SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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RAFAEL RODRIGUEZ,

Plaintiff,

-against-

KATHLEEN LUPINO, Trustee RR & MM LUPINO IRREVOCABLE TRUSTS,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 12690/2009
Motion Date: October 28, 2010

The following papers numbered 1 to 6 were read on this motion by plaintiff for summary judgment:

Notice of Motion-Affirmation-Exhibits 1-4

Affirmation in Opposition 5

Reply Affirmation 6

Upon the foregoing papers it is ORDERED that the matter is disposed of as follows:

This is an action in personal injury stemming from the plaintiff's fall from a ladder. Plaintiff moves this Court for summary judgment pursuant to CPLR 3212 predicated upon Labor Law § 240(1). This accident occurred on August 16, 2009 while plaintiff was performing painting work at 35 Oakland Avenue, Warwick, New York on a three family house. According to the plaintiff, he was caulking and removing old paint in preparation of painting the exterior of the

subject premises and fell off of the ladder upon which he was standing over twenty feet to the ground below. Prior to the accident's occurrence, plaintiff was standing on the ladder approximately 30 minutes as it was being secured by a co-worker on the ground. The co-worker walked away, according to plaintiff, and left the ladder unsecured. Plaintiff then alleges that once the co-worker left, the ladder collapsed and slid straight down, causing him to fall to the ground. Plaintiff indicates that the ladder was supplied by his employer, that the ladder lacked anything on its feet to prevent it from slipping or which would have provided traction. Plaintiff acknowledges that there were other ladders on site, but that each of them had the same issues as the one he was using, namely an absence of traction and each required someone to secure it while he was on it. Plaintiff states that the ladder was not braced, secured or tied in any way, and that he was never directed to secure the ladder nor provided with any devices to secure it. Furthermore, he claims that no one directed him not to use the ladder nor was he directed to specifically use any of the other ladders present on the job site.

Defendants contend that the plaintiff was the sole person placing the ladder. In essence, defendants take the position that the accident at issue was due to the plaintiff's own conduct and that he was the "sole proximate cause" of his own accident.

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be

> resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Moreover, if summary judgment is granted, plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR§ 3212(c), after completion of the outstanding discovery.

Subdivision 1 of Section 240 of the Labor Law of the State of New York provides in relevant part that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

The purpose of Labor Law §240(1) is to place responsibility for safety practices squarely upon the owner and general contractor, instead of on workers who are scarcely in a position to protect themselves from accident. The statute is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed. *Felker v Corning Inc.*, 90 NY2d 219, 224 (1997); *Gordon v Eastern Ry. Supply Co.*, 82 NY2d 555, 559 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991); *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520-521 (1985).

In establishing a prima facie Labor Law §240(1) case, the plaintiff must establish that the owner, contractor or the respective agents thereof, failed to furnish or erect, or failed to effect the furnishing or erection of those devices enumerated above, which are to be constructed, placed and operated in a manner which giving the worker proper protection. Once it is determined that

the owner, contractor or the respective agent of each failed to supply proper safety devices to give the worker proper protection and as a direct result the worker is injured, "absolute liability is unavoidable under [Labor Law] section 240(1)." *Bland v Manocherian*, 66 NY2d 452, 459 (1985); *See, Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 (1985); *See generally, Haimes v New York Tel. Co.*, 46 NY2d 132 (1978) (the purpose of Labor Law § 240(1) was to fix the ultimate responsibility for safety on the owner and general contractor.) " . . . Labor Law §240(1) 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." *Ross v Curtiss-Palmer Hydro-Electric Company,* 81 NY2d 494, 501 (1993) (emphasis in original); *Weber v 1111 Park Avenue Realty Corp.,* 253 AD2d 376, 377 (1st Dept. 1998).

Thus, Labor Law §240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury. *Gordon, supra,* 82 NY2d at 559; *Rocovich, supra*, 78 NY2d at 513; *Zimmer, supra*, 65 NY2d at 524. The duty is nondelegable, and an owner is liable for a violation of this section even though the job was performed by an independent contractor over which it exercised no supervision or control. *Gordon, supra*, 82 NY2d at 559; *Rocovich, supra*, 78 NY2d at 513.

In *Harmon v Sager,* 106 AD2d 704 (3rd Dept. 1984), the Appellate Division affirmed the decision of the lower court stating that:

> This provision [Section 240(1)] imposes nondelegable duties which, when breached, result in absolute liability [cit om.]. In order to prevail, all a plaintiff must prove is that the statute was violated and that the violation was the proximate cause of the injuries sustained (see, e.g., *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 493 N.Y.S. 2d 102, 482 N.E. 2d 898 *Smith v.*

> *Hooker Chem & Plastic Corp.,* 89 A.D. 2d 361, 363, 455 N.Y.S.2d 446, app. dsmd. 58 N.Y.2d 824).

Harmon 106 AD2d at 705. *See, Kyle,* 268 AD2d at 195; *Bland, supra*; *Limauro v New York Dept. of Environmental Protection*, 202 AD2d 170, 171 (1st Dept. 1994); *Figueroa v Manhattanville College*, 193 AD2d 778, 778-779 (2nd Dept. 1993); *see Boshart v Buffalo*, 185 AD2d 706 (4th Dept. 1992). The nondelegable duty imposed by Section 240(1) requires the imposition of liability regardless whether the job was performed by an independent contractor or other entity over which the general contractor had no supervision or control. *See, Kyle*, 268 AD2d at 195.

Furthermore, a general contractor's control over the ladder or other device such as a scaffold is immaterial as is the latency of the defect at issue since liability pursuant to §240(1) is not dependent upon the general contractor's degree of control over the work or whether it had notice of the defective condition. *See, Santamaria v 1125 Park Avenue Corporation*, 249 AD2d 16, 17 (1st Dept. 1998); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 (1993); *Lombardi, supra*; *Rocovich, supra; Haimes, supra*.

The Courts have repeatedly held and the Court of Appeals reaffirmed in *Rocovich* that:

> It is settled that [Labor Law] section 240(1) `is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.' (See *Quigley v. Thatcher*, 207 N.Y. 66, 68 [100 N.E. 596].) (*Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 319, 83 N.E.2d 133) Thus, we have interpreted the section *as imposing absolute liability* for a breach which has proximately caused an injury. Negligence, if any, of the injured worker is of no consequence (*see, Bland v. Manocherian*, 66 N.Y.2d 452, 459-461, 497 N.Y.S.2d 880, 488 N.E.2d 810; *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 521, 493 N.Y.S.2d 102, 482 N.E.2d 898; *Koenig v. Patrick Constr. Corp., supra*).

Rocovich, supra 78 NY2d at 513; *See, Kyle v City of New York*, 268 AD2d 192, 195 (1st Dept. 2000). Furthermore, the Court of Appeals stated that Section 240 of the Labor Law was intended to place responsibility at the doorstep of the owner and general contractor to protect workers covered by the statute since the workers are " . . . scarcely in a position to protect themselves from accidents." *Lombardi v Stout,* 80 NY2d 290, 296 (1992).

It is well settled that an injured worker's contributory negligence is not a defense to a claim based on Labor Law Section 240(1), and that the worker's negligence, if any, does not operate to avoid or reduce the absolute liability of owners and contractors for failing to provide adequate safety devices. *Stolt v General Foods Corp.*, 81 NY2d 918, 920 (1993); *Rocovich, supra*, 78 NY2d at 513 ; *Bland, supra*, 66 NY2d at 459-461; *Zimmer, supra*, 65 NY2d at 521-522; *Elkins v Robbins & Cowan*, 237 AD2d 404, 406 (2d Dept. 1997); *Iannelli v Olympia & York Battery Park Co.*, 190 AD2d 775, 776 (2d Dept. 1993).

Labor Law §240 imposes **strict and absolute liability** upon owners contractors and the respective agents thereof for to provide proper safety devices. Questions surrounding the notions of duty, breach of duty, proximate and actual causation, and damages which arise in an action based strictly on negligence **are not applicable** to a Labor Law §240 action. *See Bland, supra; See Zimmer, supra*. The New York Legislature has established a policy by enacting Labor Law §240 which entitles an injured worker, in a case such as the one at bar, an absolute remedy against the general contractor of the building. *See Zimmer, supra.*; *See generally Haimes, supra* (the purpose of Labor Law § 240(1) was to fix the ultimate responsibility for safety on the owner and general contractor.) The Court of Appeals has made a point in stating that Labor Law

§240(1) is to be construed and interpreted as liberally as necessary to achieve its ultimate purpose which is to place absolute liability on the doorstep of the owner or contractor and not on a worker who is not in a position to protect himself from an accident. *See Zimmer,* 65 NY2d at 520.

NY PJI2:217 clearly expresses holdings of the courts on the issue of comparative negligence. More specifically the commentators stated:

> Comparative fault principles have no application to an action governed by Labor Law § 240, *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898; *Haulotte v Prudential Insurance Co. of America*, 266 AD2d 38, 698 NYS2d 24 (Labor Law § 240 applies where plaintiff's alleged intoxication was not sole proximate cause of accident); *Garcia v 1122 East 180th Street Corp.*, 250 AD2d 550, 675 NYS2d 2 (Labor Law § 240[1] applies regardless of plaintiff's negligence in use of scaffold); *Van Alstyne v New York State Thruway Authority*, 244 AD2d 978, 665 NYS2d 220 (plaintiff's failure to tie off lanyard on available static lines while working on elevated girder at bridge rehabilitation project); *Haystrand v Ontario*, 207 AD2d 978, 617 NYS2d 249 (plaintiff's failure to use locking device on his own scaffold no defense); *Keane v Lee*, 188 AD2d 636, 591 NYS2d 521 (plaintiff's use of marijuana on the afternoon of the accident cannot be interposed as a defense to a claim under Labor Law § 240[1]); *see also Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 675 NYS2d 341 (plaintiff's summary judgment motion under Labor Law § 240[1] cannot be defeated with mere speculation as to plaintiff's alleged intoxication). Likewise, assumption of risk is no defense to absolute liability under the statute, *Heath v Soloff Constr., Inc.*, 107 AD2d 507, 487 NYS2d 617. Therefore, a third party defendant employer who has been allocated a share of liability may not attempt to recover that allocable share back from the plaintiff, *Schaefer v RCP Associates*, 232 AD2d 286, 649 NYS2d 13; *see DiVincenzo v Tripart Development, Inc.*, 272 AD2d 904, 709 NYS2d 271.

1B NY PJI3d 1011 [2003]. Therefore, any arguments proffered by defendants that the negligence or culpable conduct of plaintiff's decedent affects the outcome of the instant case are totally incorrect.

The Labor Law requires safety devices so "constructed, placed and operated as to give proper protection" to workers employed at elevated worksites. Labor Law Section 240(1). *See*

Klein v City of New York, 89 NY2d 833, 834-835 (1996); *Wright v State of New York*, 66 NY2d 452, 461 (1985). Thus, the two elements of a Labor Law §240(1) cause of action are a violation of the statute and proof that the violation was a proximate cause of the injury sustained. The statute requires that all contractors and owners "furnish or erect or cause to be furnished or erected for *** [the erection, demolition, repairing, altering, cleaning or painting of a building or structure], scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed or operated as to give proper protection to a person so employed."

Moreover, the courts of this State repeatedly hold that if a scaffold or ladder collapses, and the plaintiff is injured as a result, the mere collapse in and of itself makes a prima facie case of liability pursuant to Labor Law §240(1). *See, Alomia v New York City Transit Authority*, 292 AD2d 403, 405 (2nd Dept. 2002). If the ladder upon which a plaintiff is working breaks, a plaintiff is entitled to summary judgment as a matter of law on the issue of liability pursuant to Labor Law §240(1). *See, Lawrence v Forest City Ratner Companies*, 268 AD2d 380 (1st Dept. 2000); *Pereira v A.D. Herman Construction Co., Inc.*, 74 AD2d 531, 533 (1st Dept. 1980). Proof of a collapsed or broken scaffold or ladder establishes a prima facie violation of the statute, thus shifting the burden to the defendant to submit evidence that would raise a factual issue for its failure to provide the necessary and proper protection. *See, Davis v Pizzagalli Construction Co.*, 186 AD2d 960, 960-961 (3rd Dept. 1992); *Ferrara v Bronx House, Inc.*, 163 Misc2d 908, 913 (Civ. Ct., Bronx Co. 1994). "Proof of a collapse of a safety device constitutes a prima facie showing that the statute [§240(1)] was violated and that the violation was a proximate cause of the worker's injuries, thereby establishing that the claimant's entitlement to summary judgment

as a matter of law on the issue of liability [cit. om.]." *Dos Santos v State*, 300 AD2d 434 (2nd Dept. 2002).

The plaintiff is not required to prove that the device itself was defective in any way. *See, Bonanno v Port Authority of New York and New Jersey*, 298 AD2d 269, 270 (1st Dept. 2002); *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 290-291 (1st Dept. 2002). Moreover, it is no defense to liability under Labor Law §240(1) that the safety device collapsed as a result of a defect in the product. *See, Drew v Correct Mfg. Corp. (Hughes-Keenan Div.)*, 149 AD2d 893 (3rd Dept. 1989).

Plaintiff demonstrated in his motion that the ladder collapsed. Plaintiff's version of the accident is uncontroverted. The burden then shifted to the defendant to submit admissible evidence that would raise a factual issue for its failure to provide the necessary and proper protection. Defendants failed to do so.

The Labor Law imposes absolute liability on owners and contractors for any §240(1) violation which has proximately caused injury. To establish proximate cause, the plaintiff must show that the defendant's act or failure to act as §240(1) requires was "a substantial cause of the events which produced the injury." *Gordon v Eastern Ry. Supply, supra*, 82 NY2d at 561-562; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 (1980). Where the defendant has violated Labor Law Section 240(1), and, as a result, sustains exactly the type of injury Section 240(1) was designed to prevent, then, in the absence of some intervening or superseding event, proximate cause is established as a matter of law. *See Gordon, supra; Garcia v 1122 East 180th Street Corp.,* 250 AD2d 550 (1st Dept. 1998). Allegations of mere negligence on the plaintiff's part are insufficient to avoid summary judgment on liability. *Stolt v General Foods Corp., supra*, 81

NY2d at 920; *Bland v Manocherian, supra*, 66 NY2d at 459 ("once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker 'proper protection', absolute liability is 'unavoidable' under Section 240(1) . . . regardless of the injured worker's own negligence in contributing to his accident"); *La Lima v Epstein,* 143 AD2d 886, 888 (2d Dept. 1988). Where no view of the evidence would support a conclusion that the Section 240 violation was not a substantial cause of plaintiff's injuries, summary judgment for the plaintiff is warranted. *See Felker v Corning, Inc., supra*, 90 NY2d at 225; *Zimmer v Chemung County Performing Arts, supra*, 65 NY2d at 524.

Summary judgment for a plaintiff is warranted unless a reasonable jury could conclude "that plaintiff's actions were the sole proximate cause of his injuries." *Weininger v Hagedorn & Company,* 91 NY2d 958, 960 (1998)(emphasis added). "Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment (*see Klein v. City of New York,* 89 N.Y.2d 833, 835 [1996])." *Blake v Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280, 289 at n. 8.

The Court of Appeals goes to great pains in distinguishing cases in which the plaintiff is not the sole proximate cause of the accident, meaning, by definition, that a violation of Labor Law §240(1) occurred. To that end, the Court of Appeals stated in *Blake* " **. . . that there can be no liability under section 240(1) when there is no violation and the worker's actions (here,**

his negligence) are the 'sole proximate cause' of the accident. Extending the statute to impose liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed." (Emphasis supplied). In other words, proof of an absence of a safety device, a defect in a safety device, or proof that a safety device was improperly placed necessitates the imposition of the absolute liability protections of Labor Law §240(1).

The *Blake* Court went on to hold that:

> Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation. That is what we held in *Weininger,* a holding the Appellate Division has consistently understood and applied. [FN10] The Pattern Jury Instructions reflect a like-minded interpretation of *Weininger* (*see* PJI3d 2:217 [2003]) [FN11]. We reaffirm that holding today.

Blake, 1 NY3d at 290-291.

The *Blake* Court made a point of stating that its holding was limited to the facts of that case wherein it stated that " . . .the record now before us fully supports the jury's findings that **there was no statutory violation and that plaintiff alone, by negligently using the ladder with the extension clips unlocked, was fully responsible for his injury**." (Emphasis supplied). Thus, the plaintiff's own failure to engage the extension clips on the ladder was the sole proximate cause of the accident, not the placement of the ladder.

The *Blake* Court cited its decision in *Bland v Manocherian*, 66 NY2d 452 (1985). The

Blake Court reminded us that in *Bland*:

> . . . the jury found that the ladder in question was not "placed so as to give proper protection to the plaintiff"and that "improper placement of the ladder [was] a proximate cause of the accident" (*id.*). **We held that "[t]he jury was clearly entitled to find that, under the circumstances, defendants failed to satisfy the responsibilities imposed by section 240(1) in that they had not 'erected' or 'placed the ladder from which plaintiff fell in such a manner, or with such safeguards, as necessary to provide plaintiff with 'proper protection" while he was working on defendants' building**" (*id.* at 460).
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> In reaching this conclusion, we noted the nature of the work the plaintiff had to perform while on the ladder and the conditions at the work site. "[P]ressure would have to be applied to the sashes and, at the same time, the windows forcibly twisted loose, all while plaintiff was standing on a ladder" (*id.* at 460). Further, and also in contrast to the case before us, there was testimony that "the floor upon which the ladder was placed was bare, highly polished and shiny" and that "no safety equipment, safety belts, hard hats, scaffolding or anything else, was used to protect plaintiff from falling through the fourth floor window or to secure the ladder to insure that it remained steady and erect while plaintiff was applying pressure to that window" (*id.*).
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> The record in *Bland* fairly suggested that better safety devices could have prevented the accident. In our case, the ladder was undisputedly in proper working order, and no further devices were necessary.

In the instant case, the unrebutted evidence demonstrated that the ladder slipped from under the plaintiff and the plaintiff fell down, thus shifting the burden to the defendants to come forward with evidence to demonstrate that the plaintiff was the sole proximate cause of his accident, not just one potential cause. Defendants failed to do so. Defendants failed to supply one affidavit or provide one shred of evidentiary support for their conclusion that the plaintiff was the sole proximate cause of this accident, necessitating a finding that the plaintiff was not the sole proximate cause.

In short, defendants violated Labor Law §240(1) as a matter of law, and the conclusion

that defendants' Section 240(1) violation proximately caused plaintiff's accident is not altered by any negligence on his part in implementing an expedient for hoisting and securing the duct work which occurred only because defendants violated its obligation under the Labor Law. As there were no safety devices on site at the time of the accident to protect against the elevation-related hazard that led to plaintiff's accident, plaintiff is entitled to summary judgment on the issue of defendants' liability under Labor Law §240(1). *See, Wallace v Stonehenge Group, Ltd.,* 1 AD3d 589 (2d Dept. 2003)*; Taeschner v M & M Restorations, Ltd.,* 295 AD2d 598, 599 (2d Dept. 2002); *Elkins v Robbins & Cowan, Inc.,* 237 AD2d 404 (2d Dept. 1997).

The Second Department's decision in *Wallace v Stonehenge Group, Ltd., supra,* is illustrative of this point. In *Wallace,* the plaintiff was an independent contractor hired to frame a salt barn. Since the owner and general contractor supplied no safety devices, the plaintiff supplied and constructed his own scaffolding, consisting of two extension ladders, ladder brackets, and an aluminum scaffold placed across them to create an elevated work platform. As an expedient to increase efficiency, plaintiff put a stepladder on the work platform so he could reach higher. When he ascended the stepladder, once of the extension ladders, which had not been secured to the wall of the salt barn, pulled away from the wall and the scaffold collapsed. The motion court granted the defendants' motion for summary judgment on the ground that plaintiff's actions in assembling the scaffold and in placing the stepladder on it were the sole proximate cause of the accident. The Second Department, however, reversed and granted the plaintiff partial summary judgment on the issue of defendants' liability under Labor Law §240(1), writing:

The plaintiffs established their entitlement to partial [summary] judgment as a matter of

> law on the issue of liability by presenting evidence that no safety devices were provided (*see Taeschner v M & M Restorations,* 295 AD2d 598). In opposition, the defendants failed to raise a triable issue of fact regarding liability. While a plaintiff cannot recover where his or her conduct was the sole proximate cause of his or her injuries [cit.om.], that defense was not available to the defendants under the circumstances of this case (*see Vacanti v Habasit Globe,* 283 AD2d 935, *DiVicenzo v Tripart Dev.,* 272 AD2d 904).

Wallace, supra (emphasis added).

The Second Department pointed to *Vacanti v Habasit Globe, Inc.,* 283 AD2d 935 (4th Dept. 2001), which in similar circumstances affirmed an award of summary judgment to the plaintiff:

> [Plaintiff] was standing on a "foot scaffold", which consisted of a wooden plank laid across two concrete blocks. The main scaffold that was supporting the "foot scaffold" came apart as plaintiff was reaching to repair the block wall of a lading dock, and plaintiff fell approximately 12 feet to the ground. We reject defendant's contention that there is an issue of fact whether the actions of plaintiff were the sole proximate cause of his injuries (*cf., Weininger v. Hagedorn & Co.,* 91 N.Y.2d 958, 960...). Here, plaintiffs established that plaintiff fell because of the instability of the base scaffold and was injured because no safety devices were in place or provided by the owner, notwithstanding the fact that plaintiff's own workmen constructed the two scaffolds. "**Because there is no dispute that there were no safety devices provided, this is not a case where 'a reasonable jury could *** conclude[] that plaintiff's actions were the sole proximate cause of his injuries,'" and plaintiffs therefore are entitled to summary judgment** (*DiVicenzo v. Tripart Dev.,* 272 A.D.2d 904, 905...).

Id. (emphasis added). In *DiVincenzo v Tripart Development, Inc.,* 272 AD2d 904 (4th Dept. 2000), the other case cited in *Wallace*, the plaintiff independent contractor was using his own scaffolding because none was provided. The scaffold collapsed because he failed to properly secure the planking, using only one nail at each juncture instead of two. The Appellate Division nevertheless granted the plaintiff summary judgment and wrote:

> We reject the contention of [defendants] that an issue of fact exists whether plaintiff's actions were the sole proximate cause of the accident. **Because there is no dispute that there were no safety devices provided, this is not a case where "a reasonably jury could conclude [] that plaintiff's actions were the sole proximate cause of his**

> **injuries**, and consequently, that liability under Labor Law Section 240(1) [will] not attach" [citing *Weininger, supra,* and *Felker, supra*]. Plaintiff therefore is entitled to partial summary judgment.

DiVicenzo, 272 AD2d at 904-905 (emphasis added).

Similarly, in *Prenty v Cava Construction Co., Inc.,* 289 AD2d 120 (1st Dept. 2001), the Court, in affirming an award of summary judgment for the plaintiff, wrote:

> Plaintiff, a self-employed plasterer, established [defendant owner's] liability under Labor Law Section 240(1) by showing that the scissor lift he was using, provided by [general contractor], toppled over, causing him to fall to the ground about 30 feet below [cit.om.]. Since [the general contractor] did not provide plaintiff with any appropriate safety devices, it does not avail [the owner] to argue that the lift was not defective and that the sole cause of the accident was plaintiff's attempt to level the lift on a slanted sidewalk by use of planks without any bracing or support (*see, Vacanti v. Habasit Globe,* 283 AD2d 935...).

Prenty, 289 AD2d at 121 (emphasis added).

The thrust of this line of cases, culminating in *Wallace*, is that where the owner and general contractor fail to provide any safety devices to protect a worker against an elevation-related hazard in violation of Labor Law §240(1), no reasonable jury could conclude that the worker's negligence in implementing alternative measures to carry out his task was the sole proximate cause of injury. In other words, as the Court of Appeals made clear in *Blake v Neighborhood Housing Services of New York City, supra,* "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." *Id.*

In the instant case, there is no dispute that the plaintiff's employer, not the defendant, supplied the ladder at issue. There is no evidence whatsoever that the defendants supplied any safety devices for plaintiff's use, and the failure to so provide such devices does not leave defendants with a viable argument on the issue of sole proximate cause.

In *Robinson v City of New York*, 4 Misc.3d 542 (Sup. Ct. Bronx Co. 2004) (Victor, J.), the Court construed *Blake* as standing for the familiar proposition that § 240(1) imposes absolute liability where the injury arises from a failure to provide "proper protection" within the meaning of the statute, but imposes no liability where a plaintiff who was provided with such protection nonetheless managed to cause his/her own injury:

> The core objective of Section 240 is proper protection. Therefore, a *nondelegable duty* is imposed upon all responsible entities to protect construction workers, not just with scaffolds, but with such `ladders … ropes, *and other devices …* as to give *proper protection* to [such workers]' (emphasis added). When a construction worker is not provided with `proper protection' and is injured as a result of one of the hazards, which Section 240 was enacted to eradicate, the general common law defenses are not available, and absolute liability is imposed on all responsible entities. However, it has been made abundantly 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*.' (Emphasis supplied.) (*Tate v. Clancy-Cullen Storage Co., Inc.*, 171 A.D.2d 292, 296, 575 N.Y.S.2d 832 [1st Dept. 1991]). This kind of egregious conduct has evolved into the legal `axiom' that 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 N.Y.2d 958, 672 N.Y.S.2d 840, 695 N.E.2d 709 [1998], *reargument denied*, 92 N.Y.2d 875, 677 N.Y.S.2d 777, 700 N.E.2d 317 [1998].)
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> The `sole proximate cause' defense must logically 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. (*McMahon v. 42nd St. Development Project, Inc.*, 188 Misc.2d 25, 726 N.Y.S.2d 203 [Supreme court, Bronx County 2001]). Thus, once a plaintiff makes a prima facie showing that he or she was subjected to one of the hazards covered by Section 240, the burden shifts to the defendant to provide evidentiary proof in admissible form (not speculation) sufficient to establish that proper protection was afforded but rendered ineffective as a result of intentional or culpable conduct on the part of plaintiff.

Robinson, 4 Misc3d at 546-547.

Additionally the *Robinson* Court found that *Blake* should be regarded as a product of the Court of Appeals' limited jurisdiction to overturn affirmed factual findings, in this instance, the affirmed finding that the plaintiff had been afforded "proper protection." Justice Victor put it this way:

> This court believes that Blake is more a reflection of the limited review power of the Court of Appeals, rather than a dilution of the strict obligations imposed upon owners and contractors to afford proper protection to construction workers who are exposed to elevation-related risks.
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> The Court of Appeals is a court of limited jurisdiction, and except in limited circumstances, is constitutionally confined to review of questions of law, and is precluded from a review of questions of fact.
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> Overlooked by most commentators who have speculated on the meaning of Blake, is the initial observation of the Court as to the issues presented which incorporates the unreversed factual findings of the jury by which the Court was bound:
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> > "We are presented with the question whether a plaintiff who was injured while using a ladder may prevail in a Labor Law § 240(1) action even *when a jury finds* that the ladder was so constructed and operated as to give him *proper protection and he was the sole cause of his injury*. In deciding the appeal it is necessary for us to address the concept of strict (or absolute) liability and the *§ 240(1) predicate for its application* under *Labor Law* [emphasis added]
>
> Having been presented with these affirmed factual findings (that proper protection was provided to plaintiff and that it was his actions that were the sole proximate cause of his injury), the Court of Appeals had no legal or factual predicate for the imposition of absolute liability on the defendants. It was beyond the Court's review power under the circumstances presented to do anything but affirm the Appellate Division's affirmance of the jury's verdict. Everything in the decision relating to the above issue, beyond the words `we affirm' appearing on page 284 of the decision, was merely a reiteration of the already well established principles of law and the history and purpose of Labor Law § 240.

Robinson, 4 Misc3d at 543, 547-548.

There are a myriad of decisions rejecting the defense of "sole proximate cause" based upon the plaintiff's negligence merely being a concurrent cause and not the sole proximate cause of the accident. In *Montalvo v. J. Petrocelli Construction, Inc.*, 8 AD3d 173, 175 (1st Dep't 2004) (where plaintiff was struck by a falling metallic casing as plaintiff was astride an A-frame ladder, where plaintiff was thrown forward and extended his right arm to break his fall, where plaintiff thus hyperextended his right arm, resulting in a dislocated right shoulder and torn rotator cuff, and where the accident was caused, at least in part, by defendant's "failure to properly secure the ladder by having someone hold it or by the provision of some other safety device …", the actions of plaintiff and his co-worker in dropping the casing "were not a superseding cause under the circumstances").

In *Gilbert v Albany Medical Center*, 9 AD3d 643 (3rd Dep't 2004) (where plaintiff placed an A-frame ladder on a floor that was covered in polyethylene and was thereby slippery, and where plaintiff then caused the ladder to slip when he reached too far out in the course of his work, plaintiff was entitled to summary judgment and "[t]he fact that plaintiff may have been extending or reaching from the ladder would implicate comparative negligence, which is not a defense to a section 240(1) action").

In *Serrano v 432 Park South Realty Co., LLC*, 8 AD3d 202, 779 N.Y.S.2d 198, 199 (1st Dep't 2004) (plaintiff was entitled to summary judgment where "[p]laintiff established that his accident was attributable to a lack of proper safety equipment and/or the failure to secure the ladder upon which he was working"; "Even if plaintiff had been negligent in continuing his work in his coworker's momentary absence, no triable issue would therefore be raised as … such

negligence would not be susceptible of characterization as the sole proximate cause of plaintiff's harm").

In *Torres v Monroe College*, 12 AD3d 261 (1st Dept. 2004), the Court held that even if one cause of the accident was plaintiff's improper use of an unopened A-frame ladder leaned against the wall from on top of a scaffold, plaintiff's negligence is not a defense unless such negligence is the sole proximate cause of the accident, and the Court determined that the facts revealed that the safety devices provided plaintiff were inadequate to protect him. Thus, the plaintiff's conduct was not the sole proximate cause of the accident.

As such, plaintiff's motion must be granted in its entirety. CPLR § 3212(c) states in pertinent part:

> Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

Given the fact that summary judgment on liability has been granted, plaintiff is entitled to a trial solely on the issue of damages. The parties will appear as scheduled for their conference on November 16, 2010 at 9:30.

The foregoing constitutes the decision and order of this Court.

Dated: October 29, 2010 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.