SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. JOSEPH P. DORSA** **IAS PART 12**
Justice

- x

LUIS BEJARANO,

Plaintiff, Index No.: 10102/05

- against - Motion Date: 11/7/07

59-25 GRAND AVENUE, LLC, Motion No.: 1

Defendant. Motion Seq. No. 1

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The following papers numbered 1 to 9 on this motion:

	Papers Numbered
Plaintiff's Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	1-4
Defendant's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	5-7
Plaintiff's Reply Affirmation-Exhibit(s)	8-9

By notice of motion, plaintiff seeks an order of the Court, pursuant to CPLR § 3212, granting him partial summary judgment in favor of plaintiff and against defendant under Labor Law § 240(1).

Defendant files an affirmation in opposition and plaintiff replies.

In this action, defendant is the owner of the premises located at 59-25 Grand Avenue, Maspeth, Queens, N.Y. The tenant in possession of said premises is plaintiff's employer, Citywide Testing, Inc.

On the date of the accident, March 11, 2004, plaintiff was working on an electrical construction project, the purpose of which was to install the electrical systems for certain welding equipment at the subject premises. As part of the project

certain cables had to be strung or installed in a drop ceiling.

Using a nine foot "A" frame ladder, plaintiff removed several tiles from the drop ceiling and grabbed the end of a 100 to 150 lb. cable to begin installing it in the ceiling. As he was doing so, plaintiff maintains that the cable slipped out of his hand and struck the ladder, causing it to shake and tip. Plaintiff tried to grab the ceiling to stop his fall, which caused a portion of the ceiling to collapse as plaintiff fell approximately seven (7) feet to the floor. Plaintiff was working alone at the time.

As a result, plaintiff suffered facial fractures and fracture to his left wrist.

Plaintiff does not allege that the ladder itself was in any way defective, but he does maintain that defendant's failure to provide safety devices is a violation of Labor Law § 240(1). In particular, plaintiff maintains there were no scaffolds, life lines, safety harnesses, tail lines, lanyards, or side supports provided to secure the ladder or assure plaintiff's safety.

In response, defendant maintains through the testimony of William Perez, plaintiff's supervisor, that prior to the accident he told plaintiff "not to get started until he returned."

Moreover, Perez also maintains that in speaking to plaintiff after the accident he (plaintiff) admitted it was a mistake to start without him; that he should have waited.

Defendant's assertions that plaintiff may not even have fallen from the ladder, but rather from the ceiling itself, are based on inadmissible hearsay and will not be considered herein (Guaman v. New Sprout Presbyterian Church of New York, 33 AD3d 758, 759, 822 NYS2d 635(2d Dep't 2006).

"To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards." See, Plass v. Solotoff, 5 AD3d 365, 357 (2d Dep't. 2004); Ross v. Curtis Palmer Hydro Elec. Co., 81 NY2d 94 (1993); Ferrero v. Best Modular Homes, Inc., 33 AD3d 847, 851, 823 NYS2d 477 (2d Dep't. 2006). "In addition, the provision must be applicable to the facts of the case." See, Singleton v. Citnalta Constr. Corp., 291 AD2d 393, 394 (2d Dep't. 2002). Id. 851.

Plaintiff alleges in this instance, that the safety devices

meant to secure plaintiff from falling while working at an elevated height were not available at the site where they were working. Having established his prima facie entitlement to summary judgment pursuant to Labor Law § 240(1), it was incumbent upon defendant to raise a triable issue of fact. They have not. Granillo v. Donna Karen Co., 17 AD3d 531, 793 NYS2d 465 (2d Dep't 2005).

Thus "...plaintiff [has] established the issue of liability pursuant to Labor Law § 240(1) by showing, based on the undisputed testimony that [plaintiff] was not provided with the proper protection required under the statute, and that the failure to provide such protection was a proximate cause of his injuries (see Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 (2004); Blake v. Neighborhood Hous. Servs. of NY City, 1 NY3d 28, 287 [2003]; cf Tylman v. School Constr. Auth., 3 AD3d 488, 489 (2004); Alava v. City of New York, 246 AD2d 614, 615 (1998)." Nimirovski v. Vornado Realty Trust Co., 29 AD3d 762, 763, 818 NYS2d 93 (2d Dep't 2006).

Defendant maintains, based on Cahill v. Triborough Bridge and Tunnel Auth., 4 NY3d 356 (2004), that plaintiff's own actions were the sole proximate cause of the accident and that defendant, therefore, can not be held liable. Defendant relies on what they characterize as plaintiff's disregard for his supervisor's instructions "to not get started until he returned."

Plaintiff's supervisor's instruction to "wait for him" before getting started is hardly a substitute for providing safety devices. Moreover, "[e]ven if plaintiff was partially at fault, a worker's contributory negligence is not a defense to a Labor Law § 240(1) claim. (See Stolt v. General Foods Corp., 81 NY2d 918 (1993); Kouros v. State of New York, 288 AD2d 566, 567 (2001)." Moniuszko v. Chatham Green, Inc., 24 AD3d 638, 639, 808 NYS2d 696 (2d Dep't 2005); Bartlett v. American Real Estate Holdings, LP, 2008 WL 475912 (N.Y. Sup.) (Trial Order) 2008 NY Slip Op. 30421.

Further, contrary to the contention of [defendant], the evidence does not establish a recalcitrant worker defense, which requires proof that a plaintiff disobeyed an 'immediate specific instruction(s) to use an actually available safety device [provided by the employer] or to avoid using a particular unsafe device.' (Wall v. Turner Constr. Co., 10 AD3d 261, 262 (2004), aff'd 4 NY3d 861 (2005); Jastrezebski v. North Shore School Distr., 223 AD2d 677 (1996), aff'd 88 NY2d 946 (1996); Beamon v. Agar Truck Sales, Inc., 24 AD3d 481, 483-484 (2005); Palacios v. Lake Carmel Fire Dep't. Inc., supra; Andino v. BFC Partners, 303

AD2d 338, 340 (2003))." Santo v. Scro, 43 AD3d 897, 898-899, 841 NYS2d 627 (2d Dep't 2007).

Finally, in consideration of this Court's previously so-ordered stipulation, the Court finds no basis for ruling the motion for summary judgment untimely.

Accordingly, based on all of the foregoing, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on the issue of liability and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein.

Dated: Jamaica, New York
March 12, 2008

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JOSEPH P. DORSA
J.S.C.