At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 16th day of October 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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CARLOS ALBERTO RODRIGUEZ,
Plaintiff,
-against-

Index No. 520438/19

ANDREW JACKSON REALTY CO., L.P. AND SIBLING MANAGEMENT INC., KAJ NY CONSTRUCTION INC.,
Defendants

ORDER

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ANDREW JACKSON REALTY CO., L.P., AND SIBLING MANAGEMENT INC.,
Third Party Plaintiffs,
-against-

YELLOWSTONE CONSTRUCTION, INC.,
Third Party Defendants

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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	77-89, 91-104
Opposing Affidavits (Affirmations)	110-111, 112
Affidavits/ Affirmations in Reply	113
Other Papers:	

Upon the foregoing papers, defendants Andrew Jackson Realty Co., LP, (Jackson) and Sibling Management Inc., (Sibling) (collectively, defendants) move (in motion [mot.] sequence [seq.] number [no.] 5), for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Carlos Alberto Rodriguez's claims arising under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence.

Plaintiff moves (in mot. seq. no. 6) for an order, pursuant to CPLR 3212, granting partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim.

Jackson is the owner of a building, located at 68-64 Yellowstone Boulevard, in Queens. Sibling is the entity that served as the managing agent of the building on behalf of Jackson.

Third-party defendant Yellowstone Construction, Inc., (Yellowstone) was hired by Sibling to repair and replace the parapet located on the front right side of the building. Plaintiff was employed by Yellowstone as a bricklayer. Plaintiff testified that on September 11, 2019, he was working on the roof performing repairs to the parapet wall. He states that, at some point, he crossed over the roof to assist one of his co-workers connect his safety harness to a pipe scaffold that was adjacent to the building. Plaintiff also testified that he had to step onto the scaffold in order to assist his co-worker and as he was turning to go back to the roof, he stepped on an unsecured scaffold plank which turned, causing him to fall to the ground below and sustain various injuries. It is undisputed that plaintiff's safety harness was not secured at the time of the accident.

Plaintiff commenced the instant action by filing a summons and verified complaint on September 17, 2019, and an amended summons and complaint on October 2, 2019. Defendants joined issue by filing a verified answer on March 17, 2020. On or about November 18, 2019, plaintiff served his verified bill of particulars and thereafter served several amended bills of particulars. On June 23, 2021, defendants commenced a third-party action against Yellowstone, and on February 16, 2022, a default judgment was issued against Yellowstone based upon its failure to answer or appear in this action. Plaintiff was deposed on March 9, 2022, and defendants produced a witness for examination before trial on March 16, 2022. On June 3, 2022, plaintiff filed his note of issue and the following timely motions ensued.

Defendants move for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common law negligence claims. Defendants argue that all of plaintiff's claims should be dismissed as a matter of law because plaintiff's decision to fail to use his safety harness renders him a recalcitrant worker and thus, his actions were the sole proximate cause of his injuries. To support this claim, defendants point to plaintiff's testimony that he had used his safety harness earlier on the day of his accident but had proceeded to unhook his own safety harness when he went over to help his co-worker get hooked onto the pipe scaffolding. Defendants contend that the appropriate safety devices had been provided, in the form of a proper hookup and harness, for both the roof and the pipe scaffolding and that plaintiff was aware of this and chose not to use his safety harness when he was on the pipe scaffolding helping his co-worker. Accordingly, defendants contend that liability cannot be imposed upon them for plaintiff's accident.

In opposition, and in support of plaintiff's motion seeking partial summary judgment on his Labor Law § 240 (1) claim, plaintiff argues that the branch of defendants' motion seeking summary judgment dismissing his Labor Law § 240 (1) claim should be denied. Specifically, he asserts that the record demonstrates that his fall was caused by the movement of the unsecured scaffold plank he was standing on as he was attempting to get off the scaffold and back onto the roof. Plaintiff contends that he was neither recalcitrant, nor were his actions the sole proximate cause of the accident, and therefore he should be awarded summary judgment on the issue of liability for his Labor Law § 240 (1) claim. Plaintiff notes that the failure of the scaffold plank was a proximate cause of the accident, and thus his purported failure to attach his harness would merely constitute comparative negligence, which does not entitle defendants to summary dismissal of this claim. Moreover, plaintiff asserts that defendants have failed to demonstrate that plaintiff received specific instructions regarding using the harness on the day of the accident, or ever at the work site, and deliberately disregarded such instruction.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, __ AD3d __, 2023 NY Slip Op 04329 **1 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].

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 admissible evidence to establish the existence of material issues of fact which require a trial for resolution (*see Gesuale v Campanelli & Assocs.*, 126 AD3d 836, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

Labor Law § 240 (1), states, in relevant part, that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . .

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501.

The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High` Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). "To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124

AD3d 715, 716-717 [2d Dept 2015]). In this regard, "where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). "In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, 'the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch.*, Inc., 13 NY3d 599, 603 [2009]; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Plaintiff's testimony herein reveals that his Labor Law § 240 (1) claim arises out of his fall off of a scaffold after the unsecured plank he was standing on moved. 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" (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Thus, the collapse of a scaffold or ladder constitutes prima facie evidence of a Labor Law § 240 (1) violation (*see Exley v Cassell Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022]; *Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that the collapse of the scaffold, for no apparent reason, gave rise to "a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries"]).

Here, plaintiff has established that defendants failed to furnish or erect a scaffold that would protect him from an elevation-related risk in violation of Labor Law § 240 (1), and the absence of such protection was a proximate cause of his accident (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1094 [2018]; *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023,1024 [2018] [plaintiff established his prima facie entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim where he was injured when scaffold plank broke causing him to fall to ground below]). Even if plaintiff was partially at fault for not attaching his harness to the pipe scaffold when he went to assist his co-worker, a worker's comparative negligence is not a defense to a claim based on Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Mejia v 69 Mamaroneck Rd. Corp.*, 203

AD3d 815, 818 [2d Dept 2022]; *Garzon*, 124 AD3d at 716-717 [2d Dept 2015]; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 638-639 [2d Dept 2005]).

"While an injured worker's comparative negligence is not a defense to a Labor Law § 240 (1) cause of action, the "recalcitrant worker" defense may allow a defendant to avoid liability under the statute 'where a plaintiff's own actions are the sole proximate cause of the accident'" (*Robinson v National Grid Energy Mgt., LLC*, 150 AD3d 910, 912 [2d Dept 2017], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *see Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]). The court finds that the recalcitrant worker defense has no application here as defendants have failed to present any evidence demonstrating that plaintiff disobeyed a direct order with regard to the use of a particular safety device (*see Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815-16 [2d Dept 2018]; *Silvas v Bridgeview Inv'rs, LLC*, 79 AD3d 727, 731 [2d Dept 2010]; *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 809 [2d Dept 2010], citing *Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker "disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device"]).

Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied. Conversely, plaintiff's motion seeking partial summary judgment in his favor on his Labor Law § 240 (1) claim is granted as he has demonstrated that his fall from the unsecured scaffold plank constituted a violation of the statute and defendants have failed to demonstrate that plaintiff was a recalcitrant worker or that his actions were the sole proximate cause of his accident.

Labor Law § 241 (6), provides, in pertinent part, that:

> 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 persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515

[2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC,* 96 AD3d 727, 728 [2d Dept 2012]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Defendants argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. However, defendants fail to address the applicability of any of the Industrial Code provisions that plaintiff asserts in his bills of particulars[1] in support of his Labor Law § 241 (6) claim. Rather, defendants solely contend that this claim should be dismissed because plaintiff was a recalcitrant worker and argue that he was provided with all the safety devices required but chose not to use them. Since the court has determined that the recalcitrant worker defense is not applicable in this case. The court finds that defendants have failed to meet their prima facie burden of establishing entitlement to dismissal of plaintiff's Labor Law § 241 (6) claim and this branch of defendants' motion seeking dismissal is denied (*see Toalongo v Almarwa Ctr., Inc.*, 202 AD3d 1128, 1132 [2d Dept 2022]).

Section 200 of the Labor Law statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Where "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition

[1] In his amended bill of particulars, plaintiff asserts violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23- 1.16 (a) (b) 23-1.17, 23-1.7, 23-1.21, 23-1.24, 23-3.2, 23-3.3, 23-5.1, 23-5.1(c,1) (e) (f) (g) (h), 23-5.2, 23-5.3 and 23-5.9.

while having actual or constructive notice of it" (*Mitchell v Caton on the Park, LLC,* 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira v City of New York*, 120 AD3d 1163,1164 [2d Dept 2014]; *see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2d Dept 2017]; *Marquez v L & M Dev. Partners, Inc*, 141 AD3d 694, 698 [2d Dept 2016]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]).

Moreover, "'the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'" (*Marquez*, 141 AD3d at 698, quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; *see Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], *affd on other grounds* 15 NY3d 869 [2010]; *Torre v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]).

Here, defendants do not argue that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed because defendants did not create the condition that caused plaintiff's accident, or that they lacked notice of the condition. Defendants merely assert that such claims should be dismissed because plaintiff was a recalcitrant worker. The court has determined that the recalcitrant worker defense is not applicable herein. Additionally, defendants, through their submissions, have failed to meet their prima facie burden of establishing their entitlement to summary judgment. In support of their motion, defendants submit the deposition testimony of their witness, Gary Hoffman, a real estate business manager and owner, who testified that the scaffold was erected by Yellowstone and that defendants did not provide any tools to plaintiff and did not direct or supervise the work that plaintiff was performing. However, there is nothing in Mr. Hoffman's testimony indicating whether or not defendants had any notice, either actual or constructive, of the unsecured plank. Accordingly, the court finds that defendants have failed to meet their prima facie burden of establishing entitlement to dismissal of plaintiff's Labor Law § 200 and common law negligence claims thus this branch of defendants' motion seeking dismissal is denied (*see Estrella v ZRHLE Holdings, LLC.*, 218 AD3d 640 [2d Dept 2023]; *Bonkoski v Condos Bros. Constr. Corp.*, 216 AD3d 612, 616 [2d Dept 2023] [holding that defendants failed to establish that they lacked actual or constructive notice of the allegedly dangerous condition of the scaffold, and whether the

condition should have been discovered upon a reasonable inspection]; *Toalongo*, 202 AD3d at 1131 [2d Dept 2022]; *Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]).

The parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is hereby

ORDERED that defendants' motion (mot. seq. no. 5) for summary judgment dismissing plaintiff's claims arising under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence is denied in its entirety; and it is further,

ORDERED that plaintiff's motion (mot. seq. no. 6) seeking partial summary in his favor on the issue of liability for his Labor Law § 240 (1) claim is granted.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice