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At an IAS Term, Part 70 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 11th day of September, 2025.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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ROBERTO ABREU PEREZ,

Plaintiff,

-against-

176 EAST 116 LLC, ARIANA CONTRACTING INC., LUXURY HOME IMPROVEMENT CORP. and 178 JJH INC.,

Defendants.

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176 EAST 116 LLC,

Third-Party Plaintiff,

-against-

178 JJH, INC.,

Third-Party Defendant.

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Index No.: 515104/2017
MS #7
DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	172-197
Opposing Affidavits (Affirmations)	219-221
Affidavits/Affirmations in Reply	224

Upon the foregoing papers, defendant/third-party plaintiff 176 East 116 LLC (movant 176 East) moves (Seq. 07) for an order: (i) pursuant to CPLR § 5015 (a) (3), vacating the order of this court, signed on January 5, 2023 and entered on January 11,

2023 (the "January 5, 2023 order") (NYSCEF Doc. No. 139) based on fraud and misrepresentation on the part of plaintiff Roberto Abreu Perez (plaintiff). The order granted summary judgment on liability as to plaintiff's Labor Law § 240 (1) cause of action, against movant 176 East. Alternatively, pursuant to CPLR § 2221 (e), movant seeks to renew plaintiff's motion for summary judgment on the issue of liability (Seq. 04) and, upon renewal, vacatur of the order. Plaintiff opposes the motion.

BACKGROUND

In this personal injury action, plaintiff asserts claims premised on common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) arising from injuries allegedly sustained on June 27, 2017 when he fell from a ladder while working as a laborer at a construction project located at 176 East 116th Street in Manhattan, New York (the property).[1] The project involved the renovation and conversion of the property from a variety store into to a Shop Fair supermarket (the "supermarket").[2] The property was owned by movant 176 East.[3] The supermarket was slated to be operated by movant 176 East's tenant, defendant/third-party defendant 178 JJH, Inc.[4]

Plaintiff alleges that movant 176 East retained defendant Luxury Home Improvement Corp. ("Luxury") as general contractor on the construction project.[5] Luxury, in turn, purportedly applied for, and procured, permits for the project from the New York City Department of Buildings; as well as entered into a subcontract agreement

[1] NYSCEF Doc. No. 177, bill of particulars, ¶¶ 2-3, 14, 20.
[2] NYSCEF Doc. No. 83, Azar EBT Tr. at 22, lns. 5 to 11 and 12, ln. 6 to 13, ln. 10; *see also* NYSCEF Doc. No. 88, subcontractor agreement at 1.
[3] NYSCEF Doc. No. 83, Azar EBT Tr. at 7, ln. 22 to 8, ln. 2.
[4] *Id.* at 6, ln. 23 to 7, ln. 18; *see also* NYSCEF Doc. No. 85, Min EBT Tr. at 9, ln. 3 to 10, ln. 20.
[5] NYSCEF Doc. No. 136, Moran aff, ¶¶ 26-28.

with non-party FCS Construction, Inc. to undertake construction work on the site.[6] On the date of the accident, plaintiff was employed by FCS Core Construction, Inc.[7]

When the accident occurred, plaintiff was installing a beam, integral to the erection of an interior wall on the project.[8] Plaintiff testified at his deposition that he was standing on the 15th rung of a 20-foot ladder.[9] He recounted that, as he began to step on the 14th rung of the ladder during his descent, the ladder abruptly shifted to the left, causing him to fall to his right.[10] As plaintiff began to fall, his right side struck the top of an adjacent seven-foot wall.[11] At this juncture, the ladder fell to the ground and plaintiff claims he clutched the edge of the wall, hanging onto it until he was rescued by co-workers.[12] After the accident, plaintiff was transported via ambulance from the construction site to the hospital for medical treatment.[13]

DISCUSSION

The Underlying January 5, 2023 Order

At issue on movant 176 East's motion is the Court's January 5, 2023 order which granted summary judgment to plaintiff on liability as to the Labor Law § 240 (1) claim (NYSCEF Doc. No. 139, order at 7). The Court finds it necessary to address the issues previously considered on the prior motion (Seq. 04) in order to properly frame the

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[6] NYSCEF Doc. No. 84, Lin EBT Tr. at 27, ln. 6 to 28, ln. 9; *see also* NYSCEF Doc. No. 88, subcontractor agreement at 1 and 3; NYSCEF Doc. No. 89, work permits at 1-3.
[7] FCS Construction, Inc. and FCS Core Construction, Inc. are distinct corporate entities (NYSCEF Doc. No. 86, workers' compensation report at 1). *See also* NYSCEF Doc. No. 180, Perez EBT Tr. at 34, ln. 16 to 36, ln. 12 and NYSCEF Doc. No. 86, workers' compensation report at 1.
[8] NYSCEF Doc. No. 180, Perez EBT Tr. at 55, ln. 24 to 57, ln. 3.
[9] *Id.* at 54, lns. 14 to 23 and 77, lns. 3 to 17.
[10] *Id.* at 54, lns. 14 to 23; *see also* NYSCEF Doc. No. 181, Perez EBT Tr. at 125, ln. 16 to 127, ln. 12.
[11] NYSCEF Doc. No. 181, Perez EBT Tr. at 128, ln. 24 to 129, ln. 14.
[12] *Id.* at 129, ln. 3 to 131, ln. 24; *id.* at 127, ln. 21 to 128, ln. 3.
[13] *Id.* at 131, ln. 25 to 132, ln. 5.

arguments now raised by movant 176 East herein. Here, plaintiff's claim under Labor Law § 240 (1) was based on the elevation-hazard created by the subject unsecured ladder. Labor Law § 240 (1) imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks. [14] The New York Court of Appeals articulated long ago in *Ross v Curtis-Palmer Hydro-Elec. Co.*:

> "We recently had occasion to consider the nature of the occupational hazards to which Labor Law § 240 (1) was addressed. Noting that the statute is to be construed as liberally as may be for the accomplishment of the purpose for which it was . . . framed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319, quoting *Quigley v Thatcher*, 207 NY 66, 68), we held in *Rocovich v Consolidated Edison Co.* (*supra*) that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device." [81 NY2d 494, 500 [1993] [internal quotation marks omitted].

Thus, as a prerequisite to recovering under Labor Law § 240 (1), plaintiff was required to establish that the accident giving rise to his injuries, constitutes the type of elevation-related hazard to which the statute applies (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991] ["Consistent with this statutory purpose we have applied section 240 (1) in circumstances where there are risks related to elevation differentials"]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [A plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk

[14] Labor Law § 240 (1) provides, in pertinent part, that "[a]ll contractors and owners and their agents . . . 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."

arising from a physically significant elevation differential."]; *see also Jimenez v RC Church of Epiphany*, 85 AD3d 974, 975 [2d Dept 2011]).

As a corollary, pursuant to Labor Law § 240 (1), absolute liability is imposed on, among others, owners, such as movant 176 East, when their failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker due to related risks associated with elevation differentials (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *see also Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490-491 [1995]). While a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1), liability will be imposed when the evidence establishes that the ladder was inadequately secured and that the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries (*Guaman-Sanango v 57 E. 72nd Corp.*, 227 AD3d 677, 679 [2d Dept 2024]).

Plaintiff's testimony that, while descending the ladder, as he was in the process of stepping on the 14th rung, the ladder abruptly shifted to the left, leading him to fall to the right (NYSCEF Doc. No. 181, Perez EBT Tr. at 125, ln. 16 to 127, ln. 12) constitutes evidence that the ladder was inadequately secured and is sufficient to establish, *prima facie*, that it failed to afford plaintiff proper protection from elevation-related hazards (*Cioffi v Target Corp.*, 188 AD3d 788, 790-791 [2d Dept 2020]; *see also Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]).

Plaintiff having established a *prima facie* case under Labor Law § 240 (1), the burden shifted to movant 176 East to raise an issue of fact barring summary judgment. Movant 176 East argued that plaintiff was the sole proximate cause of the accident by

virtue of his alleged style of descent, contending plaintiff purportedly faced away from the ladder and allegedly jumped down from the second or third step, all in a stagged effort to secure workers' compensation benefits (NYSCEF Doc. No. 132, Bang aff, ¶¶ 6-8). The Court found movant 176 East's attempt to characterize plaintiff as the sole proximate cause of the occurrence unavailing, since this factual assertion was based on the hearsay affidavit of Jong Bang, the president of plaintiff's employer, FCS Core Construction, Inc., who did not witness the accident. Under similar circumstances, the Second Department affirmed a trial court's grant of a plaintiff's summary judgment motion on liability under Labor Law § 240 (1) where:

> "The defendants did not offer any evidence, other than mere speculation, that undermined the prima facie case or presented a bona fide issue regarding the plaintiff's credibility as to a material fact . . . ." (*Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]; *see also Rivera v Dafna Constr. Co. Ltd.*, 27 AD3d 545, 545-546 [2d Dept 2006]).

Based on the reasoning delineated above, the Court granted plaintiff summary judgment against movant 176 East under the Labor Law § 240 (1) claim (NYSCEF Doc. No. 139, order at 7). At no point during the pendency of Motion Seq. 04 was the issue of plaintiff's fraud and/or misrepresentation raised by movant 176 East.

Movant 176 East's Reargument Argument

Movant 176 East adopts a two-pronged approach in its challenge to the January 5, 2023 order. First, movant 176 East argues that the January 5, 2023 order should be vacated pursuant to CPLR § 5015 (a) (3) based on the fraud and misrepresentation of plaintiff (NYSCEF Doc. No. 172, notice of motion, ¶ [a]). Movant 176 East initially

points to the August 10, 2020 decision issued by Administrative Judge Craig Cooke of the New York State Workers' Compensation Board (the workers' compensation decision) as indicia of plaintiff's fraud and misrepresentation herein. The decision disqualified plaintiff from receiving benefits based on an unspecified "false statement or misrepresentation of a material fact made for the purpose of obtaining wage replacement benefits or influencing any determination regarding such benefits" (NYSCEF Doc. No. 186, workers' compensation decision at 1).[15]

An analysis of the subject workers' compensation decision, however, reveals that nowhere therein is it suggested that plaintiff's misrepresentation related to the circumstances surrounding plaintiff's accident, including whether: (i) plaintiff fell, or intentionally jumped, from the ladder; (ii) the ladder abruptly shifted, leading plaintiff to fall; and (iii) plaintiff recklessly descended the ladder while facing away from it (*id.*). To the contrary, movant 176 East indicates in its motion that the "defense does not have a transcript of the proceeding to determine the exact misrepresentation plaintiff was cited for" (NYSCEF Doc. No. 173, Frittola aff, ¶ 29), thereby all but conceding that no evidence exists linking plaintiff's misrepresentation in the workers' compensation proceeding to the liability determination made herein. As such, plaintiff's unspecified misrepresentation in the workers' compensation context cannot plausibly be used as a cornerstone to vacate the January 5, 2023 order, and movant 176 East's argument in this

[15] Movant 176 East avoids the remainder of the August 10, 2020 workers' compensation decision in which Administrative Judge Cooke underscores that, the indeterminate misrepresentation notwithstanding, plaintiff's workers' compensation benefits, including medical treatment, shall proceed: "As to the discretionary penalty, I find I find [sic] the claimant would be entitled to benefits subsequent to 3/28/20. Medical treatment and care, as necessary, for established sites of injury and/or conditions, is authorized. Treatment rendered to one of the body parts covered by the Medical Treatment Guidelines must be consistent with those Guidelines" (*id.* at 1).

regard is rejected (*Globe Trade Capital, LLC v Hoey*, 199 AD3d 775, 777 [2d Dept 2021]).

Second, movant 176 East also points to plaintiff's deposition testimony -- that post accident he was an Uber driver "[f]or the last five months, which suggests that he began driving for Uber on approximately August 23, 2019 (as the deposition took place on January 23, 2020) – and plaintiff's 2019 IRS Schedule C, which appears to indicate that plaintiff "place[d] [the] vehicle in service for business purposes" on "01-01-2019; to argue that the discrepancy between the foregoing dates (August 23, 2019 vs. January 1, 2019) undercuts plaintiff's credibility and serves as a legitimate basis to vacate the January 5, 2023 order.[16]

The Court finds this argument unavailing. Indeed, on a motion to vacate an order pursuant to CPLR §5015 (a) (3), it is incumbent on the moving party to establish that the order itself was secured through fraud or misrepresentation, a showing movant 176 East cannot establish simply by pointing to the post accident date discrepancy regarding when plaintiff began work as an Uber driver, as this discrepancy has nothing to do with the factual determinations made regarding movant 176 Easts' liability to plaintiff herein (*Abakporo v Abakporo*, 202 AD3d 646, 649 [2d Dept 2022]; *see also Anghel v Ruskin Moscou Faltischek, P.C.*, 190 AD3d 903, 905 [2d Dept 2021]).

Finally, movant 176 East argues the Court should vacate the January 5, 2023 order based on a purported discrepancy between plaintiff's medical records generated by his physician, Joseph Weinstein, M.D., dated May 29, 2019 and June 19, 2019, which feature

[16] " NYSCEF Doc. No. 180, Perez EBT Tr. at 27, lns. 13 to 15 and NYSCEF Doc. No. 185, IRS Schedule C, ¶ 43.

entries indicating that "[p]atient is currently not working" (NYSCEF Doc. No. 187, medical record at 1; *see also* NYSCEF Doc. No. 188, medical record at 1) and plaintiff's testimony that he ceased working as an Uber driver in December of 2022 owing to the imminence of a surgery (NYSCEF Doc. No. 182, Perez EBT Tr. at 28, lns. 3 to 14).

This argument also is unavailing, as these date discrepancies do not implicate the factual determinations regarding the happening of plaintiff's accident and the Court's finding of liability as to movant 176 East (*HSBC Bank USA N.A. v Kantor*, 215 AD3d 643, 644-645 [2d Dept 2023]; *see also Bank of Am. N.A. v Patino*, 128 AD3d 994, 995 [2d Dept 2015]).

Movant 176 East's Renewal Argument

Movant 176 East also moves pursuant to CPLR § 2221 (e) for leave to renew plaintiff's underlying summary judgment motion on the issue of liability and, upon renewal, seeks an order vacating the January 5, 2023 order. Movant 176 East relies essentially on the same grounds as advanced for the relief sought under CPLR § 5015 (a) (3). These arguments, nonetheless, are evaluated through the prism of CPLR § 2221 (e), which governs motions for leave to renew.

First, movant 176 East argues that the January 5, 2023 order should be vacated in light of the workers' compensation decision. Notably, this decision was issued on August 10, 2020, close to two years before movant 176 East filed its June 1, 2022 opposition to plaintiff's underlying motion for summary judgment on liability (Seq. 04). Upon review, the foregoing opposition does not mention the workers' compensation decision, which is now presented by movant 176 East as a basis for the present motion

(*see id.* at ¶¶ 2-13). In fact, counsel for movant 176 East concedes: "Unfortunately, the proverbial dots were not connected until the defense began preparing for the trial" (NYSCEF Doc. No. 173, Frittola aff, ¶ 43). Movant 176 East's reliance on the workers' compensation decision is unavailing and insufficient to satisfy CPLR § 2221 (e),[17] which mandates that:

> "A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion."

Further, as the Second Department instructs:

> "In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination . . . The new or additional facts presented either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion . . . However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented . . . ." (*Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d 512, 513 [2d Dept 2018] [internal citations and quotations marks omitted; emphasis supplied]).

Second, equally unfounded is movant 176 East's argument that the January 5, 2023 order should be vacated owing to a purported discrepancy between plaintiff's deposition testimony and his tax return, regarding the onset of his Uber-related driving work (NYSCEF Doc. No. 173, Frittola aff, ¶ 4). Plaintiff's deposition testimony took

[17] Movant 176 East's silence as to the workers' compensation decision in its June 1, 2022 opposition to plaintiff's underlying motion for summary judgment is all the more noteworthy in that plaintiff was questioned at length regarding the workers' compensation proceeding close to two years earlier during his September 14, 2020 deposition (NYSCEF Doc. No. 181, Perez EBT Tr. at 140, ln. 22 to 142, ln. 6 and 154, ln. 10 to 155, ln. 7 and 165, ln. 22 to 166, ln. 14 and 191, ln. 7 to 194, ln. 16 and 199, lns. 10 to 22).

place on January 23, 2020, and his year 2019 IRS Schedule C was generated on October 19, 2020. In short, the evidence pertaining to the Uber time discrepancy was available for almost two years before movant 176 East filed its June 1, 2022 opposition to plaintiff's underlying summary judgment motion on liability (Seq. 04), but was not raised therein. As movant 176 East fails to submit a reasonable justification for its omission on the underlying motion, the Court lacks discretion to grant renewal (*Seegopaul v MTA Bus Co.*, 210 AD3d 715, 716 [2d Dept 2022]; *Makropoulos v City of New York*, 187 AD3d 885, 888 [2d Dept 2020]).

Finally, movant 176 East argues that plaintiff's "untruthfulness" (NYSCEF Doc. No. 173, Frittola aff, ¶ 27) serves as a basis for renewal, based on the previously discussed hearsay affidavit of Jong Bang. Here, movant 176 East previously relied on the same affidavit in support of its opposition to plaintiff's underlying motion for summary judgment on liability (Seq. 04). This affidavit is not new. Accordingly, as a "motion for leave to renew shall be based upon new facts not offered on the prior motion", this argument is rejected (*Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1214 [2d Dept 2018]; *Central Mtge. Co. v Resheff*, 136 AD3d 962, 963 [2d Dept 2016]).

CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff 176 East 116 LLC's motion (Seq. 07) for an order: (i) pursuant to CPLR § 5015 (a) (3). vacating the January 5, 2023 order and/or, in the alternative, (ii) pursuant to CPLR § 2221 (e), renewing plaintiff's motion

for summary judgment on the issue of liability (Seq. 04) and, upon renewal, vacating the January 5, 2023 order, is denied in every respect.

Any arguments not expressly addressed herein were considered and deemed to be without merit.

This constitutes the decision and order of the Court.

ENTER

J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.