At an IAS Term, Part 70 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 12th day of July, 2021.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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GAD WILLIAMS,

Plaintiff,

-against-

Index No.: 504461/18

Motion Seq 3, 4, 6

1825 PARK AVENUE PROPERTY INVESTORS III, LLC, CUSHMAN & WAKEFIELD, INC. and SAVANNA SERVICES HOLDINGS, LLC,

Defendants.

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1825 PARK AVENUE PROPERTY INVESTORS III, LLC, and SAVANNA SERVICES HOLDINGS, LLC,

Third-Party Plaintiffs,

-against-

SUMMIT INTERIORS, INC.,

Third-Party Defendant.

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1825 PARK AVENUE PROPERTY INVESTORS III, LLC, and SAVANNA SERVICES HOLDINGS, LLC,

Second Third-Party Plaintiffs,

-against-

POLARIS CONSTRUCTION GROUP, INC.,

Second Third-Party Defendant.
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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	68-69, 79, 89-90, 141-143
Opposing Affidavits (Affirmations)	125-127, 151-152, 153
Affidavits/ Affirmations in Reply	161, 162-164
Other Papers:	

Upon the foregoing papers, plaintiff Gad Williams moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law § 240(1) cause of action against defendants 1825 Park Avenue Property Investors III, LLC (1825 Park) and Savanna Services Holdings Inc. (Savanna) (collectively referred to as Owner Defendants) (motion sequence 003).[1] The Owner Defendants cross-move for an order: (1) pursuant to CPLR 3212(f), denying plaintiff's motion as premature given the existence of ongoing discovery; and (2) pursuant to CPLR 2004, extending the Owner Defendants' time to move for summary judgment as against second third-party defendant Polaris Construction Group, Inc. (motion sequence 004).

[1] The court notes that the third-party action and the second third-party action have been discontinued by stipulations of discontinuance (*see Gonzalez v United Parcel Serv.*, 272 AD2d 129, 129-130 [1st Dept 2000]; *Hoag v Chase Pitkin Home & Garden Ctr.*, 252 AD2d 953, 953-954 [4th Dept 1998]). There is also a purported stipulation discontinuing the action as against defendant Cushman & Wakefield, Inc. However, this stipulation relating to Cushman & Wakefield, Inc. appears to be facially defective as it was not signed by the attorneys for 1825 Park and Savanna (*see Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012]; CPLR 3217 [a] [2]). Nevertheless, the court will make no determination with respect to the Cushman & Wakefield Inc. stipulation at this time as 1825 Park and Savanna have not addressed the effectiveness of the stipulation in their papers before the court.

The Owner Defendants also cross-move for an order, pursuant to CPLR 3212, dismissing plaintiff's Labor Law § 240(1) cause of action (motion sequence 006).

Plaintiff's motion (motion sequence 003) and the Owner Defendants' cross-motions (motion sequences 004 and 006) are hereby denied.

In view of the stipulations discontinuing the third-party and second third-party actions, the caption is amended to read as follows:

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GAD WILLIAMS,

Plaintiff,

-against- Index No.: 504461/18

1825 PARK AVENUE PROPERTY INVESTORS III, LLC, CUSHMAN & WAKEFIELD, INC. and SAVANNA SERVICES HOLDINGS, LLC,

Defendants.
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BACKGROUND

Plaintiff alleges that he suffered injuries on or about February 22, 2018, when a roll-up gate shaft he was cutting fell and struck the ladder on which he was standing, causing him to fall to the ground. This accident happened during the demolition/renovation of a retail shop area of a building owned by 1825 Park. Savanna, acting as 1825 Park's agent, hired third-party defendant Summit Interiors, Inc., (Summit) to demolish and reconstruct the storefront at issue. Second third-party defendant Polaris Construction Group, Inc., (Polaris) was a company related to Summit that provided labor

or supervision for Summit's projects, and with respect to the instant project, employed Earl Dowers, who served as project superintendent. Plaintiff was employed by Summit as a general laborer.

On the date of the subject accident, plaintiff was working as part of a crew whose job involved the removal of two roll-up gates. Plaintiff and his coworkers initially cut off and removed the subject gate from the gate shaft. According to plaintiff's deposition testimony, in order to remove the seven to eight foot tall shaft, which weighed 100 to 200 pounds, plaintiff climbed up to the fourth or fifth step of an eight-foot tall A-frame ladder and used a Sawzall to cut the shaft in half. After he had cut one of the shaft halves from the shaft supports and let it drop to the ground, plaintiff intended to do the same with the other half of the shaft. However, as he started to cut the remaining half of the shaft from the support, it broke loose from the support, struck the bottom of the ladder on which plaintiff was standing, and caused both the ladder and plaintiff to fall to the ground.

Earl Dowers, who was acting as project superintendent for the work at issue, stated, in his deposition testimony and affidavit, that he had directed plaintiff to use a chain that had been removed from the gate to secure the shaft while it was being cut. In his affidavit, Dowers further asserted that the chain was long enough to secure the shaft. Dowers also stated that he had directed plaintiff to use a scaffold that was present at the worksite rather than a ladder. Plaintiff, in his testimony, conceded that the chain was available, and that there was a beam over which it could have been strung to secure the shaft; however, plaintiff asserts that the chain was too short to do so. Plaintiff also conceded that there were scaffolds onsite but asserts that they were not set up at the right

height for the work plaintiff was performing, and that there was no time to adjust the height of the scaffold because Dowers wanted him to finish the work promptly. In contrast to Dowers' assertions, plaintiff states that it was Dowers who told him to cut the shaft in half and to let it drop to the ground, and although Dowers was not present when the accident happened, Dowers was present when he was performing work while standing on the ladder and when he cut and let drop the first half of the shaft. Affidavits submitted by plaintiff, a coworker and a Summit supervisor, who were each present during the work at issue, largely support plaintiff's version of events.

DISCUSSION

Labor Law § 240(1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from elevation related risks proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Carlton v City of New York*, 161 AD3d 930 [2d Dept 2018]). Here, there is no dispute that 1825 Park, as owner, and Savanna, as 1825 Park's agent in contracting for the work, may be held liable under section 240(1) (*see Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018]), that plaintiff's demolition work was of the kind of work covered under section 240 (1) (*Llamas v Chen*, 2021 NY Slip Op. 03580 [2d Dept 2021]; *see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-883 [2003]), or that plaintiff's work on the fourth and fifth rungs of the ladder constitutes a sufficient elevation to implicate the protections of section 240(1) (*see Escobar v Savi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]).

Plaintiff's testimony that he fell off the ladder because the ladder moved when it was struck by the beam is sufficient to establish his prima facie entitlement to summary judgment (*see Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-60 [2d Dept 2018]). Here, where it was foreseeable that the shaft could strike the ladder after being dropped and cause the ladder to fall to the ground, the ladder "'was inadequate in and of itself to protect [the plaintiff] against hazards encountered' in the course of his work, and 'additional safety devices were necessary to satisfy Labor Law § 240 (1)'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Lightfoot v State of New York*, 245 AD2d 488, 489 [2d Dept 1997] [internal quotation marks omitted]).

The Owner Defendants, however, contend that plaintiff's motion should be denied and their own cross-motion granted because plaintiff's actions were the sole proximate cause of the accident. "A defendant has no liability under Labor Law § 240(1) when plaintiffs: (1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices 'were available and that [they were] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had they 'not made that choice'" (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, Dowers' affidavit and deposition testimony that he had directed plaintiff to secure the shaft with the chain and shackle and perform the work from the scaffolds that were present at the work site present factual issues as to whether there were readily available safety devices that would have prevented the accident (*see Valente v Lend Lease (US)*

Constr. LMB, Inc., 29 NY3d 1104, 1105 [2017], *revg* 143 AD3d 625, 625-626 [1st Dept 2016]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712, 713-714 [2d Dept 2017]; *Videan v NRG Energy, Inc.*, 149 AD3d 1533, 1533-1534 [4th Dept 2017]).[2] Dowers' testimony and affidavit are thus sufficient to require denial of plaintiff's motion.

However, plaintiff's testimony that the chain was too short to secure the shaft, that the scaffolds available were set up at the wrong height, and that Dowers' desire to complete the job quickly did not allow time for plaintiff to modify a scaffold to the correct height, present factual issues as to whether these safety devices were readily available (*see Videan*, 149 AD3d at 1533-1534; *Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 712-713 [2d Dept 2013]). In addition, plaintiff's testimony that it was Dowers who told him to cut the shaft in half and let each half drop to the ground, and that Dowers was present while plaintiff was removing the first half of the shaft and raised no objection to plaintiff working from a ladder or performing the work in that manner, presents a factual issue as to whether Dowers approved of, or at least acquiesced in, plaintiff's manner of performing the work (*see Biaca-Neto*, 34 NY3d at 1168; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750-751 [2d Dept 2009]). These factual issues preclude finding that plaintiff was recalcitrant or that his actions were the sole proximate

[2] Contrary to plaintiff's contention, this court does not equate the need to adjust the scaffold height, as testified to by plaintiff, or the direction to use the chain that had been removed from the gate to secure the shaft as equivalent to shifting the burden to plaintiff to create an adequate safety device (*compare Collins v West 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009] *with Valente*, 29 NY3d at 1105, *revg.* 143 AD3d at 625-626; *Plass v Solotoff*, 5 AD3d 365, 367 [2d Dept 2004], *lv denied* 2 NY3d 705 [2004]). *Collins* is readily distinguishable in that the defendants there argued, in effect, that plaintiff should have constructed a scaffold from scratch by using raw materials available on the work site (*Collins*, 63 AD3d at 622).

cause of his accident as a matter of law, and thus require denial of the Owner Defendants' cross-motion to dismiss the Labor Law § 240 (1) cause of action (motion sequence 006).

With respect the Owner Defendants other cross-motion (motion sequence 004), this court's denial of plaintiff's motion renders academic the portion of the Owner Defendants' cross-motion requesting that plaintiff's motion be denied on the ground that there is outstanding discovery. The stipulations discontinuing the second third-party action as against Polaris renders moot the portion of the Owner Defendants' cross motion seeking to extend the time to move for summary judgment as against Polaris.

This constitutes the decision and order of the court.

Accordingly, it is

ORDERED that plaintiff Gad Williams' motion for summary judgment as to liability against defendants 1825 Park Avenue Property Investors III, LLC and Savanna Services Holdings Inc. (motion sequence 003) is hereby denied; and it is further

ORDERED that that defendants 1825 Park Avenue Property Investors III, LLC and Savanna Services Holdings Inc.'s cross-motion to deny plaintiff's motion and extend movants' time to move for summary judgment (motion sequence 004) is hereby denied; and it is further

ORDERED that defendants 1825 Park Avenue Property Investors III, LLC and Savanna Services Holdings Inc.'s cross-motion to dismiss the plaintiff's Labor Law 240(1) claim (motion sequence 006) is hereby denied; and it is further

ORDERED that the caption is amended in light of stipulations discontinuing the third-party and second third-party actions. The amended caption should read as follows:

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GAD WILLIAMS,

Plaintiff,

-against- Index No.: 504461/18

1825 PARK AVENUE PROPERTY INVESTORS III, LLC, CUSHMAN & WAKEFIELD, INC. and SAVANNA SERVICES HOLDINGS, LLC,

Defendants.

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ENTER

J.S.C.

HON. WAVNY TOUSSAINT