BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a transmittal from the County Attorney recommending the adoption of an Act that, if approved by this Board, would authorize the settlement of the lawsuit of *Jacek Krassowski v. County of Westchester, et al.*, in the amount of $750,000.00.

This matter is pending in the Westchester County Supreme Court before the Honorable Joan B. Lefkowitz. The matter tentatively settled pending this Board's approval of a settlement in the amount of $750,000.00. Bruce E. Cohen, Esq., Law Offices of Bruce E. Cohen & Associates, P.C., 425 Broadhollow Road, Suite 310, Melville, New York 11747, represents the Plaintiff.

This matter arises out of a construction accident that occurred on March 2, 2020, during Plaintiff's employment as a roofing laborer with non-party KDA Roofing, a subcontractor of co-defendant Sony NY Management & Construction Corporation ("Sony"), in connection with Contract 15-518 between the County and Sony for the replacement of, *inter alia*, various portions of the roofs of the Westchester County Department of Correction's ("WCDOC") facilities at 10 Woods Road, Valhalla, New York.

The accident purportedly occurred when Plaintiff slipped on ice located on the north-sloped portion of the WCDOC J-Block facility roof, causing him to fall approximately fifteen feet to the ground, hitting a barbed-wired fence in the process. Plaintiff had with him at the time of his fall a safety harness and a safety line which was unsecured. Plaintiff was taken by ambulance to the Westchester Medical Center for treatment. Plaintiff alleges that he suffered compression fractures of the T6 and T10 vertebrae, a non-displaced fracture of the anterior sternum, and mild compressions of the C6-C7, T1-T2 and T10-11 vertebrae as a result of his fall. After discharge from Westchester Medical Center, Plaintiff was treated by an orthopedic spine surgeon and an anesthesiologist and pain management physician. On June 17, 2022, a lumbar block was done at

three levels of Plaintiff's lumbar spine. Plaintiff currently complains of persistent pain and spasms in his lumbar region, which he claims precludes him from resuming his employment as a roofing laborer.

At the close of discovery, the County moved for summary judgment. The basis of the County's motion was that Plaintiff failed to properly use the safety harness and safety line provided prior to stepping onto the north-sloped portion of the J-Block roof, thus proximately causing his fall. In its March 17, 2022 Decision and Order, a copy of which is attached, the Court granted the County's motion in part and denied the County's motion in part. The basis of the Court's denial was (a) that the County had a non-delegable duty to provide a safety device to Plaintiff while working on the J-Block roof, and (b) the absence of evidence that the County or Sony instructed Plaintiff where to anchor his safety line precludes a finding that the County satisfied its non-delegable.

Co-defendant Sony has failed to appear in this action. All efforts to contact representatives of Sony have gone unanswered. Pursuant to the County's contract with Sony, Sony was required to (a) indemnify and safe the County harmless from all suites of any kind and nature whatsoever from or on account of the construction contemplated by the contract, and (b) provide the County proof of liability insurance and a certificate naming the County as an additional insured. Demands for indemnification were served on both Sony and its insurance provider; however, the certificate of liability insurance naming the County as an additional insured expired prior to the date of Plaintiff's accident, and there is no evidence that the certificate was ever renewed. Notwithstanding, the County still has an active cross-claim against Sony for indemnification.

The requested settlement takes into consideration the uncertainty of litigation and the potential costs of trial, subsequent proceedings and potential appeal. The accompanying Act will authorize settlement of the lawsuit entitled *Jacek Krassowski v. County of Westchester, et al.*, in the amount of $750,000.00, Westchester County Supreme Court Index No. 59834/2020. An affirmative vote of a majority of the Board is required to pass this Legislation.

Dated: White Plains, New York
January 9th, 2023

COMMITTEE ON

Budget & Appropriations

Law & Major Contracts

Dated: January 9, 2023
White Plains, New York

The following members attended the meeting remotely pursuant to Chapter 1 of New York State Laws of 2022, and approved this item out of Committee with an affirmative vote. Their electronic signature was authorized and is below.

COMMITTEES ON

Catherine F. Parker	Catherine F. Parker

Budget & Appropriations **Law & Major Contracts**

ACT NO. -2022

AN ACT authorizing the County Attorney to settle the lawsuit of *Jacek Krassowski v. County of Westchester, et al.*, Westchester County Supreme Court Index No. 59834/2020, in the amount of $750,000.00

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

Section 1. The County Attorney is authorized to settle the lawsuit of *Jacek Krassowski v. County of Westchester, et al.*, Westchester County Supreme Court Index No. 59834/2020, in the amount of $750,000.00 inclusive of attorney's fees. The County will pay $750, 000.00 out of the self-insured retention fund.

Section 2. The County Attorney or his designee is hereby authorized and empowered to execute and deliver all documents and take such actions as the County Attorney deems necessary or desirable to accomplish the purpose of this Act.

Section 3. This Act shall take effect immediately.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

----------X

JACEK KRASSOWSKI,

Plaintiff,

-against-

COUNTY OF WESTCHESTER, THE COUNTY OF WESTCHESTER DEPARTMENT OF CORRECTION and SONY NY MANAGEMENT & CONSTRUCTION CORP.,

Defendants.

----------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 59834/2020

Motion Sequence Nos. 02 and 04

The following papers (NYSCEF document nos. 25-40; 50-53; 55-56) were read on: (1) the motion by the defendants, County of Westchester and The County of Westchester Department of Correction (collectively, the County of Westchester), for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint that asserts a cause of action against it (sequence no. 02); and (2) that branch of the cross-motion by the plaintiff for an order, pursuant to CPLR 3025 (b), granting him leave to supplement the bill of particulars in order to allege certain provisions of the Industrial Code (sequence no. 04).

Motion Sequence No. 02
Notice of Motion-Statement of Facts-Affirmation-Affidavit-Exhibits (A-I)-Memo of Law
Reply Affirmation in Further Support and in Opposition-Reply Memo of Law

Motion Sequence No. 04
Notice of Cross-Motion-Affirmation in Support and in Opposition-Affidavit

Upon reading the foregoing papers, the motions are determined as follows:

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained in a construction accident that occurred on March 2, 2020, during the course of his employment as a roofing laborer with non-party subcontractor, KDA Roofing (hereinafter, KDA), on premises owned by the defendant-movant, County of Westchester (hereinafter, County), known as the Westchester County Jail, located at 10 Woods Road, Valhalla, New York.

KDA was retained by the general contractor and defendant, Sony NY Management & Construction Corp. (hereinafter, Sony), to perform the roofing work at the Jail. Sony was retained by the County pursuant to a written contract to perform the roofing work at the Jail which involved the replacement of various portions of roofs. The accident purportedly occurred when the plaintiff slipped on ice located on an upper portion of a sloped roof while attempting to attach his safety harness, which was provided by KDA, to a ventilation box located near the center of said sloped roof.

As relevant herein, plaintiff alleges that the County is liable for his injuries based on the County's purported violations of Labor Law §§ 200, 240 (1), and 241 (6) and Industrial Code § 23-1.7. More specifically, plaintiff alleges "[t]hat the negligence of the defendants consisted, amongst other things, in failing to take precautions to avoid the occurrence herein, in causing and/or permitting the claimant to work in [an] unsafe area; in failing to have in place protective equipment as well as the failure to provide accessway that was not in an icy, slippery and dangerous condition" (Krassowski complaint at ¶ 19, NYSCEF Doc No. 1).

Following the completion of discovery, the County moves (#02) for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint that asserts a cause of action against it. Plaintiff opposes the motion and cross-moves (#04) for an order, pursuant to CPLR 3025 (b), granting him leave to supplement the bill of particulars to allege further violations of the Industrial Code.[1] The County opposes the cross-motion. The court consolidates the motions for joint disposition herein.

In support of its motion for summary judgment, the County proffers, among other things, the deposition transcript and affidavit of Edward Duffy (hereinafter, Duffy), Construction Coordinator for the County's Department of Public Works. Based thereon, the County submits that judgment should be granted to it as a matter of law. Regarding plaintiff's claim that the County is liable under Labor Law § 200, the County argues that pursuant to the contract between it and Sony, Sony was responsible for the means and methods of the project's completion. As such, the County asserts that it did not exercise supervisory control over the injury-producing work. The County further asserts that it had no notice, actual or constructive, of any ice condition on the roof and did not create said condition. Accordingly, the County submits that it cannot be held liable under section 200 of the Labor Law. In any event, the County notes that pursuant to the contract, Sony

[1] By order dated and entered November 3, 2021, the court denied, as untimely, that branch of the plaintiff's cross-motion which sought an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability. The court further referred that branch of the cross-motion which sought an order, pursuant to CPLR 3025 (b), granting plaintiff leave to supplement his bill of particulars, to the IAS Part for determination (*see* NYSCEF Doc No. 57). The court considers that remaining branch of the plaintiff's cross-motion herein and further considers the cross-motion to the extent that it contains opposition to the County's summary judgment motion.

possessed the right to determine whether weather conditions permitted work on any given day. For the same reasons, the County argues that it cannot be held liable under Labor Law § 241 (6) which is premised upon the County's purported violation of 12 NYCRR § 23-1.7 (d). Regarding plaintiff's claim that the County is liable under Labor Law § 240 (1), the County contends that plaintiff was provided with an adequate safety device (a harness) and that the plaintiff's failure to properly secure his safety harness to a proper tie-in point (i.e. to the air conditioning unit located on the flat portion of the roof connected to the building) was the sole proximate cause of the accident. Since plaintiff was the sole proximate cause of the accident, the County further submits that it cannot be held liable under Labor Law § 240 (1).

In opposition, plaintiff contends, among other things, that he was not the sole proximate cause of his accident. Plaintiff asserts that the nearest ventilation box that he was told by his supervisor to secure his safety harness to was about 5-7 feet away from the point where he entered the second roof and that he had never been told by anyone to use any other places on the roof to connect his safety line, including any air conditioning units. Thus, plaintiff argues that because the County failed to provide him with more suitable protection to prevent his fall, he asserts that the County's motion should be denied.

In reply, the County argues, among other things, that plaintiff has not submitted opposition to the branch of the County's motion seeking dismissal of the claim premised upon violation of section 200 of the Labor Law. The County further asserts that plaintiff has failed to raise an issue of fact regarding its contention that he was the sole proximate cause of the accident. The County notes that plaintiff concedes that he observed ice on the roof that morning and, notwithstanding said observation, proceeded to walk onto the sloped roof. The County thus submits that plaintiff was the substantial cause of the events which produced his injuries and, as such, its motion should be granted.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating the absence of triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant satisfies its prima facie burden, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

Labor Law § 200

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where, as here, "a plaintiff's injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property,...a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, only when the owner created the complained-of condition, or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice" (*Martinez v City of New York*, 73 AD3d 993, 997 [2d Dept 2010]).

Here, the County established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff's claim premised upon violation of section 200 of the Labor Law by demonstrating that it did not create the alleged dangerous condition on the roof nor did it have notice, actual or constructive, of the alleged icy condition on the roof. Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, the plaintiff, who did not oppose this branch of the County's motion, failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Accordingly, this branch of the County's motion is granted, and this claim is dismissed.

Labor Law § 240 (1)

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993] ["[i]t is by now well established that the duty imposed by Labor Law § 240(1) is nondelegable and that 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."]). The Court of Appeals has explained that "the statute is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed" (*Ross*, 81 NY2d at 500 [internal quotation marks and ellipses omitted]). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Morocho v Plainview-Old Bethpage Cent. Sch. Dist.*, 116 AD3d 935, 936 [2d Dept 2014]). "Where a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach. Instead, the owner or contractor must breach the statutory duty under

section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks, citations, brackets and ellipses omitted]). " '[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1),' and when 'there are questions of fact as to whether the [structure] provided adequate protection,' summary judgment is not warranted" (*Giordano v Tishman Constr. Corp.*, 152 AD3d 470, 470-471 [1st Dept 2017], quoting *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]).

Here, the County failed to establish its prima facie entitlement to judgment as a matter of law dismissing the claim premised upon a violation of section 240 (1) of the Labor Law. The County failed to eliminate all triable issues of material fact regarding its contention that plaintiff was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1505 [4th Dept 2016]). The affidavit of Duffy, proffered in support of the motion, is insufficient to eliminate all triable issues of fact as to whether the plaintiff's failure to use a more appropriate anchorage point (the air conditioning unit) to which the safety harness could have been tied-off, according to Duffy, was the sole proximate cause of the accident (*see Giordano*, 152 AD3d at 471; *Scruton*, 144 AD3d at 1505; *cf. Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept 2017] ["[t]he fact that both Caro and O'Shaughnessy, as well as defendants' expert, later claimed in affidavits that plaintiff could have tied off to a raker beam above his head is of no moment, inasmuch as there is no evidence in the record that plaintiff was ever instructed or knew to use such points to tie off."]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]).

Since the County failed to establish its prima facie entitlement to judgment as a matter of law, the court need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, this branch of the County's motion seeking dismissal of the plaintiff's claim premised upon a violation of Labor Law § 240 (1) is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes upon owners and contractors a nondelegable duty "to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross*, 81 NY2d at 501-502 [internal quotation marks omitted]). "To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards" (*Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). Moreover, plaintiff must demonstrate that a defendant's alleged violation of the specific regulation was a proximate cause of the accident (*see Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2d Dept 2012]). "A failure to identify the Industrial Code provision in the

complaint or bill of particulars is not fatal to such a claim" (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011] [internal quotation marks omitted]).

Plaintiff's complaint alleges that the County violated Industrial Code § 23-1.7. The complaint does not specify the specific subsection under section 23-1.7 that the County purportedly violated. However, the complaint alleges that the County "fail[ed] to provide accessway that was not in an icy, slippery and dangerous condition" (Krassowski complaint at ¶ 19, NYSCEF Doc No. 1). Based thereon, it is evident that plaintiff intended to claim a violation of 12 NYCRR § 23-1.7 (d), which provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Moreover, the court notes that the County cannot claim any prejudice insofar as it sought summary judgment dismissing this particular regulation.

In support of its motion dismissing this claim, the County argues that because it did not have actual or constructive notice of the icy condition which caused plaintiff to fall, plaintiff's claim premised upon a violation of this section of the Labor Law and this regulation of the Industrial Code fails as a matter of law (*see* Micciche memorandum of law in support at p. 5). While such argument is sufficient to establish entitlement to dismissal under section 200 of the Labor Law (*see Temes v Columbus Ctr. LLC*, 48 AD3d 281, 281 [1st Dept 2008]), it is insufficient, standing alone, to establish prima facie entitlement to judgment as a matter of law dismissing the plaintiff's claim predicated upon section 241 (6) of the Labor Law (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]; *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 742 [2d Dept 2015]). In any event, as noted above, questions of fact remain as to whether plaintiff was the sole proximate cause of the accident (*cf. Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 [2d Dept 2007]). Accordingly, this branch of the County's motion seeking dismissal of the plaintiff's claim premised upon a violation of Labor Law § 241 (6) is denied without regard to the sufficiency of the plaintiff's opposing papers.

The court next addresses that branch of the cross-motion (#04) which seeks leave to supplement the bill of particulars to assert further violations of the Industrial Code. A motion to amend or supplement a bill of particulars is governed by the same standard as a motion to amend a pleading under CPLR 3025 (*see Cedano v New York Racing Assn., Inc.*, 171 AD3d 1126, 1127 [2d Dept 2019]; *Scarangello v State of New York*, 111 AD2d 798, 798 [2d Dept 1985]). CPLR 3025 (b) provides, in relevant part, that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Here, in contravention of CPLR 3025 (b), plaintiff failed to submit a proposed supplemental bill of particulars with his cross motion. Accordingly, this branch of the cross motion is denied (*see Cedano*, 171 AD3d at 1127; *Scialdone v Stepping Stones Assoc., L.P.*, 148 AD3d 950, 952 [2d Dept 2017]).

All other arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED that the motion (#02) by the defendant County of Westchester seeking summary judgment is granted to the extent that the plaintiff's claim alleging a violation of Labor Law § 200 is dismissed, and the motion is otherwise denied as to the plaintiff's claims alleging a violation of Labor Law §§ 240 (1) and 241 (6); and it is further

ORDERED that the branch of the cross-motion (#04) by the plaintiff seeking leave to supplement his bill of particulars is denied; and it is further

ORDERED the matter shall be scheduled for a settlement conference on a date and time set by the clerk.

ENTER,

Dated: White Plains, New York
March 17, 2022

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

All counsel of record via NYSCEF

FISCAL IMPACT STATEMENT

SUBJECT: Lawsuit Settlement: Krassowski, Jacek ☐ **NO FISCAL IMPACT PROJECTED**

OPERATING BUDGET IMPACT

(To be completed by operating department and reviewed by Budget Department)

A) ☒ **GENERAL FUND** ☐ **AIRPORT** ☐ **SPECIAL REVENUE FUND (Districts)**

B) EXPENSES AND REVENUES

Total Current Year Cost $ 750,000

Total Current Year Revenue $ _____

Source of Funds (check one): ☐ Current Appropriations

☐ Transfer of Existing Appropriations ☐ Additional Appropriations ☒ Other (explain)

Identify Accounts: 6N Fund: 615 59 0700 4410 4280 04

6N Fund:

Potential Related Operating Budget Expenses: Annual Amount $ N/A

Describe: Settlement of General Liability Claim (G200022 Krassowski, Jacek)

_____

_____

_____

Potential Related Revenues: Annual Amount $ N/A

Describe: _____.

_____

_____

Anticipated Savings to County and/or Impact on Department Operations:

Current Year:

N/A

_____

Next Four years: N/A

_____

_____

_____

Prepared by: Giacomo G. Micciche

Title: Assistant County Attorney

Department: Law

Reviewed By: PH

Budget Director

10/31/22

If you need more space, please attach additional sheets.