| **Sikorski v Trustees of Columbia Univ. in the City of N.Y.** |
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| 2019 NY Slip Op 32676(U) |
| September 4, 2019 |
| Supreme Court, New York County |
| Docket Number: 150752/2015 |
| Judge: Shlomo S. Hagler |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 17**

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**STEFAN SIKORSKI,**

**Index No. 150752/2015**
**[Motion Seq. No. 002]**

**Plaintiff,**

**- against -**

**THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and LEND LEASE (US) CONSTRUCTION LMB INC.,**

**DECISION/ORDER**

**Defendants.**

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**HON. SHLOMO S. HAGLER, J.S.C.:**

This is an action to recover damages for personal injuries allegedly sustained by a roofer on August 6, 2014 when he fell off of a Styrofoam block while working at a construction site located at 605 West 129th Street, in New York, New York (the "Premises"). Plaintiff Stefan Sikorksi moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 claim, and the Labor Law § 241(6) claim predicated on alleged violation of Industrial Code 12 NYCRR 23-1.7 (f), against defendants the Trustees of Columbia University in the City of New York ("Columbia University") and Lend Lease (US) Construction LMB Inc. ("Lend Lease") (collectively, "defendants").

## BACKGROUND

On the day of the accident, Columbia University owned the Premises where the accident occurred (Complaint at ¶¶ 4-5). Columbia University hired Lend Lease to serve as the construction manager for a project at the Premises, which entailed redeveloping a portion of the Manhattanville area of West Harlem to build a new mixed-use campus (the "Project") (plaintiff's

Notice of Motion, Exhibit "5", Construction Manager Agreement). Lend Lease, in turn, hired non-party Eagle One Roofing Contractors ("Eagle") to perform work at the Premises (Complaint, ¶¶ 21-23). Plaintiff was employed by Eagle on the day of the accident (*id.* at ¶ 24).

The complaint alleges causes of action against defendants sounding in common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

***Plaintiff's Affidavit***

In his affidavit, plaintiff stated that on the date of the accident, he was employed by Eagle as a roofer (plaintiff's Notice of Motion, Exhibit "1", plaintiff's aff at ¶ 2). He was working on the ground level of the Premises, applying primer and waterproofing to the exterior foundation walls (*id.* at 3). Prior to plaintiff's arrival at work that day, his foreman, Mark Getz ("Getz"), had set up a Baker's scaffold along the wall and two white Styrofoam blocks on the other side of a concrete column (*id.*). The concrete column and a large aluminum plate on the ground made the work space in that area very narrow (*id.*).

Plaintiff stated that at approximately 8:00 A.M., Getz was called to a meeting, at which point, he told plaintiff to continue applying the primer, and, once he could no longer reach the top of the wall from the scaffold, plaintiff "was to move onto the Styrofoam blocks to continue [his] work" (*id.* at ¶ 4). When plaintiff could no longer reach the top of the wall, he stepped onto the first Styrofoam block and worked from it to apply primer to the top of the wall (*id.* at ¶ 5). He then moved off of the first block and onto the second block. While working on top of the second block, it "moved back and forth several times" (*id.*). Plaintiff stated, "As a result of the block moving, my balance was thrown off and I was sent falling backwards. I fell from the Styrofoam block to the concrete floor" (*id.*).

Plaintiff stated that on the date of the accident, Eagle did not have any ladders at the job site (*id.* at ¶ 6). He was unable to use the Baker's scaffold in the area where he fell because the cramped workspace in that area made him unable to push the scaffold along the wall (*id.*). In addition, he could not dismantle the scaffold by himself (*id.*).

Plaintiff testified that he "was only given the Styrofoam blocks from which to perform [his] work along that area of the wall" (*id.*). He "was not provided with any ladder or other safer alternative mean[s] of working at a height" (*id.* at ¶ 7).

***Plaintiff's Deposition Testimony***

Plaintiff testified that Getz was supervising his work on the date of the accident (plaintiff's Notice of Motion, Exhibit "3", plaintiff's tr at 43-44). Plaintiff was using a brush to apply primer to a 20-foot long wall which had a pitch that varied from 6 to 12 feet (*id.* at 47-48, 78). He began applying the primer to the highest point of the wall and worked his way down (*id.* at 49). At the time he sustained the injury, the height of the wall was about 7 feet (*id.*).

Plaintiff testified that when he first started working on the wall that morning, he used a scaffold (*id.* at 49-50). At some point, he reached an area of the wall where he could no longer work on the scaffold because he could not move it past some columns and an aluminum angle blocking the next section of wall (*id.* at 62-63). Getz set up Styrofoam blocks so that plaintiff could apply the primer to the top of the wall in that area (*id.* at 68). Getz asked plaintiff if he could reach that section of the wall using the blocks, and plaintiff responded "yes" (*id.* at 70). Getz then instructed plaintiff to use the Styrofoam blocks, which were about 3 feet tall, 4 or 5 feet wide, and 2 feet deep (*id.* at 62, 75).

Plaintiff testified that he typically used an A-frame ladder to apply primer, but that on this

job, he did not use ladders (*id.* at 68-69). Plaintiff was asked whether Eagle had "a ladder for [him] to use" (*id.* at 69). Plaintiff responded, "Yeah. They got plenty of ladders" (*id.*). Plaintiff further testified:

> "Q. Did you ever use a ladder to apply the primer at any point in time while you were at the . . . project?
>
> A. No.
>
> Q. But Eagle One did own ladders that you had used in the past, correct?
>
> [PLAINTIFF'S ATTORNEY]: Are you asking generally or –
>
> [DEFENDANTS' ATTORNEY]: Yes.
>
> A. Yes, plenty of ladders"

(*id.* at 76-77).

Plaintiff explained that Getz had to go to a meeting every day from around 8:00 A.M. until 9:30 A.M. (*id.* at 63-64). Getz never asked plaintiff to stop working while he attended the meetings (*id.* at 63-64). At the time of the accident, Getz was at one of these meetings (*id.* at 63). He told plaintiff to keep working and that the work on the wall had to be finished that day (*id.* at 62, 66). Since Getz was at the meeting, plaintiff was by himself, and, therefore, could not ask anyone to help him de-construct the scaffold so that he could reconstruct it for use in the section of wall where he fell (*id.* at 63).

Plaintiff testified that when he stepped on the first Styrofoam block, it permitted him to reach the top of the wall to apply the primer (*id.* at 72). He then stepped onto the second Styrofoam block (*id.* at 74). He applied primer to the left side (*id.* at 78). When he tried to reach to his right to apply the primer, the block started to move (*id.* at 75, 78). He testified that the block was not stable and he fell off (*id.* at 78). At the time, he was holding a half-full, 5-gallon

bucket of primer in his left hand, and a brush in his right hand (*id.* at 81-82). About a half-hour later, when Getz arrived at the site, plaintiff told Getz that he fell from the Styrofoam block (*id.* at 99).

***Deposition Testimony of Mark Beatini (Lend Lease's Site Safety Manager)***

Mark Beatini testified that he served as Lend Lease's site safety manager for the Project on the day of the accident (plaintiff's Notice of Motion, Exhibit "4", Beatini tr at 11). Lend Lease was hired by Columbia University to act as the construction manager and to hire subconstractors for the Project (*id.* at 10-14). At the time, the Project was in Phase I, which involved putting up two buildings (*id.* at 12).

Beatini would inspect the job site every morning and afternoon, looking for safety issues, including fall risks (*id.* at 26-27). If he encountered a safety issue, he had the authority to stop the work (*id.*). Beatini would record any safety issues on a safety log (*id.* at 28).

During his deposition, Beatini was shown a photograph of the area where plaintiff fell. Beatini testified that it appeared to him that the Styrofoam block depicted in the photograph had a spattering of "tar" on it, which indicated that it was being used to stand on in order to perform waterproofing (*id.* at 66). Beatinti testified that the Styrofoam block should not be used to access an elevated work site (*id.* at 67). If he had observed a worker using it to access an elevated work site, he most likely would have stopped the activity and had the block removed (*id.*).

Beatini was questioned about whether he observed contractors working with Styrofoam at the job site. He responded that he did not recall ever seeing Styrofoam around the construction site other than around the loading dock (*id.* at 65-66).

***Affidavit of Mark Getz (Plaintiff's Supervisor/Foreman)***

In his affidavit, Getz stated that he was employed by Eagle and served as plaintiff's foreman on the date of the accident (Defendants' Affirmation in Opposition, Exhibit "B", Getz aff at ¶ 2). On that date, he was working with plaintiff on waterproofing a wall. At approximately 10:00 A.M., he left the area to attend a meeting (*id.* at ¶ 4).

Getz stated in his affidavit that he told plaintiff to cease working while he was at the meeting (*id.*). He never instructed plaintiff to utilize a Styrofoam block as a means of accessing upper areas of the wall (*id.*). The Baker scaffold was capable of being disassembled and reassembled by one person and utilized to roof the entire wall (*id.*). Additionally, if required, ladders were available by Eagle on the date of the accident (*id.*).

Getz further stated in his affidavit that when he returned from the meeting, plaintiff informed him that he twisted his knee as he was climbing off the Baker scaffold (*id.* at ¶ 5). Plaintiff never informed Getz that he had been working on a Styrofoam block nor that he had fallen off a Styrofoam block (*id.*).

Getzs stated that if plaintiff fell off the Styrofoam block, then the accident occurred solely as a result of plaintiff's failure to use the safety devices available to him, including the Baker scaffold and ladders (*id.* at ¶ 6). Getz averred that plaintiff knew the Baker scaffold could be disassembled and reassembled by one person and could have been utilized along the entire wall (*id.*). Additionally, the aluminum panel that plaintiff testified was preventing him from moving the scaffold to another area was capable of being moved and was not an impediment (*id.*). According to Getz, plaintiff was aware that Eagle had ladders that were available for his use (*id.*). Getz stated that plaintiff "knew he was expected to use the scaffold or ladder to waterproof the

wall, but instead, for no good reason, chose to use a Styrofoam block" (*id.*).

***Eagle's Report of Work-Related Injury/Illness (C-2 Report)***

Eagle's C-2 Report, which was filled out by Eagle employee Teresa Larino, states that plaintiff gave notice of the injury to Teri Sabatino (defendants' Affirmation in Opposition, Exhibit "A"). The C-2 Report states that plaintiff was "WORKING ON A BAKER SCAFFOLD" and that he "STEPPED OFF SCAFFOLD + TWISTED KNEE" (*id.*). The report lists Teresa Larino as the person who provided the information necessary to prepare the form (*id.*).

***The Medical Records***

Plaintiff's emergency department medical chart from Trinitas Hospital states that on August 7, 2014, plaintiff presented with knee pain "AFTER FALL AT WORK FROM A 4 FT SCAFFOLDING" (defendants' Affirmation in Opposition, Exhibit "C"). Other medical office notes and reports also indicate that plaintiff fell from a 4-foot high scaffolding (*id.*, Exhibits "C"-"E").

**DISCUSSION**

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing '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'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . .

. , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

"[T]he court's function is issue finding rather than issue determination" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]). "[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]).

***The Labor Law § 240(1) Claim***

Plaintiff moves for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), commonly referred to as the Scaffold Law, provides, in part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"[T]he statute places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed" (*Hill v Stahl*, 49 AD3d 438, 441-442 [1st Dept 2008]). The protections of the statute, however,

> "'do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity . . . . [It] was designed to prevent those types of accidents in which scaffold, hoist, stay, ladder or other protective device proved inadequate to

> shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'"

(*id. at* 442 [emphasis in original], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "[T]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

In order to prevail on a section 240 (1) claim, plaintiff must show that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Santos v Condo 124 LLC*, 161 AD3d 650, 654 [1st Dept 2018]). "Liability is contingent upon the existence of a hazard contemplated in section 240 (1) and a failure to provide, or the inadequacy of, a safety device of the kind enumerated in the statute" (*Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013]; *see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 525 [1st Dept 2017] ["Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240 (1)"]; *Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426, 426 [1st Dept 2009]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]; *see also Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425, 425 [1st Dept 2009]).

Here, in support of his motion, plaintiff submitted his deposition testimony and affidavit,

wherein he stated that the Styrofoam block on which he was working moved from side to side while he was applying the primer, which caused him to fall 3 feet to the floor below and sustain injuries. Therefore, plaintiff established a prima facie violation of Labor Law § 240(1) (*see id.*; *see also Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]["Plaintiff established a prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim by showing that the subject fire escape [on which he was working] was the functional equivalent of a scaffold and failed to provide adequate protection for the elevation-related work he was performing"]; *Beharry v Public Stor., Inc.*, 36 AD3d 574, 574 [2d Dept 2007]["'metal decking' was a 'safety device' within the meaning of Labor Law § 240 (1)," because it "served as a functional equivalent of a ladder"]; *De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948, 950 [2d Dept 2003]["fire escape was being used as the functional equivalent of a scaffold to protect the decedent from elevation-related risks and therefore constituted a safety device within the meaning of Labor Law § 240 (1)"]).

In opposition to plaintiff's prima facie showing, defendants argue that plaintiff is not entitled to judgment in his favor on the Labor Law § 240 (1) claim because his recalcitrance in utilizing the Styrofoam block, instead of a scaffold or ladder, makes him the sole proximate cause of his accident. However, these defendants have not sufficiently established that this is a case where "adequate devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]; *see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Hagins v State of New York*, 81 NY2d 921, 922-923 [1993]).

To that effect, plaintiff stated that no ladders were provided, he could not move the Baker scaffold to the area where he was working at the time of the accident, and that his foreman, Getz, directed him to stand on the Styrofoam block to apply primer to that area of the wall. Accordingly, plaintiff "cannot be the sole proximate cause of his injuries" (*Harris v City of New York*, 83 AD3d 104, 110-111 [1st Dept 2011], citing *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879 [2d Dept 2006][worker's conduct was not the sole proximate cause of his accident where the evidence established that at the time of accident, he was acting pursuant to the instructions of his supervisor]; *see also Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504-505 [1st Dept 2013]["because plaintiff has established that no adequate safety device was provided, his own [n]egligence, if any, . . . is of no consequence [and, i]n any event, since plaintiff's use of the ladder was consistent with his employer's instructions, any negligence on his part cannot be deemed to be the sole proximate cause"]).

While Getz stated in his affidavit that plaintiff "knew that he was expected to use the scaffold or ladder to waterproof the wall, but instead for no good reason, chose to use a Styrofoam block," this conclusory statement, standing alone, is insufficient to raise a genuine issue of fact as to whether plaintiff's own actions were the sole proximate cause of the accident (*see Zuckerman v New York,* 49 NY2d at 562["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment]; *Bent v Jackson*, 15 AD3d 46, 50 [1st Dept 2005]). Getz's statement that plaintiff knew the Baker scaffold could be disassembled and reassembled by one person and utilized along the entire wall is also conclusory and unsubstantiated. In addition, Getz failed to state whether anyone instructed plaintiff to do so. Without such an instruction, it was not unreasonable for plaintiff to use the Styrofoam blocks that were already in place to prime that area of the wall. Although Getz also stated that the aluminum

panel could have been moved so as to access the area where the accident occurred, he did not state that plaintiff was aware that it could be moved or that plaintiff could have moved it by himself.

Further, while defendants assert that there were ladders available for plaintiff's use, under these circumstances, plaintiff was under no duty to take it upon himself to fetch an alternate safety device because placing "that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). To that effect, workers would be put "in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

In opposition, defendants also argue that plaintiff is not entitled to recover because he was the sole proximate cause of his accident in that he failed to heed Getz's instruction to stop working until he returned from the meeting. Where a plaintiff's own actions are the sole proximate cause of his accident, liability under Labor Law § 240(1) will not attach (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). However, any alleged negligence on plaintiff's part in failing to heed Getz's instruction goes to the issue of comparative fault, which is not a defense to a Labor Law § 240(1) cause of action inasmuch as the statute imposes absolute liability once a violation is shown (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008][noting that defendant did not establish, as a matter of law, that the plaintiff's failure to heed instructions to stop working was the sole proximate cause of his injuries "and any comparative negligence on the plaintiff's behalf is not a defense to a claim under Labor Law § 240 (1)"]).

In any event, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because defendants raised a triable issue of fact as to the credibility of plaintiff, the

sole witness to the accident, and as to the manner in which the accident occurred. The fact that a plaintiff may have been the sole witness to the accident does not preclude summary judgment in his favor (*see Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011]). However, "the denial of summary judgment is appropriate where the injured party is the sole witness to the accident . . . and his credibility is placed in issue" (*Donohue v Elite Assoc.*, 159 AD2d 605, 606 [2d Dept 1990]; *see Goreczny v 16 Ct. St. Owner LLC,* 110 AD3d 465, 466 [1st Dept 2013]; *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

Here, defendants submit Getz's affidavit, wherein he asserts that immediately after the accident, plaintiff told him, personally, that he "twisted his knee as he was climbing off the Baker scaffold." This account squarely contradicts plaintiff's assertion, in his deposition testimony and affidavit, that he was injured when he fell off of an unstable Styrofoam block. As such, Getz's assertion raises an issue of fact.[1]

For example, in *Albino v 221-223 W. 82 Owners Corp.*, the plaintiff testified in his deposition that "as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and result[ed] in plaintiff's fall to the ground below" (142 AD3d 799, 800 [1st Dept 2016]). In contrast, "[t]he

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[1] Plaintiff asks the court to preclude defendants from offering Getz's affidavit, pursuant to CPLR 3126, on the ground that defendants failed to provide Getz's address despite a preliminary conference order requiring the exchange of the names and addresses of all eye witnesses and notice witnesses. Under CPLR 3126, where a "party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just." However, 22 NYCRR § 202.7 requires that a motion under CPLR 3126 must, as a motion affecting disclosure, be accompanied by "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion"(22 NYCRR § 202.7 [a], [c]; *see Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 415-416 [1st Dept 2019]). Plaintiff failed to satisfy this requirement.

foreman . . . testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold" (*id.*). In finding that the cause of the accident presented an issue of fact, the Appellate Division, First Department reasoned:

> "These two versions of how the accident happened, each given by plaintiff, the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of section 240 (1). As this Court recently noted, '[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident' (*Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676, 676 [1st Dept 2016], citing *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013]; *see also Jones v W. 56th St. Assoc.*, 33 AD3d 551, 552 [1st Dept 2006] [the plaintiff was not entitled to summary judgment as to liability where inconsistencies in his accounts of how he came to be injured raised 'a factual issue . . . as to whether a violation of Labor Law § 240 (1) was a proximate cause of plaintiff's injury']).

(*id.* at 800-801).

Plaintiff contends that the statement in Getz's affidavit constitutes inadmissible hearsay and therefore cannot be relied upon to defeat his motion. Although evidence that is otherwise excludable at trial may not form the sole basis for denying a motion for summary judgment (*see Matter of New York City Asbestos Litig.*, 7 AD3d 285, 285 [1st Dept 2004]; *Narvaez v NYRAC*, 290 AD2d 400, 400-401 [1st Dept 2002]), an inconsistent account of the accident by a party is admissible on the ground that it constitutes an admission by the party, so long as there is clear evidence connecting the party to the statement (*see Kamolov v BIA Group, LLC*, 79 AD3d 1101, 1102 [2d Dept 2010]["the challenged statements set forth in the ambulance report . . . were admissible on the independent ground that they constituted admissions by the plaintiff, since they are inconsistent with his current account of the accident and the statements were satisfactorily connected to him"]; *Newman v Vetrano,* 283 AD2d 264, 264-265 [1st Dept 2001][finding that

Supreme Court erred in striking testimony of a state trooper to the effect that plaintiff reported a different version of the accident than what he testified to at trial, because the "evidence should have been received as an admission contrary to plaintiff's position at trial"]; *see generally Reed v McCord,* 160 NY 330, 341[1899] ["In a civil action the admissions by a party of any fact material to the issue are always competent evidence"]; *Preldakaj v Alps Realty of NY Corp.*, 69 AD3d 455, 456-457 [1st Dept 2010] [admission against interest "may only be admitted if there is clear evidence connecting the party to the entry (i.e., testimony that the party made the statement)"]; *Vendette v Feinberg*, 125 AD2d 960, 960 [4th Dept 1986][a party admission "constitutes evidence in admissible form necessary to defeat a motion for summary judgment"]; *cf. Ellis v Allstate Ins. Co.*, 97 AD2d 970, 970 [4th Dept 1983]["The hearsay statement of . . . Sotero was not admissible as an admission against interest, because it was not established that the declarant was unavailable or that when the declarant made the statement he knew it was against his interest . . . . While the statement would be admissible as an admission by a party if offered against Sotero . . . , the statement was not admissible against a coparty . . . .. Thus, defendant Allstate could not offer Sotero's hearsay statement as evidence against Ellis"]).

Here, the statement in Getz's affidavit, that plaintiff told him he "twisted his knee as he was climbing off the Baker scaffold," is inconsistent with plaintiff's current account of the accident and is clearly attributable to the plaintiff. Therefore, it constitutes admissible evidence.

Although plaintiff argues in this regard that Getz's affidavit is inadmissible because it does not qualify as a declaration against interest (*see Gomes v Pearson Capital Partners LLC*, 159 AD3d 480, 481 [1st Dept 2018]), declarations against interest are distinguishable from admissions in that they "are admissible only when the declarant is unavailable," whereas "admissions are admissible regardless of the declarant's availability" (Jerome Prince, Richardson on Evidence §

8-203 [Farrell 11th ed]). Furthermore, unlike an admission, the declaration against interest exception does not apply unless the declarant knew the statement was adverse to his or her interests when the statement was made (*see Gomes v Pearson Capital Partners LLC*, 159 AD3d at 481; *People v Sotto*, 26 NY3d 455, 460-461 [2015]; *see* Jerome Prince, Richardson on Evidence § 8-203 [Farrell 11th ed]["While an admission may be a declaration against interest, it is not necessarily so, for at the time it was made it may have been favorable to the declarant's interest"]).

Finally, even assuming plaintiff twisted his knee as he was climbing off the Baker scaffold as Getz claims and as set forth in the hospital emergency room records, there are insufficient facts in the record to establish that any defect in the scaffold was a proximate cause of the accident. "'[A] fall from a scaffold or ladder, in and of itself, [does not] result[ ] in an award of damages to the injured party' under section 240 (1)" (*Albino v 221-223 W. 82 Owners Corp.,* 142 AD3d at 801, *quoting Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]; *see Benefield v Halmar Corp.*, 264 AD2d 794, 795 [2d Dept 1999]). "[L]iability under section 240 (1) depends on the injury having resulted from 'the failure to use, or the inadequacy of . . . a device' within the purview of the statute" (*Albino v 221-223 W. 82 Owners Corp.,* 142 AD3d at 801 *quoting Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]). Furthermore, according to the version of the accident set forth in the C-2 Report, namely that plaintiff stepped off the scaffold and twisted his knee, there is likewise insufficient evidence in the record that plaintiff's accident resulted from a defect in the Baker scaffold (*see Gasper v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012] [no Labor Law §240(1) liability where plaintiff's fall resulted from a loss of balance rather than from a defective or inadequate ladder or from the failure to otherwise provide protection]; *see also Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; *Chin-Sue v City of*

*New York*, 83 AD3d 643, 644 [2d Dept 2011]). Given that there is insufficient evidence in the record under any version of the accident that plaintiff's fall was caused by a defective scaffold or from the failure to provide adequate protection, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 240(1) claim.

***The Labor Law § 241(6) Claim***

Plaintiff also moves for summary judgment in his favor as to liability on the Labor Law § 241(6) claim against defendants. Labor Law § 241(6) requires "[a]ll contractors and owners and their agents" to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240 (1), the Labor Law § 241 (6) duty to comply with the Commissioner's regulations is nondelegable" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241[6]). The statute

> "is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (*Ross*, 81 NY2d at 502). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (*id.* at 503-504). The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury"

(*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Here, although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, on this motion, he seeks summary judgment as to liability on the Labor Law § 241(6) claim based only upon an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(f). That section provides:

> "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided"

(12 NYCRR 23-1.7[f]).

Initially, Industrial Code § 23-1.7(f) is sufficiently specific to sustain a claim under Labor Law § 241(6) (*see Doto v Astoria Energy II, LLC,* 129 AD3d 660, 664 [2d Dept 2015]; *Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]).

Here, section 23-1.7(f), which governs vertical passageways, does not apply because plaintiff was not attempting to access a working level above or below ground, but rather, he was merely standing on a Styrofoam block when he fell (*see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 AD3d 445, 445-46 [1st Dept 2014][where plaintiff fell from an A-frame ladder placed on top of a scaffold, section 23-1.71(f) was inapplicable because, at the time of the accident, plaintiff was not attempting to access another working level within the meaning of section 23-1.7 (f)]; *cf. Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008][where plaintiff slipped on a "chicken ladder" that was the sole means of access to his employer's shanty, court held that his "Labor Law § 241 (6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7 (f) was properly sustained, because the ramp, which is alleged to have been unsafe, provided a means of access to different working levels"]).

Thus, plaintiff is not entitled to summary judgment in his favor as to that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (f).

**CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Stefan Sikorski's motion, pursuant to CPLR 3212, for summary

judgment in his favor on the issue of liability on the Labor Law § 240 claim, and the Labor Law § 241(6) claim predicated on alleged violation of Industrial Code 12 NYCRR 23-1.7 (f), is denied.

The foregoing constitutes the decision and order of this Court.

Dated: September 4, 2019

ENTER:

HON. SHLOMO S. HAGLER, J.S.C.