At an IAS Term, Part 20 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 17th day of March, 2022.

P R E S E N T:

HON. CONSUELO MALLAFRE MELENDEZ,
Justice.

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GERARD DEMATTEO and DAWN DEMATTEO,

Plaintiffs,

-against- Index No.: 517296/17

THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

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)	38-39 .
Opposing Affidavits (Affirmations)	57 .
Reply Affidavits (Affirmations)	59 .

Upon the foregoing papers, plaintiffs Gerard Dematteo and Dawn Dematteo move (in motion sequence [mot seq.] three) for an order granting them partial summary judgment with respect to liability on their Labor Law §§ 240 (1) and 241 (6) causes of action.

The motion is granted with respect to the Labor Law § 240 (1) cause of action and denied with respect to the Labor Law § 241 (6) cause of action.

Plaintiffs have pleaded causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries plaintiff Gerard Dematteo[1] suffered on July 27, 2016, when he fell from a scaffold to the floor while painting the wall of an auditorium located in P.S. 101. P.S. 101 is a public school owned by defendant City of New York (City) and operated by defendant New York City Department of Education (DOE) (*see e.g.* Education Law § 2554 [4], [13] [a], [13] [b]; NY City Charter, ch 20, § 521 [a]; *Bleiberg v City of New York*, 43 AD3d 969, 971 [2d Dept 2007]).[2] Non-party Nicholas Schiavo (Schiavo), a DOE custodial engineer who worked at P.S. 101, hired plaintiff as a "fireman."[3] Plaintiff's duties as fireman included maintaining P.S. 101's boilers and general handyperson work at the school. Schiavo directed plaintiff to perform the sanding/painting work in the school's auditorium, which involved repainting the entire auditorium as part of the school's summer renovation.

According to plaintiff's deposition testimony, his painting work on the date of the accident required him to use the school's scaffold. The scaffold was a metal pipe "Bakers" scaffold that had a wheel at the base of each of its four legs. With the legs fully extended and the additional extension added, the scaffold platform stood approximately

[1] Plaintiff Dawn Dematteo's claims are derivative only. All singular references to plaintiff relate to plaintiff Gerard Dematteo.

[2] Even if the Education Law and New York City Charter provisions are insufficient to establish, as a matter of law, the City's ownership and the DOE's operation of P.S. 101, these facts must be deemed admitted by defendants. Namely, since defendants' respective status as the owner and operator of P.S. 101 is within their exclusive possession, their denials of "knowledge or information sufficient to form a belief" regarding the ownership and operation of P.S. 101 must be deemed an admission of such status (*see Majerski v City of New York*, 193 AD3d 715, 717 [2d Dept 2021]).

[3] The 50-H hearing testimony and deposition testimony of plaintiff and the deposition testimony of Schiavo demonstrate that plaintiff was an employee or independent contractor of Schiavo, not of the DOE.

15 feet above the floor. According to Schiavo's deposition testimony, the scaffold also had bars or railings on three sides. While plaintiff had never been afraid to use the scaffold, he felt it was too shaky, and had complained about how shaky it was in the past.

In his 50-h hearing testimony, plaintiff testified that he "more than likely" or "probably" checked to see that the wheels of the scaffold were locked before he climbed up to perform his work immediately before the accident. At this deposition, plaintiff testified that he "did check the brakes." Plaintiff then proceeded to climb up onto the scaffold platform using a ladder that he had placed next to the scaffold and started to paint. At both his 50-h hearing and deposition, plaintiff testified that the scaffold buckled, and that the next thing he recalls is waking up in the hospital. Plaintiff Dawn Dematteo, plaintiff's wife, who worked in P.S. 101 as a teacher, arrived in the auditorium a few minutes after the accident and observed that the scaffold had fallen to the floor and appeared to be broken. At that time, plaintiff was sitting in one of the seats in the auditorium and his face was black and blue and covered in blood. Plaintiff, however, did not respond to Dawn Dematteo when she asked him questions. Photographs taken after the accident show the fallen scaffold lying partly on the floor and partly over the row of the auditorium seats, with the scaffold platform detached from the scaffold. The photographs also show paint on the floor as well as blood in the area where plaintiff had apparently fallen.[4]

[4] There were no witnesses to the accidence. Robert Dematteo, a co-worker who was assisting plaintiff from the floor of the auditorium, told Dawn Dematteo that he had turned his back to get some paint when the scaffold collapsed and that he then saw plaintiff on the floor and called 911. Schiavo also testified that Robert Dematteo told him that he did not observe the accident.

Turning first to plaintiff's Labor Law § 240 (1) cause of action, Labor Law § 240 (1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide scaffolding which is "so constructed, placed and operated as to give proper protection" to employees using it. To make a prima facie showing of liability under 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 (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Cruz v Roman Catholic Church of St. Gerard Magella*, 174 AD3d 782, 783 [2d Dept 2019]). The burden then shifts to the defendant to raise a triable issue of fact (*see Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 502 [2014], *lv dismissed* 24 NY3d 1096 [2015]). A plaintiff's comparative negligence is not a defense to a cause of action under Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1024 [2d Dept 2018]). However, where a plaintiff's actions are the sole proximate cause of his or her injuries, liability under Labor Law § 240 (1) does not attach (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Rapalo*, 163 AD3d at 1024).

Here, there is no dispute that the City, as owner, and DOE, as the entity that contracted for plaintiff to perform work, may be held liable under Labor Law § 240 (1) (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1190 [2d Dept 2020]), that plaintiff's painting work is work that is covered under section 240 (1) (*see Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460,

461 [2d Dept 2008]; *cf. Mejia v Cohn*, 188 AD3d 1035, 1037 [2d Dept 2020]), and that plaintiff was working at an elevation for purposes of section 240 (1) (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339-340 [2011]; *Myiow v City of New York*, 143 AD3d 433, 436 [1st Dept 2016]; *Henry v Eleventh Ave., L.P.*, 87 AD3d 523, 524 [2d Dept 2011]). Additionally, through plaintiff's testimony that he felt the scaffold platform buckle and the photographs and testimony of Dawn Dematteo and Schiavo that the scaffold was lying on the auditorium floor and seats after the accident, plaintiffs have demonstrated, prima facie, that the statute was violated by the movement and/or collapse of the scaffold and that this violation was a proximate cause of plaintiff's injuries (*see Hernandez v 767 Fifth Partners, LLC*, 199 AD3d 484, 485 [1st Dept 2021]; *Debennedetto*, 190 AD3d at 936; *Cruz*, 174 AD3d at 783; *Caban v Plaza Constr. Corp.*, 153 AD3d 488, 489-490 [2d Dept 2017]; *Strojek v 33 East 70th St. Corp.*, 128 AD3d 490, 491 [1st Dept 2015]).

Contrary to defendants' contentions, the fact that the plaintiff may have been the sole witness to the accident does not preclude an award of summary judgment in his favor (*see e.g. Klein v City of New York*, 89 NY2d 833, 834-835 [1996]; *Cardenas v 111-127 Cabrini Apts. Corp.*, 145 AD3d 955, 957 [2d Dept 2016]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]). Denying summary judgment in such circumstances is only appropriate where the defendant raises a bona fide issue as to how the accident happened or with respect to plaintiff's credibility (*see Klein*, 89 NY2d 833, 835 [1996]; *Alverez v 2455 8 Ave., LLC*, ___ AD3d ___, 2022 NY Slip Op 00837 [2d Dept 2022]; *King v*

Villette, 155 AD3d 619, 622 [2d Dept 2017]; *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799, 800-801 [1st Dept 2016]; *Melchor*, 90 AD3d at 869).

Here, defendants have failed to point to any evidence that would warrant denying plaintiff's motion. Although the photographs may be insufficient to demonstrate whether the scaffold actually buckled or collapsed, the photographs unequivocally prove that the scaffold fell to the ground – which fall likewise demonstrates, prima facie, that the scaffold failed to perform its proper function (*see Wolf v Ledcor Constr., Inc.*, 175 AD3d 927, 929 [4th Dept 2019]; *Strojek*, 128 AD3d at 491). Similarly, the fact that plaintiff's 50-h hearing testimony may leave open the possibility that plaintiff failed to lock the wheels of the scaffold does not raise a bona fide issue regarding the happening of the accident. In light of the fall or collapse of the scaffold, the failure to lock the wheels would, at best, constitute comparative fault, rather than the sole proximate cause of the accident (*see Ordonez v One Block, LLC*, 191 AD3d 412, 413 [1st Dept 2021]; *Celaz v Cornell*, 144 AD3d 590, 590 [1st Dept 2016]; *see also Cruz*, 174 AD3d at 782; *Bermejo*, 119 AD3d at 502). Finally, contrary to defendants' contention, an affidavit from an engineer or other expert was not necessary for plaintiff to make out his prima facie showing in view of the record before the court (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]).

Defendants, in opposition, only submitted a certified copy of the "Prehospital Care Report" in which one of the EMTs who transported plaintiff to the hospital noted that "PT STATED THAT HE GOT DIZZY AND FELL OFF A SCAFFOLDING ABOUT 10 FT HIGH." Plaintiff's statement to the EMTs may be considered as a party admission

(*see Pina Arthur Clinton Hous. Dev. Fund Corp.*, 188 AD3d 614, 614-615 [1st Dept 2020]; *Robles v Polytemp, Inc.*, 127 AD3d 1052, 1054 [2d Dept 2015]; *Goodrich v Watermill Townhouses, Inc.*, 169 Misc 2d 314, 318-319 [Sup Ct, Ulster County 1996]; *see also Grieve v MCRT Northeast Constr., LLC*, 197 AD3d 623, 625 [2d Dept 2021]). However, in view of the indisputable evidence that the scaffold itself fell, the fact that plaintiff may have initially begun to fall because he was dizzy fails to raise a factual issue as to the whether the fall of the scaffold was a proximate cause of the accident. In short, the fall of the scaffold, in and of itself, demonstrates that it failed to provide proper protection (*see Ordonez*, 191 AD3d at 413; *Lajqi v New York City Tr. Auth.*, 23 AD3d 159, 159 [1st Dept 2005]; *see also Mena v 485 Seventh Ave. Assoc. LLC*, 199 AD3d 420, 421 [1st Dept 2021]; *Angemarca v Silverstein Props., Inc.*, 16 AD3d 242, 242 [1st Dept 2005]). This failure of the scaffold, which plaintiff had testified was shaky to begin with (*see Caban*, 153 AD3d at 489-490), distinguishes this case from cases where a plaintiff simply falls from an otherwise adequate safety device (*see Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424, 425-426 [1st Dept 2019], *reargument granted* 36 NY3d 1084 [2021]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 515 [1st Dept 2013]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 763 [2d Dept 2006]; *cf. Nazario v 222 Boadway, LLC*, 28 NY3d 1054, 1055 [2016]). Moreover, an adequate scaffold, unlike an adequate ladder (*see Nazario*, 28 NY3d at 1055), should not fall simply because a worker falls on it (*see Yaucan v Hawthorne Village, LLC*, 155 AD3d 924, 925 [2d Dept 2017]; *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101,

1102 [2d Dept 2012]; *Nimirovski*, 29 AD3d at 425-426; *see also Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 980 [2d Dept 2021]).

Accordingly, since defendants have failed to demonstrate a material factual issue with respect to plaintiff's credibility or as to whether the fall of the scaffold was a proximate cause of plaintiff's injury, plaintiffs are entitled to partial summary judgment with respect to liability on the Labor Law § 240 (1) cause of action.

Turning to plaintiffs' Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). In moving for partial summary judgment, plaintiff relies upon: (1) 12 NYCRR 23-5.1 (e) and 23-5.18 (a), which require that scaffold planking be "laid tight"; (2) 12 NYCRR 23-5.6 (c), which requires that "pole" scaffolds be properly braced; and (3) 12 NYCRR 23-5.18 (f), which requires that mobile scaffolds be properly braced. Each of the foregoing sections relied upon by plaintiff states a specific standard. However, nothing in the record suggests that the manually propelled mobile scaffold used by plaintiff may be deemed a pole scaffold within the meaning of 12 NYCRR 23-5.6. In addition, plaintiff's testimony and the photographs of the scaffold after the accident fail to demonstrate, as a matter of law, that the collapse or fall of the scaffold was proximately caused by a failure with respect to the planking of the scaffold or the adequacy of the bracing. Accordingly, plaintiffs have

failed to demonstrate, prima facie, that a violation of 12 NYCRR 23-5.1 (e), 23-5.6 (c), or 23-5.18 (a) and (f) was a proximate cause of his accident (*see Torres v New York City Hous. Auth.*, 199 AD3d 852, 854 [2d Dept 2021]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712, 714 [2d Dept 2017]; *cf. Melchor*, 90 AD3d at 870-871). Plaintiffs' motion with respect to the section 241 (6) cause of action must be denied regardless of the sufficiency of defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

This constitutes the decision, order, and judgment of the court.

E N T E R

J.S.C.
Hon. Consuelo Mallafre Melendez