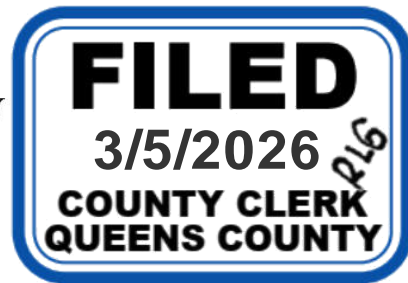


Duchitanga v Apex Skyline Constr. LLC
2026 NY Slip Op 31711(U)
March 3, 2026
Supreme Court, Queens County
Docket Number: Index No. 720971/2020
Judge: Marguerite A. Grays
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE MARGUERITE A. GRAYS
Justice

IAS Part 4

-----X
SEGUNDO M. FAREZ DUCHITANGA,

Index No.: 720971/2020

Plaintiff,

Motion

Date: August 12 2025

-against-

Motion Seq. No.: 7

APEX SKYLINE CONSTRUCTION LLC,
UNASSIGNED DEFENDANT, APEX
BUILDING COMPANY INC., HELP LIVONIA
II LLC,HELP LIVONIA II HOUSING
DEVELOPMENT FUND CORPORATION,
HELP USA and MDB DEVELOPMENT CORP.,

Motion Cal. No.

Defendants.

-----X
HELP LIVONIA II, LLC., HELP LIVONIA II HOUSING
DEVELOPMENT FUND CORPORATION and H.E.L.P,
USA, INC s/h/a HELP USA,

Third-Party Plaintiffs

-against-

MDB DEVELOPMENT CORP.,

Third Party Defendant

-----X
APEX SKYLINE CONSTRUCTION LLC, APEX
BUILDING COMPANY, INC.,

Second Third-Party Plaintiffs,

-against-

1 JCS CONSTRUCTION CORP.,

Second Third Party Defendant

-----X

-----X
APEX SKYLINE CONSTRUCTION LLC, APEX
BUILDING COMPANY, INC.,

Third Third-Party Plaintiffs,
-against-

MDB DEVELOPMENT CORP.,

Third Third-Party Defendant.

-----X
HELP LIVONIA II, LLC., HELP LIVONIA II HOUSING
DEVELOPMENT FUND CORPORATION and
H.E.L.P, USA, INC s/h/a HELP USA,

Fourth Third-Party Plaintiffs

-against-

1 JCS CONSTRUCTION CORP.,

Fourth Third Party Defendant

-----X
The following numbered papers EF 183-230, and EF 232-288 read on plaintiff Segundo Farez Duchitanga’s, (Duchitanga), motion seeking an Order (1) pursuant to CPLR §3212 granting partial summary judgment against the defendants, as to liability under Labor Law §240(1), and (2) upon defendant MDB Development Corp.’s cross-motion, for an Order permitting them to amend their Answer and to include an affirmative defense and counterclaim alleging fraud.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 183-223
Notice of Cross-Motion- Affidavits- Exhibits.....	EF 232-246
Answering Affidavits - Exhibits.....	EF 224-230; 247-248;255-288
Reply.....	EF 249-250; 252-253

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

This action arises from the alleged personal injuries sustained by the plaintiff, an employee of second third-party defendant subcontractor 1-JCS Construction Corp., (JCS), owned by Javier Cajas, hired by co-defendant, MDB Development Corp., (MDB), in turn

hired by the defendant general contractor Apex Skyline Construction, LLC., (Apex). It is alleged that in the course of his work, the plaintiff fell from an 8 foot A-frame ladder, causing his injuries. The work being performed was stucco work on the walls of a portion of the premises. The plaintiff alleged that while standing on this 8 foot A-frame ladder, the ladder inexplicably moved or slid, causing him to lose his balance and fall.

On a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. (*See Vega v Restani Const. Corp.*, 18 NY3d 499 [2012].) In doing so, the evidence submitted by the movant must eliminate all material issues of fact. (*Id.*) Labor Law § 240 (1) places a duty on all contractors, owners and their agents, except owners of one or two-family dwellings, to furnish or erect, or cause to be furnished or erected, ladders, scaffolding, or other listed equipment so as to give proper protection to a person so employed in performing tasks which have a danger of a gravity related accident. (*See Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316 [2009].) For the plaintiff to prevail on a motion for summary judgment on his claim under Labor Law § 240 (1) he must show that the statute was violated by an owner, contractor or their agents, and that said violation was a proximate cause of the accident. (*See Przyborowski v A & M Cook, LLC*, 120 AD3d 651 [2014]; *Chlebowski v Esber*, 58 AD3d 662 [2009].) A fall from a ladder does not establish, in and of itself, that proper protection was not provided. (*See Carrion v City of New York*, 111 AD3d 872 [2013]; *Melchor v Singh* 90 AD3d 866 [2011].) Labor Law §240(1) was designed to prevent those types of accidents in which the ladder or other protective device proved inadequate to protect the worker from harm directly flowing from the application of the force of gravity. (*See Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555 [1993].) A plaintiff may meet his prima facie burden by demonstrating that the ladder was defective, was not secured properly, or was not otherwise adequate to protect him from a fall. (*See Id.*; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096 [2012].) However, it has been held that a ladder in a closed, leaning position, is unsafe, unless it can be proven to be necessary to perform the job, and that putting the ladder in its open, locked position is in itself, unsafe or not amenable to the work necessary to be performed. In such a case, the ladder in its closed, leaning position, must be shown to be rendered safe prior to its use. (*See Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037 [2022].) A plaintiff can make a prima facie showing that Labor Law §240 has been violated, by showing the ladder had been improperly placed due to the condition of a floor. (*Klein v City of New York*, 89 NY2d 833 [1996].) However, where plaintiff's own negligence was the sole proximate cause of his fall, no liability under scaffold law could be imposed. (*See Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003].)

In support of this motion, plaintiff submits, *inter alia*, his attorney's affirmation, a copy of the plaintiff's affirmation, pleadings, a copy of the plaintiff's deposition testimony, a copy of the contract between Apex and MDB, and copies of various photographs and links to video clips.

In opposition, and in its cross-motion, defendant MDB submits, *inter alia*, copies of the two “employee claims” made by plaintiff to the NYS Worker’s Compensation Board seeking compensation for his injuries incurred on October 21, 2020, a copy of the affirmation of Nathan C. Woodard, Esq., and a copy of the affidavit of Stephen Debellas, Accounting Manager for MDB.

Defendants Apex also oppose plaintiff’s motion as premature and allege that there are triable issues of fact as to plaintiff’s credibility warranting denial of plaintiff’s motion. Similarly, defendants HELP Livonia II LLC, HELP Livonia II Housing Development Fund Corporation, and H.E.L.P. USA, Inc. (Help) oppose plaintiff’s motion and allege *inter alia*, that there are questions of fact and as such, plaintiff’s motion should be denied.

At plaintiff’s deposition, the plaintiff testified that his employer Javier Cajas (Javier) picked him up, and brought him to the site where the work was to take place. A ladder was not brought. The plaintiff did not take his hard hat, and one was not provided. An 8 foot A-frame ladder was obtained from on-site by his employer, Javier, and was carried to the location where the work was to be performed. The ladder was necessary to enable them to climb to the balcony above, which then gave them access to a wall across the roof where a ladder was not necessary to perform the work of fixing the stucco walls. The plaintiff was instructed to climb up the ladder, and carry the necessary tools and materials to the work site above. At first, Javier opened the ladder, and locked it into place, but in trying to settle it into place on the floor, he was not satisfied with the stability of the ladder. After looking over the situation, Javier closed the ladder and leaned it up against the wall, appeared satisfied, and then both he and the plaintiff climbed up and down the ladder a few times carrying the necessary materials for the work. After a few minutes, Javier left the plaintiff to do the work by himself. The plaintiff went up and down a few times, but then at one point, he noticed the ladder had either fallen, or shifted to another position that was not where it should be. He testified that he then reset the ladder in its place, in its closed position, and climbed up and down. Shortly thereafter, he was climbing up and nearly to the top, he claimed that the ladder moved, or slid causing him to lose his balance and fall.

Ordinarily, as a matter of law, a demonstration that the ladder on which the plaintiff was working moved for no apparent reason, causing him to fall, is sufficient to meet his prima facie burden, (*See Cabrera v Arrow Steel Window Corp.*, 163 Add 758 [2018]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177 [2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744 [2016]). However, here, questions of fact remain unresolved as to whether the plaintiff, having knowledge that the ladder moved or shifted from its previous setting, should have known that re-setting the ladder, without further inspection, would be negligence on his part. The plaintiff testified that he did not inspect the condition of the floor before he reset the ladder into place. Under these circumstances, a question of fact as to whether the plaintiff was the sole proximate cause of his fall, remains unresolved. Furthermore, plaintiff’s two NYS Worker’s Compensation claims do not mention a fall from a ladder, but instead, refer to a different fall altogether. These inconsistencies create triable issues of fact as to plaintiff’s

credibility and what caused plaintiff's injuries. Even if plaintiff's prima facie burden had been met, the burden then shifts to the defendant to raise triable issues of fact. (*See, Zuckerman v City of New York* 49 NY2d 557 [1980].) Given these evidentiary submissions by both parties, the defendants have raised triable issues of fact. As such, plaintiff's motion for partial summary judgment pursuant to CPLR §3212 as to liability under Labor Law §240(1) as against defendants, is denied.

Defendant MDB's cross-motion to amend its Answer and to include an affirmative defense and counterclaim alleging fraud, is denied, inasmuch as the allegations of fraud as set forth in the proposed Amended Answer are insufficient to make out this defense, lacking in detail as required and seemingly based upon speculative assumptions.

Accordingly, the plaintiff's motion for partial summary judgment pursuant to CPLR §3212 as to Labor Law §240(1) against the defendants, is denied and the cross-motion by defendant MDB for leave to amend their Answer to add an affirmative defense and counterclaim alleging fraud is also denied.

Dated: *March 3, 2024*



MARGUERITE A. GRAYS
J.S.C.

