

Villamarin v Millstone586 LLC

2025 NY Slip Op 33870(U)

October 9, 2025

Supreme Court, New York County

Docket Number: Index No. 160179/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

FABIAN ACOSTA VILLAMARIN AS ADMINISTRATOR OF
THE ESTATE OF REMBERTO FERNANDO VILLALVA
ARCE, DECEASED,

Plaintiff,

INDEX NO. 160179/2019

MOTION DATE 01/10/2025,
01/08/2025

MOTION SEQ. NO. 002 003

- v -

MILLSTONE586 LLC, MKL CONSTRUCTION CORP., PHIL
KOUFFMAN BUILDER, INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

MILLSTONE586 LLC

Plaintiff,

Third-Party
Index No. 595062/2020

-against-

ELITE CARPENTRY FG CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 109, 110, 111, 146, 147, 148, 152, 153, 154, 155, 156, 157, 158, 159, 168

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 112, 113, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 149, 150, 151, 160, 161, 162, 163, 164, 165, 166, 167

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

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by decedent

Remberto Fernando Villalva Arce, on November 2, 2017, when, while working at a construction

site located at 586 Millstone Road in Bridgehampton, New York (the Premises), he fell from a ladder to the ground and passed away the following day.

In motion sequence number 002, defendant/third-party plaintiff Millstone 586 LLC (Millstone) and defendant MKL Construction Corp (MKL) (together, defendants) move for summary judgment dismissing the complaint as against them.¹ Millstone also moves for summary judgment in its favor on its third-party claims for common-law indemnification against third-party defendant Elite Carpentry FG Corp. (Elite). MKL moves for summary judgment on its cross-claims for contractual and common-law indemnification and breach of contract for the failure to procure insurance against Elite.

In motion sequence number 003, plaintiff moves for summary judgment in his favor on his Labor Law § 240(1) claim as against defendants. Elite opposes and cross-moves for summary judgment dismissing the complaint.

BACKGROUND

On the day of the accident, Millstone owned the Premises, and it had hired MKL to provide general contracting services for a project at the Premises that entailed new construction of a two-story single-family home (the Project). MKL hired Elite to install siding and roofing at the Premises; decedent was the owner of Elite.

Villamarin's Deposition Testimony (NYSCEF Doc. No. 95)

Villamarin testified on behalf of decedent's estate, as decedent's friend and the estate's administrator. He testified that decedent was the owner of Elite (Villamarin tr at 39-40), a carpentry company (*id.* at 40). It had several employees, including Gustavo Guzman and Jamie

¹ By decision and order dated February 2, 2021, this action was dismissed as against defendant Phil Kouffman Builder, LLC.

Cabrera (*id.* at 42). Villamarin testified that, to his understanding, Arce was “in charge of doing the siding” and responsible for Elite’s employees (*id.* at 128). John Cuccia, from MKL, was “the person in charge all the time” (*id.* at 130).

Villamarin testified that, after the accident, he went to the Premises (*id.* at 82) and spoke with Guzman and Cabrera about what happened (*id.* at 43). In his conversation with Guzman and Cabrera, he learned that Arce fell from a ladder (*id.* at 83). Villamarin learned that Guzman was on “the other side” at the time of the accident, and that Guzman and Arce were installing siding at the time of the accident (*id.* at 85). He did not know if “the other side” meant the other side of the house (*id.* at 85). Guzman also told Villamarin that the ladder “was sliding towards him” during the fall (*id.* at 85; 120 [“he remembered that he looked to the right side and he saw [Arce’s] ladder sliding towards him”]).

Testimony of Phillip Kouffman (MKL’s Vice-President) (NYSCEF Doc. No. 96)

Phillip Kouffman testified that on the day of the accident, he was a vice-president of MKL (Kouffman tr at 16), and his responsibilities included “running the day-to-day business” (*id.* at 19). He would not go to the construction sites regularly, but when he did, it was just to see “overall what’s going on” (*id.* at 19). MKL had a project manager on-site daily named John Cuccia (*id.* at 22), and a single laborer (*id.* at 23). MKL did not have an independent safety supervisor (*id.* at 25).

At his deposition, Kouffman was shown a copy of a contract between Millstone and MKL for the Project, and he confirmed that he signed it on behalf of MKL (*id.* at 31). He also confirmed that a second contract shown to him was between MKL and Elite (*id.* at 32). To his knowledge, Arce acted as Elite’s foreman and was responsible for directing Elite’s work,

including the use of ladders (*id.* at 58). Cuccia was familiar with Elite’s equipment, and that Cuccia reported to him that Elite’s equipment was new and in good repair (*id.* at 35-36).

Kouffman believed that Arce was approximately 12 feet off the ground when he fell (*id.* at 35-36), and he was told that an Elite employee was holding the ladder steady at the time of the accident (*id.* at 37). Kouffman was not present at the time of the accident, and he did not arrive at the Premises until the afternoon. By the time he got there, “everybody had left the job” and all the equipment was put away (*id.* at 38). He later spoke with Cuccia and learned that Cuccia had a conversation with Arce at the accident location (*id.* at 62), and that Arce had said the ladder “slid” (*id.* at 62); Arce said the same to the police and the ambulance crew (*id.* at 62-63). Cuccia did not witness the accident (*id.* at 72).

According to Kouffman, the ladder used by Arce had stability guards on the top of the ladder, which were laid against the roof to provide stability to the ladder.

Affidavit of Gustavo Guzman (NYSCEF Doc. No. 123)

In his notarized and sworn statement, dated March 26, 2018, Gustavo Guzman stated that he was an employee of Elite, and was present at the Premises on the day of the accident and was working near Arce (*id.* page 1). He and Arce were on 23-foot tall ladders leaning against the side of the Premises (*id.* at 1), with Cabrera holding onto Arce’s ladder. He saw Arce’s “ladder sliding over towards [his] direction with [Arce] still on it” (*id.* at 1). Guzman “attempted to grab the ladder as it was sliding towards [him]” but then saw that Arce had fallen from it (*id.* at 1). Guzman opines that Arce lost his balance “since the paper we were installing was very slippery, which probably caused the ladder to slip.”

Even though he saw the accident, no one requested a statement from him at that time (*id.* at 2).

Affidavit of Jaime Cabrera (NYSCEF Doc. No. 124)

In his notarized and sworn statement, Jaime Cabrera stated that he was employed by Elite and present at the Premises on the day of the accident. Cabrera's affidavit is largely identical to Guzman's, except that Cabrera does not state that he saw the ladder move. He was holding Arce's ladder at the time of the accident, and he "observed [Arce] falling to the ground from almost the top of the ladder" (*id.* at 1).² Cabrera also opines that Arce lost his balance and fell from the ladder.

As with Guzman, Cabrera stated that no one requested a statement from him at the time (*id.* at 2).

Affirmation of Andre Hubner (NYSCEF Doc. No. 74)

Andre Hubner submits an affirmation in which he states that he is the "Member Manager" for Millstone (the Hubner Affirmation) (Hubner aff, ¶ 1; NYSCEF Doc. No. 74), and that Millstone was formed in 2017 for the purpose of constructing the Premises "with the intent for personal use between [his] family and Riccardo Leoni's family" (*id.*, ¶ 4).

The OSHA Report (NYSCEF Doc. No. 85)

An OSHA inspection report was prepared after the accident (the OSHA Report), but the names of all individuals who were interviewed were redacted.

The OSHA Report reflects that the accident occurred when a "worker fell off a ladder approximately 20 ft. to the ground below" (*id.* at 6). OSHA thereafter conducted an inspection, consisting of a visual inspection of the subject ladder, which revealed it was in good condition (*id.* at 9). OSHA's investigator also spoke, through an interpreter, with "subcontractor's

² The court notes that Cabrera's affidavit contains language that he observed the ladder slide. That language was struck through. The strike-through was initialed by Cabrera and stamped with a notary seal. Accordingly, the court will not consider this language.

employee” (name redacted), who told the investigator that Arce “had a jerk movement and fell off the ladder approximately 20-23 feet to the ground below” (*id.* at 9).

Handwritten notes attached to the OSHA Report indicate that the subject ladder was a 32-foot ladder that was “standing on soft ground” and “resting against Tyvek home wrap” (*id.* at F1).

Ultimately, the OSHA inspector determined that “No Violations [were] Observed” (*id.* at 11).

DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [emphasis omitted]). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks and citation omitted]). “If there is any doubt as to the existence of a triable issue, the motion [for summary judgment] should be denied” (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; citing *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Preliminary Procedural Issues

Guzman and Cabrera's Affidavits (NYSCEF Doc. Nos. 123 & 124)

As part of his papers, plaintiff submitted copies of the notarized eyewitness statements of Guzman and Cabrera, both taken in New York county and dated March 26, 2018. In its opposition to plaintiff's motion (NYSCEF Doc. No. 134), Elite objects to the introduction of these statements as they were never produced in discovery.

However, in its own cross-motion, filed one week prior to its opposition (NYSCEF Doc. No. 118), Elite – without objection – incorporated and referenced both Guzman and Cabrera's affidavits, and used them in support of its own arguments. Given Elite's incorporation, use and reliance on the affidavits, it has waived any objection to the court's consideration of the affidavits.

Timeliness of Elite's cross-motion

Plaintiff filed the note of issue on September 10, 2024, and therefore the time to file summary judgment motions expired on January 8, 2025. While plaintiff filed his motion on January 8, 2025 (NYSCEF Doc. No. 91), Elite's cross-motion was filed on April 18, 2025 and is thus untimely. However, a portion of Elite's cross-motion directly addresses Labor Law § 240 (1) – a claim raised in plaintiff's motion.

A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. . . . The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion.

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; see also *Connor v AMA Consulting Engrs. PC*, 213 AD3d 483, 484 [1st Dept 2023]).

Accordingly, the court will consider that part of Elite's motion related to Labor Law § 240 (1) only.

Propriety of Elite's cross-claims

MKL alleges that it has asserted "cross-claims" against Elite. However, Elite is not a defendant in the main action. To the extent that MKL's cross-claims could be deemed "third-party" claims, MKL is not a third-party plaintiff (*see e.g., BAS Communications, Inc. v YT Corp.*, 15 Misc 3d 1104[A] [Sup Ct, Nassau County 2007] [defendant could not assert cross-claim in third-party answer as it was not party to third-party complaint]).

While cross-claims may be asserted against a non-party (CPLR 3019[b]), the proper procedure for maintaining such a cross-claim is to file a summons and answer containing the cross-claim, and to serve it on the non-party in the same manner as serving a summons and complaint (CPLR 3019[d]).

Here, MKL did not file a summons and answer containing a cross-claim against Elite. Rather, it filed a "notice of cross-claims," which has no legal significance. Moreover, to the extent that Elite was not yet a party, there is no proof that MKL served the "notice of cross-claims" on Elite in the same manner as serving a summons and complaint.

Thus, any "cross-claim" asserted by MKL against Elite is not legally cognizable, and therefore not considered on defendants' motion.

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Defendants move and Elite cross-moves for summary judgment dismissing the claim on the ground that defendants are not proper Labor Law defendants.

Labor Law § 240 (1), known as the Scaffold Law, provides as relevant:

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.

Labor Law § 240 (1) “imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work” (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It “was designed to prevent those types of accidents in which the scaffold . . . 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” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one.

(*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]; *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [section 240 liability “is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein”).

That said, not all workers injured at a construction site fall within the scope of protection of section 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace” (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia*

Grammar & Preparatory, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) “does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site”). Instead, liability is “contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Millstone

Millstone argues that it is not a proper Labor Law defendant, as the Premises was a one-family home and Millstone “contract[ed] for, but [did] not direct or control the work” (Labor Law § 240 [1]) – an exemption known as the homeowner’s exemption.

“The homeowner's exemptions preclude the imposition of the otherwise absolute statutory liability upon owners of one and two-family dwellings who contract for but do not direct or control the work” (*Farias v Simon*, 122 AD3d 466, 467 [1st Dept 2014] [internal quotation marks and citation omitted]). “The exemptions, however, do not encompass homeowners who use their one and two-family premises entirely and solely for commercial purposes” (*id.* at 467 [internal quotation marks and citation omitted]).

To determine whether construction work on a project was for a residential or a commercial purpose, the court must determine (1) the intended use of the property and (2) whether the purpose of the work was primarily residential or commercial. This test “must be employed on the basis of the homeowners’ intentions at the time of the injury” (*Solis v 340 W.*

12 Realty LLC, 226 AD3d 449, 450 [1st Dept 2024] [internal citations and quotation marks omitted]).

In support of its argument, Millstone relies on Hubner’s Affirmation, which sets forth Hubner’s then-present intent to use the Premises entirely for residential purposes (Hubner Aff., ¶ 4). This demonstrates a prima facie entitlement to the protection of the homeowner’s exemption (see *Solis*, 226 AD3d at 449-450; *Rivera v Matiz Architecture, PLLC*, 217 AD3d 552, 553 [1st Dept 2023]).

In opposition, plaintiff argues that the homeowner’s exemption does not apply because Millstone intended to sell the Premises, relying on a copy of a printout purportedly from a real estate website for the Premises that shows a “listed for Sale” date of June 16, 2018 – approximately seven months after the accident (plaintiff’s aff in opp, exhibit 1; NYSCEF Doc. No. 153]). Notably, plaintiff does not provide a link for the website, or otherwise establish a foundation for this exhibit. Even had he established a foundation, this exhibit does not raise a question of fact as to Millstone’s “intentions at the time of the injury,” seven months prior to the listing (*Solis*, 226 AD3d at 450).

Plaintiff also provides a copy of a printout from the website realtor.com (along with the specific website address) that notes that the Premises was sold in 2020 (plaintiff’s aff in opp, exhibit 2; NYSCEF Doc. No. 154). Again, that the Premises may have been sold in 2020 does not raise a question of fact as to Millstone’s intent in 2017, nor does a printout showing that the Premises was listed for rent in 2024 (*id.*, exhibit 4).

Importantly, in *Solis* the plaintiff raised a question of fact regarding the owner’s intent through evidence showing “that a provision of the mortgages on the property that required defendant to occupy the property within 60 days and to use the property as its principal residence

for one year had been deleted” (*Solis*, 226 AD3d at 450). In *Rivera*, the plaintiff raised a question of fact as to the applicability of the homeowner’s exemption by, amongst other things, producing “documentation showing that [the owner defendant] had previously undertaken similar projects for commercial purposes” (*Rivera*, 217 ad3d at 553). Here, there is no contemporaneous information in the record that raises a question of fact as to Millstone’s intent at the time of the injury.

Finally, plaintiff argues that Hubner’s affidavit does not establish then-present intent to reside at the Premises because Hubner never affirms that he or his family ever did, in fact, reside at the Premises. This argument also fails to raise a question of fact (*Solis*, 226 AD3d at 450 [noting that the owner’s subsequent affidavit – submitted on a motion to renew – stating that he moved into the subject property did not establish, as a matter of law, intent to do so at the time of the accident]).

Given the foregoing, Millstone has met its prima facie burden and is entitled to the homeowner’s exemption. Accordingly, Millstone is not a proper Labor Law defendant, and the Labor Law claims are dismissed against it.

MKL

As MKL was the general contractor, the homeowner’s exemption does not apply, and therefore it is a proper Labor Law defendant.

“Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016], quoting *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). “Whether the device provided proper

protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials” (*Pai v Nelson Senior Hous. Dev. Fund Corp.*, 232 AD3d 822, 825 [2d Dept 2024] [internal quotation marks and citation omitted]).

Here, there is no testimony from Arce as to what caused his fall, but according to Guzman, Arce’s ladder shifted toward him and Arce then fell from it, while Cabrera reports that he was holding the ladder when Arce fell from it. Both witnesses attribute the accident to Arce losing his balance on the ladder, and neither recounts that the ladder suddenly moved without Arce’s fault or that the ground on which the ladder was placed was insecure or unstable or somehow contributed to the accident. Moreover, Guzman told the OSHA investigator that Arce “had a jerk movement and fell off the ladder.” MKL thus establishes, *prima facie*, that the fall was not caused by an unsafe condition associated with the ladder.

However, in opposition, plaintiff observes that Guzman testified that the ladder shifted before Arce fell, and MKL’s on-site supervisor apparently told Kouffman that he spoke to Arce at the premises after his fall, and that Arce told him the ladder “slid.”

Based on this conflicting testimony, defendants and plaintiff both fail to demonstrate their entitlement to summary judgment on the Labor Law 240(1) claim (*see Duran v ERY Retail Podium LLC*, 238 AD3d 665, 665 [1st Dept 2025] [“conflicting accounts as to how the plaintiff fell from a ladder raised genuine factual disputes over causation, that is, whether the accident resulted from a defect in safety devices or plaintiff’s own conduct”]; *Hamill v Mut. Am. Inv. Corp.*, 79 AD3d 478 [1st Dept 2010] [conflict between witnesses’ testimony and plaintiff’s testimony that ladder shifted and fell raised triable issue]; *see also Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062 [4th Dept 2019] [defendant would not be liable under section 240(1) if plaintiff merely lost balance and fell off ladder]; *Mitchell v City of New York*, 169 AD3d 505 [1st

Dept 2019] [no viable Labor Law 240(1) claim where plaintiff lost footing while (descending) properly-secured, non-defective extension ladder that did not malfunction]).

The Labor Law § 241 (6) Claims (Motion Sequence Number 002)

Labor Law § 241 (6) provides, in pertinent part, as follows:

All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors “to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff’s injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

In opposition to defendants’ motion, plaintiff only opposes that part of the section 241 (6) claim predicated upon violations of Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii) and (iv). All other claimed violations are thus deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff

who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

Industrial Code 12 NYCRR 23-1.21 (b) (4) (ii)

Industrial Code section 23-1.21 (b) (4) governs the installation and use of ladders, and provides, in pertinent part, that: (ii) All ladder footings shall be firm.”

Section 23-1.21 (b) (4) (ii) is sufficiently specific to support a Labor Law § 241 (6) claim (*Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]).

As there is no evidence that the ladder’s footings here were not firm, especially as Cabrera was holding the ladder for Arce, defendants establish that this subsection was not violated.

Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv)

Industrial Code section 23-1.21 (b) (4) (iv) provides the following:

. . . When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side 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.

This provision is sufficiently specific to support a Labor Law § 231 (6) claim (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [1st Dept 2004]).

Based on Kouffman’s unrefuted testimony that the ladder at issue had stability guards on the top of it to stabilize it, and the undisputed evidence that Cabrera was holding the lower part of the ladder, defendants demonstrate that there was no violation of this subsection of the Code.

Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 002)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. Plaintiff, in his opposition, affirmatively discontinues

these claims (memorandum in opposition, ¶ 4; NYSCEF Doc. No. 160). Accordingly, that portion of defendants' motion seeking dismissal thereof is rendered moot.

Millstone's Cross-Claim for Common-Law Indemnification Against Elite (Motion Sequence Number 002)

Common-law indemnification is predicated on "vicarious liability without actual fault," *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006]) "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia*, 259 AD2d at 65).

Here, Millstone has not been found vicariously liable for the subject accident, as the homeowner's exemption shields it from liability. Accordingly, its claim for common-law indemnification is moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

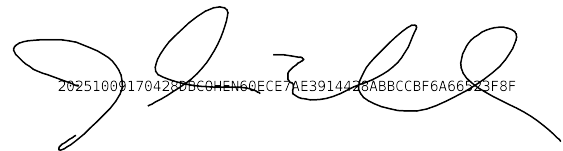
ORDERED that the branch of the motion (motion sequence number 002), pursuant to CPLR 3212, of defendant/third-party plaintiff Millstone 586 LLC and defendant MKL Construction Corp's seeking summary judgment dismissing the complaint as against Millstone is granted, and the complaint is severed and dismissed as against it, and the motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint against MKL is granted to the extent that the Labor Law § 241(6) claim is severed and dismissed; and the motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment in their favor on Millstone's third-party claims against third-party defendant Elite Carpentry FG Corp. is denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 240 (1) claim as against MKL is denied; and it is further

ORDERED that Elite's cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is denied.



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10/9/25
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE