Germain v Tanner Prince Realty, LLC
2019 NY Slip Op 33268(U)
November 1, 2019
Supreme Court, Kings County
Docket Number: 501576/17
Judge: Debra Silber

At an IAS Term, Part 9 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 1st day of November, 2019.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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ALAIN GERMAIN,

Plaintiff,

- against -

TANNER PRINCE REALTY, LLC, JOHN HARDY USA INC. and MICHILLI CONSTRUCTION INC.,

Defendants.

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TANNER PRINCE REALTY LLC AND JOHN HARDY USA INC.,

Third-Party Plaintiffs,

- against -

MICHILLI CONSTRUCTION, INC.,

Third-Party Defendant.

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DECISION/ORDER

Index No. 501576/17

Motion Sequence Nos. 5,6

The following papers number 1 to 11 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	4-5, 8 6-7, 9
Reply Affidavits (Affirmations)	8, 9, 10 11

Upon the foregoing papers, defendant/third-party defendant Michilli Construction, Inc. (Michilli) moves, in motion (mot.) sequence (seq.) 5, for an order, pursuant to CPLR

3212, granting it summary judgment dismissing all claims asserted against it. Plaintiff Alain Germain cross-moves, in mot. seq. 6, for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6) against Michilli as well as against defendants Tanner Prince Realty LLC (Tanner) and John Hardy USA Inc. (Hardy).

Background

Plaintiff commenced the instant action on January 25, 2017 by electronically filing a summons and verified complaint against Tanner and Hardy. Plaintiff claims therein that Tanner and/or Hardy had an ownership interest in and/or were responsible for maintenance of the premises, intended to be used as a jewelry store, located at 118 Prince Street in Manhattan. The complaint also asserts that Tanner/Hardy hired Mutual Central Services (Mutual), plaintiff's employer, to perform construction, renovation, repair and alteration work thereon. Plaintiff alleges that on November 23, 2016, while performing construction work for Mutual at the subject premises, he had an accident and, consequently, sustained injuries.

Specifically, plaintiff alleges that on the date of the accident, he was working while standing on a ladder, and was caused to fall. Plaintiff contends that defendants had a duty to provide workers with safe equipment to protect them from elevation-related hazards; however, plaintiff claims, the equipment provided (including the ladder) was either defective, broken, poorly maintained and/or inadequate for his task.

The original verified complaint asserts causes of action alleging that Tanner and Hardy are vicariously responsible for violations of sections 240 (1), 241 (6) and 200 of the

Labor Law. The complaint also asserts claims for common law negligence. The pleadings further state that Tanner and Hardy are owners of the subject premises, contractors hired by the owners, and/or agents of owners or contractors, as those terms are defined in the Labor Law and interpreted by courts of this State. Plaintiff also claims that at relevant times, he was engaged in work within the scope of the Labor Law.[1] Plaintiff claims that, therefore, Tanner and Hardy are subject to vicarious liability, without regard to fault, pursuant to the Labor Law. Plaintiff also contends that Tanner and Hardy breached their common-law duty to maintain a safe workplace. Plaintiff asserts that these Labor Law violations and breaches of the common-law duty of care proximately caused his injuries, and he thus seeks damages.

Tanner and Hardy subsequently interposed an answer, generally denying plaintiff's allegations, and discovery and motion practice ensued. On May 25, 2017, Tanner and Hardy commenced the instant third-party action against Michilli, who then interposed a third-party answer. On August 23, 2018, plaintiff filed a note of issue with a demand for trial by jury, certifying that discovery is complete and that this matter is ready for trial. Subsequently, by a September 11, 2018 so-ordered stipulation, this court granted leave to amend the summons and complaint to add Michilli as a direct defendant.[2] As relevant to the present motion and cross motion, other orders permitted post-note of issue discovery and extended the time for

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[1] Work within the scope of the vicarious liability provisions of Labor Law § 240 (1) is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

[2] A later so-ordered stipulation provides that Tanner is the relevant property owner and that Hardy is Tanner's lessee.

dispositive motions. The instant summary judgment motion and partial summary judgment cross motion followed.

Michilli's Arguments Supporting Its Summary Judgment Motion

In support of its motion for summary judgment dismissing all claims asserted against it, Michilli first asserts that plaintiff has made no valid Labor Law § 240 (1) and § 241 (6) claims against it, and, hence, those claims should be dismissed. More specifically, Michilli states that the vicarious liability provisions of those statutes apply to owners, contractors and their agents; however, Michilli contends, contractors are subject to liability pursuant to those provisions only when they are responsible for ongoing construction activities. Michilli acknowledges that it is a contractor for the purposes of this action, but maintains that its work (and the work of its subcontractors) had been completed and its equipment and personnel had been removed from the site, at least one full day before the date of the plaintiff's accident. Furthermore, Michilli contends it had not hired plaintiff's employer, and instead argues that Hardy (the commercial tenant) directly hired Mutual to provide and install a security system after Michilli's work was done. Moreover, Michilli states that Mutual's work (and, specifically, the work performed by plaintiff prior to the accident) is wholly unrelated to, and is not part of the scope of Michilli's work at the premises. Michilli reasons that since Hardy hired Mutual, and since plaintiff used only his own or Hardy's equipment, and since neither Michilli nor its subcontractors supervised plaintiff's work, the vicarious liability provisions of the Labor Law are inapplicable to Michilli herein. Therefore, concludes Michilli, this court should award it summary judgment dismissing plaintiff's negligence and Labor Law § 240 (1) and § 241 (6) claims.

Alternatively, Michilli maintains that plaintiff's Labor Law § 240 (1) claims should be dismissed because he either misused or chose not to use available safety devices that would likely have prevented the accident. Specifically, Michilli claims the record reflects that plaintiff requested and received a particular ladder. Michilli states that the record further indicates that, before the alleged accident, plaintiff's coworker was present to hold the ladder in place. Michilli adds that the record also indicates that there were no prior complaints about the subject ladder and that plaintiff was unable to identify the cause of his fall.

Michilli reasons that if plaintiff claims that the subject ladder was inadequate, plaintiff, having specifically requested this ladder, is thus the sole proximate cause of his injuries and, therefore, cannot recover damages pursuant to Labor Law § 240 (1). Michilli adds that Mutual provided him with the subject ladder. Moreover, Michilli claims that plaintiff did not request additional adequate safety equipment nor did he request or make sure that a coworker secured the ladder while plaintiff used it. Michilli argues that therefore, plaintiff's unwise actions and inactions precipitated the accident. Michilli concludes that plaintiff is thus the sole proximate cause of his injuries, and, therefore, his Labor Law § 240 (1) claims should be dismissed.

Michilli also argues that plaintiff's Labor Law § 241 (6) should be dismissed. Michilli points out that Labor Law § 241 (6) requires an injured worker to show the existence of a violation of an applicable Industrial Code provision (12 NYCRR ch. 1, subch. A). Michilli asserts that the instant claims lack merit because the Industrial Code provisions plaintiff alleges were violated are inapplicable to the facts herein. To the extent that any such Industrial Code provisions are, in fact, applicable, Michilli contends that the record indicates

that those provisions were not violated. Michilli also argues that a sustainable Labor Law § 241 (6) claim requires that a plaintiff pleads (and eventually proves) violations of one or more applicable Industrial Code provisions containing a positive, specific command. Michilli claims that appellate courts have determined that some of the Industrial Code provisions cited by plaintiff lack the required specificity to support a Labor Law § 241 (6) claim. Finally, Michilli reiterates its position that plaintiff's failure to use available ladders, safety harnesses and life lines proximately caused the accident, and thus urges dismissing plaintiff's Labor Law § 241 (6) claim on one of the above alternate grounds.

Additionally, Michilli argues that, according to the record, plaintiff has no viable common-law negligence or Labor Law § 200 claims against it. Michilli points out that such claims exist in two categories: those claims where the means and methods of the work employed allegedly led to the accident, and those where a premises condition allegedly led to the accident. Michilli states that plaintiff has not alleged any defective condition with regard to the ladder, and that, to the contrary, the record indicates that there were no complaints about the subject ladder. Michilli also reiterates that plaintiff does not know how the accident occurred and suggests that the record indicates no dangerous premises condition was involved here. Finally, Michilli points out that plaintiff's testimony established that only he and plaintiff's employer, Mutual, directed the manner in which he worked and that they used their own equipment. For these reasons, Michilli concludes that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed.

Lastly, Michilli avers that the third-party claims asserted by Tanner and Hardy against it should likewise be dismissed. Michilli notes that Tanner and Hardy assert claims for

indemnification, contribution and breach of a covenant to maintain insurance coverage. Michilli argues that all of these claims lack merit; that contribution and common-law indemnification is available only against actual wrongdoers; and that, in contrast and as stated above, it has demonstrated that it was not at fault here. Thus, Michilli urges, it cannot be responsible to any party for contribution or common-law indemnification. As for contractual indemnification, Michilli acknowledges that its written agreement with the owner (Tanner) contains an indemnity provision, but also highlights that this provision applies only to the "willful misconduct and/or negligent acts or omissions" of Michilli and the subcontractors it hired. Michilli reiterates that neither it nor its subcontractors were involved in the accident, since plaintiff used his (or Mutual's) own methods and equipment. Additionally, Michilli restates that its employees and subcontractors had finished their work at the site (store) before the plaintiff's accident. Lastly, Michilli states that any claims that it breached a covenant to maintain commercial general liability insurance is belied by the record, as the owner was an additional insured under the subject policy. Therefore, Michilli reasons, no insurance procurement provision in the contract was breached, and any breach of contract claim should be dismissed. In sum, Michilli submits that its summary judgment motion should be granted, and all claims asserted against it should consequently be dismissed.

Plaintiff's Arguments Supporting His Partial Summary Judgment Cross Motion

In support of his cross motion, plaintiff first asserts that the motion is timely. Plaintiff claims that his cross motion is a response to Michilli's pending, timely summary judgment motion, and should thus be considered timely. Additionally, plaintiff notes that before the

original summary judgment deadline lapsed, he sought an order extending the deadline because discovery remained outstanding from defendants. For this additional reason, plaintiff argues the court should consider his cross motion as timely.

Plaintiff then argues the merits of his causes of action. In support of partial summary judgment with respect to Labor Law § 240 (1) against defendants, plaintiff first reiterates that this statute subjects owners, contractors and their agents to a nondelegable duty to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection is breached, owners, contractors and their agents are vicariously liable for injuries that are proximately caused by the breach. Here, plaintiff claims, for Labor Law purposes, Tanner was an owner, Hardy was an agent of the owner, and Michilli was a contractor. Plaintiff reasons that all three companies are thus subject to absolute vicarious liability under Labor Law § 240 (1).

Plaintiff next notes that appellate courts have stated that Labor Law § 240 (1) is to be interpreted as liberally as possible to afford protection to workers. Plaintiff also claims that at all relevant times, he was engaged in work within the scope of the Labor Law (*see* n 1). Specifically, plaintiff asserts that when the accident occurred, he was "altering" an integral part of the building. At a minimum, plaintiff continues, the statute required defendants herein to furnish workers such as himself with adequate safety devices that provide proper protection against elevation-related risks. Plaintiff also states that adequate protection against elevation-related hazards includes securing ladders against the risk of slipping and sliding, which could cause a worker on the ladder to fall and be injured.

Plaintiff argues that appellate authority interpreting Labor Law § 240 (1) provides that the failure to secure a ladder, even if the ladder is otherwise adequate, constitutes a prima facie violation of Labor Law § 240 (1). Put another way, plaintiff continues, the nondelegable duty imposed by Labor Law § 240 (1) required defendants herein to ensure that the ladder was secured while plaintiff climbed or stood on it. However, plaintiff notes, the ladder was not secured, and it slipped while plaintiff was standing on it, causing him to fall. Plaintiff acknowledges that defendants make much of the fact that a worker was available to hold the ladder and secure it. However, plaintiff points out that the worker failed to do so, and plaintiff reiterates that the duty imposed by Labor Law § 240 (1) is nondelegable. The fact remains, plaintiff reasons, that the ladder was unsecured, and it then slipped and caused him to fall and suffer injuries. Plaintiff concludes that he has thus established a Labor Law § 240 (1) violation.

For similar reasons, plaintiff argues that he could not have been the sole proximate cause of his injuries. Plaintiff notes that he neither misused the subject ladder nor disregarded safety instructions and reiterates that Labor Law § 240 (1) imposes duties on owners, contractors and their agents—not on workers. As such, plaintiff reasons, he was under no obligation to request additional safety equipment or to direct the other worker to hold the ladder. Plaintiff concludes that the sole proximate cause defense alleged therefore lacks merit.

As to Michilli's contention that it was no longer a contractor for Labor Law purposes at the time of the accident because it no longer had a presence at the work site, plaintiff answers by pointing out that this contention is belied by the record. Plaintiff states that the

written agreements and relationship between Michilli and Hardy (tenant) indicates that Michilli was in charge of site safety and had the authority to control the area where the accident took place. Plaintiff also claims that the record indicates that Michilli conducted site safety meetings that Mutual's employees were required to attend. Moreover, plaintiff maintains that Michilli's agents were present at the site on the date that the plaintiff's accident took place, and Michilli's tools remained on the site thereafter. Lastly, plaintiff notes that the copies of "punch lists" and other documents and items and EBT testimony in the record indicate that Michilli, contrary to its present contentions, did not finish work at the job site until approximately one month after the plaintiff's accident occurred. For these reasons, plaintiff concludes that the court should reject any contention that Michilli was not a contractor for Labor Law purposes at any relevant time.

Lastly, plaintiff asserts that he is entitled to partial summary judgment against defendants with respect to his Labor Law § 241 (6) claim. Plaintiff points out that, like § 240 (1), § 241 (6) imposes absolute vicarious liability without regard to fault against owners, contractors and their agents for any violations of the Industrial Code (12 NYCRR ch. 1, subch. A) that proximately cause injuries to workers. Here, plaintiff argues, applicable Industrial Code provisions required that the subject ladder was secured and was placed on a non-slick surface. Plaintiff claims that defendants' failure to ensure compliance with these provisions violated the Industrial Code, proximately caused his injuries, and also establish a prima facie Labor Law § 241 (6) claim. Since no applicable defenses to such a claim exists, reasons plaintiff, his cross motion under Labor Law § 241 (6) should be granted insofar as it seeks partial summary judgment on liability against defendants.

Tanner and Hardy's Opposition Arguments

In opposition to plaintiff's partial summary judgment cross motion, Tanner and Hardy first claim that it is untimely. Tanner and Hardy point out that plaintiff had until February 28, 2019 to timely move for summary judgment. However, Tanner and Hardy note that plaintiff did not do so until on or about April 8, 2019. Tanner and Hardy conclude that the motion should be denied on this ground.

Additionally, Tanner and Hardy oppose the substance of plaintiff's cross motion and submit the affidavit and curriculum vitae of a professional engineer, proffered as an expert. The engineer opines that, based on his knowledge of professional standards of construction site safety, plaintiff was provided with an adequate safety device (the subject ladder) to complete his tasks. Moreover, the engineer states, the ladder was not defective, and it was plaintiff's failure to secure the subject ladder that led to the accident. Tanner and Hardy, based on the engineer's opinion, assert that plaintiff's misuse and mis-positioning of the ladder was the primary factor leading to the accident. Accordingly, Tanner and Hardy reason, plaintiff was the sole proximate cause of his injuries; alternatively, at a minimum, they continue, a trier of fact should determine the question. Consequently, Tanner and Hardy conclude, plaintiff may not properly obtain summary judgment with respect to Labor Law § 240 (1) or § 241 (6).

The court notes that the same lawyers represent both Tanner and Hardy and they do not argue that Hardy, as a commercial lessee, is not a proper labor law defendant.

Lastly, Tanner and Hardy oppose Michilli's motion. Specifically, Tanner and Hardy suggest that the record contains a factual issue whether Michilli had already completed all

relevant construction activities before the accident occurred. Tanner and Hardy point out that Michilli's representative, in response to the subject accident, completed a written incident report. This fact, Tanner and Hardy contend, belie any suggestion that Michilli had "turned over" the site before the plaintiff's accident occurred. Accordingly, they argue that a factual issue exists as to whether Michilli was still a contractor, for Labor Law purposes, on the accident date. For this reason, Tanner and Hardy conclude that Michilli's motion should be denied. In addition, Tanner and Hardy assert that if the trier of fact does not agree with Michilli, the applicable indemnity provision in the subject construction contract requires Michilli to indemnify Hardy against plaintiff's claims. Tanner and Hardy allege in this regard that the subject indemnity provision is applicable, enforceable, and was in effect at all relevant times.

Michilli's Opposition Arguments

In opposition to plaintiff's cross motion, Michilli first contends that the cross motion is untimely. Michilli points out that an order of this court extended the parties' time to make dispositive motions to February 28, 2019. However, notes Michilli, plaintiff did not serve or file his cross motion until April 8, 2019—the cross motion is thus untimely by approximately 40 days. Michilli also notes that plaintiff does not provide a satisfactory explanation for the belated motion. Additionally, Michilli contends that the record belies any argument that additional discovery, provided beyond February 28, 2019, was necessary for plaintiff to file and serve his motion. For these reasons, concludes Michilli, no "good cause" (as required by the CPLR) is shown for plaintiff's late motion. Michilli maintains that the cross motion should be denied on this ground.

Alternatively, Michilli argues that the cross motion should be denied on its merits. Michilli contends that plaintiff's affidavit in support of his cross motion contradicts sworn statements and answers that plaintiff gave at his deposition. Michilli reasons that the affidavit is therefore feigned and a cynical attempt to win or avoid summary judgment. More specifically, Michilli notes that plaintiff's deposition testimony suggests that he had no knowledge of the construction or renovation work at the subject premises before he began installing security cameras. Now, however, Michilli claims, plaintiff avers that his work was part of a larger construction project. Michilli argues that this recent assertion is belied by the fact that plaintiff previously could not identify Michilli or its employees. Given that the plaintiff's affidavit is disingenuously designed to suggest that plaintiff's work was part of the construction or renovation project, Michilli urges the court to ignore it.

Michilli also alternatively reiterates that plaintiff was the sole proximate cause of his accident, and can thus not recover damages pursuant to Labor Law § 240 (1). Michilli again points out that plaintiff had both an adequate safety device (the subject ladder) to protect against elevation related risk, and the assistance of another worker who could have secured the ladder as plaintiff climbed or stood upon it. Michilli notes that plaintiff claimed that he "called the shots" while installing the security equipment, but failed to direct the worker at the foot of the ladder to hold it while plaintiff ascended and stood on it. Michilli reasons that plaintiff thus bore the ultimate responsibility for, and had the last clear chance to prevent the accident; accordingly, Michilli concludes, plaintiff was the sole proximate cause of his accident and thus cannot recover damages.

A third alternative argument raised by Michilli is that at all relevant times, it was not a "contractor" for Labor Law purposes because its agents were no longer present at the site when the accident occurred. Michilli reiterates that it "turned over" the site to the owner/ lessee before plaintiff was injured. Specifically, Michilli states that the uncontroverted evidence establishes that Michilli had completed all work[3] in the scope of its contract and that its subcontractors had removed all equipment from the site. Michilli also notes that on the day before the accident, Hardy inventoried its jewelry in the store, which Michilli claims is an act inconsistent with the possibility that construction was ongoing. Indeed, Michilli continues, the record indicates that plaintiff's injury occurred while Hardy's employees were preparing to open the subject store. Lastly, Michilli reiterates that plaintiff's employer was hired directly by Hardy and was not a Michilli subcontractor. Michilli reasons that since work enumerated in the Labor Law was no longer being performed when plaintiff was injured, Michilli was no longer a contractor - and thus no longer subject to absolute vicarious liability - under the Labor Law.

Finally, and again alternatively, Michilli claims that plaintiff's arguments concerning Labor Law § 241 (6) lack merit. Michilli states that the Industrial Code provisions noted by plaintiff were either inapplicable, or not violated. Also, Michilli alleges that plaintiff's current contentions concerning the Industrial Code - such as any present claim about what caused the subject ladder to slip - is flatly contradicted by plaintiff's earlier deposition

[3] Except for so-called "punch list" work, described as "minor touch ups" still to be done.

testimony. For these reasons, Michilli asks this court to deny plaintiff's cross motion and instead grant its summary judgment motion dismissing all claims against Michilli.[4]

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 NY3d941 [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

[4] In addition, Michilli states that it adopts the arguments of Hardy and Tanner asserted against plaintiff.

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 summary judgment motion 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 summary judgment motion 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 summary judgment motion, the court must 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]). Furthermore, "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). 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]).

Timeliness of Plaintiff's Cross Motion

Plaintiff's cross motion is prima facie untimely. The applicable rule (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 [formerly Rule 13]) states that:

> "[i]n cases where the City of New York is a defendant and is represented by the Tort Division of the Corporation Counsel's office, summary judgment motions may be made no later than 120 days after the filing of a Note of Issue. In all other matters, including third party actions, motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue. In both instances the above time limitation may only be extended by the Court upon good cause shown. See CPLR 3212(a)."

In this action, plaintiff filed a note of issue and certificate of readiness on August 23, 2018. A subsequent discovery order extended the deadline for a timely motion for summary judgment to February 28, 2019. Nevertheless, plaintiff did not electronically file his cross motion until April 8, 2019; plaintiff's motion is thus prima facie untimely. Generally, the court should not entertain such an untimely summary judgment cross motion absent a showing of "good cause" for the delay (CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *First Union*

Auto Fin., Inc. v Donat, 16 AD3d 372 [2005]; *Breiding v Giladi*, 15 AD3d 435 [2005]). The requisite "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness— rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, 2 NY3d at 652).

Nevertheless, and contrary to defendants' arguments, plaintiff has established the requisite "good cause" for a delayed summary judgment cross motion. Specifically, this court's April 22, 2019 discovery order, resolving plaintiff's motion to strike a pleading or compel discovery, directed that numerous items of discovery be exchanged as late as May 24, 2019. Applicable appellate authority suggests that once post-note of issue discovery is ordered by the trial court, deadlines for summary judgment are implicitly extended (*see e.g. Khan v Macchia*, 165 AD3d 637, 638-639 [2d Dept 2018] [post-note of issue discovery order constituted "good cause" for extension of time to file summary judgment]).[5] Since another justice of this court explicitly approved (and directed) the exchange of discovery as late as May of 2019, good cause exists for plaintiff's late cross motion, filed April 8, 2019. Therefore, the court will entertain the merits of plaintiff's cross motion.

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

[5] Moreover, even if post-note discovery is not considered an implicit extension of summary judgment deadline, the Appellate Division in *Khan* suggests that in such instances, motions to extend the deadline should be granted (*id.* at 639).

> 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 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *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 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 unsecured and lacked firm footing; it slipped when he stood on it and consequently caused him to fall and sustain

injuries. Plaintiff's deposition testimony indicates that his coworker (who, prior to the accident, transported the subject ladder and other equipment to plaintiff) knew enough to hold the ladder while plaintiff climbed or stood on it, but failed to do so.[6] Therefore, there is no indication that a premises condition was involved. Accordingly, owners, contractors and their agents—such as defendants herein—are subject to liability only if they exercised actual 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 none of the defendants directed plaintiff's work; in fact, plaintiff testified that he alone determined the manner in which he worked. Accordingly, plaintiff has no viable Labor Law § 200 or common-law negligence claims against defendants (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]). 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 claims or under Labor Law § 200 (*Biance v Columbia*

[6] The court notes that to the extent that some statements contained in the affidavit of plaintiff, submitted in connection with the instant motions, deviate from or contradict plaintiff's prior sworn deposition testimony, such statements have been disregarded as feigned attempts to avoid the consequences of summary judgment (*see e.g. Semple v Sterling Estates*, 300 AD2d 297 [2d Dept 2002]).

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 no defendant was involved in supervising or controlling plaintiff's work, plaintiff's Labor Law § 200 claims are unsustainable (*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 Michilli's summary judgment motion to the extent of dismissing plaintiff's common law negligence and Labor Law § 200 claims asserted against it.[7]

Labor Law § 240 (1) and § 241 (6)

The court is compelled to deny both the summary judgment motion and partial summary judgment cross motion 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

[7] Additionally, the court notes that plaintiff offers no significant arguments in opposition to this branch of Michilli's motion.

> 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 at 524). "[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,* 91 NY2d at 348; *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 plaintiff to demonstrate 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 494 [1993]) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d 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, "such a violation . . . 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, the 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 ["Under 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, issues of fact preclude awarding summary judgment to any party with respect to Labor Law § 240 (1) or § 241 (6).[8] First, the court rejects Michilli's contention that, as a matter of law, it is not a "contractor" for Labor Law purposes because its work was completed (except for the punch list work) before the accident. To be sure, the nondelegable provisions of the Labor Law do not apply to accidents that occur after enumerated work—work within the purview of the Labor law—is completed (*see e.g. Beehner v Eckerd Corp.*, 3 NY3d 751 [2004]) or not yet initiated (*see e.g. Martinez v City of New York*, 93 NY2d 322 [1999]). However, the Labor Law provisions 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]). Here, despite Michilli's contention, the record indicates that, unlike in *Beehner* or *Martinez*, Michilli's work at the site was not completed. Indeed, the testimony and documents establish that at the time of the accident, additional "Michilli work" existed, and that Tanner and Hardy would soon prepare a "punch list" of these items. Viewing the record in the light most favorable to plaintiff (*Pierre-Louis*, 66 AD3d at 862), the record suggests that Michilli had its personnel and tools present on the site until one

[8] Some observations are noted with regard to the evidentiary material submitted in connection with these motions. First, the court cannot consider any photographs or visual recordings, since it is the province of the trier of fact to draw inferences from such items (*see e.g. Somersall v New York Tel. Co.*, 52 NY2d 157, 167 [1981] ["Interpretation of the photographs in evidence involved evaluations of angle and perspective that are the essence of the jury's function"]). Moreover, the court cannot give any weight to the "battling" affidavits of the purported experts, as they simply state bare legal conclusions (*see e.g. Amatulli v Delhi Constr. Corp.*, 78 NY2d 525, 533 [1991]).

month after the accident occurred. Moreover, as plaintiff correctly points out, "[t]o be treated as a statutory agent, the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011] [internal quotations omitted]). Here, there is no dispute that Michilli had authority to supervise and control the job site—and, moreover, "[t]he determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*Johnsen v City of New York*, 149 AD3d 822, 822 [2d Dept 2017], quoting *Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]).[9] Since Michilli had the requisite authority, it is a statutory "contractor" for purposes of Labor Law § 240 (1) and § 241 (6) and is thus subject to liability under these provisions (*see e.g. Merino v Continental Towers Condominium*, 159 AD3d 471, 472 [1st Dept 2018] ["the test of whether a defendant is a statutory agent subject to liability under those sections is not whether it actually supervised the work, but whether it had the authority to do so"]).

Also, the court rejects the arguments advanced by both movant and cross movant concerning the sole proximate cause defense. Plaintiff has in fact demonstrated prima facie

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[9] The court notes that plaintiff's activities, installing security cameras and wires, is analogous to those in *Joblon v Solow* (91 NY2d 457 [1998] [finding that electrician's injuries from fall were compensable under Labor Law § 241 (6) because his activities of chopping through wall, chiseling and routing conduit pipe and wire to install a clock constituted construction]). Plaintiff's accident herein occurred "in the context of construction, demolition and excavation" (*Nagel,* 99 NY2d at 103). Also, there appears to be some authority for the proposition that accidents occurring on a construction or renovation site are, because of such, within the protections of Labor Law § 240 (1), even if they occur at a time when the plaintiff is not, or no longer, directly involved in the enumerated work (*see e.g. Reinhart v Long Is. Light. Co.*, 91 AD2d 571 [1st Dept 1982], *appeal dismissed* 58 NY2d 1113 [1983]).

entitlement to judgment under § 240 (1) as a matter of law. Although the mere fact that a plaintiff worker fell from a ladder is insufficient to establish "that the 'proper protection' required by Labor Law § 240 (1) was not provided" (*Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 [2d Dept 1998], citing *Basmas v J.B.J. Energy Corp.*, 232 AD2d 594, 595 [2d Dept 1996]), a fall from a ladder that is unsecured and slips out from underneath a plaintiff, causing him to fall, establishes prima facie liability under Labor Law § 240 (1) (*see e.g. Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598 [2d Dept 2005], citing *Loreto v 376 St. Johns Condominium*, 15 AD3d 454 [2d Dept 2005]; *Blair v Cristani*, 296 AD2d 471 [2d Dept 2002]; *Guzman v Gumley-Haft, Inc.*, 274 AD2d 555 [2d Dept 2000]). Since it is undisputed that plaintiff fell from an unsecured ladder, Michilli has not demonstrated prima facie entitlement to judgment of a matter of law.

However, there are issues of fact which preclude awarding summary judgment to plaintiff. Although plaintiff correctly states that a worker's comparative negligence is not a defense to a Labor Law § 240 (1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993]), the trier of fact may find that other affirmative defenses apply. For example, "the 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*, 89 AD2d at 366; *see also Blake*, 1 NY3d at 290). Contrary to plaintiff's assertions, Labor Law § 240 (1) does impose on the injured worker the duty to use safety equipment sensibly (*see e.g. Negron v City of New York*, 22 AD3d 546, 547 [2005] [plaintiff's failure to ensure lanyard with safety harness was tied to structure was sole proximate cause of accident]). Similarly, here, an issue of fact exists as to whether plaintiff was the sole proximate cause of his injuries. The deposition

testimony indicates that plaintiff could have (and, arguably should have) directed an available coworker to hold the ladder while plaintiff ascended and/or stood on it. A trier of fact may reasonably conclude that plaintiff's failure to issue such a directive is tantamount to plaintiff's misuse of an available safety device (*see e.g. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006]). For these reasons, plaintiff is likewise not entitled to summary judgment on his Labor Law § 240 (1) claim.

Similarly, neither movant nor cross movant is entitled to summary judgment with respect to Labor Law § 241 (6). Plaintiff correctly states that his allegations suggest violations of Industrial Code § 23-1.21 ("Ladders and ladderways"), which states, in applicable part, as follows:

> "(a) Approval required. Any metal or fiberglass ladder which is 10 feet or more in length shall be approved. Any other ladder not named or described in this Part (rule) shall not be used unless approved.
>
> "(b) General requirements for ladders.
> . . .
> "(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> "(i) If it has a broken member or part.
> . . .
> "(iv) If it has any flaw or defect of material that may cause ladder failure.
> "(4) Installation and use.
> . . .
> "(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
> . . .
> "(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall

> be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

The regulations contained in Industrial Code 23-1.21 are sufficiently specific to support a cause of action under Labor Law § 241 (6) (*Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006], citing *Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017 [2001]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [1999]). Moreover, given plaintiff's undisputed testimony that the ladder he used slipped out from under him and was not secured, Michilli has thus not established prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim (*see e.g. Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619-620 [2008], citing *Jicheng Liu,* 35 AD3d 378 [2006]; *Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Jamison v County of Onondaga*, 17 AD3d 1142, 1143 [2005]; *Sprague,* 240 AD2d at 394; *see also Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [2004]). However, plaintiff has also not demonstrated entitlement to judgment as matter of law. With respect to Labor Law § 241 (6), any questions of causation or contributory negligence are left for the trier of fact to determine (*Rizzuto*, 91 NY2d at 350; *see also Misicki,* 12 NY3d at 521-522). Additionally, plaintiff's failure to ask his coworker to hold the subject ladder presents an issue of fact (*see e.g. Allen,* 282 AD2d at 487 ["Under 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"]). Thus, neither movant nor cross movant is entitled to summary judgment with respect to Labor Law § 240 (1) or § 241 (6).

Indemnification, Contribution and Breach of Covenant to Maintain Insurance Coverage

The court grants Michilli's motion to the extent that it seeks summary judgment dismissing the third-party claims for breach of the covenant to procure and maintain a commercial general liability insurance policy that names the applicable parties as additional insureds. By submitting a copy of a policy that is enforceable and was in effect, the terms of which include any party required by a construction contract to be insureds as such, Michilli has demonstrated prima facie entitlement to judgment as a matter of law dismissing Tanner and Hardy's claim based on Michilli's alleged failure to procure insurance (*see e.g. McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018]). Tanner and Hardy have not addressed this prima facie showing in their opposition, and, as such, no issue of fact was raised (*id.* citing *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *Sicilia v City of New York*, 127 AD3d 628, 629 [1st Dept 2015]). Accordingly, the court dismisses the third-party claim alleging a breach of contract due to the failure to procure insurance.

However, the court denies the remainder of Michilli's motion insofar as it seeks summary judgment dismissing the remaining third-party claims. As this decision does not determine which party's negligence (if any) caused the subject accident, summary judgment would be premature with respect to common-law indemnification (*see e.g. Nasuro v PI Assoc., LLC*, 49 AD3d 829, 832 [2d Dept 2008]) or contractual indemnification (*see e.g.*

Fritz v Sports Auth., 91 AD3d 712, 713-714 [2d Dept 2012] ["as there are triable issues of fact as to whose negligence, if anyone's, caused the plaintiff's accident . . . [u]nder these circumstances, it is premature to reach the issue of contractual indemnification"]). Accordingly, the court denies Michilli's motion to the extent that it seeks summary judgment dismissing the remaining third-party claims.

Accordingly, it is

ORDERED that the motion, mot. seq. 5, of defendant/third-party defendant Michilli Construction, Inc. for an order awarding it summary judgment dismissing all claims asserted against it is granted solely to the extent that the Labor Law § 200 and common-law negligence claims asserted by plaintiff Alain Germain are dismissed, and that the breach of the covenant to procure insurance claim asserted by defendants/third-party plaintiffs Tanner Prince Realty LLC and John Hardy USA Inc. are also dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion, mot. seq. 6, for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and § 241 (6) against all of the defendants is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court