At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of JUNE, 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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UROY KERR,

Plaintiff(s),

Index No.: 519882/2018

-against-

Decision and Order

RXR SL OWNER, LLC and RXR CONSTRUCTION SERVICES, LLC,

Defendant(s).

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RXR SL OWNER, LLC and RXR CONSTRUCTION SERVICES, LLC i/s/h/a RXR CONSTRUCTION & DEVELOPMENT, INC.,

Third-Party Plaintiff(s),

-against-

LABOR INNOVATIONS CORP.

Third-Party Defendant(s).

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After having heard Oral Argument on May 22, 2020 and a review of the submissions herein, the Court finds as follows:

Plaintiff moves for partial summary judgment on issues of liability on their Labor Law 204(1) claims. (MS#2) Defendants oppose the same.

FACTS

This action arises from an alleged incident where Plaintiff was allegedly injured as the result of a falling from an unsecured ladder while conducting demolition work at a

building located at 601 West 26th Street in Manhattan. It is alleged that at the time of the accident the plaintiff was standing on a 8-foot ladder when he was removing sheetrock framing from the ceiling that had a fire hose and cabinet and pipe attached. It is alleged that without warning, the sheetrock framing and fire hose cabinet and pipe gave way and struck the ladder causing the ladder to fall to the right and the plaintiff to fall off the ladder to the ground. It is alleged that at the time of the accident the plaintiff's co-worker was holding the ladder. It is alleged that as a result of the aforesaid fall, Plaintiff sustained severe injuries, including a fracture to his right wrist, shoulder and rotator cuff tear all requiring surgery.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any

issue of fact." *Id.* A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh,* 45 Misc2d 93 [Sup Ct, Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield,* 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze,* 84 NY2d 1019 [1995]).

Labor Law § 240(1)

Labor Law 240(1) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

"Liability under Labor Law 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against". (*Salazar v. Novalex Contracting Corp.*, 18 NY3d 134, 139 [2011].) " Labor Law 240(1) was designed to prevent those types of accidents in which the 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.*" (*Runner v. New York Stock Exchange,* 13 NY3d 599, 604 [2009] *[quoting Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 (1993)].) In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange,* 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*Runner v. New York Stock Exchange,* 13 NY3d at 603.) "Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.*)

"The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603; *see also Davis v. Wyeth Pharmaceuticals, Inc.*, 86 AD3d 907, 909 [3d Dept 2011].) To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a

proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.*, 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC*, 80 AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

Again, the legislative purpose underlying Labor Law § 240 (1) was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Bland v Manocherian,* 66 NY2d 452, 459, *quoting 1969 NY Legis Ann*, at 407) instead of on workers, who "are scarcely in a position to protect themselves from accident." (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 318.) To that end, "the Legislature determined that owners or contractors shall be liable for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Liability is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522; *Crawford v Leimzider*, 100 AD2d 568, 569). A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence. *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990).

In *Oakes v. Wal–Mart Real Estate Business Trust* (99 AD3d at 39), the Third Department in discussing the Court of Appeal's decision in *Willinski v. 334 E. 92nd Street*

Hous. Dev. Fund Corp. (18 NY3d at 10), explained that, even though the Court of Appeals has rejected a "same level rule" that automatically precludes liability "where the base of a falling object ... and the injured worker are on the same level" (*see Oakes v. Wal–Mart Real Estate Business Trust,* 99 AD3d at 38), the Court of Appeals has not abandoned the requirement that there be a physically significant height differential between the plaintiff and the object in order to establish liability under Labor Law § 240(1). Indeed, as noted by the Third Department in *Oakes,* the Court of Appeals determined in *Willinski* that there was a four-foot differential between the Plaintiff and the pipes that fell on him, and that such differential was physically significant. *Oakes v. Wal–Mart Real Estate Business Trust* (99 AD3d at 39).

In *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.* (84 N.Y.2d 841, 844 [1994]), the Court of Appeals held that a worker "placing a 120–pound beam onto the ground from seven inches above his head with the assistance of three other co-workers ... was not faced with the special elevation risks contemplated by the statute." Although *Rodriguez* preceded both *Runner* and *Willinski,* it was recently cited by the Court of Appeals in *Ortiz v. Varsity Holdings, LLC* (18 NY3d 335 [2011]) for the proposition that "[i]t is true that courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and ... the extraordinary elevation risks envisioned by Labor Law § 240(1)' " (*see id.* at 339 [quoting *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.,* 84 N.Y.2d at 843)]; *see also Oakes v. Wal–Mart Real Estate Business Trust,* 99 AD3d at 39.)].

In the present case, the plaintiff does assert a cause of action under Labor Law § 240 (1) because he had been exposed to an "elevation-related risk" arising from the

inadequacy of the protective device (180 AD2d, at 390); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499, 618 NE2d 82 (1993). In the present case, while at work on a construction site plaintiff was caused to fall from an unsecured ladder when an unsecured firs hose and cabinet fell onto the ladder he was working from, this is the type of risk that the Labor Law was enacted to protect from. **"It is by now well established that the duty imposed by Labor Law § 240 (1) is nondelegable and that 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"** (*see, e.g., Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137); *quoting Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 618 NE2d 82 (1993).

Here, it is uncontroverted that Plaintiff was on an ladder when a fire hose cabinet and pipe and frame fell onto the ladder causing the plaintiff to fall. The accident reports as well as all descriptions of how the accident occurred establish the proximate cause of plaintiff's injury was a "physically significant" elevation differential between the object that fell and Plaintiff. In the present case, it is clear that the pipe which could and actually did fall onto a person working below is the type of risk that the Labor Law was enacted to protect from. Moreover, it is clear, that the plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" because there was nothing to secure the fire hose cabinet and pipe and frame. Therefore, as a result, it also cannot be said that the plaintiff was the sole proximate cause of this accident. Accordingly, plaintiffs motion for partial summary judgment as to their Labor Law 240(1) claim is granted.

Next the Court shall address defendants cross-motion for summary judgment as to Labor Law 241(6) and Common Law 200 claims.

Labor Law 241(6)

"**Labor Law 241(6)** imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable ." (*Fusca v. A & S Construction,* LLC, 84 AD3d 1155, 1156 [2d Dept 2011]).

Plaintiff contends defendants violated Rule 23-1.5 which merely recites the "general responsibility of employers." Rule 23-1.5(a) and would not be a basis for a Labor Law claim because it is a general provision. Therefore, defendants motion to dismiss this industrial code claim is hereby granted.

Plaintiff's contends defendants violated Rule 23-1.7. This provision concerns areas in a workplace where workers are normally exposed to falling material or objects, and speaks to the requirements of overhead protection involving structures such as sidewalk bridges which are inapplicable to the facts of this case. Therefore, defendants motion to dismiss this industrial code claim is hereby granted.

Plaintiff contends defendant violated Rule 23-1.16, a provision that pertains to safety belts, harnesses, tail lines and lifelines. 12 NYCRR 23-1.16. These provisions, are inapplicable, based on the facts in the case at bar. Therefore, defendants motion to dismiss this industrial code claim is hereby granted.

Plaintiff contends defendants violated Rule 23-1.21 is also pleaded by Plaintiff. Subpart (a) of the Rule concerns the approval requirements of ladders and ladderways that are 10 feet or more in length. 12 NYCRR, Rule 23-1.1.21(a). The testimony in this case demonstrates that Plaintiff was using an eight (8) foot ladder when the incident occurred. As such, this provision would not apply to the case at bar. Therefore, defendants motion to dismiss this industrial code claim is hereby granted.

Plaintiff contends defendants violated Industrial Code Section 23-3.3(b)(3). Section 23-3.3(b)(1) and (b)(3) provides:

> "Demolition of walls and partitions. Subpart (b)(1) of the Rule provides that "[t]he demolition of walls and partitions shall proceed in a systematic manner and all demolition work above each tier of floor beams shall be completed before any demolition work is performed on the supports of such floor beams." 12 NYCRR, Rule 23-3.3(b)(1). Subpart (b)(3) provides "Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3.

In the present case, plaintiff contends the fire hose and cabinet and pipe were unguarded in such condition that it may fall. Defendant in opposition contends the pipe did not fall due to wind or vibrations and as such this code does not apply to the current situation. This court notes in *Willinski v. 334 E. 92nd Street Hous. Dev. Fund Corp.*, 18 NY3d at 10, the court rejected an argument that wind pressure or vibration must be involved for the regulation to apply. Defendants in the present case have failed to establish that these industrial code violation do not apply to this case. Accordingly, the branch of defendants, cross-motion for summary judgment of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR 23-3.3(b)(2) and (b)(3) is hereby denied.

Labor Law § 200 & Common Law Negligence

"Labor Law 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v. Puccia*, 57 AD3d 54, 60, 866 NYS2d 323). "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*id.* at 61, 866 NYS2d 323). *Goodwin v. Dix Hills Jewish Center,* 144 AD3d 744, 41 NYS3d 104, 2016 NY Slip Op. 07293. **"A defendant has the authority to supervise or control the work for purposes of Labor Law 200 when that defendant bears the responsibility for the manner in which the work is performed"** (*Ortega v. Puccia*, 57 AD3d at 62, 866 NYS2d 323). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law 200 or for common-law negligence" (*Austin v. Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684 [internal quotation marks omitted]; see *Cambizaca v. New York City Tr. Auth.*, 57 AD3d 701, 871 NYS2d 220). The court would also like to note that "Tenants who either contract for or control and supervise the work may be held liable under these statutes" (*see Wendel v Pillsbury Corp.*, 205 AD2d 527, 528-529 [1994]; *cf. Garcia v Market Assoc.*, 123 AD3d 661, 665 [2014]), "but tenants who neither contract for nor control and supervise the work may not be held liable under them" (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d at 319-320; *Garcia v Market Assoc.*, 123 AD3d at 665; *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 99-100 [1999]); quoting, *Rizo v. 165 Eileen Way, LLC,* 169 A.D.3d 943, 946, 94 N.Y.S.3d 157 (2nd Dep't 2019).

In the present case, defendants RXR SL OWNER, LLC and RXR CONSTRUCTION SERVICES, LLC i/s/h/a RXR CONSTRUCTION & DEVELOPMENT, INC.established that they did not control the means or methods of the plaintiff's work; and were not aware of any conditions. Therefore, the Labor Law 200 and common law negligence claims against these defendants are hereby dismissed, for the reasons stated above.

Accordingly, plaintiff's, motion for summary judgment on the issue of liability as to Plaintiffs' Labor Law § 240(1) cause of action is Granted.(MS#2) Defendants cross-motion for summary judgment as to plaintiff's Labor Law §241(6) cause of action premised upon the violations of 241(6) under Industrial Codes 12 NYCRR 23-3.3(b)(1) and (b)(3) are hereby denied, for the reasons stated above. Defendants request to dismiss all other industrial code violations mentioned above are hereby granted, for the reasons stated above. Defendants cross-motion for summary judgment on Labor Law 200 claim is hereby granted, for the reasons stated above.

This constitutes the Decision/Order of the Court.
Date: June 18, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

JUN 18 2020