[* 1]
SCANNED ON 4/2/2009

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART** 59

Justice

JIMMY AURIEMMA and DAVONNE AURIEMMA,
Plaintiffs,

- v -

BILTMORE THEATRE, LLC, BILTMORE TOWER, LLC, BILTMORE 47 ASSOCIATES, LLC, MANHATTAN THEATRE CLUB, INC., SWEET CONSTRUCTION CORP. and SWEET CONSTRUCTION of LONG ISLAND, LLC,
Defendants.

Index No.: 116971/03

Motion Date: 09/16/08

Motion Seq. No.: 6

Motion Cal. No.: _____

SWEET CONSTRUCTION CORP., SWEET CONSTRUCTION of LONG ISLAND, LLC; and LIBERTY INTERNATIONAL UNDERWRITERS a/s/o SWEET CONSTRUCTION of LONG ISLAND, LLC,
First Third-Party Plaintiff,

- v -

First Third-Party
Index No.: 590748/04

MASS ELECTRIC CONSTRUCTION COMPANY; ST. PAUL FIRE and MARINE INSURANCE COMPANY; JOHN CIVETTA & SONS, INC.; DIAMOND STATE INSURANCE COMPANY,
First Third-Party Defendant.

SWEET CONSTRUCTION of LONG ISLAND, LLC; and LIBERTY INTERNATIONAL UNDERWRITERS a/s/o SWEET CONSTRUCTION of LONG ISLAND,
Second Third-Party Plaintiffs,

- v -

Second Third-Party
Index No.: 590502/05

MASS ELECTRIC CONSTRUCTION COMPANY; ST. PAUL FIRE and MARINE INSURANCE COMPANY; ST. PAUL TRAVELERS GROUP; JOHN CIVETTA & SONS, INC.; DIAMOND STATE INSURANCE COMPANY; and UNITED NATIONAL GROUP,
Second Third-Party Defendant.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Affidavits -Exhibits	1, 2
Notice of Cross Motion/Answering Affidavits - Exhibits	3
Replying Affidavits - Exhibits	

Cross-Motion: ☐ Yes ☒ No

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Upon the foregoing papers,

Plaintiff in this Labor Law (§§ 200, 240, and 241) and negligence action alleges that while employed by third party defendant Mass Electric Construction Company ("Mass Electric"), a subcontractor working on a construction project at 261-265 West 47th Street ("the project") he suffered injuries when he fell off a plank leading down into a pit while walking to a mechanical room to perform work. At his deposition, plaintiff testified that he was walking on a particular plank when it shifted and he slipped and fell approximately 4 to 6 feet into a pit. He described the plank as eight inches wide by ten feet long and alleges that there was no alternate route to his work area as the stairwell was either blocked by debris or unavailable as work was being done on the stairwell. Plaintiff contends that his injuries arose out of the negligence of defendants Biltmore Tower, LLC, Biltmore Theatre, LLC, and Manhattan Theatre Club (hereinafter collectively "Biltmore")[1], the owners/lessee, respectively, and the Sweet Construction Corp. entities (hereinafter collectively "Sweet"), the owner's construction manager on the project.

Defendants Biltmore and Sweet move for summary judgment against the plaintiff's complaint on Motion Sequence No. 6,

[1] Defendant Biltmore 47 Associates, LLC, was dismissed from this action pursuant to Order of this court dated April 10, 2006.

decided herein. Defendant Mass Electric moves for similar relief on Motion Sequence No. 5 making similar arguments and therefore the court shall utilize this decision to discuss the arguments raised in both motions.

Defendants' arguments with respect to plaintiff's Labor Law 240 claim are that (1) plaintiff's accident does not come within the protection of the statute because it was not height-related due to the use of a ramp as a passageway; (2) plaintiff was the sole proximate cause of his accident. Defendants fail to surmount their burden of establishing that there are no questions of fact to be tried as to these arguments and therefore their motions must be denied. Defendants misread Appellate Division cases in proffering a "ramp" or "passageway" rule that somehow absolves them of compliance with the Labor Law. In a case heavily relied upon by the defendants, the Court stated that

> The primary issue on this appeal is whether plaintiff's fall from an unsecured plank is the type of accident that is afforded the protection of Labor Law § 240 (1). Previous cases involving falls from planks come within one of two categories: those in which the plank was used as a passageway or stairway, and those in which the plank served as the functional equivalent of a scaffold, ladder or other device enumerated in the statute. When the plank has been used as a passageway or stairway, section 240 (1) has been held not to apply.
> On the other hand, when the plank has served as the functional equivalent of a scaffold, ladder or other device enumerated in the statute, then section 240 (1) has been held to apply.

Paul v Ryan Homes, Inc., 5 AD3d 58, 60-61 (4th Dept 2004) (citations omitted).

In this case there is no dispute that the elevation between the top and bottom of the ramp was sufficient that a stairway was installed to regularly allow access and that a blockage of the stairwell would necessitate utilizing another means of accessing the height differential between the levels. This is not a case where the ramp only covered a minor elevation above a ground floor as in the cases cited by defendants (see Kavanaugh v Marrano/Marc Equity Corp., 225 AD2d 1037 [4th Dept 1996] [Labor Law not applicable to ramp into one-family house] contrast Pascalli v Schiame Dev., 2007 NY Slip Op 31772[U] [Sup Ct, NY County, Jun 15, 2007] [Labor Law 240 applies where planks were not merely providing access from point A to point B, but were the only support available]). Where a ramp acts as a ladder or other safety device to allow access to different levels on a jobsite, the ramp is within the application of the statute. See Conklin v Triborough Bridge and Tunnel Authority, 49 AD3d 320, 321 (1st Dept 2008) ("Plaintiff . . . was injured when he slipped on a 'chicken ladder' or 'makeshift ladder,' consisting of two parallel wooden planks with two-by-fours nailed across them at regular intervals, which was placed on sloped ground to function as a ramp . . . As a ramp, the 'chicken ladder' presented a risk covered by Labor Law § 240, and the record demonstrates that

defendants' failure to equip it with a handrail or other safety device was the proximate cause of plaintiff's injuries").

The conflicting testimony as to whether ladders or other safety devices were provided in lieu of the blocked staircase raises an issue of fact as to whether plaintiff was the sole proximate cause of the accident. Contrary to defendants' contention, plaintiff's affidavit does not refute his deposition testimony and whatever differences there are may be raised as to the weight to be accorded the testimony at trial. In any event, it is the defendants' burden on this motion to establish that safety devices were available and they have not surmounted that hurdle. See Miro v Plaza Const. Corp., 9 NY3d 948, 949 (2007) (denying summary judgment to defendants as to the Labor Law § 240 (1) claim because even assuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured).

Plaintiff's Labor Law 241 (6) claim is also not subject to summary disposition as there are issues of fact as to the predicate Industrial Code violations. See Conklin, supra.

With respect to plaintiff's Labor Law 200 and common law negligence claims, there are issues of fact as to the control over the jobsite by the Mass Electric, Biltmore and Sweet defendants since the deposition testimony read in the light most favorable to opposing parties could establish that any of these

defendants had the right to intervene if they were aware of unsafe conditions.

Accordingly, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the parties are are directed to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on June 2, 2009 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: March 31, 2009 ENTER:

HON. DEBRA A. JAMES J.S.C.

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK