

**Pearson v Mill Cr. Residential Trust, LLC**

2025 NY Slip Op 34243(U)

November 5, 2025

Supreme Court, New York County

Docket Number: Index No. 156437/2020

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

JON PEARSON AND PETER N. BUZOID, ESQ. as Legal Representative of the ESTATE OF ROBERT LEMKE, DECEASED, Plaintiff, INDEX NO. 156437/2020 MOTION DATE 01/27/2025, 02/24/2025 MOTION SEQ. NO. 004 005

- v -

MILL CREEK RESIDENTIAL TRUST, LLC, MCRT NORTHEAST CONSTRUCTION, LLC, WATER GRANT STREET, LLC, ALLEN BLVD INTERIORS, INC., and MAC-LAD CORP.,

DECISION + ORDER ON MOTION

Defendants.

MILL CREEK RESIDENTIAL TRUST, LLC, MCRT NORTHEAST CONSTRUCTION, LLC, WATER GRANT STREET, LLC, and ALLEN BLVD INTERIORS, INC.

Third-Party Index No. 595935/2020

Plaintiffs,

-against-

K&M FIRE PROTECTION SERVICES, INC.

Defendant.<sup>1</sup>

The following e-filed documents, listed by NYSCEF document number (Motion 004) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 193, 195, 197, 206, 208, 210, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 273, 275, 277, 279, 280, 285 were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 194, 196, 198, 207, 209, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 274, 276, 278, 281, 282, 283, 284, 286, 287 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

1 The Court issued an Order substituting Peter N. Buzaid, Esq. as legal representative for Robert Lemke's estate on October 12, 2023 (NYSCEF Doc. 97) but the parties never served that order on the Clerk's office and so the substitution was never reflected in the caption on NYSCEF. The Court uses the correct caption on this motion but reminds the parties that orders substituting parties in a caption must be served on the Clerk's office so that the amended caption can be reflected on NYSCEF.

Upon the foregoing documents, and after a final submission date of August 25, 2025, motion sequences 004 and 005 are consolidated for disposition and decided as follows:

- A.** Third-Party Defendant K&M Fire Protection Services, Inc.'s ("K&M") motion for summary judgment dismissing the third-party complaint and all other claims asserted against it and Defendants/Third-Party Plaintiffs Mill Creek Residential Trust, LLC ("Mill Creek"), MCRT Northeast Construction, LLC ("MCRT Northeast"), Water Grant Street, LLC ("Water Grant") and Allen Blvd Interiors, Inc.'s ("Allen Blvd") (collectively "Third-Party Plaintiffs") cross motion for summary judgment on their third-party claim against K&M alleging breach of contract for failure to procure insurance ("Mot. Seq. 004") is granted in part and denied in part.
- B.** Plaintiffs Jon Pearson ("Pearson") and Peter N. Buzaid, Esq., as Legal Representative of the Estate of Robert Lemke, Deceased's ("Lemke") (collectively "Plaintiffs") motion for summary judgment against Mill Creek, MCRT Northeast, and Water Grant on their Labor Law § 241(6) claims predicated on a violation of Industrial Code § 23-2.1(a)(1), Defendant Mac-Lad Corp.'s ("Mac-Lad") cross motion for summary judgment dismissing all claims and cross claims asserted against it, and Mill Creek, MCRT Northeast, Water Grant, and Allen Blvd's cross motion for summary judgment dismissing Plaintiffs' Labor Law §§ 240(1) and 241(6) claims ("Mot. Seq. 005") is granted in part and denied in part.

**I. Background**

K&M employed Pearson and Lemke as sprinkler fitters at a construction project located at 20 Water Grant Street, Yonkers, New York (the "Premises") (NYSCEF Docs. 154 and 155 at 13). Water Grant owned the Premises. Mill Creek was the general contractor at the Premises and MCRT

Northeast is a subdivision of Mill Creek (NYSCEF Doc. 161 at 11-12). K&M was subcontracted to install fire sprinklers. Allen Blvd was subcontracted to complete sheetrock installation (NYSCEF Doc. 162 at 18-19). Allen Blvd contracted Mac-Lad to deliver sheetrock (NYSCEF Doc. 160 at 35-36; 39; 49; 62; *see also* NYSCEF Doc. 161 at 20-21).

On October 10, 2017, Pearson and Lemke were walking through a hallway on the Premises where approximately 28 sheets of sheetrock fell and pinned them to a wall (NYSCEF Doc. 155 at 62). At the time of the accident sheetrock was being delivered and installed (NYSCEF Doc. 156 at 72-73; *see also* NYSCEF Doc. 162 at 98). Allen Blvd instructed Mac-Lad where to deliver the sheetrock (NYSCEF Doc. 162 at 41-42). According to Rene Ferris, a K & M employee, the ongoing delivery of sheetrock on other floors caused the Premises to vibrate and resulted in the already delivered sheetrock to fall onto Plaintiffs (NYSCEF Doc. 163 at 38). Mr. Ferris testified stacking sheetrock in a heavily trafficked area created a hazard because they could fall if workers or equipment bumped into the sheetrock (NYSCEF Doc. 163 at 141).

In Mot. Seq. 004, K&M moves for summary judgment dismissing all claims and crossclaims asserted against it, while Third-Party Plaintiffs seek summary judgment on their breach of contract for failure to procure insurance claim against K&M. In Mot. Seq. 005, Plaintiffs move for summary judgment against Mill Creek, MCRT Northeast, and Water Grant on their Labor Law § 241(6) claims predicated on a violation of Industrial Code § 23-2.1(a)(1), Mac-Lad moves for summary judgment dismissing all claims and crossclaims asserted against it, and Mill Creek, MCRT Northeast, Water Grant, and Allen Blvd's cross move for summary judgment dismissing Plaintiffs' Labor Law §§ 240(1) and 241(6) claims.

## II. Discussion

### A. Mot. Seq. 004

K&M's motion for summary judgment dismissing all claims and crossclaims asserted against it is granted. There is no evidence that K&M was negligent or contributed to Plaintiffs' accident. Other than employing Plaintiffs, K&M was not involved with the accident. K&M as the fire safety subcontractor had no responsibility or control over the delivery, storage, or installation of the sheetrock which ultimately injured Plaintiffs. The undisputed evidence shows no employee of K&M ever touched the sheetrock piles, nor did K&M have any authority to move or store the sheetrock. The mere employment of workers who are injured on a worksite is insufficient to impose liability on K&M.

Notably, the only parties to oppose dismissal of K&M are the Third-Party Plaintiffs, and these parties do not even oppose dismissal of their common-law contribution and common-law indemnification causes of action. The lack of any evidence of K&M's negligence requires dismissal of the Third-Party Complaint as absent some evidence of K&M's negligence, the contractual duty to indemnify and insure Third-Party Plaintiffs was never triggered (*see Peranzo v WFP Tower D Co. L.P.*, 201 AD3d 486, 487-88 [1st Dept 2022]; *Hamill v Mutual of America Investment Corp.*, 79 AD3d 478, 479-80 [1st Dept 2010]).

Third-Party Plaintiffs' arguments that K&M can be held vicariously liable for the acts of Pearson and Lemke's purported negligence is speculative given the lack of any evidence that Pearson and Lemke moved or climbed onto the sheetrock and were the sole proximate cause of its fall. The record on this motion reflects undisputed testimonial evidence that Allen Blvd and MacLad were delivering and installing sheetrock at the time of Plaintiff's accident and K&M's involvement in the accident is based on impermissible speculation (*see e.g. Rubino v 330 Madison*

*Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]). Because the Third-Party Complaint is dismissed, Third-Party Plaintiffs' cross motion for summary judgment on its breach of contract for failure to procure insurance claim is denied as moot.

**B. Mot. Seq. 005**

Plaintiffs' motion for summary judgment is denied. As a preliminary matter, Plaintiffs' notice of motion only seeks summary judgment on their Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a)(1). Although a passing reference is made to Labor Law § 240(1) in Plaintiffs' memorandum of law, they did not seek this relief in their notice of motion, nor do they set forth any legal arguments in favor of this relief in their motion papers. Therefore, the Court only considers Plaintiffs' request for summary judgment on their Labor Law § 241(6) claims (*see Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]; *Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]).

Industrial Code § 23-2.1(a)(1) provides that “[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.” Viewing the facts in the light most favorable to the non-movants, there remain triable issues of fact as to whether the sheetrock was not stored in a safe and orderly manner, and whether they constituted an obstruction in violation of Industrial Code § 23-2.1(a)(1).

Moreover, there are issues of fact as to whether the sheetrock was being stored or merely staged as part of active and ongoing sheetrock installation, and whether the accident was in a work area or a passageway (*see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 260 [1st Dept 2008] citing *McLaughlin v Malone & Tate Bldrs., Inc.*, 13 AD3d 859 [2004]). Although some evidence indicates the accident occurred in a hallway with no workers around, other testimonial

evidence establishes that sheetrock was placed in locations where it would be installed, and there was further testimony that sheetrock installers were working near the site of the accident. Therefore, Plaintiffs' motion for summary judgment is denied (*see also Brown v Tishman Const. Corp. of N.Y.*, 226 AD3d 529, 530 [1st Dept 2024]).

Mill Creek, MCRT Northeast, Water Grant, and Allen Blvd's cross motion for summary judgment dismissing Plaintiffs' Labor Law §§ 240(1) and 241(6) claims is granted in part and denied in part. For the same reason triable issues of fact precluded Plaintiffs' from obtaining summary judgment on their Labor Law § 241(6) claims predicated on a violation of Industrial Code § 23-2.1(a)(1), those same issues of fact preclude summary dismissal of the Labor Law § 241(6) claims predicated on a violation of Industrial Code § 23-2.1(a)(1) (*see also Padilla v Touro College University System*, 204 AD3d 415, 416 [1st Dept 2022]).

Moreover, MCRT Northeast's and Allen Blvd's arguments failed to establish their *prima facie* entitlement to a finding that they are not proper Labor Law defendants. Allen Blvd may be held liable under Labor Law § 241(6) if they "had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor's statutory agent" (*see Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 192-93 [1st Dept 2011]). Allen Blvd was the sheetrock installer who instructed Mac-Lad where to deliver and place the sheetrock. Thus, Allen Blvd had the authority to supervise and control the placement, delivery, and installation of the sheetrock that allegedly caused Plaintiffs' injuries. MCRT Northeast's witness testified they were present at the Premises and are a subdivision of Mill Creek, which is sufficient for a jury to conclude MCRT Northeast is an agent of the general contractor, Mill Creek. However, Plaintiffs do not oppose dismissal of the remainder of their Labor Law § 241(6) claims. Therefore, the motion for summary judgment is granted to the extent of

dismissing the remainder of Plaintiffs' Labor Law § 241(6) claims not predicated on an alleged violation of Industrial Code § 23-2.1(a)(1).

Mill Creek, MCRT Northeast, Water Grant, and Allen Blvd's cross-motion for summary judgment dismissing Plaintiffs' Labor Law § 240(1) claim is denied. Although there may not have been a large height differential between Pearson and Lemke and the sheetrock piles, given testimony that the pile could have weighed approximately 3,000 pounds, there remain issues of fact as to whether Labor Law § 240(1) applies which precludes summary dismissal (*see, e.g. Touray v HFZ 11 Beach Street LLC*, 180 AD3d 507, 507 [1st Dept 2020]; *see also Ali v Sloan-Kettering Institute for Cancer Research*, 176 AD3d 561, 561 [1st Dept 2019]). Issues of fact regarding an actionable Labor Law § 240(1) claim are compounded as to whether the sheetrock piles were properly secured given the conflicting testimony and expert opinions.

Mac-Lad's cross motion for summary judgment dismissing all claims and crossclaims asserted against it is granted. The only parties to oppose Mac-Lad's cross-motion are the Plaintiffs, but Plaintiffs' own expert states in his report, exchanged by Plaintiffs' counsel, that "Maclad did not bear responsibility for the storage or staging of the material. It only placed the sheetrock as dictated by Allen Blvd foreman at the time of delivery" (*sic*) (*see* NYSCEF Doc. 268). This conclusion is buttressed by Third-Party Plaintiffs' expert, Vincent Pici, P.E. (NYSCEF Doc. 269). Moreover, Plaintiffs failed to allege in their Complaint any causes of action alleging violations of the Labor Law against Mac-Lad, instead only alleging Mac-Lad violated the Labor Law in their Bills of Particulars. Therefore, Plaintiffs' Complaint as alleged against Mac-Lad is dismissed. Because no party opposes dismissal of any crossclaims asserted against Mac-Lad, and because the Complaint against Mac-Lad has been dismissed, all crossclaims asserted against Mac-Lad are likewise dismissed.

Accordingly, it is hereby,

ORDERED that K&M’s motion for summary judgment dismissing the Third-Party Complaint asserted against it is granted and Third-Party Plaintiffs’ cross motion for summary judgment on their breach of contract for failure to procure insurance claim against K&M (Mot. Seq. 004) is denied; and it is further

ORDERED that Plaintiffs’ motion for summary judgment on their Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a)(1) (Mot. Seq. 005) is denied; and it is further

ORDERED that Mill Creek, MCRT Northeast, Water Grant, and Allen Blvd’s cross-motion for summary judgment dismissing Plaintiffs’ Labor Law § 240(1) and § 241(6) predicated on a violation of Industrial Code § 23-2.1(a)(1) (Mot. Seq. 005) is denied, but the cross-motion for summary judgment dismissing the remainder of Plaintiffs’ Labor Law § 241(6) claim is granted without opposition; and it is further

ORDERED that Mac-Lad’s cross motion for summary judgment dismissing all claims and crossclaims asserted against it is granted; and it is further

ORDERED that within ten days of entry, counsel for K&M shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

11/5/2025  
DATE

Mary V Rosado JJC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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