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 23rd day of October, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JOHN RAJNAUTH,

Plaintiff,

-against-

Index No.: 512323/2016

Mot. Seq. 9

903 SAINT JOHN PLACE, LLC,
CHESKEL LICHTMAN, ZNKO CONSTRUCTION INC.,
ZENCO GROUP INC. and CITlWIDE PLUMBING NYC,

Defendants.

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The following e-filed papers were read herein:	NYSCEF Nos.:
Notice of Motion and Affidavits (Affirmations) Annexed	179-212, 242
Opposing Affidavits (Affirmations)	217-231, 232
Affidavits/ Affirmations in Reply	259-260

Upon the foregoing papers, plaintiff moves in motion sequence #9 for an order, pursuant to CPLR 2004, extending his time to file a motion for summary judgment and for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor on his claims under Labor Law §§ 240(1) and 241(6) as against defendant 903 Saint John Place LLC. For the reasons which follow, plaintiff is granted leave to make a late motion, and his motion for summary judgment is denied.

Background Facts and Procedural History

This action arises out of a December 21, 2015 construction site accident at which plaintiff sustained injuries. At the time, he was working for a plumbing sub-contractor. The project was a gut renovation of 903 St. Johns Place, Brooklyn, NY. It is a rowhouse which contains twelve apartments, four per floor. He testified at his EBT that he was standing in a trench in the courtyard area behind the building and was working on the installation of waste and drain lines, which had to be connected to the sewer line for the building, which in turn is connected to the sewer line in the street. His co-worker was going back and forth between the courtyard and the basement of the building, where his power tools were set up. There were other workers who were removing the windows in the top (third) floor apartments, to prepare for the installation of new windows. In the course of their work removing the old windows, several bricks were loosened and fell, hitting plaintiff on his back and injuring him.

Plaintiff brought this action in 2016 against 903 Saint John Place, LLC, [the correct name is 903 St Johns Place LLC] the owner of the property, (hereafter "903 Saint John") and he brought a second action in 2018 against the other defendants. The actions were consolidated under this [earlier] index number on November 14, 2019. The consolidation order specifically states that plaintiff was granted leave to make a summary judgment motion within 60 days of the date of the order. This motion was filed on December 4, 2019.[1] It is thus timely. However, the court notes that plaintiff's counsel re-filed the

[1] A prior, identical motion was previously made, and was withdrawn until after the consolidation motion was granted, as was required by the court's order granting consolidation and an extension of time to make this motion.

identical notice of motion and affirmation in support, so his motion, even after consolidation, is still only made with regard to the original defendant 903 Saint John. Defendant ZNKO Construction Inc. (hereafter "ZNKO") was the general contractor. This corporation is wholly owned by defendant Cheskel Lichtman, who testified at his EBT that he is also a member of the property owner LLC and is also the sole owner of defendant ZENCO Group Inc. The other defendant, Citiwide Plumbing NYC, is in default. The action is on the trial calendar.

Plaintiff's Motion

Plaintiff first describes the procedural history of this action, so it is clear that the court granted plaintiff an extension of time to make this summary judgment motion in the order consolidating the two actions issued on November 14, 2019 (E-File Doc 176). Plaintiff also summarizes the many discovery motions which were made in order to obtain a deposition from defendant property owner. On February 11, 2019, Justice Colon issued an order deciding plaintiff's motion to strike the property owner's answer, which states that if defendant 902 Saint John is not deposed on or before March 14, 2019, the property's owner's answer will be deemed stricken without further court order. Mr. Lichtman was deposed on March 14, 2019, almost four years after the action was commenced.

Plaintiff's motion next seeks summary judgment on the issue of liability with regard to his Labor Law §240(1) claim. Counsel avers that the plaintiff is entitled to summary judgment because: "1) Defendant 903 Saint John owned the property; 2) Work contemplated by the statute was taking place and Plaintiff was employed to do work contemplated by the statute; 3)Plaintiff was struck by bricks that fell approximately 35 feet

from the third floor; 4) The bricks should have been secured while adjacent windows were being removed; 5) No overhead protection was in place that would have shielded the plaintiff from these falling bricks at this construction site." Plaintiff supports the motion with the pleadings, his EBT, 903 Saint John's EBT (Mr. Lichtman), an affidavit from Herbert Heller, an engineer, dated June 19, 2019, and various court orders and other documents. Plaintiff provides evidence that the property owner applied for and was granted a permit for the work by the NYC Department of Buildings, which indicates that, at that time, 903 Saint John was the owner, ZNKO was the general contractor, and Citiwide was the plumbing contractor.

Mr. Heller, plaintiff's expert, avers that, with regard to 240(1), there should have been something employed to protect workers in the courtyard below the windows from falling debris as they removed the windows, and not doing so "violates acceptable safety practice and constitutes a violation of Labor Law section 240(1). The falling bricks and the resulting accident that befell Plaintiff cannot reasonably be considered a general workplace hazard, as through use of a proper safety mechanism, the bricks could and should have been secured or diverted."

Plaintiff also seeks summary judgment on his claim under Labor Law 241(6). In particular, plaintiff claims defendant violated Industrial Code section 23-1.7(a)(1),which states:

> Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.

Mr. Heller, plaintiff's expert, states that "The owner of the building was obligated under New York State Labor Law section 241(6) to keep the job site safe and free of falling objects that could strike a worker on the job. Specifically, the owner violated 12 NYCRR section 23-1-7(a)(1), which requires that every place where persons are required to work or pass that is normally exposed to falling materials and objects shall be provided with suitable overhead protection. It is clear based upon the evidence reviewed that no such suitable overhead protection was provided to the Plaintiff who was indeed working in an area that could normally be expected to be exposed to falling materials and objects, particularly in light of the work taking place above him.. It is thus my opinion, to a reasonable degree of engineering certainty, that the owner of the premises violated Labor Law section 241(6) and the applicable Industrial Code section, 23-1.7(a)(1)."

Plaintiff points out that once Mr. Lichtman was finally deposed, he could not provide any concrete information. He could not name any of the sub-contractors, and he said his cousin Mendy Schwimmer would know the answer to all the questions, not him. Counsel summarizes Mr. Lichtman's EBT in Paragraph 20 of his affirmation as follows:

> Mr. Lichtman testified that "defendant ZNKO Construction was retained as general contractor (p29-p30). Mr. Lichtman was, in fact, the President and sole owner of ZNKO (p33-p34). Mendel Schwimmer, an employee of ZNKO, was the project manager who "ran the show" (p29, p 43). He is Mr. Lichtman's second cousin (p44). (Other testimony suggests that Mr. Lichtman hired his cousin while wearing his "903 hat" rather than his "ZNKO hat" and, that he could not really say which entity hired Schwimmer (p50- p52). In any event, it was Schwimmer that ran the "day-to-day show." (p57-p58). He also described Schwimmer as the foreman (p115). He was in charge of safety and had the

> authority to stop the work if necessary (p115-p116). Schwimmer was at the job site at least three times a day (p117).

After this EBT, plaintiff's attorney served a notice to take Mr. Schwimmer's deposition, but he has not been produced.

Plaintiff testified at his April 2018 EBT that he was employed by Real Plumbing and Heating, Corp., owned by Ravi Rattan. He had been working for this company for three months. This was his sixth day at this job site. Before this job, he had worked for a different plumbing company for about a year and a half. He learned plumbing at a school in Trinidad, which is where he grew up. He testified that his company had been hired to completely replace all of the plumbing in the building, which was vacant. He said that on the date of his accident, there were also workers who were installing framing for the walls, there were electricians, workers doing demolition and workers who were working on the windows. He did not know the names of any of the sub-contractors. He testified that the workers who were removing the windows had not been there during the prior week and had arrived for the first time that Monday morning, at least since he started working there six days earlier [Pages 33-34]. His supervisor was named Wayne, and he had not worked for him before this project at 903 Saint John [Page 37]. He testified that he thought "Mendy" was the building owner, and that most of the jobs he had worked on for Real Plumbing had been for Mendy's projects [Page 38]. On the day of his accident, Wayne assigned him four or five "helpers." They first sorted a delivery of plumbing equipment before starting the work. He testified that at around 11:00 a.m., he went down to the basement with Wayne and a "helper," discussed the connection of the waste lines and the

leaders/gutters (for rain water) to the sewer line, then walked outside of the building with Wayne to the trench where the sewer line was. The helper had dug the trench the prior week. Wayne then left. Plaintiff heard a lot of noise coming from above and saw some debris fall from above, so he testified that he went upstairs to the top floor to tell the workers who were removing the windows that he and his helpers were working in the courtyard [Pages 74-76]. He went back downstairs and started his work in the courtyard. The helper came back and forth from the basement, which was on the same level as the courtyard, with pipes and elbows and other items plaintiff needed, sometimes cutting them to plaintiff's specifications while inside the basement, where he had power tools. Less than ten minutes after he came outside, plaintiff was hit by the bricks. They hit him on his neck and his back. There were three of them, reddish in color. At the moment of the accident, plaintiff was alone in the courtyard, standing in the trench and waiting for his helper to bring him something. He was looking down and connecting an elbow to a pipe. The bricks knocked him over, into the pile of dirt that had been removed from the area where the trench was. At the time the bricks fell on him, he testified that he was about one foot from the building wall, in front of the door to the basement [Pages 65-66]. They fell from the top floor. Nobody had yelled "look out," but there was so much construction noise, he probably would not have heard it. His helper came out, and called Wayne, who also came out into the courtyard. Wayne called someone else, and his helper assisted him to the sidewalk. He called a friend who took him home. He assumed he could "sleep it off" and come back to work the next day. But he was in so much pain he could not sleep and went to Kings County Hospital at 1:00 a.m. [Page 92]. The doctor's note, entered on December

22, 2015 at 6:00 a.m., states "pt states a coworker accidentally dropped 3 bricks from the 3rd floor that hit him in the back yesterday; pt c/o [complains of] upper back pain."

Defendant 903 Saint John's Opposition to Plaintiff's Motion

First, defendant argues that the motion is premature, as discovery is incomplete. That is not something the court can seriously consider, as any remaining "discovery" is in defendant's possession and control. Mr. Lichtman is the principal of all of the defendant entities other than Citiwide, which is in default.

Next, defendant claims there are so many issues of fact that summary judgment cannot be granted. Defendant disputes there was an accident at all, and provides an affidavit (E-file Doc 222) from Mendy Schwimmer, who has not been deposed, which states that he would have known if there was an accident, and as he doesn't know about it, there could not have been an accident. He then says, with regard to the crew that was removing the old windows, "For jobs I completed with Ms. Lan of L & Y Glass Window Inc., we either performed window related demolition work the same day or the day prior to the installation, never earlier." Here, plaintiff's accident took place on December 21, 2015, a Monday, and the windows were delivered on Wednesday, December 23, 2015, according to the paperwork defendant provides. Defendants attorney alleges that there is thus an issue of fact whether any workers were removing the windows on December 21, 2015.

Next, defendant claims there was no plumbing work to be done in an airshaft, so plaintiff could not have been working on his assigned tasks at the time of his accident. This is a misunderstanding. Plaintiff was in the courtyard/backyard behind the building.

These buildings, a line of rowhouses, instead of being flat across their rear wall, had angled corners on the sides of each building, to permit the installation of windows at angles to allow the entry of more light. There was no "airshaft."

Next, defendant claims that there is an issue of fact whether it was foreseeable "that bricks would fall such that safety devices were required." This is not a correct analysis of the law at issue, Labor Law 240(1), does not require foreseeability. This is discussed further in the analysis below.

Defendant's counsel next claims that plaintiff has not established that the accident took place as he described it, as some of his medical records say conflicting things about the accident, including one which says that he fell three stories down, and one which says there were seven bricks, so "Plaintiff is, at best, uncertain how the accident occurred and whether he fell, if bricks were dislodged from a wall, or if bricks were dropped."

Finally, defendant claims that it has not been established that plaintiff was working for Real Plumbing & Heating, Corp. at the time of his accident. Mr. Schwimmer avers (Doc 222) that the plumbing contractor was Real Plumbing & Heating. He does not dispute that plaintiff was working for Real Plumbing in his affidavit, or that plaintiff was at the job site. The owner of Real Plumbing & Heating, Inc., Mr. Rattan, contested plaintiff's worker's compensation claim, and said he did not work for him. Worker's Compensation did not believe Mr. Rattan and awarded plaintiff benefits. The decision affirming the agency's decision is E-File Doc 161. Defendant now argues that this finding is not binding on it, as 903 Saint John did not participate in the hearing. Defendant provides an EBT

transcript of Mr. Rattan (E-File Doc 220). He testified pursuant to a subpoena on October 25, 2018, two years after plaintiff's worker's compensation appeal was decided in his favor, and almost three years after the plaintiff's accident. He said plaintiff was not his employee, but was a friend of Dexter Baptiste, one of his employees, who quit working for him at some point after the plaintiff's accident and started his own plumbing company. He could not provide Dexter's address or phone number. He said Mendy Schwimmer hired him, but he could not remember which company he signed the contract with. He did not know which entity Mendy worked for. He could not name any of the subcontractors at the job. He said his company was hired to do a completely new plumbing installation, which included the kitchens and baths for the twelve apartments, plus all the water and waste lines, hot water heaters and the sewer lines. He had four to five workers on the job site each day. He named four [Page 16]. He said he was told about the accident on the date that it happened. He was told 3-4 bricks fell on plaintiff from the top floor, but he was able to walk and there was no blood. He said they were the only plumbing contractor at the job site. He did not know who Citiwide is, which was the company that was granted the plumbing permit.

Discussion

Summary Judgment

CPLR 3212(a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made." The Court of Appeals made clear in *Brill v City of New York*, 2 NY3d 648, 652 [2004] that a court may not permit such motions if untimely

absent a satisfactory, rather than non-existent or perfunctory, explanation for the untimeliness. It is undisputed that here a note of issue was filed on May 11, 2018 and that, per Kings County UCTR Rule C, 6, "motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue" and that "the above time limitation may only be extended by the Court upon good cause shown." The parties are correct, however, that there was significant discovery outstanding at the time when the note of issue was filed (and sixty days thereafter). As such, the Court finds that good cause for the delay in moving has been shown and will consider the merits of the motion (*see Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740, 741 [2d Dept 2012]); *Sclafani v Washington Mut.*, 36 AD3d 682 [2d Dept 2007]). Further, the court made this finding in the consolidation order, which granted plaintiff leave to make this motion, as discussed above.

It is well settled that "the 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also, *Smalls v AJI Industries. Inc*., 10 NY3d 733, 735 [2008]). 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 NY2d 557 [1980]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc*., 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth*., 294 AD2d 348, 348 [2d Dept 2002]). Here, the court finds that plaintiff has made a prima facie case for summary judgment on both Labor Law 240(1) and 241(6), but that defendant 903 Saint John has overcome plaintiff's prima facie case and raised issues of fact which require a jury to decide.

Labor Law 240(1)

With respect plaintiff's Labor Law § 240 (1) cause of action, that section imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[1] For a

[1] As is relevant here, Labor Law § 240 (1) provides that,

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663).

Here, case law indicates that the absence of netting to prevent falling debris while removing windows is a violation of Labor Law 240(1). In *Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014], plaintiff was working on the ground level, just outside the north side of the subject building under construction, when he was suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices. The defendants' witnesses further established their liability by confirming that the brick fell out of the hands of a masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north side's exterior. The lack of overhead protective devices was found to be a proximate cause of plaintiff's injuries under any of the conflicting accounts and plaintiff's comparative

negligence, if any, is not a defense to a Labor Law § 240 (1) claim [internal citations omitted]. See also (*Hewitt v NY 70th St. LLC*, ___AD3d___, 2020 NY Slip Op 05853 [2020]; *Garcia v SMJ 210 W. 18 LLC*, 178 AD3d 473 [1st Dept 2019]; *Sarata v Metro. Transp. Auth.*, 134 AD3d 1089 [2d Dept 2015].

The court finds that the evidence defendant has submitted is largely speculative testimony. However, the EBT testimony of Mr. Rattan creates an issue of fact as to whether plaintiff was a covered worker or was just visiting his friend at the job site. For this reason, and not the other ostensible issues of fact defendant raises, the motion must be denied. For example, Mr. Schwimmer cannot make a statement about what he "usually" does to deny that there was window removal work taking place at the time of plaintiff's accident. He is basically saying that there could not have been window work on this Monday, as they would not have taken out the windows until Tuesday if the new windows were coming on Wednesday. The court takes judicial notice that the day after the windows were delivered was Christmas Eve. It is a reasonable inference that the workers would want all of the windows installed, so the interior of the building would be protected from rain and snow in time to take their holiday break. Perhaps the window company had promised to deliver the windows on Tuesday, but they did not come until Wednesday. Perhaps Mr. Schwimmer didn't go to the job site on Monday, December 21, 2015 because it was his birthday, or maybe he had a cold. The court cannot base its decision on speculation, or on Mr. Schwimmer's general practices. His affidavit, dated November 6, 2019, was signed four years after the date of the accident. Mr. Lichtman could not identify the name of any of the sub-contractors, and he did not know where he had the records for

this job. Mr. Schwimmer's affidavit cannot raise an issue of fact as to whether plaintiff was actually working or whether the workers were removing windows, as he makes his statements without any records to support them. He also says at Paragraph 4: "During this renovation, I was on site nearly every day overseeing the operations." This is why job foremen keep records of who is at work on a site on a daily basis.

Labor Law § 241(6)

Labor Law § 241(6) provides, in pertinent part, that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents, to comply with the specific safety rules set forth in the Industrial Code (*see Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable, given the circumstances of the accident, and which sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.*, at 502; *Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]).

Plaintiff has narrowed his arguments down to one subsection, NYCRR section 23-1-7(a)(1). As he has abandoned his arguments based on the others, the Court need not address them. Plaintiff makes a prima facie case with regard to this claim, however, as

discussed above, defendant raises an issue of fact as to whether plaintiff was a covered worker on the job site, which prevents the court from granting him summary judgment on the plaintiff's Labor Law § 241(6).

Conclusions of Law

Accordingly, it is

ORDERED that the branch of plaintiff's motion for an extension of time to file a motion for summary judgment is granted and the instant motion is deemed timely, and, on the merits, plaintiff's motion for summary judgment is denied in its entirety.

The foregoing constitutes the decision, order and judgment of the court.

ENTER:

Hon. Debra Silber, J.S.C.