caused plaintiff to become disoriented and fall off the stage because part of the railing was missing. The Appellate Division held that plaintiff was properly awarded summary judgment on his *Labor Law § 240(1)* claim where a "full assessment of the work being performed" demonstrated that "plaintiff's task of wiring the drum apparatus for use in the show was ultimately part and parcel of the stage's overall construction" (*Id.*).

In the case at bar, the facts are distinguishable from *Prats* and *Traub*, compelling a different outcome. Notably, plaintiff testified that his accident occurred at the end of the workday when he was already done with his work, and everyone had left for the day. Plaintiff further testified that no one had directed him to go down into the pit, that he had not used the subject ladder before, and that his reason for going down into the pit was to retrieve his headlamp. Unlike in *Prats*, where the court reasoned that plaintiff's "inspections were ongoing and contemporaneous with the other work" he had performed, here, plaintiff was not performing any work at the time his accident occurred, had not performed any work in the pit during his working hours, had not used the subject ladder to perform any work that day or on any other day, was not directed to retrieve his headlamp in the pit, and such retrieval could not possibly be considered an ancillary duty to the work he had been performing during his workday. Thus, based on the caselaw submitted by plaintiff and the specific circumstances of this case, plaintiff's accident does not fall within the purview of *Labor Law § 240(1)*, warranting dismissal of this claim.

Next, plaintiff seeks summary judgment on his *Labor Law § 241(6)* claim predicated on Industrial Codes sections *23-1.21(b)(4)(ii)*[1] and *23-1.21(b)(4)(iv)*[2] while defendants seek to dismiss plaintiff's claim in its entirety based on sections *23-1.5, 23-1.7(d), 23-1.7(e), 23-1.7(f), 23-1.8(c), 23-1.15, 23-1.17, 23-1.21(a), 23-1.21(b)(1), 23-1.21(b)(3)(i), (ii), (iii)* and *(iv), 23-1.21(b)(4)(i), (ii), (iii), (iv)* and *(v), 23-1.21(e)(2), 23-1.21(e)(3), 23-1.21(e)(5), 23-1.30, 21-1.32, 23-2.1* and *23-2.8.* Except for sections *23-1.21(b)(4)(ii)* and *23-1.21(b)(4)(iv)*, plaintiff's opposition does not address defendants' request dismissing the remaining Industrial Code sections.

Here, the Court finds that plaintiff's deposition establishes a *prima facie* showing that defendants violated section *23-1.21(b)(4)(ii)* by failing to ensure that the ladder had firm footing. Specifically, plaintiff stated that the ladder was sitting on debris and garbage at the bottom of the pit, causing the same to be unleveled, and contributing to his fall. In opposition, defendants argue that the photograph submitted under NYSCEF Doc. #32 demonstrates that the ladder was not placed on slippery surface and had proper rubber feet. Plaintiff, however, challenges the admissibility of this photograph, arguing that the same was not authenticated by any witness. Here, the Court finds that the photograph is inadmissible, considering that defendants continuously refer to the photograph as "[a] photograph of what may have been the ladder and elevator pit" and the same was not authenticated by any witness (*See Sanchez v. MC 19 E. Houston LLC*, 216 A.D.3d 443, 187 N.Y.S.3d 632 (1st. Dept. 2023).

Next, defendants argue that plaintiff's alleged post-incident statement raises an issue of fact where it demonstrates that plaintiff purportedly stated that the ladder was "steady and stationary", and that his shoes were "resting on a concrete sill". Plaintiff also challenges the admissibility of this statement as being unsworn to and having not been disclosed during discovery.

The First Department has held that unsworn statements constitute inadmissible hearsay (*See Gonzalez v. 1225 Ogden Deli Grocery Corp.*, 158 A.D.3d 582, 71 N.Y.S.3d 473 [1st Dept. 2018]). "While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment 'where it is the only evidence upon which the opposition to summary judgment is predicated'" (*Id.* at 158 A.D.3d 584; citing *Narvaez v. NYRAC*, 290 A.D.2d 400, 401, 737 N.Y.S.2d 76 [1st Dept. 2002]).

Here, a review of plaintiff's purported statement demonstrates that the same is unsworn to and constitutes inadmissible hearsay. By itself, the statement cannot overcome plaintiff's *prima facie* showing and therefore defendants have failed to submit evidence in admissible form to overcome plaintiff's *prima facie* showing that they violated their non-delegable duty to ensure all ladders had firm footing as mandated by *§ 23-1.21(b)(4)(ii)*, warranting the granting of summary judgment in favor of plaintiff on this section.

Plaintiff's remaining Industrial Code sections are addressed as follows. First, plaintiff was not performing any work from the ladder, therefore, under *Cordova*,[3] *§ 23-1.21(b)(4)(iv)* is dismissed. Under *Martinez*[4], *§ 23-1.5* is too general to support a cause of action for violating *Labor Law § 241(6)*. *§ 23-1.7(d)* is inapplicable to the circumstances of this case because the ladder from which plaintiff fell was not "a

[1] *Industrial Code § 23-1.21(b)(4)(ii)* states "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."
[2] *Industrial Code § 23- 1.21(b)(4)(iv)* states "When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.
[3] *Cordova v. 653 Eleventh Avenue LLC*, 190 A.D.3d 637 (1st Dept. 2021).
[4] *Martinez v. 342 Prop. LLC*, 128 A.D.3d 408 (1st Dept. 2015).

floor, passageway, walkway, scaffold, platform or other elevated working surface" (See *D'Angelo*[5]). *§ 23-1.7(e)* is inapplicable as it applies to tripping hazards. Next, plaintiff has not demonstrated that *§ 23-1.7(f)*[6] was violated, as the evidence shows a ladder was present to access the pit, warranting dismissal of this section. *§ 23-1.8(c)* pertains to protective apparel and is thus inapplicable. *§§ 23-1.15* and *23-1.17* pertain to safety railings and life nets which are inapplicable to the circumstances of this case. *§ 23-1.21(a)* is dismissed as insufficiently specific to support a *Labor Law § 241(6)* claim (See *Sochan*[7]). *§ 23-1.21(b)(1)* is also dismissed as inapplicable, given it pertains to a ladder's ability to sustain at least four times the maximum load. Here, there is no evidence the ladder couldn't sustain four times the maximum load (See *Campos*[8]). *§§ 23-1.21(b)(3)(i), (ii), (iii)* and *(iv)*[9] are inapplicable as the evidence does not demonstrate that the ladder was not maintained in good condition. *§§ 23-1.21(b)(4)(iii), (iv),* and *(v)* are hereby dismissed, as the record does not show that the ladder sagged, nor that plaintiff was working from the ladder. *§ 23-1.21(e)(2)* is not sufficiently specific to form the basis for a *Labor Law §241(6)* claim (*See Crousset*[10]). *§§ 23-1.21(e)(3)* and *23-1.21(e)(5)* are dismissed as inapplicable, given that plaintiff was not working from the ladder and this case did not involve a stepladder. *§ 23-1.30* is also dismissed, as it pertains to sufficient illumination and the record does not show that plaintiff had an issue with the illumination in the elevator pit. *§ 21-1.32* is inapplicable to this case, as it concerns "imminent danger-notice, warning and avoidance." *§ 23-2.1* is not sufficiently specific to support a *Labor Law § 241(6)* claim (*See Venezia*[11]). *§ 23-2.8* is inapplicable, as it addresses safety regarding painting and plaintiff was not engaged in this activity. Finally, dismissal regarding *§§ 23-1.21(b)(4)(i)*[12] and *(ii)*[13] is denied, as plaintiff's deposition established that the ladder was unsecured, that it wobbled and slid to the side, and that the ladder had been placed on top of debris and garbage.

Next, the Court notes that, even though plaintiff moves for summary judgment on his *Labor Law § 200* and common-law negligence claims, his supporting documents do not address the same, and therefore plaintiff has failed to establish a *prima facie* showing of entitlement to summary judgment on this section. On the other hand, defendants' motion argues that summary judgment is warranted as to plaintiff's claims where Tishman did not direct or control any work that plaintiff performed. Defendants further argue that the daily log from the date of the accident demonstrates that no one worked in the pit on that day. In opposition, plaintiff argues that this matter involves both categories of the *Labor Law § 200* and common-law negligence cases (i.e., defective condition and means and methods), arguing that denial is warranted because defendants (1) rely on the inadmissible photograph to show that the ladder was not a dangerous condition and (2) Tishman's contract demonstrates that it had the requisite level of authority to direct plaintiff's work.

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[5] *D'Angelo v. Legacy Yards Tenant LLC,* 237 A.D.3d 607 (1st Dept. 2025).

[6] *§ 23-1.7(f)* states that "[s]tairways, 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.

[7] *Sochan v. Mueller*, 162 A.D.3d 1621 (4th Dept. 2018).

[8] *Campos v. 68 E. 86th St. Owners Corp.*, 117 A.D.3d 593 (1st Dept. 2014).

[9] *§ 23-1.21(b)(3)* states: "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. (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness. (iv) If it has any flaw or defect of material that may cause ladder failure.

[10] *Crousset v. Chen*, 102 A.D.3d 448 (1st Dept. 2013)

[11] *Venezia v. State of New York*, 57 A.D.3d 522 (2nd Dept. 2008)

[12] *§23-1.21(b)(4)(i)* states: "Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such as ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

[13] *§23-1.21(b)(4)(ii)* states: "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Here, the Court finds that this matter falls exclusively under the dangerous condition category of *§ 200* cases. Plaintiff's deposition testimony establishes that he accessed the elevator shaft after the work had been completed for the day and that he was not performing any work at the time he went to retrieve his headlamp. Plaintiff further testified that no one had directed him to use the ladder, he had not used that ladder before on the date of his accident, and he did not know who owned the ladder. Therefore, based on the foregoing, the Court cannot find that this matter falls under a "means and method" category of cases. Under a dangerous condition analysis, the Court finds that defendants have failed to establish their *prima facie* entitlement to summary judgment in their favor. Defendants have not tendered sufficient evidence in admissible form to demonstrate that the ladder utilized by plaintiff was not a dangerous condition existing on the premises and that they had no notice of it. Therefore, this portion of defendants' motion must be denied.

Finally, plaintiff seeks to dismiss defendants' affirmative defenses of sole proximate cause, recalcitrant worker and failure to use safety devices, arguing that they are inapplicable to the circumstances of this case. In opposition, defendant rely on plaintiff's alleged post-incident statement to demonstrate that the ladder was "steady and stationary", and that plaintiff's shoes were "resting on a concrete sill". As demonstrated above, plaintiff's purported statement is inadmissible.

Our courts have held that an injured worker is the sole proximate cause of his injury where the worker (1) had adequate safety devices available, (2) knew both that they were available and that he was expected to use them, (3) chose for no good reason not to do so and (4) would not have been injured had he not made that choice (*Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp.,* 34 NY3d 1166 [2020]; *Sacko v. New York City Hous. Auth.,* 188 A.D.3d 546 [1st Dept. 2020]). The recalcitrant worker defense applies when there is evidence showing that plaintiff was told not to use the defendants' equipment or that he knew he should not do so (*See Cronin v. New York City Transit Auth.,* 143 A.D.3d 419, 38 N.Y.S.3d 544 [1st Dept. 2016]).

Here, the Court finds that plaintiff has establish his *prima facie* entitlement to summary judgment, warranting dismissal of defendants' affirmative defenses. Specifically, the evidence demonstrates that the plaintiff could not have been the sole proximate cause of his accident where the defendants violated Industrial Code section *23-1.21(b)(4)(ii)* when they failed to ensure that the ladder had firm footing. Next, the Court finds that defendants' recalcitrant worker defense should also be dismissed, as there is no evidence in the record demonstrating that plaintiff was told not to use the ladder or that he should have known not to use it to access the elevator shaft. The Court also finds that defendants' defense regarding "failure to use safety devices" is inapplicable to this matter, as the record demonstrates that plaintiff used the only means of access there was to the elevator shaft (i.e., the ladder). Finally, as noted above, defendants' reliance on plaintiff's purported unsworn statement is insufficient by itself to raise an issue of fact to defeat plaintiff's *prima facie* showing, warranting dismissal of defendants' affirmative defenses.

Accordingly, it is

ORDERED: Plaintiff's motion pursuant to *CPLR § 3212* seeking an order granting him summary judgment on his *Labor Law § 240(1)* claim is hereby denied;

ORDERED: Defendant's motion pursuant to *CPLR § 3212* seeking an order dismissing plaintiff's *Labor Law § 240(1)* claim is hereby granted, and the claim is dismissed;

ORDERED: Plaintiff's motion pursuant to *CPLR § 3212* seeking an order granting him summary judgment on his *Labor Law § 241(6)* claim is granted to the extent that summary judgment is awarded as to plaintiff's claim predicated on Industrial Code *§ 23-1.21(b)(4)(ii)*;

ORDERED: Defendants' motion pursuant to *CPLR § 3212* seeking an order granting them summary judgment dismissing plaintiff's *Labor Law § 241 (6)* is granted to the extent it Industrial Code *§§ 23-1.21(b)(4)(iv), 23-1.5, 23-1.7(d), 23-1.7(e), 23-1.7(f), 23-1.8(c), 23-1.15, 23-1.17, 23-1.21(a), 23-1.21(b)(1), 23-1.21(b)(3)(i), (ii), (iii)* and *(iv), 23-1.21(b)(4)(iii), (iv)* and *(v), 23-1.21(e)(2), 23-1.21(e)(3), 23-1.21(e)(5), 23-1.30, 21-1.32, 23-2.1* and *23-2.8*;

ORDERED: Plaintiff motion pursuant to *CPLR § 3212* seeking an order granting him summary judgment on his *Labor Law § 200* and common-law negligence claims is hereby denied;

ORDERED: Defendants' motion pursuant to *CPLR § 3212* seeking an order granting him summary judgment on his *Labor Law § 200* and common-law negligence claims is also denied.

ORDERED: Plaintiff motion pursuant to *CPLR § 3212* seeking an order granting him summary judgment dismissing defendants' affirmative defenses is hereby granted, and defendants' affirmative defenses are hereby dismissed.

This constitutes the decision and Order of this Court.

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10/3/25
DATE

LETICIA M. RAMIREZ, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**