SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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INDEX NO. 162747/2014

AVDI LAJQI,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005 006 007 008

- v -

THE M&B BUILDING OWNERS I, LLC, LONG ISLAND CONCRETE, INC, NULITE FUEL OIL COMPANY, LTD, SCIAME CONSTRUCTION, LLC, F.J. SCIAME CO., INC., PAR PLUMBING CO., INC.,

DECISION + ORDER ON MOTION

Defendants.

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PAR PLUMBING CO., INC.,

Third-Party
Index No. 595753/2015

Third-party Plaintiff,

-against-

METROPOLITAN SEWER, INC.,

Third-party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 98-121, 161, 187-190, 193, 194, 196, 201, 202

were read on this motion to/for dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 122-142, 162, 183-186, 197, 229

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143-159, 163, 169-177, 191, 192, 198, 203-228

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 164-168, 199

were read on this motion to/for dismiss.

This action brought under the Labor Law arises from an accident that occurred at a

building under construction on October 12, 2012, when plaintiff allegedly fell from a ladder and sustained injury.

By notice of motion, defendants The M&B Building Owners I, LLC (M&B), Sciame Construction, LLC (Sciame), F.J. Sciame Co., Inc. (F.J.), Joseph E. Marx Company, Inc. (Marx Co.), and Marx Realty & Improvement Co., Inc. (Marx Realty) move, pursuant to CPLR 3212, for an order summarily dismissing plaintiff's claims of common-law negligence and violations of Labor Law §§ 200, 241(6), and 241-a, and for an order summarily dismissing the complaint and all cross claims against F.J., Marx Co. and Marx Realty (mot. seq. 005).

By notice of motion, third-party defendant Metropolitan Sewer, Inc. (Metropolitan) moves pursuant to CPLR 3212 for an order granting defendant/third-party plaintiff Par Plumbing Co., Inc. (Par) summary judgment dismissing the complaint against it (mot. seq. 006).

By notice of motion, plaintiff moves pursuant to CPLR 3212 for summary judgment against defendants M&B, Sciame, and Par as to their liability under Labor Law § 240 (mot. seq. 007).

By notice of motion, Par moves, pursuant to CPLR 3212, for summary dismissal of the complaint as against it (mot. seq. 008).

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

By contract dated July 26, 2011, M&B hired Sciame to serve as construction manager for a construction project on the property it owns at 953 Third Avenue and 201-03 East 57th Street in Manhattan. Pursuant to the contract, Sciame agreed to "administer, manage, supervise, direct, coordinate and cause … through Subcontracts or its own forces, of all work, labor, materials, equipment, tools and General Conditions Work required for the complete construction and/or

installation of the Project," and to "administer, manage, supervise, direct, coordinate and cause … through Subcontracts or its own forces, of all work, labor, materials, equipment, tools and General Conditions Work required for the complete construction and/or installation of the Project." (NYSCEF 137).

Sciame hired Par to complete plumbing work on the project. Pursuant to the contract, Sciame agreed to "supervise and direct the Work," and Par agreed to "supervise and direct" its subcontractors' work. (NYSCEF 138). Par hired Metropolitan to install water and sewer lines. (NYSCEF 139).

By summons and complaint dated December 29, 2014, plaintiff alleges that on October 12, 2012, he was employed by Metropolitan to work at the site and was injured. He advances causes of action for common-law negligence and for violations of Labor Law §§ 200, 240 (1), 241 (6), 241-a. (NYSCEF 101). By verified answer dated July 6, 2015, Sciame and F.J. advance a cross claim against Par for contribution. (NYSCEF 102). By verified answer dated July 15, 2015, M&B advances cross claims against Par for contribution and common-law and contractual indemnification. (NYSCEF 103).

By third-party summons and complaint dated October 12, 2015, Par commenced a third-party action against Metropolitan for contribution and common-law and contractual indemnification. (NYSCEF 108). By verified answer, Metropolitan advances "cross claims" against M&B, Sciame, F.J., and Par for contribution and common-law and contractual indemnification. (NYSCEF 109).

On November 7, 2019, plaintiff served and filed a note of issue and certificate of readiness. (NYSCEF 121).

A. Plaintiff's deposition testimony (NYSCEF 113, 116, 117)

At his depositions, plaintiff testified that he was employed as a laborer by Metropolitan, and that on October 12, 2012, he was assigned to work at the building located at 201 East 57th Street. That morning, he arrived at Metropolitan's off-site shop, where his supervisor, the only person from whom he received instructions, directed him to install a valve at the premises and bring with him another co-worker. The task required the fastening of a six-inch water valve onto a horizonal pipe located nine to ten feet above the basement floor. The valve was "very heavy," and given its weight, more than one person was needed to move it.

While a ladder was required to install the pipe, there were no ladders available at Metropolitan's shop, so plaintiff's supervisor advised him to borrow one at the site. Plaintiff and the co-worker took the valve, a wrench, and some other tools from the shop and drove to the building, where the two carried the valve to the basement. Plaintiff claimed to have arrived in the basement at approximately 11am. Once the valve was in the basement, plaintiff's co-worker returned to their vehicle, per the instruction of plaintiff's supervisor. There were no other Metropolitan employees at the site.

Plaintiff asked another worker, whom he assumed was a plumber, to borrow an eight-foot aluminum A-frame ladder. Plaintiff did not know by whom the worker was employed and whether the worker's employer owned the ladder, and he did not read the two stickers affixed to the side of the ladder. Nor did he look at the feet of the ladder.

Plaintiff set up the ladder in its maximum open position, "fixed it with the hinges," and without touching them, "made sure that they were on." Before climbing it, he attempted to move the ladder and observed no movement or wobbling.

After tying a rope to the valve, the worker from whom plaintiff had borrowed the ladder,

along with another worker, assisted plaintiff with the installation. The worker who had lent him the ladder placed another ladder next to plaintiff's and the two ascended their ladders and slung a rope over the pipe. Then, using the rope, they hoisted the valve into position. Plaintiff put in one of the screws to secure the valve, and then untied the rope and descended the ladder to retrieve another screw. The two workers then left him to finish the installation on his own. When plaintiff ascended the ladder a second time and tried to secure a second screw, the ladder's legs slid away from each other and the ladder opened completely and collapsed.

Plaintiff testified that although the two workers who had helped him were nearby, he did not know if either had witnessed the accident, and that after one of them had brought plaintiff's co-worker to the scene, plaintiff told him that he had fallen from the ladder. The co-worker drove plaintiff back to Metropolitan's shop, and although plaintiff did not recall who had called his supervisor, he told his supervisor of the accident and also called his wife to meet him at the shop to drive him home. Plaintiff did not visit a hospital until two or three days after the accident.

B. Deposition of Metropolitan's vice president (NYSCEF 120)

At his deposition, Metropolitan's co-owner and vice president, plaintiff's supervisor, testified that Par had hired Metropolitan to perform the water and sewer connections for the building and that Metropolitan began working at the site in September 2012, although the company kept no records or daily logs. Metropolitan was responsible for, among other things, installing a gate valve onto a pipe, located about five feet above the floor of the building's basement. The installation requires two people to hold the valve and one to connect the nuts and bolts.

The supervisor explained that his employees generally worked on a scaffold if the installation was more than five feet above the floor as, given the weight of the valve, some 120

pounds, it is not safe to ascend a ladder, which could hold only approximately 300 pounds with a valve. He did not know whether his employees used a scaffold to install the valve at the site, but believed that as the valve was not being installed at an elevation above five feet, a scaffold or ladder would have been unnecessary.

The supervisor did not recall who at Metropolitan had installed the valve and he was unaware of any documents showing the date on which it was installed, although he confirmed that the last day Metropolitan had worked at the site was the day it received certification from the New York City Department of Environmental Protection (DEP) that the valve in the building had been inspected and was compliant with all applicable regulations. He was shown a certification, dated October 15, 2012, issued by DEP, and signed by DEP's deputy chief, which reflects that on October 10, 2012, the installation was inspected and complete (NYSCEF 173). The supervisor also testified that this sign-off would not have been issued unless the valve had been installed. Moreover, after October 10, 2012, no one from Metropolitan returned to the site.

Neither plaintiff nor his coworker were permitted to install the valve. Moreover, plaintiff's co-worker did not start working for Metropolitan until April 2013. The supervisor did not receive a call from plaintiff on October 12, 2012, plaintiff did not return to the shop that day and told no one in the shop of his injury, and plaintiff's wife had not been to the shop.

The supervisor did not believe that plaintiff worked at the building on October 12, 2012 because the job was finished by then, as reflected in a DEP inspection report dated October 10, 2012, certifying that the valve had been installed at the building. Although he could not recall if he was present for the inspection, he concluded that the valve had to have been installed before October 10 "because we had the call for [an] inspection the next day."

C. Deposition of Sciame's superintendent (NYSCEF 119)

Sciame's superintendent testified that his duties were conducting weekly safety meetings, coordinating trades, and ensuring that the project was completed in accordance with the plans and specifications. Sciame hired contractors to perform the actual construction work, and at this site, Par served as the plumbing contractor, subcontracting with Metropolitan for the "utilities" portion of the plumbing work. It was customary for contractors to notify Sciame of all workplace accidents and for Sciame and the contractor to complete separate accident reports. The superintendent first learned of plaintiff's accident from a Sciame employee several years after it had occurred, and he had unsuccessfully searched for an accident report. Par and other trades used and stored ladders on site, but he did not know whether Metropolitan used their own ladders or those of others at the site.

D. Deposition of Par's foreperson (NYSCEF 136)

Par's foreperson testified that Metropolitan's work included installing a main "OS and Y" valve or gate valve, and that no one from Par was involved with installing the valve. At the time, Par owned fiberglass and wooden ladders, which would be labeled as Par's property and were left onsite; it did not own any aluminum ladders. Only Par employees were permitted to use its ladders, and its employees were not authorized to lend their ladders to others.

E. Deposition of Par's plumber (NYSCEF 172)

At his deposition, one of the Par plumbers testified that he worked at the site with an apprentice to install drain lines, vents, and meters. He did not know if Metropolitan had installed the valve or when or if the installation occurred. Although he and another Par employee are listed on a Par daily log as having worked in the basement on October 12, 2012 (NYSCEF 171), he cannot recall if he worked at the site that day.

F. Deposition of M&B's real estate manager (NYSCEF 132)

At her deposition, the senior real estate manager for nonparty CBRE, Inc. testified that she was responsible for overseeing the operation and management of the building, which she confirmed was owned solely by M&B. No one from CBRE was involved in the construction.

G. Depositions of DEP

At his deposition, a DEP assistant civil engineer testified that based on his review of the October 10 DEP report (NYSCEF 175), a DEP supervisor had conducted an inspection, and there is no indication on it as to whether the OS&Y valve was installed or inspected. However, as the report reflects that only the "curb box" needed inspection, the OS&Y valve must have already been inspected, although the engineer admitted that he was not present at the inspection. He testified that based on his review of the October 12 DEP report (NYSCEF 176), he conducted an inspection of the premises at 10am that day, although he had no independent recollection of doing so. He confirmed that his name appears on that report, and that the report reflects that he inspected a "C/box, four," the sidewalk curb box. Although it is possible that at that point, the OS&Y valve had not yet been installed, he would have noted it in his report. According to the engineer, DEP's inspections were complete as of October 12, 2012. (NYSCEF 177).

At his deposition, a DEP city planner testified that he had no recollection of visiting the building, notwithstanding DEP records which reflect that he visited on October 10, 2012. Based solely on the report, he claims to have inspected part of the project, but DEP had not yet inspected the OS&Y valve. He did not know when the valve had been installed. (NYSCEF 206).

H. Plaintiff's affidavit (NYSCEF 211)

By affidavit dated May 27, 2020, plaintiff states that on October 12, 2012, he was presented with the DEP report dated the same day by a DEP inspector and he signed it. He

attaches a copy of the report with his signature. (NYSCEF 212).

II. TIMELINESS OF PAR'S MOTION

Par contends that although its motion is untimely, as it was filed on January 31, 2020 (NYSCEF 164), more than 60 days after plaintiff filed his note of issue, it demonstrates good cause for the delay, alleging that its counsel had left his former law firm on January 6, 2020, with Par following him to the new firm, and that Par's counsel did not receive an executed consent to change attorney form from his former firm until January 30, 2020 (NYSCEF 167). Absent a signed consent to change attorney form from his old firm, Par's counsel maintains that he lacked authority to file papers on its behalf. Additionally, Par's counsel claims that he had no access to the litigation file. Once he received the fully executed form, he promptly filed it with the court on January 30, 2020, and filed Par's summary judgment motion the next day (NYSCEF 165).

Plaintiff, in opposition, argues that the motion is untimely under the preliminary conference order and the individual part rules, and that having failed to move for an extension of time to file its motion, Par's motion is untimely. In addition, he asserts that counsel's lack of access to the litigation file does not constitute good cause as Par's motion essentially mirrors Metropolitan's, and thus, access to the file was unnecessary. (NYSCEF 187). For the same reason, in reply, Par maintains that plaintiff suffers no prejudice if its motion is considered. (NYSCEF 201).

While it is undisputed that Par's motion is untimely, an untimely summary judgment motion may nonetheless be considered upon a showing of good cause for the delay. (CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Although "a perfunctory claim of law office failure" does not qualify as good cause (*Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell Univ.*, 114 AD3d 472, 474 [1st Dept 2014]), here Par

demonstrates good cause for the delay, as it took an unanticipated amount of time to obtain the form consent to change attorney, during which time he could file no papers for Par. Once the substitution was effectuated, counsel did not delay in moving. Moreover, having been able to substantively oppose Par's motion, plaintiff suffers no prejudice, and Par's motion is thus considered.

III. DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. F.J., Marx Co., and Marx Realty

M&B, Sciame, F.J., Marx Co., and Marx Realty deny that F.J., Marx Co. or Marx Realty had any ownership interest in the building and deny that they served as the general contractor or construction manager of the project. Thus, they deny that those defendants are liable for plaintiff's injuries. (NYSCEF 99).

Plaintiff does not oppose the motion as to these defendants and withdraws his motion for summary judgment to the extent that he seeks judgment against them. (NYSCEF 187).

As it is undisputed that that neither F.J., Marx Co., nor Marx Realty had any involvement in the project, plaintiff's claims as asserted against them are not viable, nor are the cross claims asserted by and against them.

B. Par's agency

1. Contentions

Metropolitan and Par deny that Par is an owner or general contractor of the building or that it exercised supervision or control over Metropolitan's work. Thus, they argue that Par cannot be held liable under Labor Law §§ 240(1), 241-a, and 241(6). (NYSCEF 142).

In opposition, plaintiff contends that the contracts into which Par entered concerning the work demonstrate that it had the authority to choose a responsible subcontractor and to set and enforce safety standards and practices. Moreover, the contract between Par and Metropolitan reflects that Metropolitan was bound to perform the work in a safe, proper, and workmanlike manner and to comply with all applicable regulations. (NYSCEF 187).

In reply, Par and Metropolitan reiterate that only Metropolitan had the authority to supervise and control the means and methods of plaintiff's work, and thus, cannot be held liable. Even if Par provided the ladder to plaintiff, it cannot be held liable absent control and supervision of plaintiff's work. Metropolitan denies that its contract with Par requires Par to supervise and control its work. (NYSCEF 201, 229).

2. Analysis

Although Labor Law §§ 240 (1), 241-a and 241 (6) impose a nondelegable duty on owners, contractors or their agents "to conform to the requirement of those sections, the duties themselves may in fact be delegated." (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-18 [1981] [internal citations omitted]). "When the work giving rise to these duties has been

delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor." (*Id.* at 318). In the absence of authority to supervise or control the injury-producing work, a third party is not subject to liability as a statutory agent. (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [defendant not considered agent under Labor Law §§ 240(1), 241-a, or 241(6) absent authority to control injury-producing work]).

M&B owned the building and hired Sciame as its construction manager, and pursuant to their contract, Sciame agreed to "administer, manage, supervise, direct, coordinate and cause … through Subcontracts or its own forces, of all work, labor, materials, equipment, tools and General Conditions Work required for the complete construction and/or installation of the Project" and to "supervise and direct the Work." Pursuant to its contract with Par, Par agreed to "supervise and direct" its subcontractors' work.

Although there is testimony that Par's employees did not actually supervise plaintiff, "there is no requirement that actual supervision or control have been exercised." (*Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]). Rather, the key issue is whether Par had the authority to control plaintiff's work. (*Merino v Continental Towers Condominium*, 159 AD3d 471, 472 [1st Dept 2018]). Here, the contract terms reflect that M&B had delegated to Sciame its authority to supervise and control plaintiff's work and that Sciame had delegated that authority to Par. Consequently, Par and Metropolitan fail to meet their *prima facie* burden of establishing that Par was not a statutory agent.

C. Labor Law § 200 and negligence

1. Contentions

M&B and Sciame contend that plaintiff's common-law negligence and Labor Law § 200 claims should be dismissed, as the accident arose from the means and methods of plaintiff's work, which neither M&B nor Sciame supervised. That they may have retained the power of general supervision does not render them liable. They also deny having had notice of an allegedly defective condition with the ladder before the accident, as plaintiff himself testified that the ladder was stable before his accident. (NYSCEF 99). Likewise, Metropolitan and Par argue that plaintiff does not allege that his accident was due to a premises defect, and as only Metropolitan had the authority to supervise and control the means and methods of plaintiff's work, Par is entitled to dismissal of plaintiff's Labor Law § 200 and negligence claims. (NYSCEF 142).

Plaintiff does not address his common-law negligence and Labor Law § 200 claims in his opposition. (NYSCEF 187).

2. Analysis

Labor Law § 200 is "a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

Where a plaintiff is injured due to defective equipment provided by his employer, the pertinent question is whether the defendant supervised and controlled the work. Where the defendant provided the defective equipment, the pertinent question is whether the owner created or had notice of the defect. (*Sochan v Mueller*, 162 AD3d 1621, 1625 [4th Dept 2018]).

Here, Par offers evidence that it owns no aluminum ladders, and its plumber denied having lent plaintiff a ladder. Thus, Par establishes *prima facie* that it did not own the ladder. Moreover, plaintiff's testimony confirms that only Metropolitan controlled and supervised his work. Having testified that the ladder he used was made of aluminum and that he does not know who owned the ladder, plaintiff fails to raise a material issue of fact.

While Sciame and M&B also demonstrate that they did not supervise or control plaintiff's work, they do not address whether they owned the ladder or created the defect. (*See Chowdhury v Rodriguez*, 57 AD3d 121, 131–32 [2d Dept 2008] ["when a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition"]). That plaintiff offers no evidence that Sciame's and M&B own the ladder does not warrant dismissal of his claim. (*See Rivera v State*, 34 NY3d 383, 401 [2019] [motion for summary judgment denied where movants fail to sustain *prima facie* burden, even if nonmoving party failed to oppose motion]).

D. Labor Law § 241-a

1. Contentions

M&B, Sciame, Metropolitan, and Par argue that Labor Law § 241-a is inapplicable because the accident did not involve work in an elevator shaftway, hatchway, or stairwell. (NYSCEF 99, 142). Plaintiff does not address this claim in his opposition. (NYSCEF 187).

2. Analysis

Pursuant to Labor Law § 241-a:

> "[a]ny men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two

inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board."

As it is undisputed that plaintiff was not working in or at an elevator shaftway, hatchway, or stairwell, the statute is inapplicable.

E. Labor Law § 240 (1)

1. Contentions

Plaintiff contends that he is entitled to summary judgment on his Labor Law § 240(1) claim against M&B, Sciame, and Par, as the ladder on which he was standing collapsed, causing him to fall. Moreover, he argues that the decision rendered against Metropolitan by the workers compensation board (NYSCEF 148) precludes defendants from challenging whether the accident occurred. (NYSCEF 144).

In opposition, M&B and Sciame contend that an issue of fact exists as to whether plaintiff's alleged accident occurred and deny that the workers compensation board decision is dispositive of that issue. (NYSCEF 169). Par and Metropolitan, likewise, argue that the conflicting witness testimony raises triable issues of fact as to whether the accident occurred, and deny that the workers compensation board has a preclusive effect, as it was not conclusive on whether plaintiff was injured while working on the site. Moreover, defendants observe, they were not involved in those proceedings. (NYSCEF 192).

In reply, plaintiff contends that the deposition testimony relied on to create issues of fact are vague and not based on personal knowledge, and the DEP reports are inadmissible. He observes that the DEP report offered by defendants lacks his signature, as opposed to the report attached to his affidavit. To the extent plaintiff's Metropolitan supervisor disputes whether the accident occurred, his deposition testimony should be disregarded because the issue was

determined by the workers compensation board. (NYSCEF 203).

2. Analysis

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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) "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 Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against "'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured.'" The special hazards are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross*, 81 NY2d at 502). The statute thus imposes a "'flat and unvarying' duty on the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]); it is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was

provided but was defective or that no equipment was provided and should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

As plaintiff's testimony reflects that the ladder on which he was working was defective and collapsed, and that he was not provided with a fall prevention device, plaintiff establishes, *prima facie*, entitlement to summary judgment on liability under Labor Law § 240(1). (*See e.g.*, *Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018] [awarding summary judgment where plaintiff injured when he fell from unsecured ladder while installing steel wall panels in lobby]; *Harrison v V.R.H. Const. Corp.*, 72 AD3d 547, 547 [1st Dept 2010] [plaintiff satisfied *prima facie* burden of showing violation with her testimony that ladder on which she worked inexplicably tilted and caused her to fall]).

Nevertheless, defendants raise an issue of fact as to whether plaintiff's accident occurred, as plaintiff's supervisor testified that plaintiff was not permitted to install the valve and was not assigned the job, and that his coworker was not employed by Metropolitan at the time. The supervisor also testified that Metropolitan had ceased working at the site after DEP certified that the work was complete. In addition, Par's plumber testified that he is not permitted to lend ladders to other trades, and he denied having lent a ladder to plaintiff. The testimony of the DEP employees also raise an issue of fact as to when the project was completed, as the engineer, who confirmed that he wrote one of the reports, testified that the work was completed as of the date of plaintiff's alleged accident. While plaintiff questions the credibility of these witnesses and

documents, questions of credibility cannot be resolved at this stage. (*Coldwell Banker Commercial Hunter Realty v Rainbow Holding Co., LLC*, 160 AD3d 548, 548 [1st Dept 2018]).

The workers compensation board's decision does not preclude defendants from litigating whether the accident occurred, as plaintiff fails to address whether defendants were a party a party to that proceeding or were in privity with Metropolitan. (*See Buechel v Bain*, 97 NY2d 295, 304 [2001] [litigant seeking benefit of collateral estoppel must demonstrate that decisive issue necessarily decided in prior action against party, or one in privity with party]; *Rojas v Romanoff*, 186 AD3d 103, 108 [1st Dept 2020] [issue preclusion applicable only against party to first lawsuit, or one in privity with party]).

E. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating the violation of such a regulation, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d

Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

As plaintiff does not address 12 NYCRR §§ 23-1.5 (a-c), 23-1.7 (b), 23-1.21 (b)(4), (5), (7), (9), (10), (c-e), 23-1.16 (a-f), 23-1.17 (a-e), and OSHA § 1926.1053 in his opposition, they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [deeming abandoned industrial code provisions that plaintiff did not address in opposition to summary judgment motion]).

Pursuant to 12 NYCRR §§ 23-1.21(b)(1) and (3), ladders must comply with the following requirements:

> (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.
>
> [...]
>
> (3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> (i) If it has a broken member or part.
>
> (ii) If it has any insecure joints between members or parts.
>
> (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
>
> (iv) If it has any flaw or defect of material that may cause ladder failure.

M&B and Sciame contend that there is no evidence that section 23-1.21 was violated, as plaintiff observed no issues with the ladder before the accident. (NYSCEF 99). Likewise, Metropolitan and Par contend that the code provisions were not violated, as the evidence reflects that the ladder was in perfect working order, with no insecure members, defects, or worn portions. (NYSCEF 142).

In opposition, plaintiff contends that the evidence reflects that the ladder collapsed, which would not have occurred unless one or more of the ladder's components broke, dislodged, or loosened, and that there is no evidence to the contrary. That he saw no defects in the ladder is immaterial, plaintiff claims, as defendants are ultimately responsible for ensuring safety. He maintains that the ladder was not capable of sustaining at least four times the maximum load, as the ladder broke while he was on it with the heavy valve. Plaintiff also observes that his supervisor stated that a scaffold, not a ladder, was necessary to complete the work. (NYSCEF 187).

In reply, M&B, Sciame, Metropolitan, and Par reiterate their earlier contentions, and assert that the ladder used by plaintiff was not intended for his use and that he was not permitted to install the valve. Moreover, they argue, the evidence reflects that plaintiff's accident did not occur. (NYSCEF 193, 229).

Movants offer no evidence that the ladder plaintiff allegedly used was capable of holding four times the maximum load intended. While they offer evidence that plaintiff's accident did not occur, in light of plaintiff's testimony that he installed the valve and that the ladder collapsed shortly after he had ascended it with the valve, issues of fact remain as to whether 12 NYCRR § 23-1.21(b)(1) was violated. (*See supra* at III.E.2).

However, as plaintiff testified that he checked the ladder before using it and observed no defects or issues, movants establish, *prima* facie, that they did not violate section 23-1.21(b)(3). (*See e.g.*, *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014] [dismissing claim where plaintiff testified that he had used ladder in question without incident before accident]; *Croussett v Chen*, 102 AD3d 448, 448 [1st Dept 2013] [dismissing claim where plaintiff testified that he properly opened and set up ladder, that side supports in working order,

and that ladder had four rubber feet]). Plaintiff fails to raise an issue of fact, because it is possible that the ladder was not defective, as plaintiff testified, yet still collapsed due to excessive weight. Absent evidence that the ladder was not in good condition, liability under this section cannot be found.

IV. CONCLUSION

Accordingly, it is

ORDERED, that defendants The M&B Building Owners I, LLC's, Sciame Construction, LLC's, F.J. Sciame Co., Inc.'s, Joseph E. Marx Company, Inc.'s, and Marx Realty & Improvement Co., Inc.'s motion for summary judgment is granted to the following extent:

(1) severing and dismissing plaintiff's causes of action and all cross claims advanced against defendants F.J. Sciame Co., Inc., Joseph E. Marx Company, Inc., and Marx Realty & Improvement Co., Inc.,

(2) severing and dismissing plaintiff's Labor Law § 241-a claim, and

(3) severing and dismissing plaintiff's Labor Law § 241(6), but only as to 12 NYCRR §§ 23-1.5 (a-c), 23-1.7 (b), 23-1.21 (b)(3), (4), (5), (7), (9), (10), (c-e), 23-1.16 (a-f), 23-1.17 (a-e), and OSHA § 1926.1053, and is otherwise denied (motion sequence five); it is further

ORDERED, that third-party defendant Metropolitan Sewer, Inc.'s motion for summary judgment is granted to the following extent:

(1) severing and dismissing plaintiff's Labor Law § 241-a claim,

(2) severing and dismissing plaintiff's common-law negligence and Labor Law § 200 claim as advanced against defendant Par Plumbing Co., Inc., and (3) severing and dismissing plaintiff's Labor Law § 241(6), but only as to 12 NYCRR §§ 23-1.5 (a-c), 23-1.7 (b), 23-1.21 (b)(3), (4), (5), (7), (9), (10), (c-e), 23-1.16 (a-f), 23-1.17 (a-e), and OSHA § 1926.1053, and is otherwise

denied (motion sequence six); it is further

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety (motion sequence seven); and it is further

ORDERED, that defendant Par Plumbing Co., Inc.'s motion for summary judgment is granted to the following extent:

(1) severing and dismissing plaintiff's Labor Law § 241-a claim,

(2) severing and dismissing plaintiff's common-law negligence and Labor Law § 200 claim as advanced against it, and

(3) severing and dismissing plaintiff's Labor Law § 241(6), but only as to 12 NYCRR §§ 23-1.5 (a-c), 23-1.7 (b), 23-1.21 (b)(3), (4), (5), (7), (9), (10), (c-e), 23-1.16 (a-f), 23-1.17 (a-e), and OSHA § 1926.1053, and is otherwise denied (motion sequence eight).

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12/4/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE