Albino v J.P. Morgan Chase Bank, Inc.
2019 NY Slip Op 31662(U)
June 10, 2019
Supreme Court, Suffolk County
Docket Number: 13-9435
Judge: Vincent J. Martorana

SHORT FORM ORDER

INDEX No. 13-9435
CAL. No. 18-00290OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 7-19-18 (003)
MOTION DATE 7-26-18 (004 & 005)
ADJ. DATE 11-8-18
Mot. Seq. # 003 - MG # 005 - MD
004 - MotD

JASON ALBINO and LISA ALBINO,

Plaintiffs,

- against -

J.P. MORGAN CHASE BANK, INC., 1411 IC-SIC PROPERTY, LLC, and DBSI, INCORPORATED and ACCU-SAFES, INC.,

Defendants.

FANNING & FIORE, LLP
Attorney for Plaintiffs
500 N Broadway, Suite 243
Jericho, New York 11753

LEWIS JOHS AVALLONE AVILES
Attorney for Defendants DBSI, Inc., J.P. Morgan Chase Bank and 1411 IC-SIC
One CA Plaza, Suite 225
Islandia, New York 11749

J.P. MORGAN CHASE BANK N.A. s/h/a JP MORGAN CHASE & CO.,

Third-Party Plaintiff,

- against -

DBSI, INCORPORATED,

Third-Party Defendants.

HAMMILL O'BRIEN CROUTIER, P.C.
Attorney for Defendant Accu-Safes, Inc.
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

DBSI, INCORPORATED,

Third-Party Plaintiff,

- against -

ACCU-SAFES, INC.

Third-Party Defendants.

Upon the following papers numbered 1 to 171 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 91; 98 - 161; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 92 - 95; 162 - 165; 166 - 167; Replying Affidavits and supporting papers 96 - 97; 168 - 169; 170- 171; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) by Accu-Safes, Inc., and the motions (seq. 004 and seq. 005) by defendants JP Morgan Chase Bank, NA, DBSI, Inc., and 1411 IC-SIC Property, LLC, are consolidated for purposes of this determination; and it is further

ORDERED that the motion (seq. 003) by defendant Accu-Safes, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the portion of the motion (seq. 004) by defendants JP Morgan Chase Bank, NA, DBSI, Inc., and 1411 IC-SIC Property, LLC, seeking summary judgment dismissing the complaint and cross claims against them is granted and the portion of such motion seeking leave to amend their answers is denied as moot; it is further

ORDERED that the motion (seq. 005) by defendants JP Morgan Chase Bank, NA, DBSI, Inc., and 1411 IC-SIC Property, LLC, for summary judgment dismissing the complaint and cross claims against them, or, in the alternative, for leave to amend their answers, is denied as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jason Albino on January 31, 2012, when he was pinned between two automated teller machines ("ATMs") on the premises of a construction site at 1411 Broadway, New York, New York, owned by defendant 1411 IC-SIC Property, LLC and leased by defendant JP Morgan Chase Bank, NA ("Chase"). The accident occurred during plaintiff's employ as a laborer by non-party Shaw Consturction. Plaintiff asserts claims against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff's wife, Lisa Albino, sues derivatively for loss of services.

Plaintiff testified that he began working for Shaw Construction in November 2007 or 2008. His responsibilities as key holder included opening the banks, handling security, and closing the banks. Plaintiff testified that he started working at the 1411 Broadway job in October or November 2011, but not continuously, as he moved around to different job locations. Plaintiff described the 1411 Broadway job as "big scale," as the basement was converted from storage and vault-space into a private client area. Plaintiff did not know who hired Shaw Construction as general contractor for the job, and he did not recall having any conversations at the job site with anyone who identified themselves as the owner of the property.

Plaintiff testified that he worked on jobs with free-standing ATMs approximately 20 to 25 times prior to the accident. He stated that Shaw Construction moved the ATMs five or six of those times, while others moved the ATMs on other occasions. Although no one ever told him he was authorized to move the machines, plaintiff stated that he was told to move them many times and Stacey, his supervisor, would also tell him to "get the job done." Plaintiff also stated that DBSI would check that Shaw Construction's work was up to standards on the approximately 20 jobs done with DBSI. When asked if DBSI directed the methods of how he performed his work, plaintiff stated, "[y]es. What they wanted, not how to do it . . . They told me directly, '[t]his is what I would like to see happen.'" Plaintiff stated that he worked with Accu-Safes 25-30 times. Accu-Safes would bring in the new safes and take away the old ones. At the 1411 Broadway job, Accu-Safes put in new safes in the counting room previously built by Shaw Construction. Plaintiff estimated the ATMs at the 1411 Broadway job to be four feet high, three feet wide, and three to four feet deep. He also estimated that the four ATMs were spaced approximately 2 feet apart and about 1 ½ to two feet from the wall where he was installing cove base molding.

Plaintiff testified that on the night of the accident, he got to the 1411 Broadway job around 7:00 p.m. to let Accu-Safes in the building to switch out safes. Plaintiff removed two doors, re-cut the carpet, and lifted the floor up, so the safes would be flush and level. Plaintiff testified that Stacey instructed him to also finish installing cove base and to perform a few other small tasks. There were three or four pieces of cove base he needed to install along the bottom of the wall behind the ATMs. Plaintiff called Stacey for permission to ask Accu-Safes employees to help him move the ATMs, to which Stacey replied "[a]bsolutely not." Plaintiff stated that Stacey did not specifically tell him to move the machine by himself. Plaintiff explained that for the first piece of cove base, he was able to move the ATMs' wires and slide the cove base on. For the second piece, plaintiff climbed on top of an ATM and hung down the back to install the cove base. For the third piece, plaintiff climbed on top of an ATM, but was not able to install the cove base in the same manner as the second piece. Plaintiff then made the decision to move an ATM in order to finish the cove base. Plaintiff testified that he slid a crowbar under the third ATM and used his weight to lift it off the ground, tilt it and lean it against the second ATM. He placed wooden chocks and flat bars under the ATM to keep it tilted. Plaintiff stated that while he was working between the tilted ATM and the fourth and upright ATM, the third ATM tilted back and pinned him between the third and fourth ATMs, causing personal injuries. Plaintiff testified that he was alone in the bank at the time of the accident, as Accu-Safes finished their work and left three or four hours before the accident.

Anastaious ("Stacey") Valdakis, Shaw Construction's field supervisor, testified that work began at the 1411 Broadway job at 6:00 p.m. daily, after banking hours, and that his crew did not touch the ATMs in order to avoid setting off the ATMs' alarms. Mr. Valdakis testifed that on the night of the alleged accident, he sent plaintiff and another employee to the 1411 Broadway job to let Accu-Safes in to switch out the ATMs, as Shaw Construction was entrusted with the building's key and alarm code. Mr. Valdakis also testified that he did not direct plaintiff to install base molding behind the ATMs on the day of the accident. He stated that he did not receive any calls from plaintiff or the other employee seeking permission to ask Accu-Safes to move the ATMs back so cove base molding could be installed.

Todd Brown testified that he began working for DBSI on February 1, 2012. Mr. Brown stated that DBSI was the general contractor for the 1411 Broadway project, and that Shaw Construction did not contract to do construction work with DBSI directly. His understanding was that Accu-Safes engaged Shaw Construction to build a wall, but he did not believe Shaw Construction was engaged with regards to moving ATMs. Mr. Brown testified that he did not believe there was a on-site safety engineer or manager on behalf of DBSI, and that he did not know if the subcontractors had on-site safety managers. Jason Krasilovsky, the vice president of Accu-Safes, testified that his company contracted with DBSI. Accu-Safes, in turn, subcontracted with Shaw Construction to build a safe room. He also stated that plaintiff did not ask him or his workers to help move ATMs.

James Hines, a real estate construction lead for Chase, testified that the 1411 Broadway job was to install safes and relocate the existing ATMs within the branch. Chase did not have anyone on site during this job. He testified that it was DBSI's responsibility to handle the moving of the ATMs, and that there was no contract between Shaw Construction and Chase to perform any work at this particular Chase branch. Mr. Hines further testified that separate companies were hired to move the ATMs and to arm and disarm the ATMs.

Accu-Safes now moves for summary judgment dismissing the complaint and cross claims against it on the grounds that it did not have supervision or control over plaintiff's work, that the accident was not due to an elevated-related risk, and that the cited Industrial Code provisions do not apply or lack the specificity required to qualify as a predicate for liability. Accu-Safes submits, among other things, copies of the pleadings, the bill of particulars, a contract between Accu-Safes and DBSI, and the transcripts of the deposition testimony of plaintiff, Lisa Albino, James Hines, Todd Brown, Jason Krasilovsky, Anastaious Valdakis, and Michael Sullo. In opposition, plaintiffs

argue that plaintiff was acting within the scope of his employment and within the scope of the contract between Shaw Construction and Accu-Safes when the accident occurred, that the accident involved a significant elevation, and that Accu-Safes exercised control over the specific work, because it retained plaintiff's employer.

DBSI, Chase, and 1411 IC-SIC Property also move for summary judgment dismissing the complaint and cross claims against them on the same grounds as Accu-Safes. In the alternative, Chase and 1411 IC-SIC Property seek to amend their answers to include cross claims against Accu-Safes or for conditional contractual indemnification of DBSI, Chase, and 1411 IC-SIC Property by Accu-Safes. DBSI, Chase, and 1411 IC-SIC Property submit, among other things, copies of the pleadings, the bill of particulars, a contract between Accu-Safes and DBSI, and the transcripts of the deposition testimony of plaintiff, James Hines, Todd Brown, Jason Krasilovsky, Anastaious Valdakis, and Michael Sullo. In opposition, plaintiffs argue that the accident involved a significant elevation, that DBSI, Chase, and 1411 IC-SIC Property either created a defective and hazardous condition or had control over the performance of plaintiff's work, and that DBSI, Chase, and 1411 IC-SIC Property violated specific provisions of the Industrial Code. In opposition, Accu-Safes argues that DBSI, Chase, and 1411 IC-SIC Property lack a basis for contractual indemnification, as they were not were signatories to any contracts that include Accu-Safes and there is no evidence that Accu-Safes breached the contract with DBSI by failing to procure insurance.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law § 200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Wadlowski v Cohen***, 150 AD3d 930, 55 NYS3d 279 [2d Dept 2017]; ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Melendez v 778 Park Ave. Bldg. Corp.***, 153 AD3d 700, 702, 59 NYS3d 762 [2d Dept 2017], quoting ***Torres v City of New York***, 127 AD3d 1163, 1165, 7 NYS3d 539 [2d Dept 2015]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that he, she, or it had the authority to supervise or control the performance of the work (***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]; ***Rodriguez v Mendlovits***, 153 AD3d 566, 60 NYS3d 87 [2d Dept 2017]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose

liability under Labor Law § 200" (***Ortega v Puccia***, *supra* at 62; ***Kandatyan v 400 Fifth Realty, LLC***, *supra*). In the alternative, where a defective premises condition is alleged, a property owner may only be held liable for violation of Labor Law § 200 if the owner either created the dangerous condition, or had actual or constructive notice of its existence (***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***La Giudice v Sleepy's Inc.***, *supra*; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, *supra*).

Accu-Safes, DBSI, and Chase established their prima facie entitlement to summary judgment dismissing plaintiff's claims in common law negligence and Labor Law § 200 through evidence that the subject accident stemmed from the manner of his work, and that they did not have the authority to control or supervise the performance of plaintiff's work (*see* ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]; ***Melendez v 778 Park Ave. Bldg. Corp.***, *supra*; ***Zupan v Irwin Contr. Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]). At most, defendants' right to generally supervise the work performed did not amount to supervision and control of the performance of plaintiff's work (*see* ***Zupan v Irwin Contr. Inc.***, *supra*; ***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Ortega v Puccia***, *supra*). In opposition, plaintiffs failed to raise a triable issue of fact as to whether Accu-Safes, DBSI, or Chase had the requisite supervision or control over plaintiff's work (*see* ***Poulin v Ultimate Homes, Inc.***, *supra*; ***Miller v Weeden***, 7 AD3d 684, 777 NYS2d 516 [2d Dept 2004]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Therefore, Accu-Safes, DBSI, and Chase are granted summary judgment dismissing plaintiff's Labor Law § 200 claim.

Labor Law § 241 "[i]mposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866, 90 NYS3d 316 [2d Dept 2018]; *see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Jones v City of New York***, 166 AD3d 739, 87 NYS3d 631 [2d Dept 2018]; ***Lopez v New York City Dept. of Envtl. Protection***, 123 AD3d 982, 999 NYS2d 848 [2d Dept 2014]). "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code, which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54 [2d Dept 2012]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Jones v City of New York***, *supra*; ***Simmons v City of New York***, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; ***Aragona v State of New York***, 147 AD3d 808, 47 NYS3d 115 [2d Dept 2017]). The particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (***Misicki v Caradonna***, 12 NY3d 511, 882 NYS2d 375 [2009]). Furthermore, a plaintiff must show that the violation of the regulation was a proximate cause of his or her accident (***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Accu-Safes, DBSI, and Chase established a prima facie case of entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, as the Industrial Code provisions cited by plaintiff are inapplicable to the case at bar or reference mere general safety standards (*see* ***Simmons v City of New York***, *supra*; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Carrillo v Circle Manor Apts.***, 131 AD3d 662, 15 NYS3d 463 [2d Dept 2015]; ***Palacios v 29th Street Apts, LLC***, 110 AD3d 698, 972 NYS2d 615 [2d Dept 2013]). Notably, 12 NYCRR 23-1.5, which merely sets forth a general standard of care for employers, cannot serve as a predicate for liability pursuant to Labor Law § 241 (6) (***Honeyman v Curiosity Works, Inc.***, *supra*; ***Ulrich v Motor Parkway Props., LLC.***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 524, 906 NYS2d 54 [2d Dept 2010]; ***Pereira v Quogue Field Club of Quogue, Long Is.***, 71 AD3d 1104,

898 NYS2d 220 [2d Dept 2010]). As there is no evidence of plaintiff utilizing any personal protection or safety devices, the provisions of 12 NYCRR 23-1.6 are inapplicable. The safety requirements to protect workers from falling hazards enumerated in 12 NYCRR 23-1.7 (a) are inapplicable, as plaintiff was not faced with an overhead hazard. Similarly, 12 NYCRR 23-1.7 (b) is inapplicable, because plaintiff did not fall into an opening. 12 NYCRR 23-1.7 (c), (d), and (e) generally prohibit creating, or allowing, drowning, slipping, or tripping hazards, respectively. As no testimony has been adduced that plaintiff drowned, slipped, or tripped, these provisions of law is irrelevant to the instant case. The safety requirements of 12 NYCRR 23-1.7 (f), (g), and (h) concerning vertical passageways, air-contaminated or oxygen-deficient work areas, and corrosive substances, also do not apply to the instant case. 12 NYCRR 23-1.8 is inapplicable to the instant case, as plaintiff was not wearing protective equipment, including protective apparel. Sections 12 NYCRR 23-1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.19, and 12 NYCRR 23-1.31 each regulate the manner and construction of various safety devices which may be used on construction sites, if required, when a worker is performing his or her duties at a height. As no safety devices are alleged to have been in use and plaintiff was not working at a height, those sections are not applicable here. In addition, it is well established that violations of Occupational Safety and Health Administration ("OSHA") standards do not provide a basis for liability under Labor Law § 241 (6) (***Marl v Liro Engineers, Inc.***, 159 AD3d 688, 73 NYS3d 202 [2d Dept 2018]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

In opposition, plaintiffs failed to raise a triable issue of fact as to whether Accu-Safes, DBSI, or Chase violated a specific rule or violation of the Industrial Code (*see* ***Honeyman v Curiosity Works, Inc.***, *supra*; ***Carrillo v Circle Manor Apts.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Therefore, Accu-Safes, DBSI, and Chase are granted summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

Labor Law § 240 provides, in pertinent part, that all contractors and owners and their agents must furnish or erect, or cause to be furnished or erected, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices to give proper protection to an employee in his or her performance in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]; ***Misseritti v Mark IV Constr. Co., Inc.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). The hazards intended to be mitigated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, *supra* at 514; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*). Labor Law § 240 (1) applies to both "falling worker" and "falling object" cases (***Narducci v Manhasset Bay Assocs.***, 96 NY2d 259, 727 NYS2d 37 [2001]).

The protections of Labor Law § 240 (1) apply only to a narrow class of special hazards and do not apply to any and all perils that may be connected to the effects of gravity (***Palumbo v Transit Tech., LLC***, 144 AD3d 773, 41 NYS3d 85 [2d Dept 2016]; ***Santoro v New York City Tr. Auth.***, 302 AD2d 581, 755 NYS2d 425 [2d Dept 2003]). "[T]he relevant inquiry is 'whether the harm flows directly from the application of the force of gravity to the object'" (***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 850, 63 NYS3d 681 [2d Dept 2017], quoting ***Runner v New York Stock Exchange, Inc.***, 13 NY3d 599, 604, 895 NYS2d 279 [2009]). In the case of a falling object, Labor Law § 240 (1) "applies where the falling of an object is related to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured" (***Simmons v City of New York***,

supra at 727 [internal quotation omitted]). A plaintiff must demonstrate that when the object fell, it was being hoisted or secured, or that the object required securing for purposes of the undertaking (***Passos v Noble Constr. Group, LLC***, 169 AD3d 706, 93 NYS3d 132 [2d Dept 2019]; ***Simmons v City of New York***, *supra*; ***Ruiz v Ford***, 160 AD3d 1011, 75 NYS3d 242 [2d Dept 2018]; ***Berman-Rey v Gomez***, 153 AD3d 653, 59 NYS3d 789 [2d Dept 2017]; ***Escobar v Safi***, 150 AD3d 1081, 55 NYS3d 350 [2d Dept 2017]). A plaintiff must also demonstrate that the object fell due to the absence or inadequacy of a safety device of the kind enumerated in the statute (*see* ***Passos v Noble Constr. Group, LLC***, *supra*; ***Simmons v City of New York***, *supra*; ***Romero v 2200 N. Steel, LLC***, 148 AD3d 1066, 50 NY3d 158 [2d Dept 2017]). The application of Labor Law § 240 (1) requires a significant elevation differential, "even if the injury is caused by the application of gravity on an object" (***Simmons v City of New York***, *supra*). A object's fall from a minuscule height is not the elevation-related injury contemplated by Labor Law § 240 (1) (***Cambry v Lincoln Gardens***, 50 AD3d 1081, 857 NYS2d 225 [2d Dept 2008]; ***Perron v Hendrickson/Scalamandre/Posillico (TV)***, 22 AD3d 731, 803 NYS2d 106 [2d Dept 2005]). Further, where the injured worker and the falling object are located on the same level, liability under Labor Law § 240 (1) is generally precluded, because of the absence of a physically significant elevation differential (*see* ***Runner v New York Stock Exch., Inc.***, *supra*; ***Oakes v Wal-Mart Real Estate Bus. Trust***, 99 AD3d 31, 948 NYS2d 748 [3d Dept 2012]). In determining whether an elevation differential is physically significant or de minimis, the Court must consider not only the elevation differential itself, but also "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent" (***Runner v New York Stock Exch., Inc.***, *supra* at 605; ***Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, 935 NYS2d 551 [2011]; ***Christiansen v Bonacio Constr., Inc.***, 129 AD3d 1156, 10 NYS3d 683 [2015]).

To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Jones v City of New York***, *supra*; ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]). The question of whether the safety device at issue provided protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact for the jury (***Garhartt v Niagara Mohawk Power Corp.***, 192 AD2d 1027, 596 NYS2d 946 [3d Dept 1993]; ***Plass v Solotoff***, 283 AD2d 474, 724 NYS2d 887 [2d Dept 2001]). A plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) claim, and does not effect a reduction in liability (***Rapalo v MJRB Kings Highway Realty, LLC***, 163 AD3d 1023, 82 NYS3d 63 [2d Dept 2018]). However, a plaintiff cannot prevail on a Labor Law § 240 (1) claim if "his or her actions were the sole proximate cause of the accident" (***Saavedra v 64 Annfield Ct. Corp.***, 137 AD3d 771, 772, 26 NYS3d 346 [2d Dept 2016]; *see* ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Silvas v Bridgeview Investors, LLC***, 79 AD3d 727, 912 NYS2d 618 [2d Dept 2010]; ***Plass v Solotoff***, 5 AD3d 365, 773 NYS2d 84 [2d Dept 2004]).

Accu-Safes, DBSI, and Chase established their prima facie entitlement to summary judgment dismissing the cause of action for violation of Labor Law § 240 (1), as they demonstrated that there was no elevation differential between plaintiff and the falling ATM, and that the ATM was not in the process of being hoisted or secured, and did not require securing for the undertaking ***Narducci v Manhasset Bay Assoc.***, *supra*; ***Rodriguez v D & S Bldrs., LLC***, *supra*; ***Toefer v Long Is. R.R.***, 4 NY3d 399; ***Oakes v Wal-Mart Real Estate Bus. Trust***, *supra*; ***Whitehead v City of New York***, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]; ***Cruz v Neil Hospitality, LLC***, 50 AD3d 619, 855 NYS2d 219 [2d Dept 2008]; ***Cambry v Lincoln Gardens***, *supra*). Plaintiff testified that the accident occurred when the ATM he tilted came back towards the floor and pinned him between that ATM and another ATM. Plaintiff indicated that he was not in the process of hoisting or securing the ATM at the time it fell. In opposition, plaintiffs failed to raise a triable issue of fact (*see* ***Simmons v City of New York***, *supra*).

Any claims for indemnification and contractual indemnification are also summarily dismissed, as such claims cannot stand independently of potential liability of the indemnitor (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]; ***Tapinekis v Rivington House Health Care Facility***, 17 AD3d 572, 739 NYS2d 484 [2d Dept 2005]).

Accordingly, the motion by Accu-Safes for summary judgment dismissing the complaint against it is granted, and the motion by DBSI, Chase, and 1411 IC-SIC Property for summary judgment dismissing the complaint and cross claims against them is granted. In light of the foregoing, the duplicate motion by DBSI, Chase, and 1411 IC-SIC Property for summary judgment dismissing the complaint and cross claims against them, or, in the alternative, for leave to amend their answers, is denied, as moot.

Dated: Riverhead, New York
June 10, 2019

VINCENT J. MARTORANA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION