

Zarkowski v City of New York

2025 NY Slip Op 34681(U)

December 3, 2025

Supreme Court, New York County

Docket Number: Index No. 157418/2022

Judge: Richard G. Latin

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

PRESENT: HON. RICHARD G. LATIN PART 46M

Justice

-----X

ANTONI ZARKOWSKI,

Plaintiff,

- v -

THE CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, METRO NORTH
RAILROAD, NEW YORK CITY TRANSIT AUTHORITY,
LONG ISLAND RAILROAD COMPANY, MTA-LONG
ISLAND RAILROAD, MIDTOWN TRACKAGE VENTURES,
LLC, MIDTOWN TDR VENTURES LLC, MTA CAPITAL
CONSTRUCTION COMPANY

Defendant.

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INDEX NO. 157418/2022
MOTION DATE 06/25/2025,
07/22/2025
MOTION SEQ. NO. 002 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 139

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 140, 141, 142, 153

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

Plaintiff Antoni Zarkowski’s (“Zarkowski”) motion pursuant to CPLR 3212 for an order granting partial summary judgment on the issue of liability against defendants Metropolitan Transportation Authority (“MTA”) and MTA Capital Construction Company (“MTACCC”) (NYSCEF # 70) and defendants the City of New York, Metropolitan Transportation Authority, Metro North Railroad, New York City Transit Authority, Long Island Railroad Company, MTA – Long Island Railroad, Midtown Trackage Ventures, LLC., Midtown TDR Ventures, LLC, and MTA Capital Construction Company’s (collectively hereinafter, “defendants”) motion pursuant to CPLR 3212 for an order granting summary judgment to dismiss plaintiff’s causes of action for

common-law negligence and breach of Labor Law §§ 200, 240(1), and 241(6) (NYSCEF # 86) are determined as follows:

Background

Plaintiff sustained injuries as a result of falling from a ladder when a guardrail allegedly broke while plaintiff was ascending up the ladder (NYSCEF # 71 at 1). Plaintiff's employer was general contractor GCTC JV who was responsible for the project to which plaintiff was allegedly injured (NYSCEF # 76 at 49). Defendants' incident report also contains evidence to confirm plaintiff's employer was GCTC JV (NSYCEF # 81 at 1). Plaintiff's work involved "[p]redominantly construction of forms and building of forms for -- to fill with concrete" (NYSCEF # 122 at 39-40). Plaintiff testified that when he was climbing up the wooden ladder, the ladder moved precipitating this event (*id.* at 77). Plaintiff further testified that to secure his stability and safety, he grabbed the pole of a railing (*see id.*). The pole of the railing was in between the ladder and the wall (*see id.* at 78). Plaintiff testified the pole fell off. Plaintiff testified that "the ladder was not stable, and the rung of the ladder was twisted and wouldn't hold his leg (*see id.*). Plaintiff alleges that as a result he fell off the ladder on a concrete floor (*see id.*).

On June 25, 2025, plaintiff filed a motion pursuant to CPLR 3212 seeking summary judgment on the issue of liability against defendants Metropolitan Transportation Authority ("MTA") and MTA Capital Construction Company ("MTACCC") under Labor Law §§ 240(1) and 241(6) predicated upon Industrial Codes 23-1.5(c)(3) and 23-1.21(4)(i), alleging both parties are liable as owner and agent for any alleged injury (NYSCEF # 70).

Defendants oppose plaintiff's motion and filed a motion pursuant to CPLR 3212 for an order seeking summary judgment to dismiss plaintiff's causes of action for common-law negligence and breach of Labor Law §§ 200, 240(1), and 241(6) (NYSCEF # 86).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Liability Under Labor Law § 240(1)

Labor Law § 240(1) mandates that building owners and contractors “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” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 6-7 [2011], quoting Labor Law § 240(1)).

The statute imposes absolute liability on building owners and contractors whose failure to “provide proper protection to workers employed on a construction site” constitutes proximate cause of injury to a construction worker (*Wilinski*, 18 NY3d at 7, quoting *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490 [1995]). An “accident alone” does not sufficiently establish a violation of Labor Law § 240(1) or causation (*Cutaia v Bd. of Managers of 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038 [2022]). In addition, Labor Law § 240(1) is designed to

protect against “harm directly flowing from the application of the force of gravity to an object or person” (*id.*, quoting *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]).

Labor Law 240(1) is to be interpreted as “liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]). Thus, this section has been interpreted to impose absolute liability for a breach which has proximately caused an injury (*id.*). “Negligence, if any, of the injured worker is of no consequence” (*id.*; see *Bland v Manocherian*, 66 NY2d 452, 459-461 [1985]) In furtherance of the legislature’s purpose of protecting workers “against the known hazards of the occupation” § 240(1) is nondelegable and that “an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control” (*Rocovich*, 78 NY2d at 513).

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law” (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235-36 [1st Dept 2009], citing *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985]). Thus, “[i]n order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries” (*see id.* at 36; see also *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 289 [2003])

Here, plaintiff made a prima facie showing that his injuries were proximately caused by a violation of Labor Law § 240(1) through his testimony that he was climbing up a wooden ladder when the ladder moved and was not stable (NYSCEF # 122 at 77). Plaintiff further testified that:

“[t]he pole fell off, and I tried to place my left leg on that third rung, but the ladder there was not stable, it was not stable, and the rung was twisted, and it didn't hold my left leg. And with the major impact, I fell down on a concrete 20 floor” (*id.* at 78).

In addition, defendants' "Incident Report" from Exhibit 10 stated that the direct cause of the accident was a

"previously installed guardrail was unintentionally grabbed while employee was accessing ladder, rail broke causing employee to step backwards onto the ground below causing discomfort to leg" (NYSCEF # 81 at 4).

Thus, plaintiff has made a prima facie showing as to his Labor Law § 240(1) claim by demonstrating that his falling from a ladder was a gravity-related risk against which defendants failed to provide adequate protection (*see Barreto v Bd. of Managers of 545 W. 110th St. Condominium*, 234 AD3d 515, 516 [1st Dept 2025]; *see also Loaliza v Museum of Arts and Design*, 228 AD3d 511, 512 [1st Dept 2024]). Here, plaintiff's injury arose from a broken rail while ascending a ladder, as well as an allegedly defective rung of a ladder (NYSCEF # 122 at 78). Both alleged issues contributed to plaintiff's fall and injury (*see id.*). Whether or not the ladder had proper extension rails, or that the guardrail was not a safety device for the ladder would not change the court's analysis (NYSCEF # 134 at 7).

In addition, defendants' argument that plaintiff was the sole proximate cause of his incident by choosing to misuse equipment and failing to maintain three points of contact is unavailing (NYSCEF # 134 at 8; NYSCEF # 81 at 4). Such acts by plaintiff would at most merely qualify as comparative negligence, which is not a defense to a Labor Law 240(1) claim (*see Barreto*, 234 AD3d at 516 [holding that "plaintiff's testimony that he properly positioned the rope grab above his head prior to the accident, would support the conclusion that plaintiff was, at most, only comparatively negligent"]; *see also Morales v 2400 Ryer Ave. Realty, LLC*, 190 AD3d 647, 647 [1st Dept 2021]; *see also Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.*, 176 AD3d 627, 628 [1st Dept 2019]). Here, defendants' incidence report stated the guardrail "broke causing

employee to step backwards onto the ground below causing discomfort to leg” (NYSCEF # 81 at 4). Defendants also did not put into issue the rung of the ladder twisting based on plaintiff’s testimony (NYSCEF # 122 at 78).

Accordingly, plaintiff’s motion under Labor Law 240(1) is granted, and defendants’ motion to dismiss plaintiff’s Labor Law 240(1) is denied.

Liability Under Labor Law 241(6)

Labor Law § 241(6) provides, in pertinent part, that all areas where construction is being performed should provide reasonable and adequate protection and safety to persons employed or frequenting such areas. To prevail on a cause of action under § 241(6), however, a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor (*see Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 392 [1st Dept 1997], citing *Ross*, 81 NY2d at 505; *see also Kulis v Xerox Corp.*, 231 AD2d 922, 923 [4th Dept 1996]).

Plaintiff claims Industrial Code §§ 23–1.5(c)(3) and 23-1.21(4)(i) were violated (NYSCEF # 71 at 16-18). Plaintiff does not oppose defendants’ motion to dismiss plaintiff’s other Labor Law § 241(6) claims except for claims predicated on Industrial Codes §§ 23–1.5(c)(3), 23-1.21(4)(i), and 23-1.15 (NYSCEF # 141 at 1-3; NYSCEF # 153 at 2-3, 9-12). Therefore, the other causes of action, with the exception of Labor Law § 241(6) claims predicated on Industrial Code §§ 23–1.5(c)(3), 23-1.21(4)(i), and 23-1.15, are dismissed. Thus, the Labor Law § 241(6) claims predicated on Industrial Codes §§ 23–1.5(c)(3), 23-1.21(4)(i), and 23-1.15 will be examined.

Industrial Code § 23–1.5(c)(3)

Defendants assert that there was no violation of 12 NYCRR 23–1.5(c) because the broken guardrail post was “not a safety device meant to be used for purposes of ascending and descending

the ladder. The guardrail itself is a protection, a physical barrier to prevent falling into a hole or elevation below” (NYSCEF # 134 at 17). Industrial Code § 23–1.5(c)(3) provides:

“(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.”

In *Becerra*, the court held that 12 NYCRR 23–1.5(c) followed a similar structure as 12 NYCRR 23–9.2(a), which stated “[u]pon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement” (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015]) In *Misicki*, the court held that 12 NYCRR 23–9.2(a) imposed an affirmative duty which would constitute a violation to support a Labor Law § 241(6) claim (*see Misicki v Caradonna*, 12 NY3d 511, 521 [2009]). Based on the findings by the *Misicki* court, the *Becerra* court found that 12 NYCRR 23–1.5(c) “is explicitly concerned with the condition of equipment and safeguards” and prohibits the use of equipment that is not “in good repair and in safe working condition” (*Becerra*, 126 AD3d at 559, citing § 23–1.5 (c)(1)). Thus, a violation of section (c)(3) would provide a basis for liability under Labor Law § 241(6) as long as such railings were “ordinarily or originally provided with safety guards” (*id.* [holding a violation would be warranted if angle grinders were ordinarily or originally provided with safety guards]).

Here, 12 NYCRR 23–1.5(c) was violated. 12 NYCRR 23–1.5(c) explicitly states all safety devices must be kept in sound working condition, and all damaged or defected devices must be repaired or restored. There is no dispute that the guardrail broke when plaintiff tried to reach for the guardrail, as stated in defendants’ incident report (NYSCEF # 81 at 4). Defendants’ incident report also admitted that the guardrail was not in working order, which stated that the “previously installed guardrail should have been removed to avoid unintentional usage” (*id.*). Accordingly,

plaintiff's motion under its Labor Law 241(6) claim predicated on 12 NYCRR 23-1.5(c) is granted, and defendants' motion dismiss under that claim is denied.

Industrial Code §23-1.21(4)(i)

Industrial Code §23-1.21(4)(i) provides:

“(i) 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 a 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.”

Plaintiff asserts that defendants failed to submit any evidence that at the time of the accident, the ladder was nailed or securely fastened in place in accordance to §23-1.21(4)(i) (NYSCEF # 139 at 11). In addition, plaintiff avers defendants' investigator affidavit lacked knowledge and

“[h]e admittedly only took the photographs and made his initial observations five days after the accident with absolutely no indication, let alone proof, that the ladder, its rails, the handrail/guardrail, the surrounding areas or any of the other items depicted or referenced were in the same condition that they were in at the time of the accident” (*id.*).

Defendants' investigator affirmed that the he saw the ladder and it was nailed in place at the time of the accident (NYSCEF # 125 ¶ 9). In contrast, when plaintiff was asked if the ladder was nailed to the wall, plaintiff testified he did not know (NYSCEF # 122 at 80). Here, the record demonstrates there is an issue of fact on whether Industrial Code §23-1.21(4)(i) was violated. Accordingly, plaintiff's motion under its Labor Law 241(6) claim predicated on § 23-1.21(4)(i) is denied, and defendants' motion under that claim is also denied.

Industrial Code § 23-1.15. Safety railing

Industrial Code § 23-1.15 provides:

“Whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:

(a) A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than eight feet.

(b) A one inch by four inch horizontal midrail.

(c) A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

(d) The hand rail of every safety railing shall be smooth and free from splinters and protruding nails.

(e) Other material or construction may be used for safety railings required by this Part (rule) provided such assemblies have equivalent strength and assure equivalent safety.”

Industrial Code § 23–1.15 applies to standards for safety railings (*see Ramirez v Metro. Transp. Auth.*, 106 AD3d 799, 801 [2d Dept 2013]). Here, both defendants’ incident report and plaintiff’s deposition provided a showing that the railing broke and contributed to plaintiff’s injury (NYSCEF # 122 at 78; NYSCEF # 81 at 4). The breaking of the rail also provides a showing that defendants failed to provide a railing that was “securely supported” (12 NYCRR 23–1.15(a)). Contrary to defendant’s contention, plaintiff’s deposition testimony established, *prima facie*, that the unstable handrail, which broke and allegedly contributed to plaintiff’s fall and caused him to lose his balance, was a proximate cause of the accident (*see Chiarella v New York State Thruway Auth.*, 230 AD3d 463, 466 [2d Dept 2024]). Whether the broken railing was part of the ladder or not remains a question of fact. Defendants’ incident report characterizes the railing as a “guardrail,” providing an inference that the purpose of the railing was to guard or provide safety within the ambit of Industrial Code § 23–1.15. Thus, because a question of fact exists, defendants’

motion to dismiss plaintiff's Labor Law 241(6) claim predicated on Industrial Code § 23–1.15 is denied.

Labor Law § 200 / Common Law Negligence

Labor Law § 200 is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (*see Lombardi v Stout*, 80 NY2d 290, 294-95 [1992]; *see also Allen v Cloutier Const. Corp.*, 44 NY2d 290, 299 [1978]). It is settled law 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 (*see Lombardi*, 80 NY2d at 295). However, “[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*Vazquez v Takara Condominium*, 145 AD3d 627, 628 [1st Dept 2016], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). In other words, a Labor Law § 200 requires a showing that a party had “the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Carty v Port Auth. of New York and New Jersey*, 32 AD3d 732, 732-33 [1st Dept 2006], quoting *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]).

Here, a question of fact exists on whether defendants created or had notice of the alleged defective condition (*see Vazquez*, 145 AD3d at 628 [holding that plaintiffs failed to show defendants created or had notice of the alleged slippery condition]). Moreover, defendants failed to provide sufficient evidence that defendants were not responsible “for supervising, controlling and directing [of general contractor GCT] employees, or the means and methods by which such employees were to perform their work” (*Carty*, 32 AD3d at 733). Defendants’ witness Joseph

Christen, who was the senior vice president of MTA Capital Construction, testified that his department would follow up on issues and “make sure that the corrective action was taken to repair, replace, or whatever, the defective work” (NYSCEF # 79 at 19). Thus, whether defendants had notice regarding the alleged defects which contributed to plaintiff’s injury remains a question of fact.

Mere “monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200” (*Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] [holding defendants cannot be held liable under Labor Law 200 because the accident was caused not by a contractor’s methods but by a defect in the premises itself of which defendants had constructive notice]).

Here, while plaintiff “did not receive instructions or directions from anyone other than his own company,” defendants can be viewed to be liable to whether they contributed or had knowledge of the alleged defective working condition (*D’Angelo v Legacy Yards Tenant LLC*, 237 AD3d 607, 608 [1st Dept 2025]; *see also Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]). At his deposition, Mr. Christen testified he would “periodically walk the jobsite to get a firsthand knowledge of the progress of the work” (NYSCEF # 79 at 38). By physically walking around the jobsite, Mr. Christen could have been made aware of the alleged defective working condition to qualify as to having notice (*see Carty*, 32 AD3d at 733).

Thus, there remains a question of fact as to whether “defendants established that they did not actually exercise supervisory control over the injury-producing work” (*Villanueva*, 162 AD3d at 406). Moreover, because defendants could be seen to have “created or had prior notice of allegedly defective conditions, the causes of action under § 200 and for common-law negligence”

defendants' motion seeking to dismiss such claims is denied (*Carty*, 32 AD3d at 733; *see also Bond v York Hunter Const., Inc.*, 95 NY2d 883, 885 [2000]).

Conclusion

WHEREFORE, it is hereby:

ORDERED that plaintiff Antoni Zarkowski's motion pursuant to CPLR 3212 for an order granting partial summary judgment on the issue of liability against defendants Metropolitan Transportation Authority and MTA Capital Construction Company for his Labor Law §§ 240(1) and 241(6) predicated on Industrial Code § 23-1.5(c)(3) is granted. Plaintiff's Labor Law § 241(6) predicated on Industrial Code §23-1.21(4)(i) is denied; and it is further

ORDERED that defendants the City of New York, Metropolitan Transportation Authority, Metro North Railroad, New York City Transit Authority, Long Island Railroad Company, MTA – Long Island Railroad, Midtown Trackage Ventures, LLC., Midtown TDR Ventures, LLC, and MTA Capital Construction Company's (collectively "Defendants") motion pursuant to CPLR 3212 for an order granting summary judgment to dismiss plaintiff's causes of action for common-law negligence and breach of Labor Law § 200 is denied; and it is further

ORDERED that defendants' motion pursuant to CPLR 3212 to dismiss plaintiff's Labor Law §§ 240(1) and 241(6) claims predicated on Industrial Codes §§ 23-1.5(c)(3), 23-1.21(4)(i), and 23-1.15 are denied; and it is further

ORDERED that defendants' motion to dismiss all of plaintiff's causes of action under Labor Law § 241(6) claims is granted, with the exception of claims predicated on Industrial Code §§ 23-1.5(c)(3), 23-1.21(4)(i), and 23-1.15, and it is further

ORDERED that, within 20 days from entry of this order, defendant 321 West shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

12/3/2025
DATE


RICHARD G. LATIN, 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