At an IAS Term, Part 75 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 13th day of July, 2023.

P R E S E N T:
HON. ROBIN S. GARSON,
Justice.

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WILMAN FERNANDEZ-VELAYARSE,

Plaintiff,

-against-

Index No.: 513009/18

(Mot. Seq. 4)

CLARKSON BU LLC and
DAWNY CONSTRUCTION LTD.,

Defendants.

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CLARKSON BU LLC and
DAWNY CONSTRUCTION LTD.,

Third-Party Plaintiffs

-against-

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	67-84
Opposing Affidavits (Affirmations)	85-86, 89-94
Affidavits/ Affirmations in Reply	88, 95-96
Other Papers:	

Plaintiff Wilman Fernandez-Velayarse commenced this action to recover damages for injuries sustained in an accident alleged to have been caused by defendants Clarkson BU LLC's (Clarkson) and Dawny Construction LTD's (Dawny) violations of Labor Law §§ 240 (1), 241 (6), and 200. Plaintiff moves for summary judgment on his cause of action

under Labor Law § 240 (1). Upon the foregoing cited papers and after argument, plaintiff's motion is denied as follows:

Plaintiff alleges the following: On June 21, 2018, plaintiff sustained various injuries while performing work on a project involving the construction of a seven-story residential apartment building located at 77 Clarkson Avenue in Brooklyn, NY (the building). The owner of the building, defendant Clarkson, hired defendant Dawny as the general contractor on the project. Dawny in turn subcontracted with third-party defendant Magellan Concrete Structures Corp. (Magellan) to perform concrete work on the project. Plaintiff was employed by Magellan.

Plaintiff had worked at the jobsite for approximately 15 days prior to the time of the accident. He was supervised by Magellan foreman Paulo Andre. On the day of the accident, concrete had been poured for the first four floors of the building, and Magellan workers were in the process of constructing formwork into which wet concrete would be poured in order to form the fifth floor of the structure. As part of this work, plaintiff was directed by Andre to stand at the edge of a piece of plywood at the fifth-floor level and lay two-by-four pieces of wood across horizontal beams which were supported by vertical metal posts. The accident occurred while plaintiff stepped onto one of the vertical beams and was about to lay down the two-by-four when the vertical post supporting the beam unexpectedly moved. As a result, the beam moved and plaintiff lost his balance and fell to the fourth floor, some eight to ten feet below.

At his deposition, plaintiff testified that he was wearing a harness supplied by Magellan at the time of the accident but was not provided with a lanyard to attach to his

harness. At his deposition, plaintiff testified that on the morning of the accident he had spoken to a Magellan employee who was in charge of providing safety equipment and requested a lanyard, but was told that no lanyards were available. Plaintiff further testified that he complained to Andre about the lack of lanyards but was told to keep working. Further, plaintiff testified that even if a lanyard had been provided, there was no place to tie the lanyard off.

In opposition to plaintiff's motion, defendants maintain that there are material issues of fact regarding whether plaintiff was a recalcitrant worker. In support of this argument, defendants point to the deposition testimony of Andre. In particular, defendants note that, when he was informed about plaintiff's claim that there were no lanyards available on the day of the accident, Andre testified that Magellan always had enough lanyards and that Netto would have told him that they needed to order lanyards if more were needed, which never occurred. Defendants also point out that Andre testified that, at some point prior to the accident, he issued plaintiff an oral and written reprimand for failing to wear his harness while working on the project. In addition, defendants submit copies of written disciplinary warnings which predate the accident that were purportedly issued to plaintiff for failing to wear his safety harness. As a final matter, defendants note that Andre, as well as Dawny's owner, Dawny Martinez, testified that they went to the site of the accident immediately after it occurred and both individuals saw tie off points to which plaintiff could have tied off.

Labor Law § 240(1) provides, in pertinent 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, [or] altering . . . 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 an 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, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, "[t]he 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).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In cases involving falling workers, "[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls or otherwise

fails to support the plaintiff and his or her materials" (*Melchor v Singh*, 90 AD3d 866, 868). Thus, the fact that a scaffold or ladder collapses constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Exley v Cassel Vacation Homes, Inc.*, 209 AD3d 839, 841 [2022]; *Debennedetto v Chetrit*, 190 AD3d 933, 936 [2021]).

Once a plaintiff makes a prima facie showing that his or her injuries were caused by a violation of Labor Law § 240 (1), the burden shifts to the owner/contractor defendant to submit admissible evidence which raises a triable issue of fact regarding liability, by evidence indicating plaintiff was a recalcitrant worker or was the sole proximate cause of the accident.

Fernandez-Velayarse has satisfied his a prima facie burden by presenting evidence showing that he was caused to fall eight to ten feet while performing construction work when the support pole and beam that he stepped onto unexpectedly moved (*Bisram v Long Island Jewish Hosp.*, 116 AD3d 475, 475-476 [2014]). Accordingly, the burden shifts to defendants to raise a triable issue of fact as to whether plaintiff was a recalcitrant worker or the sole proximate cause of the accident.

The recalcitrant worker defense applies when there is evidence that a safety device that would have prevented the accident was readily available, that the plaintiff knew that it was available and that he or she was expected to use the device, and that for no good reason, the plaintiff chose not to use the device (*Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Garcia*, 196 AD3d at 676; *Yax,* 67 AD3d at at 1004). Here, defendants submit the deposition testimony of Andre and Martinez. Andre testified that Magellan workers could obtain safety devices from a shanty located outside the first floor

of the building and that these safety devices included lanyards. Further, when directly asked if he disputed plaintiff's claim that no lanyards were available in the shanty on the day of the accident, Andre testified that, "I don't know what to say. We always had enough." Moreover, Andre testified that on two occasions prior to the accident, he reprimanded plaintiff for failing to wear his harness. Both Andre and Martinez testified that they went to the site immediately after the accident and saw several places to which plaintiff could have tied off. Accordingly, defendants have raised triable issues of fact as to whether there was a lanyard available to the plaintiff and the ability to utilize a lanyard if he had one.

For the foregoing reasons, it is hereby:

ORDERED that plaintiff's motion for summary judgment against Clarkson BU LLC and Dawny Construction LTD. under his Labor Law § 240 (1) cause of action is denied.

Clarkson BU LLC shall serve a copy of this order along with notice of entry on all parties within 20 days of the date of this order.

This constitutes the decision and order of the court.

ENTER,

7/13/23

Hon. Robin S. Garson, A. J. S. C.

HON. ROBIN S. GARSON
A.J.S.C.