

**Ortiz v Federation Herkimer Hous. Dev. Fund Corp.**

2025 NY Slip Op 35019(U)

December 23, 2025

Supreme Court, Kings County

Docket Number: Index No. 517126/2021

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23<sup>rd</sup> day of December, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
CESAR LUIS MINO ORTIZ,

Plaintiff,

-against-

FEDERATION HERKIMER HOUSING  
DEVELOPMENT FUND CORPORATION,  
FEDERATION HERKIMER GARDENS LLC,  
FEDERATION HERKIMER, LLC,  
MEGA CONTRACTING GROUP LLC, and  
MEGA CONTRACTING INC.,

Defendants.

-----X  
FEDERATION HERKIMER HOUSING  
DEVELOPMENT FUND CORPORATION,  
FEDERATION HERKIMER GARDENS LLC,  
FEDERATION HERKIMER, LLC,  
MEGA CONTRACTING GROUP LLC, and  
MEGA CONTRACTING INC.,

Third-Party Plaintiffs,

-against-

CAPITAL CONCRETE NY INC.,

Third-Party Defendant.  
-----X

Index No.: 517126/2021

**DECISION AND ORDER**  
(Mot. Seq. No. 3)

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Amended Affirmation in Support/Amended Memorandum of Law/ Exhibits.....	54, 57 – 72
Affirmation in Opposition/ .....	75
Reply Affirmation.....	78

Upon the foregoing papers, Plaintiff Cesar Luis Mino Ortiz (“Plaintiff”) moves, pursuant to CPLR 3212, for an order (a) pursuant to CPLR 3212, granting him summary judgment on his Labor Law § 241 (6) cause of action against Defendants Federation Herkimer Housing Development Fund Corporation, Federation Herkimer Gardens LLC (collectively, the “Federation Defendants”), and Mega Contracting Group LLC (“Mega”, together with the Federation Defendants, “Defendants”),<sup>1</sup> and on his Labor Law § 200 and common law negligence causes of action against Mega; and (b) dismissing Defendants’ affirmative defenses alleging Plaintiff’s culpable conduct and/or comparative negligence (Mot. Seq. No. 3). Defendants oppose the motion.

This matter involves an accident that occurred on April 27, 2021, at a construction site located at 491 Herkimer Street in Brooklyn, New York (the “Premises”).<sup>2</sup> Plaintiff, a rebar worker, alleges that on the date of the accident, he and his coworker Henry were tasked with building a wall. To do so, Plaintiff testified that they had to carry the rebars from a location more than 100 feet away to the area where they were working. The path they had to take was between two walls, which were approximately 20 to 30 feet long and two or three meters wide. Plaintiff testified that there were other people performing construction work in that path, who had hammers, other tools and wood. Plaintiff further testified that there was a carpenter working between the two walls about five to six feet away from where the accident occurred.

Plaintiff stated that he had made four or five previous trips before his accident. According to Plaintiff, he and Henry were carrying two pieces of rebar and were about 10 to 15 feet from the installation site when he tripped over a wooden 2x4 and fell. Plaintiff testified that the 2x4 was not on the ground when he went to pick up the rebars 10 to 12 minutes prior to his accident.

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<sup>1</sup> The action was discontinued as to Defendants Mega Contracting Inc. and Federation Herkimer LLC (*see* NYSCEF Doc Nos. 62-63).

<sup>2</sup> The Premises is owned by the Federation Defendants. Mega was the general contractor for the construction project and contracted with Plaintiff’s employer, third-party defendant Capital Concrete NY Inc. (“Capital”).

In his motion, Plaintiff moves for summary judgment on his Labor Law § 241 (6) cause of action on the grounds that Defendants violated Industrial Code §§ 23-1.7 (e) (1) and (e) (2).<sup>3</sup> Plaintiff contends that to perform his task, he had to go through a passageway where other people were doing construction work. Plaintiff further contends that Defendants' failure to protect him from tripping hazards proximately caused his accident and injuries. Plaintiff also argues that he was not utilizing the 2x4; thus, it was not integral to the work he was performing.

With respect to his Labor Law § 200 and common law negligence claims, Plaintiff asserts that he is entitled to summary judgment because Mega had the authority to control the injury-producing work which proximately led to Plaintiff's accident, as well as constructive notice of the hazardous condition. As the general contractor, Plaintiff argues that Mega had the authority to control the manner in which the work, including the work done by its subcontractors, was performed. In support, Plaintiff cites to the deposition transcript of Mega's construction superintendent, Makram Halabi. At his deposition, Mr. Halabi testified, inter alia, that he had the authority to stop the work if he observed a condition that was not safe or an individual working in an unsafe manner. Mr. Halabi also testified that Mega was responsible for maintaining clear egress and ingress paths. In addition, Plaintiff contends that there were always 2x4s thrown down in the area. Thus, according to Plaintiff, Mega failed to conduct sufficient inspections of the hazards presented by the 2x4s, which would have been readily observable upon reasonable inspection.

In his motion, Plaintiff also seeks dismissal of Defendants' affirmative defenses regarding comparative negligence and/or culpable conduct. According to Plaintiff, there is no evidence that Plaintiff was in any way culpable for his incident and resulting injuries.

In opposition, Defendants argue that there are material issues of fact concerning Plaintiff's Labor Law § 241 (6) claim. Defendants first contend that the area where Plaintiff fell was a work area, and not a passageway. Thus, Defendants assert that Industrial Code § 23-1.7 (e) (1) does not apply. Defendants next contend that Industrial Code § 23-1.7 (e) (2) is inapplicable because the subject 2x4 was integral to the work being performed. Defendants note that a carpenter was

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<sup>3</sup> Industrial Code § 23-1.7 (e), addressing tripping and other hazards, states that:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed (12 NYCRR 23-1.7 [e]).

actively working with wood to build forms five to six feet from where Plaintiff fell. According to Defendants, this work was integral to the building of the foundation wall work in which Plaintiff was engaged. Defendants further note that Plaintiff testified that the 2x4 was not present 10 to 12 minutes before his accident. Defendants argue that there is, at best, an issue of fact as to whether the 2x4 was integral to the work in which he was engaged, rather than debris or scattered material.

Turning to Plaintiff's Labor Law § 200 and common law negligence claims, Defendants aver that, pursuant to a contract between Mega and Capital, Capital was responsible for the supervision of its workers and their safety. Since Mega did not have authority to direct or control the means and methods of Capital's work, Defendants argue that it cannot be held liable. In addition, Defendants cite to Plaintiff's deposition transcript, in which he testified that he received all instructions and directions from Capital's foreman Mike. Defendants also assert that the 2x4 was open and obvious and not inherently dangerous. Defendants note that since Plaintiff's coworker, who was ahead of Plaintiff, managed to avoid the 2x4, it is indicative of the fact that it was observable. Defendants further argue that there is no evidence that they had notice. Plaintiff testified that he had walked back and forth four to five times without incident and that 10 to 12 minutes prior to his fall, there was no wood on the ground. Defendants argue that Plaintiff has not proffered any evidence that Mega was present in the area in the 10 to 12 minutes before he fell.

With respect to the portion of Plaintiff's motion seeking dismissal of Defendants' affirmative defenses concerning comparative negligence and culpable conduct, Defendants argue that his failure to observe an open and obvious condition and/or pay attention to where he was walking is a valid affirmative defense and the sole proximate cause of his accident. Thus, Defendants aver that Plaintiff cannot demonstrate freedom from negligence.

In reply, Plaintiff maintains that the area where the accident occurred was a passageway and a "floor" where Plaintiff was "working." Thus, Plaintiff argues that both subsections of Industrial Code § 23-1.7 (e) apply. Plaintiff further disputes that the 2x4 was integral to the work Plaintiff was performing—carrying rebar from one location to another. Plaintiff argues that it is irrelevant whether the 2x4 was being used in the work being performed by others at the time. Moreover, Plaintiff contends that Mega had authority to oversee and control basic housekeeping duties, including ensuring that the site was clean. Plaintiff also argues that Mr. Halabi was responsible for overseeing the work force on site and ensuring workers were using equipment properly and complying with Mega's written site safety plan. Thus, Plaintiff argues that he is

entitled to summary judgment on his Labor Law § 200 and common law negligence claims against Mega. Though Plaintiff maintains that Mega had constructive notice, he argues that alternatively, there are issues of fact since Mega did not proffer evidence as to when Defendants last inspected the subject area prior to the accident. Since there is no evidence he was in any way culpable, Plaintiff asserts that he cannot be charged with any comparative negligence or culpable conduct.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact’” (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citations omitted]).

“The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]).

The Court will first address Plaintiff’s Labor Law § 241 (6) cause of action. “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 . . . all areas in which construction . . . work is being performed” (*Lopez v New York City Dept. of Env’tl. Protection*, 123 AD3d 982, 983 [2d Dept 2014], *lv denied* 26 NY3d 905 [2015]). “As a predicate to a section 241 (6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by

the Commissioner of the Department of Labor in the Industrial Code” (*Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]). Here, Plaintiff has alleged violations of Industrial Code §§ 23-1.7 (e) (1) and (2).

According to Plaintiff, since *he* was not using the 2x4 and it was not integral to the work *he* was performing, there are no triable issues of fact as to the applicability of Section 23-1.7 (e). At his deposition, Plaintiff testified that carpenters were working in the area (Pl tr at 143, lines 7-11). When asked if the carpenters were using the 2x4s approximately two to three feet long, Plaintiff answered “Yes, Of course they use a two-by-four, but it doesn’t have to be 2 or 3 feet long...” (*id.* at 143, lines 12-25). However, Plaintiff argues that “the fact that the 2x4s may have been utilized during other parts of the construction process is of no consequence” (NYSCEF Doc No. 55, ¶ 26). Contrary to Plaintiff’s contention, that fact is determinative of his Labor Law § 241 (6) claim.

Whether the area where Plaintiff tripped and fell is considered a passageway (23-1.7 [e] [1]) or a work area (23-1.7 [e] [2]), neither subsection “applies where the object over which the plaintiff trips is an integral part of construction” (*Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022]). “The [integral to the work] defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident” (*Krzyzanowski v City of NY*, 179 AD3d 479, 481 [1st Dept 2020], citing *O’Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]).<sup>4</sup>

Two of the cases cited by Plaintiff establish that an alleged dangerous condition can be deemed an integral part of the construction, even where it did not relate to Plaintiff’s work (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022] [finding that defendants did not establish defense applied on other grounds]; *Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668, 668 [1st Dept 2019] [finding that debris was “not inherent in, or an integral part of, the work being performed by either plaintiff electrician *or* [the demolition contractor] at the time of the accident”] [emphasis added]).

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<sup>4</sup> The Second Department’s decision in *Martinez v 281 Broadway Holdings, LLC* (183 AD3d 712 [2d Dept 2020]) further illustrates this point. In that case, plaintiff, an employee of the cement subcontractor, was carrying a sheet of wood and metal when his foot became entangled in electrical wires hanging from the ceiling. The Second Department determined that the electrical subcontractor had established that the electrical wires at issue were an integral part of the construction; thus, the requirements of Section 23-1.7 (e) (2) were inapplicable (*Martinez*, 183 AD3d at 714). Therefore, it was inconsequential that the task plaintiff was performing at the time of his accident had nothing to do with the wires.

Since Plaintiff did not establish that the 2x4 was not integral to the *construction*, the portion of his motion seeking summary judgment as to his Labor Law § 241 (6) cause of action is denied.

The Court next turns to Plaintiff's Labor Law § 200 and common law negligence causes of action against Mega. "Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors and their agents to provide workers with a safe place to work" (*Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020], quoting *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site and those involving the manner in which the work is performed" (*Southerton v City of New York*, 203 AD3d 977, 979-98 [2d Dept 2022], quoting *Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). Here, Plaintiff is asserting Mega is liable under both categories.

The Court will discuss the first category. "When a claim arises out of alleged defects or dangers involving the manner in which the work was performed, a general contractor will be held liable under Labor Law § 200 only if it possessed the authority to supervise or control the means and methods of the work" (*Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1017 [2d Dept 2023]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Roblero v Bais Ruchel High School, Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Gasques v State of NY*, 59 AD3d 666, 668 [2d Dept 2009], *affd* 14 NY3d 869 [2010]).

Plaintiff asserts that Mega had the authority to supervise and control the injury-producing work. In support, Plaintiff cites to Mr. Halabi's deposition, in which he testified that he was responsible for (i) ensuring workers were using equipment properly, (ii) conducting weekly safety toolbox talks, and (iii) ensuring workers complied with Mega's written safety plan. In addition, Plaintiff asserts that Mr. Halabi performed daily walkthroughs and Mega employed laborers to ensure the area was clean. In opposition, Defendants argue that Plaintiff received instructions and

directions from his employer Capital. Moreover, Defendants contend that pursuant to the contract, Capital assumed sole responsibility for the supervision and safety of its workers.

Generally, a defendant's "authority to monitor safety conditions at the work site is merely indicative of their 'general supervision and coordination of the work site and is insufficient to trigger liability'" (*Portalatin v Tully Constr. Co.-E.E. Cruz & Co.*, 155 AD3d 799, 800 [2d Dept 2017]). While Mr. Halabi testified that "[i]n general, subcontractors were required to maintain their own housekeeping," he also stated that Mega employed laborers to perform "basic housekeeping duties," such as "ensuring sites are clean" (Halabi tr at 23, lines 12-22; at 104, lines 10-12). The Court finds that there are issues of fact as to whether Mega had the authority to supervise or control the means and methods of the work.

The Court will now address the second category. Here, Plaintiff has not argued that Mega created the condition or had actual notice of it. Thus, the Court's analysis is limited to determining whether Plaintiff established, prima facie, that Mega had constructive notice. "In order to prove constructive notice, the plaintiff [is] required to present evidence that the condition was apparent and that it existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it" (*Shildkrout v Bd. of Educ.*, 173 AD2d 603, 604 [2d Dept 1991], citing *Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, it is undisputed that Plaintiff had taken four or five trips without incident prior to the accident. At his deposition, Plaintiff stated, "[w]hen we went to get the bars, [the subject 2x4] was not there, it wasn't there" (Pl tr at 63, lines 15-16). Plaintiff also testified that 10 to 12 minutes had passed between the time he went to get the bars and the time his accident occurred (Pl tr at 64, lines 8-15). Accordingly, Plaintiff failed to demonstrate that the 2x4 was visible and apparent for a sufficient length of time for Mega to have discovered and remedied it (*see Kanarskee v Pergament Distributions*, 201 AD2d 704, 705 [2d Dept 1994]; *Scammell v Flum*, 225 AD3d 726, 727 [2d Dept 2024]).

Plaintiff argues that 2x4s thrown along passageways was a "reoccurring condition." Plaintiff further argues that this hazard would have been readily observable upon reasonable inspection, but Mega failed to conduct "sufficient inspections." Thus, Plaintiff contends that this constitutes constructive notice. While Plaintiff testified that "there was always two-by-fours thrown down" in the area (Pl tr at 92, lines 7-11), he did not present evidence showing that Mega had "actual knowledge of an ongoing and recurring dangerous condition [such that it] may be

charged with constructive notice” (*Cappolla v City of NY*, 302 AD2d 547, 548 [2d Dept 2003]). In fact, Plaintiff testified that he did not complain to anyone about the presence of 2x4s in the area (Pl tr 92, lines 12-20). Moreover, Plaintiff testified that the 2x4 was not present 10 to 12 minutes before his accident (*id.* at 64, lines 8-15).

Since Plaintiff did not meet his burden establishing entitlement to judgment as a matter of law as to this second category, it is not necessary to consider the sufficiency of Defendants’ opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).


The Court will discuss the portion of Plaintiff’s motion seeking dismissal of Defendants’ affirmative defenses of culpable conduct or comparative negligence. “Generally, the party moving for dismissal of a defense as a matter of law bears the burden of proving its entitlement to such relief” (*Rossi v Flying Horse Farm, Inc.*, 131 AD3d 1033, 1036 [2d Dept 2015]). Defendants assert that the condition was open and obvious. Nonetheless, “[t]he issue of whether a dangerous condition is open and obvious is fact specific, and thus usually a question for the jury” (*Ruiz v Hart Elm Corp.*, 44 AD3d 842, 843 [2d Dept 2007]). Thus, this portion of Plaintiff’s motion is denied.

Therefore, it is hereby

ORDERED that Plaintiff’s motion (Mot. Seq. No. 3) for summary judgment is denied.

To the extent not specifically addressed herein, the parties’ remaining contentions and arguments were considered and found to be without merit and/or moot.

This constitutes the decision and order of the court.

  
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Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**