

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Mather v. HFZ KIK 30th St. Owner LLC

2025 NY Slip Op 06909 (N.Y. Ct. App. 2025) · No. Index No. 161223/19; 595632/20; Appeal No. 5367; Case No. 2024-05955 · Decided December 11, 2025

SUMMARY

The Appellate Division, First Department affirmed an order granting plaintiff partial summary judgment on his Labor Law § 241(6) claim based on an alleged violation of Industrial Code § 23-9.4(e). The court held that pushing an unsecured dumpster with an excavator violated the regulation and caused plaintiff's injury, while finding an issue of fact concerning whether the excavator was "not in use" under Industrial Code § 23-9.5(c).

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Kern, J.P.; Friedman, J.; Rodriguez, J.; Pitt-Burke, J.; Rosado, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	December 11, 2025
DOCKET	Index No. 161223/19; 595632/20; Appeal No. 5367; Case No. 2024-05955
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order granting plaintiff partial summary judgment on his Labor Law § 241(6) claim predicated on Industrial Code § 23-9.4(e), and denying defendants' and third-party defendant's motions for summary judgment dismissing the Labor Law § 241(6) claims predicated on Industrial Code §§ 23-9.4(e) and 23-9.5(c).
STANDARD OF REVIEW	Summary judgment is proper where the movant establishes entitlement to judgment as a matter of law and no material factual issue remains; the court reviewed the evidence and issues of fact concerning the Industrial Code § 23-9.5(c) claim.
PRECEDENTIAL VALUE	published

PARTIES

HFZ KIK 30th Street Owner LLC, Pavarini McGovern, LLC, Linde-Griffith Construction Co. v. Cody Mather

TOPICS

construction law negligence comparative fault appellate procedure

PRACTICE AREAS

construction law personal injury negligence appellate procedure

QUESTIONS PRESENTED

1. Whether the excavator operator violated Industrial Code § 23-9.4(e) by pushing the dumpster without securing or rigging it.
2. Whether that regulatory violation established negligence and supported partial summary judgment for plaintiff on his Labor Law § 241(6) claim.
3. Whether plaintiff's alleged comparative negligence barred summary judgment on liability under Labor Law § 241(6).
4. Whether a triable issue existed as to whether the excavator was 'not in use' under Industrial Code § 23-9.5(c) when the accident occurred.

HOLDINGS

1. The excavator handled the dumpster when its operator began moving it, so Industrial Code § 23-9.4(e) applied.
2. The undisputed failure to rig the dumpster as required by Industrial Code § 23-9.4(e), together with the unsafe decision to push it, constituted negligence and supported plaintiff's partial summary judgment on the Labor Law § 241(6) claim.
3. Plaintiff was not required to establish freedom from comparative negligence to obtain summary judgment on liability under Labor Law § 241(6).
4. Defendants and the third-party defendant were not entitled to summary judgment dismissing the § 23-9.5(c) claim because a factual issue existed as to whether the excavator was 'not in use' when the accident occurred.

KEY QUOTATIONS

"Any load handled by such equipment" must be secured as provided by the regulation." ([*1])

"Even assuming plaintiff was comparatively negligent by walking between the dumpsters, he is not required to show freedom from comparative negligence to be entitled to summary judgment on liability under Labor Law § 241(6)." ([*1])

FACTUAL BACKGROUND

Cody Mather was injured when an excavator pushed a dumpster into him, pinning him between that dumpster and another dumpster. The excavator operator moved the dumpster without securing or rigging it as required by Industrial Code § 23-9.4(e). Mather had left the excavator cab to retrieve rigging after notifying the operator, but the operator moved the dumpster while Mather remained within its range; video and photographs corroborated Mather's account.

PROCEDURAL HISTORY

Supreme Court, New York County, entered an order on or about August 22, 2024. The order granted Cody Mather partial summary judgment on liability under Labor Law § 241(6) based on Industrial Code § 23-9.4(e), while denying the defense motions seeking dismissal of claims based on §§ 23-9.4(e) and 23-9.5(c). The Appellate Division, First Department, unanimously affirmed the order to the extent appealed.

DISPOSITION

affirmed

CASES CITED

- Malloy v. Madison Forty-Five Co., 13 A.D.3d 55, 57 (1st Dep't 2004)
- Cotroneo v. Van Wagner Sign Erectors, LLC, 210 A.D.3d 421, 422 (1st Dep't 2022)
- Webber v. City of Dunkirk, 226 A.D.2d 1050, 1051 (4th Dep't 1996)
- Benevento v. City of Buffalo, 74 A.D.3d 1738, 1740 (4th Dep't 2010), leave to appeal denied, 77 A.D.3d 1457 (4th Dep't 2010)

OPINION

PER CURIAM.

Mather v HFZ KIK 30th St. Owner LLC (2025 NY Slip Op 06909) Mather v HFZ KIK 30th St. Owner LLC 2025 NY Slip Op 06909 Decided on December 11, 2025 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: December 11, 2024 Before: Kern, J.P., Friedman, Rodriguez, Pitt-Burke, Rosado, JJ. Index No. 161223/19 595632/20|Appeal No. 5367|Case No. 2024-05955| [*1]Cody Mather, Plaintiff-Respondent, v HFZ KIK 30th Street Owner LLC, et al., Defendants-Appellants, HFZ KIK 30th Street Owner LLC, et al., Third-Party Plaintiffs, v Linde-Griffith Construction Co., Third-Party Defendant-Appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Anu Bhargava of counsel), for HFZ KIK 30th Street Owner LLC and Pavarini McGovern, LLC, appellants. Ahmuty, Demers & McManus, Albertson (Nicholas P. Calabria of counsel), for Linde-Griffith Construction Co., appellant. Sakkas, Cahn & Weiss, LLP, New York (Matthew Sakkas of counsel), for respondent. Order, Supreme Court, New

York County (Eric Schumacher, J.), entered on or about August 22, 2024, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim as predicated on a violation of Industrial Code (12 NYCRR) § 23-9.4(e), and denied the respective motions of defendants and third-party defendant for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as predicated on violations of Industrial Code §§ 23-9.4(e) and 23-9.5(c), unanimously affirmed, without costs.

Plaintiff was injured when an excavator pushed a dumpster into plaintiff, pinning him between another dumpster. Industrial Code § 23-9.4(e)(1) specifically provides that "[a]ny load handled by such equipment" must be secured as provided by the regulation.

Here, the excavator clearly "handled" the dumpster as the operator began moving it (see *Malloy v Madison Forty-Five Co.*, 13 AD3d 55, 57 [1st Dept 2004]). The excavator operator violated Industrial Code § 23-9.4(e) because it is undisputed that he did not rig the dumpster as required by the regulation.

Moreover, this violation constituted negligence because it was unsafe to move the dumpster by pushing it rather than rigging it. It is also undisputed that the maneuvering of the rig to move the dumpster caused plaintiff's injury by pinning him between the two dumpsters.

Although plaintiff walked away from the excavator between the dumpsters, he credibly testified that this was the only way he could stay in the operator's line of sight. The video evidence and photographs corroborate his testimony. Even assuming plaintiff was comparatively negligent by walking between the dumpsters, he is not required to show freedom from comparative negligence to be entitled to summary judgment on liability under Labor Law § 241(6) (*Cotroneo v Van Wagner Sign Erectors, LLC*, 210 AD3d 421, 422 [1st Dept 2022]).

As to Industrial Code § 23-9.5(c), plaintiff stresses that before leaving the cab of the excavator, he notified the operator that he was going to retrieve the rigging to move the dumpsters, but the operator decided to move the dumpster immediately after plaintiff left the cab, before he retrieved the rigging, and while he was still in its range.

Thus, there is an issue of fact as to whether the excavator was "not in use" at the time of the accident (see *Webber v City of Dunkirk*, 226 AD2d 1050, 1051 [4th Dept 1996]; *Benevento v City of Buffalo*, 74 AD3d 1738, 1740 [4th Dept 2010], lv denied 77 AD3d 1457 [2010]).

We have considered defendants' and third-party defendant's remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: December 11, 2024

PER CURIAM.

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Pillinger Miller Tarallo, LLP, Elmsford (Anu Bhargava of counsel), for HFZ KIK 30th Street Owner LLC and Pavarini McGovern, LLC, appellants. Ahmuty, Demers & McManus, Albertson (Nicholas P. Calabria of counsel), for Linde-Griffith Construction Co., appellant. Sakkas, Cahn & Weiss, LLP, New York (Matthew Sakkas of counsel), for respondent. Order, Supreme Court, New York County (Eric Schumacher, J.), entered on or about August 22, 2024, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim as predicated on a violation of Industrial Code (12 NYCRR) § 23-9.4(e), and denied the respective motions of defendants and third-party defendant for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as predicated on violations of Industrial Code §§ 23-9.4(e) and 23-9.5(c), unanimously affirmed, without costs.

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Moreover, this violation constituted negligence because it was unsafe to move the dumpster by pushing it rather than rigging it. It is also undisputed that the maneuvering of the rig to move the dumpster caused plaintiff's injury by pinning him between the two dumpsters.

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