

**Cardenas-Parra v 540 Fulton Assoc. LLC**

2023 NY Slip Op 30901(U)

March 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 506232/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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 23<sup>rd</sup> day of March, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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ROMAN CARDENAS-PARRA,

Plaintiff,

- against -

540 FULTON ASSOCIATES LLC,  
JENEL MANAGEMENT CORP.,  
PAV-LAK INDUSTRIES, INC.  
and PAV-LAK CONTRACTING INC.,

Defendants.

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540 FULTON ASSOCIATES LLC,  
JENEL MANAGEMENT CORP.,  
PAV-LAK INDUSTRIES, INC.  
and PAV-LAK CONTRACTING INC.,

Third-Party Plaintiffs,

- against -

RC STRUCTURES INC.,

Third-Party Defendant.

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The following papers read herein:

NYSCEF Documents

Notice of Motion and Affidavits (Affirmations) Annexed and Exhibits

75-93

Opposing Affidavits (Affirmations) and Exhibits

95-109

Reply

110-117

Upon the foregoing papers, plaintiff moves, in mot. seq. 3, for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability against defendants 540 Fulton Associates LLC, Jenel Management Corp. and Pav-Lak Contracting Inc. pursuant to Labor Law

§240(1) and §241(6), and also against Pav-Lak Contracting Inc. only pursuant to his Labor Law §200 and common law negligence claims. This action was previously discontinued as against defendant Pav-Lak Industries Inc. [Doc 17]. The third-party action was also discontinued [Doc 18].

### ***Background***

Plaintiff commenced the instant action on March 21, 2019 by electronically filing a summons and verified complaint. Plaintiff claims therein that defendant 540 Fulton is the owner of the premises. The pleadings further state that the other defendants were the construction manager (Pav-Lak) and the owner's management company (Jenel) and were thus statutory agents of the owner as this term is defined in the Labor Law and interpreted by the courts of this State. He was employed by non-party RC Structures Inc., which subcontracted with defendant Pav-Lak, the construction manager, to perform the concrete superstructure work at the premises, a new 43-story building being constructed at 540 Fulton Street, Brooklyn, NY. There was no general contractor. Plaintiff alleges that defendants failed to provide him with a safe place to work, and failed to offer proper equipment and/or safety devices so as to prevent him from being injured at the worksite.

Plaintiff alleges that on December 18, 2018, while he was working for non-party RC Structures Inc. at the subject premises, he was "caused to fall from an elevated height off of a wet, slippery, defective makeshift scaffold," [Doc 76 Aff in support ¶3] to the ground below and sustain serious physical injuries. The complaint asserts causes of action pursuant to sections 240(1), 241(6) and 200 of the Labor Law, as well as claims for common law negligence. Plaintiff also claims that at all relevant times, he was engaged in work within the scope of the Labor Law.<sup>1</sup>

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<sup>1</sup> Work within the scope of the vicarious liability provisions of Labor Law §240(1) is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

Defendants (other than Pav-Lak Industries) subsequently interposed an answer on May 28, 2019, [Doc 6] generally denying plaintiff's allegations. On June 18, 2019, defendants commenced a third-party action against RC Structures Inc., who then interposed a third-party answer. On January 28, 2020, defendants/third-party plaintiffs discontinued the third-party action [Doc 18]. On October 28, 2019, plaintiffs discontinued the action as against Pav-Lak Industries. The instant partial summary judgment motion was filed on November 9, 2022. On February 24, 2023, plaintiff filed a note of issue with a demand for trial by jury, certifying that discovery is complete and that this matter is ready for trial. The motion is thus timely.

Plaintiff avers that non-party RC Structures was retained by Pav-Lak as the superstructure contractor for the project. Plaintiff started work at this job site about four weeks prior to the date of his accident. On the day of his accident, there were more than thirty RC employees on site. On the day of his accident, the first floor had just been cast, after the basement level had been completed. "When he arrived that day, he signed in and went down to the basement. He put on his work jacket, along with his safety equipment, which included a harness, chains, a yo-yo and a helmet. RC did not provide his clothing or safety equipment other than the helmet; everything else belonged to Mr. Cardenas-Parra. He also wore a tool belt with his own hammer, crowbar and drill bits" [Doc 76 ¶39, citing plaintiff's EBT transcript Doc 84 at Page 34]. "Plaintiff's foreman, Dennis, told him to continue the unfinished work from the day before, so after signing in, Plaintiff proceeded to continue his stripping work, which consisted of removing plywood from the deck that had been placed so concrete could be poured" [Doc 76 at ¶41, citing plaintiff's EBT at pp. 32-33, 37-38].

The plaintiff's accident occurred while plaintiff was performing this form-stripping work. He was on a makeshift scaffold, he claims, because the scaffold had not arrived yet [EBT Doc 84 Pages 45, 48]. A photograph of the work area is at Document 92. They were removing plywood from the ceiling, which had recently been poured. He testified that he had unclipped or unhooked

his yo-yo from one place “so I can go to the next place because my line didn’t allow me to continue moving forward,” [Page 46] but he was not able to hook to the next location before he fell. He testified that he slipped, tried to hold onto a railing to break his fall, but the railing broke, and he fell [Doc 84 Page 49]. He testified that he fell approximately five feet [id.], and landed on debris, which included plywood, metal, posts, and dry concrete. The wood he was standing on was slippery and wet as it was exposed to the elements and it had been raining [Page 55]. One of his co-workers (Vasquez) provided an affidavit and states therein that “there was no other way to reach the plywoods on the ceiling except on the makeshift scaffold and hooking off to move around” [Doc 88 lines 12-14], and that “as he stepped on the scaffold railing it broke off and caused Roman to fall about 8 feet to the ground” [Doc 88 Lines 16-18]. Another co-worker (Vera) executed an affidavit that also claims that they could not access the plywood which they were stripping without sometimes unhooking, stating “we would need to hook off to pass and move on the makeshift scaffold to get to the plywood” [Doc 89 Lines 10-12].

Plaintiff claims, with regard to Labor Law §240(1), that defendants “breached their non-delegable duty under Labor Law §240(1) in failing to provide Plaintiff with the proper equipment and/or safety devices so as to protect him against elevation-related hazards, specifically a fall from a wet, slippery, defective, makeshift scaffold, which failure was a proximate cause of Plaintiff’s incident and resulting injuries” [Doc 76 ¶5]. With regard to Labor Law §241(6), plaintiff claims that defendants “violated Labor Law §241(6) as a matter of law, specifically New York State Industrial Code §23-1.7(d) prohibiting employers from permitting any employee to use an elevated working surface in a slippery condition, which also proximately caused Plaintiff’s incident and resulting injuries” [id.]. With regard to Labor Law §200, plaintiff claims defendant Pav-Lak “breached its duty pursuant to Labor Law §200 and common law negligence in permitting a dangerous condition to exist and remain at the Premises despite having both the authority to control

the injury producing activity and, at a minimum, constructive notice of the dangerous condition which proximately resulted in Plaintiff's injuries" [id.].

Plaintiff asserts that these Labor Law violations and breaches of the common-law duty of care proximately caused his injuries.

*Plaintiff's Arguments Supporting His Partial Summary Judgment Motion*

**Labor Law 240(1)**

In support of his motion with respect to Labor Law §240(1) against all three defendants, plaintiff first notes that this statute subjects owners, contractors and their agents to a nondelegable duty to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection is breached, owners, contractors and their agents are vicariously liable for injuries that are proximately caused by the breach. Here, plaintiff claims, for Labor Law purposes, 540 Fulton was an owner, Janel was an agent of the owner, and Pav-Lak was the construction manager and equivalent to a general contractor. Counsel argues that the statute required defendants herein to furnish workers such as plaintiff with adequate safety devices that provide proper protection against elevation-related risks. Plaintiff states he was injured when "the protective device which he was provided with proved inadequate to shield him from the harm directly flowing from the application of the force of gravity. Whether as a result of its wet and slippery condition or a defective broken railing, the failure of the scaffold to shield Mr. Cardenas-Parra from injury constituted a prima facie violation of Labor Law §240(1)" [Doc 76 ¶78]. Further, counsel avers that "Defendants' failure to comply with their absolute duty to provide Plaintiff with a safe means to perform his work, including providing a stable, secure scaffold and proper tie-off location for his lanyard, was a proximate cause of Plaintiff's fall and resulting injuries, and, accordingly, is sufficient to establish Plaintiff's prima facie entitlement to summary judgment under Labor Law §240(1)" [id. ¶80].

Plaintiff contends that all three defendants are thus subject to absolute vicarious liability under Labor Law §240(1).

Plaintiff also argues that he could not have been the sole proximate cause of his injuries, and in fact, there is no evidence to suggest that he was in any way culpable [id. ¶81]. Specifically, plaintiff contends that “even if Defendants argue that Plaintiff’s actions may have contributed to incident, they are not relieved of §240(1) liability because the fact remains that Defendants failed to provide him with an adequate safety device in the first place, instead requiring him to utilize a wet, slippery, defective makeshift scaffold without appropriate safety equipment, which proximately caused him to fall to the ground. Accordingly, Plaintiff cannot be deemed the sole proximate cause of his incident or injuries” [id. ¶83].

Defendants apparently produced only one witness for deposition, Mr. William McNeice, of Pav-Lak Contracting, Inc., as only one transcript is provided, Document 85. The deposition was held on November 4, 2021 on Zoom. At the time of the accident, Mr. McNeice had an OSHA 10 certification and he was certified to go onto a scaffold, but not to erect one. He subsequently obtained an OSHA 30 certification, but not until after plaintiff’s accident. Mr. McNeice testified that he did not know plaintiff, and had never heard his name before the deposition [Doc 85 Page 16]. He said he had testified at prior depositions, and could not say how many times. He said he had no knowledge of plaintiff’s accident or of any witnesses to it. He could not say if plaintiff worked for RC Structures [Page 44]. He worked Monday through Friday in an office adjacent to the worksite [Page 18] unless he had an offsite meeting [Page 26]. There were four Pav-Lak employees assigned to this job. They did not do physical labor. He said Tom Zagrofas was initially the site safety manager. But “after Tom Zagrofas passed away,<sup>2</sup> we retained CRSG to provide site

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<sup>2</sup> No date is provided for this incident. But later [Page 52] he said “Tom was still the guy” on the date of the accident.

safety and fire safety for the job and RC Structures was required to provide a concrete safety manager to provide and manage all of the safety requirements for their scope of work” [Page 48]. He further testified that “there was no general contractor, and that Pav-Lak was the construction manager and it hired RC Structures with a written contract. RC Structures started their work after Structure Tech New York finished the foundation and the piles. RC Structures “picked it up from there, took it to the 43<sup>rd</sup> floor” [Page 30]. Mr. McNeice testified that Pav-Lak kept daily logs, but none were produced prior to or at the deposition. Counsel for plaintiff requested their production on Page 34. Mr. McNeice was asked if Pav-Lak took progress photos for the job, and he said sometimes, and he was not the one who took the photos. He was not asked which employee prepared the daily logs. He testified that RC Structures also prepared daily logs, and took progress photos, which they had to submit to Pav-Lak [Page 35]. Pav-Lak did not provide any tools to RC Structure’s employees. The scaffolding used by RC Structures’ workers was owned and was set up by RC Structures [Pages 37-38]. When asked if “any RC Structures employees were utilizing any scaffolding specifically on December 20, 2018,” he answered, “I don’t know specifics.” He was then asked if he had seen any RC Structures employees using a scaffold before December 20, 2018, and he responded “I don’t remember” [Page 38].

Mr. McNeice was asked if there was an accident report for plaintiff’s accident prepared by Pav-Lak, and he said “no” [Page 50]. He was then shown a photo, described by counsel as plaintiff’s exhibit 2,<sup>3</sup> and he said he had not seen it before, did not know who took it and could not identify the location depicted [Page 54]. He did not know who the person in the photo is, and when asked if there was “some sort of scaffolding” in the photo, he replied “it’s not a scaffolding” [Page 54]. He

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<sup>3</sup> Document 92, or “Exhibit O” is presumably what he was shown, from the description in the transcript, such as the number on the person’s helmet in the photo.

continued “he is standing on – basically a concrete formwork, supporting formwork for concrete deck.” He could not say if it was a photo of the job site at 540 Fulton. He was asked [Page 56] if he and his co-workers had the authority to stop the work if he saw one of the workers doing something unsafe or working in an unsafe manner, and he said “yes.” He was asked “are you aware of anyone complaining to you just with respect to this project of scaffolding not having proper guardrails?” and he responded “subsequently” [Page 59] meaning after the plaintiff’s accident.

Mr. McNeice was asked “If an individual was working on a scaffold and was tied let's say to a yo-yo, would there be any situation where that individual would untie to continue to do the work that they were doing on the scaffold?” and he responded “yes” [Page 61]. Asked to explain, he said “if that particular individual wearing a yo-yo had to move from one area of the scaffold to the other, he would unclip, walk to the area. And if there was a cable, he would stay on the cable line and slide his clip all of the way down, if that existed. If not he'd clip it from section to section as he went, and then when he got to the area he'd stay, he'd leave it clipped on and that's that.” Asked about safety railings, he said [Page 64] “There is scaffold guidelines. They'd have to follow the appropriate scaffold guidelines pertinent to the type of scaffold that they were using.” Next, he was asked what type of scaffold RC Structures used, and he said he did not know [Page 64].

### **Labor Law 241(6)**

Next, plaintiff asserts that he is entitled to partial summary judgment against all three defendants with respect to his Labor Law §241(6) claim. Plaintiff points out that, like §240(1), §241(6) imposes absolute vicarious liability without regard to fault against owners, contractors and their agents for any violations of the Industrial Code (12 NYCRR ch. 1, subch. A) that proximately cause injuries to workers. Plaintiff argues that the applicable Industrial Code provision is §23-1.7(d), which addresses slipping hazards, provides a sufficiently specific predicate for Labor Law §241(6) liability. It provides that “[e]mployers shall not suffer or permit any employee to use a

floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

Plaintiff claims that defendants’ failure to ensure compliance with this provision violated the Industrial Code, proximately caused his injuries, and establishes a prima facie Labor Law §241(6) claim. Counsel avers that “Here, where Plaintiff testified that it was raining on the day of the incident, and everything was wet and slippery, (Exhibit “G” at pp. 42, 54-55) Defendants’ failure to ensure that Plaintiff’s elevated working surface was free from water and any other slippery conditions was a direct violation of Industrial Code §23-1.7(d) and, accordingly, a prima facie violation of Labor Law §241(6). . . . Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law §241(6) liability. Accordingly, it is of no consequence whether Defendants were aware of the wet and slippery condition of the work site; they nevertheless had a non-delegable statutory obligation to cure the hazard” [Doc 76 at ¶¶87-88].

Plaintiff concludes that his motion under Labor Law §241(6) should thus be granted insofar as it seeks partial summary judgment on liability against defendants.

### **Labor Law §200**

Plaintiff seeks summary judgment on his Labor Law §200 and common law negligence claims solely as against defendant Pav-Lak. He argues that “Pav-Lak had the authority to control the injury-producing work which proximately led to Plaintiff’s incident and resulting injuries, as well as constructive, if not actual, notice of the hazardous condition” [id. ¶90].

Plaintiff states that

“Pav-Lak admitted that it was responsible for ensuring that its subcontractors were aware of, and complied with, the safety requirements set forth in Pav-Lak’s site safety plan, and enforced by Pav-Lak’s site safety manager. In addition to its undisputed responsibility for safety on site, Pav-Lak’s authority over the means and methods of the work at the Premises is further evidenced by the fact that Pav-Lak imposed its own requirements with respect to worker training and safety railings on scaffolding, and the fact that Pav-Lak’s project manager, super, and site safety manager walked through the project, identified scaffold towers that were not up to par, and advised RC’s concrete safety manager and concrete super of those issues. Thus, Pav-Lak had the authority to oversee and control the work of its various on-site contractors with respect to the means and methods of their work. Additionally, as set forth in Point IV(B), *infra*, given Mr. McNeice’s admission that he was aware that there were situations in which an individual working on a scaffold and tied to a yo-yo would have to unclip to move from one area of the scaffold to another, Defendant Pav-Lak had, at a minimum, constructive notice of the hazardous manner in which the stripping work was being performed, which proximately led to Plaintiff’s injuries. . . . there can be no dispute that Pav-Lak had constructive, if not actual, notice of the fact that RC employees were working on a wet, slippery, defective makeshift scaffold, with no continuous means of fall protection, in sufficient enough time that they could, and should, have remedied the hazardous conditions that resulted in Plaintiff’s injuries. . . . Accordingly, Plaintiff is entitled to summary judgment with respect to both his Labor Law §200 and his common law negligence claims against Defendant Pav-Lak as a matter of law (internal cites omitted)” [Doc 76 ¶¶92-94, 99].

### ***Defendants’ Arguments in Opposition***

In opposition to plaintiff’s partial summary judgment motion, defendants submit an attorney’s affirmation, the pleadings, copies of the EBT transcripts already provided by plaintiff, a copy of the contract between 540 Fulton as owner and Pav-Lak as construction manager, a copy of the contract between Pav-Lak and RC Structures Inc., Pav-Lak’s daily logs from 11/1/2018 to 12/20/2018, an incident report, a handwritten statement from plaintiff’s foreman Deniz Almeida, which is not in admissible form, a site safety plan for the project, and a defectively executed and defectively notarized affidavit and curriculum vitae of a professional engineer, who is proffered as an expert. The engineer, Anthony Kelly, states that he is a registered architect and a licensed professional engineer in the State of Pennsylvania. He signed the certificate of conformity in the

place for the notary's signature, and did not sign the affidavit, and then the notary signed on a jurat which does not constitute a certificate of conformity for an out of state notary. The court has overlooked these errors in Mr. Kelly's affidavit.

The court notes that the same lawyers represent all three defendants and they do not argue that any of them is not a proper labor law defendant.

First, counsel for defendants argues that the motion is premature as the note of issue had not been filed at the time it was made. Next, counsel avers that the motion is defective as it lacks a Statement of Material Facts. Finally, with regard to their procedural objections, counsel claims they did not receive notice of the existence of the plaintiff's co-workers as witnesses in discovery, as the disclosure was mailed to the wrong address for the firm<sup>4</sup>, so the affidavits should be disregarded.

On the merits of the motion, defendants refute every statement plaintiff makes. Counsel avers that plaintiff was the sole proximate cause of his accident and injuries, as it was "plaintiff's misconduct and improper use of available equipment that was the sole proximate cause of his accident" [Doc 95 ¶4]. Defendants' counsel specifies "Plaintiff disconnected his lifeline while elevated above six feet, failed to secure his position using the chain assembly in his waist tool bag, failed to ensure he had stable and safe footing, and then stepped onto the scaffold's railing to freeclimb to another work area. In doing so, plaintiff ignored his own OSHA safety/scaffold training, his employer's express safety instructions, this jobsite's written and Dept. of Buildings-approved Site Safety Plan, and the written instruction printed on the label of his own lifeline which he brought from home [id.]." In sum, defendants argue that plaintiff knew that he was supposed to remain tied off when working at a height of six feet or more, but he unhooked his yo-yo (retractable

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<sup>4</sup> Defendant Pav-Lak has been represented by four different law firms since this action was commenced. Doc 93 is the plaintiff's exchange and affidavit of service, indicating service (7 months before the motion was filed) to defendants' current attorneys at a prior address for the firm. It is not known when they moved.

line) and climbed onto the scaffold rail to move to another location when he should have climbed down, then unhooked, so he was on the ground when he unhooked, then moved to the next location and climbed back up.

Defendants also aver that it was not raining, as plaintiff testified. Counsel argues that “Daily Logs maintained in the ordinary course of this construction project shows it did not rain until hours after plaintiff’s alleged fall. Nevertheless, being unavoidably exposed to elements and working in a cellar, it would have been impossible to ensure a work environment that was fully dry and free of all debris. Moreover, New York’s Labor Law imposes no such duty.”

Further, defendants aver that the scaffold was not a “makeshift,” “temporary,” or “provisional” one, but was a “Doka” brand system of scaffold and accessories. Counsel states that “photo evidence also shows this system included locked-in horizontal scaffolding, planks, railings, and safety netting, all in compliance with workplace safety standards.”

Defendants also claim that “it is uncontested that plaintiff had a lifeline (Yo-Yo), full body harness, and chain assembly with him” and “knew how to use his safety equipment and that ‘You always have to walk constantly with the yo-yo and the chains at all times.’ Daily Logs also showed the jobsite was equipped with proper scaffolding, planks, railings, and safety netting. However, despite all of the proper safety equipment in plaintiff’s possession, scaffolding, railings and additional safety features at this job site, Defendants’ Site Safety Plan, RC Structures’ instructions and daily safety meetings, instructions printed on the lifeline itself and his own extensive safety training, plaintiff unhooked his lifeline, stepped onto a scaffold railing and fell” [Doc 95 ¶¶18-19].

Finally, defendants argue that “[p]laintiff claims there was no way to move across the scaffold without unhooking his lifeline but defendants’ construction safety expert, Anthony Kelly, opines plaintiff could and should have descended, re-positioned himself below the new work area, and used the available ladders and scaffolding instead of disconnecting and trying to freeclimb onto

the scaffold railing. The accident did not result from an elevation-related risk or from a failure to provide or otherwise defective safety device [sic] but from plaintiff's own misconduct and recalcitrance" [id. ¶¶20-21].

With regard to plaintiff's claim under Labor Law §241(6), defendants do not aver that Industrial Code §23-1.7(d) is inapplicable, but that it was not violated. That is, that there was no slippery condition to "be removed, sanded or covered to provided safe footing" as "plaintiff's self-serving testimony (that it was raining on December 20, 2018 and that the scaffold and everything was wet) is not supported by fact" [id. ¶25]. Further, counsel points out that plaintiff's co-worker Mr. Vasquez said that plaintiff fell "as he stepped on the scaffold railing it broke off" and he does not mention rain, wetness, or slipperiness.

Finally, with regard to plaintiff's claim under Labor Law §200 and the common law, defendants argue that the accident arose from the means and methods of the work, and not from a hazardous premises condition, and as such, as defendants did not supervise, direct and/or control plaintiff's work, they cannot be liable under this statute or the common law.

Mr. Kelly states in his affidavit that his report is based upon a review of the court file and an examination of the plaintiff's safety equipment at the office of the plaintiff's lawyer on June 3, 2022, four years after the accident. With regard to the plaintiff's safety equipment, he states that it was found to be in "good working condition" [Doc 108 ¶8]. His description of the site is that "as of December 20, 2018, this construction project remained in the superstructure phase of construction meaning RC Structures was the concrete subcontractor responsible for constructing the foundation and cellar/first floor slab before another contractor (Structuretech New York, Inc.) began its work constructing other areas.<sup>5</sup> This stage of construction was unavoidably exposed to weather since the

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<sup>5</sup> Defendant Pav-Lak's witness, Mr. McNeice testified to the opposite. Structure Tech NY did the foundation and pile driving, and RC Structures did the concrete for the 43 floors [Doc 85 Page 30].

building was nowhere near ready to be “weathered-in” (sealed to keep out precipitation, debris and similar conditions).” [Doc 108 ¶6(F)]. He continues “Photos attached to the December 12, 2018 Daily Logs confirm use of a “Doka” brand vertical support system and horizontal scaffold accessories within the cellar area” [id. ¶6(E)].

Mr. Kelly states “[t]he safety equipment used by Plaintiff was a vital component of his own personal safety and needed to be used at all times while performing his work on the foundations to mitigate the risks of falling or losing his balance when working at heights above ground. His functional self-retracting Yo-Yo was a vital lifeline, and failure to tie-off while moving between work areas can result in an accident. During elevated work, understanding the manufacturer’s instructions, proper usage as intended and regular inspections are paramount to one’s safety” [id. ¶10]. Mr. Kelly avers that “Although a suitable chain assembly and lifeline were readily available to him, Plaintiff improperly disconnected his lifeline while attempting to move to another work area but failed to use his chain assembly or any other securement to position himself before reconnecting his lifeline. He did not descend to re-position himself in a new work area and was effectively freeclimbing out of convenience. As inspected, if it had been used properly, Plaintiff’s own self-retracting lifeline would have been able to prevent Plaintiff’s fall. Plaintiff’s decision to disconnect his lifeline without proper securement was improper use of his safety equipment and contradictory to his safety training/RC Structures’ instructions” [id. ¶24]. He concludes that “Plaintiff fell because he failed to tie-off, as required. The record for this case shows the sole cause for his accident was Plaintiff’s own failure to properly tie-off his lifeline and to ensure stable and secure positioning” [id. ¶21]. He continues “[i]t is important to note, Plaintiff does not claim the walking surface failed or fell but rather that he slipped and fell because his lifeline was left unsecured. To the extent Plaintiff will claim the scaffold’s railing broke away, as asserted by his co-worker Jorge Vasquez, it is also important to note Mr. Vasquez states ‘I saw Roman hooking off to cross the makeshift scaffold and

as he stepped on the scaffold railing it broke off ....' (Ref: Vasquez statement, lines 15-17<sup>6</sup>.) It was improper and unsafe for Plaintiff to step onto a scaffold railing to access another work area. Scaffold railings are not a ladder substitute, and it appears Plaintiff was trying to save time by climbing over this railing – despite being there for his own safety. When presented with such an obstacle, the safe and proper method would have been to descend, re-position himself in the new work area, and use available ladders and scaffolding to ascend.” [id. ¶30].

Mr. Kelly concludes that there was no “makeshift” or “temporary” scaffold, but a Doka system and a Simmons system [id. ¶6(D)], that plaintiff’s safety equipment was in good working order, that “Plaintiff claims the floor was slippery and wet, but this does not appear to be a contributing factor” [id. ¶31], and that “[a]lthough Plaintiff had all the safety equipment needed to prevent this accident, he ignored RC Structures’ instruction, the Site Safety Plan, OSHA requirements and his own safety training. By failing to first ensure he had stable and secure footing before disconnecting his lifeline and then free climbing onto the scaffold’s railing, Plaintiff misused his lifeline and chain assembly and caused his own accident” [id. ¶33].

### ***Summary Judgment Standards***

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]; *see also Winegrad v New York*

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<sup>6</sup> Document 88.

*Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d941 [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]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the summary judgment motion must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a summary judgment motion are entitled to “every favorable inference from the parties’ submissions” (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *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]). Indeed, in deciding a summary judgment motion, the court must accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Furthermore, “[i]n all but the most extraordinary instances,

whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial” (*St. Andrew v O’Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

### *Discussion*

#### **Procedural issues**

This motion was not filed prematurely. All discovery was completed and the Note of Issue was filed before the motion was argued and submitted for decision. The motion is not defective for failing to include a Statement of Material Facts. The requirement for such a document was terminated shortly after it was imposed by the Chief Administrative Judge, and changed to specify that it is only required if the judge requires it [Doc 111 Page 5, amending Section 202.8-g (a)]. This court has never required a Statement of Material Facts. Finally, the court sees no basis to disregard the affidavits from plaintiff’s co-workers, whose identities were exchanged April 6, 2022, [Doc 116] many months before this motion was filed. The fact that the notice was sent to an old address for defendants’ new (since 2/22) lawyers is of no moment. The firm’s mail should have been forwarded to their new office address. However, the statement from Mr. Vera was notarized in New Jersey, and there is no certificate of conformity. The absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual

prejudice (*Williams v Light*, 196 AD3d 668 [2d Dept 2021]; *U.S. Bank Trust v McGlone*, 201 AD3d 999, 1001 [2d Dept 2022]).

### **Labor Law §240(1)**

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 construction 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]). Therefore, Labor Law §240(1) is implicated in an injury that directly flows 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 “proper protection” against elevation-related risks is nondelegable; 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”]).

However, Labor Law §240(1) does not apply to “any and all perils that may be connected in some tangential way with the effects of gravity” (*Ross*, 81 NY2d at 501). Instead, “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]). ““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). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein”” (*Harrison v State of New York*, 88 AD3d 951, 952 [2d Dept 2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see also *Gutman v City of New York*, 78 AD3d 886, 887 [2d Dept 2010]). 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 ). “[T]he statutory protection [of Labor Law §240(1)] does not extend to workers who have adequate and safe equipment available to them but refuse to use it” (*Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982], appeal dismissed 58 NY2d 824 [1983]). Lastly, “a defendant is not liable under Labor Law §240(1) where there is no evidence of violation and the proof reveals that the plaintiff’s own negligence was the sole proximate cause of the accident” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; see also *Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 463 [2005]).

Here, the court finds that plaintiff makes a prima facie case for summary judgment on his Labor law §240(1) claim. His motion papers include the pleadings, plaintiff’s EBT testimony, a photo of the work area, his co-workers’ affidavits, Mr. McNeice’s EBT testimony, a copy of the

contract between the owner and Pav-Lak, to demonstrate who the owner and construction manager were, a copy of the contract between Pav-Lak and RC Structures, plaintiff's employer, and a copy of the site safety plan.

Plaintiff avers that he was removing the plywood from the underside of the first floor which had recently been poured, that the scaffold was wet and slippery, that it was not the regular scaffold, which had not been delivered as yet, that he had to unhook and re-hook to move about on the scaffold to remove the plywood from the ceiling, and that he slipped and fell while he was in the process of unhooking and re-hooking because the scaffold was wet, slippery and covered with debris. He also avers that the rail on the scaffold was inadequate and broke when he tried to use it to catch his fall. The court notes that without any expert testimony, the court has no way to review the site safety plan which plaintiff submitted. Mr. McNeice testified that he had no knowledge of plaintiff or of his accident. He testified that the equipment in the photo he was shown was not a scaffold, that he did not know what kind of scaffold was used for RC Structure's job, and that by the time of his testimony, he had been trained in scaffold use and construction. When asked "If an individual was working on a scaffold and was tied let's say to a yo-yo, would there be any situation where that individual would untie to continue to do the work that they were doing on the scaffold?" he responded "yes" [Doc 85 Page 61]. Asked to explain, he said "if that particular individual wearing a yo-yo had to move from one area of the scaffold to the other, he would unclip, walk to the area." He continued "if there was a cable, he would stay on the cable line and slide his clip all of the way down, if that existed. If not he'd clip it from section to section as he went, and then when he got to the area he'd stay, he'd leave it clipped on and that's that" [id.]. Plaintiff testified that he supplied his own equipment, but concedes that his employer would have given him equipment if he asked. There is no evidence in plaintiff's motion which contradicts this statement. Finally, from the testimony it appears that plaintiff was stripping the plywood from one side of the first floor of the

building while the concrete for the other side of the first floor was being poured. It is not necessary for the court to find that it was raining while plaintiff was working for plaintiff's claim that the scaffold was wet to be credible. Water is an essential part of cement mixing. Defendants' expert Mr. Kelly states "[a]s typical of sites at this phase of construction, this job site appears to have de minimis wetness and dust debris due to wet/poured concrete work and exposure to the elements" [Doc 108 ¶6(E)] and "the realities of constructing with elemental exposure and poured concrete make it impossible to ensure a perfectly dry work site free of dust and debris" [¶31]. The burden then shifts to the defendants to overcome the motion and raise a triable issue of fact.

Defendants first submit an attorney's affirmation, which relies heavily on Mr. Kelly's affidavit. Defendants then submit the pleadings and the two EBT transcripts again. Next, defendants provide another copy of the contract between the property owner and Pav-Lak, and another copy of the contract between Pav-Lak and RC Structures. Defendants also provide another copy of the site safety plan. Again, it is not clear why this was submitted without any narrative from an expert to explain to the court how it is relevant. The remaining documents will be discussed one at a time.

The Pav-Lak daily logs provided [Doc 105] are not in admissible form. They were not authenticated by Mr. McNeice at his EBT and are not accompanied by any certification. Defendants' counsel avers that they were kept in the ordinary course of Pav-Lak's business [¶25]. This is insufficient. Further, counsel argues that the weather statement on the log that it was not raining on the morning of the plaintiff's accident proves that it was not raining. This is not a correct conclusion. There is no certified weather report from NOAA. Pav-Lak's weather summary, even if there was someone to authenticate the daily logs, cannot be evidence of the weather at the job site without evidence of how the weather described in the report is imported into the report. Does it come from an official source of weather information, or does it come from the Pav-Lak worker who prepares the daily log? There is no explanation provided.

The incident report [Doc106] is not in admissible form. It is on non-party RC Structures' stationary, and is signed by someone as "safety coordinator" whose signature is illegible, and it is not certified or authenticated by anyone.

The "statement" of Mr. Almeida [Doc 107], who defendants' counsel states was a foreman for RC Structures, is not in admissible form. It is a statement written out by someone other than Mr. Almeida, is not notarized, and attached is an invoice from a translator. It says that a "language consultant" provided Spanish language interpretation, but not the name of who he provided the services for. To be clear, there is a statute which governs, which was not complied with. CPLR §2101(b) states "Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." None of this was done. There is no Spanish language document and no affidavit from the translator. Just a handwritten document which was not written by the witness.

Lastly, defendants' provide an expert affidavit, from Mr. Kelly [Doc 108], which was not properly executed, but the court, as previously discussed, elects to disregard this non-fatal defect and consider it on its merits. Mr. Kelly did not go to the job site. He claims that his opinions are based on what he read in the court file. However, the court file doesn't support his opinions. Therefore, they are speculative. For example, in Paragraph 5 of his affidavit, he lists the documents he reviewed in order to "conduct a safety investigation and analysis concerning the December 20, 2018 incident involving plaintiff." All of the documents are items in this motion, that is, in the court file. He did not review any building plans filed with the NYC Department of Buildings. The opinions he provides are specifically based on the above-described inadmissible items. He relies on Mr. Almeida's statement, the "daily logs" he was told were prepared by Pav-Lak, and from those,

he concludes that the scaffolding, which plaintiff claims was “provisional” as the scaffolding had not arrived as yet, was not provisional or temporary, and was not “makeshift,” but was a “Doka” brand system. Mr. Kelly could only have reached this conclusion from the photos in the inadmissible daily logs. Mr. Kelly says plaintiff’s one photo [Doc 92] is “misleading” [Doc 108 ¶18]. The court cannot consider any photographs, since it is the province of the trier of fact to draw inferences from such items (*see e.g., Somersall v New York Tel. Co.*, 52 NY2d 157, 167 [1981] [“Interpretation of the photographs in evidence involved evaluations of angle and perspective that are the essence of the jury’s function”]).

Mr. Kelly concludes that plaintiff was the sole proximate cause of the accident, as he had not properly used his equipment, which he had in his possession, and which was in good working order. However, other than his examination of plaintiff’s safety equipment, the remainder of his factual conclusions and opinions are based on inadmissible items, and thus, constitute inadmissible hearsay. To be clear, Mr. Kelly has no personal knowledge of the facts of the accident, the weather, or the slipperiness of the scaffold. His opinions are “based on inadmissible hearsay, surmise and conjecture and were of no probative value” (*Madalinski v Structure-Tone, Inc., et al*, 47 AD3d 687 [2d Dept 2008]; *see also Bellafiore v L & K Holding Corp.*, 244 AD2d 443 [2d Dept 1997]).

While Labor Law §240(1) does impose on the injured worker the duty to use safety equipment sensibly (*see e.g., Negron v City of New York*, 22 AD3d 546, 547 [2005] [plaintiff’s failure to ensure lanyard with safety harness was tied to structure was sole proximate cause of accident]), here, defendants’ claims that plaintiff did not use his safety equipment in the manner that he was trained to, and thus, whether plaintiff was the sole proximate cause of his injuries, is supported solely with hearsay allegations of what he “could have” or “should have” done. The plaintiff, his co-workers and Pav-Lak’s witness, who all provide the actual evidence in the motion papers, all argue that unhooking and re-hooking were, or can be, necessary. They do not set forth

any opinion that plaintiff could have or should have climbed down to the ground before asking someone else, who was still up on the scaffold, to unhook his yo-yo, and that he then should have moved the ladder to the next place he needed to work, located an available coworker to hold the ladder while plaintiff ascended to the scaffold at the location of his next place to work, and that he could have then safely re-hooked his yo-yo. Nor is there any evidence that when he then ascended the ladder and stepped onto the scaffold in the new work area, and started to re-hook his yo-yo, that he wouldn't have slipped in that location before he had re-hooked. He could not re-hook from the ground. Nor could he unhook from the ground. There was no horizontal bar available that would have allowed him to remain hooked while moving from one location to another. Perhaps the amount of debris on the ground would have made it hard to re-position the ladder in the next work location. These unknown facts demonstrate that defendants' statements lack probative value. Defendants have submitted absolutely no facts to support their arguments, as the items they have submitted are not in admissible form.

The court finds that defendants do not overcome the plaintiff's prima facie case and raise a triable issue of fact. Plaintiff is entitled to summary judgment on his Labor Law §240(1) claim. To be clear, whether plaintiff fell because when he slipped on the wood of the scaffold, the railing did not keep him from falling because it broke, or whether he fell because he stepped onto the railing, for purposes of Labor Law §240(1), the scaffold failed to provide plaintiff with proper protection.

As the Court of Appeals explained in *Blake v Neighborhood Hous. Serv. of New York City, Inc.* (1 NY3d 280, 289 n 8 [2003]):

In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have (ever since *Stewart v Ferguson*, 164 NY 553 [1900], *supra*) continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. See *Panek v County of Albany* (99 NY2d 452, 458 [2003] [summary judgment appropriate for the plaintiff where it was uncontroverted that a ladder collapsed beneath him, causing the fall]); *Styer v Walter Vita Constr.* (174 AD2d 662 [2d Dept 1991]); *Olson v Pyramid Crossgates Co.* (291 AD2d 706 [3d Dept 2002]). 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. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]).

(*See also Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] [“Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials”]).

**Labor Law §241(6)**

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 nondelegable 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*, 91 NY2d at 348; *Ross*, 81 NY2d at 501-502; *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]).

A sustainable Labor Law §241(6) claim requires the plaintiff to demonstrate 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 494 [1993]) and “mandates a distinct standard of conduct, rather than a general reiteration of common-law principles” (*Rizzuto*, 91 NY2d at 351). “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 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]).

Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff’s injury (*Rizzuto*, 91 NY2d at 351). Indeed, “such a violation . . . does not conclusively establish a defendant’s liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances” (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]). Similarly, the court may not make a summary determination on whether plaintiff foolishly chose not to use available safety devices (*see e.g. Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010] [as to Labor Law §241(6) claim, triable issues of fact exist as to whether sole proximate cause of injuries was refusal to obey

instructions to use actually available safety device]; *see also Allen v Village of Farmingdale*, 282 AD2d 485, 487 [“Under the circumstances, whether the plaintiff refused to properly use the available safety equipment, and is a recalcitrant worker, is a question of fact which cannot be resolved on a motion for summary judgment”).

Plaintiff also seeks summary judgment on his claim under Labor Law 241(6). In particular, plaintiff claims defendant violated Industrial Code section 23-1.7(d), entitled “Slipping Hazards”, which states: “[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.” Plaintiff relies on just this one section. As he has abandoned his arguments based on the other sections in his bill of particulars, the Court need not address them.

Plaintiff claims that “defendants’ failure to ensure that Plaintiff’s elevated working surface was free from water and any other slippery conditions was a direct violation of Industrial Code §23-1.7(d) and, accordingly, a prima facie violation of Labor Law §241(6). Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law §241(6) liability. Accordingly, it is of no consequence whether Defendants were aware of the wet and slippery condition of the work site; they nevertheless had a non-delegable statutory obligation to cure the hazard” [Doc 76 ¶87-88].

Defendants argue that this provision has “no bearing on the facts of this case since no violations occurred,” and that “[p]laintiff Labor Law §241 claim must also be dismissed [sic] because plaintiff cannot show that defendants violated a specific Industrial Code provision that was

causally related to the accident or plaintiff's injury-producing work"[Doc 95 ¶23]. Counsel concludes [¶26] "Mr. Vasquez wrote plaintiff fell "as he stepped on the scaffold railing it broke off."

The court finds that section 23-1.7 (d), is sufficiently specific and concrete to support a Labor Law §241(6) cause of action, and it applies to the plaintiff's description of how this accident occurred in this case (*see Harsch v City of New York*, 78 AD3d 78, 783 [2010]). Plaintiff's deposition testimony that he slipped on the wooden scaffold planking, which was wet, slippery and covered with debris, is sufficient to raise an issue of fact as to whether 12 NYCRR 23-1.7(d) was violated, and whether said violation was a substantial cause of plaintiff's injuries (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [2008]).

However, issues of fact preclude awarding summary judgment to plaintiff with respect to Labor Law §241(6). Plaintiff's co-worker states in his affidavit [Doc 88] that plaintiff stepped onto the railing, which "broke off and caused Roman to fall about 8 feet to the ground". This does not implicate slipping on a scaffold. The court cannot determine issues of credibility. Or whether the translation of Mr. Vasquez' oral statement by the translator was correctly done. "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]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). Further, with respect to Labor Law §241(6), any questions of causation or contributory negligence are left for the trier of fact to determine (*Rizzuto*, 91 NY2d at 350; *see also Misicki*, 12 NY3d at 521-522).

### **Labor Law §200 and Common-Law Negligence**

Labor Law §200 states, in applicable part, as follows:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable

and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons.”

Labor Law §200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). “It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it” (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]).

Labor Law §200 and common-law negligence liability “will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury” (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, plaintiff’s allegation in support of the branch of his motion which is for summary judgment on these claims solely as against defendant Pav-Lak is that he has “established a prima facie entitlement to summary judgment with respect to liability as against Defendant Pav-Lak pursuant to Labor Law §200 and common law negligence because Pav-Lak had the authority to

control the injury-producing work which proximately led to Plaintiff's incident and resulting injuries, as well as constructive, if not actual, notice of the hazardous condition" [Doc 76 ¶90].

However, the record establishes that Pav-Lak did not direct plaintiff's work; in fact, plaintiff testified that his RC Structures' foremen alone determined the manner in which he worked. Accordingly, plaintiff has no viable Labor Law §200 or common-law negligence claims against this defendant (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]). Moreover, the court notes that "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence claims or under Labor Law §200 (*Biance v Columbia Washington Ventures, LLC*, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]). Since no defendant was involved in supervising or controlling plaintiff's work, plaintiff's Labor Law §200 claims are unsustainable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008] [no Labor Law §200 liability if accident arose from methods of plaintiff's employer and defendants exercised no supervisory control over the work], citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]). Accordingly, the court denies the branch of plaintiff's motion for summary judgment with regard to his claims of common law negligence and Labor Law §200 which he has asserted against defendant Pav-Lak.

Accordingly, it is

**ORDERED** that the branch of plaintiff’s motion, mot. seq. #3, for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §240(1) against all of the defendants is granted; and it is further

**ORDERED** that the branch of plaintiff’s motion for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §241(6) against all of the defendants is denied; and it is further

**ORDERED** that the branch of plaintiff’s motion for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §200 and common law negligence, solely as against defendant Pav-Lak, is denied; and it is further

**ORDERED** that the caption is hereby amended to read as follows:

----- X  
ROMAN CARDENAS-PARRA,

Plaintiff,

Index No. 506232/2019

- against -

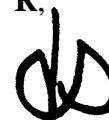
540 FULTON ASSOCIATES LLC,  
JENEL MANAGEMENT CORP.,  
and PAV-LAK CONTRACTING INC.,

Defendants.

----- X

The foregoing constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.