At an IAS Term, Part 83 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.

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

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KAZEEM DAVID-ANTHONY NELLIS,
Plaintiff,

-against-

CADMAN ASSOCIATES LLC, TRIDENT GENERAL CONTRACTING LLC, T.G. NICKEL & ASSOCIATES LLC, and CONSIGLI & ASSOCIATES,
Defendants.

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DECISION AND ORDER
Index No. 514998/19
Mot. Seq. No. 1

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	35-59
Affirmations (Affidavits) in Opposition and Exhibits Annexed . .	61-67
Reply Affirmation	71-79

In this action to recover damages for personal injuries, plaintiff Kazeem David-Anthony Nellis ("plaintiff") moves for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against defendants Cadman Associates LLC, Trident General Contracting LLC, T.G. Nickel & Associates LLC, and Consigli & Associates, LLC (incorrectly sued herein as Consigli & Associates[1]) (collectively, "defendants").

On Saturday, February 23, 2019, the 29 year old plaintiff, was injured when, according to him, he fell off a ladder while performing construction work for his employer, nonparty Spacious Living Group LLC ("SLG"), at defendants' site.[2] As a result of the accident, plaintiff received Workers' Compensation benefits, in the form of "temporary total disability," from March 15, 2019 (the date of his first documented visit to the emergency room) to November 6, 2019.[3]

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[1] As listed in the summons (NYSCEF Doc No. 39).

[2] *See* Pre-Hearing Conference Statement, dated July 16, 2019, prepared and signed by SLG's workers' compensation counsel, at page 1, ¶ 1 (NYSCEF Doc No. 51).

[3] *See* Workers' Compensation Board's Notice of Decision, dated November 15, 2019, in *Matter of Nellis*, WCB Case #G247 5464, at page 1 (NYSCEF Doc No. 53).

Plaintiff's entitlement to the Workers' Compensation benefits was predicated on two findings; first, that his accident was work-related, and, second, that his accident occurred in the exact manner in which he alleged it had occurred (*i.e.*, that he fell off a ladder).

On July 10, 2019, plaintiff commenced this action against defendants to recover damages for personal injuries under (among other statutes) Labor Law § 240 (1). On September 23, 2019, defendants interposed a joint answer. After discovery was completed and a note of issue was filed on November 18, 2022, plaintiff timely moved for partial summary judgment on liability, contending that his alleged fall off the ladder at defendants' construction site entitled him to judgment under Labor Law § 240 (1). On June 7, 2023, the Court heard argument on the motion, reserving decision.

The threshold question is whether plaintiff may use his favorable WCB's determination to collaterally estop defendants from contesting the manner in which his accident happened. The recently passed Justice for Injured Workers Act (the "Act") (L 2022, ch 835) dictates that the question must be answered in the negative.

Effective December 30, 2022, the Act amended the Workers' Compensation Law ("WCL") by adding two new provisions: WCL § 11 (2) and WCL § 118-a. The first addition – WCL § 11 (2) – provides that a "[d]etermination by the [Workers' Compensation] [B]oard shall not be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, *other than the determination of the existence of an employer employee relationship*" (emphasis added). The second addition – WCL § 118-a – similarly provides that "[w]ith respect to an action for a workers' compensation claim permissible under this chapter, no finding or decision by the [W]orkers' [C]ompensation [B]oard, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, *other than the determination of the existence of an employer employee relationship*" (emphasis added).

The Act was held to be retroactive in *Pacheco v P.V.E. Co., LLC*, ___ Misc 3d ___, 2023 NY Slip Op 23279 [Sup Ct, Kings County Sept. 6, 2023, Rothenberg, J.]). In *Pacheco*, the defendant moved for leave to interpose a proposed affirmative defense of collateral estoppel based on the WCB's determination that was adverse to the plaintiff. In opposition to the defendant's request for leave to interpose, the *Pacheco* plaintiff contended that the Act applied retroactively. In adopting the plaintiff's position, the *Pacheco* Court reasoned that:

> "[W]hile there is no express directive as to whether [the Act] should be applied retroactively, it is clear that it is a remedial law intended to 'correct recent court decisions that granted preclusive effect to decisions of the . . . WCB . . . , barring injured workers from seeking justice through the courts because of an administrative decision of the WCB" (2021 NY Senate Bill S9149). The legislative history, specifically the sponsor memorandum, highlights that administrative hearings before a [WCL] Judge sacrifice basic procedures and evidentiary rules of trials to swiftly decide the claims and that [the Act] is 'needed to ensure that findings from cursory [WCB] hearings do not prevent workers from exercising their constitutional right to a jury trial' (*id.*). Additionally, the statute took effect immediately, which evinced a sense of urgency. Furthermore, retroactive application will not result in unfairness or impair substantive rights. Contrary to [defendant's] contentions, retroactive application will not increase their liability but rather will provide plaintiff with an opportunity to exercise his right to a fair trial. These factors together weigh in favor of the finding that the remedial purpose of [the Act] should be effectuated through retroactive application (*id.*)"

(*Pacheco*, ___ Misc 3d ___, 2023 NY Slip Op 23279, *3) (internal citations omitted).

Here, however, it is plaintiff (rather than defendants) who are against the retroactive application of the Act. According to plaintiff, he should be permitted (notwithstanding the passage of the Act) to collaterally estop defendants from challenging the WCB's determination in his favor because the "[A]ct was designed to protect the rights of injured workers, not impair them as Defendants seek to do now."[4] The Court finds that plaintiff's approach cannot be squared with the clear text (not to mention the clear purpose) of the Act.

The recent enactment of WCL §§ 11 (2) and 118-a has vitiated the collateral estoppel effect of all WCB's determinations, subject to the narrow exception of the employment-relationship determinations. The language of the Act cannot be made clearer in this regard. The purpose of the Act – the immediate and nearly complete elimination of the collateral estoppel effect of the WCB's determinations – would not prevent plaintiff from exercising his or her

[4] Plaintiff's reply memorandum of law, at page 9 (NYSCEF Doc No. 79).

constitutional right to a jury trial. In this case, the Court's straightforward application of the Act is compatible with its manifest remedial purpose.

Viewing evidence in a light most favorable to defendants as non-movants, the Court finds that there are triable issues of material fact as to: (1) whether (or not) plaintiff was injured at defendants' construction site; (2) if so, whether (or not) he was injured as the result of his alleged fall off a ladder; and (3) if so, whether (or not) his alleged injuries were proximately caused by the inadequacy and/or unavailability of the statutorily required fall-protection devices (*see e.g. Andrade v Bergen Beach 26, LLC,* 215 AD3d 722, 723 [2d Dept 2023]; *Yong Qiao Zhao v A.T.C. Constr. Group Corp.*, 190 AD3d 788, 789 [2d Dept 2021]; *see also Alvarez v 2455 8 Ave, LLC*, 202 AD3d 724, 725 [2d Dept 2022]; *Woszczyna v BJW Assoc.*, 31 AD3d 754, 755 [2d Dept 2006]; *cf. Klein v City of NY*, 89 NY2d 833, 835 [1996]).

Plaintiff's principal contentions to the contrary are unavailing. First, "[t]he mere fact that a plaintiff fell [off] a ladder does not, in and of itself, establish that proper protection was not provided, and whether a particular safety device provided proper protection is generally a question of fact for a jury" (*Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]). "Indeed, where a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach" (*Puchalski v 4212 28ST LLC*, 69 Misc 3d 1222[A], 2020 NY Slip Op 51463[U], *7 [Sup Ct, Kings County 2020, Landicino, J.] [collecting authorities]).

Second, plaintiff's attack on the veracity of the pretrial testimony of SLG's employee (Anika Blandon) misses the point. "As a general rule, a party does not carry [his or her] burden in moving for summary judgment by pointing to gaps in [his or her] opponent's proof, but must affirmatively demonstrate the merit of [his or her] claim . . ." (*Pace v International Bus. Machines Corp.*, 248 AD2d 690, 691 [2d Dept 1998] [internal quotation marks omitted]). More fundamentally, "[t]he function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]).

Third and finally, although "plaintiff's criminal convictions *alone* [does not] raise an issue regarding his credibility" (*Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 438

[1st Dept 2022] [emphasis added]),[5] the value of having a trier of fact accurately assess his credibility is heightened where, as here, the record (as construed in a light most favorable to defendants as non-movants) is replete with multiple contradictions as to how the accident happened.[6]

Accordingly, it is hereby,

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim is *denied in its entirety*; and it is further,

ORDERED that plaintiff's counsel shall serve a copy of this decision and order on plaintiff's counsel and file an affidavit of service.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[5] *See* plaintiff's Certificates of Disposition Nos. 30491 and 30490 (NYSCEF Doc No. 67).

[6] *See e.g.* plaintiff's cell-phone text messages and his hospital ER visit record (NYSCEF Doc Nos. 66 and 64, respectively).