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 16th day of November, 2023.

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

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ESVIN GODINEZ,

Plaintiff,

-against-

Index No.: 501449/17
Mot. Seq. No.: 010

TRAYMORE ASSOCIATES, L.P., MARLBORO MANAGEMENT CO., INC., ARMEX 4 TRATTORIA CORP. d/b/a GUANTANAMERA and WNS CONTRACTING CORP.,

DECISION & ORDER

Defendants.

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ARMEX 4 TRATTORIA CORP.,

Third-Party Plaintiff,

-against-

WNS CONTRACTING CORP. and THE MAIN STREET AMERICA GROUP, INC.,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/Petition/ Affidavits (Affirmations), and Exhibits	225-234
Opposing Affidavits (Affirmations) and Exhibits	238-244
Affidavits (Affirmations) in Reply	245

In this personal injury action predicated on alleged violations of Labor Law §§ 200, 240 (1), and 241 (6) and common law negligence, plaintiff Esvin Godinez (plaintiff) moves for judgment as a matter of law on the issue of liability for violations of Labor Law §§ 240 (1) and 241 (6) against defendants. Plaintiff specifically alleges violations of Industrial

Code §§ 23-1.7 (a) (1) and 23-1.8 (c) (1). Plaintiff's motion is granted to the extent as follows:

Plaintiff alleges: that he was performing demolition work atop an A-frame ladder when he was struck by a large piece of the ceiling that was being demolished by his co-workers; that he was caused to fall from an elevation to the concrete floor below; that the portion of the ceiling fell when it was dropped by one of the two men on the scaffold approximately three to four feet away, struck his neck and back, causing his body to fall against the ladder; that the falling piece of ceiling knocked both plaintiff and the ladder to the ground; and that he was caused to lose consciousness. Plaintiff further contends that he was not provided with a hard hat or any other protective equipment.

Defendants Traymore Associates, L.P. and Marlboro Management Co., Inc. (owner and agent, respectively) and Armex 4 Trattoria Corp. (the tenant of the premises who contracted for the work) oppose plaintiff's motion. Third-party defendant WNS Contracting Corp. (WNS), plaintiff's alleged employer, opposes the motion to the extent that plaintiff characterizes his alleged injuries as traumatic head and brain injuries.

Plaintiff's Labor Law § 240 (1) Claim

In *Zoto v 259 W. 10th, LLC* (189 AD3d 1523, 1524), the Appellate Division, Second Department, sets forth the elements necessary to establish liability under Labor Law § 240 (1):

> Labor Law § 240 (1) imposes upon owners, contractors, and their agents a nondelegable duty to provide workers proper protection from elevation-related hazards. The purpose of the statute is to protect workers from the pronounced risks arising from construction work site elevation differentials. The protections of the statute are implicated where a worker's task creates

> an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against. 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. In order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his or her injury. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*id.* quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [internal quotation marks and citations omitted]).

Labor Law § 240 (1) provides that contractors and owners shall furnish "scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed, and operated as to give proper protection to a person" employed in the "erection, demolition, repairing, [and] altering . . . of a building." Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to protect a plaintiff (*see Melchor v Singh*, 90 AD3d 866, 868 [2d Dept. 2011]). However, because a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1), there must be evidence that the subject 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 (*id.*).

If plaintiff's conduct was the sole proximate cause of his injuries, liability does not attach (*id.* at 867). Conversely, where a violation of Labor Law § 240(1) is *a proximate cause* of an accident, plaintiff's conduct, of necessity, cannot be the *sole proximate cause* (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2d Dept. 2011]).

Plaintiff demonstrates that there was an elevation-related risk. Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability

under Labor Law § 240 (1) by showing that, although he was provided with a ladder, as required by the statute, the ladder was not secured so as to prevent him from falling (*Baugh v New York City School Constr. Auth.*, 140 AD3d 1104, 1105-1106 [2016]; *Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 961, 963 [2012]). Additionally, plaintiff demonstrates that there was no assistance provided in holding the ladder while plaintiff worked (*see Canas*, 99 AD3d at 963). Defendants and WNS offer no evidence to disturb plaintiff's prima facie showing. Accordingly, that branch of plaintiff's motion for summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim is granted.

Plaintiff's Labor Law § 241 (6) Claim

Plaintiff also moves for summary judgment under Labor Law § 241 (6) on the issue of liability, asserting two separate violations of 12 NYCRR 23 (the Industrial Code). Specifically, plaintiff alleges violations of Industrial Code §§ 23-1.7 (a) (1) and 23-1.8 (c) (1).

Labor Law § 241 (6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. Plaintiff's burden is to establish, prima facie, the violation of a specific, as opposed to a general, directive of a section of the Industrial Code and that this violation was a proximate cause of his injuries (*Grant v City of New York*, 109 AD3d 961, 963 [2013]).

Industrial Code § 23-1.7 (a) (1)

Industrial Code § 23-1.7 (a) (1) is sufficiently specific to support a claim brought under Labor Law § 241 (6) (*see e.g. Zervos v City of New York*, 8 AD3d 477, 480 [2004]). The provision requires that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection" (12 NYCRR § 23-1.7 [a] [1]). This provision is not applicable where it is merely foreseeable that an object could fall (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2009]). The section goes on, however, to "set forth specific standards for planking required for overhead protection at work places" (*Zervos*, 8 AD3d at 480) and states as follows: "Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength [and] shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot" (12 NYCRR § 23-1.7 [a] [1]).

The Appellate Division, Second Department has held that an area is not "normally exposed to falling objects" simply because construction is being performed and an object falls as a result (*see Marin*, 60 AD3d at 826). Here, plaintiff failed to meet his burden as he did not provide any evidence or testimony that the area in which he was injured was one where workers are "normally exposed to falling objects" (*see Portillo v Roby Anne Development, LLC*, 32 AD3d 421, 422 [2006]). As such, plaintiff failed to prove that Industrial Code § 23-1.7 (a) (1) was applicable, violated, and that the violation was a

proximate cause of his accident (*see id.*; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2013]; *cf. Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2008]). Accordingly, that branch of plaintiff's motion seeking summary judgment on the issue of liability on his Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-1.7 (a) (1) is denied.

Industrial Code § 23-1.8 (c) (1)

Industrial Code § 23-1.8 (c) (1) may be used to establish liability under Labor Law § 241 (6). Industrial Code § 23-1.8 (c) (1) states, in relevant part, that "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat" (12 NYCRR § 23-1.8 [c] [1]). This provision, unlike Industrial Code § 23-1.7 (a) (1), "does not require that the site of the accident be 'normally exposed' to falling material" (*Marin*, 60 AD3d at 826). Plaintiff must establish that the job was a hard hat job and that the plaintiff's failure to wear a hard hat was a proximate cause of his injury. (*Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2016]; *see also Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1018 [2023]; *Aguilar v Graham Terrace, LLC*, 186 AD3d 1298,1301 [2d Dept 2020]).

Here, plaintiff fails to show, prima facie, that this was a job requiring a hard hat and that his injuries would have been diminished if he had been provided with a hard hat (*see Seales*, 142 AD3d at 1157; *Reyes*, 214 AD3d at 1018; *Aguilar*, 186 AD3d at 1301. Accordingly, that branch of plaintiff's motion seeking summary judgment on the issue of

liability on his Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § § 23-1.8 (c) (1) is denied as material issues of fact remain.

For the foregoing reasons, it is hereby:

ORDERED that plaintiff is granted judgment as a matter of law on the third cause of action (Labor Law §240 [1]).

In all other respects plaintiff's motion is denied.

The above is the decision and order of the court.

ENTER,

11/16/23

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

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