McCabe v Lincoln Ctr. for the Performing Arts, Inc.
2026 NY Slip Op 31899(U)
April 27, 2026
Supreme Court, New York County
Docket Number: Index No. 159778/2022
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **01M**

Justice

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INDEX NO. 159778/2022

SEAN MCCABE,

Plaintiff,

MOTION DATE 02/26/2026, 02/26/2026

MOTION SEQ. NO. 002 003

- v -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,TURNER CONSTRUCTION COMPANY

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 55, 60, 61, 62, 64, 65, 66

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 56, 58, 59, 67

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment pursuant to CPLR 3212 on the issue of liability under Labor Law § 240(1) and defendants' motion for summary judgment pursuant to CPLR 3212, dismissing all of plaintiff's claims, are consolidated for disposition and determined as follows:

Plaintiff commenced the instant action alleging that he was injured on June 15, 2022 when he fell from an unsecured ladder while working for Almar Plumbing ("Almar") performing plumbing work for a renovation project at Lincoln Center. With his motion, plaintiff seeks summary judgment against defendants Lincoln Center for the Performing Arts, Inc. ("LCPA") and Turner Construction Company ("Turner"), the owner of the premises and general contractor, respectively, arguing that plaintiff was not provided with proper protection to perform work at a height. With their motion, defendants seek summary judgment to dismiss plaintiff's Labor Law § 240(1) claim, Labor Law § 241(6) claim, and Labor Law § 200 and negligence claims. The crux of their arguments is that the ladder was not a substantial factor in plaintiff's fall, there were no applicable regulations that were violated that caused plaintiff's accident since the ladder was in good working order, and that defendants did not supervise the plaintiff.

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240 (1)

Plaintiff moves for summary judgment under Labor Law § 240 (1), arguing that the defendants violated the statute when the unsecured ladder plaintiff was standing on shifted causing him to lose his balance and fall off to the right side, causing his injury. In support of his motion, the plaintiff relies on, among other things, his deposition transcript (*see* NYSCEF Doc. No. 45).

Plaintiff's Deposition

Plaintiff averred that on June 15, 2022, he arrived at Lincoln Center at 6am to perform Local 1 plumbing work on behalf of his employer, Almar, as part of a renovation project at Geffen Hall (NYSCEF Doc. No. 45). Before work commenced at 7am, plaintiff recalled attending a toolbox talk lead by Marty Moy, Almar supervisor, wherein he was instructed to work in the basement with Ed Timms to install valves for waterlines[1] (*id.* at 36). The work involved making sure the waterlines were not live, drilling into them to drain them, and then cutting them and installing the valves. To perform this work, plaintiff utilized a 6-foot A Frame ladder, handheld drill, copper tools, valves, and pipes all provided by his employer. In terms of safety devices,

[1] Plaintiff could not recall if anyone from Turner was ever present at the toolbox meetings (*id.* at 39-40). He thought maybe they were at times but did not recall anyone on the morning of the accident. He additionally stated that he would never receive instruction or direction from Turner, or the LCPA for that matter (*id.* at 57-58).

plaintiff alleges he was provided with a hard hat, glasses, and gloves but could not recall being provided with a harness (*id.* at 42).

Plaintiff stated that when he arrived at the work area, he set up the ladder by opening it up, locking it down, and testing it to make sure it was sturdy (*id.*).[2] Thereafter, he stepped up to the second or third rung of the ladder and began drilling the holes in the ceiling pipe. He did so by drilling with his left hand and holding onto the ladder with his right. Timms was not holding the ladder since he was likely cleaning valves and getting material ready (*id.* at 44). He further alleges that after about a 30- or 40-minute period, while drilling he felt the ladder shift beneath him, with the bottom of the ladder moving to the left (*id.* at 48). This caused his left arm to slip off the pipe and lose his balance on the ladder. He explains that as this happens, he feels tons of pain in his left shoulder (*id.*). He claims that while falling his right arm shot up and grabbed the ceiling pipe above him and was able to catch himself before descending the ladder and heading to the onsite medic (*id.* at 52).

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

> "All contractors and owners and their agents, . . . , 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."

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136 [1978]). The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The "purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners

[2] He stated that it was sturdy and had footings (*id.* at 42-45).

and contractors instead of on workers themselves" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]).

To prevail on a motion for summary judgment pursuant to Labor Law § 240 (a)(1), a plaintiff must show both that "the statute was violated and that the violation proximately caused his injury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Thus, plaintiff bears the initial burden of showing that there was an elevation-related risk and that the owner did not provide him with adequate safety devices (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). Because the duty to provide safety devices pursuant to Labor Law § 240 (1) is absolute, contractors and owners who breach that duty are liable regardless of whether they actually exercised supervision or control over the work (*Blake*, 1 NY3d at 287) and whether plaintiff's negligence contributed to the accident (*id.*).

Section 240 (1) "mandates that owners and contractors provide devices which shall be so constructed, placed and operated as to give proper protection to persons performing work covered by the statute" (*Rivera v 712 Fifth Ave. Owner LP*, 229 AD3d 401, 402 [1st Dept 2024], citing *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). To establish liability under the statute, "[i]t is sufficient . . . that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent" (*Rivera*, 229 AD3d at 402, citing *Montalvo,* 8 AD3d at 174). In *Rivera*, the Court found the "plaintiff's testimony that he was not provided with any other safety protection except an unsecured ladder," which fell when a falling duct struck the plaintiff and the ladder, "established prima facie entitlement to judgment as a matter of law" (*Rivera*, 229 AD3d at 402 [citation omitted]).

It is well settled that a plaintiff may still recover under Labor Law § 240(1), even where the plaintiff does not actually fall (*see Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561 [1st Dept 2011]; *LaGrippo v 95th and Third LLC*, 237 AD3d 578 [1st Dept 2025]; *Messina v City of New York*, 148 AD3d 492 [1st Dept 2017]). The court has routinely held that § 240(1) is applicable to cases where a plaintiff is "injured in the process of preventing himself from falling" (*Reavely*, 88 AD3d at 563). Here, plaintiff meets his prima facie burden through his testimony that it was the shifting of the ladder that caused him to lose his balance and ultimately suffer injury. Thus, it is incumbent on the defendants to raise a triable issue-of-fact (see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

In opposition to plaintiff's motion and in support of their motion, defendants assert, inter alia, that plaintiff did not suffer from a gravity related injury and that the ladder was not a substantial factor in causing plaintiff's alleged injuries[3]. They argue that it is undisputed that neither the plaintiff nor the ladder fell at the time of the accident and that plaintiff testified that he observed nothing wrong with the ladder. In further support of their position, they provide a purported witness statement from plaintiff's co-worker, Ed Timms, and an incident report/medical report. Nevertheless, neither of these documents are sufficient to create a triable issue of fact or meet defendants' burden. The purported witness statement from Timms, from presumably 2022, was not notarized and was thus, not in admissible form (*see Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]; CPLR 2106]). Moreover, assuming arguendo that the unsworn incident report/medical report were in admissible form, the hearsay statements alone about the happening of the accident would be insufficient on their own to defeat summary judgment (*see Garcia v 122-130 East 23rd Street LLC*, 220 AD3d 463 [1st Dept 2023]). Likewise, defense counsel's memorandum of law in support of their own motion for summary judgment speculating that plaintiff may have been injured when the drill bit slipped off the pipe does not constitute evidence sufficient to meet a prima facie burden nor does it create a question of fact regarding causation in opposition to plaintiff's motion (*see generally Jenkins v Alexander*, 9 AD3d 286 [1st Dept 2004]). Accordingly, plaintiff's motion for summary judgment on the Labor Law § 240(1) is granted and that aspect of defendants' motion seeking to dismiss that same cause of action is denied.

The Labor Law § 241 (6) Claims

Defendants move for summary judgment dismissing the Labor Law § 241(6) claims against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored,

[3] Defendants do not contest that they are proper Labor Law defendants and that the work being performed was protected construction activity within the meaning of the statute.

> [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d at 501–502).

To sustain a Labor Law § 241 (6) claim, it must be established that the defendant violated a specific, "concrete specification" of the Industrial Code, rather than a provision that considers only general worker safety requirements (*Messina v City of New York,* 300 AD2d 121, 122 [1st Dept 2002]; quoting *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [1st Dept 2000]). Such violation must be a proximate cause of the plaintiff's injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017] ["a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident"]; *see also Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159, 161 [1st Dept 2022]). "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York,* 88 AD3d 951, 953 [2d Dept 2011]).

As an initial matter, plaintiff lists multiple violations of the Industrial Code in his bill of particulars. Except for Industrial Code 12 NYCRR 23-1.21(b)(3)(iv), plaintiff does not seek to oppose their dismissal. As a result, all the other provisions listed in the bill of particulars are uncontested and deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-1.21 (b)(3)(iv)

Industrial Code 12 NYCRR 23-1.21(b)(3) governs "maintenance and replacement" as it pertains to requirements for ladders. It provides, as relevant, the following:

> "(3) All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

(iv) If it has any flaw or defect of material that may case ladder failure."

(12 NYCRR 23-1.21 [b][3][iv]). Section 23-1.21(b)(3)(iv) has been held to be sufficiently specific to support a §241 (6) claim" (*see Hossain v Kurzynowski*, 92 AD3d 722 [2d Dept 2012]). Nevertheless, the provision is inapplicable to the facts of this matter inasmuch as it is limited to structural defects in ladders (*see D'Angelo v Legacy Yards Tenant LLC*, 237 AD3d 607 [1st Dept 2025]). Here, the only testimony regarding the condition of the ladder comes from the plaintiff who tested its stability, locked it, and found it to be sturdy and with footings before using it. Accordingly, this claim pursuant to Labor Law § 241 (6) should be dismissed (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 [1st Dept 2014]; *Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. In their motion, defendants set forth sufficient evidence establishing that the accident arose from the means and methods of the work at the premises, and that they did not have actual control over the injury producing work (*see Andino v Wizards Studios N. Inc.*, 223 AD3d 508, 509 [1st Dept 2024] [dismissing common-law and section 200 claims where "there is no evidence that (the moving defendants) actually exercised control over the means and methods of plaintiff's work"]).

Plaintiff did not oppose the dismissal of these claims as to defendant LCPA but maintained that Turner's contract with LCPA placed responsibility and the control with Turner. They further cite the testimony of Peter Crouse, mechanical, electrical, plumbing superintendent for Turner who stated that Turner would walk the jobsite and had the ability to stop work and would stop would if he or his fellow superintendents observed anything unsafe. Nevertheless, plaintiff testified that he received all of his instructions, assignments, and work materials from his employer, Almar. Whereas here, Turner maintained only general supervisory authority and did not control the manner in which plaintiff performed his work, the Labor Law § 200 and common-law negligence claims cannot stand (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2007]; *Reilly v Newireen Associates*, 303 AD2d 214 [1st Dept 2003]). As a result, defendants are entitled to

summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Accordingly, plaintiff's motion for summary judgment pursuant to Labor Law § 240 (1) is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted solely to the extent that plaintiff's claims pursuant to Labor Law §§ 200 and 241 (6) and common law negligence are all dismissed.

The remainder of the motions have been considered and are denied in all other respects.

This constitutes the decision and order of the Court.

4/27/2026
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE