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 24th day of July, 2023.

P R E S E N T:

HON. ROBIN S. GARSON,
Justice.

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ESDRAS ARZU,
Plaintiff,
-against-

Index No.: 500542/19

SALM PROPERTIES, LLC and 1 OAK CONTRACTING, LLC,
Defendants.

(Mot. Seq. 4)

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	72-73, 89
Opposing Affidavits/Answer (Affirmations)	95
Affidavits/ Affirmations in Reply	102
Other Papers:	

Plaintiff Esdras Arzu moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action as against defendants Salm Properties, LLC (Salm) and 1 Oak Contracting, LLC (1 Oak). Upon the foregoing cited papers, the motion is granted as follows:

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 and 241 (6), plaintiff alleges that he was injured on September 4, 2018, while working on a project in Long Island City involving the construction of townhouses, when the ladder on which he was standing kicked out and fell, causing plaintiff to fall to the floor

below. Salm owned the premises at issue, and it hired 1 Oak to act as the construction manager for the project. 1 Oak, in turn, hired Bowne Tech Construction Corp. (Bowne Tech) to erect the steel superstructure for the project. Plaintiff was employed as a welder by Safetx Contracting Corp. (Safetx),[1] and he performed welding work at the project site at various times during the course of the project.

According to plaintiff's deposition testimony, on the date of the accident, Phillip, a Safetx boss, assigned plaintiff to work at the construction site at issue with four other Safetx employees. Once he was at the jobsite, Tony, his Safetx supervisor, directed plaintiff, along with his coworkers, to continue welding metal plates that were to be part of the fall-prevention system on the roof of the third or fourth floor of the building under construction. Although plaintiff and his coworkers had brought a ladder with them in their van, this ladder was not tall enough to reach the top of an approximately 15 to 16 feet tall concrete wall that they needed to reach to access the area where they were to perform their work. As such, Tony had instructed plaintiff to use a ladder that was present at the worksite to access the roof (plaintiff's 5/14/21 depo. at 85-86). This ladder was one part of an extension ladder that had previously been taken apart (*id.*).

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[1] Although plaintiff's deposition testimony is somewhat confused as to how the name of his employer was spelled or pronounced, plaintiff's counsel clarified that plaintiff was asserting, as determined by the Workers' Compensation Board (Board), that plaintiff's employer was Safetx (plaintiff's 5/14/21 depo. at 69-71). How Safetx came to be working on the project is not entirely clear from the record before the court. In his own deposition, plaintiff stated that his boss at Safetx was named Phillip, and that Safetx's shop was located at 72 Bowne Street in Brooklyn. This 72 Bowne Street address is the same address provided for Bowne Tech in its contract with 1 Oak, which contract was signed on the behalf of Bowne Tech by Philippos Kapnisis. In addition, plaintiff submitted a copy of a Workers' Compensation Board investigative report and determination relating to Safetx, the admissibility of which has not been challenged, which shows a connection between Safetx and Bowne Tech. While none of this is determinative, it would thus appear that Bowne Tech subcontracted for Safetx to perform a portion of its steelwork that involved welding, that Bowne Tech and Safetx are alter egos, and/or that Bowne Tech borrowed employees from Safetx to perform its work. The court further notes that defendants make no contention that plaintiff's employment by Safetx has any bearing on plaintiff's entitlement to summary judgment.

In order to reach to top of the wall at issue, the ladder was placed with its bottom resting on the concrete floor and its top, which stood about an inch over the top of the concrete wall, resting against the top of the wall. After plaintiff's coworkers climbed up the ladder, plaintiff checked the ladder to see if it was stable. Plaintiff then climbed the ladder with his welding tanks or other tools. After climbing back down the ladder to get a bag of water bottles, plaintiff climbed up the ladder again and placed the water bottles on a beam. He then started to climb off the ladder onto the top of the concrete wall, with his left foot on the second rung from the top of the ladder and his right foot already on the top of the concrete wall (plaintiff's 7/12/21 depo. at 155-156). As he did so, the bottom of the ladder then slipped away from the wall, and the top slid down the wall, causing plaintiff to fall to the concrete floor below (*id.* at 157, 159, 162; plaintiff's 5/14/21 depo. at 96).

In an affidavit dated October 25, 2021, plaintiff added that he did not set up the ladder himself, that no one was holding the ladder at the time of his accident and that there was nothing on which to secure the top or bottom of the ladder to hold it in position. Although plaintiff was wearing a safety harness at the time of the accident, plaintiff asserted that there were no anchorage points or other places to attach the harness while he was climbing up the ladder. Plaintiff also stated in the affidavit that he did not see any scaffolds at the worksite.

It is in the context of this factual background that the court considers plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action. Section 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with elevation

differentials proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Here, plaintiff has demonstrated, prima facie, that Salm was an owner and 1 Oak was a contractor or Salm's statutory agent for purposes of section 240 (1) liability. In this respect, Salm conceded that it was the owner of the premises at issue in its response to plaintiff's notice to admit and 1 Oak, despite being identified as a construction manager in its contract with Salm, effectively acted as a general contractor by hiring the subcontractors and by being the only supervisory presence at the worksite (*see Wells v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Pipia v Turner Constr. Co.*, 114 AD3d 424, 427 [1st Dept 2014], *lv dismissed* 24 NY3d 1216 [2015]; *Gallagher v Resnick*, 107 AD3d 942, 943-944 [2d Dept 2013]; *Barrios v City of New York*, 75 AD3d 517, 519 [2d Dept 2010]; *Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1086 [4th Dept 2005]). As there is no real dispute that plaintiff's fall involved a significant elevation differential, plaintiff's entitlement to summary judgment turns on whether defendants' failure to provide proper protection was a proximate cause of plaintiff's injuries.

In order for plaintiff to demonstrate the absence of proper protection in the context of a cause involving a fall from a ladder, "[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). Here, plaintiff's testimony that he fell because the unsecured ladder kicked out from under him is sufficient to demonstrate his

prima facie entitlement to summary judgment in this respect (*see Lochan v H & H Sons Home Improvement, Inc.*, 216 AD3d 630, 632 [2d Dept 2023]; *Soczek v 8629 Bay Parkway, LLC*, 193 AD3d 1093, 1094 [2d Dept 2021]; *Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]).

Defendants, in opposition, contend that plaintiff failed to demonstrate his prima facie showing because his deposition transcripts are unsigned and, thus, inadmissible, and because his affidavit contradicts his deposition testimony. Plaintiff's deposition transcripts, however, can be considered despite his failure to sign them because the court reporters certified the accuracy of the transcripts, and plaintiff, by submitting the transcripts in support of his motion, has adopted them as accurate (*see Farquharson v United Parcel Serv.*, 202 AD3d 923, 924 [2d Dept 2022]; *E.W. v City of New York*, 179 AD3d 747, 747-748 [2d Dept 2020]; *see also Yerry v Whole Food Mkt. Group, Inc.*, 208 AD3d 733, 734 [2d Dept 2022]; *Celestin 40 Empire Blvd., Inc.*, 168 AD3d 805, 808 [2d Dept 2019]). While plaintiff's statement in his affidavit regarding the absence of scaffolding at the worksite may be inconsistent with his deposition testimony that he did not remember whether or not there were scaffolds at the worksite, the remainder of the affidavit may be considered because the statements are either consistent with plaintiff's deposition testimony or address issues that were not fully addressed in his testimony (*see Bartels v Eack*, 164 AD3d 1202, 1204 [2d Dept 2018]).

Defendants' argument that plaintiff was not engaged in a covered activity under Labor Law § 240 because he was carrying water bottles up the ladder is without merit. Plaintiff was on the site to perform welding work, which he had performed on other

occasions, and the fact that the accident happened while bringing water to the work area, but before he actually started the welding work, does not remove him from the protections of section 240 (*see Estrella v ZRHLE Holdings, LLC*, ___ AD3d ___, 2023 NY Slip Op 03848, *2 [2d Dept 2023]; *Crutch v 421 Kent., LLC*, 192 AD3d 977, 980 [2d Dept 2021]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 48 [1st Dept 2005]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Finally, contrary to defendants' contentions, plaintiff's actions were not the sole proximate cause of the accident. It was plaintiff's supervisor who directed plaintiff to use the unsecured ladder at issue, and defendants have provided no evidence that plaintiff failed to use any safety devices to secure the ladder, that there were other safety devices at the worksite plaintiff could have used to access his work area, or that there was anything to which plaintiff could have attached his harness while he was climbing the ladder (*see Zholangi v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 730 [2d Dept 2020]; *Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 888 [2d Dept 2019]; *see also Melendez v 1595 Broadway LLC*, 214 AD3d 600, 601-602 [1st Dept 2023]) Notably, "when a plaintiff [is] provided only with an unsecured ladder and no safety devices, [he] cannot be held solely at fault for his injuries, even where the plaintiff has negligently placed the ladder" (*Von Hegel*, 180 AD3d at 730 [internal quotation marks omitted]).

As defendants have failed to demonstrate the existence of a factual issue that warrants the denial of plaintiff's motion, plaintiff is entitled to summary judgment in his

favor with respect to liability on his Labor Law § 240 (1) cause of action. Accordingly, it is hereby:

ORDERED that partial summary judgment is granted to plaintiff Esdras Arzu as to those claims predicated on violations of Labor Law § 240 (1) as pleaded within the third cause of action of the complaint.

Plaintiff 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 and judgment of the court.

Dated: July 24, 2023

ENTER

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

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