At an IAS Term, Part 64 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 7th day of May, 2020.

P R E S E N T:

HON. KATHY J. KING,
Justice.

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PABLO SANCHEZ

Plaintiff,

- against -

513 WEST 24th ASSOCIATES, LLC, DONATO, INC METRO PICTURES and METROARTS GALLERY, INC

Defendants.

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DECISION/ORDER

Index No. 512521/2016

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

Upon the foregoing papers, plaintiff Pablo Sanchez ("plaintiff") moves, pursuant to CPLR 3212, for an order granting partial summary judgment on liability under Labor Law 240(1), Labor Law 240(2) and Labor Law 241(6) against defendants 513 West 24th Associates, LLC, ("513 West"), Metro Pictures, and Metroarts Gallery, Inc (collectively "Metro").

Defendant 513 West opposes plaintiff's motion. Defendant Metro submits no opposition to plaintiff's motion.

BACKGROUND

Plaintiff Pablo Sanchez seeks to recover monetary damages for personal injuries allegedly sustained on March 31, 2016 at an art gallery which was under renovation. At the time of the accident, plaintiff was an employee of third-party defendant Riverside Builders Inc. Defendant Metro are tenants/occupants of the premises. Defendant 513 West is the owner of the premises located at 519 West 24th Street, New York, NY. Plaintiff was plastering the ceiling and walls on the project site while standing on a scaffold when the planks moved, shifted and fell, causing plaintiff to fall a distance of approximately 10-15 feet to the ground.

Upon commencement of the instant action, both defendants 513 West and Metro interposed an answer with cross-claims. The instant motion for summary judgment followed.

DISCUSSION

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*see* 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 [1986]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2s 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*see Di Mena & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is

even arguable, summary judgment must be denied (*see Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; Museums at Stony Brook v Vil. Of Patchogue Fire Dept., 146 AD2d 572 [2d Dept 1989]).

Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *(see Zuckerman v City of New York*, 49 NY 2d 557 [1980]).

LABOR LAW 240 (1)

Plaintiff moves for partial summary judgment against defendants as to liability in favor of his claim pursuant to Labor Law 240(1).

Labor Law §240 (1) provides, in pertinent 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, [or] altering . . . 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."

"[T]he duty imposed by Labor Law 240(1) is non-delegable and . . . an owner is subject to liability for violation thereof regardless of whether actual supervision or control over the work" has been exercised (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

Here, the Court finds that defendants are subject to the requirements imposed by Labor Law 240(1), since defendant 513 West was the owner of the building and defendants Metro were the tenants/occupants responsible for hiring various contractors at the project site, including plaintiff's employer, Riverside Builders Inc.

Plaintiff's asserts that defendants 513 West and Metro as owner and lessor, respectively, are liable under Labor Law 240(1), also know as, the "scaffold law" theory of liability, since the the plank upon which plaintiff was standing upon while he was plastering and painting the ceiling at the project site, moved and fell from underneath plaintiff causing him to fall from a significant height. Plaintiff argues, as a matter of law, that defendants failed to provide proper protection from an elevation related hazard under Labor Law 240(1) since defendants failed to provide the plaintiff with any harness/anchor system in order to prevent his fall and failed to provide safety railings on the scaffold which causing plaintiff to fall.

Labor Law § 240(1), often called the scaffold law, provides that [a]ll contractors and owners shall furnish or erect or cause to be furnished or erected 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 construction workers employed on the premises (see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 499-500 [1993][internal citations omitted]). "To establish liability pursuant to Labor Law § 240 (1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his injuries (see *Viera v WFJ Realty Corp.*, 140 AD3d 737, 738 [2d Dept 2016]; see *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 286-87 [2003]; *see Cabrera v Bd. of Educ. of City of New York*, 33 AD3d 641, 642 [2d Dept 2006]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his own injuries, there can be no recovery under Labor Law 240(1)" (*Garcia v Mkt. Assoc.*, 123 AD3d 661, 663 [2d Dept 2014]; citing *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 290 [2003]).

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Plaintiff testified in his EBT that he was provided a scaffold and used the metal rung steps alongside the scaffold to climb onto the aluminum planking platform area to perform his work about 10 feet high from the ground.

The open aluminum planking platform area was supported by two planks side by side. Plaintiff testified that he started to apply plaster on the walls that went up to the ceiling which was about 16 to 18 ft. high. As plaintiff was about to finish plastering, the planks moved side to side, lifted in the air, and fell to ground, causing plaintiff to fall off the left side of the scaffold. Plaintiff further testified that on the day of the accident he was instructed to continue plastering the walls as he had done the day before, and that he received no further instruction from any supervisor. Jaime Dougherty ("Dougherty"), plaintiff's foreman, testified in his EBT, that the scaffolding provided to plaintiff looked like it was not set up correctly and that he was concerned that the scaffold had no have safety railings. The Court finds that these facts demonstrate prima facie entitlement to summary judgment under the scaffold law theory according to Labor Law 240 (1) as plaintiff fell from an unsecure scaffold. (*see Bermejo v New York City Health and Hosps. Corp.*, 119 AD3d 500, 501-02 [2d Dept 2014] *see also Cabrera v Bd. of Educ. of City of New York*, 33 AD3d 641, 642 [2d Dept 2006]).

Here, while defendant 513 West's opposition establish that harnesses were available to the plaintiff, there was no evidence that the plaintiff had been instructed to utilize the harness (*see Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481, 483 [2d Dept 2005][internal citations omitted]; *see also Walls v Turner Constr. Co.,* 10 AD3d 261, 262 [2004], *affd* 4 NY3d 861 [2005]; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37 [2004]; *Palacios v Lake Carmel Fire Dept., Inc., supra* at 463). Dougherty testified that while there were harnesses on the site on the day of

the accident, he couldn't recall if he heard anyone speak to plaintiff about harnesses before the day of the accident and he couldn't recall if he spoke to plaintiff about harnesses at any point in time before the accident. Dougherty also testified that he did not know where the harnesses were located within the area that plaintiff fell, and did not know whether Riverside Builders' employees were using harnesses on the floor where the accident occurred. Defendants, 513 West, failed to raise a triable issue of fact, in opposition, as to whether the plaintiff was the sole proximate cause of the accident since there is no evidence that a harness anchor system was used at the time of accident nor, is there any showing that plaintiff was instructed to use a harness to perform his work (*see Pacheco v Halsted Communications, Ltd.*, 144 AD3d 768, 769 [2d Dept 2016]).

Labor Law 241(6)

Plaintiff moves for partial summary judgment on liability under Labor Law 246(1) against defendants 513 West and Metro. Plaintiff contends defendants violated various industrial codes and violation of the industrial Labor Law § 241(6), which requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-02 [1993]). Labor Law § 241(6) duty to comply with the Commissioner's regulations is nondelegable (*Id.* at 494).

Here, plaintiff has made a prima facie showing for summary judgment under Labor Labor Law 246(1) concerning the various alleged violations of Industrial Codes 23-1.22(c)(2)[safety railings for platforms], Industrial Codes 23-1.15(a)[handrails for safety railings], Industrial Codes 23-5.1(e)(1)[scaffold planks shall be securely fastened], and Industrial Codes 23-5.3(e)[safety railings for metal scaffolds] as the record establishes that the scaffold from which plaintiff fell was

made of metal and did not have any safety railings. Further, railings were not provided for the platform that plaintiff used to perform his work. Contrary to defendant 513 West's contentions, the record also demonstrates that the planking was not laid tight nor securely fastened as one of the planks that plaintiff was standing upon while plastering the wall moved, lifted in the air, and fell to the ground.

Defendant 513 West, in opposition, contends that plaintiff failed to show a violation of the Industrial Codes since the failure of safety railing did not contribute to the plaintiff's accident, and the planks do not need to be secured. The Court disagrees. The record shows the Industrial Codes require safety railing on metal scaffolds and scaffold planks to be securely fastened. Thus, defendant 513 West has failed to raise a triable issue of fact regarding plaintiff's violation of the Industrial Code.

Based on the foregoing, plaintiff's motion for partial summary judgment on liability pursuant to Labor Law 240 and Labor Law 246(1) is granted in its entirety.

The foregoing constitutes the decision and order of the court.

ENTER,

HON. KATHY J. KING
J.S.C.

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