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 17th day of November, 2025.

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

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MIGUEL BUSTAMANTE,

Plaintiff,

-against-

ST. GEORGE OUTLET DEVELOPMENT LLC, d/b/a EMPIRE OUTLETS, EMPIRE OUTLET BUILDERS LLC, BFC PARTNERS DEVELOPMENT LLC, BFC PARTNERS LP, and CITYWIDE CONTAINER SERVICE CORP.,

Defendants.

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ST. GEORGE OUTLET DEVELOPMENT LLC and EMPIRE OUTLET BUILDERS LLC,

Third-Party Plaintiffs,

- against -

DiFAMA CONCRETE, INC. and DFC STRUCTURES, LLC,

Third-Party Defendants.

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ST. GEORGE OUTLET DEVELOPMENT LLC and EMPIRE OUTLET BUILDERS LLC,

Second Third-Party Plaintiffs,

- against -

COMMERCIAL PAYROLL, INC.,

Second Third-Party Defendant.

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Index No. 514444/18
Mot. Seq. Nos. 9 and 13

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion and Affidavits (Affirmations) Annexed	283-299; 322-338
Opposing Affidavits (Affirmations)	426-430; 445-471; 499-525; 532; 536-537
Affidavits/Affirmations in Reply	554; 558-559; 560
Order, dated April 23, 2025, on Motions Seq. Nos. 9-13	572
Plaintiff's Counsel's Letter to Court, dated July 23, 2025, Enclosing EBT Transcript of Non-Party Witness Yiraldy Lopez	583, 585

Upon the foregoing papers in this action to recover damages for personal injuries, plaintiff Miguel Bustamante (plaintiff) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability under Labor Law § 240 (1) as against (among others) defendants St. George Outlet Development, LLC, d/b/a Empire Outlet, and Empire Outlet Builders LLC (Seq. No. 9).[1] Concurrently, second third-party defendant Commercial Payroll, Inc. (CPI) moves for an order, pursuant to CPLR 3212, dismissing the entirety of the second third-party complaint (Seq. No. 13).

On May 2, 2018 at approximately 10 a.m.,[2] plaintiff allegedly was injured while working at a construction site as an employee of third-party defendant DiFama Concrete, Inc., a structural concrete subcontractor.[3] At the time of the accident, plaintiff was standing on top of a 30-yard dumpster which measured 8-10 feet in height, 20-25 feet in length, and 12-13 feet in width (the dumpster).[4] At the time, plaintiff was standing with his right foot on the lengthwise edge of the dumpster, while he positioned his left foot on top of the debris in the dumpster, with the debris reaching up approximately one foot below the top of the dumpster.[5] At the time, he was working with both hands inside the dumpster.

At the time of the accident and in proximity to the dumpster, a CPI employee, Joseph Fama (Joseph Fama),[6] was operating a lull-type forklift with a telescopic handle (the forklift). The telescopic handle of the forklift was holding at its distant end a small dumpster, measuring 10 feet

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[1] By order, dated April 23, 2025 (the April 2025 order), the Court (in relevant part) granted the joint motion (in Seq. No. 11) of co-defendants BFC Partners Development LLC and BFC Partners, L.P. (collectively, BFC) dismissing all direct and indirect claims against them (NYSCEF Doc No. 572). By virtue of the April 2025 order, the remaining branch of plaintiff's motion (in Seq. No. 9) which is for identical relief as against BFC is denied as academic.

[2] The weather was "normal" or "sunny"; there was no rain, and no moisture on the ground (plaintiff's EBT transcript, page 201, lines 19-21).

[3] Plaintiff's EBT transcript, page 22, line 16 to page 23, line 8; page 38, lines 14-16. Plaintiff allegedly sustained multiple orthopedic injuries as the result of the accident and has not worked since. At the time of the accident, plaintiff was approximately 31 years old, stood 5 feet 10 inches tall, and weighed approximately 185 pounds (plaintiff's EBT transcript, page 55, line 20 to page 56, line 5).

[4] Plaintiff's EBT transcript, page 74, line 25 to page 75, line 15; page 76, lines 3-23.

[5] Plaintiff's EBT transcript, page 81, lines 10-15; page 83, lines 6-11; page 86, lines 2-8; page 229, lines 3-7; page 265, line 21 to page 267, line 9. The dumpster was owned (and was provided to the work site) by the since-dismissed defendant Citywide Container Service Corp.

[6] Whether Joseph Fama is also known as Joseph Fama, Jr., is unclear from the record. His pre-deposition "sworn statement," dated April 11, 2022, identified him as "Joseph Fama, Jr.," whereas he subsequently testified at his pretrial deposition that he was not using a "Jr." or any other designation after his name (*compare* Sworn Statement of Joseph Fama, Jr., at NYSCEF Doc No. 524 *with* Josepha Fama's EBT transcript, held September 25, 2024, page 11, lines 2-4 at NYSCEF Doc No. 464).

in length and 5 feet in width,[7] that was loaded with construction debris.[8] At the time of the accident, the forklift was stopped at or near the dumpster.[9] Plaintiff testified that he did not see the forklift "[a]t the moment of [the] accident"[10] because the forklift was "behind" him and was positioned on the lengthwise side of the dumpster.[11] The accident happened when plaintiff fell off the dumpster, bounced off a nearby Yodock, a plastic, two-foot high, water-filled, barrier that was standing on the ground parallel to the dumpster, and landed onto the ground. Arguably, the accident-triggering event was the "dump[ing]" of "debris . . . on [him]" from the small dumpster that was attached to the forklift.[12] Plaintiff's workers' compensation form, which he signed approximately one month after the accident, merely described only his fall from the dumpster to the ground, but made no mention of anything falling on him from above.[13]

Yiraldy Lopez (Lopez), a CPI flagman directing traffic approximately 15 feet away from the dumpster, was the only witness to the accident. In his pre-deposition affidavit, Lopez averred that plaintiff, while "standing on top of an approximately 30-yard dumpster," "was assisting the loading of construction/demolition debris into the dumpster." Lopez further averred that as he was standing with his back facing plaintiff, he "heard a loud sound from where [plaintiff] was working at the dumpster. [He] turned around and saw that [plaintiff] [had] fall[en] from the dumpster down on[]to the [Y]odock barrier, that was placed next to the dumpster, about 10 feet below."[14] His pre-deposition affidavit made no mention of the forklift, its small, debris-filled dumpster it was carrying, or its dumping of the debris into plaintiff's dumpster.

At his subsequent deposition,[15] Lopez initially confirmed the averment in his pre-deposition affidavit that he did not "actually see the accident" but only "the aftermath of the

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[7] Plaintiff's EBT transcript, page 204, lines 6-15.
[8] Plaintiff's EBT transcript, page 90, line 17 to page 91, line 3; page 216, lines 17-20.
[9] Plaintiff's EBT transcript, page 214, lines 10-11; page 216, lines 7-9.
[10] Plaintiff's EBT transcript, page 215, lines 5-8.
[11] Plaintiff's EBT transcript, page 222, line 21 to page 223, line 10; page 229, lines 13-17.
[12] Plaintiff's EBT transcript, page 86, line 9 to page 87, line 2; page 90, lines 17-23; page 267, lines 19-22; page 305, lines 17-21.
[13] "[Plaintiff was] working on top of [the] dumpster [when he] fell off [the] dumpster[,] hitting the barricade and falling to the ground" (Form C-3, dated June 22, 2018, ¶¶ 5-6 at NYSCEF Doc No. 469).
[14] Affidavit of Yiraldy Lopez, dated January 30, 2020, ¶¶ 4-5 (NYSCEF Doc No. 292).
[15] By Decision/Order, dated February 27, 2025, the Court held, in relevant part, that "the parties should be afforded an opportunity to depose Lopez. . . . Should Lopez's deposition testimony differ from his affidavit or there is an allegation that he tailored his testimony, then any party can make motion before or at trial" (NYSCEF Doc No. 566). Lopez's EBT was held on March 13, 2025. Plaintiff's counsel e-filed a transcript of Lopez's EBT on July 23, 2025 (NYSCEF Doc Nos. 583 and 585).

accident."[16] Nonetheless, Lopez equivocated in his deposition testimony as to whether the forklift and its small dumpster were or were not involved in the accident. On the one hand, Lopez testified that the forklift's dumping of debris from its small dumpster into plaintiff's dumpster was a causative factor in the accident: *"[the forklift is] the one [with the small dumpster] carrying the material" – "I [Lopez] see the garbage [on the forklift] move forward. [Plaintiff is] on the floor [ground]. That's what I saw."*[17] On the other hand, Lopez repeatedly denied that the forklift was involved in the accident: *"[the forklift] had nothing to do with what I [Lopez] saw"; "[the forklift] [was] inside the building."*[18] Next, Lopez testified that he would adhere to the contents of his pre-deposition affidavit which made no mention of the small dumpster, the forklift, or the dumping.[19] During further questioning, however, Lopez clarified that *the small dumpster on the forklift was "close . . . towards the edge [of the dumpster on which plaintiff was standing] and "above him."*[20]

The alleged operator of the forklift at issue – Joseph Fama – confirmed that he was the only forklift operator at the work site on the date/time of the accident, but denied dumping any debris using a forklift, let alone onto plaintiff or any other individual, on the date/time of the accident.[21]

In July 2018, plaintiff commenced this action against, among others,[22] St. George Outlet Development, d/b/a Empire Outlets, and Empire Outlet Builders LLC (collectively, Empire), which were the owner/lessee and the general contractor of the work site, respectively. Plaintiff asserted a violation of Labor Law § 240 (1). In May 2022, Empire impleaded CPI, among others, for contribution, breach of contract to obtain insurance, as well as for contractual and common-law indemnification. After the completion of discovery, plaintiff and CPI served their respective motions.

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]). "[T]he proponent of a summary judgment motion must

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[16] Lopez's EBT transcript, page 63, lines 3-7.
[17] Lopez's EBT transcript, page 78, line 21 to page 79, line 11 (emphasis added).
[18] Lopez's EBT transcript, page 76, line 13 to page 77, line 16 (emphasis added).
[19] Lopez's EBT transcript, page 80, line 7 to page 81, line 11.
[20] Lopez's EBT transcript, page 87, lines 12-21 (emphasis added).
[21] Joseph Fama's EBT transcript, page 52, lines 18-22; page 54, lines 10-13; page 56, lines 17-24; page 57, lines 6-20; page 61, lines 5-7; page 69, lines 5-9; page 71, lines 22-25; page 74, line 20 to page 75, line 9; page 83, lines 10-13; page 98, lines 9-13; page 100, line 21 to page 101, line 7.
[22] All claims against codefendant Citywide Container Service Corp. were discontinued by stipulation, which was e-filed April 18, 2022, and which superseded a prior stipulation of discontinuance, dated February 5, 2020 (NYSCEF Doc Nos. 168 and 49, respectively).

make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When evaluating a motion for summary judgment, "facts must be viewed in the light most favorable to the nonmoving party" (*Vega v Restani Const Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, 18 NY3d at 505).

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]).

Labor Law § 240 applies to both "falling worker" and "falling object" cases (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). To establish liability for a "falling worker" case under Labor Law § 240 (1), the injured worker "must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device" (*Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]). With respect to "falling objects," the injured plaintiff must demonstrate the existence of a hazard contemplated under Labor Law § 240 (1), and the failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute (*see Rzepka v City of New York*, 227 AD3d 922, 923 [2d Dept 2024]). "This requires a showing that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 859 [2022] [internal quotation marks omitted]). In either case, however, where the injured worker is the sole witness of the accident and his/her credibility is placed in issue, summary judgment in his/her favor on the issue of liability under Labor Law § 240 (1) is not appropriate (*see Lahoz-Vargas v Bop Ne, LLC*, 241 AD3d 812, 813 [2d Dept 2025]; *Injai v Circle F 2243 Jackson [DE], LLC*, 230 AD3d 1122, 1124 [2d Dept 2024]; *Alvarez v 2455 8 Ave, LLC*, 202 AD3d 724, 725 [2d Dept 2022]).

Here, neither the "falling worker" nor the "falling object" theory entitles plaintiff to partial summary judgment on liability on his Labor Law § 240 (1) claim against Empire. Viewing the facts in a light most favorable to Empire, the Court finds that under the "falling worker" theory, "a question of fact remains regarding whether the task [plaintiff] was expected to perform created an elevation-related risk of the kind that the safety devices listed in section 240 (1) shield workers from" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]).[23] Further, the Court finds that plaintiff failed to "show [as a matter of law] 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" (*Vega v Metro. Transp. Auth.*, 133 AD3d 518, 519 [1st Dept 2015] [internal quotation marks omitted]; *Wysk v New York City School Const. Auth.*, 87 AD3d 1131, 1131-1132 [2d Dept 2011]; *Fried v Always Green, LLC*, 77 AD3d 788, 788-789 [2d Dept 2010]).

More fundamentally, material issues of fact as to how the accident happened preclude summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 435 [1st Dept 2021]). As noted, it is well-established that where, as here, the plaintiff is the sole witness of the accident and his or her credibility is placed in issue, summary judgment in favor of the plaintiff on the issue of liability on a cause of action alleging a violation of Labor Law § 240 (1) is not appropriate (*see Lahoz-Vargas*, 241 AD3d at 813; *Injai*, 230 AD3d at 1124; *Alvarez*, 202 AD3d at 725). Accordingly, denial of the Labor Law § 240 (1) relief to plaintiff at the summary-judgment stage is warranted.

Turning to CPI's motion for summary judgment dismissing Empire's second third-party complaint, the Court finds that triable issues of fact exist as to whether CPI's employee Joseph Fama (despite his pretrial deposition to the contrary) operated the forklift at issue on the date/time of the accident and, more generally, whether plaintiff was in fact struck by the debris from the small dumpster attached to the forklift before he fell off the 30-yard dumpster atop of which he was then working. As noted, Lopez's pretrial testimony as to whether the forklift emptied the construction debris from its small dumpster onto plaintiff then working in the 30-yard dumpster, was equivocal. Denial of CPI's motion is appropriate because of its failure to tender sufficient

[23] In *Ortiz*, the Court of Appeals held (at page 339) that summary judgment was properly denied on the plaintiff's Labor Law § 240 (1) claim where the plaintiff "failed to establish that he stood on or near the ledge at the top of the dumpster because it was necessary to do so in order to carry out the task he had been given," and his statements in his affidavit that he was required to do so was insufficient to eliminate issues of fact in this regard").

evidence to demonstrate the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The parties' remaining contentions have been considered and found to be either without merit or moot in light of the court's determination.[24]

Accordingly, it is hereby

ORDERED that in Seq. No. 9, the initial branch of plaintiff's motion for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his Labor Law § 240 (1) claims as against Empire is denied;[25] and it is further

ORDERED that in Seq. No. 13, CPI's motion for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the entirety of the second third-party complaint is denied; and it is further

ORDERED that to reflect the prior stipulated dismissal of defendant Citywide Container Service Corp., as well as the prior dismissal of codefendants BFC Partners Development LLC and BFC Partners, L.P. pursuant to the Court's April 2025 order (insofar as it determined Seq. No. 11), the caption of the principal action is amended to read in its entirety as follows:

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MIGUEL BUSTAMANTE,

Plaintiff,

-against- Index No. 514444/18

ST. GEORGE OUTLET DEVELOPMENT LLC, d/b/a EMPIRE OUTLETS, and EMPIRE OUTLET BUILDERS LLC,

Defendants.
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[24] The Court reviewed each of the decisions cited by plaintiff's counsel in ¶¶ 18-20 of its opening affirmation at NYSCEF Doc No. 284, as well as in ¶¶ 9, 12-23 of its reply affirmation at NYSCEF Doc No. 558, and found that none of the facts of those cases were relevant to the particular facts of this case. Further, because the underlying facts of the accident are disputed, the affidavit of plaintiff's site-safety expert Kathleen Hopkins (at NYSCEF Doc No. 285) is irrelevant (*accord Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 605 [1st Dept 2022] ["Although not pertinent to our holding here, defendants argue that Hopkins's contradictory statements raise an issue of fact as to her credibility that should be resolved by a jury. Hopkins's first (expert) affidavit states that, if safety railings had been installed, they would have protected plaintiff from falling. In contrast, Hopkins avers in her second (expert) affidavit that safety railings would not have prevented plaintiff's fall. Hopkins's changed opinion could be seen as a flagrantly feigned attempt to tailor facts to favor plaintiff's case. However, *plaintiff's unrefuted testimony is all that is needed to determine the initial cause of his fall* – the uneven, unsupported, and shaking scaffold. Thus, as [it] pertain[s] to the issue of the sole and proximate cause of the accident, . . . Hopkins's contradiction [is] of no moment."] [internal citations omitted; emphasis added]). Unlike *Quiroz*, the "initial cause of [plaintiff's] fall" in this case has not been established as a matter of law, either by plaintiff's or Lopez's respective pretrial testimony.

[25] As noted, the Court's April 2025 order granting dismissal of all direct and indirect claims against BFC has rendered academic the remaining branch of plaintiff's motion seeking summary judgment as against it.

and it is further

ORDERED that Empire's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the parties are reminded of their next scheduled, in-person appearance for jury selection/trial in JCP-1 on April 20, 2026 at 9:45 a.m.

This constitutes the decision and order of the court.

E N T E R,

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice