E#004

Supreme Court of the State of New York
County of Bronx Part IA-9

---x

Danilo Dominguez Martinez
Plaintiff

-against-

Amalgamated Housing Corporation,
Quality Building Construction LLC
Defendants

---x

Amalgamated Housing Corporation,
Quality Building Construction LLC,
Third Party Plaintiffs

-against-

Virjedas Restoration Inc.,
Third Party Defendant

---x

Amalgamated Housing Corporation,
Quality Building Construction LLC,
Second Third Party Plaintiffs

-against-

FPHR Construction Corp.,
Second Third-Party Defendant

---x

Index No. 32060-2019E
Motion seq #4

DECISION & ORDER
Hon. Myrna Socorro, J.S.C.

The following e-filed documents, listed by NYSCEF Doc. #73-98; 100; and 102, were read on this motion for **SUMMARY JUDGMENT**, which motion was orally argued and marked submitted on August 23, 2024.

According to the plaintiff, on the day of the accident on August 5, 2019: he was employed by FPHR Construction Corp. ("FPHR"); he was on the roof at 98 Van Cortland Park South, Bronx, New York ("subject premises") with a helper in the process of erecting a scaffold; he was using a ladder leaning against the wall on the roof to the construct the scaffold; the ladder was tied at the top and a coworker held the footing of the ladder in the bottom; plaintiff had to move the ladder to another location in order to continue building the scaffold so he untied the ladder; while his coworker held the bottom of the ladder and as plaintiff was going down the ladder, the ladder moved to the side, which caused him to fall approximately 12-13 feet; he was not given any harness, lanyard or lifeline.

Plaintiff now moves for summary judgment on his Labor Law §240(1) claim arguing that he was

supplied with an inadequate ladder, which shifted. Plaintiff also moves for summary judgment on his Labor Law §241(6) cause of action as predicated on Industrial Code §23-1.21(b)(4)(iv).

Defendants Amalgamated and Quality oppose plaintiff's motion and cross-move for summary judgment on plaintiff's Labor Law §240(1), §241(6) and §200/common law negligence claims. As a preliminary matter, this Court notes that plaintiff did not oppose defendants' motion to dismiss his Labor Law §200/common law negligence. Therefore, the branch of the motion seeking to dismiss plaintiff's Labor Law §200/common law negligence is **granted** as unopposed.

In support of their papers, defendants note that plaintiff testified that when he climbed the ladder, the ladder was securely tied with a rope at the top and his coworker was holding it down at the bottom. They highlight plaintiff's testimony that he untied the top of the ladder and as he descended, he fell. Defendants further aver that plaintiff had other ladders available to him at the site and did not have to move the secured ladder. Thus, it is defendants' argument that plaintiff was the sole proximate cause of his accident for untying the rope and descending from the untied ladder.

Summary Judgment

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b];Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 [1985].

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The 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, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, 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." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

Upon a review of the motion papers, this Court finds that Plaintiff established his *prima facie* burden of a Labor Law §240(1) violation through his testimony that the subject ladder moved to the side as he was descending, which served as a proximate cause of the accident. *See Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650 [1st Dept 2021]; *Merino v Continental Towers Condominium*, 159 AD3d 471 [1st Dept 2018]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999]. "It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker." *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

The Court notes that plaintiff's testimony establishes that in order to continue erecting the scaffold, plaintiff had to change the location of the ladder and therefore had to untie it and descend in order to secure it at another location. Even though defendants allege that plaintiff testified that there were other ladders available for plaintiff to use, there is no evidence to support such claim. Plaintiff

testified that there were on-site storage supplies and equipment such as hammers, however, he did not testify that there were more ladders in storage. Therefore, this Court finds that in opposition, defendants have failed to raise an issue of fact.

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim is **granted** and defendants' cross-motion to dismiss Labor Law §240(1) is **denied.**

Labor Law §241(6)

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. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

Plaintiff moves for summary judgment on his Labor Law §241(6) claim as predicated on Industrial Code § 23-1.21(b)(4)(iv). Defendants cross-move to dismiss the claim as predicated on §23-1.21(b)(4)(iv).

Industrial Code §23-1.21(b)(4)(iv) provides:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is 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.

Plaintiff testified that he was working at a height of about 14-16 feet. He further testified, as indicated above, that he had to untie the ladder so that it could be moved to another location. Plaintiff argues that defendants violated this provision because they did not provide plaintiff with a means of transitioning his work without having to use an unsecured ladder.

Defendants argue that since plaintiff has admitted the subject ladder was secured with a rope at the upper end of the ladder and a coworker was stationed at the bottom holding it in place, that therefore shows that this section was not violated.

This Court finds that plaintiff has established that defendants violated Industrial Code §23-1.21(b)(4)(iv) as there is no evidence that there was any mechanism in place for plaintiff to transition his work from one place to another. Plaintiff testified that the was 14-16 feet high, which would is more than the 10 feet and above the ladder footing. Therefore mechanical means are required for securing the upper end of the ladder and the lower end to be held in place by a person or tied down. Defendants have not submitted any evidence that they provided Plaintiff with any safety mechanisms to use during transitioning of the ladder when the ladder becomes unsecured for moving.

Therefore, plaintiff's branch of motion for summary judgment on Industrial Code §23-1.21(b)(4)(iv) is **granted**, and defendant's cross motion to dismiss said industrial code is denied.

Accordingly, it is

ORDERED, that plaintiff's branches of motion for summary judgment on his Labor Law §240(1) and Labor Law §241(6) claim as predicated on Industrial Code §23-1.21(b)(4)(iv) claim is **GRANTED**; and it is further

ORDERED, that defendants' branches of cross-motion for summary judgment to dismiss plaintiff's Labor Law §240(1) and Labor Law §241(6) claim are **DENIED**; and it is further

ORDERED, that defendants' cross-motion for summary judgment to dismiss plaintiff's Labor Law §200/common law negligence claim is **GRANTED**; and it is further

ORDERED, that movants shall serve and file a Notice of Entry of this Decision and Order within thirty (30) days from the date herein.

This constitutes the decision and order of this court.

Dated: September 25, 2025

HON. MYRNA SOCORRO, J.S.C.