At an IAS Term, Part 94 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 29th day of January 2021.

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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CARLOS RIVERA,

Plaintiff,

-against-

BUILDING 77 QALICB, INC., THE BROOKLYN NAVY YARD DEVELOPMENT CORPORATION, and PLAZA CONSTRUCTION CORP.,

Defendants.

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DECISION AND ORDER ON MOTION

Index No. 1170/16

The following e-filed papers read herein: NYSCEF #:

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Upon the foregoing papers, plaintiff Carlos Rivera moves for an order, pursuant to CPLR 2221, granting renewal with respect to this court's order dated June 28, 2019, and upon renewal, granting plaintiff partial summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action as against defendants Building 77 QALICB, Inc., The Brooklyn Navy Yard Development Corporation and Plaza Construction Corp.

Plaintiff's motion to renew (motion sequence number 8) is granted, this court's June 28, 2019 decision is vacated, and plaintiff's motion for partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action is granted (motion sequence number 4).

Plaintiff alleges that he suffered injuries on December 17, 2015 when a scaffold staircase on which he was climbing, flipped down like a trap door, causing plaintiff to fall to the staircase level below. Plaintiff was employed by non-party Safway Atlantic (Safway) as a scaffold erector, and, on the date of the accident, plaintiff was part of a team of five other laborers who were installing a scaffold staircase from the 10th to 15th floors on a scaffold that surrounded a building located in the Brooklyn Navy Yard. Plaintiff and the rest of his team were working under the direction of Constantin Dragomir, a Safway supervisor. In order to perform this work, plaintiff stood on the scaffold frame one level down from the roof, and plaintiff, who was wearing a harness to which his lanyard was attached, tied-off his lanyard to the scaffold frame. While standing there, plaintiff received staircase sections from Dragomir, who was standing on the roof of the building, and plaintiff passed them down to another worker who was standing below him.

According to plaintiff's deposition testimony, after he had received and passed down three staircase sections in this manner, one of the workers working below plaintiff stated that one of the sections did not fit. Upon hearing this, Dragomir told plaintiff to go down and check it out. Plaintiff proceeded to climb down the ladder portion of the scaffold frame, a change in position that required him to detach and reattach his lanyard as

he went down to a lower level of the scaffold. Once he reached the bottom portion of the staircase section at issue, plaintiff noted that the top portion of the staircase section was not hooked in. The staircase section, however, appeared secure enough for him to climb up and examine the top portion. Plaintiff, after unhooking his lanyard, took a couple of steps up the staircase section and heard a click as the top portion of the staircase section locked into the scaffold frame. As the top portion locked in, the bottom portion of the staircase section, which had been resting on the scaffold frame at a lower level, pulled off of the scaffold frame causing the staircase section to swing down like a trap door and, as a result, plaintiff fell 12 to 15 feet to the staircase section below. Plaintiff asserted that he had learned this method of inspecting staircase sections while at Safway, and that he had to detach his lanyard in order walk up the staircase section because there were no intermediate structures on the scaffold frame on which he could attach the lanyard.

In opposing plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) cause of action, defendants submitted an affidavit from Dragomir, in which Dragomir asserted that Safway had a policy providing that all workers working at a height of six feet or more above a lower level were required to-tie off their lanyard to the scaffold frame or a structural member, that he had communicated this policy to plaintiff on numerous occasions at the Brooklyn Navy Yard jobsite before the date of the accident, and that any worker working on a scaffold would have had a place on which to tie off no matter his/her position on the scaffold. In contrast to plaintiff's testimony, Dragomir also asserted that, on the day of the accident, his only instruction to plaintiff was to receive the

staircase sections he and another worker were passing down to plaintiff, and that he never told plaintiff to leave this stationary position in order to assist his coworkers working below. Further, Dragomir stated that Safway's staircase erection procedures provided that, if a worker experienced difficulty in installing a stair section, he or she was supposed to pass that section of staircase back up the scaffold and a different section would be passed down. According to Dragomir, he had previously informed plaintiff and his coworkers regarding this procedure for the installation of the staircase sections while they were at the Brooklyn Navy Yard jobsite.

In an order, dated December 11, 2018, the court granted plaintiff's motion for partial summary judgment, finding that the collapse of the scaffold stair constituted a violation of Labor Law § 240 (1), and that, in the face of the section 240 (1) violation, defendants' sole proximate cause and recalcitrant worker defenses, premised on plaintiff's failure to remain tied-off while ascending the staircase section, were precluded. Defendants thereafter moved for reargument based on Dragomir's affidavit. This court, in an order dated June 28, 2019, granted reargument, and, upon reargument, denied plaintiff's motion for partial summary judgment, finding that Dragomir's affidavit demonstrated factual issues as to whether plaintiff's decision to leave his position one level below the roof, in order to climb down to assist his coworkers in attaching the staircase section, made him a recalcitrant worker in view of Dragomir's instructions that plaintiff was to remain tied off and that problematic stair sections should simply be passed back up to the roof. In this regard, the court found that such recalcitrance could be deemed the sole proximate cause of the

accident because plaintiff never would have left his position of safety and stepped on the staircase that collapsed if he had followed Dragomir's instructions.

Plaintiff in moving, asserts that Dragomir's non-party deposition testimony, taken on September 17, 2019, supports renewal and refutes the material factual assertions in his affidavit that formed the basis of this court's finding that plaintiff might have been a recalcitrant worker. As is relevant here, Dragomir testified that he said "yes" when plaintiff asked him if he should climb down to assist his coworkers below who were having trouble attaching the staircase section. Dragomir also conceded that plaintiff would have had to detach and reattach his lanyard as he climbed down to assist the other workers. Further, Dragomir stated that, if a staircase piece was a little bent, the workers would attempt to make it fit before giving up and passing the piece back up to the roof. One method used to attempt to push the stair into the frame, according to Dragomir, involved walking up one to three steps of the staircase. Dragomir, however, asserted that this could have been done with the lanyard still attached to the frame of the scaffold. Dragomir's testimony suggested that any effort to attach the top of the staircase, as plaintiff testified that he intended to do, generally would not have involved climbing more than a few steps up the ladder and would not have required plaintiff to unhook his lanyard. Of note, Dragomir testified that the affidavit he signed fairly represented what he told the attorney who drafted it, and that he agreed with everything that was in the document.

It is in this factual background that plaintiff's motion to renew must be considered. A motion for leave to renew "must be (1) based upon new facts not offered on the prior

motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion" (*see Betz v Blatt*, 160 AD3d 689, 692 [2d Dept 2018] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Mone*, 185 AD3d 626, 629 [2d Dept 2020]; CPLR 2221 [e]). Here, there is no real dispute that plaintiff's failure to present the facts raised by Dragomir's deposition testimony on the prior motion is reasonably justified by the fact that Dragomir's deposition only occurred after the issuance of the June 28, 2019 order (*see Betz*, 160 AD3d at 693; *Donovan v* Rizzo, 149 AD3d 1038, 1039 [2d Dept 2017]). As such, determination of the motion turns on whether the new facts contained in Dragomir's deposition would warrant changing the prior determination.

Contrary to defendants' contentions, the court finds that Dragomir's deposition testimony paints an entirely different picture of plaintiff's interaction with Dragomir and Safway's workplace practices than is presented by Dragomir's affidavit. While there might not be any direct conflict between Dragomir's affidavit and his testimony, this is only because it appears that his affidavit omitted certain facts that were favorable to plaintiff's position. Namely, while Dragomir's statement in the affidavit that he did not direct plaintiff to climb down to assist his coworkers may be technically correct, the statement is misleading because he conceded in his testimony that he gave plaintiff permission to do so. Similarly, although Dragomir stated in the affidavit that Safway's work policies required workers to be tied off at all times, and required that they were to simply pass up staircase sections when they did not fit, his testimony reveals that, in actual

practice, workers needed to unhook and reattach their lanyards on the scaffold frame as they moved around on the scaffolding, and that they would make remedial efforts to attach the staircase sections to the scaffold frame before passing them up. Indeed, the methods Safway's workers used in attempting to attach the staircase sections to the scaffold frame included having a worker climb onto the first few steps of the staircase in order to put pressure onto the staircase to get it to lock into the scaffold frame.

Dragomir's testimony regarding his granting plaintiff permission to assist his coworkers and how the workers typically performed the work demonstrates that there is no real factual basis for finding that plaintiff was a recalcitrant worker (*see Miraglia v H & L Holding Corp.*, 36 AD3d 456, 456-457 [1st Dept 2007] [evidence that workers were permitted to walk on planks negated recalcitrant worker defense], *lv denied* 10 NY3d 703 [2008]; *see also Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1168 [2020] [supervisor's tacit approval of means of performing work negates sole proximate cause defense]; *Zholanji v 52 Wooster Holding, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020] [no sole proximate cause defense where plaintiff was following the example of his coworkers and acting with the tacit consent of his supervisor]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2d Dept 2009]). Dragomir's testimony that plaintiff nevertheless should have been tied off while he was working on the staircase fails to demonstrate an issue of fact regarding sole proximate cause or plaintiff's recalcitrance. In this regard, as this court found in its December 11, 2018 decision, the collapse of the staircase itself demonstrates that a Labor Law § 240 (1) violation is a proximate cause of

the accident, and, as such, plaintiff's failure to tie off cannot constitute the sole proximate cause of his accident (*see Smith v State of New York*, 180 AD3d 1270, 1271 [3d Dept 2020]; *Wilk v Columbia Univ.*, 150 AD3d 502, 503 [1st Dept 2017]; *Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]; *Garzon v Viola*, 124 AD3d 715, 717 [2d Dept 2015]; *Wahab v Agris & Brenner, LLC*, 102 AD3d 672, 674 [2d Dept 2013]; *Munzon v Victor at Fifth, LLC*, 2015 WL 10550292, *4 [Sup Ct, Queens County 2015], *affd* 161 AD3d 1183 [2d Dept 2018]; *but see Bascomb v West 44th St. Hotel, LLC*, 124 AD3d 812, 813 [2d Dept 2015]; *Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010]).[1]

This case is also readily distinguishable from cases where courts find that conflicts between a witness' affidavit or deposition testimony present an issue of credibility for a jury (*see Mejia v Kennedy*, 124 AD3d 731, 732 [2d Dept 2015]; *Schoen v Rochester Gas & Elec., Inc.*, 242 AD2d 928, 928 [4th Dept 1997]; *see also Clindinin v New York City Hous. Auth.*, 117 AD3d 628, 629 [1st Dept 2014]; *Romero v Twin Parks Southwest Houses, Inc.*, 70 AD3d 484, 485 [1st Dept 2010]; *People v Novak*, 39 Misc 3d 1233 [A], 2013 NY

[1] The court notes that, in footnote 2 of the June 28, 2019 decision, the court suggested that, based on Dragomir's assertion in his affidavit that plaintiff could have remained tied off no matter his position on the scaffold, the jury might be able to infer that plaintiff could have checked whether the stair section was properly attached by going directly to the top of the staircase section rather than climbing to the bottom of that level and walking up the insecure staircase section. Dragomir's testimony that a worker would first attempt to get the staircase section to attach by adding weight to the bottom of the staircase section, however, demonstrates that there is no real factual basis for allowing a jury to draw an inference that plaintiff could simply have gone directly to the top of the staircase section. Indeed, based on the photographs that were marked as exhibits at Dragomir's deposition, it is unclear that there was scaffold framing or a scaffold platform on which plaintiff could have walked between his position below Dragomir and the top of the staircase section at issue. Even if plaintiff could have walked directly from his position below Dragomir to the top of the staircase section, Dragomir's testimony shows that plaintiff would have had to unhook his lanyard and reattach it as he moved along the scaffold.

Slip Op 50866, *2 [U] [County Ct, Sullivan County 2013]; *cf. Thomas v Gonzalez*, 158 AD3d 531, 531 [1st Dept 2018]; *D'Acunzo v Rouse S.I. Shopping Ctr., Inc.*, 214 AD2d 531, 531 [2d Dept 1995] [found it appropriate to disregard affidavit based on subsequent deposition testimony]). Unlike those cases, Dragomir's affidavit and his deposition testimony do not truly conflict. Rather, it is apparent from Dragomir's testimony that his affidavit was tailored to omit details about how the work was actually performed and about Dragomir's interaction with plaintiff in an attempt to demonstrate that plaintiff was recalcitrant. Dragomir's deposition testimony simply fills in the gaps of information that were omitted from the affidavit. While the affidavit may thus be misleading, the differences between the affidavit and Dragomir's deposition testimony do not present credibility issues that must be determined by a jury. Accordingly, the court finds that Dragomir's deposition testimony presents new facts that require the granting of renewal, the vacatur of this court June 28, 2019 decision, and the granting of plaintiff's motion for partial summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action.

This constitutes the decision and order of the court

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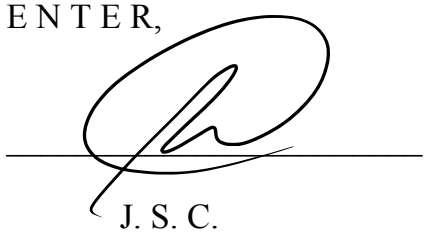

J. S. C.

HON. PAMELA L. FISHER