Zaborski v MB Lorimer LLC
2021 NY Slip Op 30582(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 504273/17
Judge: Debra Silber
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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 March, 2021.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

ROBERT ZABORSKI,

Plaintiff,

- against -

MB LORIMER LLC and
CORNERSTONE BUILDERS NY LLC,

Defendants.

- X

CORNERSTONE BUILDERS NY LLC,

Third-Party Plaintiff,

-against-

NEW YORK BUILDER OF STAIRS,

Third-Party Defendant.

- X

DECISION/ORDER

Index No. 504273/17

Motion Sequence Nos. 3, 4

The following e-filed papers read herein:	NYSCEF Doc. Nos.	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	58-70,	75-76
Opposing Affidavits (Affirmations)	74, 76,	77
Reply Affidavits (Affirmations)	77, 78,	76, 79-80

Upon the foregoing papers, plaintiff Robert Zaborski (plaintiff or Mr. Zaborski) moves (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3212, granting

him partial summary judgment against defendant Cornerstone Builders NY LLC (Cornerstone) on the issue of liability pursuant to Labor Law § 240 (1). Third-party defendant New York Builders of Stairs, Inc. (NY Builders or NYBS) cross-moves (in mot. seq. four) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.

Background

Mr. Zaborski commenced the instant action by electronically filing a summons and verified complaint with this court on March 3, 2017. Plaintiff alleges therein that on July 18, 2016, he was in a construction/renovation accident at the premises known as 163 Middleton Street in Brooklyn. Specifically, plaintiff (a NY Builders' employee) claims that he was injured while assembling an interior wooden curved/spiral staircase in a residential building under construction. He maintains that a clamp, used to keep steps and risers in place, fell and struck him, causing injuries. Cornerstone later interposed an answer and impleaded NY Builders.

Plaintiff argues that defendants, *inter alia*, violated Labor Law § 240 (1) and § 241 (6), as well as certain applicable provisions of the Industrial Code (12 NYCRR ch 1, subch A.) by allowing the clamp to fall. Plaintiff also maintains that the Labor Law and Industrial Code violations proximately caused his injuries. Plaintiff further asserts that defendants MB Lorimer LLC (against which a December 7, 2017 default judgment order was issued [*see* NYSCEF Doc No. 21]) and Cornerstone were, respectively, the owner of the subject premises and the general contractor hired by the owner to construct the building. Plaintiff reasons that defendants are vicariously liable for the Labor Law violations without regard to

fault or responsibility. Lastly, plaintiff argues that he was on a construction site performing construction work[1] and, as such, was a covered worker, and he seeks damages against defendants for his injuries.

Discovery ensued, and on February 14, 2020, plaintiff filed a note of issue and certificate of readiness, with a trial by jury demand (*see* NYSCEF Doc No. 56), certifying that discovery is complete and that this matter is ready for trial. The instant summary judgment motions followed.

Plaintiff's Arguments Supporting His Partial Summary Judgment Motion

Mr. Zaborski, in support of his motion, contends that Cornerstone, being a "contractor," as that term is used in Labor Law § 240 (1) and interpreted by the courts of this state, is subject to liability, pursuant to Labor Law § 240 (1), for elevation-related construction accidents without regard to fault or responsibility. He points out that the statute places a non-delegable duty on owners and contractors to provide "proper" protection against elevation-related risks on construction sites.

Plaintiff states that, immediately before the accident, he was standing on a plywood platform that covered a stairwell opening. He was assisting a coworker who, while standing on a ladder, was installing steps and risers to complete the stairs from the second to the third floors of the building under construction. Plaintiff claims that he was standing below the coworker, in front of the ladder, and was lifting and handing tools and materials to his coworker.

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

Plaintiff alleges that, when he bent down to pick up a drill to hand to his coworker, a stair clamp (presumably some form of a c clamp) which were used to secure the steps and risers in place during the construction of the stairs, somehow fell approximately six feet and struck him on the head. He testified at his EBT that he lost consciousness and woke up in a pool of blood. Plaintiff argues that an accident involving a falling object at a construction site implicates Labor Law § 240 (1), and reiterates that the statute places a non-delegable duty to protect workers from the risk of being struck and injured by a falling object on the property owners and general contractors (such as defendants herein). Mr. Zaborski claims that Cornerstone's failure to keep the subject clamp properly secured, and/or the failure to furnish plaintiff with personal protective equipment to protect him from falling objects (such as a hard hat) or devices that would prevent a fall (such as a net) constitute violations of Labor Law § 240 (1).

Plaintiff claims that the facts establish that the Labor Law § 240 (1) violations were the proximate cause of his injuries and that he was a "protected" worker performing "protected tasks" (*see* n 1, *supra*) within the scope of the statute. Lastly, plaintiff maintains that there is no serious dispute as to whether Cornerstone is a general contractor subject to absolute vicarious liability pursuant to the statute. For these reasons, Mr. Zaborski concludes that he has established prima facie entitlement to judgment as a matter of law against Cornerstone, and, therefore, his partial summary judgment motion, pursuant to Labor Law § 240 (1), on the issue of liability against Cornerstone should be granted.

Cornerstone's Arguments Opposing Plaintiff's Motion

Cornerstone, in opposition to Mr. Zaborski's motion, first argues that plaintiff has not demonstrated a Labor Law § 240 (1) violation because plaintiff has failed to identify any relevant safety devices. Cornerstone claims that a plaintiff who alleges the existence of a Labor Law § 240 (1) violation based on a falling object must demonstrate that the object required securing for the purposes of the undertaking and that, here, plaintiff has failed to demonstrate this.

More specifically, Cornerstone argues that Mr. Zaborski must specify what safety device either failed or was absent in order to support his Labor Law § 240 (1) claim. Cornerstone notes that, to the extent Mr. Zaborski claims that defendants were required to install safety nets in the subject stairwell, the NYBS deposition witness testified that it would have been impossible to install nets in the area where plaintiff was working. Moreover, Cornerstone adds that the NYBS deposition witness contradicted Mr. Zaborski's testimony about the availability of hard hats and instructions to wear them. Also, Cornerstone claims that there is a significant difference between Mr. Zaborski's description of the fall, in which he says the subject clamp fell six feet, and other deposition witnesses who stated Mr. Zaborski was working approximately two feet below the clamp. Cornerstone contends that these are material factual issues, which preclude summary judgment. Accordingly, Cornerstone concludes that Mr. Zaborski's motion should be denied.

NY Builders' Arguments Supporting Its Summary Judgment Cross Motion and Opposing Mr. Zaborski's Motion

NY Builders, in opposition to plaintiff's motion, and in support of its motion for summary judgment dismissing Mr. Zaborski's Labor Law § 240 (1) and § 241 (6) claims, first asserts that plaintiff's Labor Law § 240 (1) claim lacks merit. NY Builders maintains that the goal of Labor Law § 240 (1) is to provide exceptional protection for workers against the special hazards which stem from a work site that is either elevated or positioned below the level where materials are hoisted or secured. However, NY Builders continues, 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). NY Builders asserts that liability exists only where the alleged accident is a product of both a hazard contemplated in § 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. Here, though, NY Builders claims, the subject work precluded the use of devices such as safety nets. Specifically, NY Builders continues, its deposition witnesses testified that a safety net would have prevented workers from accessing the relevant areas of the stairway under construction. NY Builders also suggests that Labor Law § 240 (1) only applies to falling objects that were hoisted or secured at relevant times, and, here, it adds, the subject clamp was not being hoisted or secured before the accident. For these reasons, NY Builders states that Labor Law § 240 (1) does not apply to the instant facts.

Alternatively, NY Builders alleges that Mr. Zaborski was the sole proximate cause of his injury. Specifically, NY Builders asserts that any failure on Cornerstone's part to provide protection from such an elevation-related risk was not a proximate cause of the

accident. To the contrary, NY Builders continues, Mr. Zaborski's own actions are the sole proximate cause of the accident, and there is thus no liability. Here, notes NY Builders, Mr. Zaborski was not wearing a hard hat at the time of the accident despite standard protocols requiring him to do so. NY Builders acknowledges that Mr. Zaborski claimed to not know whether it was safe or not to perform his work without a hard hat; however, NY Builders' deposition witness testified that all employees are, when hired, given personal protective equipment (including a hard hat, gloves and face mask) and instructions to always use them. Indeed, NY Builders continues, its witness testified that before the subject accident the use of hard hats was discussed at safety meetings with employees. NY Builders adds that its witness recalled telling Mr. Zaborski to wear a hard hat during installations, approximately three to four months before the accident. Additionally, NY Builders points out that Cornerstone's deposition witness stated that the use of hard hat was required at the premises, and that if he observed any worker on site not wearing a hard hat, the worker would be asked to obtain a hard hat or leave. Also, NY Builders claims that Mr. Zaborski was improperly not paying attention to the work being performed above him before the accident.

Lastly, NY Builders argues that Labor Law § 240 (1) does not apply to the instant matter because any height differential between plaintiff and the object that fell on him was *de minimis*. NY Builders points out that although plaintiff approximated that the clamp fell a distance of one and a half meters, its deposition witness testified that the clamp was within touching distance from plaintiff, approximately 2 feet above plaintiff's head, when it fell. NY Builders notes that appellate authority stands for the proposition that objects that are

within reach of the injured worker, but later fall, do not trigger Labor Law § 240 (1). NY Builders concludes that for this third reason, Labor Law § 240 (1) does not apply here, and plaintiff's claims thereunder should be dismissed. Alternatively, NY Builders alleges that the record indicates several material factual issues that preclude awarding Mr. Zaborski summary judgment.

With respect to Labor Law § 241 (6), NY Builders asserts that for an owner, contractor or agent to be liable under Labor Law § 241 (6), a plaintiff is required to establish a breach of an Industrial Code rule or regulation which gives a specific, positive command. NY Builders further argues that, even if the worker alleges the breach of such a specific Industrial Code rule, the Labor Law § 241 (6) claim is unsustainable if the identified rule is inapplicable to the facts of the case. Here, NY Builders continues, Mr. Zaborski alleges violations of Industrial Code §§ 23-1.7, 23-1.8, 23-1.18, 23-1.30, 23-1.32, 23-1.33 and 23-2.1. NY Builders claims that perusing these sections demonstrates that the provisions therein are either not sufficiently specific to support a Labor Law § 241 (6) claim or are inapplicable to the instant facts. Accordingly, concludes NY Builders, the Labor Law § 241 (6) claim should be dismissed based on plaintiff's failure to identify an applicable and sufficiently specific Industrial Code provision. For these reasons, NY Builders argues its cross motion should be granted and plaintiff's motion denied.

Plaintiff's Arguments Opposing NY Builders' Cross Motion

Mr. Zaborski, in opposition to NY Builders' cross motion, first argues that the cross motion is untimely and should thus not be considered. Alternatively, he continues, to the extent that appellate authority permits entertaining an ostensibly untimely summary judgment cross motion because the issues raised therein are nearly identical to those raised by plaintiff's pending summary judgment motion, consideration should thus be limited to only those issues previously raised - to wit, summary judgment as to Labor Law § 240 (1).

Next, and again alternatively, Mr. Zaborski claims that the record establishes his entitlement to judgment as a matter of law regarding Labor Law § 240 (1). He reiterates that the stair clamp fell approximately six feet and struck him, and that the clamp was not properly secured or it wouldn't have fallen Thus, he reasons that Cornerstone failed in fulfilling its non-delegable duty to provide safety equipment to prevent the subject clamp from falling and thereby committed a Labor Law § 240 (1) violation.

Mr. Zaborski also characterizes Cornerstone and NY Builders' opposition arguments as dependent on hearsay statements. More specifically, NY Builders' deposition witness testified that he was off-site when the accident happened and then received a call from plaintiff's coworker indicating that a clamp fell on plaintiff's head. Any other statement about the accident, plaintiff continues (such as plaintiff's alleged inattention), should be disregarded, irrespective of whether such statements are attributed to plaintiff's coworker, as hearsay. Indeed, Mr. Zaborski adds, if Cornerstone or NY Builders wanted to rely on statements of plaintiff's coworker, they could have deposed the coworker and would then

have sworn statements from him. Absent that, Mr. Zaborski concludes, Cornerstone and NY Builders' arguments, premised on hearsay statements, should be ignored.

Additionally, plaintiff claims that the distance that the clamp fell - from a height of approximately six feet - is not *de minimis*. Instead, he asserts that the relevant inquiry is whether the falling object is capable of generating significant force even over a relatively short descent. Mr. Zaborski notes that relatively recent appellate authority instructs trial courts addressing falls under Labor Law § 240 (1) to consider the combination of gravity coupled with the object's injury-producing potential, instead of just a height threshold. Moreover, as Mr. Zaborski adds, given that the clamp was required to be secured for the purposes of the performed work, there is no merit to suggesting that the failure to wear a hard hat was the "sole" proximate cause of the accident. Consequently, Mr. Zaborski claims that he is entitled to summary judgment as to Labor Law § 240 (1), notwithstanding these opposition arguments.

Lastly, plaintiff asserts that his Labor Law § 241 (6) claim should not be dismissed as it is sustainable based on Industrial Code § 23-1.30, which imposes minimum illumination requirements. He highlights that this section contains a positive, specific command, and that NY Builders offers no evidence that the minimum illumination requirements set forth in the section were met. Accordingly, Mr. Zaborski contends that the cross motion should be denied on this additional ground. In sum, he concludes that his summary judgment motion should be granted, and the cross motion should be denied.

Discussion

Summary Judgment Standard

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], citing *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 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]; *Pierre-Louis v*

DeLonghi America, Inc., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *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]).

Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman,* 3 NY2d at 404`[internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).[2]

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[2] With respect to the argument that the cross motion is untimely, the court finds that "good cause" (CPLR 3212 [f]) exists for an erstwhile untimely cross motion for summary judgment.

Labor Law § 241 (6)

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 non-delegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto* v *L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501-502 [1993]; *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]). "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

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Specifically, the court notes that the December 11, 2019 discovery order (*see* NYSCEF Doc No. 51 resolving mot. seq. two) contemplated significant post-note of issue discovery. Alternatively, an executive order issued in connection with the Coronavirus Pandemic tolled motion filing deadlines until November of 2020, and the cross motion, filed on October 8, 2020, is thus timely.

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]). A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d at 351).

Here, plaintiff's Labor Law § 241 (6) claim lacks merit and must be dismissed. NY Builders has successfully demonstrated that the Industrial Code provisions cited by plaintiff are inapplicable to the instant facts, lack a specific command, or both. In opposition to NY Builder's argument, plaintiff claims that the record demonstrates an issue of fact as to Industrial Code § 23-1.30, which specifies that "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work . . . ." Plaintiff asserts that NY Builders has not demonstrated compliance with this Industrial Code provision. However, the record contains no indication that a lack of illumination contributed to the subject accident. Indeed, plaintiff testified at his deposition that he had no difficulty observing his work, and there is nothing in the record suggesting that plaintiff's coworkers had any difficulty seeing the subject clamp or other materials. Accordingly, Industrial Code § 23-1.30's illumination requirement is either inapplicable to the instant facts, or, if the light was

inadequate and the provision was violated, the violation did not proximately cause the subject accident. The absence of a violation of an applicable Industrial Code provision containing a positive command where such violation proximately caused the accident warrants granting NY Builders summary judgment motion to dismiss plaintiff's Labor Law § 241 (6) claim.

Labor Law § 240 (1)

Lastly, the court considers Labor Law § 240 (1), which pertinently states that:

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

The purpose of Labor Law § 240 (1) is to protect 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,* 81 NY2d at 501). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow 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 the required "proper protection" against elevation-related risks is non-delegable. Therefore, owners, contractors and their agents are liable for 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"]).

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). One of the hazards contemplated by the statute is the risk that a worker will be injured by an object falling from a height (*see e.g. Thompson v Ludovico*, 246 AD2d 642, 642-643 [1998]; *see also White v Dorose Holding*, 216 AD2d 290 [1995]; *Lanzilotta v Lizby Assocs.*, 216 AD2d 229 [1995]; *Rocovich,* 78 NY2d at 514). To recover in a "falling object" case, a plaintiff must show that the object was either being "hoisted or secured" or "required securing for the purposes of the undertaking" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] and *Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also demonstrate 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). Lastly, this statute "is to be construed as liberally as may be" to protect workers from

injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

However, "not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Novak v Del Savio*), 64 AD3d 636, 638 [2d Dept 2009]). In fact, whether or not a particular object requires securing depends on "the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268 [1st Dept 2007]). The injured worker must show more than simply that an object fell causing injury. A plaintiff must show 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).

Cornerstone and NY Builders' arguments against plaintiff's Labor Law § 240 (1) claim lack merit. First, contrary to their contentions, plaintiff has identified a safety device (specifically, netting)[3] that would have prevented the falling object from striking his head. Moreover, given the risk of the subject clamp falling and striking a worker, plaintiff has shown that the object "required securing for the purposes of the undertaking" (*Fabrizi*, 22 NY3d at 662-663).[4] Mr. Zaborski was a protected worker performing a protected task, and,

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[3] The testimony of witnesses suggesting that the work could not have been completed if safety nets were in place creates, at best, an issue of fact as to Labor Law § 240 (1).

[4] Contrary to NY Builders' arguments, in falling object cases, Labor Law § 240 (1) does not only apply to objects being hoisted or secured (*see Outar v City of New York*, 5 NY3d 731 [fall of

therefore, if the object required securing for the purposes of the undertaking, the violation is established.

Lastly, there is no merit to the contention that plaintiff was the "sole" proximate cause of his injuries. To be sure, if an injured worker's foolish conduct was the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach (*see Tomlins v DiLuna,* 84 AD3d 1064, 1065 [2011]; *Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 642 [2009]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2009]). However, where a violation of Labor Law § 240 (1) is a proximate cause of an accident, the injured worker's conduct, of necessity, cannot be deemed the sole proximate cause (*see Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 290 [2003]; *Triola v City of New York*, 62 AD3d 984, 986 [2009]). Conversely, if the injured worker is solely to blame for the injury, it necessarily means that there has been no statutory violation (*see Blake*, 1 NY3d at 290). Where, as here, no safety devices were provided to prevent or arrest the subject falling object, plaintiff's conduct cannot be the "sole" proximate cause of his injuries (*see e.g. Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009] citing *Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Hagins v State of New York*, 81 NY2d 921, 922-923 [1993]; *Stolt v General Foods Corp.*, 81 NY2d 918 [1993]; *DeRose v Bloomingdale's Inc.*,

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unsecured dolly implicates § 240 [1]; *see also Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017] ["'[F]alling object" liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured"]).

120 AD3d 41 [1st Dept 2014]).[5] Thus, this branch of NY Builders' cross motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim merits denial.

However, issues of fact permeate the record and preclude awarding partial summary judgment to Mr. Zaborski against Cornerstone on the issue of liability pursuant to Labor Law § 240 (1). One example is the discrepancies with regard to the descriptions of how far the clamp fell before hitting plaintiff. Plaintiff avers it was approximately one and a half meters, and other parties note that the top of plaintiff's head could not have been more than two feet below the subject clamp. This presents an issue of credibility, which may not be resolved summarily. Similarly, since "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]), if the trier of fact believes the sworn witness statement that safety netting or other securing devices would not have been feasible considering the work being performed, there would thus be no Labor Law § 240 (1) violation. This also presents an issue of credibility.

"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, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.* , 477 US 242, 255 [1986]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["[i]t is not the court's function on a

[5] The record contains conflicting sworn statements about the availability of hard hats on site. A hard hat would not have prevented the subject clamp from falling, and thus would not constitute an "adequate" safety device as set forth in Labor Law § 240 (1). Assuming that the trier of fact concludes that plaintiff refused to wear an available hard hat, plaintiff's failure to do so would constitute comparative negligence, which is not a defense to a Labor Law § 240 (1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993]).

motion for summary judgment to assess credibility"]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). "The credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts" (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [2d Dept 1976]). For these reasons, the court will not find that, as a matter of law, plaintiff was not provided with adequate safety devices. Hence, plaintiff's partial summary judgment motion against defendants on the issue of Labor Law § 240 (1) liability must be denied. Accordingly, it is

ORDERED that Mr. Zaborski's partial summary judgment motion against defendant/third-party plaintiff Cornerstone on the issue of liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that third-party defendant NY Builder's cross motion for summary judgment is granted solely to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed, and is otherwise denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.