

**Cox v Forest Hills MHA Hous. Dev. Fund Corp.**

2025 NY Slip Op 35289(U)

June 23, 2025

Supreme Court, Queens County

Docket Number: Index No. 723471/20

Judge: Timothy J. Dufficy

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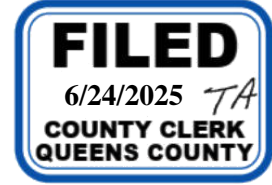
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**



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**EARL COX,**

**Plaintiff,**

**Index No.: 723471/20**

**-against-**

**Mot. Date: 11/26/24**

**Mot. Seq. 6**

**FOREST HILLS MHA HOUSING  
DEVELOPMENT FUND CORPORATION,**

**Defendants.**

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**FOREST HILLS MHA HOUSING  
DEVELOPMENT FUND CORPORATION,**

**Third-Party Plaintiff,**

**-against-**

**ATLAS WELDING & BOILER REPAIR, INC.,**

**Third-Party Defendant.**

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The following papers were read on this motion by defendant/ third-party plaintiff for an order: (1) pursuant to CPLR 3212, granting summary judgement in favor of defendant/third-party plaintiff and dismissing plaintiff's Complaint; and (2) granting summary judgment in favor of defendant/third party-plaintiff on its cause of action for contractual indemnification against third-party defendant.

**PAPERS  
NUMBERED**

Notice of Motion-Affidavits-Exhibits .....	EF 112-126
Answering Affidavits-Exhibits.....	EF 162-163; EF166-169
Replying Affidavits .....	EF 171- 172

Upon the foregoing papers, it is ordered that the motion by defendant/ third-party plaintiff is denied.

This is an action for personal injuries arising from a workplace accident, that occurred on August 18, 2020. Plaintiff, an employee of third-party defendant Atlas Welding & Boiler Repair, Inc (Atlas), alleges that he was injured, on that date, when he fell while descending a ladder affixed to a boiler at premises owned by defendant/third-party plaintiff Forest Hills MHA Housing Development Fund Corporation (Forest Hills).

The court record reflects that the action was commenced, on December 4, 2020. In the Summons and Complaint, the plaintiff alleges that Forest Hills was negligent in maintaining the ladder and violated New York City Administrative Code Section 28-301.1. Issue was joined by Forest Hills by service of an Answer, on January 5, 2021.

On May 11, 2023, Forest Hills commenced the third-party action against Atlas, on May 11, 2023. The third-party action is for contractual indemnification and failure to procure insurance. Atlas filed an Answer to the Third-Party Complaint, on August 22, 2023.

Forest Hills brings the instant motion, which is opposed by plaintiff and Atlas. In support of its motion, Forest Hill submits, among other things: the deposition transcript of the plaintiff; copies of photographs exchange by the plaintiff; a copy of the deposition transcript of Kevin Harris, of Forest Hills; and, a copy of the contract between Forest Hills and Atlas.

The record reflects that Forest Hills owned the premises, located at 108-53 62<sup>nd</sup> Drive, in Queens County. There were two boilers in the basement of the premises, known as Boiler Number 1 and Boiler Number 2, both of which had ladders affixed to them. On the date of the accident, the plaintiff was descending from the ladder affixed to Boiler Number 2. Forest Hills had a maintenance agreement with Atlas, pursuant to which Atlas was to perform boiler and hot water maintenance, including monthly maintenance and service calls.

Plaintiff testified that, on the date of the accident, he was at the premises for the purpose of performing a monthly inspection and a service call, because Boiler Number 2 was not working. He performed work on the boiler, which required him to ascend and descend the ladder three times. As he was descending the ladder for the fourth time, he

fell, sustaining injuries. He had taken approximately six or seven steps down the ladder when he fell.

In the first branch of its motion, Forest Hills moves for summary judgment dismissing plaintiffs's Complaint, on the grounds that the plaintiff cannot identify the cause of his fall from the ladder. It cites to the plaintiff's deposition testimony, in which he was asked the following questions and gave the following answers:

Q: As you went down the ladder the fourth time that day, did you experience any problems with the ladder?

A. I fell off the ladder.

Q. What caused you to fall?

A. As I said, I fell off the ladder. I was on the ground.

That's all I can remember. I fell off the ladder, laying on the ground, pissed off.

Q. Do you know what, if anything, caused you to fall?

A. No, I don't.

Forest Hills also argues that when the plaintiff was questioned, at the deposition, about the photographs showing the ladder, he could not identify anything improper or dangerous about the ladder.

Plaintiff also testified:

Q: Do you recall ever telling anyone at the hospital that as you were going down the steps, you missed the fifth step?

A. No, I didn't give them a number because I didn't know the number of steps.

Q. Do you recall telling anybody at the hospital that you missed a step?

A. Yes. I must of missed a step and fell. That's how I said it.

Forest Hills also cites to the deposition testimony of Kevin Harris (Harris), who was the assistant superintendent at 108-53 62nd Drive. Harris testified that was

familiar with the layout of the boiler room and used the affixed ladders daily. Harris never experienced any issues with the ladders and knew of no complaints concerning the ladders. He was not present when the accident occurred. Harris learned of the accident when the plaintiff telephoned him and Harris then went to the boiler room to assist the plaintiff. According to Harris, the plaintiff stated that he “slipped off the ladder.”

In opposition, the plaintiff argues that, at the deposition, which the record reflects was done virtually, when shown the photographs, he testified, *inter alia*, that “[t]he picture isn’t big enough to see anything” and that “The picture is too small.” He submits an affidavit wherein he avers, in sum and substance that, at his virtual deposition, he was shown the photograph of the ladder, but that he was unable to see the rungs of the ladder because his “screen was too small.”

Plaintiff further affirms that now that he can see the photograph in full, he can see the rungs of the ladder, which are circled in red, and that these are the rungs from which he fell. He affirms that two of the rungs (the ones that are circled in red) are “very close to the boiler, much closer than the others.” He affirms that as he was descending the ladder, his foot “didn’t catch” the next step,” which caused him to fall from the ladder.

Plaintiff also submits an affirmation and report from a licensed professional engineer, Robert Fuchs (Fuchs), who affirms that he inspected the subject boiler and ladder, on August 24, 2021, at which time he took photographs and measurements. He states that his inspection revealed that there was inadequate horizontal clearance between the sixth and seventh rungs of the attached ladder and the attached boiler. Specifically, the clearance of 4 ½ inches between the sixth rung and the boiler and the clearance of 4 3/8 inches between the seventh rung and the boiler was inadequate as generally accepted industry standards require a minimum clearance of seven (7) inches. He opines that this inadequate clearance is a defective condition and creates a safety risk for workers descending the ladder, due to their natural downward momentum. Fuchs states that the inadequate clearance of the sixth and seventh rungs was hazardous condition and a proximate cause of the accident.

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact, and he or she must do so by tender

of evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Alvarez v Prospect Hosp.*, *supra*, 68 NY2d 320, 324).

“A court deciding a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party” (*Tucubal v. National Express Tr. Corp.*, 209 AD3d 788, 789 [2d Dept 2022]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Vargas v Town of Huntington*, 206 AD3d 1034, 1035 [2d Dept 2022].)

In a trip-and-fall case, “a defendant can make its *prima facie* showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation” (*Colini v Stino, Inc.*, 186 AD3d 1610, 1611 [2d Dept 2020], quoting *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). “A plaintiff’s inability in a premises liability case to identify the cause of the fall is fatal to the cause of action because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation” (*Chang v Marmon Enters., Inc.*, 172 AD3d 678, 679 [2d Dept 2019]). “Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation” (*Colini v Stino, Inc.*, 186 AD3d at 1611, quoting *Ash v City of New York*, 109 AD3d at 855).

However, proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident. It is the mere speculation as to the cause of an accident when there could have been many possible causes that is fatal to a cause of action (*see Gardell v. Arden Ave. Homeowners Assn.*, 228 AD3d 834 [2d Dept 2024].)

[T]hat a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred

from the facts and circumstances underlying the injury" (*Buglione v Spagnoletti*, 123 AD3d 867, 867 [2d Dept 2014]. In such cases, the plaintiff "need not positively exclude every other possible cause of the accident" (*Gayle v City of New York*, 92 NY2d 936, 937 [1998]), but "need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" (*id.*) (internal quotation marks and citations omitted); see *Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 630 [2d Dept 2015].)

Here, viewing the evidence, including the photographs, the plaintiff's affidavit and the affirmation and detailed report of the plaintiff's expert regarding the defective design of the rungs of the ladder, there are triable issues of fact as to whether the design of the ladder was a proximate cause of the plaintiff's accident (see *Grieve v McRt Northeast Constr.*, 197 AD3d 623, 625 [2d Dept 2021]; *Cross v Roberts*, 162 AD3d 852, 853 [2d Dept. 2018].) Thus, the branch of defendant/third-party plaintiff's motion for summary judgment dismissing the plaintiff's Complaint is denied.

Defendant/third-party plaintiff also moves for summary judgment on its cause of action for contractual indemnification. Here, both sides agree that the indemnification clause in the maintenance agreement states:

The Contractor/Vendor agrees to indemnify and hold harmless the owner of the premises, ... its officers and employees, from and against all liability, claims, demands, damage, costs, and expenses (including attorney's fees) on account of injury to persons including death resulting therefrom and damage to property arising out of the performance of this contract by the Contractor/Vendor, employees and agents of the Contractor/Vendor or in conjunction with the Contractor's property, **except where such claims and demands arise out of the sole negligence of the above named parties.** The Contractor/Vendor shall, at his or its own expense, defend any and all action at law brought against the above named parties and shall pay all attorney fees and all other expenses. These conditions shall also apply to any sub-contracted operations. [emphasis added].

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Gurewitz v City of New York*, 175 AD3d 658, 664

2d Dept 2019].) A contractual indemnity provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hanna v Millazo*, 179 AD3d 907, 909 [2d Dept 2020] [internal quotations and citations omitted].)

Here, the indemnification clause clearly states that it does not apply to claims that arise out of the sole negligence of the above named parties. As stated above, there are questions of fact as to whether Forest Hills was negligent in the design of the subject ladder and whether the plaintiff's claim arose out of this alleged negligence. As Forest Hills has failed to establish its *prima facie* entitlement to summary judgment, the branch of its motion for contractual indemnification against Atlas must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

Accordingly, it is

**ORDERED** that the branch of the motion for summary judgment by defendant/ third-party plaintiff Forest Hills MHA Housing Development Fund Corporation (Forest Hills) for summary judgment dismissing plaintiff's Complaint is denied; and it is further

**ORDERED** that the branch of the motion by Forest Hills for summary judgment on its cause of action for contractual indemnification against third-party defendant Atlas Welding & Boiler Repair, Inc (Atlas) is also denied; and it is further

**ORDERED** that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

**Dated: June 23, 2025**



**TIMOTHY J. DUFFICY, J.S.C.**

