At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16 day of October 2024.

PRESENT:

HON. HEELA CAPELL,
Justice.

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LUIS OBESTO,

Plaintiffs,

-against-

Index No. 504522/21

1461-1469 THIRD AVENUE OWNER, LLC and LEEDING BUILDERS GROUP, LLC,
Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	21-31, 33-49
Opposing Affidavits (Affirmations)	51, 52
Affidavits/ Affirmations in Reply	53, 54 , 55
Other Papers:	

Upon the foregoing papers, plaintiff Luis Obesto (plaintiff) moves (in motion [mot.] sequence [seq.] number [no.] 1) for an order, pursuant to CPLR 3212, granting partial summary judgment in plaintiff's favor as against defendants 1461-1469 Third Avenue Owner, LLC (Third Avenue) and Leeding Builders Group, LLC (Leeding) (collectively, defendants) on the issue of liability pursuant to Labor Law § 240 (1). Defendants move in mot. seq. no. 2 for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims.

Background and Procedural History

Third Avenue was the owner of premises located at 200 East 83rd Street, New York, New York (hereinafter "the premises"). Third Avenue contracted with Leeding to serve as the general contractor/construction manager for a project at the premises involving the erection of a mixed-use building. Leeding subcontracted with non-party Trident General Contracting LLC (Trident) for the construction of the cast-in-place concrete superstructure. At the time of the incident, plaintiff was employed by Trident as a laborer.

On February 10, 2021, plaintiff was directed by his Trident supervisor, Stitch, to place barricades along the sides of the 21st floor which had not yet been fully constructed. In order to accomplish this task, plaintiff had to utilize a ladder that had been built by Trident employees to move between floors through an opening in the 21st floor. Plaintiff testified that the ladder was approximately four feet wide and twelve feet high, with approximately twelve steps, no handrail and was not affixed to any surface. As he was climbing the ladder towards the 21st floor, plaintiff was carrying approximately 10-12 wooden 2x 4's in his left hand. He testified that as he was nearing the top of the ladder, his right foot came in contact with a loose eight foot long by four foot wide beam that was adjacent to the ladder. Plaintiff stated that the beam then rolled inwards striking the ladder, which caused the ladder to move at which point the plaintiff fell off the ladder down to the 20th floor. Plaintiff alleges that he sustained various injuries as a result of the accident.

Plaintiff subsequently commenced this action with the filing of a summons and verified complaint on February 24, 2021, as against defendants. On May 14, 2021,

defendants filed a verified answer. Discovery, including depositions, was completed and plaintiff filed note of issue on April 28, 2023. The following timely motions ensued.

Plaintiff's Motion (mot. seq. no. 1)

Plaintiff moves for partial summary judgment on his Labor Law § 240 (1) cause of action. Plaintiff contends that he was injured while performing protected construction activity while working on a ladder in his capacity as a laborer. He contends that the ladder failed to protect him from the elevation related hazard of his work. Plaintiff argues that Third Avenue, as the owner of the premises, and Leeding, as the general contractor for the project, are strictly liable as his injuries were proximately caused by a violation of Labor Law § 240 (1). Specifically, plaintiff testified that the ladder he was caused to work on was not tied off or secured in any way at the time of the accident and that it moved and shifted to the right when it was struck by the unsecured beam. He contends that the shifting of the ladder then caused him to fall off of it onto the ground below. Thus, plaintiff argues that the unsecured ladder failed to offer adequate protection to prevent him from falling off of it onto the ground below.

Discussion

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (*see Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730 [2d Dept 2024]; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]).

Labor Law § 240 (1)

Labor Law § 240 (1), states, in relevant part, that:

> 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 purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock*

Exch., Inc., 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High` Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). "To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, "where

. . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290).

Plaintiff's testimony herein reveals that his Labor Law § 240 (1) claim arises out of his falling off of an unsecured man-made ladder that had been struck by a loose beam. Plaintiff testified that he was in the process of ascending the ladder from the 20th up to the 21st floor, with several 2 x 4's under his left arm. He testified that he was on approximately the seventh rung of the ladder and could see up to the 21st floor when he stepped on an unsecured beam that was poking out between ladder rungs. The beam then rolled and struck the ladder causing it to move resulting in plaintiff falling off the ladder and onto the 20th floor.

In opposition, and in support of that branch of their own motion seeking summary judgment dismissing this claim, defendants argue that plaintiff's motion should be denied as he misrepresents how the accident occurred. In this regard, defendants contend that plaintiff's moving papers indicate that the accident occurred as he reached the top of the ladder but note that he testified that the accident occurred around the seventh rung of the twelve-rung ladder, which would place him at the center of the ladder. Next, defendants contend that plaintiff did not step on the beam after stepping off the ladder, but rather the beam was between the rungs of the ladder. Finally, defendants maintain that the beam striking the ladder did not cause the ladder to move, but rather the effect of plaintiff losing his balance when he stepped on the beam between rungs caused the movement. Thus, defendants assert that this creates an issue of fact as to how the accident occurred.

Defendants next assert that questions of fact exist precluding a grant of summary judgment to plaintiff as there are other versions of how the accident occurred contained in "witness" statements and accident reports. In support of this assertion, defendants point to a witness statement from Trident employee Segundo Tuza, which defendants contend states that Tuza heard a "blow" and turned around to see plaintiff on the ground. The court notes that Mr. Tuza's statement is written in Spanish and no translation has been provided to the court. Next, defendants point to a statement from Trident foreman, Clesio Alves De Souza, which states that plaintiff was climbing a ladder behind him when plaintiff lost his balance and fell. Similarly, this statement is in Spanish but attached to defendants' motion papers there is a translated version which states "I was in the front when the accident happened the guy was climbing the ladder and then he lost his balance and fell down into the concrete floor hitting his face" (NYSCEF Doc No. 44 at 6). Defendants also point to the Leeding Injury Report signed by site safety manager James O'Connor which, in the section entitled "state your observations," states "as per Clesio Alves, Luis [plaintiff] was climbing up the gang ladder behind him. When he was at or around the 4th or 5th step from the ground Luis [sic]his balance and or contact with the gang ladder and he fell to the floor striking his head on the 20th floor slab." Defendants further point to a report prepared by the Department of Buildings, which states that plaintiff was "climbing a gang ladder, missed his foot, and fell." Finally, defendants note that plaintiff's Workers' Compensation Board C-3 claim form, similar to his deposition testimony, indicates that there was a beam on a stair that caused him to slip and fall. Defendants argue that since the accident reports and witness statements present a different version of the accident from that testified to by

plaintiff and contained in his Workers Compensation application, plaintiff's motion should be denied as there is a material issue of fact.

Defendants further argue that there is a question of fact regarding whether the ladder was properly affixed and/or secured. In this regard, they argue that although plaintiff testified that the ladder was not affixed at the bottom, the Department of Buildings failed to document this in their investigation, thus creating an issue of fact. Additionally, defendants contend that even if it can be demonstrated that the ladder was unsecured, plaintiff has failed to establish that this was a substantial factor in causing his fall.

Finally, defendants assert that the movement of the ladder occurred due to plaintiff losing his balance. Thus, defendants maintain that there are questions of fact regarding whether plaintiff's action in holding materials in his left arm while climbing the ladder was the sole proximate cause of his accident. In support of this contention, defendants point to an affidavit submitted in support of their own motion from Yoandi Interian, a licensed professional engineer. Mr. Interian affirms that he reviewed all relevant documents, including deposition testimony, workers' compensation forms, accident investigation and injury reports, witness statements and photographs. He states that under OSHA guidelines, plaintiff was required to maintain three points of contact with the ladder, either two hands and one foot or two feet and one hand. Defendants assert that "plaintiff was most likely only maintaining two points of contact any time he moved up rungs" (NYSCEF Doc No. 51 at ¶ 48).

In reply, and in opposition to defendants' argument that he was the sole proximate cause of his accident, plaintiff argues that there is nothing in the record establishing that

the manner in which he was carrying the materials caused or contributed to the accident. Moreover, he notes that, at best, this would amount solely to comparative negligence which is not a defense to a Labor Law § 240 (1) violation. Further, plaintiff contends that the accident reports attached to defendants' motion fail to establish that his actions were the sole proximate cause of the accident. In this regard, he notes that although some of the reports state that plaintiff lost his balance, plaintiff's own testimony is clear that any loss of balance and subsequent fall were caused by the sudden movement of the ladder. Moreover, plaintiff contends that the movement of the ladder, whether caused by the beam striking it or another factor, creates a presumption that it was not adequately secured.

"'Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials'" (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Moreover, "[t]o establish a violation under Labor Law § 240 (1), '[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiffs injuries'" (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020], quoting *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). "Where, for instance, the plaintiff falls from a ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach" (*id.*). However, "where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation" (*id.*, citing *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept

2019]; *see also Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624, 625 [2d Dept 2008]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124, 1125 [2d Dept 2019]; *Alvarez v Yingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]).

Contrary to defendants' contentions, plaintiff's deposition testimony that the ladder moved subsequent to it being struck by the beam which caused him to fall to the ground demonstrates that the ladder was inadequately secured and is sufficient to establish his prima facie entitlement to summary judgment on his Labor Law § 240 (1) cause of action (*see Paiba v 56-11 94th St. Co., LLC*, 228 AD3d 881, 882 [2d Dept 2024] [ladder moved]; *Mora v 1-10 Bush Term. Owner, L. P.*, 214 AD3d 785,786 [2d Dept 2023] [ladder struck by falling pipe causing ladder and plaintiff to fall to the ground]; *Avila v Saint David's Sch*, 187 AD3d 460, 460 [1st Dept 2020] [ladder struck by falling debris causing plaintiff working on the ladder to fall to the ground]; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dep't 2019] [ladder moved];*Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dep't 2018] [ladder moved]).

Labor Law § 240(1) supports the contention that "[w]here the furnished protective devices fail to prevent foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statue" (*Cruz v Turner Constr. Co.*, 279 AD2d 322 [1st Dept 2001]; *see also Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1024 [2d Dept 2018]; *Coque v Wildflower Ests. Devs., Inc.*, 31 AD3d 484 [2d Dept 2006]). Accordingly, the court finds that plaintiff has

demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim.

In opposition to plaintiff's prima facie showing, the defendants have failed to raise an issue of fact with regard to the statutory violation or to demonstrate that plaintiff's own acts or omissions were the sole cause of his accident (*see Lazo v New York State Thruway Auth.*, 204 AD3d 774, 776 [2d Dept 2022]; *Masmalaj v New York City Econ. Dev. Corp.*, 197 AD3d 1292, 1293-1294 [2d Dept 2021]; *Leon-Rodriguez v R.C. Church of Sts. Cyril & Methodius*, 192 AD3d 883, 885 [2d Dept 2021]; *Carrion v City of New York*, 111 AD3d 872, 873 [2d Dept 2013]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]). "Where, as here, a violation of Labor Law § 240 (1) is a proximate cause of the accident, the plaintiff's conduct cannot be deemed solely to blame for it" (*Zong Mou Zou v Hai Ming Const. Corp.*, 74 AD3d 800, 801 [2d Dept 2010]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006]). Further, the court notes that defendants' submissions fail to raise an issue of fact regarding how the accident occurred. Specifically, the court notes that the witness statements of Tuza and De Souza lack probative value as it does not appear that either person actually witnessed plaintiff's accident. Specifically, defendants' papers assert that Tuza's statement indicates that he *heard a "blow" and turned around* to see plaintiff on the ground, while De Souza's statement indicates that plaintiff was climbing a ladder *behind him* when plaintiff lost his balance and fell (emphasis added). Nor does the Leeding Injury Report, signed by O'Connor, which merely refers to De Souza's statement present a different

version of the accident from an actual witness thereto. Similarly, the Department of Buildings report which indicates that plaintiff was "climbing a gang ladder missed his foot and fell" does not raise a question of fact. There is nothing in this report indicating that its author witnessed the accident. Thus, defendants have offered nothing but "mere speculation to refute the plaintiff['s] showing or to raise a bona fide issue as to how the accident occurred" (*Cardenas v 111-127 Cabrini Apts. Corp.*, 145 AD3d 955, 957 [2d Dept 2016], quoting *Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *see Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011]; *Florestal v City of New York*, 74 AD3d 875, 876 [2d Dept 2010]). Furthermore, although the DOB report indicates that a summons and stop work order were issued for, among other reasons "failure to maintain safety measures," it is unclear what specific safety measures were not maintained, and thus it cannot be determined that DOB found that the ladder at issue was in fact properly secured.

Accordingly, that branch of plaintiff's motion seeking partial summary judgment on the issue of liability for plaintiff's Labor Law § 240 (1) claim as against the defendants is granted.

Defendants' Motion (mot. seq. no. 2)

Defendants move for an order granting summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 and common law negligence claims. For the reasons discussed in detail above, that branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

Labor Law § 200 and Common Law Negligence

With regard to plaintiff's Labor Law § 200 and common law negligence claims, defendants argue that there is nothing in the record demonstrating that either defendant provided any supervision or control over the work plaintiff was performing at the project. The contract between Leeding and Trident specifically provided that Trident would exercise control over its employees on the project and was responsible for the safety of Trident employees (NYSCEF Doc No. 41 at Articles 15 & 21). Moreover, defendants point to plaintiff's testimony that he received all of his instructions from fellow Trident employees, including Trident foreman, Mr. De Souza, Trident superintendent Stitch, and co-worker Ricardo Morales (NYSCEF Doc No. 37 at 39, lines 14-25; at 40, lines 2-6). The court notes that, in his opposition papers, plaintiff states that he does not take any position with regard to that branch of defendants' motion seeking to dismiss his Labor Law § 200 and common law negligence claims and thus fails to offer any opposition (NYSCEF Doc No. 52 at ¶5). Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common law negligence claims is granted and said claims are dismissed.

Labor Law § 241 (6)

With regard to plaintiff's Labor Law § 241 (6) claim, defendants argue that the Industrial Code provisions he asserts to support this claim are either inapplicable, too general, or were not violated. In support of their motion, defendants submit the affidavit of Mr. Interian. Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons

employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Tompkins v Turner Constr. Co.*, 221 AD3d 745, 745 [2d Dept 2023]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Fuentes v 257 Toppings Path, LLC*, 225 AD3d 746 [2d Dept 2024]; *Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]). In his bill of particulars, plaintiff asserts a violation of Industrial Code §§ 23-1.5; 23-1.7; 23-1.7 (f); 23-1.15; 23-1.16; 23-1.16 (a) and (b); 23-1.17; 23-1.21 (b) (1); 23-1.21 (b) (3) (i); 23-1.21 (b) (4) (ii); 23-1.21 (b) (4) (iv); 23-1.21 (e); and 23-9.6 as predicates for his Labor Law § 241 (6) claim.

As to Industrial Code § 23-1.7, which relates to general hazards including overhead, falling, drowning, tripping and slipping hazards, vertical passageways, and corrosive substances, defendants argue that none of these subsections were applicable or violated as plaintiff's accident did not involve tripping, slipping, being struck from above or being exposed to a corrosive substance. Moreover, they point out that a ladder was provided for vertical passage. Industrial Code § 23-1.15 pertains to safety railings and defendants argue that this provision is not applicable as there is no evidence demonstrating that plaintiff's accident was caused by the lack of a safety railing. Defendants also claim that Industrial Code § 23-1.17, pertaining to life nets, does apply as there is no evidence presented that a

life net was required to be used for the work that was being performed. Defendants note that Industrial Code § 23-9.6 addresses the requirements for the use of aerial baskets which plaintiff was not utilizing at the time of his accident. Finally, defendants argue that plaintiff's claim as based upon Industrial Code § 23-1.16, pertaining to "safety belts, harnesses, tail lines and lifelines," should be dismissed as plaintiff testified that he was wearing a harness, yo-yo, hardhat, and boots at the time of the accident and has not claimed that his accident resulted from the failure of his harness. In moving, defendants have demonstrated, prima facie, that Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17 and 23-9.6 either do not state specific standards or are inapplicable to the facts herein. As plaintiff has abandoned reliance on those sections by failing to address them in his motion and in his opposition papers, defendants are entitled to dismissal of the Labor Law § 241 (6) cause of action to the extent that it is premised on those code sections (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Plaintiff only opposes defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as based upon a violation of Industrial Code §§ 23-1.5 (c) (3), 1.21(b)(1), (3), (4), (5), (6), and1.21 (c) (1) and (2), and those will be discussed in detail below.

Industrial Code § 23-1.5(c)(3)

Defendants argue that Industrial Code § 23-1.5 is a general provision and is not specific enough to support a Labor Law § 241 (6) claim. This section provides that "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall

be immediately repaired or restored or immediately removed from the job site if damaged." Defendants further point to Mr. Interian's affidavit in which he opines that "the subject ladder provided a "reasonable and adequate" safe means of access between working levels . . . no evidence was reviewed that provided that the subject ladder was defective in any way or that the ladder was not capable of supporting the maximum load intended to be placed upon it . . . the conditions at the time of the reported incident were in compliance with the requirements of Industrial Code Sections 23-1.5" (NYSCEF Doc No. 48 at ¶16[a]).

In opposition, plaintiff asserts that Industrial Code §1.5 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim pointing to several cases holding so (*see Tuapan`te v Lq-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]; *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015]; *Becerra v Promenade Apartments Inc.*, 126 AD3d 557 [1st Dept 2015]). Plaintiff argues that the ladder he was using was neither sound nor operable as it was inadequately secured against movement.

In reply, defendants assert that this section is not applicable as there is a more specific Industrial Code section that is more applicable to the facts herein, namely Industrial Code § 23-1.21, pertaining to ladders. In this regard, the court finds that the general inspection requirement of Industrial Code § 23-1.5 is overridden by the specific provisions in the Industrial Code related to ladder safety (specifically Rule 1.21 *et seq.*) (*see Zaino v Rogers*, 153 AD3d 763, 764 [2d Dept 2017]; *Greaves v Northeastern Conference Corp. of Seventh-Day Adventists*, 2023 NY Slip Op 33144[U] [Sup Ct, Kings County 2023]).

Industrial Code § 1.21(b)(1),(3),(4),(5),(6)

Defendants argue that Industrial Code § 1.21 (b) (1), which deals with ladder strength, is not applicable. Here, defendants correctly point out that there is no testimony establishing that the ladder at issue broke, dislodged or loosened due to excess weight. Thus, Industrial Code § 23-1.21 (b) (1) is not applicable to the instant action and cannot serve as a predicate for plaintiff's Labor Law § 241 (6) cause of action.

Next, defendants contend that Industrial Code § 23-1.21 (b) (3) is not applicable. This section provides that:

> All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (i) If it has a broken member or part. (ii) If it has any insecure joints between members or parts. (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness. (iv) If it has any flaw or defect of material that may cause ladder failure.

Defendants are also correct that this section is not applicable as there is no testimony or evidence that the ladder at issue herein was broken, had insecure parts, worn down rungs or any other defect that proximately caused plaintiff's accident. Accordingly, this code provision cannot serve as a predicate for plaintiff's Labor Law § 241 (6) claim,

Defendants also argue that § 23-1.21 (b) (4), which addresses ladder installation and use, is inapplicable. This section provides in pertinent part as follows:

> (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place . . .
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

> (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.
> (iv) 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.
> (v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

Defendants contend that since the job-made wood ladder was a cleat ladder, subsections (i), (iii), (iv), and (v) do not apply as the subject job-made wooden ladder appears to be built consistent with the requirements of Industrial Code § 23-1.21(c), which specifically applies to cleat ladders. However, defendants fail to offer any support for the assertion that these subsections would not also apply to a cleat ladder. As to § 23-1.21 (b) (4) (ii), which provides that all "ladder footings shall be firm", defendants assert that there is no evidence or testimony that the ladder was unsecured or slippery in any way. In support of their position, defendants point to Mr. Interian's affidavit which merely states "no evidence was reviewed that suggested that the installation of the subject ladder did not meet the requirements of 23-1.21 (b) (4)" (NYSCEF Doc No. 48 at ¶ 16 (f)). However, plaintiff in fact testified that the ladder was not affixed at the site and specifically not at the bottom (*see* NYSCEF Doc No. 27, at 53, lines 17-23).

The court finds that defendants have failed to demonstrate either that Industrial Code § 23-1.2 (b) (4) (i), (ii) and (iv) are inapplicable to the facts of this case, or that the

alleged violation of these regulations was not a proximate cause of the accident. Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code § 23-1.2 (b) (4) (i), (ii) and (iv) is denied. However, they have demonstrated that there has been no testimony or evidence presented indicating that subdivisions (iii) and (v) are applicable to the facts herein or that a violation of either subsection was a proximate cause of the accident and plaintiff has failed to raise an issue of fact in this regard.

Defendants allege that § 23-1.21 (b) (5), which addresses the size and strength requirements for wood rungs, is inapplicable as there is no evidence or testimony demonstrating that any problem with the rungs caused plaintiff's accident. Defendants also contend that the following sections are not applicable: 23-1.21 (b) (6), which addresses ladder splicing; 1.21 (b) (7), which addresses limited use of metal ladders; 1.21 (b) (8), which addresses ladders with spreaders; and 1.21 (b) (9), which relates to the placement of ladders in door openings, as there is no assertion or evidence indicating that any of these subsections were violated. The court agrees that there is nothing in the record demonstrating that any of these provisions apply to the facts herein and plaintiff has failed to raise an issue of fact in this regard. Accordingly, the court finds that Industrial Code §§ 23-1.21 (b) (5), (6), (7), (8) and (9) cannot serve as a predicate for plaintiff's Labor Law § 241 (6) cause of action.

Industrial Code § 23-1.21(c)(1) and (2)

Defendants also contend that there was no violation of § 23-1.21 (c) (1), which states that "Rung or cleat type ladders consisting of a single section shall not exceed 30 feet in

length" as plaintiff testified that the ladder was approximately 12 feet long. Based upon plaintiff's testimony in this regard, defendants have demonstrated that there was no violation of Industrial Code § 23-1.21 (c) (1) that proximately caused plaintiff's accident. Plaintiff fails to raise an issue of fact in this regard.

Next, defendants contend that there was no violation of § 23-1.21 (c) (2), which addresses the materials and construction of cleat-type ladders. In support of this contention defendant point to Mr. Interian's affidavit in which he opines that the ladders at the site, including the one at issue herein, were built using the proper materials and in accordance with industry standards, rules, regulations, and codes (NYSCEF Doc No. 48 at ¶ 16 [f]). Industrial Code 23-1.21 (c) (2) entitled "Cleat type ladders" provides as follows:

> (i) Materials. Wood used in the construction of cleat type ladders shall be thoroughly seasoned, free from sharp edges and splinters and shall be sound. The slope of the grain of side rails and cleats shall be no greater than one in 15 . . .
> (ii) Construction. (a) Cleats. The minimum size of cleats shall be three-quarter inch by three inches for cleat lengths up to and including 20 inches and three-quarter inch by three and three-quarter inches for cleat lengths up to and including 30 inches. Cleats shall not exceed 30 inches in length and the maximum vertical spacing between cleats measured along the side rails shall not be less than 12 inches nor greater than 14 inches, center to center. Cleats shall be set into the side rails one-half inch with a snug fit or they shall be braced by filler blocks between the cleats,
> (b) Side rails. The minimum size of side rails shall be one and five-eighths inches by three and five-eighths inches for ladders up to and including 19 feet in length and one and five-eighths inches by five and five-eighths inches for ladders greater than 19 feet in length.

In opposition, plaintiff argues that the record is devoid of evidence demonstrating that the ladder had been inspected or tested prior to, or after the accident and contends that

Mt. Interian is not qualified to render his opinions regarding whether the ladder from which he fell complied with the mandates of Industrial Code § 1.21 as he also did not personally inspect the ladder at issue herein.

Here, plaintiff has failed to raise an issue of fact as his testimony does not indicate that his accident was caused in whole or in part by a problem with the materials used to construct the ladder he was working on. Accordingly, the court finds that defendants have established entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code § 23-1.21 (c) (2) .

Conclusion

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. no 1) for an order granting partial summary judgment as to liability in plaintiff's favor on his Labor Law § 240 (1) claim as asserted against defendants is granted; and it is further

ORDERED that branch of defendants' motion (mot. seq. no. 2) seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied; that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is *granted to the extent that* said claim is premised upon Industrial Code §§23-1.7, 23-1.15, 23-1.16, 23-1.17, 1.5 (c) (3), 1.21 (b)(1) , 1.21 (b) (3); 1.21 (b) (4) (iii) and (v); 1.21 (b) (5)-(9); 1.21 (c) (1), (c) (2) and 23-9.6, and denied as premised upon Industrial

Code §§ 23-1.21 (b) (4) (i), (ii), and (iv); that branch of defendants' motion seeking dismissal of the Labor Law § 200 and common law negligence claims is granted.

The forgoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. HEELA D. CAPELL, J.S.C.