SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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MANUEL GUAMAN, as Administrator of the Estate of Decedent ANTONIO GUAMAN, deceased,

Plaintiff,

-against-

THE CITY OF NEW YORK and D'ONORFRIO GENERAL CONTRACTORS CORP.,

Defendants.

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D'ONORFRIO GENERAL CONTRACTORS CORP.,

Third-Party Plaintiff,

-against-

YUKON ENTERPRISES, INC.,

Third-Party Defendant.

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YUKON ENTERPRISES, INC.,

Second Third-Party Plaintiff,

-against-

DIEGO CONSTRUCTION, INC.

Second Third-Party Defendant.

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Index No. 150047/2014

DECISION AND ORDER

Motion Sequence 003

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Labor Law action for personal injuries, Diego Construction, Inc. ("Diego") moves for leave to renew this Court's decision dated April 19, 2016, and upon renewal, summary judgment dismissing the plaintiff's complaint and all remaining claims against it.

The City of New York ("the City") and D'Onofrio General Contractors Corp. (collectively, the "City") cross moves for leave to renew, and upon renewal, summary judgment dismissing the plaintiff's complaint and all remaining claims against them.

Yukon Enterprises, Inc. ("Yukon") cross moves for leave to renew and upon renewal, summary judgment dismissing the plaintiff's complaint and dismissing the City's third-party complaint against Yukon, or, in the alternative, granting Yukon common law indemnity against Diego.

Plaintiff cross-moves for renewal and summary judgment in his favor and against The City and D'Onofrio under Labor Law 240(1) and 241(6).

Factual Background

Plaintiff Manual Guaman ("Plaintiff") brings this action on behalf of his nephew, decedent Antonio Guaman ("Decedent"), who fell through an exposed skylight on the roof at a warehouse building at which he was working.

The City, as owner of the warehouse, hired D'Onofrio, as the general contractor, who in turn hired Diego as a subcontractor for work to be performed at the building. Yukon was the Decedent's employer, which allegedly provided employees to Diego.

Upon the various motions and cross-motions filed by the parties for summary judgment in their favor, the Court, by Order dated April 19, 2016, issued various rulings, some of which are the subject of the parties' instant motion to renew.

As relevant herein, the Court denied plaintiff's motion for summary judgment on his Labor Law 200, 240(1) and 241(6) claims, dismissed the Complaint against Diego (but denied Diego's request to dismiss the common law indemnification claims against it), denied Yukon's

cross-motion to dismiss plaintiff's complaint against the co-defendants and the cross-claims against it, and dismissed plaintiff's Labor Law 200 claim against the City.

The Court reasoned as follows:

> "Plaintiff failed to establish that adequate safety devices were not provided to prevent the Decedent from falling through the skylight on the roof on which he working."
>
> * * * * *
>
> . . . Plaintiff failed to establish that the harness as tied off (couple[d] with the caution tape separating the Decedent's designated work site from the rest of the roof where the subject skylight was located) was an inadequate safety device to prevent the Decedent from falling through the subject skylight. Here, the testimony indicates that the Decedent was provided with a harness which was properly tied 15 minutes before his fall. And, there is testimony indicating that the harness as tied off, would not have created "a possibility that he would have fallen"; the harness was a length that would permit him "to go to the area where was supposed to work and back" (Alonzo EBT, pp. 83-84, 97). Plaintiff presented no caselaw for the support that a functional, properly-anchored safety harness cannot serve as an adequate safety device under Labor Law 240(1) . . . .
>
> Here, the presence and adequacy of the harness, lanyard, and safety line raises an issue of fact as to whether there was a failure to provide adequate safety devices that proximately caused the Decedent's injuries. *To the extent that Plaintiffs base their entire 240(1) summary judgment argument upon the sole fact of Decedent's fall through the skylight, they fail to meet their prima facie burden* of demonstrating that no adequate safety device, or a demonstrably inadequate one, was provided.
>
> At the same time, and in relation to plaintiff's Labor Law 240(1) claim, *Defendants fail to meet their own burden of demonstrating that the Decedent was the sole proximate cause of his accident* so as warrant dismissal of all of his claims.
> (Emphasis added) (internal citations omitted).
> (Pages 14, 16-17)
>
> * * * * *
>
> Here, the cross-movants failed to establish[] that the devices provided – the harness, lanyard, and safety line and the caution tape separating the designated work site from the rest of the roof, including the skylight through which Decedent fell – constituted adequate safety devices as a matter of law. While Decedent was instructed in the use of those devices on the day of the accident [*Diego Exh A [Alonzo Aff]* ¶ 2, 4], Alonzo never explicitly testified that the length of Decedent's safety line was "*only*" sufficient to allow access to the designated work area and not beyond it (*Pl Exh 14 [Alonzo Tr]* 84:4-6), and thus his conclusion that Decedent fell because he unhooked his lanyard is insufficient to establish the adequacy of the device as a matter of law (*id.* at 97:11-16). There is also no evidence that the safety devices themselves were later inspected to ensure that they had functioned properly (*id.* at 94:14).
> (Pages 18)

* * * * *

Because is undisputed that the skylight through which Decedent fell was not protected by *any* railing, let alone one that complied with the Industrial Code's specifications, Plaintiff established that there was a violation of both Industrial Codes cited above.

* * * * *

However, in light of the testimony that the Decedent was instructed and seen wearing his harness prior to his fall, and that there was "no possibility" that the Decedent would have fallen with the harness attached as instructed, an issue of fact as exists as to whether the Decedent was negligent.

Thus, plaintiff is not entitled to summary judgment against the City, D'Onofrio, and Diego under Labor Law 241(6) at this juncture.
(Pages 20-21).

* * * * *

[As to Labor Law 200] Plaintiff failed to meet its burden of demonstrating, with any admissible evidence, that the City or D'Onofrio exercised anything beyond general supervision, or exercised sufficient supervision or control over the Decedent's work.

And, with respect to Diego, Plaintiff demonstrates, . . . that Diego sufficiently exercised control over the work. Indeed, that fact is undisputed by Diego, and the many instances of control arise in the context of Diego's arguments that Diego provided adequate safety devices, instructions on how to use them, and instructions on staying within the appropriate work area.

However, as discussed below, Diego has demonstrated entitlement to summary judgment in its own right because Decedent was Diego's "special employee" and thus, claims against it are barred under the Worker's Compensation Law.

* * * * *

However, Diego failed to demonstrate that it is not obligated to Yukon for indemnification. . . .The record does not establish Diego's freedom from negligence for the Decedent's accident, so as to support dismissal of Yukon's indemnification claims against [it].

* * * * *

inasmuch as Yukon's cross-motion seeks dismissal of D'Onofrio's indemnification claims against it is premised solely upon dismissal of the Plaintiff's claims against D'Onofrio (on the grounds that the Decedent was the sole proximate cause of his accident and that no liability exists under 241(6)), the cross-motion is denied....

* * * * *

The City and D'Onofrio have met their burden for summary judgment by showing the [] absence of any material issue of fact that neither exercised sufficient supervision and control so as to be held liable under Labor Law 200.
(Pages 22-24).

Diego, in support of renewal and dismissal of the complaint and all claims against it, argues that depositions and discovery conducted subsequent to the Court's April 19, 2016 decision establish new facts not available at the time of the earlier submissions, and establish that the Decedent's own negligence was the sole proximate cause of his accident. The additional depositions of Chris Frka ("Frka"), Ivan Baez (Decedent's co-worker) ("Baez"), Moises Ordonez (Decedent's co-worker) of Yukon ("Ordonez") and John Bianchi of D'Onofrio ("Bianchi"), and accident report of the accident show that the Decedent's harness was not long enough to access the work area, and that the Decedent could not have reached the skylight without untying his harness, and a co-worker testified that the harness was inspected and found not damaged after the fall.

The City and D'Onofrio, in support of renewal and dismissal of the complaint all claims against it, adds that the new evidence establishes that the Decedent was given direct instructions to remain "tied off" at all times and remain in his designated work area, but disconnected his harness and left his area, thereby causing his own accident.

Yukon, in support of renewal and dismissal of the complaint and third party complaint against it, or in the alternative,for common law indemnity against Diego, Yukon argues that but for plaintiff's conduct, the accident would not have occurred. Thus, upon dismissal of plaintiff's complaint against the direct defendants, Yukon is entitled to dismissal of the third party complaint against it. In addition, as Diego is the only party that supervised and controlled plaintiff's decedent's work, and was solely responsible for safety at the job site, Yukon as the general employer is entitled to common law indemnification. Further, given the testimony and this Court's finding that Diego controlled the Decedent to the extent that Diego was the

Decedent's "special employee," the only possible actively negligent party in this action must be Diego. Therefore, Yukon is also entitled to common law indemnity from Diego if the complaint is not dismissed.

Plaintiff opposes the motions, arguing that the movants failed to provide a reasonable explanation why the evidence was not previously submitted. The purported new evidence consists of deposition testimony of their own employees that purportedly confirms what defendants argued in their previous motions- that the safety line was not long enough to reach the skylight through which Decedent fell (the "subject skylight"). Such evidence, which simply reiterates the previous arguments, does not support renewal. And, defendants had access to such evidence, as demonstrated by the fact that they submitted affidavits from three of such employees previously. Additionally, such "new" evidence should be disregarded based on the doctrine of *falsus in uno*, especially since the Decedent is not in a position to refute the testimony. In any event, the additional evidence fails to demonstrate that the subject safety line to which the Decedent's safety harness was attached, was not long enough to reach the subject skylight. Defendants failed to establish that plaintiff had to have unhooked his harness prior to falling through the subject skylight. It is just as likely that the Decedent's fall resulted from a defect or malfunction in some component part of the device. And, even if the Decedent unhooked his safety harness and walked beyond the designate work area, defendants are not entitled to summary judgment because D'Onofrio's incident investigation report shows that he fell after he was "ending his shift exiting the rooftop," and not from straying from the work area; two independent causes exist - failure to cover the skylights, (failure to place a temporary cover or safety railing around the skylight) which D'Onofrio states was not its job, and unhooking of the

lanyard, preclude a finding that the Decedent was the sole proximate cause of his accident.

Plaintiff also cross moves for renewal and summary judgment in his favor under Labor Law §§240(1) and 241(6). According to the Incident Investigation Report and NYPD Complaint Follow Up Report, the Decedent did not stray from the work area, but proceeded to the area of the subject skylight as "the workers were ending their shift." Alonzo previously testified that he instructed the workers to "Finish this, go downstairs, and we'll go home" (EBT. p. 9) and that the Decedent crossed over the caution tape because he "had to leave the roof." (EBT. p. 30). Regardless, argues plaintiff, the failure to cover the skylight or guard it with an appropriate railing in violation of the Industrial Code, warrants judgment in plaintiff's favor.

In reply, Diego argues that it did not have "access" to or control over the four witnesses, and Diego did not submit any affidavits from any of these witnesses in support of its prior motion. There are no procedural barriers to determining its motion to renew and the Court should reject plaintiff's *falsus in uno* request. Further, it was unnecessary for the Decedent to unhook his harness and plaintiff still failed to provide any case law establishing that a functional, properly-anchored safety harness cannot serve as an adequate safety device under Labor Law 240. Plaintiff failed to raise an issue of fact and, according to Baez, one did not need to pass by the subject skylight to leave the roof. And, plaintiff failed to overcome its previous failure of establishing that "the harness as tied off (couple[d] with the caution tape separating the Decedent's designated work site from the rest of the roof where the subject skylight was located) was an inadequate safety device to prevent the Decedent from falling through the subject skylight." (Decision p. 16). Examination of the harness can never be done because it was destroyed by plaintiff should not result in plaintiff's favor.

Diego also points out that Yukon does not argue that Diego was negligent, and as such, Yukon's common law indemnification claim against Diego should be dismissed. Yukon's bare claim that Diego's supervision and control of the Decedent's work, without explanation of what Diego might have done negligently, is insufficient to support Yukon's common law indemnification claim against Diego.

The City and D'Onofrio add that there was no basis for plaintiff to file his motion prior to obtaining the deposition of the Decedent's co-workers, and thus, renewal by the plaintiff should be denied. Plaintiff cannot recover where an employer provides adequate safety devices and the employee was instructed to use them, but violates those instructions.[1] Yukon also opposes plaintiff's cross-motion on the grounds noted above.

And, the City and D'Onofrio oppose Yukon's motion for common law indemnification, arguing that issues of fact exist as to whether Yukon was negligent by failing to provide the Decedent with proper training and/or re-training in accordance with 29 CFR § 1926.503(c).

Plaintiff replies that he is entitled at least to partial summary judgment on his Labor Law 241(6) claim and on his Labor Law 241 claim.

The City and D'Onofrio add that plaintiff's misrepresentation and distortion of the facts and testimony do not establish that the deponents gave false testimony. All witnesses agreed that the safety line, with retractable "yo-yo" and harness, was not long enough for him to have reached the subject skylight. And, Frka and Bianchi never visited the site until after the accident or went up on the roof. Baez's and Ordonez's inability to give exact distances or recall the

[1] The determination of the parties' respective arguments concerning the destruction of the harness that the Decedent was wearing when the accident occurred and applicable sanctions, if any, is left for the trial judge.

length of the safety line does not affect the impact of their testimony that the subject skylight was further away than the "end of the rope." and that the Decedent would not have been able to reach the subject skylight without unhooking his safety line. Alonzo's uncertainty as to which skylight the Decedent fell through (*i.e.*, either the third or fourth skylight away from the designated working area) is of no moment.

Finally, Yukon replies that in light of this Court's ruling that Diego controlled the work site, the only possible actively negligent party in this action must be Diego. That Yukon was charged by OSHA with violations, as the City and D'Onofrio's claim, is inconsequential, as such violations are inadmissible and lack probative value.

Discussion

A motion for leave to renew pursuant to CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." (*American Audio Serv. Bur. Inc. v. AT & T Corp.*, 33 AD3d 473, 476, 823 NYS2d 25 [1st Dept 2006]).

The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc. 2d 126, 133, 751 N.Y.S.2d 707 [N.Y. City Civ. Ct. 2002]; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d

511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879).

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v. Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 [Sup. Ct. N.Y. County 2012], *aff'd* 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Iannucci*, 35 Misc 3d 1217, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

All defendants established that the completed deposition testimony of Alonzo (Decedent's supervisor) and deposition testimony of the Decedent's two co-workers, Moises Ordonez ("Ordonez") and Ivan Baez ("Baez"), were not available at the time plaintiff filed his previous motion. The record fails to demonstrate as a matter of law that these witnesses intentionally gave false testimony at their recent depositions. Plaintiff's interpretation of such testimony ignores the remaining somewhat consistent testimony in the record, and whether such testimony was flatly inconsistent and contrary to the testimony previously given is left to the trier of fact.

However such evidence would not change this Court's previous determination on their motion to dismiss the complaint on the ground that the Decedent was the sole proximate cause of his accident.

To establish that plaintiff's actions were the sole proximate cause of his injury, defendants must present evidence that "adequate safety devices [were] available; that [plaintiff]

knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v. Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011] citing *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 46, 823 N.E.2d 439 [2004] and *Gallagher v. New York Post*, 14 NY3d 83, 88, 896 NYS2d 732, 734 [2010]).

Alonzo testified at his continued deposition that the Decedent would not have been able to walk from the work area to the subject skylight because in order to do so, "the line would have to be placed on the other side" of the fan "in order for him to reach" it. (EBT, p. 145). However, when the topic was revisited, Alonzo stated that the safety harness "would not allow him to get there. Like I stated, *I do not remember* through which skylight in particular he fell though, but might have as well, *but the thing is that I don't remember*." (EBT, pp. 156-157). (emphasis added).[2]

Likewise, and contrary to Diego's contention, Baez testified that the most one could walk with while attached to the lines was "*Maybe* 10 feet"; when asked how far was the work area within the red tape from the subject skylight, Baez replied, "*I don't remember*. Some 16 feet, the most, I *think, maybe*. *I never measured it*." (EBT, p. 35) (emphasis added).

And, although Ordonez testified that the safety line, as tied, "doesn't get there" (the subject skylight), and the safety line was "Like around five feet or so," (EBT, p. 33), he also did

[2]At Alonzo's earlier deposition (prior to the previous motion), he denied that there were any barricades that separated the area of the roof where the workers were painting from the subject skylight, and that the "caution tape was the only thing there." (EBT, p. 78). However, at his recent continued deposition, Alonzo stated that "we had security barriers . . .which were the ones that were placed around the area that we [were] working on and the tape was - - these barriers have specific places where you stick theses tapes to. . . ." (EBT, p. 115). Baez also testified that there were no barriers on the roof on the date of the accident (EBT, p. 63). Thus, the presence of barriers in the area in which the Decedent was working or in between such area and the subject skylight is unclear.

not know how long the safety line as if fully extended (EBT, p. 28). When asked if one could have reached the subject skylight without unhooking the safety belt, Ordonez replied, "I don't *think* so" (p. 31) (emphasis added).

Furthermore, Frka testified that the subject skylight was "30 feet" from the Decedent's work area (EBT, p. 66):

A . . . where the skylight was, you couldn't be in a harness.
Q How do you know that?
A Because it was probably 30 feet away, and the harnesses that they had on were only, like, I believe, 8 feet.
(EBT, p. 68).
Q I'm sorry, how long did you say was the length to which someone could travel with that fall protection device?
A 8 feet.
Q How did you learn about that?
A That's standard.
Q Are there any fall protection devices that enable someone to go more than 8 feet?
A Yeah.
(EBT, p. 69).

And, as to the "lanyard" depicted at in a photograph shown to Frka, Frka testified that it was a "retractable" called "yo-yos." (EBT, p. 71). The job site may have had both the retractable or standard lanyard (EBT, p. 72). And, as to the retractable lanyard, Frka stated:

A Some of them are 12 feet, and some of them have cables on them and you can go, like, 16 feet.
Q Can you go more on some of them?
A I don't -- we never use more than that. *That, I don't know.*
(EBT, p. 72).

Furthermore, Bianchi testified at his deposition that the retractable lines could have been 30, 40, or 50 feet long:

Q. Going back to Defendant's Exhibit A today, you indicated that by looking at that, you do not know how long that retractable line is; is that correct?
A. On these particular items?

Q. Yes.
A. I don't know. Unless you can see the label and they can tell you they are 30, 40, 50 feet.
Q. Are there different variations in the lines that were used --
A. Yes.

(EBT, p. 58).

Thus, as the newly submitted deposition testimonies do not establish, as a matter of law, that the Decedent could not have reached the subject skylight without unhooking his harness from the safety line, summary judgment remains unwarranted.

Further, as plaintiff's point out, the Decedent's fall may have resulted from a defect or malfunction in some component part of the device. According to Alonzo, the retractable "yo-yo" "lines are equipped with this yo-yo system at the tip and it's what makes the line go back and forth and . . .that is what allows the worker to reach the working area or in the worst case scenario, if one of the workers might fall, that is the mechanism that would retract him back" (EBT, p. 133).

It is further noted that the Incident Investigation Report indicates as an "unsafe condition" that the subject skylight "panels were not covered," *and* that the Decedent "unhooked lanyard as work ceased & began walking off roof." And, this Court previously held that the record supported plaintiff's Labor Law 241(6), Industrial Code violation claim that the subject skylight was not protected by *any* railing, let alone one that complied with the Industrial Code's specifications. Thus, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Noor v. City of New York*, 130 A.D.3d 536, 15 N.Y.S.3d 13 [1st Dept 2015] ["[u]nder Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a

plaintiff's sole proximate cause for the injury"]).

Nor do such testimonies establish, as a matter of law, that the harness was in proper, working order.

As to plaintiff's cross-motion, the testimony of Baez conflicts with the records relied upon by plaintiff. At Baez's deposition, he stated:

> Q In order to leave the roof, would you need to pass by the skylight through which Mr. Guaman fell?
> A No.
>
> (EBT, p. 38).

And, as the Court stated previously as to plaintiff's Labor Law 241(6) claim, a violation of the Industrial Code "does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (citing *Long v. Forest-Fehlhaber,* 55 NY2d 154, 160 [1982]) and that an issue of fact as exists as to whether the Decedent was negligent thereby precluding partial summary judgment in plaintiff's favor (Decision, pp. 19, 21) (*Mercado v. Caithness Long Island LLC*, 104 A.D.3d 576, 961 N.Y.S.2d 424 [1st Dept 2013] ["plaintiff's cross motion for partial summary judgment on his Labor Law § 241(6) claim should have been denied in its entirety, since there are issues of fact as to whether plaintiff's comparative negligence constitutes a valid defense to this claim"]). And, the testimony of the Decedent's co-workers that were on the roof on the date of the accident, that the accident could not have occurred if plaintiff remained hooked into the safety devices raises an issue of fact as to defendants' liability under Labor Law 240(1).

Thus, plaintiff's cross-motion for renewal, and upon renewal, for summary judgment, is likewise denied.

And Diego's request to dismiss Yukon's indemnification claim against Yukon is unwarranted. Diego cites no new evidence warranting a change in this Court's previous determination that the record fails to establish Diego's freedom from negligence for the Decedent's accident.

Yukon's motion for common law indemnity against Diego is likewise denied. Yukon presented no caselaw in support of his contention that Diego's status as "special employer" of the Decedent, in and of itself, merits the assumption that Diego must have been negligent by virtue of this special employment relationship. Yukon cited to no acts of Diego constituting negligence.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Diego Construction, Inc.'s motion for leave to renew this Court's decision dated April 19, 2016, and upon renewal, summary judgment dismissing the plaintiff's complaint and all remaining claims against it is denied. And it is further

ORDERED that the City of New York and D'Onofrio General Contractors Corp.'s cross-motion for leave to renew, and upon renewal, summary judgment dismissing the plaintiff's complaint and all remaining claims against them is denied. And it is further

ORDERED that Yukon Enterprises, Inc.'s cross-motion for leave to renew and upon renewal, summary judgment dismissing the plaintiff's complaint and dismissing the City's third-party complaint against Yukon, or, in the alternative, granting Yukon common law indemnity against Diego is denied. And it is further

ORDERED that plaintiff's cross-motion for renewal and summary judgment in his favor

and against The City and D'Onofrio under Labor Law 240(1) and 241(6) is denied. And it is further

ORDERED that Diego Construction, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: June 28, 2017

Hon. Carol Robinson Edmead, J.S.C.