2016 WL 1558679 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Bronx County

Nelson **MELENDEZ** and Dwayne **Eddy**, Plaintiff(s),
v.
HISTORIC **HUDSON** VALLEY AND SCULLY CONSTRUCTION, Defendant(s).

No. 3035772010.
March 24, 2016.

Decision and Order

Sharon A.M. Aarons, Judge.

***1** In this action for personal injuries resulting from, *inter alia*, violations of Labor Law § 240(1), plaintiffs move seeking an order granting them partial summary judgment with respect to liability on their claim pursuant to Labor Law § 240(1). Plaintiffs claim that insofar as the scaffold upon which they were working collapsed, thereby, causing them injury, defendant **HISTORIC** **HUDSON** VALLEY (**Historic**) - as owner of the premises upon where the accident occurred - is liable as a matter of law. Historic opposes the instant motion averring that questions of fact as to whether the scaffold actually collapsed or proved inadequate preclude summary judgment in plaintiffs' favor.

For the reasons that follow hereinafter, plaintiffs' motion is hereby denied.

The instant action is for alleged personal injuries resulting from alleged violations of the Labor Law. A review of plaintiffs' amended complaint establishes, in relevant part, the following. On January 6, 2010, plaintiffs sustained injury while working within premises known as the Regional History Center (the Center), located at Bedford Avenue, Pleasantville, NY. It is alleged that the Center was owned by Historic, who in order to erect the same, retained defendant SCULLY CONSTRUCTION (SCULLY) as its general contractor. Scully then retained non-party Del Savio Masonry Corp. (Del Savio) to perform work at the Center in furtherance of its contract with Historic. Plaintiffs were employed by Del Savio. Plaintiffs allege that while lawfully working within the Center they were involved in an accident, said accident caused by, *inter alia*, defendants' violation of Labor Law § 240(1).

Plaintiffs' motion seeking summary judgment on the issue of Historic's liability is denied. Although plaintiffs - by submitting proof that while lawfully working within the Center, the scaffold upon which they worked collapsed, thereby causing them injury - establish prima facie entitlement to summary judgment on their claim pursuant to Labor Law § 240(1), Historic's evidence in opposition raises a material question of fact as to whether the scaffold actually collapsed or was otherwise defective. Accordingly, questions of fact on whether Historic violated Labor Law § 240(1), preclude summary judgment in plaintiffs' favor.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

***2** Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, *8* NY2d 8, 12 [1960]).

Unsworn accident reports are inadmissible and cannot be considered by the court (*Reed v New York City Transit Authority*, 299 AD2d 330, 332 [2d Dept 2002]; *Hegy v Coller*, 262 AD2d 606, 606 [2d Dept 1999]; *Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]). Similarly, photographs submitted in support or in opposition to a motion for summary judgment must be authenticated and be accompanied by the requisite foundation (*Read v Ellenville National Bank*, 20 AD3d 408, 409-410 [2d Dept 2005]; *Wasserman v Genovese Drug Store, Inc.*, 282 AD2d 447, 448 [2d Dept 2001]; *Morales v City of New York*, 278 AD2d 293, 293 [2d Dept 2000]; *Charlip v City of New York*, 249 AD2d 432, 433 [2d Dept 1998]; *Saks v Yeshiva of Spring Valley, Inc.*, 257 AD2d 615, 616 [2d Dept 1999]; *Truesdell v Rite Aid of New York, Inc.*, 228 AD2d 922, 923 [3d Dept 1996]). Authentication of photographs - for purposes of admissibility - generally requires evidence that the photographs being proffered fairly and accurately represent the condition depicted therein (*Read* at 410 ["The statements in the affidavit that the videotape is an exact copy and '(t)here are no deviations from the original night drop camera,' is insufficient to establish that the videotape is a true, fair, and accurate representation of the events depicted, as required for authentication."]; *Charlip* at 433 ["There was no evidence that the photographs submitted by the plaintiffs were a fair and accurate representation of the area of the sidewalk at the time the injured plaintiff fell. The unauthenticated photographs did not constitute evidentiary proof in admissible form so as to raise a triable issue of fact as to negligent repairs."]; *Saks* at 616 ["Although the plaintiff testified that these photos depicted the scene of his accident, he did not actually testify that the condition of the sidewalk as shown in those photos was substantially the same as its condition on December 17, 1994, and these photos are therefore not competent evidence."]).

***3** Labor Law § 240(1) requires that

> [a]11 contractors and owners and their agents who contract for but do not direct or control the work, in

> 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.

Labor Law § 240(1), applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . because of a difference between the elevation level of the required work and a lower level" (*Gordon* at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate so as to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]).

For purposes of liability, a violation of the statute which proximately causes an employee to sustain injury gives rise to absolute liability (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Gordon* at 559). Notably, Under Labor Law § 240(1), a complete failure to provide the safety devices promulgated by the statute constitutes a violation thereof, and is, in it of itself, conclusive proof of proximate causation (*Zimmer v Chemmung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985]). Hence, if the evidence demonstrates that the defendants failed to provide any safety devices at all, the statute has been violated as a matter of law (*id.*). By contrast, when a defendant does provide safety equipment and an accident nevertheless occurs, the adequacy, functionality, and placement of said device must be assessed in order to determine whether there has been a violation of the Labor Law (*Narducci* at 267 ["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."]). When a defendant provides some, but not all the safety devices required by the statute, Labor Law § 240(1) is nonetheless violated if a defendant fails to provide plaintiff with the safety devices intended to protect the plaintiff from each and every height related risk associated with the particular work being performed (*Felker v Corning Incorporated*, 90 NY2d 219, 224 [1997] (Court held that plaintiff was exposed to two different elevation related risks, the first for which defendant provided an adequate safety device; the second, for which defendant did not. Defendant, thus violated Labor Law § 240(1).]; *Barnaby v A & C Properties*, 188 AD2d 958, 959-960 [3d Dept 1992 ["Although plaintiff was provided with a safety device intended to protect him from the risk inherent in having to work at a height of up to 8 ½ feet above the floor level, he was provided with no device to protect him from the risk inherent in working in a window opening some 15 to 20 feet above the ground. Because no device was provided to protect plaintiff from this elevation-related risk, the order granting plaintiff's motion for summary judgment on the liability issue should be affirmed."). Thus, the relevant inquiry is whether given the particular risk involved a safety device intended to protect against each and every risk was provided (*Felker* at 224; *Barnaby* at 959-960).

***4** To be sure, in *Barnaby*, plaintiff was tasked with framing windows inside a building (*id.* at 959). At the time of the accident, the work was being performed indoors and plaintiff was provided with a ladder to access the windows which extended some ten feet above the floor (*id.*). As plaintiff worked atop the ladder, he stumbled and fell through the window and to the ground outside the building, some 15-20 feet below (*id.*) In granting plaintiff partial summary judgment on the issue of liability, the court found that while defendant satisfied the statute in providing a ladder to plaintiff for the work on the windows inside the building, by failing to provide a safety device designed to protect against plaintiff's fall through and out the window, the defendant violated the Labor Law § 240(1) (*id.* at 959-960).

It is well settled that under Labor Law § 240(1), owners of the location where an accident occurs and the general contractor employed by the owner are absolutely liable irrespective of whether they exercised supervision and/or control over the particular work from which the accident arose (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 135 [1978]). This means, that because the duty imposed by Labor Law § 240(1) is non-delegable, owners and general contractors remain for a breach of the statute even if the work is farmed out to an independent contractor (*Gordon* at 559; *Ross* at 500; *Rocovich* at 513). Additionally, the absolute liability imposed by Labor Law § 240(1) means that a plaintiff's contributory or comparative negligence is wholly irrelevant in determining liability and does not bar recovery or serve to offset liability (*Stolt v General Foods Corporation*, 81 NY2d 918, 919 [1993]; *Bland v Manocherian*, 66 NY2d 452, 460-461 [1985]).

Since construction work, however, can be delegated to another, the party to whom such work is delegated is only liable under Labor Law § 240(1) if such party - such as a subcontractor - controls and exercises supervision over the work from which the accident arises (*Russin v Picciano*, 54 NY2d 311, 318 [1981]; *Serpe v Eyris Production, Inc.*, 243 AD2d 375, 379-380 [1st Dept 1997]). The determinative factor on the issue of control is not whether the agent or subcontractor merely furnishes equipment, but rather, whether such subcontractor has actual control over the work and the authority to insist that proper safety practices be followed (*Serpe* at 380; *Iveson v Sweet Assocs.*, 203 AD2d 741, 742 [3d Dept 1994]).

Not every accident at a work site means that the Labor Law has been violated (*Blake* at 288-289; *Narducci* at 267). As the court in *Narducci* noted

> [n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, 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

(*id.* at 267). Significantly, Labor Law § 240(1) was not intended to penalize those people who, by providing the requisite safety equipment, have complied with the statue (*Blake* at 286). Indeed, neither owners, contractors, or agents are the insurers of a plaintiff's safety and are merely required to abide by the statute (*id.*). A distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240(1) and those caused by general hazards specific to a workplace (*Narducci* at 268-269) The former, a violation of Labor Law § 240(1) giving rise to liability, the latter negating it (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]).

***5** It is well settled that Labor Law § 240(1) is not implicated in cases where there is no appreciable height difference between the work site and the falling object (*Melo v Consolidated Edison Company of New York, Inc.*, 92 NY2d 909, 911-912 [1998]; *Misserti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]; *Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841, 843 [1994]; *Almanzar v Goval Realty*, 286 AD2d 278 [1st Dept 2001]; *Daley v City of New York Metropolitan Transportation Authority*, 277 AD2d 88, 90 [1st Dept 2000]; *Piccinich v New York Stock Exchange, Inc.*, 257 AD2d 438, 438-439 [1st Dept 1999]). In *Melo*, the Court of Appeals concluded that Labor Law § 240(1) was not applicable to an accident involving the movement of steel plates to cover holes in the ground (*Melo* at 911-912) . Saliently, the court held that since the plates, when being moved, were resting on the ground, or were at most, hovering slightly above the ground upon which plaintiff stood, the statute was not implicated (*id.*). Specifically, the court held that the statute only applies "either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials being hoisted or secured" (*id.* at 911-912).

Thus, in *Melo*, the court recognized and once again reiterated that Labor Law § 240(1), does not apply simply because an injury is caused by the effects of gravity, but rather only to those accidents where the worker is exposed to dangerous conditions by virtue of elevation differentials (*id.*). While recently, the Court of Appeals decided *Wilinski v 334 East 92nd Housing Development Fund Corp.* (18 NY3d 1 [2011]) - where the court denied summary judgment to defendants despite the fact that the accident causing instrumentality was at the same level as the plaintiff - a review of the holding evinces that it is not at odds with the holding in *Melo.* In *Wilinski*, plaintiff was injured by pipes which fell on him as he was demolishing a wall within a room (*id.* at 5). Plaintiff sued, claiming that the pipes fell because they were unsecured within the room where he performed his demolition work (*id.*). In denying defendants' motion for summary judgment, the court noted that its prior jurisprudence did not call for a "categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff" (*id.* at 9); noting that the inquiry should be whether the accident was caused by the very object plaintiff was tasked to work with, and if so, warranting liability (*id.* at 11). Expressly distinguishing the facts in *Misseritti* and implicitly distinguishing the holding in *Melo*, the Court stated

> [h]ere, the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiff's were themselves the target of demolition when they fell. In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan.

(*id.* at 11). Thus, unlike in *Melo* - where the object which fell on plaintiff was not at the same level as the plaintiff, but moving it was the task at hand - in *Wilinski* plaintiff was not tasked with working with pipes, such that they should have been secured, even if at the same level as plaintiff. Thus, provided that the falling object is part and parcel of plaintiff's assigned task - such that the falling object is foreseeable -no liability lies under the Labor Law § 240(1) if such object falls and inures the plaintiff.

***6** When the allegation is that the falling object, which allegedly caused the plaintiff injury was neither being hoisted nor secured - generally a prerequisite for liability - Labor Law § 240(1) may nonetheless apply if the accident alleged was, given the work being performed, a foreseeable consequence of the failure to provide a safety device (*Wilinski* at 11; *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 269 [1st Dept 2007]; *Boyle v 42nd Street Development Project, Inc.*, 38 AD3d 404, 408 [1st Dept 2007]. In *Buckley*, the court denied plaintiff's motion for partial summary judgment on his claim pursuant to Labor Law § 240(1) holding that his accident, involving falling elevator counterweights, did not involve a significant inherent risk attributable to elevation, did not involve the hoisting or securing of a load, nor was the accident foreseeable (*id.* at 269-270). Conversely, in *Outar*, the court granted plaintiff's motion for partial summary judgment on his claim pursuant to Labor Law § 240(1), holding that plaintiff's accident involving a dolly which fell into a ditch and injuring plaintiff was foreseeable in light of the task plaintiff was asked to perform (*id.* at 732).

There are several defenses to a Labor Law § 240(1) claim, but the ones most often interposed are the sole proximate cause and the recalcitrant worker defenses. First, a defendant can avoid liability under the statute if it can demonstrate that it did not violate Labor Law § 240(1) and that the sole proximate cause of the accident was plaintiff's own negligence (*Blake* at 290 ["Plaintiff argues that he is entitled to recover in the face of a record that shows no violation and reveals that he was entirely responsible for his own injuries. There is no basis for this argument. Even when a worker is not recalcitrant, we have held that there can be no liability under section 240 (1) when there is no violation and the worker's actions (here, his negligence) are the sole proximate cause of the accident. Extending the statute to impose liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed" (internal quotation marks omitted).]; *Weininger v Hagedorn & Company*, 91 NY2d 958 [1998] ["Supreme Court erred, however, in directing a verdict in favor of plaintiff, at the close of his own case, on the issue of proximate cause. In the circumstances presented, a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240 (1) did not attach."]). As the court in *Tate v Clancy-Cullen Storage Co., Inc.* (171 AD2d 292 [1st Dept. 1991]), aptly stated Labor Law § 240(1) "does not give absolution to the plaintiff when his injury has been caused, exclusively, as a result of his own willful or intentional acts" (*id.* at 296) . Thus, provided a defendant can establish that it complied with Labor Law § 240(1), as per the *Blake*, a violation of the labor law which proximately causes plaintiff's accident is mutually exclusive with plaintiff's negligence as a proximate cause of his accident, and, thus, defendant cannot be liable (*id.* at 290). Accordingly, the foregoing defense only applies if, and only if, a defendant has complied with the statute and no violations of the same can be shown (*Davidson v Ambrozewicz*, 12 AD3d 902, 903 [3d Dept 2004]).

Second, a defendant can negate liability by establishing entitlement to the recalcitrant worker defense. This defense allows a defendant to escape liability if he can show that the plaintiff refused to use the safety devices provided (*Gordon* at 562-563; *Stolt* at 920; *Hagins v State of New York*, 81 NY2d 921, 922-923 [1993]; *Miraglia v H&L Holding Corp.*, 306 AD2d 58, 58 [1st Dept 2003]; *Smith v Hooker Chemical & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982]). Implicit in this defense is the notion that proper equipment was actually provided, that it was functional, and safe. Hence, an instruction to employees that they not use available but defective equipment is not akin to providing the requisite and safe equipment mandated by the statute (*Gordon* at 563; *Stolt* at 920; *Hagins* at 922-923). Consequently, an employer who provides unsafe equipment cannot assert the recalcitrant worker defense by averring that he instructed the employees not use said equipment (*Gordon* at 563; *Stolt* at 920; *Hagins* at 922-923). In *Gordon*, for example, the court found that the recalcitrant worker defense did not apply when the evidence established that although plaintiff was instructed to use scaffold to perform his work, the ladder provided - which plaintiff, in disregard of the instructions given, chose to use - failed (*id.* at 563). Saliently, the court held that under the foregoing facts, defendant failed to establish that plaintiff had been provided with safe equipment in the first place, *i.e.*, the ladder (*id.*). Conversely, in *Smith*, the court denied plaintiff's motion for partial summary judgment when one version of the facts established the applicability of the recalcitrant worker defense inasmuch as a witness testified that plaintiff chose to

engage in work without the functional safety devices made available to him (*id.* at 363 ["Thus, by plaintiff's testimony the accident occurred because the safety devices failed; by Toth's version plaintiff fell off the roof because he declined to use the safety devices supplied to him. Third-party defendant contends that this evidence raises a question of fact requiring a trial, and so it would seem. Plaintiff contends, however, that whether his evidence or Toth's is accepted, Special Term's order was proper."]).

***7** Under prevailing law, it is well settled that a scaffold which prevents a plaintiff from falling is defective and when such defective scaffold causes injury to a worker thereon Labor Law § 240(1) has been violated and summary judgment on the issue of liability is, therefore, warranted (*Susko v 337 Greenwich,* 103 AD3d 434, 434-435 [1st Dept 2013] ["It is unrefuted that during an ongoing construction project, plywood sheeting was placed over the planks on the scaffold and that, in one area, there were two planks missing beneath the plywood. The scaffolding law mandates that owners and contractors provide safety devices which shall be so constructed, placed and operated as to give proper protection to persons performing work covered by the statute. 377 Greenwich had a nondelegable, statutory duty to ensure that the scaffold in use by plaintiff during the course of this construction project was an effective and stable safety device. Since preventing a worker from falling is a core objective of the statute, plaintiff established a violation of section 240 (1) as a matter of law" (internal citations omitted).]; *Aburto v City of New York,* 94 AD3d 640, 640-641 [1st Dept 2012] [Plaintiff made a prima facie showing that defendants violated Labor Law § 240 (1) and that the violation proximately caused his injuries). Indeed, plaintiff's 50-h testimony and his coworker's affidavit showed that a scaffold suddenly collapsed under him while he was attempting to dismantle it at his foreman's instructions. There were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent his fall" (internal citations omitted).]; *Nenadovic v P.T. Tenants Corp.,* 94 AD3d 534, 534-535 [1st Dept 2012] ["Plaintiff demonstrated prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim as against the property owner (PT Corp), general contractor (Liro) and general construction contractor (Liberty) by evidence that plaintiff, an employee of asbestos-removal contractor A-Tech, and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries."]).

Similarly, with regard to ladders and injuries associated therewith, it is well settled that Labor Law 240(1) is violated when the ladder supplied fails to protect an employee from a gravity-related injury (*Hernandez v Bethel United Methodist Church of New York,* 49 AD3d 251, 252-253 [1st Dept 2008] ["Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1). It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (internal citations and quotation marks omitted).]; *Lopez v Melidis,* 31 AD3d 351, 351 [1st Dept 2006] ["Plaintiff's testimony indicated that he was standing approximately 12 feet above the ground on an A-frame ladder placed at his supervisor's direction on the platform of an eight-foot-high scaffold, and that the scaffold and the ladder moved as he began removing an overhead sprinkler head. Since the scaffold-and-ladder arrangement did not prevent plaintiff from falling-"the core objective of Labor Law § 240 (1), and plaintiff's injuries were caused by the fall, plaintiff established a prima facie case for relief under Labor Law § 240 (1)" (internal citation and quotation marks omitted).]; *Hart v Turner Construction Company,* 30 AD3d 213, 214 [1st Dept 2006] ["Plaintiff, in moving for summary judgment as to liability on his Labor Law § 240 (1) claim, met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground."]).

In support of their motion, plaintiffs submit the agreement between Historic and Scully, which evinces that on December 29, 2009, Historic hired Scully as its construction manager to erect a 16,000 square foot building at a 9.2 acre site owned by Historic and located at 639 Bedford Road, Town of Mount Pleasant, NY. The building would become the Center. As per the agreement, Scully was responsible for all aspects of the construction, which included the retention of any subcontractors. Historic was responsible for financing the project, retaining an architect and a geotechnical engineer.

Plaintiffs also submit the agreement between Scully and Del Savio, dated October 30, 2009, which evinces that Scully retained Del Savio to render services in connection with the erection of the Center. Del Savio was to provide all the labor related to the foregoing agreement[1] as well as materials necessary to perform the same.

***8** Plaintiffs submit affidavits wherein they assert, in pertinent part, as follows. Plaintiff NELSON **MELENDEZ** (**Melendez**) asserts that on January 6, 2010, he was injured while within the Center. **Melendez** was employed by Del Savio as a Mason's helper and had started work at the Center in December. When he first began work, the concrete slab for the building had

already been poured and a scaffold was to be erected around both the interior and exterior of the slab. **Melendez**, along with plaintiff DWAYNE **EDDY** (**Eddy**), and others began to erect the scaffold. **Melendez** worked on the slab one day in December and then again on January 6, 2010. On that date, upon **Melendez**' arrival, he noticed that the scaffold had been partially erected. Specifically, the exterior scaffold had been erected to the third level, while the interior scaffold had only been erected to the second level. A tarp had been draped over both scaffolds, secured with wires, and was intended to provide heat for the masons erecting a cinder block wall between the scaffolds. At approximately 3:30PM, after having moved blocks and other materials to the area were the masons were working, Craig Sager (Sager), **Melendez**' supervisor, asked **Melendez**, **Eddy** and another to "button-up" the tarp around the scaffolding. The foregoing involved using wires to secure the loose areas of the tarp to the scaffold. As **Melendez** began to climb from the second level of the exterior scaffold to the third, he felt the scaffold pitch towards the interior of the building. **Melendez** descended to the second level of the scaffold, which continued to tip. As he stood on the scaffold, it continued to tip and the pipes supporting the scaffold began to come apart and collapse. **Melendez** ran away from the collapsing pipes and as he did, the wooden planks comprising the floor of the scaffold began to separate beneath his feet. As the scaffold continued to collapse, **Melendez** feared he would fall on the partially erected cinder block wall and onto the rebar emanating therefrom. Thus, **Melendez** jumped off the scaffold and clear of the collapsing pipes; falling 12 feet to the ground. **Melendez** incorporates several photographs annexed to his affidavit by reference, stating that they fairly and accurately depict the scaffold after it collapsed on the date of his accident.

Within his affidavit **Eddy** states that he too was injured on January 6, 2010, while employed as a Laborer for De Savio. Upon arriving at the site sometime after the end of December, he saw that materials had been trucked in for purposes of erecting a scaffold around the already poured concrete slab. The scaffold was to be erected both along the interior and exterior of the slab and a cinder block wall would be erected in between the scaffold thereafter. **Eddy**, along with other Del Savio employees began to erect the scaffold. First, long pieces of wood called mud-sills were placed on the ground, on top of which the scaffold would be erected. Thereafter, smaller pieces of wood were nailed to the mud-sills and screw jacks were affixed thereon. Screw-jacks are adjustable tubes, which allowed the scaffold to be raised and lowered. Once the screw-jacks were in place, pipes comprising the scaffold frame were placed over the screw-jacks and the pipes were held together using cross-braces. on January 6, 2010, the scaffold had been partially erected. Specifically, the exterior scaffold had been erected to the third level, while the interior scaffold had only been erected to the second level. A tarp had been draped over both scaffolds, secured with wires, and was intended to provide heat for the masons erecting a cinder block wall between the scaffolds. The cinder block wall within the scaffold was also partially erected, measuring four to five feet in height and from the top of which rebar emanated. At approximately 3PM, after having moved blocks and other materials to the area were the masons were working, Sager, asked **Melendez**, **Eddy** and another to "button-up" the tarp around the scaffolding. The foregoing involved using wires to secure the loose areas of the tarp to the scaffold. As **Eddy** worked on the second level of the interior scaffold, he felt the scaffold pitch towards the interior of the building. As a result, the wooden planks upon which he stood came loose and pitched steeply. **Eddy** was, thus, knocked off the scaffold and to the ground 13 feet below. **Eddy** incorporates several photographs annexed to his affidavit by reference, stating that he took them and that they fairly and accurately depict the scaffold after it collapsed on the date of his accident.

Plaintiffs submit the photographs to which they both refer. The photographs bear deposition exhibit stickers which are dated July 19, 2011 and which indicate that they were marked as defendants' exhibits. The photographs depict a collapsed scaffold.

Based on the foregoing, plaintiffs establish prima facie entitlement to summary judgment. As noted above, it is well settled that under Labor Law § 240(1), owners of the location where an accident occurs and the general contractor employed by the owner are absolutely liable irrespective of whether they exercised supervision and/or control over the particular work from which the accident arose (*Ross* at 500; *Haimes* at 135). Moreover, because the duty imposed by Labor Law § 240(1) is non-delegable, owners and general contractors remain liable for a breach of the statute even if the work involved is farmed out to an independent contractor (*Gordon* at 559; *Ross* at 500; *Rocovich* at 513). A violation of Labor Law § 240(1) which proximately causes an employee to sustain injury gives rise to absolute liability (*Blake* at 287; *Gordon* at 559). As relevant here, when a defendant does provide safety equipment and an accident nevertheless occurs, the adequacy, functionality, and placement of said device must be assessed in order to determine whether there has been a violation of the Labor Law (*Narducci* at 267). Lastly, it is well settled that a scaffold which prevents a plaintiff from falling is defective and when such defective scaffold causes injury to a worker thereon, Labor Law § 240(1) has been violated, and summary judgment on the issue of liability is warranted (*Susko* at 434-435; *Aburto* at 640-641; *Nenadovic* at 534-535).

***9** Here, plaintiffs establish that they were injured when the scaffold upon which they were tasked to work suddenly

collapsed, causing **Eddy** to be precipitated off, and leaving **Melendez** no choice but to jump therefrom. The evidence submitted further established that Historic was the owner of the site and that it retained Scully to erect the Center. Post-accident photographs of the scaffold corroborate plaintiffs' version of the events inasmuch as they depict a collapsed scaffold. Accordingly, plaintiff's establish that Labor Law § 240(1) was violated by a scaffold that failed to provide them protection during the course of their work - which work required plaintiffs to work at a substantial height off the ground. To the extent that plaintiffs also establish that the collapsing scaffold caused their alleged injuries, they have established prima facie entitlement to summary judgment.

Notwithstanding the foregoing, the evidence submitted by Historic in opposition to the instant motion raises a material issue of fact with respect to whether the scaffold at issue did in fact collapse and fail. The foregoing, thus, raises a question of fact as to whether Labor Law § 240(1) was in fact violated so as to impute liability to Historic.

Saliently, Historic submits an affidavit from Sager, Del Savio's labor foreman at the time of the instant accident, wherein he states, in pertinent, part as follows. On January 6, 2010, he was employed by Del Savio as its labor foreman at a site were the Center was being erected. Sager was responsible for, *inter alia*, the supervision of those engaged in the erection of a scaffold. The foregoing scaffold was erected around an already poured concrete slab and was erected both along the interior and exterior of the slab. A cinder block wall would then be erected in between the scaffold. **Eddy** and **Melendez** were both employed as laborers by Del Savio and assisted in the erection of the scaffold. With regard to erecting the scaffold, Sager described the process in the same way that **Eddy** did within his affidavit. Sager further stated that to ensure that the scaffold was stable and sturdy, the exterior and interior sections were lashed together with steel pipes. Accordingly, the base of the scaffold was expanded in relation to its height, such that tipping or tilting was virtually impossible. On January 6, 2010, the exterior scaffold had been erected to the third level, while the interior scaffold had only been erected to the second level. A tarp had been draped over both scaffolds, secured with wires, and was intended to provide heat for the masons erecting a cinder block wall between the scaffolds. The cinder block wall within the scaffold was also partially erected, measuring three to five feet in height. At approximately 3:30PM, Sager asked **Melendez**, **Eddy** and another to "button-up" the tarp around the scaffolding. The foregoing involved using wires to secure the loose areas of the tarp to the scaffold. Sager inspected the scaffold, found it to be safe and sturdy. He then left the site. At approximately 4:20PM, Sager received a call informing him that there had been an accident at the site. Sager reported to the site and saw plaintiffs standing inside the slab. While Sager noticed that a few of the upper scaffold frames atop the exterior scaffold were tilted, the exterior scaffold was standing, intact, and not collapsed. Nor had the interior scaffold moved at all. The next morning, the exterior scaffold was simply pushed back into place. No repairs or modifications had to be made to the scaffold thereafter, and plaintiffs continued to use the same.

Based on the foregoing, Historic establishes that the scaffold at issue did not collapse and that if it failed at all, it did so above the level upon which plaintiffs were working. As noted above, with respect to a scaffold, and as relevant here, Labor Law § 240(1) is violated only when a scaffold is defective such that it fails to prevent a plaintiff from falling. Here, Sager's affidavit controverts plaintiffs version of the facts inasmuch as Sager's version of the events the scaffold did not fail. His affidavit, thus, raises a sharp question of fact as to whether Labor Law § 240(1) was violated. In fact, Sager's affidavit could lead a jury to conclude that the accident did not occur and that the plaintiffs' simply fabricated the same. Accordingly, plaintiffs' motion is denied.

***10** Plaintiffs' contention - that even under Sager's version of the events, Historic nonetheless violated Labor Law § 240(1), such that they should be granted partial summary judgment - is unavailing. To be sure, plaintiffs essentially contend that even if the scaffold did not collapse, but only tilted slightly, as averred by Sager, the scaffold nevertheless failed and Labor Law § 240(1) was violated. In support of this contention, plaintiffs' rely on *Picano v Rockerfeller Center North, Inc.* (68 AD3d 425 [1st Dept 2009]), where the court found that Labor Law § 240(1) had been violated when plaintiff fell off a ladder after it had slipped (*id.* at 425). Plaintiffs completely misconstrue the basis for the denial of their motion.

To begin with a ladder is markedly different than a scaffold, thereby rendering *Picano* inapposite. That notwithstanding, it is clear that - as plaintiffs correctly argue - a scaffold which moves such that it causes a worker to fall therefrom violates Labor Law § 240(1) (*Lopez* at 351). However, here, contrary to plaintiff's contention Historic's version of the event does not establish - as argued - that plaintiffs failed because the scaffold merely tilted, thereby constituting prima facie entitlement to summary judgment under *Lopez.* Rather, Historic's version of the events - the sturdy nature of the scaffold prior to the alleged accident as well as the fact that it was largely intact immediately thereafter, controverts whether the accident happened at all and, hence whether Labor Law § 240(1) was in fact violated. Accordingly, given Sager's affidavit, whether

this accident happened and how it happened must be decided by a jury (*Garbacki v Hovnani at 80 N. Westchester*, 248 AD2d 434, 434 [2d Dept 1998] ["Although the plaintiff alleged that he fell when the scaffold suddenly moved without warning, his employer stated in an affidavit that he had personally inspected the scaffold both on the day of the accident and four days thereafter, and that at both times he found the scaffold to be properly erected and attached to the building. Under these circumstances, the issue of whether the device provided proper protection within the meaning of Labor Law § 240 (1) is a question of fact for the jury."]; *Nowacki v Metropolitan Life Ins. Co.*, 242 AD2d 265, 266 [2d Dept 1997] ["Although a plaintiff's account of how his accident happened may suffice to justify an award to him of summary judgment, where, as here, a jury could draw conflicting inferences from the evidence, and, indeed, where the plaintiff's account is contrary to experience, summary judgment should at least await the completion of discovery" (internal citations omitted).]) It is hereby

ORDERED that Historic serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated: March 24, 2016

Bronx, New York

<<signature>>

SHARON A.M. AARONS, J.S.C.

Footnotes

[1] Notably, the scope of the work to be provided by Del Savio under the agreement is incorporated by reference as a written proposal annexed thereto. However, plaintiff fails to provide a copy of the written proposal and as such, the Court cannot provide a summary of the same.

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