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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 113007/2006

BELEN, FELIPE

VS.

157 HUDSON LLC

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/26/09

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR §3212 for partial summary judgment on his Labor Law §240 on the issue of liability is granted; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court..

FILED
APR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/22/09

J.S.C.

HON. CAROL EDMEAD

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: PART 35

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FELIPE BELEN,

Plaintiff,

Index No. 113007/06

-against-

157 HUDSON LLC and MBR CONTRACTING, INC.

Defendants.

----------X

MEMORANDUM DECISION

In this personal injury action, plaintiff, Felipe Belen ("plaintiff") moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability on his Labor Law §240(1) claim.

Factual Background[1]

The subject accident occurred on May 11, 2006 during the renovation of a three-story building located at 157 Hudson Street in Manhattan (the "building"). Defendant 157 Hudson LLC ("defendant") was the owner of the subject premises at the time of the accident.

At the time of the accident plaintiff was working for a company called Foundation. He had two "bosses" at the worksite, "Darri and Kaji," who were also Foundation employees (p. 18). On the date of the accident, plaintiff was assigned to make holes in a wall on the third floor of the building by using a jackhammer. Foundation provided plaintiff with the subject scaffold, which was four feet tall (pp. 29, 31 and 99). There were five other scaffolds on the third floor which were of the same height, that other workers were using. Darri told plaintiff to use the subject scaffold (p. 33). Plaintiff's co-worker, "Serefino," placed a five-foot, wooden ladder on

[1] The factual background is taken from plaintiff's deposition testimony, to which both plaintiff and defendant cite in support of their respective positions.

top of the scaffold, at Darri's instruction (pp. 22, 24, 27, 44-45, 47, 88-90).

The scaffold had wheels which he locked each time (p. 37). When drilling the first hole, the scaffold moved approximately three centimeters (p. 38-39). Therefore, plaintiff placed "whatever" he could find under the wheels to keep them from rolling (p. 39), and alone, repositioned the scaffold (p. 40). Plaintiff repeated this when making the second hole (p. 39).

The third hole plaintiff was drilling was approximately three meters (approximately 9.8 feet) from the floor (pp. 26-27). Plaintiff did not place anything under the wheels before drilling the third hole, because he thought it would not move (pp. 40-41). Plaintiff placed the scaffold 20 centimeters from the wall, and in order to reach the area to make the hole, leaned the unopened ladder against the wall with its feet resting on the scaffold platform (pp. 44-48). He worked for 20 minutes, during which time, the ladder moved (p. 50-51). He re-positioned the scaffold once (pp. 50-51). Plaintiff was almost halfway done, when Darri told him to work faster; that "he could do more than three in one hour" (p. 53). So to work faster, plaintiff put more pressure on the drill and, in so doing, the scaffold "fell backwards" and the ladder fell down (pp. 54-55).

Plaintiff had problems with the subject scaffold "moving" a week before his accident (p. 35). Plaintiff complained to Darri, who responded by telling plaintiff to "use it because the other ones were occupied" by other workers sealing the holes (pp. 35-36).

There were only two safety lines at the worksite (pp. 49, 90). Plaintiff saw other Foundation workers at the site with safety harnesses, but plaintiff was never given or asked to use any type of a harness, safety belt, safety lines, ropes or anything of that nature to wear (pp. 20, 49, 89-90). He never asked for a safety harness or used one on this project (pp. 49, 90).

Motion

Plaintiff argues that based on the record, he is entitled to partial summary judgment on the issue of liability under Labor Law §240(1) because the scaffold, and the ladder that was on top of the scaffold on which plaintiff was working, collapsed, causing plaintiff to fall. In further support, plaintiff also submits a "FDNY Prehospital Care Report," which reflects that plaintiff was injured due to a scaffold falling over and that plaintiff landed on his left ankle when the scaffolding tipped over.

Plaintiff argues that pursuant to First Department caselaw, where a safety device has been furnished, and it collapses, a *prima facie* case of liability under Labor Law §240(1) is established. Thus, a scaffold that fails, and tips over, failing to serve in its primary function of protecting the worker from the effect of gravity, gives rise to absolute liability for a violation of Labor Law §240(1). Plaintiff contends that Courts have held, under similar circumstances, that a defendant's failure to ensure that the scaffold a plaintiff needs to perform the assigned task provided proper protection and was properly secured and braced, constituted a proximate cause of the accident. Even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, negligence on plaintiff's part cannot serve as a defense to a section 240(1) claim as long as his negligence is not the sole proximate cause of the accident.

Opposition[2]

Defendant argues that issues of fact exist, thereby precluding summary judgment in plaintiff's favor.

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[2] Defendant MBR Contracting, Inc. did not submit any papers in response to plaintiff's motion.

Defendant argues that plaintiff has not come forth with any evidence or expert testimony to indicate that there was any defect in the scaffold or the ladder.

Defendant also maintains that issues of fact exist as to whether plaintiff's actions were the sole proximate cause this accident. Plaintiff placed the ladder and scaffold in position and locked the wheels; yet, he did not block the wheels as he had done so previously. Also, there were other scaffolds available on this job which he didn't use. As the Court of Appeals has stressed, the mere fact that a worker fell from a ladder, without more, is insufficient as "(n)ot every worker that falls on a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1)." The Court of Appeals has held that a plaintiff must establish that there was in fact a violation of Labor Law §240 and that the violation was the proximate cause of the accident and this issue must be determined by a jury. Given plaintiff's failure to utilize safety devices or suitable equipment which was available to him, it can be argued that plaintiff's actions were the sole proximate cause of his accident and this question must be left for a jury. As such, plaintiff's motion should be denied.

Reply

In reply, plaintiff argues that defendant failed to raise any triable issue of material fact. Defendant's claim that plaintiff was the sole proximate cause of the accident in that he used an unopened ladder placed on a baker's scaffold in order to drill a hole in a wall, and did not block the scaffold wheels, amount only to comparative negligence, which is not a defense under Labor Law 240. While defendant argues that summary judgment should be denied in the absence of evidence that the scaffold and ladder arrangement involved in this case was physically defective, plaintiff need not prove that the ladder or scaffold was physically defective in some way.

Plaintiff need only establish that defendant failed to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Defendant also argues that because plaintiff did not "block" the wheels (*i.e.*, "chocking them with objects"), plaintiff was the sole proximate cause of the accident. However, the First Department has held that the argument that plaintiff fell because of his own negligence in failing to activate a locking device for the scaffold's wheels is unavailing. The concept remains the same regardless of whether a plaintiff fails to lock or chock wheels. The responsibility of the defendant to ensure that elevation devices such as scaffolds and the devices necessary to make the use of those devices safe (*i.e.*, blocks as a device to make use of a scaffold safe) also must be furnished, erected, constructed and operated as to provide proper protection.

Defendant cannot escape liability by seeking to delegate its nondelegable duty to properly operate the devices to the worker, and then claim the worker was the sole proximate cause, where a proximate cause is defendant's failure to not only furnish the safety device but to furnish, erect, construct and operate it so as to provide proper protection from the effect of gravity. Nor can defendant rest on the fact that plaintiff set up the scaffold and ladder himself. Thus, argues plaintiff, the defendant's argument that plaintiff was the sole proximate cause of this accident because he did not block or "chock" the wheels (although, he did lock them) should be rejected.

Further, since the scaffold with a ladder perched on top of it collapsed after locking the wheels, regardless of whether it was the fact that the wheels could still move if they weren't chocked or "blocked," one may conclude that the wheel locks on the scaffold were defective or

that the entire set up of a ladder atop a scaffold caused the movement and fall, in violation of Labor Law §240, and constitute a proximate cause of the accident, alongside plaintiff's alleged comparative negligence in not chocking the wheels. Defendant cannot escape the fact that the scaffold collapsed and the wheel locks were defective. Plaintiff notes that he testified that, prior to the accident, during the week before the accident, he had problems with the scaffold moving even though its wheels were locked, and he complained about this condition to his boss. He was told that he had to use the subject scaffold because the other ones were occupied.

As for defendant's argument that plaintiff was the sole proximate cause of this accident because he used an unopened ladder on top of a scaffold, such a use of a ladder cannot constitute sole proximate cause where another violation of Labor Law §240(1) was committed by the defendant which was a proximate cause of the accident.

In any event, the testimony in this case shows that plaintiff was instructed to make a hole in the wall three meters from the floor and to use the subject scaffold to perform that work, and that plaintiff had to use the ladder that had been placed on top of the scaffold at his boss's instruction as he would have been unable to reach the wall or apply pressure to create the hole he was instructed to drill. Thus, defendant cannot claim that plaintiff's placement of the unopened ladder on the scaffold was the sole proximate cause of plaintiff's accident.

As for defendant's argument that plaintiff should have used other devices, such as another scaffold, or a safety harness, defendant failed to establish that plaintiff had adequate safety devices available, that he was aware of that availability and the expectation that he would use them, that for no reason he chose not to, and that had he not made that choice he would not have been injured. In fact, plaintiff had been told to use this particular scaffold involved in the

accident by his boss. Therefore, defendant cannot fault plaintiff for using the subject scaffold, as ordered.

Therefore, defendant's effort to blame plaintiff for using the subject scaffold is unavailing, in that the testimony shows that all of the other scaffolds were in use at the time of the accident. In any event, all of the other scaffolds that were on the floor where the accident occurred were no taller than the one plaintiff was using, and were all the same height. Thus, it is unclear as to how plaintiff's use of a different scaffold would have avoided the accident or that somehow plaintiff's use of the scaffold his boss told him to use was a proximate cause of the accident, let alone the sole proximate cause.

Further, plaintiff's testimony also shows that he was not given any type of a harness or a safety belt or safety lines. There were only two safety lines and harnesses available at the site. Thus, defendant's argument that plaintiff was negligent for not using said devices lacks merit.

Finally, as to the argument that plaintiff was negligent because he put pressure on his power operated tool he was using to drill out the hole in the wall while standing on the ladder is spurious; it is obvious that the only way he could accomplish his assigned task was by using the subject scaffold and a ladder placed on the scaffold at the instruction of plaintiff's boss.

Analysis

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient proof in evidentiary form to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10,

11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212(b)).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR § 3212[b]), or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Labor Law §240(1)

Labor Law § 240(1) provides, in relevant part:

> All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a

person so employed.

Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514, 577 NYS2d 219 [1991]), the Court of Appeals defined the scope of Labor Law §240(1) as encompassing special hazards inherent in elevation-related tasks (*Gill v Samuel Kosoff & Sons*, 229 AD2d 824 [3d Dept 1996]). The Court again addressed the scope of Labor Law §240(1) in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]), wherein it stated that the section "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*supra*, at 501 [emphasis in original]). Thus, pursuant to Labor Law §240(1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Mfg. Corp.*, 149 AD2d 893 [3d Dept 1989]).

In *Crespo v City of New York* (2001 WL 1682803, NY Slip Op. 40516 [U] [Sup Ct Bronx County 2001], *affd on other grounds*, 303 AD2d 166, 756 NYS2d 183 [1st Dept 2003]), plaintiff was seriously injured when he fell from a twenty-foot extension ladder, which had been placed on top of a five-foot baker's scaffold. At the time of the accident, plaintiff and his brother, also an employee of defendant, were painting a section of a chimney which was located twenty-four feet above ground. The Court held that plaintiff "met his initial burden of demonstrating his

entitlement to judgment as a matter of law by submitting proof establishing that his injuries were proximately caused by the absence or inadequacy of safety devices affording him proper protection from an elevation-related risk. Both safety devices provided to the plaintiff, the scaffold and the ladder, 'were inadequate for the job at hand'" (*see also, e.g., Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 804 NYS2d 157 [1st Dept 2005] [plaintiff established that the ladder did not provide the requisite protection in accordance with Labor Law §240(1) where the ladder "buckled" or "walked" when plaintiff leaned to his left in order to bolt a sign cover to the wall, causing him to lose his balance and fall]).

Similarly in *Torres v Monroe College, et al.* (12 AD3d 261, 785 NYS2d 57 [1st Dept 2004]) the court granted summary judgment to a plaintiff who placed an unopened A-frame ladder on top of a scaffold and leaned it against the wall. The court held that: "Defendant's failure to ensure that the scaffold plaintiff needed to perform his assigned task provided proper protection and was properly secured and braced, constituted a proximate cause of the accident.

Here, the unrefuted testimony of the plaintiff indicates that the scaffold and ladder upon which the ladder was placed, which he was using to perform his assigned task, failed to provide plaintiff with proper protection in accordance with Labor Law §240(1), causing him to sustain injuries (*Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381, 644 NYS2d 722] [1st Dept 1996] ["Whether the ladder slipped on its own, or the platform sidewalk bridge against which it leaned, or may have even been secured, slipped or gave way, makes no difference with respect to defendants' liability [under Labor Law 240(1). Defendants were obligated to ensure that the ladder was secured to something stable"]; *see also Wasilewski v Museum of Modern Art*, 260 AD2d 271, 688 NYS2d 547 [1st Dept 1999][plaintiff made a *prima facie* showing of a

violation of Labor Law 240(1), where no one was holding the 8 to 10-foot A-frame ladder from which plaintiff fell, that the ladder was not secured to something stable and was not chocked or wedged in place, and that no other safety devices, such as safety belts, were provided]).

That plaintiff did not demonstrate that the scaffold or ladder was defective is inconsequential (*see Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 740 NYS2d 16 [lst Dept 2002] [contention that plaintiff was required to show that the ladder from which he fell was defective in some manner is not the law; it is sufficient that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent]; *see also Bonanno v Port Auth. of New York and New Jersey*, 298 AD2d 269, 750 NYS2d 7 [1st Dept 2002] [where A-frame ladder was not secured to something stable, or chocked or wedged in place, and no other safety device was provided to prevent plaintiff's, and there is no evidence that plaintiff's own actions were the sole proximate cause of his injury, plaintiff was entitled to recover under Labor Law §240(1) claim; plaintiff was under no obligation to show that the ladder was defective in some manner]).

Blake v Neighborhood Hous. Servs. of N.Y. City. Inc. (1 NY3d 280, 803 AD2d 757, 771 NYS2d 484 [2003]) is not controlling. In *Blake*, plaintiff operated his own contracting company, and was working alone on a renovation job. Defendant Neighborhood Housing Services of New York City (NHS), acting on the homeowner's application, dispatched a rehabilitation specialist to the premises to assess the scope of the work and the amount of the loan. NHS prepared a work estimate and gave the homeowner a list of contractors, from which she chose plaintiff. At the job site, plaintiff set up an extension ladder, which he owned and used frequently. He acknowledged that the ladder was steady, had rubber shoes and was in proper

working condition. When plaintiff began scraping rust from a window, the upper portion of the ladder retracted, causing plaintiff to fall. The Court of Appeals found that the accident was the result of plaintiff's own failure to engage extension clips, the only device that kept the ladder in the extended position. Thus, plaintiff was fully responsible for his own injures, and the sole proximate cause of his accident.

Unlike the plaintiff in *Blake*, the plaintiff herein did not provide his own scaffold or ladder. Further, the plaintiff herein utilized these devices at the direction of his employer. It cannot be said that plaintiff herein failed to utilize any safety device, as there is no evidence of the existence of any safety device, other than the scaffold and the ladder. Since the scaffold and ladder provided by defendant failed to provide sufficient protection to keep plaintiff from falling, *Blake* is distinguishable, and does not warrant a different result.

Thus, plaintiff established a *prima facie* case of liability against defendant under Labor Law §240(1).

Sole Proximate Cause

It is "well settled that the injured's contributory negligence is not a defense to a claim based on Labor Law §240(1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices" (*Stalt v General Foods Corp.*, 81 NY2d 918, 920, 597 NYS2d 650 [1993]). However, it is clear that "section 240 does not give absolution to the plaintiff when his injury has been caused, exclusively, as a result of his own willful or intentional acts" (*Tate v Clancy-Cullen Storage Co. Inc.*, 171 AD2d 292, 296, 575 NYS2d 832 [1st Dept 1991]). Thus, liability will not be imposed upon owners and contractors when the worker's conduct is the "sole proximate cause" of the occurrence

(*Weininger v Hagedorn & Co.*, 91 NY2d 958, 672NYS2d 840 [1998], *rearg. denied*, 92 NY2d 875, 677 NYS2d 777 [1998]). When a statutory violation was a contributing factor to a worker's fall from a ladder or scaffold, the worker's comparative negligence (as distinguished from intentional wrongdoing) is irrelevant, and cannot be used to defeat summary judgment on the speculation that the accident may have been caused "solely" because of the culpable conduct of the worker (*see, Kyle v City of New York*, 268 AD2d 192, 196 [1st Dept 2000]). Thus, the "sole proximate cause" defense should be limited to the situation where a worker has been provided with "proper protection," and the worker thereafter, through intentional misuse of the safety device, or via other egregious misconduct, neutralizes the protections afforded by the safety device (*Robinson v City of New York,* 4 Misc 3d 542, 779 NYS2d 757 [Sup Ct Bronx County 2004]; *McMahon v 42nd St. Dev. Project, Inc.*, 188 Misc 2d 25, 726 NYS2d 203 [Sup Ct Bronx County 2001]). Once plaintiff makes a *prima facie* showing that he was subjected to one of the hazards covered by Section 240, the burden shifts to the defendants to establish that proper protection was afforded but rendered ineffective as a result of intentional or culpable conduct on the part of plaintiff (*Robinson, supra; McMahon, supra*).

Here, defendant failed to make such a showing, since the defendant, by providing two inadequate safety devices "in essence provided no safety device (*i.e.*, no adequate safety device)" (*see*, *Crespo v City of New York, supra*). To the extent that the plaintiff may have engaged in any "misuse" of the ladder by placing it upon the scaffold, such "misuse" was not a deliberate failure to use a proper safety device. The scaffold was inadequate for plaintiff's assigned task because it was not high enough, and the placement of the ladder upon the scaffold was an effort by the plaintiff to reach the desired area. Had plaintiff been provided with an adequate safety device he

would not have needed to put together equipment in an unsafe manner. Under these circumstances plaintiff's actions amount to no more than comparative negligence, which is irrelevant in an absolute liability case predicated on a Labor Law §240(1) violation (*see Crespo v City of New York, supra*).

Although plaintiff did not block the wheels in preparation of drilling the third hole as he had done so previously, his failure to do so cannot be considered the sole proximate cause of the accident (*Crespo v City of New York, supra* [stating that whether or not wheels on a scaffold were locked is immaterial, as the failure to lock the wheels can not be considered the sole proximate cause of the accident]).

Further, that plaintiff could have used other devices, such as another scaffold, or a safety harness, is inconsequential. Defendant failed to establish that plaintiff had adequate safely devices available, that he was aware of that availability and the expectation that he would use them, that for no reason he chose not to, and that had he not made that choice he would not have been injured. The record indicates that plaintiff was not given any type of a harness or a safety belt or safety lines. There were only two safety lines and harnesses available at the site. Additionally, plaintiff was instructed to use the subject scaffold by his boss. And, the record indicates that the other scaffolds were in use at the time of the accident. In any event, all of the other scaffolds were not taller than the one plaintiff was using. Thus, it cannot be said that the other scaffolds would have been adequate to assist plaintiff in drilling holes three meters from the floor.

Finally, that plaintiff applied more pressure on his drill to drill the hole in the wall while standing on the ladder is also inconsequential. The only way plaintiff could accomplish his

assigned task was by using the subject scaffold and a ladder placed on the scaffold and it is clear that the scaffold and ladder he used were not adequate safety devices for the task he was performing, rendering defendant, who admittedly provided no safety devices, absolutely liable under section 240(1) (*see Torres v Monroe College, supra* ["Even if another cause of the accident was Plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, negligence on Plaintiff's part cannot serve as a defense to a section 240(1) claim as long as his negligence is not the sole proximate cause of the accident"]; *see, Dasilva v A.J. Contracting Co.*, 262 AD2d 214, 694 NYS2d 353 [1st Dept 1999] [unsecured A-Frame ladder plaintiff was standing on was struck by a section of pipe he had cut, causing him to fall; plaintiff's actions in cutting the pipe were not the sole proximate cause of his injuries]).

Based on the above, plaintiff is entitled to partial summary judgment on the issue of liability.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR §3212 for partial summary judgment on his Labor Law §240(1) on the issue of liability is granted; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 22, 2009

Hon. Carol Robinson Edmead, J.S.C.