Mroziuk v Tishman Constr. Corp.
2026 NY Slip Op 30498(U)
January 15, 2026
Supreme Court, Kings County
Docket Number: Index No. 532513/2021
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 532513/2021
Seqs. 004, 005

Part LL1M

WLODZIMIERZ MROZIUK,

Plaintiff,

against

DECISION/ORDER

TISHMAN CONSTRUCTION CORPORATION, 153 WEST 48TH STREET, LLC, AND EXG 159W48, LLC,

Defendants.

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: 61–90, 94, 98–105.

Upon the foregoing papers, defendants' motion for summary judgment (Seq. 004) and plaintiff's cross-motion for summary judgment (Seq. 005) is decided as follows:

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on November 15, 2021, while in the course of his employment at a worksite located at 159 West 48th, New York, NY. The premises was owned by 153 West 48th Street and EXG 159 W48 was the ground tenant. Tishman was the construction manager at the premises, which was under construction to be a Hard Rock Hotel.

Plaintiff testified as follows: Plaintiff was employed as a finish carpenter on the date of his accident (Mroziuk EBT at 11). On the date of the accident, plaintiff was walking across the work area to retrieve materials that were stored by his employer, Art Woodworking (*id.* at 52). Plaintiff stepped "on something that looked like floor, some kind of material that was filling the

gap in between the concrete floor and the window," and his left leg penetrated the material and created a hole in the floor (*id.*). Plaintiff's expert, Douglas Miller, identified the material as "firestop material" (Miller aff. at ¶ 7). The gap between the concrete portion of the floor and the window was approximately one foot (Mroziuk EBT at 53). Plaintiff's left leg entered the floor, stopping at his groin and hip area (*id.* at 53–54). Plaintiff answered "No" when asked if his "whole body fit through the hole" (*id.* at 54).

Larry Long, senior superintendent at Tishman, testified that the area filled with fireproofing material was ultimately going to be covered by a radiator and radiator cover (Long EBT at 77–78). While the space between the concrete and the window was one foot, there was aluminum in that gap—the area where plaintiff stepped that was comprised of fireproofing materials was four inches. At the time of the incident, the fireproofing material was uncovered because it still needed to be inspected (*id.* at 78). A third-party inspector would come and inspect the material after a smoke sealant liquid was applied (*id.* at 85). During the six to eight hours that the sealant dried, nothing could be placed on or over the material (*id.* at 83–84). No tape or barrier was placed because this was "not an area that can be walked in . . . It's not a place where people walk" (*id.* at 84).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). The failure or absence of an adequate floor covering placed over floor openings constitutes a violation of the statute (*see Gamez v New Line Structures & Development, LLC*, 218 AD3d 446 [2d Dept 2023]). However, a hole of "dimensions" that would not permit a worker to fall through constitutes the "ordinary and usual peril" of a construction site, and not an elevation-related hazard as contemplated by Labor Law § 240 (1) (*Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 422 [2d Dept 2001]). If the dimensions are adequate but the worker does not fall through completely through for other reasons, the protections of Labor Law § 240 (1) still apply (*see Robertti v Powers Chang*, 227 AD2d 542 [2d Dept 1996]).

Here, plaintiff testified that the distance between the wall and the window was one foot. The authenticated photograph in the record appears to support Mr. Long's testimony that there is additional metal material in the gap between the concrete and the window, and that the fireproofing material occupies less than half of the one-foot gap. Finally, plaintiff admitted that the hole was not large enough for his whole body to fit through when he was asked directly at this deposition. Plaintiff's effort to limit the word "dimension" to mean "depth" is unavailing (*see e.g. Avila v Plaza Const. Corp.*, 73 AD3d 670 [2d Dept 2010]). Therefore, Labor Law § 240 (1) is inapplicable to the facts of this case; defendants' motion is granted and plaintiff's motion is denied as to this claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff only makes substantive arguments with respect to Rules 23-1.7 (b) (1) (i) and 23-1.30. The remaining Industrial Code provisions[1] pleaded are, therefore, deemed waived (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Rule 23-1.7 (b) governs the proper covering of hazardous openings. As with claims under Labor Law § 240 (1), a worker seeking to recover under Labor Law § 241 (6) based on a hazardous opening must demonstrate that the opening was large enough for "a worker to completely fall through" (*Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983 [2d Dept 2016]). Here, as already determined, plaintiff has not shown that the opening was of sufficient dimensions to satisfy this requirement; therefore, defendants' motion is granted and plaintiff's cross-motion is denied as to this provision.

Rule 23-1.30 governs the provision of adequate illumination at work sites. When asked whether permanent light fixtures were already installed, plaintiff answered, "Partially, yes" (Mroziuk EBT at 40). That colloquy is the only mention of lighting or illumination in plaintiff's deposition, and no other witness testified about the adequacy or availability of lighting. In the absence of unequivocal testimony about the lighting, there remains a triable issue of fact as to whether the partial fixtures provided inadequate lighting or whether poor lighting conditions

[1] 12 NYCRR §§ 23-1.7 (b) (ii–iii), 1.15, and 1.16.

were a substantial factor in plaintiff stepping on the fireproofing material. Therefore, defendants' motion is denied with respect to the alleged violation of Rule 23-1.30.

Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Plaintiff contends that the fireproofing material constituted a dangerous condition because it was unguarded, unmarked, and of insufficient strength to support workers traveling across the floor. Mr. Long admitted that the area where plaintiff stepped was not blocked off or marked in any way. Mr. Long's testimony that workers did not walk in that area is insufficient to eliminate issues of fact about whether the unmarked, unguarded fireproofing gap constituted a dangerous condition about which defendants had either actual or constructive notice. Defendants contend that the fireproofing was an "open and obvious" condition that plaintiff should have observed, and that Labor Law § 200 liability should not attach (*see Sanchez v BBL Construction Services*, LLC, 202 AD3d 847 [2d Dept 2022]).

In light of disputes about whether the condition was sufficiently observable that it was open and obvious and whether it should have been marked or blocked off, both parties' motions for summary judgment on plaintiff's Labor Law § 200 claim are denied.

Conclusion

Defendants' motion for summary judgment (Seq. 004) is granted to the extent of dismissing plaintiff's Labor Law §§ 240 (1) claim and Labor Law § 241 (6) claim as predicated on all Industrial Code provisions except Rule 23-1.30; the motion is otherwise denied.

Plaintiff's cross-motion for summary judgment (Seq. 005) is denied.

This constitutes the decision and order of the court.

January 15, 2026

DATE

DEVIN P. COHEN
Justice of the Supreme Court