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

PRESENT: HON. MICHAEL D. STALLMAN PART 7
Justice

MICHAL MINIEWICZ

-v-

KAREL SIMEK, et al.

INDEX NO. 108337/07
MOTION DATE 6/27/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 82

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-J	1-3
Answering Affidavits — Exhibits A-H	4-5
Replying Affidavits	6-9
Reply to Cross Motion	10-11

Cross-Motion: ☒ Yes ☐ No
+ papers on seq 002

Upon the foregoing papers, it is ordered that this motion and motion seq 002 are determined by the annexed memorandum decision and order.

FILED
APR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 4/6/09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

----------X

MICHAL MINIEWICZ,

Plaintiff,

-against-

KAREL SIMEK and AMY SIMEK,

Defendants.

----------X

Index No. 108337/07

Decision and Order

HON. MICHAEL D. STALLMAN, J:

Motions with sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants move: (1) to vacate plaintiff's statement of readiness; (2) to strike the note of issue and to keep this matter off the trial calendar; (3) to preclude plaintiff from testifying at trial as to damages, for his failure to appear at an independent medical exam (IME) or to provide defendants with authorizations that were directed in this court's February 7, 2008 Order; (4) to preclude plaintiff from testifying at trial or referring to records relative to any new injuries and damages noted in plaintiff's supplemental bill of particulars; and (5) to extend defendants' time to move for summary judgment, because outstanding discovery and depositions remain. Plaintiff cross-moves for summary judgment on the issue of defendants' liability under Labor Law §§ 240 (1) and 241 (6).

In motion sequence number 002, defendants move for summary judgment dismissing the complaint.

Because plaintiff has submitted to an IME (*see* Marchisotto 6/13/08 Reply Affirm., ¶ 12), and has provided the required authorizations (*see* Isaacs 5/7/08 Affirm., ¶ 19), and defendants have moved for summary judgment, the parts of defendants' motion (sequence number 001) which seek to preclude plaintiff's testimony at trial with respect to his IME and authorizations, and which seek an extension of time to file a summary judgment motion are denied as moot.

BACKGROUND

On May 17, 2007, the date of the accident, plaintiff, then a laborer employed by non-party SECO E&C Corp. (SECO), was working in a garage of a building located at 503 Wales Avenue, in the Bronx. SECO is a general contracting firm owned by defendant Karel Simek (Simek). The building itself was owned jointly by defendants (Simek Depo., at 14). Plaintiff was directed to prepare the interior walls of the garage for painting by scraping them down with a wire brush (Plaintiff's Depo., at 77-80). According to plaintiff, the walls were concrete, approximately 25 feet high (*id.* at 82, 84). Plaintiff thought that there were maybe three ladders available: a six-foot A-frame, an eight- or nine-foot "unfoldable" ladder, and a piece of an extension ladder, approximately 20 feet long (*id.* at 77-78). He was using the 20-foot-long piece of an aluminum ladder supplied by Simek that had no safety feet on it (*id.* at 78, 87). He chose that ladder because it was the tallest,

and he felt that it was appropriate for the job (*id.* at 89; Plaintiff's 6/26/08 Aff., ¶ 7). Plaintiff was working alone (Plaintiff's Depo., at 75-76). When he climbed the ladder, it slipped away from the wall when he was approximately 15 feet above the ground, and he was injured (*id.* at 95).

According to defendants, in the garage wherein plaintiff's accident occurred, or in the adjacent garage, there were five or six ladders available for plaintiff's use (Simek Depo., at 21-22). Simek, one of the owners of the property, estimated that the garage was "about 16 to 18 feet high to the bottom of the joist," with another foot from the joist to the ceiling (*id.* at 17-18).

Later, however, after defendants' expert went to the property, Simek estimated that the height of the garage was only about 14 to 16 feet (Simek 6/13/08 Aff., ¶¶ 6, 9). In addition, Simek then averred that there were 11 ladders available to plaintiff on the day of his accident, three of which defendants consider would have been appropriate for plaintiff's work: a 24-foot Werner extension ladder (made of two sections, each 12 feet long); a 16-foot Werner extension ladder (made of two sections, each eight feet long); and a 16-foot extension ladder base section (Simek 6/13/08 Aff., ¶¶ 10, 12).

Defendants' expert went to the site on April 2, 2008, and concluded that the ceiling of the garage was 15½ feet high (Pfreundschuh 6/13/08 Aff., ¶¶ 2, 6). Thus, he concluded that

plaintiff's use of a 20-foot ladder was inappropriate because it was too long. In addition, the ladder which plaintiff used had no safety feet on it, making it inappropriate for stand-alone use (*id.*, ¶ 15). In defendants' expert's opinion, both the length of the ladder and its lack of safety feet caused the ladder to slip (*ibid.*). The expert concluded that plaintiff, because he chose an inappropriate ladder when other, appropriate, ladders were available, was the sole proximate cause of his accident (*id.*, ¶ 18).

Plaintiff responded to defendants' expert's affidavit by saying that he had approximated the wall's height to be 25 feet, but, as defendants' expert had found, it was actually only 15½ feet (Isaacs 6/26/08 Reply Affirm., ¶ 22). He concluded that it is likely that his approximation of the length of the ladder may also have been excessive, and that maybe he had used a 16-foot ladder instead of one that was 20 feet (*ibid.*). In any case, he maintains that he used the ladder he did because the others available at the location were heavy and difficult to maneuver without the help of another worker (*see* Plaintiff's 6/26/08 Aff., ¶ 5; Plaintiff's 9/2/08 Aff., ¶ 5).

Defendants' Procedural Motion (motion sequence number 001)

The part of defendants' motion which seeks the vacatur of the statement of readiness and the striking of the note of issue is denied. Plaintiff's deposition has been held. An affidavit of

plaintiff's foreman, Jarek Kondratowicz, sworn to June 13, 2008, is in evidence. Because Mr. Kondratowicz is a non-party, the parties shall be permitted to take his deposition post-note of issue.

The part of defendants' motion which seeks to preclude plaintiff from testifying at trial or referring to records relative to any new injuries and damages noted in plaintiff's supplemental bill of particulars is denied.

Plaintiff's supplemental bill of particulars alters the original one in several respects: (1) in paragraph 16, plaintiff again asserts that Industrial Code § 23-1.21 (b) (4) was violated, but adds subsections (iv) and (v) to the allegation; (2) several additions to his list of injuries have been added in paragraph 18, to wit: "Severe scaring [*sic*] along the right forearm"; "It is further expected that plaintiff will undergo a salvage procedure that may include but not be limited to a fusion of the right wrist"; and "Moreover, due to the severity of the fractures set forth above it is expected that plaintiff will suffer arthritis in both the left and right wrists that will require the use of pain medications including but not limited to opiates, for the remainer [*sic*] of his natural life, together with the concomitant effects of using same"; (3) damages have increased: in paragraph 23, his lost wages have increased from $12,000 to $25,000; in paragraph 25, physicians' services have increased from $35,000 to $40,000, and "Other (therapy)" has increased from "None" to $10,000.

CPLR 3044 (b) provides:

> A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities.

CPLR 3042 (b) governs the amendment of a bill of particulars:

> In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue.

Defendants assert that the inclusion of an "expected ... salvage procedure that may include but not be limited to a fusion of the right wrist" is actually an allegation of a new injury, which makes the bill of particulars an amended, rather than a supplemental, one. They claim that plaintiff, in a letter dated February 26, 2008, advised them that "Mr. Miniewicz does not plan on having additional surgery in the near future" (Ex. G to Higgins 4/9/08 Affirm. in Support). Plaintiff's supplemental bill of particulars is dated March 24, 2008, barely a month after his statement that he did not anticipate further surgery "in the near future." Defendants allege that they will be prejudiced if they are not permitted an additional deposition and medical exam post-surgery, as well as continuing medical records and authorizations covering plaintiff's surgery and post-surgical treatment.

In his memo of law, plaintiff maintains that his supplemental bill of particulars does not allege any new injuries, and that no surgery was scheduled or contemplated at that time (Plaintiff's 5/7/08 Memo of Law, at 21).

No evidence has been proffered that indicates that plaintiff has, in fact, undergone any further surgery. Thus, no "new injury" has been alleged in the supplemental bill of particulars, and no entitlement to additional discovery with respect to such "new injury" has been triggered. In addition, the bill of particulars is correctly denominated a supplemental, rather than an amended, bill of particulars, and was properly served post-note of issue.

In sum, defendants' procedural motion (motion sequence number 001) is denied.

Plaintiff's Cross Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [proponent must tender "'sufficient evidence to demonstrate the absence of any material issues of fact'"], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing

papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; *see also Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez*, 68 NY2d at 324). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Labor Law § 240 (1)

Section 240 (1) of the Labor Law "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Ramos v Port Auth. of N.Y. & N.J.*, 306 AD2d 147, 147-148 [1st Dept 2003]).

> The Court of Appeals has long and repeatedly observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers who are not in a position to protect themselves. Consistent with this objective, the Court of Appeals has stated that the statute is to be construed as liberally as necessary to accomplish the purpose for which it was framed, but has also cautioned that not every worker who falls at a construction site ... gives rise to an award of damages under Labor Law § 240(1). ... [I]t is still necessary for a plaintiff to demonstrate that the statute was violated, and that the violation proximately caused his/her injuries [internal citations omitted]

(*Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]; *see also Miro v Plaza Constr. Corp.*, 38 AD3d 454, 455 [1st Dept], *affd as mod* 9 NY3d 948 [2007] [proof of fall does not establish liability unless there is also evidence that fall was proximately caused by violation of statute]).

Defendants contend that plaintiff was the sole proximate cause of his injuries, in that he chose an inappropriate ladder to accomplish his task.

"'[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence'" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008], quoting *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008]). Indeed, once a violation of the statute is shown, and that violation is a proximate cause of a worker's injury, the worker's "contributory negligence ... is not a defense to a section 240 (1) claim" (*Ernish v City of New York*, 2 AD3d 256,

257 [1st Dept 2003]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003] ["comparative negligence is not a defense to absolute liability under the statute"]). However, "[w]here a 'plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240 (1) [does] not attach' [citation omitted]" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004] ["'there can be no liability under section 240 (1) when there is no violation and the worker's actions ... are the "sole proximate cause" of the accident'", quoting *Blake*, 1 NY3d at 290]).

Plaintiff has met his prima facie showing of entitlement to summary judgment under Labor Law § 240 (1) by proffering evidence demonstrating that his injuries were caused by a fall from an unsecured ladder (*see e.g. Davis v Selina Dev. Corp. of N.Y.*, 302 AD2d 304 [1st Dept 2003] [evidence that plaintiff fell from unsecured ladder "set forth a prima facie case of liability under Labor Law § 240 (1)"]; *see also Posillico v Laquila Constr.*, 265 AD2d 394, 395 [2d Dept 1999] [same]). Thus, the burden shifts to defendants to raise a triable issue of fact in order to defeat plaintiff's cross motion for summary judgment.

In *Cahill v Triborough Bridge & Tunnel Auth.* (4 NY3d 35, *supra*), the Court of Appeals set forth factors which may be taken into account in determining whether a worker was the sole proximate

cause of his injuries: "plaintiff had adequate safety devices available; ... he knew both that they were available and that he was expected to use them; ... he chose for no good reason not to do so; and ... had he not made that choice he would not have been injured" (*Cahill*, 4 NY3d at 40). In addition, a court may consider whether the action or device the worker chose was a "normal and logical response" to the situation presented (*see Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005], citing *Blake*, 1 NY3d 280, *supra*).

Defendants have submitted the affidavits of Simek, Kondratowicz, and their expert, Pfreundschuh, all attesting that plaintiff had 11 ladders available to him on the day of the accident, three of which would have been adequate and appropriate for his task.

However, initially, in his deposition, Simek testified that there were "[a]bout five to six [ladders] in both spaces" (Simek Depo., at 22), but he did not describe any of them. Later, he attested that "[o]n the date of the accident there were eleven ladders available to the Plaintiff either in the garage where the accident occurred or the adjacent garage" (Simek 6/13/08 Aff., ¶ 10), and gave very precise descriptions of those ladders (*id.*, ¶ 12) in exactly the same language that defendants' expert used in his affidavit of the same date (*see* Pfreundschuh 6/13/08 Aff., ¶ 9).

"The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Madtes v Bovis Lend Lease LMB*, 54 AD3d 630 [1st Dept 2008] [evidence insufficient to raise triable issue of fact because appears feigned, in that inconsistent with prior testimony]; *Fernandez v Laret*, 43 AD3d 347, 347-348 [1st Dept 2007] [deposition "clearly coached and tailored, creat(ed) only a feigned issue of fact" and was insufficient to defeat summary judgment]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007] [affidavit that contradicts prior sworn testimony creates only feigned issue of fact, insufficient to defeat properly supported motion for summary judgment]).

Simek's affidavit clearly appears to have been crafted to buttress and mirror defendants' expert's affidavit concerning the ladders which were available to plaintiff on the day of his accident. Thus, it cannot raise an issue of fact concerning the presence of any of the ladders described, including the three which defendants and their expert maintain would have been appropriate. Since Simek's affidavit contradicts his prior deposition testimony, his affidavit will be disregarded.

Plaintiff's supervisor, Kondratowicz, attests that he made his affidavit "with my own personal knowledge" (Kondratowicz 6/13/08 Aff., ¶ 1). He maintains that "[a]t the job site there were eleven

(11) ladders present for the Plaintiff's use at the time of his accident" (*id.*, ¶ 7), and describes them in the same language used in defendants' expert's affidavit of the same date (*id.*, ¶ 9). Because his affidavit is made with his own personal knowledge, Kondratowicz's affidavit is sufficient to raise a question of fact concerning the availablity of appropriate ladders to plaintiff on the day of his accident, and thus, concerning the possibility that plaintiff was the sole proximate cause of his injuries because he chose an inappropriate ladder when safer ones were available.

With respect to the other factors to be considered in determining sole proximate cause that the *Cahill* Court set forth (*Cahill*, 4 NY3d at 40), even if it were established that other ladders were at the site, it is not clear whether plaintiff was aware that other, more appropriate, ladders were available to him.

The "both spaces" to which Simek referred in his affidavit were the two adjoining garages on the premises, the one in which plaintiff was injured, and the adjacent one. Both Simek and Kondratowicz state that plaintiff used the adjacent one "to change his clothing, to take lunch breaks, and to choose tools and ladders for the jobs. Access to the ladders was not an issue" (Simek 6/13/08 Aff., ¶ 11; Kondratowicz 6/13/08 Aff., ¶ 13). According to Simek, plaintiff had keys and access to both garages (Simek 6/13/08 Aff., ¶ 11).

There is no evidence, however, that plaintiff either entered or did not enter, or had or did not have any notion of what equipment was in the adjacent garage on the morning of his accident. Rather, he arrived at the site before 7 o'clock (Plaintiff's Depo., at 75), and Simek came a little after 7 and told him what to do (*id.* at 76). The accident occurred at approximately 10:30 A.M. (Plaintiff's Bill of Particulars, ¶ 4). Even if plaintiff had access to the adjacent garage, there is no evidence with respect to whether he went there for any reason before his accident.

In addition, there is no evidence that either Simek or Kondratowicz told plaintiff what ladder to use, or indicated in any way that he was expected to use any of the three that defendants now claim were present and would have been appropriate. Nor is there any evidence that any of the three ladders which defendants claim would have been appropriate were in the garage where plaintiff was injured. Rather, not one of the ladders which plaintiff described as being there fits the description of any of the ladders that defendants say he should have used.

As set forth above, the reasons plaintiff gave for choosing the ladder he did were that it was long enough to be appropriate for the height of the wall, and that other available ladders were too heavy and/or unwieldy for him to handle alone. Thus, it cannot be said that, in the event that he chose to use an inappropriate

ladder, he did so "for no good reason."

Had plaintiff not chosen the ladder he did, he might not have been injured. But, even if, as Kondratowecz alleges, appropriate ladders were available to plaintiff, defendants have failed to raise any issue of fact that he was aware of those ladders and that he was expected to use them, or that he chose to use the ladder he did, instead of a more appropriate one, for no good reason.

Lastly, if plaintiff chose the ladder he did for the reasons he alleges, defendants have not shown that his choice was not the "normal and logical response" required for the situation.

In sum, defendants, by submitting Kondratowicz's affidavit that indicates that plaintiff may have chosen to use an inappropriate ladder when other, safer, ladders may have been available to him, have raised a question of fact with respect to whether plaintiff was the sole proximate cause of his accident. The part of plaintiff's cross motion which seeks summary judgment in his favor on his Labor Law § 240 (1) claim is denied. Having failed to establish their entitlement to the relief, the part of defendants' motion which seeks summary judgment dismissing the same claim is also denied.

Labor Law § 241 (6)

> Section 241 (6), which imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers, is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove

[* 17.]

> the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]). A plaintiff's comparative negligence is a valid defense to a Labor Law § 241 (6) claim (*see Spages v Gary Null Assoc.*, 14 AD3d 425, 426 [1st Dept 2005]).

Plaintiff alleges that defendants violated Industrial Code § 23-1.21 (b) (4) (iv) and (v). While subsection (iv) is specific enough to support a section 241 (6) claim (*see e.g. Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]), subsection (v) is inapplicable, because there has been no showing either that the wall had a slippery surface or that the accident was caused by side slip of the ladder.[1]

It cannot be determined at this time whether subsection (iv)[2] is applicable because questions concerning the height at which

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[1] Industrial Code § 23-1.21 (b) (4) (v) reads: "The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder."

[2] "When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

plaintiff was working are outstanding. If, however, it becomes established that plaintiff was working more than six feet above the ladder footing, it is evident that the provision applies, and the only question will be whether his accident can be attributed to the failure of defendants to make sure someone was stationed at the bottom of the ladder.

Therefore, the part of plaintiff's cross motion which seeks summary judgment in his favor on his Labor Law § 241 (6) claim is denied. Having failed to set forth their prima facie entitlement to summary judgment, the part of defendants' motion which seeks summary judgment dismissing this claim is also denied.

Defendants' Summary Judgment Motion (motion sequence number 002)

Whether the Court May Consider Plaintiff's Affidavit in Opposition to Defendants' Motion

Defendants assert that the Court should disregard plaintiff's September 2, 2008 affidavit in opposition to their motion because it is not in admissible form, and thus, cannot raise any issue of fact. Defendants base this argument, in part, on CPLR 2101 (b).

CPLR 2101 (b) provides:

> Language. Each paper served or filed shall be in the English language, which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate.

Plaintiff, originally a native of Warsaw, Poland, came to the United States on December 1, 2004 (Plaintiff's Depo., at 11, 13). After he came, he studied English on weekends at Hudson Community

College in New Jersey (*id.* at 15). At plaintiff's deposition, although a Polish interpreter was present, defendants' counsel addressed plaintiff and said, "I don't know if you understand some English, but I'm assuming that you do" (*id.* at 6).

Plaintiff's September 2, 2008 affidavit is in English. There is no indication that someone else wrote it, and then had it read in Polish to plaintiff, who then signed it. Nor is there any indication that plaintiff asked someone who speaks Polish to translate what he said into written English before he signed the affidavit.

Defendants, relying on the dissent in the case, cite the Second Department's decision in *Kwi Bong Yi v JNJ Supply Corp.* (274 AD2d 453 [2d Dept 2000]) for the proposition that plaintiff's affidavit is inadmissible under CPLR 2101 (b) and cannot be used to create an issue of fact or oppose defendants' motion for summary judgment. However, the *Kwi Bong Yi* case is distinguishable on several levels. In that case, the affidavit was written in English, but the affiant spoke only Korean. The affidavit contained a statement that the affidavit, as written, had been translated to the affiant in Korean. Unfortunately, there was no affidavit from the translator stating his or her qualifications and that the translation was accurate. Thus, the affidavit did not comply with CPLR 2101 (b). In addition, the plaintiff in that case relied solely upon the inadmissible affidavit to create an issue of fact in opposition to the defendants' demonstration of their prima

facie entitlement to judgment. The dissenting Judge argued that "[t]his Court has consistently held that where the party opposing summary judgment submits evidence which is not in admissible form, the motion court should not consider it and summary judgment should be granted" (*id.* at 454). Nevertheless, the dissenting Judge stated: "I have no objection to inadmissible evidence being considered, if there is a reasonable excuse for the failure to have the evidence in admissible form and if the party opposing summary judgment does not rely solely upon the inadmissible proof to sustain its burden" (*id.* at 455).

Here, defendants have failed to establish that plaintiff speaks only Polish. While it is clear that plaintiff's native tongue is Polish, the evidence indicates that he has at least some understanding of English because he studied English after he arrived in this country almost five years ago. It cannot be said, as a matter of law, that his affidavit is inadmissible because it is in English, and lacks an affidavit of a translator.

Defendants next argue that the court should disregard plaintiff's affidavit because it is self-serving and contradicts plaintiff's prior testimony, citing *Lupinsky v Windham Constr. Corp.* (293 AD2d 317 [1st Dept 2002]) (Higgins 9/15/08 Reply Affirm., ¶¶ 12, 13). The *Lupinsky* Court determined that

> [g]enerally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded. ... [A] plaintiff's self-serving affidavit, submitted in an attempt to retract a previous admission, is insufficient to avoid summary judgment

(*Lupinsky*, 293 AD2d at 318).

Defendants misconstrue the evidence.

Defendants assert that during his deposition, plaintiff "testified that he had previously used all ladders on the job site, including the ones in the garage adjacent to the area of his accident, without incident. That the equipment he used was not heavy and he was able to lift it on his own" (Higgins 9/15/08 Reply Affirm., ¶ 14). The testimony to which defendants allude, plaintiff's deposition, at 88, lines 21-24, specifically concerns the particular ladder that plaintiff used on the day of his accident (*see* Plaintiff's Depo., at 84, line 22 - 88, line 24). In reply to being asked, "Was it a heavy ladder, light ladder or something else?", plaintiff responded, "It was just regular, you could lift it up" (*id.* at 88, lines 21-24).

With respect to defendants' assertion that plaintiff's statement in his affidavit contradicted his prior testimony concerning the weight of the ladders, plaintiff, in his affidavit, stated: "I had only used these ladders [in an adjacent area] with other workers due to the fact that they were heavy and difficult to maneuver" (Plaintiff's 9/2/08 Aff., ¶ 5). Defendants counter: "That at no time during his deposition, did he testify that he only used the ladders, which were in the adjacent garage, with the aid of other workers, because those ladders 'were too heavy'" (Higgins 9/15/08 Reply Affirm., ¶ 16). Obviously, defendants cannot object that plaintiff contradicted a prior statement that he never made.

There is no reason for the Court to disregard plaintiff's September 2, 2008 affidavit, and the Court will consider it.

Labor Law §§ 240 (1) and 241 (6)

As set forth above, the parts of defendants' motion which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are denied.

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe work site" (*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; *see also Buckley v Columbia Grammar & Preparatory*, 44 AD3d at 272 [same]).

> Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work [citation omitted]. ... General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed [citations omitted]

(*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Fischetto v LB 745 LLC, York*, 43 AD3d 810, 810 [1st Dept 2007] [section 200 claim dismissed because dangerous condition "arose from plaintiff's employer's methods over which defendant property owner exercised no supervisory control"]). Although it is well-settled that general supervision of a site and the authority to stop unsafe work are not enough to impose liability under Labor Law

§ 200 and common-law negligence (*see e.g. Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]), where an owner or general contractor directs "how to do" the work, liability may be imposed (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept], *affd* 7 NY3d 805 [2006]).

Defendants contend that they are not liable to plaintiff under Labor Law § 200 or common-law negligence because (1) they did not cause the accident - plaintiff was the sole proximate cause of his injuries; and (2) they did not direct or control plaintiff's work.

This Court has found that there is an issue of fact concerning whether plaintiff was the sole proximate cause of his injuries. Thus, summary judgment may not be based on the first assertion.

With respect to the issue of defendants' supervision or control of plaintiff's work, plaintiff identified Kondratowicz as his "supervisor" who told him what to do and how to do it (Plaintiff's Depo., at 32). If Kondratowicz was not around, Simek would tell plaintiff what to do (*id.* at 33). Considering the evidence in this case, there are questions of fact concerning whether, at the time of his accident, defendants provided him with the kind of supervision and control that would subject them to liability under Labor Law § 200 and common-law negligence. It is uncontested that after Simek told plaintiff what to do shortly after 7 A.M., plaintiff worked alone.

Therefore, the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law

negligence claims is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion (motion sequence number 001) is denied; and it is further

ORDERED that plaintiff's cross motion (motion sequence number 001) is denied; and it is further

ORDERED that defendants' motion (motion sequence number 002) is denied.

Dated: April 6 , 2009
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN