At an IAS Term, Part 35 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 4th day of April, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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MARCOS NICHOLAS DELEON PEREZ, a person adjudged to be incompetent by his appointed Guardian, VERA INSTITUTE OF JUSTICE, THE GUARDIANSHIP PROJECT,

Plaintiff,

-against- Index No.: 505066/16

147 GREEN STREET LLC and AIDA BUILDING CO, INC.,

Defendants.

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147 GREEN STREET LLC and AIDA BUILDING CO, INC.,
.

Third-Party Plaintiff,

-against

EASTERN ELEVATOR COMPANY, INC.,

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	109-120
Opposing Affidavits (Affirmations)	124-129,130-135, 137-139
Affidavits/ Affirmations in Reply	140

Plaintiff moves in M.S. 9 for an order pursuant to CPLR 3212, granting him partial summary judgment on the issue of Labor Law § 240 (1) liability against defendant owner 147 Green Street LLC (147 Green).

Background and Procedural History

147 Green was the owner of the subject premises located at 147 Green Street in Brooklyn. 147 Green retained Aida Building Co, Inc. (Aida), to serve as the general contractor for a project that involved the construction of a new five story building with a cellar. 147 Green retained Eastern Elevator Company Inc., (Eastern) to install a passenger elevator at the site. Plaintiff was employed by Eastern as a mechanic involving various aspects of elevator installation. Plaintiff, along with his brother Juan Jose Deleon Perez (Juan) and another employee "Keith", were working at the premises in February 2016 to install the elevator. They had already installed approximately 16-20 rails inside the elevator shaft and had set up the "sling", which would ultimately become the finished elevator cab. The sling frame fit inside the rails and could be moved up and down the shaft using a chain hoist located at the top of the shaft. The sling, consisting of a makeshift plywood floor and metal clamps that served as the platform's safety brakes, was assembled in the basement on or about February 14, 2016.

Juan testified that the workers tested it by attaching the chain hoist to the sling's crosshead beam, raising it up to the first floor, and then setting the brakes. The sling assembly's platform, with the brakes engaged, aligned with the first floor and remained in that position until February 16, 2016. Plaintiff, Juan, and Keith began work at around 8:30 a.m. on February 16th and planned to hoist the elevator's motor, weighing approximately 1,800 pounds, into its overhead position. The motor was on a dolly on the first floor as they wheeled it over to the sling's platform. In order to move the dolly and motor onto the platform, the workers unhooked and moved the chain hoist's chain from the upper crossbar

of the sling's frame. Plaintiff remained on the platform with the motor while Juan went to the second floor to move the hoist's chain to its proper position. Juan testified that he looked down from the shaft above as plaintiff connected the chain to the motor and activated the hoist, causing the chain to begin moving. Juan testified that he then left the elevator shaft and was in the process of replacing the shaft barricade on the second floor when he heard "the noise of, like, a bunch of metals, like a really strong noise. And I saw the chain was just moving around." (NYSCEF doc. no. 113, Juan deposition tr at p. 77, lines 21-24). He looked down the shaft and observed that the platform, the motor, and plaintiff had all fallen down to the bottom of the shaft in the basement or cellar level. He observed that the chain had detached from the motor and the hook between the motor and chain had broken. Juan ran down to the cellar and found plaintiff unconscious and bleeding from the head. Plaintiff was taken by ambulance to Bellevue Hospital where he remained in a medically induced coma for approximately 23 days. He suffered a severe brain injury and was ultimately adjudged incompetent, and a conservator was appointed to protect his interests.

The Legal Standard and Parties' Arguments

Plaintiff moves for an order granting him partial summary judgment on the issue of liability against 147 Green, pursuant to Labor Law § 240 (1).

Labor Law § 240 (1) Standard

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 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 v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). 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 (*see 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]). Accordingly, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501). "In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, 'the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner*, 13 NY3d at 603; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]). The duty to provide the required "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 (*see 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"]; *see Roblero v Bais Ruchel High Sch., Inc*., 175 AD3d 1446, 1447 [2d Dept 2019]). "To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]).

Plaintiff's Position

Plaintiff argues that 147 Green, as the owner of the premises, is strictly liable as his injuries were the result of a Labor Law § 240 (1) violation and that his accident occurred when he was performing work covered under the statute. Specifically, that he was not provided with adequate equipment to ensure that the elevated platform he was working on would not collapse and fall, and further that the sole chain hoist was inadequate to prevent the motor, that was being hoisted, from falling. Plaintiff acknowledges that it cannot be definitively determined if he sustained his injuries as a result of the platform's collapse or from being struck by either the falling motor or the chain hoist's hook. In any event his

injuries were the result of a failure to protect him from the application of the force of gravity during the failed hoisting operation.

In support of his motion, plaintiff submits an affidavit from Michael Sena, who affirms that he has over 34 years of relevant experience in the vertical transportation field, including all aspects of maintenance, service, repair, and consulting for vertical transportation equipment including elevators, escalators, moving walks, lifts, dumbwaiters, and other vertical transportation equipment. Mr. Sena states that he has spent the last 11 years, in the field of accident investigation and reconstruction and code research and interpretation with respect to vertical transportation equipment. Mr. Sena avers that he performed a site inspection of the scene of the accident on April 19, 2016, and took photographs which he attaches to his affirmation. He reviewed Juan's deposition, and the plaintiff's Verified Bill of Particulars. In addition, he consulted the 2015 edition of the Elevator Industry Field Employees' Safety Handbook (the Handbook), which he contends is widely used in the elevator industry.

Mr. Sena opines, to a reasonable degree of mechanical vertical transportation certainty, that plaintiff and the workers at this site were not provided adequate and necessary safety equipment to secure the elevated platform and to protect themselves in the event of a fall. He points out that the unguarded platform, when located at the first-floor level was more than six feet above the bottom of the elevator shaft in the basement. Mr. Sena points to Juan's testimony indicating that prior to plaintiff's accident the platform had been secured by a safety brake from below and the chain hoist attached to the crosshead above, but the elevator's governor assembly had not yet been installed. As such, when

plaintiff unhooked the chain hoist from the crosshead to lift the machine, the only thing holding the elevated platform in place at the first-floor level was the safeties. Mr. Sena opines that "without the completed and operational governor assembly, the safeties were inadequate to hold up the platform, which consequently fell to the bottom of the shaft into the pit" (NYSCEF doc. no.111, Sena aff at ¶14). In support of his opinion, Mr. Sena points to Section 11,1(b) of the Handbook which provides that the governor system (which includes the tension sheave, rope, and safeties) should be installed and tested before the platform is used as a hoisting work surface. He notes that when the governor system is "installed, tested and working properly, the elevator governor's components mechanically prevent an elevator platform from free falling to the bottom of the shaft, as occurred in this case, by placing wedges in the guide rails to stop unintended downward travel" (*id*. at ¶15).

Mr. Sena further opines that the equipment provided to plaintiff to hoist the motor to the top of the shaft was also inadequate and a cause of the accident. In this regard, he notes that the worksite was equipped with only one overhead chain hoist, and two hoists were needed, one to hold the platform in place in the elevator shaft and a second to lift the motor. Thus, here when the sole chain hoist's hook was removed from the platform crosshead, to hook onto the motor, the platform was held in place solely by the safeties, which based upon the accident, proved to be inadequate to the task. Mr. Sena contends that when the hoisting operation began, the chain hoist's chain came into contact with the platform's crosshead which lifted the platform up and released the safeties, causing the platform to fall from the first floor down to the cellar level.

Finally, Mr. Sena indicates that plaintiff was not provided with adequate and necessary safety fall protection equipment. In this regard, he points to Juan's testimony that plaintiff was working on the platform without a safety harness. Mr. Sena notes that §§ 11.1(c) and 18.9 of the Handbook, as well as OSHA and industry standards, require that a safety harness be worn by anyone working on an elevated platform. Thus, Mr. Sena opines that "the absence of adequate equipment to secure the elevated platform, to safely hoist the machine and to protect workers in the foreseeable event of a platform free fall were causative factors in this accident and in the severe injuries that followed" (*id.* at ¶20).

Defendants' Opposition

In opposition, defendants argue that plaintiff's motion is premature as there is outstanding discovery. Specifically, they note that there has only been one witness deposed in this action with knowledge of the worksite and the accident, non-party witness Juan. Defendants contend that party depositions, paper and document discovery, further non-party witness depositions, potential further expert discovery remain outstanding. In addition, defendants maintain that plaintiff's motion should be denied because this matter was "administratively marked-off", at a January 2, 2020 FCP appearance, due to plaintiff's failure to comply with discovery, and was listed as "disposed" in the court's database. Defendants assert that inasmuch as this matter has not been restored, and plaintiff has not moved for restoration, the instant motion is being made on a case currently marked "disposed" and should be denied. Accordingly, they argue that plaintiff needs to move to restore the case prior to making a motion for summary judgment. Moreover, defendants note that plaintiff's motion is largely premised upon the non-party witness deposition of

Juan, and as this deposition was noticed/subpoenaed and held after this lawsuit was marked "disposed", and held over the objections of defendants, the testimony is not admissible evidence and should be denied.

Defendants further argue that plaintiff's motion should be denied as questions of fact exist regarding whether the manner in which plaintiff performed his work was the sole proximate cause of the accident, and that plaintiff was provided with proper safety devices to protect against height and gravity-related risks. In support of this argument, defendants submit the affidavit of William J. Meyer, a professional engineer, licensed in New York and New Jersey. Mr. Meyer affirms that he is a licensed elevator inspector in New Jersey and has completed continuing education courses in Elevators and Elevator Maintenance. He notes that he has over twenty years of experience in the fields of engineering analysis and accident reconstruction, including elevators and elevator-related accident analysis. On April 19, 2016, Mr. Meyer attended the inspection of the site of the accident, and on October 6, 2016, he inspected eye bolts and ruptured nylon sling straps from the subject accident. He also affirms that he reviewed plaintiff's Bill of Particulars; affirmation in support of this motion; Juan's deposition testimony; Mr. Sena's affidavit and the photographs he took of the accident site. Mr. Meyer opines that some factors relating to the causation of this accident remain unknown, that Juan's testimony does not adequately explain what caused the accident, and further investigation is thus needed. Additionally, he contends that the affidavit of plaintiff's expert, Mr. Sena, does not adequately explain causation of the accident, especially in regard to the photographs he attaches to his affirmation. Mr. Meyer asserts that Mr. Sena's opinion that that two chain hoists were

necessary is not supported by any known rule, standard, or regulation and further points to Juan's testimony that one chain hoist was typically utilized to perform this task. Moreover, he points out that Mr. Sena's photographs indicate that nylon straps and eye bolts failed but fails to explain what caused straps and eye bolts to fail nor how a second chain hoist would have prevented those failures. Thus, he contends that "further discovery and investigation may reveal specific details as to what caused the nylon straps and eye bolts to fail" (NYSCEF doc. no. 135, Meyer aff at ¶ 20). Further, Mr. Meyer states that it is "possible that Plaintiff's operation of the hoist may have caused the motor to because caught on the crossbar as it was being hoisted" (id.at ¶20).

Additionally, he states that Mr. Sena's opinion that a safety harness was necessary is in contradiction to the evidence which establishes that plaintiff was working inside of an elevator cab frame, known as a sling, which consisted of a platform and a crossbar on top, and that there was no available tie-off point for a safety harness. Moreover, Mr. Meyer states that it does not appear that a safety harness would have prevented this accident. Finally, he points to Juan's testimony that safety harnesses were readily available at the site, and that they would use the harnesses for other activities inside of the shaft.

Next, Mr. Meyer contends that questions of fact exist regarding whether plaintiff's own actions caused or contributed to the accident as Juan testified that it was plaintiff who connected the chain hoist to the motor, and operated the hoist control button from inside the elevator shaft at the time of the accident. In this regard he states that the motor may have become caught on the crossbar while being hoisted, pointing to the damage to the crossbar depicted in Mr. Sena's photograph, and Juan's testimony that the chain hoist was

disconnected from the crossbar and connected to the motor by plaintiff. Mr. Meyer opines that the "raising of the motor against the crossbar would have caused lifting of the sling, which would have in turn released the safeties. Under this scenario, this improper hoisting would have caused the platform to fall, and not alleged inadequacies of the platform, hoisting equipment, or safety equipment" (*id*. at ¶ 23).

Mr. Meyer opines that plaintiff should have been operating the chain hoist control, from a position outside the shaft, and not from a position under the motor which was being raised. Finally, Mr. Meyer attaches two photographs which he states were "presumably taken of the accident scene" which depict rail blocks and a damaged A-frame ladder. He asserts that the rail blocks could have been used, along with the safeties, to help secure the platform. Moreover, he notes that Mr. Sena's affidavit does not address the damaged ladder, and whether there was a ladder on the platform at the time of the accident.

Eastern also opposes plaintiff's motion and adopts defendants' arguments that it is premature and may not rely on Juan's deposition. In addition, Eastern contends that the motion should be denied as there are questions of fact regarding whether plaintiff's actions were the sole proximate cause of the accident. Further, Eastern asserts that there is no liability under Labor Law § 240 (1), as plaintiff was provided with all the proper safety devices to protect against height and gravity-related risks and that he failed to utilize them although properly instructed to do so. In support of its opposition, Eastern submits the affidavit of Frank DiTomasso, the owner of Eastern, who affirms that he is a certified elevator mechanic and is familiar with the facts and circumstances surrounding this action based on his review of Eastern's files, conversations with their employees at the jobsite,

his observations at the site before and after the incident and his 40 years of experience in the elevator industry. He affirms that he received formal training in elevator inspection, maintenance and repair through the Joint Elevator Industries Educational Program provided through the Elevator Division of Local 3 of the IBEW, which was a 4 year program involving all aspects of elevator operation, service, and repair. Mr. DiTomasso notes that he also has a New York City Inspector's License and a National QEI (Qualified Elevator Inspector's) License which is a license based on the National ASME QBI standard.

Mr. DiTomasso states that it appears that as plaintiff was attempting to hoist the motor it made contact with the crosshead and became stuck Rather than lowering it to try to re-position it, plaintiff apparently continued to operate the chainfall, which caused it to lift both the motor and the platform he was standing on. This resulted in excessive weight and tension being placed on the chainfall and straps. Mr. DiTomasso contends that the raising of the platform caused the safeties to disengage, which he affirms was not a malfunction, as pursuant to elevator industry standards and codes, safeties are designed to disengage when an elevator cab, or a work platform is manually lifted up. Thus, when the platform was caused to be physically lifted up when the motor contacted it, excessive weight was placed on the straps causing them to break and the safeties disengaged resulting in the platform falling down to the pit.

Mr. DiTomasso opines that the accident was caused by plaintiff’s errors while operating the chainfall while hoisting the motor and was not due to the malfunction of the equipment. He states that plaintiff was given all the necessary safety equipment to perform his job and was instructed and directed to use that equipment but failed to do so properly

and safely. Mr. DiTomasso affirms that "the straps were examined by OSHA after the incident and no defects were found with them, they had no problems lifting the load they were rated to hold. There were also no defects with the platform safeties found after the incident. OSHA determined the incident was caused due to Plaintiff not utilizing the extra cables that were present at the site" (NYSCEF doc. no. 139, DiTomasso aff at ¶ 11). He further states that the NYC Department of Buildings also examined the elevator after the incident and found that plaintiff had placed excessive stress on the hoisting equipment.

Accordingly, Mr. DiTomasso opines that "the only way for this incident to have Occurred was due to Plaintiff improperly continuing to raise the hoist machine when it contacted the crosshead, causing it to move the platform upward and thereby release the safety. That put excessive stress on the hoist straps and caused both the machine and platform to drop down"(*id*. at ¶13). He further opines, to a reasonable degree of mechanical certainty, that if plaintiff had secured the platform with the extra safety cable he had been provided and instructed to use, and not used the chain fall as he did, the accident would not have occurred.

With regard to Mr. Sena's opinions regarding the necessity of guardrails and a safety harness, Mr. DiTomasso contends that these items are not relevant here as the intent of the Handbook section he references relates to fall protection to prevent someone from falling off of the platform, which did not occur in the instant case. Moreover, he opines that the governor would not have prevented this incident as plaintiff was not injured because the platform dropped, but as a result of the motor breaking free from the straps due to the excessive weight plaintiff placed on it when it became stuck on the crosshead as he was

hoisting it. This resulted in both the motor and the platform being hoisted and the disengagement of the safeties. Mr. DiTomasso asserts that plaintiff was struck by the motor as it dropped after the straps broke and that the platform then dropped down due to plaintiff's actions which caused the safeties to disengage.

Plaintiff's Reply

In reply, plaintiff argues that the procedural objections to his motion lack merit and that there is no proof supporting the recalcitrant worker and sole proximate cause defense arguments. He contends that the assertions by defendants and Eastern that there are issues of fact regarding which component of the hoisting operation failed first and whether plaintiff's reaction to the unfolding crisis somehow contributed to his injuries is irrelevant to 147 Green's statutory liability for the failure to provide adequate protection.

Plaintiff maintains that there was no need for a motion to restore this case inasmuch as it had merely been administratively marked off and not dismissed. Additionally, he contends that there is no merit to the argument that Juan's deposition testimony should be disregarded because it took place after the case was administratively marked off, as the case was not dismissed at the time of Juan's deposition.

Plaintiff further notes that there is no merit to the argument that his motion is premature as discovery is not complete, noting that defendants have failed to produce their own witnesses for court-ordered depositions. Plaintiff points out that the cases cited by defendants in support of this argument involve summary judgment motions denied as premature because the moving party had not completed its discovery obligations and the opponents showed both that the motion could not be opposed without the outstanding

discovery and that the movant, not the opponents were at fault for the delay. Conversely, plaintiff points out that here all liability discovery within his control has been completed, including his deposition and that of the jobsite foreman, Juan. Plaintiff notes that the only other person present at the time of the accident was Keith and that he has no other identifying information, such as his last name, and has not been provided with such information from his employer, Eastern. Moreover, plaintiff notes that a post-accident site inspection was conducted in April 2016 by both defense engineer Mr. Meyer, and plaintiff's engineer, Mr. Sena, and Mr. Meyer affirmed that he conducted a second site inspection in October 2016. Plaintiff asserts that there is no merit to the argument that defendants may need to depose Juan again, as he was not questioned regarding the photographs taken by Mr. Sena. In this regard plaintiff notes that Mr. Meyer attended the same site inspection and could have taken photos as well. Moreover, counsel for defendants and Eastern both questioned Juan during his deposition and could have asked about the site photos, but chose not to. Finally, plaintiff notes that he testified that he has no memory of the accident, thus there is no reason to solicit additional testimony from him.

Plaintiff further argues that no additional discovery is required to determine the order of the equipment failures, as it is irrelevant inasmuch as 147 Green is absolutely liable where, as here, his injuries are at least partially attributable to the failure to provide protection to prevent the occurrence of the accident. Plaintiff contends that the hoist, straps, and other equipment were inadequate to prevent the motor from falling. Plaintiff argues that it is apparent he was not positioned safely, as purported by the defense experts, and not given adequate protective equipment to prevent injury whether from the falling

motor or the falling platform. Plaintiff argues that proof that a worker was allowed to be positioned under an item being hoisted is prima facie proof that a Labor Law § 240 (1) violation has occurred and that defendants' own experts' description of torn straps, failed eye bolts, and missing rail blocks establishes additional, uncontestable § 240 violations. Accordingly, he maintains that any negligence on his part could not be the sole proximate cause of this accident. Moreover, plaintiff contends that defendants fail to demonstrate that plaintiff was a recalcitrant worker. Plaintiff points out that although Mr. DiTomasso states that safety rails or clamps were present in the elevator shaft, there is no evidence that plaintiff knew these items should have been installed before the hoisting began, and no testimony that he refused any directive from his foreman, Juan, to install them. Additionally, plaintiff contends that there is no evidence that he knew additional nylon straps were required and refused a direction to use them. Finally, plaintiff argues that there is no proof that he ignored a directive to stand outside the shaft, noting that decisions about what equipment to use, when it was installed, and where to perform the work were not his to make. Thus, the recalcitrant worker defense is not applicable here.

Discussion

At the outset, the court finds no merit to the argument that plaintiff's motion should be denied because this matter was "administratively marked-off", and "disposed" in the court's database, and plaintiff failed to move to restore the case. This issue was settled in 2001, with the court's decision in *Lopez v Imperial Delivery Serv*., (282 AD2d 190 [2d Dept 2001]). In *Lopez*, the court determined that because the case was at a pre-note-of-issue stage, (as the instant case is) marking a case off a motion or conference calendar does

not dispose of it. Specifically, the court held that "because this action was never properly dismissed there was no need for a motion to restore. The case was, while perhaps comatose, still alive" (*Lopez*, at 200; see *Ryskin v Corniel*, 181 AD3d 742, 743 [2d Dept 2020]; *Arroyo v Board of Educ. of City of New York*, 110 AD3d 17, 21 [2d Dept 2011] [holding that a pre-note of issue case that was "marked off" the calendar and later marked "disposed," did not require a motion to restore as those acts were a nullity]). Accordingly, the court also finds no merit to defendants' argument that Juan's deposition testimony should be disregarded.

"'A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant'" (*Devoy v City of New York*, 192 AD3d 665, 668-669 [2d Dept 2021]; *Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041 [2d Dept 2015). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013] [internal quotation marks omitted]). Contrary to the assertions of defendants and Eastern, summary judgment in this case is not premature. Defendants have failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the plaintiff's knowledge and control (*see* CPLR 3212 [f]; *Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 944 [2d 2019];*Robinson v Bond St. Levy, LLC*, 115 AD3d

928, 929 [2d Dept 2014]; *Cajas-Romero*, 106 AD3d at 852; *Gillani v 66th St. Woodside Prop., LLC*, 63 AD3d 678, 679 [2d Dept 2009]). Moreover, defendants have failed to produce a witness for a deposition despite being directed to do so by this court. It is incumbent upon defendants to lay bare their proof on the issue of whether plaintiff was a recalcitrant worker and/or whether his actions were the sole proximate cause of the accident, so as to raise a question of fact, but they have failed to do so (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Everhome Mtge. Co. v Aber*, 195 AD3d 682, 688 [2d Dept 2021]; *Yiming Zhou*, 173 AD3d at 944; *Robinson*, 115 AD3d at 929; *Cajas-Romero*, 106 AD3d at 852).

"To prevail on a motion for summary judgment in a section 240 (1) 'falling object'" case, the plaintiff must demonstrate that at the time the object fell, it was 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]). In addition, the plaintiff must demonstrate that "the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001]; *see Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 887 [2d Dept 2021]).

Here, plaintiff while standing on an elevator platform that was secured only by the use of safeties, connected a hoist chain to the motor in order to hoist it. The chain detached from the motor and the hook broke, causing the motor to land on the platform, resulting in plaintiff, the motor and the platform plunging to the cellar. Although the exact mechanism of the injury is unclear, the accident was caused by a Labor Law § 240 (1) violation.

"Regardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where, as here, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide protection as mandated by the statute" (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018]; *see Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 1420 [2005]; *Cammon v City of New York*, 21 AD3d 196, 201 [1st Dept 2005]; *Laquidara v HRH Constr. Corp.*, 283 AD2d 169 [1st Dept 2001]).

Accordingly, the court finds that plaintiff has established his prima facie entitlement to summary judgment on the issue of Labor Law § 240 (1) liability as against 147 Green, the owner of the premises. Specifically, he may recover damages for a violation of Labor Law § 240 (1) under the falling objects theory, because the object that fell, the elevator motor, "required securing for the purposes of the undertaking" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 605 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [holding that applicability of the statute in a falling object case does not depend upon whether the object hit the worker but rather whether the harm flows directly from the application of the force of gravity to the object];. *Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1092 [2d Dept 2015]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [Labor Law § 240 (1) violation found where plaintiff demonstrated that the load of material being hoisted was inadequately secured, as the drag line became stuck as the load was nearing the top of the building. Plaintiff attempted to free the drag line and the load of material broke apart and fell on him]).

In opposition to the plaintiff's prima facie showing, defendants fail to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident. Mr. Meyer's and Mr. DiTomasso's affidavits are speculative, conclusory, and insufficient to defeat plaintiff's motion for summary judgment and in several instances lend credence to plaintiff's claims regarding the lack of adequate safety devices to prevent plaintiff's accident (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Mossberg v Crow's Nest Mar. of Oceanside*, 129 AD3d 683, 684 [2d Dept 2015]; *Lopez v Retail Prop. Trust*, 118 AD3d 676, [2d Dept 2014]). In addition, Mr. DiTomasso states in his affidavit that OSHA had determined plaintiff's accident was caused by plaintiff's failure to utilize extra cables that were present at the site and that NYC Department of Buildings' investigation found that the incident was caused by plaintiff placing excessive stress on the hoisting equipment. However, Eastern fails to submit authenticated copies of these reports. Moreover, in light of the statutory violation, plaintiff's comparative negligence, if any, would not bar liability under Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1223 [2d Dept 2019]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 700 [2d Dept 2013]; *Triola v City of New York*, 62 AD3d 984, 986 [2d Dept 2009]; *Valensisi v Greens at Half Hollow*, LLC, 33 AD3d 693, 695-696 [2d Dept 2006]).

Finally, the "recalcitrant worker" defense, has no application here as no evidence has been presented that plaintiff disobeyed a direct order with regard to the use of a particular safety device (*see Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815-16 [2d Dept 2018]; *Silvas v Bridgeview Inv'rs, LLC*, 79 AD3d 727, 731 [2d Dept 2010];

Ortiz v 164 Atl. Ave., LLC, 77 AD3d 807, 809 [2d Dept 2010], citing *Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker "disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device"]). Accordingly, defendants fail to establish that plaintiff disobeyed an immediate specific instruction to use a particular safety device.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim as asserted against 147 Green is granted.

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

E N T E R,

Hon. Karen B. Rothenberg
J. S. C.