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 5th day of December, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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SANDRO GUAMAN,

Plaintiff,

-against-

NEW 470 LLC, 470 MANHATTAN CON LLC, BUNLIN LLC and J. PETROCELLI CONTRACTING, INC.,

Defendants.

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DECISION / ORDER

Index No.: 504147/2020
Mot. Seq. # 3

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affidavits (Affirmations) and Exhibits Annexed	65-81
Opposing Affidavits (Affirmations)	82-83
Affidavits/ Affirmations in Reply	91

Plaintiff moves (in motion sequence number three) for an order, pursuant to CPLR 3212 (a), granting him partial summary judgment on the issue of liability under Labor Law § 240(1) against defendants NEW 470 LLC, 470 MANHATTAN CON LLC, and J. PETROCELLI CONTRACTING, INC. However, by order dated July 20, 2023, after this motion was filed, the court dismissed the complaint as against defendant J. PETROCELLI CONTRACTING, INC. as well as against defendant BUNLIN LLC, leaving solely defendants NEW 470 LLC and 470 MANHATTAN CON LLC, the property owner and

the general contractor, respectively. Thus, this motion shall only be considered with regard to these defendants.

BACKGROUND

On October 29, 2019, the day of plaintiff's accident, defendant New 470 LLC (hereafter "New 470") was the owner of the property located at 12 Eckford Street also known as 470 Manhattan Avenue (vacant land when purchased and known as Block 2714, Lots 30, 32, 33, combined to form Lot 33 and now known as Lot 1) in Brooklyn, New York (hereinafter "the premises"). The owner filed plans to construct a new eight-story building with 100 apartments and commercial space. Defendant 470 Manhattan Con LLC (hereafter "Manhattan Con") was the general contractor hired to oversee the construction project. The building permit was issued to this company.

Plaintiff was employed by former defendant Bunlin, and he testified that at the time of the accident, he was working with a crew that was tasked with dismantling a scaffold. Plaintiff thought he worked for a company named Caulk, but it has since been determined that while he had worked for Caulk, a "staffing agency" of sorts, by the time of the accident, he had transferred to Bunlin's employment directly. He had been working at the site for three or four months prior to the accident [Doc 76 Page 32]. He indicated that the concrete superstructure was completely done, and they had started installing the exterior bricks on the outside of the building.

Plaintiff testified that during the morning meeting, he was put into a group of six workers and told they were to remove the boards from the scaffold on the fourth, fifth and sixth floors "because they were not done properly" [*id.* Page 47]. He went up to the fourth

floor, wearing his hardhat and with a hammer and a harness that the company had provided. Before the planks could be lifted out of position, the nails had to be removed from them. Plaintiff was tasked with passing the wooden planks from the fourth level of the scaffold to co-workers on the fifth level of the scaffold, and then the workers on the fifth level would pass them to the sixth level workers. When plaintiff and his co-workers finished on the fourth floor, they went up to the fifth floor to remove those planks. While he was on the fifth floor bending over to remove nails, he was suddenly struck by a plank that fell from the sixth level [*id.* Page 61]. It was an OSHA plank, and weighed approximately 30 pounds. His foreman was George Taylor, and there were a number of co-workers who witnessed the accident. They were not using any hoisting equipment, and were told to pass the boards by hand.

Plaintiff commenced this action by filing a summons and verified complaint on February 19, 2020, and issue was joined shortly thereafter. Plaintiff filed his note of issue on December 2, 2022, and this motion timely followed.

Plaintiff's Motion

Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240(1). He supports his motion with copies of the pleadings, an affirmation of counsel, EBT transcripts, and an affidavit from a certified site safety manager.

John McBride, the sole owner of Bunlin LLC at the time of plaintiff's accident, was deposed on November 17 2021 [Doc 43]. He was asked many questions about the procedures for the company's work at the site. In brief, he testified that Bunlin was a company that did exterior and interior masonry. In October of 2019, it had approximately

40 employees. He also was supplied with laborers by Caulk Construction Corp., which he testified had an adjacent office but no overlapping principals. He was asked if plaintiff was one of Bunlin's employees on the date of the accident, and he responded "yes" [Doc 78 Page 17]. For the project at issue, he said Bunlin had been hired by J. Petrocelli [*id.* Page 23], which he described as the "construction manager" and as the "general contractor" [Page 32-33]. The contract was signed by Bunlin as well as by the property owner and the general contractor, but not by J. Petrocelli [*id.* Page 25]. Mr. McBride then said that the contract he was shown was one of two contracts, and only described part of the scope of work.

Mr. McBride stated that George Taylor was one of the two foremen at the site, and that there were 10-15 Bunlin workers on site, plus 6-8 from Caulk. He himself came to the site once or twice a month. He was asked about the scaffolding at the site, which he testified was "to the top of the building, seventh floor" on the day of plaintiff's accident [Page 46]. They were about thirty percent done with their work at the site, and were working on the exterior masonry. Mr. Taylor was the foreman and supervised the Bunlin and Caulk workers. There was also a superintendent, Ciaran Rice, who he said gave instructions to Mr. Taylor [Page 49]. Mr. Taylor did not receive any instructions from Petrocelli [*id.*].

Mr. McBride testified that Bunlin contracted with another company, Dynamic Fraco, for the scaffolding. He was asked what the scope of the contract was, and he said, "to install the scaffold as per the drawings" [Doc 78 Page 52], and then he was asked "was

it Dynamic Fraco's responsibility to dismantle the scaffold?" and he replied "Yes" [*id.*] and that they supplied their own laborers for these tasks.

Counsel then tried to find out why Bunlin's masons were dismantling the scaffold, and Mr. McBride became testy and annoyed. He asked the attorney if he "knew what a scaffold is". He said the workers who were doing this task had 32-hour OSHA scaffold training, and that the City of New York had inspected and told the foreman that the scaffold had to be put back "as per the drawing" [Page 57]. He was asked "Do you know by which process George instructed these OSHA planks to be moved from one floor to another?" and he replied, "He told the 15 qualified workers who have the 32-hour 16 training card to move the planks from the certain floor to whatever floor he needed and they're qualified to know what to do." Mr. McBride was then asked if they were "instructed to pass them by hand or by a hoist mechanism or something else?" and he responded "by hand" [*id.*]. He was then asked, "was there any hoist mechanism available for use to transport the OSHA planks from one floor to another?" and he replied "No. You wouldn't need it, no" [Page 59].

Mr. McBride testified that he was called about thirty minutes after plaintiff's accident. He was told that "a toe board slipped and hit off something and then Mr. Guaman" [Page 60]. More specifically, "I was told that the employee was passing the toe board and it slipped and fell" [Page 63]. He said there were several witnesses to the accident. Their names are in the accident report, he said, and that it also included the name of the worker who dropped the board. He did not remember the names. George Taylor or Ciaran Rice would have to call the site safety manager, whose name he was not sure of,

and then he would have to call the City and OSHA. He was then shown the accident report. It says that Marcelo Quitazaca and Jorge Chavez were witnesses. Marcelo was a Bunlin employee [Page 74] but he was not sure about Jorge [Page 78]. The City issued a stop work order and a violation [Page 80]. There was a photo attached to the accident report [Page 88]. It shows plaintiff lying on the ground. There are people around him, but he could not identify them. He was next shown the site safety log for the day. It was read to Mr. McBride and states "I was notified of an accident that occurred on the fifth and sixth floor of the courtyard scaffold as stated by witness a worker on the sixth floor of scaffold was relocating a plank and lost control of the plank. At that time, the plank struck the brace of scaffold and ultimately it struck Sandro Guaman who was working on the fifth floor of the scaffolding" [Page 84].

Plaintiff also provides an affidavit from an expert, a certified site safety manager, who contends that the statute was violated because "The Plaintiff was not provided with overhead protection. The 5½ scaffold level above the Plaintiff should have been fully planked, no openings. That fully planked 5½ scaffold level would have been the Plaintiff's overhead protection. There would have been no reason to have scaffold platform openings above the Plaintiff to move scaffold planks to upper scaffold levels had a wheel well hoist been erected on the exterior side of the scaffold for hoisting planks from one scaffold level up to another scaffold level" [Doc 69 Pages 4-5].

In addition to plaintiff's EBT transcripts and Mr. McBride's EBT transcript, plaintiff also provides the EBT transcripts for Beatrice Desabatto, the witness provided by J. Petrocelli (incorrectly titled on page one of the transcript as a witness for New 470

LLC), and the witness for New 470 LLC, the property owner. The witness for J. Petrocelli was not able to remember anything when asked about plaintiff's accident. She did not know which company erected the scaffold, which company dismantled it, and testified that she was not on site on a regular basis, as she worked in the field office, a separate building. She did not know if Bunlin's work involved using a scaffold. She said Bunlin was hired by the owner, not by Petrocelli.

Defendants' Opposition to Plaintiff's Motion

In opposition, defendants supply a counter-statement of material facts and an affirmation of counsel. Defendants' counsel first argues in support of its motion that J. Petrocelli should be dismissed from the case as it is not a proper Labor Law defendant. That was previously granted, and so is not relevant to plaintiff's motion. Counsel next argues that "plaintiff failed to sustain his burden and eliminate all material questions of fact regarding defendants NEW 470 LLC. and 470 MANHATTAN CON LLC. It is well settled that not every object which falls at a construction site will implicate Labor Law's strict liability. The expert affidavit supplied by plaintiff is speculative and conclusory and therefore insufficient to sustain his burden. Where, as here, there is no evidence that an enumerated safety device was required for plaintiff's work, plaintiff has failed to sustain his burden" [Doc 83 ¶4].

Counsel next discusses the doctrine of *res ipsa loquitor,* and avers that "plaintiff improperly relies upon such a res ipsa analysis" [Doc 83 ¶41]. This is odd, as plaintiff does not mention this doctrine whatsoever in the affirmation in support. Plaintiff's counsel nonetheless attempts in his reply to refute defendants' argument, and states that

"Defendants' argument fails as the Court in *Quattrochi*[1] held that issues of fact exist with respect to sole-proximate cause due to the plaintiff's own actions, an issue that is not implicated to the facts of this case" [Doc 91 ¶4]. It must be noted that *res ipsa loquitor* has no relevance to this action.

Defendants' counsel next urges the court to disregard the affidavit from the plaintiff's expert as it is "entirely speculative and conclusory. She fails to cite any support for her opinions. She conclusively states that scaffold openings would not have been necessary if a hoist had been erected; however, there is no further analysis as to whether a hoist was required for such task" [Doc 83 ¶42]. He adds "Additionally, plaintiff's expert's opinion is based solely on her review of the transcripts. The expert did not examine any of the equipment involved in the subject accident" [Doc 83 ¶43].

Discussion

Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240(1), which provides, in pertinent 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, 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

[1] *Quattrochi v FJ Const. Corp*., 44 AD3d 377 (1st Dept 2008).

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 falling object cases, "a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 268 [2001]), "or that the falling object required securing for the purposes of the undertaking" (*Simmons v City of New York*, 165 AD3d 725, 727 [2018], quoting *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2013]).

There is no dispute that the object that fell, a scaffold plank, hit plaintiff and injured him. There is not one shred of evidence which in any way disputes or controverts

plaintiff's description of how the accident occurred. Thus, the inquiry is whether the planks "required securing for the purpose of the undertaking," or if plaintiff should have been provided with overhead protection, as he alternatively argues.

Plaintiff cites several cases for his conclusion that the accident constituted a violation of Labor Law 240(1). The first, *Hewitt v NY 70th St. LLC*, 184 AD3d 451 [1st Dept 2020], was recalled and vacated and has a big red stop sign next to the case name on Lexis. The original decision, as regards Labor Law 240(1), held that the injured employee should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against the general contractor because there was no overhead protection provided to the employee. Thus, even if the employee was in an area of the worksite where he was not supposed to be at the time of his accident, that would at most constitute comparative negligence which was not a defense to a Labor Law § 240(1) claim. The new decision did not change the outcome on this claim. Thus, counsel should have cited to the new decision, *Hewitt v NY 70th St. LLC*, 187 AD3d 574 [1st Dept 2020].

Counsel next cites *Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541 [1st Dept 2022]. In that case, the court found that "Plaintiff's testimony that he was struck by an unsecured brick, along with the foreman's statement that debris had fallen from a torn debris bag from a hanging scaffold above, establishes a violation of Labor Law § 240(1) and proximate causation." Further, the court found that "to the extent plaintiff might have negligently worked under a hanging scaffold, in contravention of instructions, such also only amounts to comparative negligence." Plaintiff's EBT [Doc 34] in that case (Bronx Ind. 302669/2014E) indicates that he was a mason, and was standing on a sidewalk

shed/bridge and laying bricks. There was a scaffold as well. He did not see anybody on it. He was alone on the sidewalk bridge, and about an hour after he started laying bricks, while he was standing upright and facing the work, spreading cement on the bricks, he was hit on the head with a brick. There was netting to protect workers, but it broke through the netting and hit him.

Plaintiff next cites *Passos v Noble Constr. Group, LLC*, 169 AD3d 706 [2d Dept 2019]. In that case, plaintiff and his co-workers "were disassembling formwork, a metal grid consisting of vertical posts and horizontal girders that hold plywood sheets in place while concrete is drying, on the first floor ceiling when a four-by-eight-foot plywood sheet fell from the first floor ceiling, hitting the plaintiff and knocking him to the ground." The Court reversed the Supreme Court, and found that plaintiff was entitled to summary judgment on his Labor Law § 240 (1) claim. The decision states "Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony and the affidavit of a coworker who witnessed the accident. These submissions established that the plaintiff was hit by an unsecured four-by-eight-foot plywood sheet that fell from the first floor ceiling onto the plaintiff as he was walking underneath. In his affidavit, the coworker stated that approximately 20 to 30 minutes before the accident, a Genuine worker had removed the vertical post supporting the plywood sheet and left the plywood sheet unsecured in the ceiling." [internal citations omitted].

One of the cases cited by the Court in *Passos*, (Escobar v Safi, 150 AD3d 1081, 1083 [2d Dept 2017]), clarifies the issue for this court, finding that "Here, the plaintiff

established his prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendant failed to provide an adequate safety device to protect him and that this failure was a proximate cause of his injuries. This is so whether the sheet of plywood fell as it was being hoisted because it was not properly secured while it was being pulled up to the roof, as testified to by the plaintiff, or whether the sheet of plywood fell from the hands of the plaintiff's coworkers on the roof as it was being installed or about to be installed due to a failure to secure it, a theory advanced by the defendant, since either scenario implicates the protections of Labor Law § 240 (1)" [internal citations omitted].

The court finds that the plaintiff makes a prima facie case for summary judgment on his claim pursuant to Labor Law §240(1), and defendants do not overcome the motion and raise any triable issues of fact. Defendants have not demonstrated that, as a matter of law, the subject plank was not an object that "required securing for the purposes of the undertaking" (see *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 268 [2001]).

Conclusions Of Law

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on his Labor Law §240(1) claim as against defendants NEW 470 LLC and 470 MANHATTAN CON LLC is granted; and it is further

ORDERED that the caption is amended to reflect the dismissal of the complaint as against defendants Bunlin LLC and J. Petrocelli Contracting, Inc. in the court's order on motion sequence #2 dated July 20, 2023, as follows:

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SANDRO GUAMAN,

Plaintiff,

-against- Index No.: 504147/2020

NEW 470 LLC and 470 MANHATTAN CON LLC,

Defendants.

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The foregoing constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.