Alvarez v 2455 8 Ave LLC
2019 NY Slip Op 30352(U)
January 28, 2019
Supreme Court, Kings County
Docket Number: 6159/15
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of January, 2019.

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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MARVIN ALEXANDER CASTRO ALVAREZ,

Plaintiff,

- against -

2455 8 AVE LLC, ZENCO GROUP INC. and "JOHN DOE #1 THROUGH JOHN DOE #5"

Defendants.

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DECISION/ORDER

Index No. 6159/15

Motion Sequence Nos. 4, 5, 6

The following papers number 1 to 14 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-7
Opposing Affidavits (Affirmations)	8, 9, 10, 11, 14
Reply Affidavits (Affirmations)	11, 12-13, 14

Upon the foregoing papers, plaintiff Marvin Alexander Castro Alvarez moves for an order, pursuant to CPLR 3212, granting him partial summary judgment against defendants[1] 2455 8 Ave LLC (the Owner) and Zenco Group Inc. (Zenco) on the issue of liability pursuant to Labor Law § 240 (1), § 241 (6) and § 200. Zenco also moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint insofar as asserted against it. Lastly, the Owner cross-moves for an order, pursuant to CPLR 3212, granting it

[1] References to defendants exclude the unidentified "John Doe" defendants.

summary judgment: (1) dismissing the complaint as asserted against it; and (2) against Zenco on the issue of indemnification.

Background

Plaintiff commenced the instant action by filing a summons and verified complaint in this court on May 15, 2015. The pleadings assert that on December 3, 2014, plaintiff was injured in a construction/renovation site accident in the building located at 2455 Frederick Douglass Boulevard in Manhattan. Plaintiff alleges both that the Owner owns the subject premises and that Zenco is a construction contractor hired by the Owner[2] to perform construction/renovation work. The pleadings allege that defendants violated sections 200, 240 (1) and 241 (6) of the Labor Law. Plaintiff contends that defendants, the owner of the subject premises and a general contractor, are subject to vicarious liability, without regard to fault, pursuant to the Labor Law. Plaintiff also claims that defendants breached their common-law duty to maintain a safe workplace. Plaintiff asserts that these violations of the Labor Law and breaches of the common-law duty of care proximately caused his injuries, and plaintiff seeks damages as a consequence.

Specifically, the record indicates the Owner purchased the subject improved premises, then consisting of a building containing six residential and two commercial units. The Owner hired Zenco to perform a gut renovation, addition of a floor and conversion of the building to contain 12 residential units.

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[2] Although it is undisputed that the Owner hired Zenco to perform construction work at the premises, Zenco disputes that it was a general contractor at relevant times (i.e. when the accident occurred).

On the date of the accident, plaintiff was a laborer and employee of non-party Brookview Designs. He was tasked with applying plaster to the ceiling corner, approximately 12 feet high, in a first-floor room. He testified that his supervisor, Luis Gonzalez, directed him to descend to the basement and retrieve a ladder for plaintiff to use and reach the ceiling. Plaintiff obtained an aluminum A-frame ladder, approximately six feet tall; plaintiff testified that one of the ladder's feet was missing and replaced with a piece of plywood.

Plaintiff asserts that he had to climb "all the way" up the ladder to reach the corner of the twelve-foot high ceiling. He also states both that no one held or steadied the ladder, and that he was provided no other equipment to either stabilize the ladder or protect him from the risk of falling. He claims that while he was applying the plaster to the corner of the ceiling, the accident occurred when the replacement plywood cracked and caused the ladder to shift while plaintiff stood on it. Plaintiff then lost his balance and fell, striking a nearby wall first before he fell approximately six feet to the ground. Plaintiff suffered injuries as a result.

After the summons and verified complaint were filed and served, the identified defendants interposed an answer, and discovery and motion practice ensued. On September 1, 2017, plaintiff filed a note of issue, certificate of readiness and jury demand, certifying that discovery is complete and that this matter is ready for trial. By order dated November 29, 2017, this court extended the parties' time to move for summary judgment until February 12, 2018. The instant motions followed.

Arguments of Plaintiff in Support of His Summary Judgment Motion

In support of his motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6) against defendants, plaintiff asserts that defendants are subject to absolute vicarious liability, without regard to fault, pursuant to these statutes. Plaintiff points out that the duties imposed by these statutes are nondelegable, and that defendants, a property owner and general contractor, are thus subject to absolute vicarious liability pursuant to these statutes. Plaintiff also notes that the culpability of either a contractor or injured worker is not a defense to such liability. Plaintiff concludes that Labor Law § 240 (1) and § 241 (6) thus apply to these defendants and this construction accident.

Next, plaintiff claims that the record establishes, as a mater of law, that he was injured as a result of a Labor Law § 240 (1) violation. Specifically, plaintiff claims that he was performing construction work that triggered the protection of the statute; plaintiff asserts that at relevant times, he was engaged in work within the scope of the Labor Law.[3] Plaintiff next contends that the accident occurred when he was performing work at an elevated height, rendering Labor Law § 240 (1) applicable. Plaintiff reiterates that the subject ladder was inadequate and not properly placed or secured. Plaintiff adds that the unsecured ladder shifted and tipped, causing him to fall and strike the ground. Plaintiff argues that a fall from an unsecured ladder that tips or shifts establishes a Labor Law § 240 (1) violation. Plaintiff asserts that he does not need to allege or prove any additional facts for that purpose. Plaintiff

[3] Such tasks are frequently referred to as "protected activities."

reiterates that he fell and suffered injuries as a consequence of the accident; he concludes that, therefore, the Labor Law § 240 (1) violations proximately caused his injuries. Plaintiff argues that, accordingly, he is entitled to partial summary judgment against defendants on the issue of Labor Law § 240 (1) liability.

Anticipating that Zenco will contend that, at relevant times, it was not a contractor for Labor Law purposes, plaintiff claims that certain items in the record suggest otherwise. Plaintiff points out that Zenco ostensibly executed a lien waiver document on December 24, 2014, and also submitted payment requests after the accident occurred. Plaintiff reasons that, therefore, Zenco functioned as the general contractor (and is thus subject to vicarious liability pursuant to the Labor Law) at all relevant times.

Plaintiff further contends that he is entitled to partial summary judgment against defendants on the issue of Labor Law § 241 (6) liability. Plaintiff asserts that the statute applies here because he was a laborer at a construction/demolition site. Defendants, continues plaintiff, are subject to vicarious liability as an owner and contractor for Labor Law § 241 (6) violations without regard to duty or fault. Also, plaintiff acknowledges that a successful Labor Law § 241 (6) claim requires an injured worker to demonstrate the existence of a violation of an applicable provision of the Industrial Code (12 NYCRR ch. 1, subch. A).

Plaintiff further points out that the Industrial Code provision relied upon must contain a specific safety command, and not a reiteration of general, common-law duties to guard against hazards. Plaintiff submits that if the record indicates that such an Industrial Code

provision was violated, he is thus entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6).

Here, plaintiff continues, the facts suggest that at least three subsections of Industrial Code § 23-1.21 were violated. Specifically, contends plaintiff, one of these subsections prohibited furnishing a ladder that had "insecure joint[s]" and "flaw[s]" to workers. Here, plaintiff adds, the record shows that the subject ladder had a broken "foot." Plaintiff states that the record further indicates that the broken ladder part contributed to the instability of the ladder and his subsequent fall and injuries. Plaintiff argues that, therefore, there is no serious question that this Industrial Code provision was violated, and that the violation was a substantial factor leading to the accident. Moreover, plaintiff maintains that appellate courts of this state have considered the applicable subsections of Industrial Code § 23-1.21 and deemed them sufficiently specific to support Labor Law § 241 (6) claims. Plaintiff concludes that, therefore, he is entitled to partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 241 (6). For these reasons, plaintiff asks this court to grant his motion in its entirety.[4]

Zenco's Arguments in Support of Its Summary Judgment Motion

In support of its motion for summary judgment, Zenco first argues that it is not subject to liability in this action because it was not the general contractor at relevant times. Specifically, Zenco maintains that the record establishes that the owner fired it no later than

[4] Plaintiff also submits his affidavit, which substantially avers in accordance with these contentions.

October of 2014, more than a full month before the accident occurred. The record further indicates, continues Zenco, that the owner hired Brookview in Zenco's stead. Moreover, adds Zenco, when the accident occurred, plaintiff was a Brookview employee. Zenco contends, in essence, that it had no connection to any aspect of the accident when it occurred.

Additionally, Zenco points out that the Labor Law sections that impose vicarious liability on contractors apply only when the contractors have authority over aspects of the accident. Zenco claims that appellate courts impose vicarious liability pursuant to the Labor Law only when the defendant had authority to control the work that resulted in the injury, enforce applicable safety measures or rectify unsafe conditions. Moreover, Zenco alleges that the same standards are used to determine whether a defendant is subject to common-law liability for a workplace accident. Zenco asserts that at relevant times, since it had been dismissed as the general contractor, it had no position or ability to provide any worker at the site with a safe workplace. Likewise, Zenco claims that it had no authority to supervise plaintiff or his work. Zenco reasons that it is therefore not subject to liability—whether pursuant to the Labor Law or common-law negligence rules—for the subject accident.

Lastly, Zenco asserts that the record is unambiguous relative to these arguments. Zenco points out that during its deposition, its principal, Cheskyl Lichtman, testified substantially in accordance with these assertions. Zenco adds that Brookview, through its owner Pinchus Blum, also testified under oath that Zenco had no control over any work at relevant times. Moreover, Zenco submits the affidavit of Cheskyl Lichtman who reiterates that Zenco was fired from the project no later than October of 2014, and thus had no

authority, at relevant times, to direct or control any aspect of the work that led to the accident; the affidavit adds that Zenco had no agents present at the site on the date of the accident. Finally, Zenco submits the affidavit of Luis Gonzalez, plaintiff's foreman. He avers that on the date of the accident, he reported to Pinchus Blum and supervised plaintiff. The affidavit also contradicts plaintiff's sworn testimony regarding the subject ladder and the need to climb above the second rung in order to perform the subject work. For these reasons, Zenco urges granting its motion for summary judgment dismissing the action as asserted against it.

Arguments in Support of Owner's Cross Motion

In support of its cross motion, the Owner first argues that plaintiff is not entitled to partial summary judgment with respect to Labor Law § 240 (1) because plaintiff was the sole proximate cause of his alleged injuries. Alternatively, the Owner suggests that Labor Law § 240 (1) liability does not attach when plaintiff's recalcitrance preceded the accident. Here, claims the Owner, the record reflects issues of fact with respect to both defenses. Specifically, the Owner contends that the deposition testimony given by its witness and Zenco's witness establishes that Zenco foremen instructed plaintiff and other workers to use scaffolds instead of ladders for ceiling work. Therefore, reasons the Owner, plaintiff's use of a ladder is suspect and thus suggests that plaintiff ignored directions to use only a scaffold for his assigned tasks. As such, the Owner continues, an issue of fact exists as to whether plaintiff was a recalcitrant worker. Alternatively, adds the Owner, plaintiff's decision to use a ladder instead of a scaffold to reach the ceiling was unwise and tantamount to negligence,

and he was thus the sole proximate cause of his injuries. The Owner concludes that in either situation, plaintiff has not demonstrated the absence of issues of fact with respect to Labor Law § 240 (1) liability.

Next, the Owner argues that plaintiff has not demonstrated entitlement to judgment as a matter of law with respect to Labor Law § 241 (6) liability. The Owner points out that a sustainable Labor Law § 241 (6) claim requires that plaintiff pleads (and eventually proves) violations of one or more applicable provisions of the Industrial Code that contain a positive, specific command. Provisions that contain a general safety standard, the Owner continues, are insufficient to support a Labor Law § 241 (6) claim. Here, the Owner acknowledges that the pleadings cite several sections of the Industrial Code that purportedly support plaintiff's Labor Law § 241 (6) claims. However, the Owner alleges, these Industrial Code provisions are either not applicable to the facts or actually not sufficiently specific to make a Labor Law § 241 (6) cause of action sustainable. The Owner concludes that plaintiff's motion, insofar as it seeks partial summary judgment with respect to Labor Law § 241 (6) liability, should be denied on this ground.

Alternatively, the Owner claims that plaintiff has not demonstrated that any alleged violation of Labor Law § 241 (6) proximately caused his injuries. The Owner contends that plaintiff merely states that the alleged violations caused the accident, but fails to identify facts supporting his conclusion. Moreover, the Owner reiterates that the record suggests that plaintiff was trained to use scaffolds, and not ladders, to reach the ceiling; the Owner therefore argues that plaintiff foolishly chose to use an unsafe device to perform his assigned

tasks. Accordingly, reasons the Owner, plaintiff was thus the sole proximate cause of his injuries, and no Labor Law § 241 (6) liability is present here. For this additional reason, the Owner concludes that plaintiff's motion should be denied insofar as it seeks partial summary judgment on the issue of Labor Law § 241 (6) liability.

Also, the Owner asserts that plaintiff is not entitled to partial summary judgment with respect to Labor Law § 200 or common-law negligence. The Owner argues that it is properly subject to this type of liability only if its agent supervised or controlled plaintiff's work. The Owner asserts that the record indicates that its agents were not involved in such supervision. Moreover, the Owner points out that actual supervision or control is necessary. For instance, continues the Owner, neither the presence of its agents on site nor coordinating safety standards with contractors qualifies as the predicate supervision or control. The Owner concludes that since the record contains no suggestion that it supervised or controlled plaintiff's work, plaintiff's motion, insofar as it seeks partial summary judgment with respect to Labor Law § 200 or common-law negligence liability, should be denied.

Lastly, the Owner claims that it is entitled to summary judgment on the issue of indemnity against Zenco. The Owner asserts that it is party to a written agreement with Zenco concerning the subject construction/renovation project, and that this agreement contains a broad indemnification provision concerning claims that arise from the project. The Owner also states that the provision was in effect at all relevant times. Moreover, the Owner alleges that there is no serious dispute that the instant action arose from the subject work. Also, the Owner claims that the agreement provides for indemnification to the fullest

extent permitted by law, and that the record contains no indication that any negligence on the Owner's part contributed to the subject accident. The Owner reasons that the indemnity provision is thus fully enforceable. Lastly, and in the alternative, the Owner asserts that Zenco was responsible for direction and supervision of plaintiff's work, and, accordingly, Zenco must indemnify the Owner pursuant to the common-law indemnification doctrine. For these reasons, the Owner concludes that this court should grant its motion.

Zenco's Opposition Arguments

In opposition to plaintiff's arguments, Zenco first reiterates that it is not subject to liability in this action because it was not, at relevant times, a "contractor" for Labor Law purposes. Zenco states that the record establishes that the Owner's property manager, Pinchus Blum fired Zenco as general contractor[5] at least one month earlier than the accident. Zenco points out that Blum's deposition testimony corroborates Zenco's position and is not contradicted. Furthermore, Zenco adds that although plaintiff makes much of the fact that Zenco and the Owner were involved in post-accident transactions, the record is clear that Zenco stopped performing construction work no later than October of 2014, more than one full month before the accident occurred. Zenco characterizes its post-accident involvement with the Owner as relating to paperwork only; accordingly, reasons Zenco, any such involvement is insufficient to raise an issue of fact as to whether Zenco was a "contractor" for Labor Law purposes.

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[5] Blum apparently replaced Zenco with his company, Brookview Design, which was plaintiff's employer.

Additionally, Zenco challenges plaintiff's affidavit in support of his motion. Zenco refers to the affidavit as self-serving, and notes that at his deposition, plaintiff testified that he could neither read nor write English. Zenco points out that the afffidavit provided in support of plaintiff's motion is not certified by any translator. Zenco reasons that, therefore, the affidavit was disingenuously drafted by plaintiff's counsel and purportedly executed by plaintiff despite his inability to understand what allegedly sworn statements the affidavit contained. Zenco concludes that plaintiff's affidavit should thus not be considered by this court to support his summary judgment motion.

Finally, Zenco claims that plaintiff's recitation of events preceding the accident is contradicted by sworn testimony. Zenco notes that plaintiff testified that his foreman, Luis Gonzalez, directed him to go to the basement and retrieve and use the defective ladder. Zenco submits Luis Gonzalez' affidavit, however, which contradicts plaintiff's version of events. Gonzalez avers that he did not direct plaintiff to use a defective ladder. He further swears that the saw the ladder immediately after plaintiff fell, but saw no makeshift plywood ladder leg or other defect. Finally, Gonzalez opines that plaintiff would not have needed to climb to the top of the ladder in order to reach the ceiling, and states that when he observed plaintiff working, plaintiff was never more than two feet above ground. For these reasons, Zenco concludes that plaintiff's motion should be denied.

Plaintiff's Opposition Arguments

In opposition to the Owner's summary judgment motion, plaintiff first asserts that under the Labor Law, the Owner had a nondelegable duty to provide workers (such as

plaintiff) on its premises with adequate safety devices against the risk of falling. Plaintiff claims that this nondelegable duty exists irrespective of whether the Owner exercised supervision or control of the workers or the work. Plaintiff also reiterates that the subject ladder was both defective and unsecured when he used it. Accordingly, reasons plaintiff, since the subject ladder was inadequate and unsafe, the Owner is thus liable for his injuries caused by the subject accident.

Plaintiff also rejects the Owner's arguments about causation. Plaintiff claims that his testimony, stating that the subject ladder was unsecured and slipped out from under him while he stood upon it, is sufficient to establish that a Labor Law § 240 (1) violation proximately caused his injuries. Moreover, adds plaintiff, the record shows that he was not provided with any other devices to protect him against the risk of falling. Additionally, plaintiff maintains that any allegation that he was the sole proximate cause of his injuries lacks merit, since the furnished ladder did not provide adequate protection and the record contains no indication of his unwise acts or omissions. Plaintiff characterizes the Owner's suggestion that other safety devices, such as scaffolds, should have been used as an attempt to mislead the court. Plaintiff states that he was directed by a superior to use the subject ladder; thus, continues plaintiff, any references to scaffolds are immaterial. Additionally, plaintiff argues that the record contains no evidence either that scaffolds were available at the location or that he knew he was supposed to use them.

Moreover, plaintiff contends that he was not a recalcitrant worker. For such a finding, plaintiff elaborates, the record must demonstrate that he was either provided with another

safety device (such as a scaffold) or instructed to use one, and then failed to use it. Here, plaintiff continues, the record contains no such suggestion. Specifically, plaintiff adds, appellate authority provides that the recalcitrant worker defense exists only where an injured worker disobeys orders given by a supervisor. Here, plaintiff claims, the record does not indicate that he failed to comply with instructions or directions. Plaintiff reasons that the recalcitrant worker defense is viable only when: (1) an adequate safety device was available to an injured worker; (2) the worker was directed to use that device; and (3) the worker refused to follow the direction. Plaintiff states that none of the three required facts is established in the record.

Alternatively, plaintiff states that even if he was directed to not use the subject ladder but disobeyed that direction, the recalcitrant worker defense still lacks merit. Plaintiff asserts that pursuant to the Labor Law, defendants were responsible for providing adequate safety devices for plaintiff's assigned tasks, and not mere warnings against using unsafe devices. Plaintiff contends that since no adequate devices were available, defendants failed to comply with the Labor Law irrespective of whether he was directed not to use the subject ladder. For these reasons, plaintiff concludes that he is entitled to partial summary judgment on the issue of Labor Law § 240 (1).

Next, plaintiff asserts that he is entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 241 (6). Plaintiff claims that he has cited at least four provisions of the Industrial Code that are both applicable to the circumstances of the accident and sufficiently specific to mandate a distinct standard of conduct. Plaintiff argues that

defendants' failure to provide a functional safety device that was adequate for the task precludes any finding that he was the sole proximate cause of his injuries. Plaintiff contends that the Industrial Code violations were manifest given the description of the subject ladder and were also a substantial factor in causing the accident. Plaintiff concludes that, accordingly, he has demonstrated the essential facts for Labor Law § 241 (6) liability and should thus be awarded partial summary judgment on this issue.

Moreover, plaintiff maintains that the Owner is not entitled to summary judgment dismissing his Labor Law § 200 claims. Plaintiff points out that even if the Owner's agents did not supervise or control his work, the Owner may still be subject to Labor Law § 200 liability if an appreciable dangerous condition was permitted to exist on the premises for a sufficient length of time. Plaintiff claims that the subject defective ladder constituted such a dangerous condition, and also that the record suggests that the Owner had constructive notice of the same. Also, plaintiff argues that given the change between the general contractors—with Zenco allegedly fired, and members of the Owner then operating Zenco's alleged successor, Brookview Designs—the record allows this court to find that the Owner *did* supervise and control his work, and would nevertheless be subject to Labor Law § 200 liability. For these reasons, plaintiff concludes that dismissing his Labor Law § 200 claims is unwarranted.

Next, plaintiff argues that Zenco is not entitled to summary judgment against him. In addition to the arguments advanced against the Owner's motion, plaintiff adds that Zenco has failed to establish that it is not a "contractor" for the purposes of Labor Law liability.

Plaintiff claims that the record suggests that Zenco was the general contractor of the subject project at all relevant times and until well after the subject accident occurred. Accordingly, reasons plaintiff, Zenco is subject to absolute vicarious liability pursuant to Labor Law § 240 (1) and § 241 (6) and, therefore, is not entitled to summary judgment dismissing those claims. Also, plaintiff asserts that Zenco should not be awarded summary judgment dismissing his Labor Law § 200 claims. Plaintiff points out that a contractor is subject to liability under that statute if the contractor provided defective equipment. Here, plaintiff continues, the record establishes that Zenco provided the subject ladder. Moreover, plaintiff states that the record suggests that Zenco had the authority to direct and control his work. Plaintiff concludes that Zenco should not be awarded summary judgment dismissing this claim.

Lastly, and in the alternative, plaintiff suggests that Zenco is not entitled to summary judgment on public policy grounds. Plaintiff asserts that all relevant documents in the record—filed with government agencies and applicable construction authorities—indicate that Zenco represented itself as the general contractor at all applicable times. Plaintiff reiterates that some of these documents, evidencing liens and payments, were prepared and/or filed after the accident occurred. Plaintiff suggests that if Zenco were really dismissed from the general contractor position when it claims to have been, Zenco is, in essence, admitting to committing fraud by continuing to represent itself as a general contractor after the dismissal date. Plaintiff argues that if this is the case, Zenco should not be permitted to

benefit from its fraud; as a result, concludes plaintiff, Zenco should not be awarded summary judgment.

Discussion

Summary Judgment Standards

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If

a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a motion for summary judgment are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept

2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Labor Law § 240 (1) and § 241 (6)

The court denies all motions for summary judgment with respect to Labor Law § 240 (1) and § 241 (6), as issues of fact exist. Labor Law § 240 (1) states, 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 protect construction workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Therefore, Labor Law § 240 (1) is implicated in an injury that directly flows from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide

"proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"])

However, Labor Law § 240 (1) does not apply to "any and all perils that may be connected in some tangential way with the effects of gravity" (*Ross*, 81 NY2d at 501). Instead, "Labor Law § 240 (1) should be construed with a commonsense approach to the realities of the workplace at issue" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]).

> "'Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Harrison v State of New York*, 88 AD3d 951, 952 [2d Dept 2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *see also Gutman v City of New York*, 78 AD3d 886, 887 [2d Dept 2010]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d 513, 524 [1985]). "[T]he statutory protection [of Labor Law § 240 (1)] does not extend to

workers who have adequate and safe equipment available to them but refuse to use it" (*Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]). Lastly, "a defendant is not liable under Labor Law § 240 (1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *see also Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 463 [2005]).

Next, Labor Law § 241 states, in applicable part, as follows:

> "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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99

NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d at 502-503 and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d 343 at 351). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross,* 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "where such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of

the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]). Similarly, this court may not make a summary determination on whether plaintiff foolishly chose not to use available safety devices (*see e.g. Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010] [as to Labor Law § 241 (6) claim triable issues of fact exist as to whether sole proximate cause of injuries was refusal to obey instructions to use actually available safety device]; *see also Allen v Village of Farmingdale*, 282 AD2d 485, 487 ["(u)nder the circumstances, whether the plaintiff refused to properly use the available safety equipment, and is a recalcitrant worker, is a question of fact which cannot be resolved on a motion for summary judgment"]).

Here, sworn testimony and affidavits demonstrate that issues of fact preclude awarding summary judgment to any party. According to plaintiff's testimony, he was directed to select a ladder to complete his task, and the only available ladder was defective. However, in considering plaintiff's motion for partial summary judgment on the issue of liability, this court is required to view the record in the light most favorable to opponents of plaintiff's motion (*Pierre-Louis*, 66 AD3d at 862). Plaintiff's supervisor, Luis Gonzalez, has submitted an affidavit wherein he disputes plaintiff's testimony; specifically: (1) he denies directing plaintiff to use the subject ladder; (2) he observed the ladder after the accident and saw nothing wrong with it; and (3) he suggests that plaintiff's assigned task would not have

required plaintiff to step beyond the second rung of the ladder. These statements, if believed, suggest that plaintiff was not directed to use the subject ladder, the ladder was not defective, and plaintiff did not fall from the height he claims. This court can neither disregard this affidavit nor summarily deem Luis Gonzalez incredible (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]). Accordingly, to the extent that plaintiff's sworn statements conflict with those of Gonzalez, a credibility issue exists for the jury to resolve (*see e.g. Williams v Bonowicz*, 296 AD2d 401, 401 [2d Dept 2002]).

Similarly, this court may not properly award any defendant summary judgment dismissing plaintiff's Labor Law § 240 (1) and § 241 (6) claims. Defendants' theory of the case is that plaintiff: (1) chose the wrong ladder; (2) should have used a scaffold; (3) fabricated the events leading up to the accident; (4) disregarded instructions; and (5) proximately caused his own injuries. However, in considering their motions for summary judgment, the court must view the record in the light most favorable to plaintiff (*Pierre-Louis*, 66 AD3d at 862). According to plaintiff's sworn testimony, he was directed to use a broken ladder, the ladder was necessary to complete his assigned task and the ladder was

unsecured, causing him to fall. If believed, this testimony establishes defendants' liability pursuant to Labor Law § 240 (1) and § 241 (6) (*see e.g. Robinson v Bond St. Levy, LLC*, 115 AD3d 928 [2d Dept 2014] [plaintiff establishes prima facie entitlement to judgment as a matter of law on issue of Labor Law § 240 (1) by "demonstrating that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries"]; *Kozlowski v Ripin*, 60 AD3d 638 [2d Dept 2009] [defective and unsecured ladder caused fall and plaintiff entitled to partial summary judgment on liability under both Labor Law § 240 (1) and Labor Law § 241 (6)]). Since this court cannot summarily deem plaintiff incredible (*Forrest*, 3 NY3d at 314-315), defendants' motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) and § 241 (6)[6] claims are denied.

Zenco's Status as Contractor

This court likewise cannot grant Zenco summary judgment dismissing plaintiff's Labor Law § 240 (1) and § 241 (6) claims (the nondelegable and vicarious liability provisions) against it based on the argument that Zenco was not a "contractor" (as defined in the Labor Law) at the time the accident occurred. To be sure, the record contains suggestions that Zenco had been dismissed from the project by the owner before the accident occurred. However, there is also evidence in the record suggesting that Zenco continued to perform work for the owner after the date when the owner allegedly dismissed Zenco. Since

[6] The court notes that plaintiff's cited Industial Code sections are sufficient to support his Labor Law § 241 (6) claim.

different inferences[7] may be made from the record, this court will not summarily determine whether Zenco was a "contractor" for Labor Law purposes and reserve this issue for the trier of fact (*Forrest*, 3 NY3d at 314-315).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto,* 91 NY2d 343 at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi,* 80 NY2d at

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[7] This court rejects plaintiff's accusation that Zenco must have committed fraud because of documents filed with government building and construction authorities.

294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, plaintiff's allegation is that the subject ladder was defective and unsecured, and thus caused the accident—therefore, there is no indication that a premises condition was involved. Accordingly, the Owner is subject to liability only if it exercised control or supervision over the work (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2d Dept 2004], citing *Lombardi,* 80 NY2d at 295). However, the record establishes that the owners did not direct plaintiff's work; only plaintiff's foremen and supervisors did (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]). Moreover, the court notes that "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence or under Labor Law § 200 (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the worksite is insufficient to give rise to a question of fact as

to the defendant's direction and control"]). Since the Owner was not involved in supervising or controlling plaintiff's work, plaintiff's Labor Law § 200 claims against the Owner are not viable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008] [no Labor Law § 200 liability if accident arose from methods of plaintiff's employer and defendants exercise no supervisory control over the work], citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]). Accordingly, the court grants the Owner's motion for summary judgment to the extent of dismissing plaintiff's Labor Law § 200 claims asserted against it.

However, this court denies Zenco's motion insofar as it seeks dismissal of plaintiff's Labor Law § 200 claim against it. Viewing the record in the light most favorable to plaintiff, the opponent of Zenco's motion for summary judgment, the record suggests both that the subject ladder was defective and that Zenco was responsible for furnishing or maintaining the ladder. If Zenco is found to have owned or maintained a defective ladder, it would be subject to liability pursuant to Labor Law § 200 (*see e.g. Cruz v Kowal Indus.*, 267 AD2d 271 [2d Dept 1999]). For this reason, this court denies Zenco's motion insofar as it seeks dismissal of plaintiff's Labor Law § 200 claim.

Indemnification

This court denies the Owner's motion insofar as it seeks summary judgment on the issue of indemnification against Zenco. Assuming arguendo that the Owner and Zenco entered into an applicable indemnity agreement that was enforceable and in full effect at relevant times, a review of the record indicates that the Owner has not pleaded a cross claim seeking indemnification from Zenco. Absent a properly pleaded claim, this court will not

grant summary judgment on this issue. Indeed, the applicable authority suggests that summary judgment would be inappropriate with respect to any pleading if issue has not been joined (*see e.g. City of Rochester v Chiarella*, 65 NY2d 92 [1985] [motion for summary judgment may not be made before issue is joined and it was improper for trial court to consider motion relating to counterclaim that had not been replied to]). Since the Owner has never asserted a cross claim for indemnification (let alone joinder of issue), the Owner's motion is premature insofar as it seems summary judgment on the issue of indemnification against Zenco. Hence, that branch of the Owner's motion is denied.

The court has considered the parties' remaining arguments and have found them without merit. Accordingly, it is

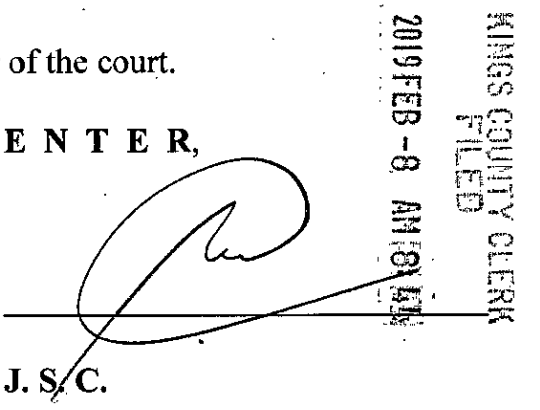
ORDERED that the motion of plaintiff Marvin Alexander Castro Alvarez is denied; and it is further

ORDERED that the motion of defendant Zenco Group Inc. is denied; and it is further

ORDERED that the motion of defendant 2455 8 Ave LLC is granted solely to the extent that plaintiff's Labor Law § 200 claims are dismissed as asserted against it, and is otherwise denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. PAMELA L. FISHER