Mahmoud v Eastlake Equities, LLC
2023 NY Slip Op 30071(U)
January 6, 2023
Supreme Court, Kings County
Docket Number: Index No. 507013/2017
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 Civic Center, Brooklyn, New York, on the 6th day of January, 2023

P R E S E N T:
HON. DEBRA SILBER,
Justice.
- -X

MOHAMED E. MAHMOUD,

Plaintiff,

- against -

EASTLAKE EQUITIES, LLC, AND
632 VANDERBILT FOOD CORP.,

Defendants.
- -X
632 VANDERBILT FOOD CORP.,

Third-Party Plaintiff,

- against -

SIGNS 4 ALL, INC.,

Third-Party Defendant.
- -X

DECISION/ORDER

Index No. 507013/2017
Motion Seq. 10 & 11
Submitted: 11/10/22

The following papers were read herein:

	Papers Numbered NYSCEF
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	198-227; 225-226
Opposing Affidavits (Affirmations)	233-236; 229
Reply Affidavits (Affirmations)	238; 230

Upon the foregoing papers, defendant Eastlake Equities, LLC (Eastlake) and defendant/third-party plaintiff 632 Vanderbilt Food Corp. d/b/a Foodtown (Vanderbilt), move, in motion sequence #10, for an order pursuant to CPLR 3212 granting them summary

judgment dismissing the plaintiff's complaint in its entirety. Plaintiff cross-moves, in motion seq. #11, for partial summary judgment on the issue of liability, on the grounds that defendants violated Labor Law § 240(1) and that such violations were the proximate cause of his accident.

BACKGROUND

This action arises out of a construction site accident which plaintiff was involved in, and which occurred at approximately 8:00 p.m. on December 19, 2016, at a Foodtown Supermarket located at 632 Vanderbilt Avenue, Brooklyn, New York. At that time and place, plaintiff, the sole owner of third-party defendant Signs 4 All, Inc., (Signs) was working at said premises to install signs on the exterior of the building for the supermarket. He alleges that he fell to the ground when the scaffold tipped over while he was climbing down from it in order to reposition it. Eastlake is the property owner and Vanderbilt is the commercial tenant that hired Signs.

Plaintiff commenced this action in 2017. He asserts causes of action for violations of Labor Law §200, 240(1) and 241(6) as well as common law negligence. The commercial tenant, Vanderbilt, has assumed the property owner's defense, and has commenced a third-party action against Signs [Doc 11]. The third-party complaint asserts causes of action for contribution, common law indemnification and contractual indemnification, as well as a claim that Signs breached the contract by failing to procure insurance, as was required therein. Signs did not answer the third-party complaint, and a default order [Doc 29] was issued in 2017, which states that the inquest against Signs shall be conducted at or after the trial or any settlement. Discovery ensued, and the case is now, five years since the action was commenced, on the trial calendar. These motions were timely made.

Defendants' motion for summary judgment

Defendants argue, in support of their motion, that plaintiff's cause of action under Labor Law §240(1) should be dismissed as he was the sole proximate cause of his accident. Counsel avers that plaintiff "personally selected, erected and placed the scaffold on the sidewalk, locked the wheels and adjusted the wheels prior to utilizing the scaffold. The plaintiff successfully used this scaffold prior to the happening of this incident, did not have any complaints about the scaffold and did not experience any issue or problem with the scaffold or its steadiness prior to the incident occurring" [¶43]. Counsel contends that "the plaintiff, as the owner of SIGNS, personally selected the scaffold that he rented, elected to use the scaffold without the top rails, erected the scaffold himself, placed the scaffold on the sidewalk, locked the wheels of the scaffold and adjusted the height of the scaffold/wheels. Therefore, the plaintiff's own actions, conduct and decisions were the sole proximate cause of this incident warranting the dismissal of plaintiff's Labor Law §240(1) claim" [¶49].

With regard to plaintiff's Labor Law §200 and common law negligence claims, counsel argues that the accident arose out of the means and methods of the plaintiff's work, and not a hazardous premises condition, and the defendants did not direct or supervise the plaintiff's work, his causes of action under §200/common law negligence must be dismissed.

With regard to Labor Law §241(6), defendants' counsel avers that the Industrial Code sections alleged in plaintiff's bills of particulars[1] are either too general or are inapplicable. She concludes that "the only sections of the Industrial Code relied on by the plaintiff that may be applicable to this matter are sections 23-5.1(j) and 23-5.3(e). Section 23- 5.1(j) requires

[1] Sections 23-1.5(a), (b), (c)(1)-(3); 23-1.7; 23-1.7 (b)(1), (d) (e) (f); 23-1.15(a), (b), (e); 23-1.16(a)-(f); 23-1.17 (a)-(d); 23-1.19(a)-(d); 23-1.22(c)(2); 23-1.30; 23-5.1(a), (b), (c)(2), (d), (e), (f), (h), (j); 23- 5.3(d), (e), (g) and 23-5.4(a)-(e).

safety railings on the open sides of all scaffold platforms and section 23-5.3(e) requires that safety railings be provided for every metal scaffold." She argues that "the scaffold that the plaintiff was using at the time of the incident was rented by the plaintiff, selected by the plaintiff, and used by the plaintiff despite the fact that it did not have a top rail. The defendants did not own, rent, or provide the scaffold to the plaintiff. Therefore, the plaintiff's own actions and conduct was the sole proximate cause of this incident warranting the dismissal of plaintiff's Labor Law §241(6) claim."

Defendants' counsel next addresses Labor Law §§240(2) and 240(3). These claims are asserted for the first time in the plaintiff's supplemental bill of particulars [Doc 207]. With regard to §240(2), counsel argues that this statute is inapplicable, as it only applies to scaffolds "more than 20 feet from the ground" and that this one was not that high, as plaintiff testified that the scaffold he rented was 16 feet high. With regard to §240(3), which requires that "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use," counsel avers that this statute is inapplicable, as plaintiff has not claimed that the scaffold was insufficient to hold his weight.

Plaintiff's cross motion for partial summary judgment

Plaintiff's attorney argues in his affirmation in support [Doc 226] that plaintiff is entitled to summary judgment on his Labor Law 240(1) cause of action as "plaintiff, working on a scaffold at a height of twelve feet above the sidewalk, was entitled to the protection afforded by § 240(1) of the Labor Law." He states, "[t]he statute 'places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty that is the proximate cause of a plaintiff's injuries' and avers that the duty is nondelegable and it makes

no difference, therefore, 'whether or not the job was performed by an independent contractor or other entity over which [the owner] had no supervision or control,'" citing *Kyle v City of New York*, 268 AD2d 192, 195 (1st Dept 2000). Plaintiff's counsel argues that the "sole proximate cause" exception is not available to defendants here, as "[d]efendants are misguided in their belief that the foregoing factors [defendants' comparisons to *Robinson v East Med Ctr* LP, 6 NY3d 550,554 (2006)] establish that plaintiff was solely responsible for the accident. Plaintiff's selection of a scaffold which he thought would be suitable for the work did not absolve defendants of their non-delegable duty under the statute to make available to plaintiff, at the job site, the appropriate safety devices. Plaintiff's status as an independent contractor, who brought his own tools and equipment to the site, did not relieve defendants from their non-delegable duty," citing *Griffen v AVA Realty Ithaca, LLC*, 150 AD3d 1462, 1464 (3d Dept 2017). Finally, plaintiff's counsel argues "Nor can defendants evade liability by positing that plaintiff was the one who 'placed the scaffold on the sidewalk, locked the wheels of the scaffold and adjusted the height of the scaffold/wheels,'" citing *Rapalo v MJRB Kings Realty, LLC*, 163 AD3d 1023, 1024 (2d Dept 2018) ["contention that the plaintiff was the sole proximate cause of the accident because the scaffold from which he fell was one which he himself was constructing is without merit"]. He continues "[a]ny neglect or error that can fairly be charged to plaintiff in connection with his assembly and placement of the scaffold would at most constitute contributory fault, which is not a defense to a § 240(1) claim," citing *Debennedetto v Chetrit*, 190 AD3d 933, 936 (2d Dept 2021).

Plaintiff's Opposition to Defendants' Motion

Plaintiff's affirmation in opposition is at NYSCEF Doc 233. Therein, counsel states

that his papers in support of the cross motion were also to be read in opposition to defendants' motion, which defendants disputed. He explains "[d]efendants' counsel stated that he had expected to receive a separate set of papers opposing defendants' motion. Rather than squabble over the point, I agreed to adjourn the return date, serve papers in opposition to defendants' motion and give defendants an opportunity to reply. The parties entered into and filed a stipulation to that effect. A copy is annexed as Exhibit A. Plaintiff now explicitly adopts the affirmation of Steve S. Efron, dated March 29, 2022, [Doc 226] as comprising plaintiff's opposition to defendants' motion for summary judgment."

With regard to his cause of action under §241(6), plaintiff has not opposed this branch of the defendants' motion in his affirmation in opposition to defendants' motion, or his affirmation in support of plaintiff's motion for summary judgment on his Labor Law §240(1) claim. Nor does plaintiff mention any of the other causes of action asserted, other than Labor Law §240(1). In his affirmation in opposition to defendants' motion, electronically filed on August 25, 2022, ten months after defendants' motion sequence ten was filed, and five months after his cross motion was filed, he merely addresses the procedural issue described above.

Defendants' Opposition to Plaintiff's Cross Motion

Defendants' counsel opposes plaintiff's cross motion on several grounds [Doc 229]. First, he argues that plaintiff's cross motion "is procedurally defective" as it omitted a statement of material facts and omitted a word count. The requirement of a statement of material facts, imposed in the Uniform Rules of Court in February 2021, was abandoned subsequently, and has not been required since the Uniform Rules were again amended, in Administrative Order 141/2022, effective July 1, 2022. The amendment (among other things)

makes statements of material fact optional, and up to the individual judges to require them. This court has not required them, mostly because the bar doesn't seem to understand the difference between a fact and an opinion. Thus, this is not an appropriate basis to oppose a motion. The word count should have been included, but there is no issue that plaintiff exceeded the word limit.

Next, counsel argues that the motion should be denied because plaintiff was the sole proximate cause of his accident, which is the same legal argument contained in defendants' motion to dismiss that claim.

Defendants' Reply to Plaintiff's Opposition to Defendants' Motion

In Doc 238, counsel for defendants provides an affirmation that "plaintiff submitted no opposition to the dismissal of plaintiff's "claims under Labor Law §200, Labor Law §240(2), Labor Law §240(3), Labor Law §241(6)." In fact, plaintiff makes no mention of his cause of action for common law negligence either. Thus, the court must conclude that plaintiff does not oppose defendants' motion to dismiss his claims under Labor Law §200, Labor Law §240(2), Labor Law §240(3), Labor Law §241(6), and common law negligence.

Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion

In Document 230, plaintiff replies to the opposition to his motion, and argues that no prejudice was caused by his omission of a statement of material facts and a word count. He then reiterates his claim in his cross motion, that "liability under the statute is absolute, an owner or contractor cannot evade liability by delegating to another party the duty to provide proper protection. The duty to provide a safe working environment is nondelegable, and a contractor or owner and its agents may be liable 'even though it exercised no control over, or

supervision of, an independent contractor who performed the job,'" citing *Griffen v AVA Realty Ithaca, LLC,* 150 AD3d 1462, 1464 (3d Dept 2017), and counsel concludes by arguing that "[t]hat is precisely why these defendants cannot insulate themselves from liability with an argument that it was plaintiff, not defendants, who selected the scaffolding, erected the scaffolding and decided where to place the scaffolding."

DISCUSSION

Counsel for defendants avers [Aff. Doc 200] that plaintiff was an experienced sign installer, with years of experience with several businesses before he opened his own business in 2007. Defendants' counsel claims that this project was underway for about two weeks prior to the date of plaintiff's accident. Plaintiff had supplied all of the tools, he had rented the scaffold, and he provided his own helper, Essam Alsayid. He testified that he and his helper had assembled the scaffold. He had stored it in a garage which was part of the building and took it out when he needed to use it for the job. The wood planks were not secured to the scaffold. The scaffold had no side rails. Plaintiff did not have a harness on, and thus was not tied off to the building or to the scaffold. There was no fall protection device [plaintiff's EBT Doc 211]. Plaintiff stated that the scaffold had four wheels that could each be adjusted separately to account for uneven surfaces. He testified that the street, Vanderbilt Avenue, sloped a bit toward the curb, and he adjusted the wheels as best he could to account for the slope. In the course of climbing down from the scaffold in order to move it to the next work area, plaintiff testified that the scaffold tipped over and caused him to fall to the ground. Plaintiff concluded that the scaffold "tilted" because it was not level on the sidewalk. After his adjustments, it was "80 percent leveled. Not like a hundred percent level" [Page 143].

Plaintiff claims he fell twelve feet to the sidewalk, and the scaffold fell on top of him, landing on his right arm and shoulder.

Plaintiff's "helper" was a friend, not an employee, and he was deposed. Mr. Alsayid's EBT transcript is at Doc. 218. He testified that plaintiff is a friend of his, and that plaintiff did not have a helper that day, so he agreed to come and help him, but only to the extent of handing the plaintiff tools. He said he is a licensed real estate broker and does not know anything about construction. He said he watched plaintiff move the scaffold into position after taking it from the storage area on other side of the building [Page 73]. Mr. Alsayid did not touch the scaffold. He was repeatedly asked if plaintiff had asked him to hold the scaffold while he was working, and Mr. Alsayid said "no" [Pages 43, 44, 53, 55, 63, 64]. Plaintiff had used the backyard of Mr. Alsayid's real estate office to build the signs. He had never gone to a worksite to help plaintiff before. A few hours after they started working, Mr. Alsayid left to use the restroom. He testified that he told plaintiff he was going to the bathroom before he left. As he was walking away, he heard a scream, and the "scaffold falling" [Page 20]. He testified that he ran back to help plaintiff, and that workers from the store came out to help, and they together lifted the scaffold off of the plaintiff. He then went with the plaintiff to the hospital.

Plaintiff was deposed on June 27, 2019. He testified that he has been a traffic enforcement agent for the NYPD since 2015. It is a full-time job. He is also sole owner of Signs 4 All, Inc. and has worked for his company since 2007. He had worked for others, making and installing signs, since 2002. After he started his company in 2007, he performed hundreds of jobs for Signs 4 All. He has not returned to work for his company since the

accident occurred. His company did not have any liability insurance or any worker's compensation insurance. He worked part time for Signs 4 All after he started working full time for the NYPD. He said that he missed a few months of work from his NYPD job after the accident, and then he returned to work for the NYPD full time.

Plaintiff described the scaffold as 16 feet high, 2 feet deep and 8 feet wide. He rented it for this job. He left it on site in a storage area near the garage for the supermarket. He said that Essam Alsayid helped him to erect the scaffold on the day of the accident. The wood planks were not secured to the scaffold, and the scaffold had no top rails [Doc 211, Page 85]. The scaffold was not secured to the building, and he had no harness [Page 94]. Plaintiff testified that right before the accident, he needed to climb down and move the scaffold to another location, and he called out to his assistant to hold and secure the scaffold [Doc 211 Pages 127-133]. He said it tipped over as he was climbing down. His assistant "was too late . . . as he was running and I was going down." Plaintiff was asked "why didn't you wait for your worker to come over and hold the scaffold before you turned to try to get off the scaffold?" and he responded "I thought that the scaffold would not move. I thought that I could just make it safe down. That's why I didn't ask him. It was so cold that day and he was sitting in the car -- he was sitting in the truck and I was working outside" [Page 134]. He later said "Essam told me that he's going to bathroom in that moment when it happened. So after the accident happened, I told him if you didn't even say you were going to the bathroom, so you could at least like do -- he can't even prevent that scaffold to have fell down because it's heavy. It's a heavy equipment and I'm in a top of it, you know, we had an argument and he said I couldn't do it anyway, even if I was right next to the scaffold, I was not going to be able

to hold it because it was so heavy" [Pages 147-148]. Then, plaintiff said, "[h]e told me I am going to bathroom as I was going down, yeah" [Page 150]. He then clarified "then he came out the truck saying I am going to the bathroom. I said hold that scaffold for me, this is not the time to go to the bathroom. As I was saying that and I was telling him hold the scaffold I was already moving my body to come down" [Page 154].

The manager of the Foodtown, Mr. Shady Widdi, was deposed on March 30, 2021, and his transcript is at Document 217. He testified that the supermarket was in the process of being converted from a Met Food to a Foodtown, and that both the Met Food and the Foodtown at that location were owned jointly by his father and his uncle. He said there was some minor interior renovation done when it was switched, which was done by a "wallpaper guy" who was hired. On the exterior, the signage was changed. Page 19 is missing from the transcript. When it continues on Page 20, Mr. Widdi testified that plaintiff had done work on his father's house before he was hired to do the new signage at the Foodtown. He said his father hired plaintiff and conducted the negotiations. He did speak with plaintiff about the job but could not remember the details of the conversation. He knew there was a written agreement. He was not at the store at the time of plaintiff's accident, which was on a Saturday night. Plaintiff had been working on the signage "on and off" for about two weeks prior to the accident. He did not remember what the scaffold looked like, and he did not take any photos.

Mohmood Widdi, one of the two supermarket co-owners, was deposed on September 6, 2019 [Doc 213]. He said he is the Vice President of Vanderbilt, and the President is his brother-in-law. They are the sole shareholders, one-half each, and have owned the corporation

since 1983. They only own this one supermarket. When they switched from Met Food to Foodtown, they did not receive any instructions or requirements with regard to renovations. He knew the store sign had to be made with their logo and colors. He had two guys who did the interior work, which was minor. One worked at the store. He could not remember their names, other than one who was known as "Boncho." He had hired plaintiff to do the new signs.

CONCLUSIONS OF LAW

Summary Judgment

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

Labor Law § 240(1)

Labor Law § 240(1) provides in pertinent part that:

> "All contractors and owners and their agents . . . 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."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners and general contractors and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Blake v Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280; *Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Moreover, "the duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500; *see also Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). Finally, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]).

To be eligible for coverage by this statute, there are a few prerequisites. First, the work must be covered work. Here, the only work going on at the site was the installation of the new Foodtown sign on an existing supermarket, as well as the installation of other smaller signs that said "Groceries," "Meats" and the like. Plaintiff testified that the signs were constructed by him elsewhere, and he brought them to the site to install them. He needed to

use bolts and anchors to attach the signs to the exterior of the building.

The only category from the list in the statute (the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure) which applies here is "altering". Plaintiff was not erecting a building, demolishing a building, repairing a building, painting a building, cleaning a building, or pointing a building. The Court of Appeals has analyzed similar facts and circumstances and concluded that what plaintiff was doing was an alteration. Defendants do not contest this (See *Joblon v Solow*, 91 NY2d 457 [1998]).

The next issue is whether the plaintiff was a covered worker. Defendants argue that he was not, as he was self-employed and the sole owner of Signs 4 All. This is not the first time this issue has arisen, and the Court of Appeals has rendered its opinion on this subject as well. In *Blake v Neighborhood Hous. Servs. of NY City, Inc*., 1 NY3d 280 [2003], the plaintiff operated his own contracting company and was working alone. He fell from a ladder and injured his ankle. The extension ladder was owned by plaintiff, and he testified that he used it frequently. He acknowledged that the ladder was steady, had rubber shoes and was in proper working condition. At trial, plaintiff conceded that he could not identify a defect in the ladder, that it was stable and there was no reason to have it steadied during use. He also revealed that he was not sure if he had locked the extension clips in place before ascending the rungs. The jury concluded that the ladder was "so constructed, operated as to give proper protection to plaintiff," leading them to the conclusion that plaintiff was the sole proximate cause of his accident. The Court of Appeals provides an extensive discussion of the history of the statute and concludes that the plaintiff was required to show that there was a violation of the statute to recover, and that plaintiff did not do so. The court states that "to impose liability for a

ladder injury even though all the proper safety precautions were met would not further the Legislature's purpose. It would, instead, be a sweeping and dramatic turnabout that the statute neither permits nor contemplates." However, the fact that he was the owner of the "company" and was working alone did not preclude his entitlement to the protection of the statute.

There are numerous cases where a self-employed plaintiff was determined to be a covered worker for purposes of Labor law 240(1) (See *Jara v Costco Wholesale Corp.*, 178 AD3d 687 [2d Dept 2019]; *Hugo v Sarantakos*, 108 AD3d 744 [2d Dept 2013]). Based on the foregoing, there is no question that Labor Law § 240(1) is applicable to the facts presented herein.

Plaintiff has met his initial burden on his motion for summary judgment under Labor Law § 240(1) by establishing that his injuries were proximately caused by a violation of the statute (*see Blake,* 1 NY3d at 280; *see also Nunez v Bertelsman Property Inc,* 304 AD2d 487 [2003]). In this regard, plaintiff has presented evidence that while working without a safety harness on a scaffold that was not equipped with safety rails, on a sidewalk which must be angled toward the curb for rain to flow, he fell and sustained injuries when the scaffold shifted and tilted. Such evidence clearly establishes, *prima facie*, a violation of the statute (*see Vasquez v C2 Dev. Corp.,* 105 AD3d 729 [2d Dept 2013]; *Paredes v 1668 Realty Associates, LLC*, 110 AD3d 700 [2d Dept 2013].

Here, the shifting, or, as maintained by plaintiff, the collapse, of the scaffold when he was climbing down, establishes that the scaffold failed to afford the injured plaintiff proper protection for the work being performed, and that this failure was a proximate cause of his injuries (*Saldivar v Lawrence Development Realty*, LLC, 95 AD3d 1101, 1102 [2d Dept

2012]; *see also Campbell v 111 Chelsea Commerce, L.P.,* 80 AD3d 721, 722 [2d Dept 2011]). The collapse of a scaffold for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the scaffold did not afford the worker proper protection.

As plaintiff has met his initial burden, the burden of proof shifts to defendants to overcome the motion and raise a triable issue of fact. The court finds that defendants have failed to do so.

In their opposition, defendants' primary contention is that plaintiff's own conduct was the sole proximate cause of the accident. The court finds no merit to this contention. "Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Bermejo v NY City Health & Hosps. Corp.*, 119 AD3d 500, 502 [2d Dept 2014]). In *Gallagher v New York Post*, 14 NY3d 83 [2010], the court delineated the three elements a defendant has to establish in order to prevail on a "sole proximate cause" defense: The defendant must prove: (1) the device that the plaintiff allegedly should have used was "readily available;" (2) plaintiff knew that the device was "readily available," and plaintiff also knew he or she was "expected" to use it; and (3) plaintiff "for no good reason chose not to do so."

Contrary to defendants' contentions, the plaintiff's participation, whether alone or with another worker, in the assembly of the scaffold does not raise a triable issue of fact as to whether he was the sole proximate cause of the accident (*see Debennedetto v Chetrit*, 190

AD3d 933, 936 [2d Dept 2021]). Nor does a failure to lock the wheels, or a failure to ascertain that the scaffold was perfectly level, as is alleged here. It is true that "[w]hen a plaintiff handles a scaffold in such a manner as to create the condition causing its collapse, his or her conduct is the sole proximate cause of the accident" (*Berenson v Jericho Water Dist*., 33 AD3d 574, 576 [2d Dept 2006]). Here, however, defendants have failed to make a prima facie showing that the accident was caused by the manner in which the plaintiff constructed or handled the scaffold (*Bermejo v NY City Health & Hosps. Corp.*, 119 AD3d 500, 502 [2d Dept 2014]).

Defendants have failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of this accident. Given the scaffold's inadequacy to protect him from falling, plaintiff's alleged failure to level the scaffold with a level, as opposed to doing so by using his eyes alone, could not be the sole proximate cause of his accident (*see Vail v 133 Broadway Assoc., L.L.C.*, 105 AD3d 636, 637 [1st Dept 2013]) ["it is undisputed that the scaffold lacked guardrails. Such evidence establishes that plaintiff's injuries were proximately caused by defendants' failure to provide proper protection against the elevation-related risk"]. It would be at most, comparative negligence, which is not a defense to a Labor Law § 240(1) claim (see *Ordonez v One City Block, LLC*, 191 AD3d 412, 413 [1st Dept 2021]). Here, the defendants offer no evidence regarding the way in which the scaffold was assembled or whether plaintiff disregarded any instructions as to its safe and proper assembly, and as such, have failed to establish prima facie that the accident was caused by the manner in which the plaintiff constructed or handled the scaffold (*see Campbell,* 111 AD3d at 722).

Thus, given that defendants have an absolute, nondelegable duty to actually provide adequate safety devices and only an injured worker's deliberate refusal to use available and

visible safety devices in place at the work site will raise a question of fact, defendants, who have not made any such showing, have failed to raise an issue of fact showing that plaintiff's own conduct was the sole proximate cause of his injuries.

Defendant Eastlake's witness Mr. Jones [Doc 212] had never seen the scaffold, and never met the plaintiff (Page 46). Vanderbilt's witnesses, Mr. Mohmood Widdi, the commercial tenant, [Doc 213] and Mr. Shady Widdi, [Doc 217] his son and the store manager, both testified that they were not present at the store at the time of plaintiff's accident. The father had not seen the scaffold [Doc 213 Page 75]. His son had seen it but didn't remember when or what it looked like [Doc 217 Page 36]. No expert affidavit is provided. There is no evidence provided by defendants with regard to what caused the scaffold to tip over.

A lack of certainty as to exactly what caused plaintiff's fall does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or its shifting. In any of those circumstances, a violation of the statute is established, due to either defective or inadequate protective devices, which constituted a proximate cause of the accident.

The court has reviewed and considered defendants' remaining contentions with regard to § 240(1) and finds them to be without merit.

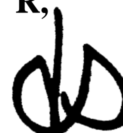
In accordance with the foregoing, plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action is granted, and defendants' motion to dismiss this cause of action is denied.

As plaintiff has not opposed the defendants' motion for summary judgment dismissing plaintiff's Labor Law §200/common law negligence cause of action, or his Labor Law

§§240(2), 240(3) and 241(6) causes of action, and as defendants have made a prima facie case for summary judgment with regard to these claims, the portion of defendants' motion seeking dismissal is granted in part, and plaintiff's claims under Labor Law §200/common law negligence, Labor Law §§ 240(2), 240(3) and 241(6) are dismissed.

The foregoing constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.