McCue v Cablevision Sys. Corp.
2017 NY Slip Op 31833(U)
September 1, 2017
Supreme Court, New York County
Docket Number: 156805/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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MICHAEL McCUE,

Plaintiff,

-against- Index No. 156805/12

CABLEVISION SYSTEMS CORPORATION,
CONSOLIDATED EDISON CO. OF NEW YORK, INC.,
VERIZON COMMUNICATIONS, INC., and
VERIZON NEW YORK, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, plaintiff Michael McCue moves for an order granting reargument[1] of the court's decision and order dated October 25, 2016 ("the original decision") and, upon reargument, pursuant to CPLR 305(c), curing the "misnomer," in naming Cablevision Systems Corporation ("Cablevision") as a defendant instead of CSC Holdings, Inc. and/or CSC Holdings, LLC, and granting summary judgment as to liability on plaintiff's Labor Law § 240 claim. CSC Holdings, LLC i/s/h/a Cablevision Systems Corporation ("CSC Holdings, LLC" or "defendant") opposes the motion.

BACKGROUND

Plaintiff alleges he was injured on September 8, 2010, when he fell from a utility pole in the vicinity of 5 Welwyn Lane in Valhalla, New York. At the time of the accident, plaintiff was working for nonparty H2O Landscape Design, Inc. (H2O), a cable installer that entered into a Aerial, Underground or Building Attachment/Plant Maintenance Contract with CSC Holdings, Inc. (hereinafter "the H20 Agreement") under which H20 was retained "to "construct, install and

[1]While plaintiff's notice of motion states that he is moving for both renewal and reargument, as plaintiff's motion papers address only reargument, the court is treating any request for renewal as abandoned.

maintain all aerial, underground or building attachment plant to complete Work designated by Cablevision hereunder...."

The H20 Agreement further provided that CSC Holdings, Inc. and its affiliated entities, including Cablevision were obligated to "furnish cable, electronic equipment, fittings, hardware and associated materials required for the Work" (*id.*). In addition, H2O's use of "equipment, tools, vehicles and Contractor supplied materials available for the Work" was subject to their approval (*id.*). CSC Holdings, Inc. and its affiliate entities, including Cablevision also reserved the right to inspect, test, and approve all work performed by H2O (*id.*).

A pole attachment agreement between Con Ed, as licensor, and CSC Holdings, Inc., as licensee, which was notarized on May 5, 2000, states that Con Ed was "willing to license attachments by LICENSEE to Edison-owned poles according to the terms of the agreement" (*id.*, exhibit H). The pole attachment contains the following provisions:

> "201. Specific License Required. No general permission is granted hereunder. LICENSEE may not make an attachment to any pole until Edison grants a license for that specific attachment.
>
> ***
>
> "601. Ten Year Term. Unless previously terminated pursuant to its terms, this Agreement shall continue in effect for a term of ten years and shall remain in effect thereafter unless it shall have been terminated on 90 days' written notice"

(*id.*). In addition, the pole attachment agreement contains indemnification and insurance procurement clauses (*id.*).

Plaintiff testified that Desmond Shepherd (Shepherd) of H2O hired him as a project

manager approximately six months before the accident; Shepherd wanted plaintiff to do "ride-out work," teach H2O employees, and "keep the [workers] happy at Cablevision" (Plaintiff tr at 140-141, 285). Plaintiff testified that the "ride-out work" consisted of going to a jobsite to "make sure it can be built to the way that they're gonna hand you a print, as-built" (*id.* at 142). This involved "looking up" if the work was "an aerial job" – i.e., installation of cable equipment on utility poles (*id.* at 143-144). Plaintiff stated that "almost all of [his] work" consisted of walking on the ground (*id.* at 144). Plaintiff was also responsible for going to "town halls and get[ting] permits" (*id.*).

According to plaintiff, in the early afternoon of September 8, 2010, he drove to 5 Welwyn Lane to meet Kevin Dickinson (Dickinson) from Cablevision to "turn the job on" (*id.* at 189-190). Specifically, on this date, Dickinson had to plug in the amplifier that feeds pole SPO54 (*id.* at 189). Plaintiff testified that "[b]asically [his] job was to be there. [His] men did the work. [He] was there to make sure everything turned on smoothly where he could turn in that job complete, but [plaintiff was] not Kevin's supervisor" (*id.* at 192-194). If the activation was not done adequately, plaintiff was responsible for taking the steps necessary to get it to work properly (*id.* at 195). Plaintiff testified that he "would have to go out and look at it, weigh it out and, you know, get back to Desmond Shepherd, who was [his] boss [at H20]" (*id.* at 220).

According to plaintiff, after Dickinson installed the amplifier, plaintiff observed Dickinson take a meter reading that showed the plant extension "didn't work," and plaintiff "turned cherry red" (*id.* at 196). Plaintiff testified that he "had to jump into gear and get this thing fixed" (*id.*). Plaintiff had a list of troubleshooting items such as "loose seizure screw" which was located on pole SPO54 (*id.* at 198). Plaintiff went up the pole to make sure that the

seizure screws were tight (*id.* at 199-200). Plaintiff testified that gaffing a pole "means going up the pole with hooks on your boots" (*id.* at 233-234). When asked whether as a supervisor at H20 he was not required to gaff, plaintiff responded that he "wouldn't say that, but [he felt he] was going in a different direction of less work and more teaching" (*id*). Plaintiff taught gaffing "mainly to [his] son" and answered no when asked whether other than his son he taught gaffing or helped other workers from H20 with gaffing before the accident (*id* at 283).

On the accident date, plaintiff used his co-worker's gaffing equipment (*id.* at 297, 318, 341-343). Plaintiff testified that he decided to take his co-worker's gaffing equipment on the accident date "in case there was a problem, because [he] knew they went and did the job" (*id* at 297). Plaintiff did not own his gaffs because he "didn't feel [he] needed them anymore [as a] supervisor" (*id* at 281). Gaffing equipment consists of gaffs, which are strapped onto the worker's boots, and a "two piece belt" (*id.* at 235, 236). The belt consists of a six-inch wide strap that goes around the worker and two large buckles "where your secondary strap goes" (*id.* at 236, 237). The secondary strap, which is about four feet long, "goes around the telephone pole" and connects to the large buckles (*id.* at 237-238). When deciding whether to gaff a pole, "[he]'d look for any other way but to gaff the pole" because he "always thought [gaffing] was dangerous" (*id.* at 247, 248).

Plaintiff climbed up the pole by putting on gaffs; he tightened all of the straps around his ankle and his shins and put his safety belt on (*id.* at 201). Plaintiff already had his hardhat on and he grabbed the tool that tightens the seizure screws (*id.*). To get down, plaintiff "put everything in [his] little ditty bag where [his] tools go, held the cable, moved down a little bit, moved down. Then [he] unhooked the belt and re-hooked the belt. And that's when [he] proceeded down the

pole" (*id.* at 328). As plaintiff was gaffing down the pole, "[his] right leg slid down and [he] was just in an awkward position" (*id.*). He was about 18 to 20 feet off the ground when his right foot slipped (*id.* at 333). Plaintiff claims that, when he reset his right gaff into the pole, he inadvertently placed his right gaff into a crack in the pole, and that was why he fell (*id.* at 335). He stated that "[he] kicked the right foot in. And then when [he] put the weight on the right foot, you know, to go down with the left foot, the right foot just gave out. . . . And the left foot wasn't in too good" (*id.* at 334). After his right foot slipped, his body went down to the ground (*id.* at 336).

Kevin Dickinson, a Cablevision technician, testified that he "activated" the Welwyn Lane project (Dickinson tr at 57). When he installed the amplifier on the project, no one from H2O was present (*id.* at 66). Dickinson activated the line and verified the signal continuity point of the work done by H2O (*id.* at 67). He used a field strength meter to access the new tap (*id.* at 68). Dickinson did not recall there being any problems with the signal strength (*id.* at 67). Dickinson stated that he was not aware that anyone had fallen off any of the utility poles in the vicinity (*id.* at 71-72). He stated that plaintiff was not present at the site when he was there; "He wasn't there. He wasn't there when I was there" (*id.* at 100).

Plaintiff commenced this action on September 28, 2012, asserting claims for violations of Labor Law §§ 240 (1), 241 (6) and 200 and seeking recovery under principles of common-law negligence. In their answers, Con Ed and the Verizon defendants assert cross claims for contractual indemnification and damages for failure to procure insurance against Cablevision.

Following the completion of discovery, various parties moved for summary judgment, including plaintiff and defendant Cablevision. Plaintiff moved for summary judgment on his

claim under Labor Law § 240 and § 241(6) against various defendants, including Cablevision. Cablevision opposed the motion on various grounds, including that it was not an owner or contractor subject to the Labor Law, asserting that CSC Holdings, Inc., and not Cablevision, entered into a contract with H20.

In the original decision, the court found that plaintiff had not shown that Cablevision was a proper Labor Law defendant on the grounds that the H2O Agreement was with between CSC Holdings, Inc. and H2O and not Cablevision. The court denied plaintiff's request in reply to correct the name of Cablevision pursuant to CPLR 305(c), writing that "the function of reply papers is to address arguments made in opposition taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." The court also denied plaintiff's motion for summary judgment as to liability on his section 240(1) claim, finding that the record raised an issue of fact as to whether plaintiff was working within the scope of his employment at the time of the accident and with respect to the circumstances leading up to the accident.[2]

DISCUSSION

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party

[2]In addition, in its original decision, the court granted Verizon's motion for summary judgment based on evidence that Verizon did not own any poles in the area of the accident; denied Con Ed's motion for summary judgment; and granted Cablevision's motion for summary judgment dismissing the Labor Law § 241(6) claim and dismissing Verizon's cross claims against it for contractual indemnification and breach of contract.

successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Request to Correct Misnomer under CPLR 305(c)

Plaintiff moves for reargument of that part of the original decision which denied his request pursuant to CPLR 305(c) to correct the plaintiff's error in naming Cablevision as a defendant instead of CSC Holdings, Inc. and/or CSC Holdings LLC. Plaintiff argues that the court erred in denying plaintiff's request on the ground that plaintiff first sought this relief in reply, noting that defendant initially raised the issue of whether Cablevision qualified as an owner or contractor for the purposes of the Labor Law in its opposition to plaintiff's summary judgment motion.

CSC Holdings LLC opposes the motion, arguing that the court correctly denied plaintiff relief as he did not move to correct the misnomer in his underlying motion but first sought this relief in reply. It also argues that the motion should be denied as plaintiff failed to annex a proposed amended pleading or to indicate that precise relief sought, and CPLR 305(c), on which plaintiff relies, permits only correction of the name of an existing party and not the addition or substitution of new parties. It also argues that it would be prejudiced if the court permitted the correction.[3]

CPLR 305(c) states that the court has discretion to "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons

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[3]CSC Holdings, LLC also argues that plaintiff should not be permitted to cure the misnomer he failed to identify this relief in its notice of motion seeking reargument; however, this defect is minimal and does not preclude the court from considering plaintiff's request to amend.

issued is not prejudiced." The provision has been interpreted as allowing a misnomer in the description of the party defendant to be cured, where, "(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought." Ober v. Rye Town Hilton, 159 AD2d 16, 19 (2d Dept 1990)(internal citation and quotation omitted).

As a preliminary matter, CSC Holdings LLC's procedural argument that plaintiff's request to amend should be denied as he first raised the issue in reply is without merit. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion." All State Flooring Distributors, LP v. MD Floors, LLC, 131 AD3d 834, 836 (1st Dept 2015)(internal citation and quotation omitted). Here, the court should have considered plaintiff's argument as it was made in response to CSC Holdings LLC's opposition argument that Cablevision was not a proper Labor Law defendant and thus was the proper subject of a reply. Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 207 (2d Dept 2009); see generally Kennelly v. Mobious Realty Holdings LLC, 33 AD3d 380 (1st Dept 2006). Next, CSC Holdings LLC's position that plaintiff should be denied relief based on his failure to attached an amended pleading and/or specify the form of relief sought is unavailing, particularly as plaintiff is seeking to correct a misnomer not to amend the complaint.

As for the merits of plaintiff's request, it should be noted that in response to plaintiff's service of the summons and complaint in this action on Cablevision Systems Corporation, through the New York Secretary of State, CSC Holdings, LLC, (the successor to CSC Holdings, Inc.), filed a verified answer in which it identified itself as "CSC Holdings, LLC i/s/h/a

Cablevision Systems Corporation (hereinafter referred to as Cablevision)." Furthermore, by defining in its answer the two entities (i.e. CSC Holdings, LLC and Cablevision) as "Cablevision," and admitting in Paragraph four of the answer that "defendant Cablevision, entered into a contract with H20 Landscapes Designs, Inc," counsel for CSC Holdings, LLC implied that the two entities are interchangeable. In addition, CSC Holdings, LLC answered the complaint which was served on Cablevision, and did not assert an affirmative defense based on lack of personal jurisdiction. That said, however, there is ambiguity as to whether substituting CSC Holdings, LLC as a defendant is appropriate under CPLR 305(c), particularly in the absence of evidence that CSC Holdings, LLC was served. See Ober v. Rye Town Hilton, 159 AD2d at 20.

In any event, upon review of the record, and in particular the terms of the H2O Agreement, the court vacates its finding in the original decision that Cablevision did not qualify as a contractor for the purposes of the Labor Law, as it was based on CSC Holdings LLC's erroneous argument that Cablevision was not a party to the H20 Agreement.[4] In this connection, the H20 Agreement states that it is made not only between H20and CSC Holdings, Inc. but also on behalf of "CSC Holdings, Inc. and each entity listed on Attachment I, as may be amended from time to time and attached hereto and incorporated by reference, their successors and assigns." These entities are thereafter referred to throughout the agreement as "Cablevision." Significantly, Attachment I identifies various entities affiliated with CSC Holdings, Inc., including Cablevision entities in various locations in tri-state area. Moreover, above the

[4]While the original decision found that Cablevision was not a proper Labor Law defendant, it did not grant Cablevision summary judgment on this ground.

signature line where a representative from CSC Holdings, Inc. executed that agreement it states that it was signed by "CSC Holdings, Inc., individually, and on behalf of the entities affiliated with or managed by it as set forth in Attachment I.[5]"

Accordingly, reargument is granted and, upon reargument, that court vacates the original decision to the extent it found that Cablevision did not qualify as a contractor for the purposes of the Labor Law because it was not a party to the H2O Agreement. See generally, Bart v. Universal Pictures, 277 AD2d 4, 5 (1st Dept 2000)(noting that the "key criterion" in determining liability under the Labor Law is "the right to insist that proper safety practices were followed and its right to control the work that is significant, not the actual exercise or nonexercise of that control"); Milanese v Kellerman, 41 AD3d 1058, 1061 (3d Dept 2007)(holding that an entity's "right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right").

Labor Law § 240 (1)

In the original decision, the court denied plaintiff's motion for summary judgment on its Labor Law § 240(1) claim, finding issues of fact as to whether plaintiff was acting outside the scope of his employment when he performed the injury producing work. In support of its conclusion, the court noted that in his affidavit, plaintiff's supervisor Shepherd,[6] stated that plaintiff was required to activate a job only when the system could be activated from a plant at

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[5] In addition, plaintiff has submitted a November 12, 2012 letter from Cablevision to H20, seeking indemnification in connection with this action, which describes the H20 Agreement as "between H20....and CSC Holdings, Inc. and its affiliated entities i/s/h/a Cablevision Systems Corporations ("Cablevision")."

[6]Shepherd was not deposed.

ground level or in a customer's home, and that climbing poles was outside the scope of plaintiff's duties, which were purely administrative and training work as a project manager (Shepherd aff, ¶¶ 8-9). The court further noted that Shepherd stated that H20 did not send plaintiff to the job on the day of the accident and that he does not know why he even went to the location on the accident date (*id* ¶ 13). The court also found that "issues as to whether plaintiff was acting within the scope of his employment should be considered together with differing accounts as to the circumstances leading up to the accident."

Plaintiff argues that the court erred in finding triable issues of fact as to defendant's liability under section 240(1), asserting that the court "folded the 'scope of employment' [analysis] into the recalcitrant worker and sole proximate cause [defenses] by pointing to Mr. Shepherd's statement in his affidavit that [plaintiff] was required to activate a job only at ground level and that climbing the utility pole was outside the scope of his employment." Moreover, plaintiff argues the recalcitrant worker defense does not apply here since there is no evidence that plaintiff "disobeyed an immediate instruction...to use safety equipment" (DePalma v. Metropolitan Transportation Authority, 304 AD2d 461, 461 (1st Dept 2003), and that since plaintiff was not afforded adequate safety devices, it cannot be said that his actions were the sole proximate cause of the accident. Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 (2003). Plaintiff further asserts that different accounts of the exact circumstances surrounding the accident are insufficient to raise a material issue of fact warranting the denial of summary judgment.

CSC Holdings, LLC counters that the court correctly denied plaintiff's motion for summary judgment as to liability on his section 240(1) claim, as the record, including plaintiff's

own deposition testimony, shows that he was not required to gaff the pole or perform any work at the jobsite at the time of the accident, and therefore his duties did not entail elevation-related risks, citing Broggy v. Rockefeller Group. Inc., 8 NY3d 675 (2007). In addition, CSC Holdings LLC argues that based on Dickinson's testimony that he did not see plaintiff at the location and that contrary to plaintiff's testimony, there were no problems with the cable signal, triable issues of fact exist as to whether the accident occurred.

For the reasons below, the court grants reargument to clarify the original decision and, upon reargument, adheres to its decision denying plaintiff's motion for summary judgment as to liability on his section 240 claim.

Labor Law § 240 (1)[7] imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury. Bland v Manocherian, 66 NY2d 452, 459 (1985); D'Amico v Manufacturers Hanover Trust Co., 177 AD2d 441, 442 (1st Dept 1991). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries. Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 287. "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a

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[7]Labor Law § 240 (1) provides, in pertinent part, that:

> "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."

failure to provide adequate protection against a risk arising from a physically significant elevation differential." Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 (2009).

In the original decision, the court found there were issues of fact as to whether plaintiff was acting outside the scope of his employment when he fell while gaffing, citing e.g. Vega v Renaissance 632 Broadway, LLC, 103 AD3d 883, 885 (2d Dept 2013)(issue of fact as to whether worker was acting outside of scope of his employment when he ascended ladder and began removing pipes, where plaintiff's employer's principal testified at his deposition that he had only authorized other employees to do this work, and that he had only instructed the plaintiff to do clean-up work); Higgins v 1790 Broadway Assoc., 261 AD2d 223, 224 (1st Dept 1999)(Labor Law § 240 (1) claim was correctly dismissed where porter, "whose duties included mopping and waxing floors, was plainly acting outside the scope of his employment in attempting to repair the elevator").

Contrary to plaintiff's argument, although in support of its conclusion the court referred to the statement by plaintiff's supervisor that plaintiff was not permitted to climb the pole, it did not fold the inapplicable recalcitrant working defense into its analysis. Nor is the sole proximate cause defense relevant to the court's reasoning. Instead, while not fully articulated in the original decision, the scope of duty analysis employed by the court relates to whether plaintiff adequately established that his work responsibilities exposed him to elevated-related risks so as to require an owner or contractor to provide protective devices under section 240(1). See Broggy v. Rockefeller Group. Inc., 8 NY3d at 681 (affirming the dismissal of the Labor Law § 240 claim where plaintiff failed to establish that his job of cleaning interior windows obligated him to work at an elevation); Ortiz v. Varsity Holdings, LLC, 18 NY3d 335, 339 (2011)(summary judgment

was properly denied on plaintiff's section 240(1) claim where plaintiff "failed to establish that he stood on or near the ledge at the top of the dumpster because it was necessary to do so in order to carry out the task he had been given" and his statements in his affidavit that he was required to do so was insufficient to eliminate issues of fact in this regard").

Thus, plaintiff's argument that the court relied on the recalcitrant worker and sole proximate cause defenses, is without merit since, as indicated above, these defenses are factually and legally distinct from the issue regarding scope of work.

As for the scope of duty analysis, the court correctly found that the record raises triable issues of fact as to whether plaintiff's duties entailed elevation related risks based on Shepherd's statements that such duties did not include climbing poles. In this connection, the court notes that Shepherd stated in his affidavit that "H20 does not train its workers to gaff poles and does not provide pole-gaffing equipment [but instead] provides its employees with ladders and bucket trucks to access cable equipment located on utility poles" (Shepherd aff., ¶ 5). Moreover, plaintiff's deposition testimony is consistent with Shepherd's statement insofar as plaintiff testified that in his job as project manager his duties consisted of completing various paperwork, observing the cable work from the ground, making sure the men did the job smoothly and, if the activation was not done adequately, going out and observing and then contacting Shepherd. With respect to the activation, plaintiff also testified that making sure the activation was complete could include gaffing; however, this testimony is insufficient to eliminate issues of fact as to whether his duties involved elevation related risks, particularly in view of evidence to the contrary.

As for plaintiff's argument that in considering whether his work falls within the statute's

purview, the court "should not isolate the moment of injury and ignore the general context of the work"(citing Prats v. Port Authority of New York and New Jersey, 100 NY2d 878, 882 [2003]), such argument is inapplicable to the circumstances here where the record raises factual questions as to whether plaintiff's duties included any elevation related risks. See Simoes v. City of New York, 81 AD3d 514 (1st Dept 2011)(finding that plaintiff who was injured when he fell from an ariel basket of a manlift was not protected by Labor Law section 240(1) "since his duties as a flag man did not entail elevation-related risks").

In contrast, the cases relied on by plaintiff addressed situations where plaintiff was hired to perform work involving elevated related risks, but at the time of the accident was not performing his assigned duties; however, since such duties were within the scope of plaintiff's employment, the plaintiff was found to be entitled to protection under section 240(1). See e.g., Roberts v. Caldwell, 23 AD3d 210 (1st Dept 2005)(although plaintiff "may not have been performing his assigned duties at the time of the accident," since he fell from a ladder while engaged in renovation related work at the premises he was entitled to protection under section 240(1)); DePalma v Metropolitan Transit Auth., 304 AD2d 461, 462 (1st Dept 2003)(summary judgment was warranted under Labor Law § 240(1) where "[d]ecedent worked as part of a rigging crew and cutting a tag line was within the scope of the crew's task"); Andino v BFC Partners, LP, 303 AD2d 338, 339-340 (2d Dept 2003)(plaintiff's use of scaffolding was clearly foreseeable and fell within the scope of his employment in connection with installation of window guards); Calaway v Metro Roofing & Sheet Metal Works, 284 AD2d 285, 286 (1st Dept 2001)(where ice removal was a top priority and plaintiff had been engaged in ice removal from the roof four to five hours two days before the accident, "even if on the particular occasion of the

accident plaintiff had been sent to the roof with instructions only to check it for leaks and to speak to the day laborers plaintiff's employer had hired, it does not follow that plaintiff was acting outside the scope of his employment simply because he threw chunks of ice off the roof that he observed while carrying out these instructions").

The remaining issue concerns whether the record raises factual questions as to the circumstances surrounding the accident. In the original decision, the court held that "issues regarding whether plaintiff was acting within the scope of his employment should be considered together with differing accounts by plaintiff and Dickinson and plaintiff as to the circumstances leading up to the accident." Specifically, the court cited plaintiff's testimony that he had to climb the pole after Dickinson tested the line and "[i]t didn't work"; and Dickinson's conflicting testimony that he did not recall any problems with the signal strength and stated that plaintiff "wasn't there when [Dickinson] was there" (Plaintiff tr at 190, 196, 303; Dickinson tr at 66, 67, 71-72, 100).

While conflicting facts as to the exact events leading up to an accident do not warrant the denial of summary judgment on a Labor Law § 240(1) claim (Campbell v. Columbus Ctr LLC, 48 AD3d 323, 324 [1st Dept 2008]), when, as here, the plaintiff is the sole witness to the accident and the record raises issues of fact as to plaintiff's credibility, summary judgment is properly denied. See e.g. Smigielski v. Teachers Ins. and Annuity Ass'n of America, 137 AD3d 676, 676 (1st Dept 2016)(holding that summary judgment is properly denied on a Labor Law § 240(1) claim "where a plaintiff is the sole witness to an accident [and]... his ... account of the accident is contradicted by other evidence, or his or her credibility is otherwise called into question with regard to the accident")(internal quotations and citations omitted); Woszczyna v BJW

Associates, 31 AD3d 754 (2d Dept 2006) (partial summary judgment in favor of plaintiff on his Labor Law § 240(1) claim inappropriate where plaintiff is sole witness and plaintiff's credibility placed in issue).

CONCLUSION

In view of the above, it is

ORDERED that plaintiff's motion for reargument is granted; and it is further

ORDERED that, upon reargument, plaintiff's request to correct the name of Cablevision Systems Corporation to CSC Holdings, LLC and/or CSC Holdings Inc., pursuant to CPLR 305(c), is denied without prejudice to a further motion on a legally sufficient basis with respect to CSC Holdings, LLC and/or CSC Holdings, Inc.; and it is further

ORDERED that the original decision is vacated to the extent that it found that Cablevision was not a proper Labor Law defendant; and it is further

ORDERED that the court adheres to its original decision denying summary judgment on plaintiff's Labor Law § 240(1) claim.

DATED: September 1, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.