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How to Litigate a Construction Accident Case – Part 4: Motion Practice

Materials By:
Andrew J. Smiley, Esq.

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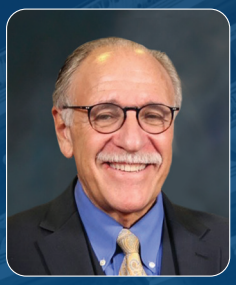

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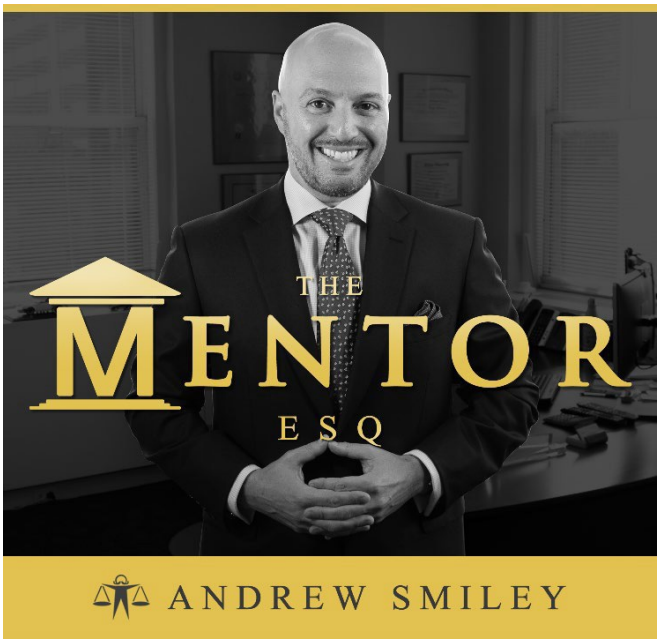

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CURRICULUM VITAE

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present
Associate, June 1996 - December 2000
Law Clerk, September 1993 - June 1996
Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation.

· *Adjunct Clinical Instructor of Law* - *Brooklyn Law School*, Trial Advocacy Program (1998-2004)

· *New York "Super Lawyer"*
2010, 2011,2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022

·Bar Admissions:
- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont.

Organizations/Affiliations:

·New York State Academy of Trial Lawyers
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-President (May 2017 – May 2018)
-President-Elect – (April 2016- May 2017)
-Vice President – 1st Dept. (July 2013-May 2016)
-Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

·New York City Trial Lawyers Alliance
-Chairman of Board of Governors (July 2017 – July 2019)
-President (July 2015 – July 2017)
-Vice President (June 2013 – July 2015)
-Treasurer (June 2011 – June 2013)
-Secretary (June 2009- June 2011)
-Board of Directors (2000-present)

· Judicial Screening Committee, Kings County Democratic Party (2013)
·New York State Bar Association
· Brooklyn Bar Association
-Medical Malpractice Committee
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Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection, New York State Academy of Trial Lawyers, September 10, 2021

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Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court, New York State Academy of Trial Lawyers, June 9, 2020

Crisis Management - The Corona Virus Pandemic, The Mentor Esq. Podcast, April 9, 2020

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Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts, New York State Bar Association, September 9, 2019

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Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives, The Defense Association of New York, September 17, 2018

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Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016\

Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA, New York State Bar Association, October 11, 2015

Effectively Using Experts in Personal Injury Cases, Lawline, October 8, 2015

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Health, Fitness & Adventure Sports Liability, New York State Bar Association, August 1, 2013

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"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement, New York State Academy of Trial Lawyers, April 1, 2012

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Practical Guidelines for Getting Items into Evidence, Lawline.com, March, 2010

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- -What's Happening Now with Martha McCallum
- - America's News Room
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CNN -Anderson Cooper 360
ET – Entertainment Tonight
Bloomberg TV
Headline News
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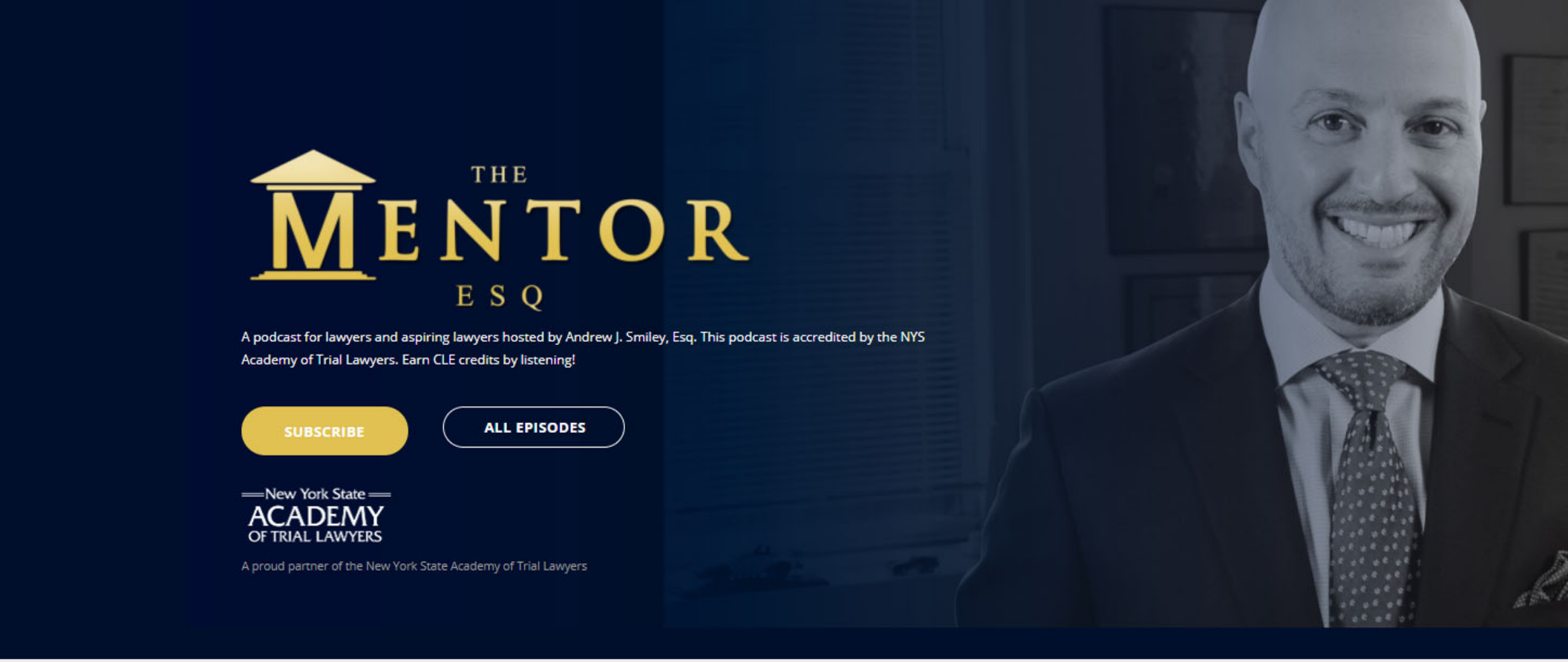
Court TV
The Morning Show with Mike and Juliet

Interests, Hobbies:

Porsche Club - High Performance Driving Events, Sim Racing, Yoga, Cooking

Podcaster – The Mentor Esq.



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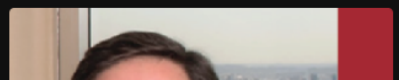

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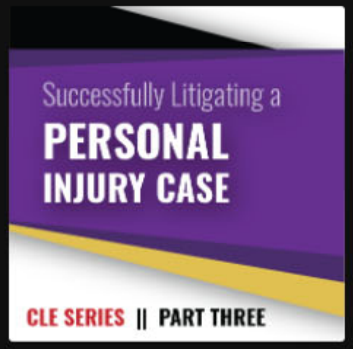

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

GARY HARRIGAN and KATHY HARRIGAN,

Plaintiffs,

-against-

G-Z/10UNP REALTY, LLC; LEND LEASE (US) CONSTRUCTION LMB, INC.; GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.,

Defendants.

----------X

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff,

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

----------X

Index No.: 156824/2014

NOTICE OF MOTION

Kindly refer to the Hon. Joan Kenney, J.S.C.

Index No.: 595582/2015

SIRS:

PLEASE TAKE NOTICE that upon the Affirmation of BRIAN J. ISAAC dated May 31, 2016, the expert Affidavit of Les Knoll, P.E., the exhibits annexed thereto including the sworn testimony of parties and non-party witness, Plaintiff's Memorandum of Law in Support and upon all the pleadings and proceedings heretofore had herein, Plaintiffs GARY HARRIGAN and KATHY HARRIGAN will move this Court, at an IAS Part thereof, located at 60 Centre Street, Room 130, New York, New York 10007, on the 30th day of June, 2016 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for an Order:

1. Pursuant to CPLR 3212, granting plaintiffs partial Summary Judgment on the Plaintiff Husband's claims under Labor Law §§ 240(1) and 241(6) against defendants G-Z/10UNP REALTY, LLC and LEND LEASE (US) CONSTRUCTION LMB, INC.;
2. Remanding the matter for an inquest on damages; and

3. For such other and additional relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that this demand and a minimum of twenty-one days' notice being provided, answering papers, if any, shall be served upon the plaintiff's counsel no later than seven (7) days prior to the return date hereof pursuant to CPLR 2214(b).

Dated: New York, New York
May 31, 2016

POLLACK, POLLACK, ISAAC & DECICCO, LLP
Of counsel to: SMILEY & SMILEY, LLP
Attorneys for Plaintiffs

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

GARY HARRIGAN and KATHY HARRIGAN,

Plaintiffs,

-against-

G-Z/10UNP REALTY, LLC; LEND LEASE (US) CONSTRUCTION LMB, INC.; GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.,

Defendants.

----------X

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff,

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

----------X

Index No.: 156824/2014

AFFIRMATION IN SUPPORT

Index No.: 595582/2015

Kindly refer to:
The Hon. Joan Kenney

BRIAN J. ISAAC, an attorney duly licensed to practice before the courts of the State of New York, hereby affirms the following to be true or, if stated upon information and belief, that I believe it to be true under penalty of perjury:

1. I am a member of the law firm Pollack, Pollack, Isaac & DeCicco, LLP, appearing here Of Counsel to the office of Smiley & Smiley, LLP, Attorneys for Plaintiffs GARY HARRIGAN and KATHY HARRIGAN.

2. By virtue of my review of the pertinent pleadings, deposition transcripts, bills of particulars and other file materials maintained by the law firms for the prosecution of plaintiff's claims herein, I am fully familiar with the facts, pleadings and prior proceedings had herein.

3. This Affirmation is respectfully offered in support of plaintiffs' Motion pursuant to CPLR 3212 for summary judgment on Plaintiff Gary Harrigan's claims under Labor Law §§240(1) and 241(6).

4. In addition to the testimony outlined herein, the motion is supported by the Expert Affidavit of Senior Mechanical Engineer Les Knoll[1] and plaintiffs' Memorandum of Law in Support of the Motion, both of which are adopted by reference as if fully set forth at length herein.

PROCEDURAL HISTORY

5. Plaintiff commenced this action by purchasing an Index number and filing a Summons and Complaint in the office of the Clerk of the Court on or about July 11, 2014. *See* **Exhibit "A"**, Plaintiffs' Summons & Complaint (NYSCEF Doc. 1).

6. Defendant UNITED RENTALS (NORTH AMERICA), INC. was duly served with process and issue was joined by the service of that defendant's Verified Answer (annexed as **Exhibit "B"**)(NYSCEF Doc. 5) on or about October 6, 2014.

7. Defendant G-Z/10UNP Realty, LLC and LEND LEASE (US) CONSTRUCTION LMB, INC. were duly served with process and issue was joined by the service of their Answer(s) (**Exhibit "C"**) (these documents were not electronically filed through NYSCEF) on or about August 22, 2014.

8. Defendant GENIE INDUSTRIES, INC. was duly served with process and issue was joined by the service of their Answer (**Exhibit "D"**) on or about October 21, 2014.

9. Defendant UNITED RENTALS (NORTH AMERICA), INC. served a third party Summons and Complaint on Third-Party Defendant COORDINATED METALS, INC. on or

[1] As Mr. Knoll was not able to obtain and return the executed CPLR 2309(c) Authentication form in support of his out-of-state Affidavit prior to the Memorial Day holiday weekend. That form will be served and filed via the NYSCEF system shortly after this motion is filed on May 31, 2016.

about August 13, 2015 (**Exhibit "E"**); issue was joined as to the Third-Party Defendant by the service of their Answer to the Third Party Complaint (**Exhibit "F"**)(NYSCEF Doc. 19) on or about October 15, 2015.

10. Plaintiffs filed a Request for Judicial Intervention on or about October 20, 2014 and a Preliminary Conference was held on January 15, 2015. *See* RJI (NYSCEF Doc. 8), **Exhibit "G"**; Preliminary Conference Order (NYSCEF Doc. 9), annexed as **Exhibit "H"**.

11. Plaintiffs served their Verified Bills of Particulars responsive to the demands served by defendants G-Z/10UNP Realty, LLC and Lend Lease (US) Construction LMB, Inc. on or about November 25, 2014; a true copy of that document is annexed here as **Exhibit "I"**.

12. Plaintiff GARY HARRIGAN was deposed on January 25, 2016 and again on January 27, 2016. (This document is voluminous, hence excerpts of the Transcript from Plaintiff's 2 days of deposition testimony ["Harrigan Dep."] are annexed at **Exhibit "J"**).

13. Third-Party Defendant Coordinated Metals, Inc. ["CMI"] produced Guy Zammit for deposition on April 13, 2016. Mr. Zammit's Deposition Transcript ["Zammit Tr."] is annexed at **Exhibit "K"**.

14. Defendant Lend Lease (US) Construction LMB, Inc. produced Kenneth Solter for deposition on March 21, 2016. A true copy of Mr. Solter's Deposition Transcript ["Solter Tr."] is annexed as **Exhibit "L"**.

15. Non-Party witness Kristen Malone was deposed pursuant to Plaintiff's subpoena on April 7, 2016. Ms. Malone's Deposition Transcript ["Malone Tr."] is annexed here as **Exhibit "M"**.

16. Defendant United Rentals, Inc. produced Barry Davis for Deposition on March 2, 2016. Mr. Davis' Deposition Transcript ["Davis Tr."] is annexed here as **Exhibit "N"**.

17. Defendant Genie produced Jason C. Berry for deposition via videoconference on February 10, 2016. A true copy of Mr. Berry's Deposition Transcript ["Berry Tr."] is annexed as **Exhibit "O"**.

EXPERT OPINION OF LES KNOLL, P.E.

18. The Affidavit of Senior Mechanical Engineer Les Knoll (and a copy of Mr. Knoll's c.v.) is annexed to these papers in support of Plaintiffs' Motion for Partial Summary Judgment.

19. Mr. Knoll has 45 years of experience in construction and industrial accident investigations. Knoll Aff., ¶ 2. This includes experience in aerial lift design, manufacture and applications. *Id.* His particular areas of expertise are Product Failure and Analysis and Engineering (Mechanical and Electrical). Knoll Aff., ¶4.

20. To prepare his Affidavit in Support of this motion, Mr. Knoll reviewed accident photographs, witness statements, equipment manuals, ANSI standards, OSHA regulations and other materials pertaining to the accident; he also attended an inspection and functional testing of the GS 3232 lift involved in Mr. Harrigan's accident. Knoll Aff., ¶¶ 5, 6.

21. During the inspection and function testing of the lift, Mr. Knoll reports, it was discovered that the tilt alarm on the machine does not sound while only three of the wheels are on the ground, because the machine's chassis remains sufficiently level that the alarm is not triggered. Knoll Aff., ¶ 12.

22. Despite the elevation of the left front wheel on a wooden ramp where Mr. Harrigan parked the lift for the inspection that was being conducted, the chassis of the machine remained sufficiently level that the tilt alarm did not sound. Knoll Aff., ¶25. Mr. Harrigan testified that it felt level and stable and he believed it was safe to elevate the lift.

23. Mr. Harrigan was not instructed that the lift was equipped with outriggers and the design of the machine conceals the outrigger components under the chassis so that it is not readily apparent that this GS3232 lift is unique in any way. Knoll Aff., ¶¶ 7, 35-37.

24. Since this feature was unique to this machine for its size and class, and because the machine was being used outside on potentially non-level surfaces, training in the operation of the outrigger and auto-leveling features on this machine was vital for the safety of the operator. Knoll Aff. ¶38.

25. The general contractor and the premises owner should not have allowed any operator to utilize the GS 3232 aerial lift, with its unique outrigger and auto-leveling systems, without assuring that the operator was fully trained in its operation. Knoll Aff., ¶39.

26. Mr. Harrigan did not know if the manuals were on the machine, and he was not properly and fully trained and certified in the use of the GS3232 lift, all of which were the joint result of his employer's failure to fully train him and the general contractor's and site owner's failure to require proof that he had been fully trained and certified in the operation of the GS 3232 lift.

27. As a result of the foregoing (and as set forth in far greater detail in his annexed Affidavit) Mr. Knoll finds, to a reasonable degree of engineering certainty, that the subject accident occurred because:

a. The Genie GS-3232 has unique safety and operating features, some of which are effectively hidden from view, that require familiarization training before an operator can utilize them

b. Mr. Gary Harrigan did not receive familiarization training on the GS-3232 before he used it. That training was not offered by his employer and the general contractor and the premises owner failed to ensure that he was so trained before allowing him to operate the subject machine on their jobsite.

c. The subject accident occurred because the left front wheel of the lift rode partially up an incline, leaving the right front wheel suspended and

unsupported. The rigidity of the lift chassis combined with the weight distribution on the lift prior to the accident permitted the lift to remain level enough so as not to activate the tilt alarms. As the lift rose and weights shifted, the lift tilted toward the unsupported right side and tipped over.

d. Had the outriggers and leveling systems been utilized on the GS-3232, the subject accident would have been avoided.

e. Had Mr. Harrigan been made aware of the operation of the outriggers and leveling capabilities of the GS-3232, he would have used them, assuring the machine was level and stable for operation, or correcting conditions to make the machine level and stable.

f. As part of his familiarization training, had Mr. Harrigan been made aware of the potentially hazardous condition wherein one wheel could be unsupported yet the tilt alarm not be activated, this accident would have been prevented.

g. Since the user, Mr. Harrigan's employer CMI, had direct control over the application and operation of the aerial platform, this employer may have also had responsibility for good job management, safety control and the sound principles of safety, training, inspection, maintenance, application and operation, consistent with all data available regarding the parameters of intended use and expected environment.

See Knoll Affidavit, ¶ 46 (a) to (g).

STATEMENT OF THE CASE

A. Testimony of Plaintiff Gary Harrigan

28. Plaintiff Gary Harrigan was deposed on two days, January 25, 2016 and January 27, 2016. See, Gary Harrigan Deposition Transcript ["Harrigan Tr."], annexed as exhibit "J".

(i) Plaintiff's Employment Experience and Training

29. Mr. Harrigan is a member of Local 580. Harrigan Tr., exhibit "J" at p. 10. He was born June 24, 1957 in Bayshore, New York. *Id.* He is a high school graduate (1976). Harrigan Tr., exhibit "J" at p. 13.

30. After several industrial jobs following high school and four years in the Navy, in 1991 Mr. Harrigan joined Local 580 as an apprentice, where he was trained for three years while also working on various jobs (all for the same company, Coordinated Metals, Inc.). Harrigan

Tr., exhibit "J" at pp. 15-16. Part of the apprentice training included safety classes, such as OSHA regulations, and the use of hand tools; these classes did not include the use of any type of machinery. Harrigan Tr., exhibit "J" at pp. 16-17.

31. Post-apprenticeship, Mr. Harrigan took an MIG and TIG welding class in 2001 and a hanging scaffold course in 2005, both of which issued certificates upon completion. Harrigan Tr., exhibit "J" at p. 18. He has taken the OSHA 10[2] and the OSHA 30 courses online in/about 2005, for which he was issued certificates upon completion. Harrigan Tr., exhibit "J" at p. 19. He has also taken a course in burning, another in fire watch, both twice as they require periodic renewal. He did not recall the dates for these courses. Harrigan Tr., exhibit "J" at p. 20.

32. He continued to work with Coordinated Metals for three years after apprentice school and has worked for the company on and off throughout his career, on many different jobs. Harrigan Tr., exhibit "J" at p. 22. He has worked for three other companies over his post-apprenticeship career: Egan Glass in White Plains, Post Road Iron Works in Greenwich, Connecticut and Regal in New Jersey. Harrigan Tr., exhibit "J" at pp. 23-24.

33. The last day he worked for Coordinated Metals was the day of the subject accident, January 13, 2014. Harrigan Tr., exhibit "J" at p. 24.

34. In his work for Egan Glass, he "did storefronts," just as he did on the job where he was injured. This work includes standing up the frames and fastening them to the building to create the first floor storefront and installing doors. Harrigan Tr., exhibit "J" at p. 25. For this work he uses drill, grinders, welders, ladders, lifts, hand tools and "maybe a torch." Harrigan

[2] The OSHA website explains these programs as follows: "Through this program, workers can attend 10-hour or 30-hour classes delivered by OSHA-authorized trainers. The 10-hour class is intended for entry-level workers, while the 30-hour class is more appropriate for supervisors or workers with some safety responsibility. Through this training, OSHA helps to ensure that workers are more knowledgeable about workplace hazards and their rights, and contribute to our nation's productivity." https://www.osha.gov/dte/outreach/construction/index.html

Tr., exhibit "J" at pp. 25; 213-214. He has also driven forklifts. Harrigan Tr., exhibit "J" at pp. 214-215.

35. He used both scissors lifts and snorkel lifts, depending on the need for the particular job. Harrigan Tr., exhibit "J" at p. 26. Mr. Harrigan explained that a "snorkel lift" has a four-wheel base and an arm with a basket at the end; there are controls on the base and in the basket, which would be extended and could swing side to side. Different models of snorkel life can hold 1-4 persons. *Id.* He recalls the snorkel lifts he used were rented from Genie and United, but could not recall the names of the brands. Harrigan Tr., exhibit "J" at p. 27.

36. He used many types of scissors lifts, different makes, models and manufacturers. *Id.* He used many different types, stating he was doubtful he ever used the same type twice. *Id.* He testified that the scissors lifts were also from Genie or United. *Id.* Scissors lifts came in all different sizes, the smallest being "maybe three by seven" and as big as "probably 24 feet by 15 feet." Harrigan Tr., exhibit "J" at p. 28. The highest he has gone on a scissor lift is approximately 60 feet on a job in or about 2000 at JFK Airport while working for Regal. *Id.*

37. Prior to January 2014, he had not suffered any injury more serious than occasional cut fingers; nothing that resulted in lost work time. Harrigan Tr., exhibit "J" at pp. 33-34. He filed a previous Workers Compensation claim as a result of suffering two cut fingers. He did not recall the year(s). *Id.*

38. In addition to his employment, Mr. Harrigan worked as a volunteer fireman for over 25 years for the Lindenhurst (NY) Fire Department. Harrigan Tr., exhibit "J" at pp. 186-187. Over the years he rose through the service as a first lieutenant, second lieutenant and Captain (two years in each level). He served as Captain during his volunteer firefighter service and has fought fires; he is now an "ex-Captain".

39. As part of this work as a firefighter, Mr. Harrigan was certified in handling the ladders; he drove the hook and ladder truck; he used a "Scott pack"; a rabbit tool, a saw and hand tools like the Halligan bar (also called the "Halligan Tool"), axe and pipe pole. Harrigan Tr., exhibit "J" at pp. 214-216.

40. Following the September 11, 2001 terrorist attacks on lower Manhattan, he was a volunteer at Ground Zero for the first three days carrying bodies out of "the pile". This volunteer service came about through his affiliation with the union, as ironworkers were being sought from the Union Hall to help move steel from the pile in the search for bodies or survivors. Harrigan Tr., exhibit "J" at p. 188.

41. He also worked at Ground Zero (the World Trade Center site following 9/11) and worked for two years in the repair of damage done to the World Financial Center[3], including the South Bridge and the Winter Garden, post 9/11. Harrigan Tr., exhibit "J" at p. 35. This work involved the use of lifts, but Mr. Harrigan could not recall which brands or models. Harrigan Tr., exhibit "J" at pp. 35-36.

(ii) Training and Experience With Aerial Lift Machinery

42. Generally, a lift was used on the job site for any work done higher than ten feet off the ground; lower than that, the work would be done via ladder. Harrigan Tr., exhibit "J" at pp. 36-37.

43. Mr. Harrigan testified that he had not been specifically trained to use or operate a lift: "other than somebody saying, 'do you know how' – another guy saying 'you know how to use it?' You get on and you drive away with it." Harrigan Tr., exhibit "J" at p. 43. Mr. Harrigan testified that he had used lifts "thousands" of times in his career; when pressed by Genie's counsel, who asked if this was literally or figuratively, he responded that he had been speaking

[3] The World Financial Center is now known as "Brookfield Place".

figuratively, but the more realistic number would be "easily 100" times. Harrigan Tr., exhibit "J" at pp. 212, 213.

44. He testified that he believes an OSHA inspector stopped a job one time because there was no certification for lift training. He described the situation where an OSHA inspector will stop the worker and ask if the operator is certified to drive/work a machine, and if the worker does not have the certificate on his person at the time, the company (Genie, the lift supplier, not his employer) has to send someone out to provide training on the machine. He testified that this happened once in his career. Harrigan Tr., exhibit "J" at pp. 43-44. When this occurs, the trainer will give each person trained a card to show that he is qualified to work that particular machine, "because they are all different." Harrigan Tr., exhibit "J" at p. 44.

45. Prior to that incident with the OSHA inspector, Mr. Harrigan had not been aware that OSHA requires that each lift operator be certified in the use of each individual machine. Harrigan Tr., exhibit "J" at p. 390. Even being aware of that fact after the above-described single incident, however, he did not change his conduct with regard to seeking training or reading manuals because when he is on the job, he is there to get the job done; they jump on the machine and go to work. Harrigan Tr., exhibit "J" at p. 390. Mr. Harrigan testified, "if you stop and get certified on every machine...you wouldn't have time to get the job done. In the real world, you know, guys are using machines that are there." Harrigan Tr., exhibit "J" at pp. 390-391.

46. Following this incident, which he estimated occurred eight years ago, he went right back to work. Harrigan Tr., exhibit "J" at p. 45. He reiterated that this one incident was the only time he was given formal training in the use of a lift. *Id.* Later, upon questioning by United Rentals' counsel, he testified that he did recall having some training on a scissor lift prior to his accident, but could not recall when that occurred. Harrigan Tr., exhibit "J" at pp. 377-378. He

did not recall what type of scissor lift he was given the training course on. *Id.* He believes the salesman or the area super, in the field, gave the course. Harrigan Tr., exhibit "J" at p. 378. He believes this person worked for United Rentals but was not certain. *Id.* He described this "course" as being approximately ten minutes long. Harrigan Tr., exhibit "J" at p. 379. The lift he was trained on did not have outriggers. *Id.*

47. He never asked his employer to give him training on the lifts. Harrigan Tr., exhibit "J" at p. 380; 387. He was never trained on the two scissor lifts owned by CMI, which he has operated, albeit not at the 50 UN Plaza job site. Harrigan Tr., exhibit "J" at p. 381.

48. He does not recall ever being trained on any lift regarding the use of outriggers. Harrigan Tr., exhibit "J" at p. 382.

(iii) The 50 UN Plaza Jobsite

49. In January 2014, Mr. Harrigan was working on a job at 50 UN Plaza for CMI. Harrigan Tr., exhibit "J" at p. 46. He had started working there in or about October 2013 and worked there continuously until his accident. *Id.* He was the foreman on a group of four workers, which in addition to Mr. Harrigan included Richie Campos, Kevin Ahern and Paul Sans. Harrigan Tr., exhibit "J" at p. 47.

50. Mr. Harrigan had served as a foreman for CMI for seven years; he had also served as foreman for the other companies that employed him. Harrigan Tr., exhibit "J" at p. 48. He has served as shop steward at the World Financial Center job; he needed no special classes or training to serve as foreman or as shop steward. Harrigan Tr., exhibit "J" at p. 49.

51. Mr. Harrigan identified defendant Lend Lease as the general contractor on the UN Plaza job. Harrigan Tr., exhibit "J" at p. 49. He did not negotiate the contracts for the job; he did not know who negotiated the contracts for CMI; he never saw the contracts for the UN Plaza

job. Harrigan Tr., exhibit "J" at pp. 50-51. He saw other contractors on the job, whose work he could describe, but he could not name the companies. Harrigan Tr., exhibit "J" at p. 51.

52. CMI's "job super" for the UN Plaza job was Guy Zammit, who appeared at the site approximately twice weekly. Harrigan Tr., exhibit "J" at p. 51. There were two project managers on the job, a "Chinese guy," whose name Mr. Harrigan did not know and another man named "Bob," whose last name he could not recall. Harrigan Tr., exhibit "J" at p. 53. Project managers would be called or would appear if there was a problem on the job, such as a "piece" that does not fit in the curtain wall where it was designated to fit. *Id.*

53. There were three or four "gang boxes" on the site, stored in the main lobby of 50 UN Plaza. These contained hand tools, chain falls, straps, hardware to do the job, electric tools like hammer drills, grinders, regular drill machines and the control panel or "brain" for the lift machines, which would be removed at night and locked in the gang box. Harrigan Tr., exhibit "J" at pp. 54-55.

54. There were two scissor lifts on site. Harrigan Tr., exhibit "J" at p. 55. Both were Genie machines, but Mr. Harrigan did not know the make or model. Harrigan Tr., exhibit "J" at p. 56. He did not know if they were the same model. Harrigan Tr., exhibit "J" at pp. 56; 88-89. Only one machine was already on site when he first arrived at the job; they were both rented by CMI from United Rentals. *Id.* He knew this was a CMI-rented machine from a conversation with the job super, Guy Zammit when he first arrived on the job site and they went over the whole job together. Harrigan Tr., exhibit "J" at p. 57. He testified that for CMI's purposes there was no difference between the lifts. Harrigan Tr., exhibit "J" at p. 89. He does not recall United Rentals ever coming back to service the lift prior to his accident. Harrigan Tr., exhibit "J" at p. 90.

55. The crew of four workers went to an orientation meeting with someone from Lend Lease on the first day they came to the job site. The meeting was held by the site safety person, whose name Mr. Harrigan did not recall. Harrigan Tr., exhibit "J" at p. 58. This meeting was "pretty much the same thing on all jobs that, you know, you go to. They just give you the lay of the job and, you know, exits and just the safety orientation is what they call it." Harrigan Tr., exhibit "J" at pp. 58-59. Mr. Harrigan did not recall the specific information provided, or whether he was provided any papers to keep or to sign. Harrigan Tr., exhibit "J" at pp. 59-60.

56. Mr. Harrigan was shown a form and identified his signature on the form; he identified the form as something that was "probably... given to us during the orientation." Harrigan Tr., exhibit "J" at p. 61. He did not recall any other orientation provided by Lend Lease. Harrigan Tr., exhibit "J" at p. 63.

57. He stated that the meeting with the job super on the first day was the only orientation provided by CMI. Harrigan Tr., exhibit "J" at p. 63. He said CMI had no site safety manual for this job, and could not remember having one for other jobs he did not know what a "site safety manual" is. Harrigan Tr., exhibit "J" at pp. 63-64.

58. Mr. Harrigan testified that on days he was working on a lift, he would wear a hard hat, harness, safety glasses and a reflective vest; all were provided to him by CMI. Harrigan Tr., exhibit "J" at pp. 66-67. He also wore boots and gloves, which were personal gear. Harrigan Tr., exhibit "J" at p. 67.

59. Mr. Harrigan testified that he saw Lend Lease personnel on the site every day. Harrigan Tr., exhibit "J" at p. 69. He generally dealt with a gentleman named "Steve," whose last name he did not know. *Id.* He or his colleague Richie filled out daily reports for the job that were submitted to Lend Lease ("where we were working, what we were going to try and get done, the tools we were using maybe"). Harrigan Tr., exhibit "J" at p. 71. Mr. Harrigan also

attended "foremen meetings" held by Lend Lease, discussing status and moving the job forward. Harrigan Tr., exhibit "J" at p. 75.

60. Although the orientation papers he was given by Lend Lease (Defendants' Exhibit "A") indicates that "all persons are required to attend the safety class conducted by the lift rental company prior to using the lift," he testified that no such safety class was conducted. Harrigan Tr., exhibit "J" at pp. 400-401.

61. He did not make any complaints about the condition of the jobsite except that on one occasion, the crew complained about ice to Kenny Sultan, the super for the area (employed by Lend Lease). Harrigan Tr., exhibit "J" at pp. 302-303. He had not made any other complaints, but was aware that other people on the job site had complained about debris and things in the way: "there was always debris and it didn't seem like there was enough laborers on the job to clean stuff up. Any time we needed stuff moved we would contact Kenny and it was his job to have laborers come down and move the stuff so we can move around the job and get our work done. They would never come. He would come himself and start moving the stuff and we used to help him." Harrigan Tr., exhibit "J" at p. 303. On follow up questioning, Mr. Harrigan testified that he had complained about this issue. *Id.*

62. Mr. Harrigan testified that these complaints were related to his accident insofar as it had to do with debris or ice that was in the area that he complained about. He said there was no precipitation on the day of his accident and he did not recall if ice was on the ground. Harrigan Tr., exhibit "J" at p. 304.

63. The CMI job super provided them weekly "toolbox" talks in the form of a printed sheet that the crew would review; they would go over it once a week and submit it to Lend Lease and send one back to CMI. Harrigan Tr., exhibit "J" at p. 73. These would cover different topics such as harnesses, ladders "all kinds of safety." Harrigan Tr., exhibit "J" at p. 74.

64. On the day of the accident, Mr. Harrigan arrived at the job site at 7:00 am; the crew discussed the work for the day. Harrigan Tr., exhibit "J" at p. 75.

(iv) CMI, Inc. Had Two Rented Lifts On the Job Site

65. Mr. Harrigan said one lift was on the site when he first arrived; defendant United Rentals later delivered the second. He witnessed this delivery on a flat bed truck and testified that he did not inspect the lift upon its delivery. Harrigan Tr., exhibit "J" at p. 83. He did not recall having any conversation with the delivery person or of asking that person how the lift is used. Harrigan Tr., exhibit "J" at p. 384. He did not ask if United Rentals could provide training. Harrigan Tr., exhibit "J" at p. 384.

66. Mr. Harrigan had a "foggy" memory of one of the lifts on the site being serviced some time prior to his accident; he could not recall which machine, nor specifically what was the problem, but believed it was something serious enough that the machine would not start. Harrigan Tr., at pp. 245; 247-248. He referred to this as the machine being "tagged out" as in a tag is hung on the machine saying "out of order". *See* Harrigan Tr., exhibit "J" at pp. 244-246. He testified that he would assume the repair was done by Genie, but he could not say with certainty. Harrigan Tr., exhibit "J" at p. 244. When questioned in some detail about the prior repair by United Rental's counsel, however, he admitted to having "haziness" as a residual effect of the accident. Harrigan Tr., exhibit "J" at pp. 374-375. He testified that although he could not recall who had performed the service call, he did recall that afterward, they were able to use the machine. Harrigan Tr., exhibit "J" at p. 375.

67. Mr. Harrigan was not provided any operator's manual and was not told that a manual or instructions would later be delivered to him. Harrigan Tr., exhibit "J" at pp. 87; 224. He did not know if there was a manual with that lift and did not know if the other lift, which had

been on site when he first came to the job, had a manual. Harrigan Tr., exhibit "J" at pp. 87; 224.

68. He never looked for a manual on either of the lifts and did not ask anyone for a manual. Harrigan Tr., exhibit "J" at pp. 87, 224. He was aware that the lifts had a compartment for the purpose of storing a manual. *Id.* That compartment was in the front of the lift basket. Harrigan Tr., exhibit "J" at p. 88. He did not look in the compartment of the subject lift for the manual and never saw anyone else open that compartment looking for a manual. Harrigan Tr., exhibit "J" at pp. 87, 224, 312-313; 422. He had looked in the compartment on other lifts in the past to see what was inside, however. Harrigan Tr., exhibit "J" at pp. 313-314. He testified that he had never taken a manual home to read for any of the lifts he had utilized at work, acknowledging that the manuals were available to him if he had wanted to read them. Harrigan Tr., exhibit "J" at p. 389.

69. He acknowledged that the decals on the machines and the manuals might have provided warnings or safety instructions for the use of the lifts. Harrigan Tr., exhibit "J" at pp. 226-227. He also admitted to knowledge that falling from an elevated height, when the basket was extended, might be dangerous, and that he might be injured if the lift tipped over while the basket was elevated. Harrigan Tr., exhibit "J" at pp. 227-228.

70. Mr. Harrigan testified that his crew might have used the first lift on the job site (not the one involved in his accident) ten to fifteen times daily. Harrigan Tr., exhibit "J" at p. 228. He estimated that his own use of the machine might be "at least three days a week." Harrigan Tr., exhibit "J" at p. 229. He estimated that his use of the accident lift was approximately the same frequency. *Id.*

71. Mr. Harrigan testified that he did not recall seeing the United Rentals rental agreement (Defendant's Exhibit "C"), which was shown to him, but identified his own signature

at the bottom of the document. Harrigan Tr., exhibit "J" at p. 84. He did not think he would have read it before signing. Harrigan Tr., exhibit "J" at p. 85.

72. He did not recall seeing Defendants' Exhibit "D" either, but identified his signature on the document, so he conceded he must have seen it. *Id.* He had no recollection of seeing or signing the document and had no idea who the other name on the document ("David") was. Harrigan Tr., exhibit "J" at p. 86.

73. Mr. Harrigan could not clearly recall the appearance of the control panel for the particular lift involved in his accident; he was deposed almost two years after it occurred. He testified that it likely had a joystick and buttons for "left" and "right." He also testified that, assuming there were controls on the panel to engage the outriggers, he had not used those. Harrigan Tr., exhibit "J" at p. 279. He could not describe the outrigger controls and did not know what they included. Harrigan Tr., exhibit "J" at pp. 279-280.

74. Mr. Harrigan denied that he or anyone else on the jobsite performed "preoperation function testing" on the lift. Harrigan Tr., exhibit "J" at p. 280. He said he had never seen anybody do one on any machine:

> we go to the work and we get on the machine and try to get the job done, that's what we do. *You have all of this stuff about having to read these manuals and doing this and doing that, in the real world that's not how it happens.* You got to get the job done and that's what we get paid to do and that's what we do. We get on the machine and we know how it runs and you get where it's got to go and you do what you have to do with it and you come down and go home.

Harrigan Tr., exhibit "J" at pp. 280-281 (emphasis added).

75. He testified that no one had ever told him not to do a preoperation functioning test of the lift, nor indeed, of any lift. Harrigan Tr., exhibit "J" at p. 281. He testified that he had never seen anyone do a function test of the subject lift (nor indeed of the other lift) from the time

it was delivered to the jobsite until the date of his accident. Harrigan Tr., exhibit "J" at pp. 281-282.

(v) The Lift Falls, Injuring Plaintiff and Non-Party Kristen Malone

76. On the day of the accident, he was asked by a girl whose name he could not recall (Ms. Malone) to take her up to take some inspection photos of their work. He testified that she appeared occasionally: "she every once in a while would come to us and [ ] take her up for pictures." Harrigan Tr., exhibit "J" at p. 92. He did not know what company she worked for; he assumed it was for the owner and stated this was because she told them so. Harrigan Tr., exhibit "J" at p. 93.

77. The weather on the day of the accident was clear and chilly; there was no snow on the ground. Harrigan Tr., exhibit "J" at p. 98.

78. The lifts were both parked outside the building; the one he used was on the other side of the building, around the corner. The ground was newly-poured concrete and smooth. Harrigan Tr., exhibit "J" at p. 100. He retrieved the control panel from the gang box and did a quick inspection, finding the lift clean, nothing on the deck and nothing hanging off of it, nothing that would obstruct the lift being extended and "fine to drive." Harrigan Tr., exhibit "J" at pp. 101-102. He had no checklist for inspecting the lift. Harrigan Tr., exhibit "J" at p. 102.

79. He inspected the surrounding ground for obstructions to see if "there were any problems with the lift" before initially climbing into the lift on the day of his accident. Harrigan Tr., exhibit "J" at pp. 399-400.

80. He also testified that he looked for obstructions on the ground while driving the rig forward, making sure the area is clear enough to move the machine. Harrigan Tr., exhibit "J" at p. 102. His recollection is that upon climbing into the rig, he first drove to the southwest

corner of the building, approximately 500 feet, without Ms. Malone in the basket. Harrigan Tr., exhibit "J" at pp. 103; 105. He did not initially clip in the harness to drive the rig to the southwest corner of the building. Harrigan Tr., exhibit "J" at p. 104.

81. He did not notice any warning stickers or decals on the lift and stated that he did not recall seeing such stickers on other lifts he had used in the past. Harrigan Tr., exhibit "J" at p. 104. He testified that if he had seen warning labels or stickers/decals, he would have complied with the warnings. Harrigan Tr., exhibit "J" at p. 449.

82. He did not look at the operator's manuals of any of those lifts either. *Id.* When he was questioned about reading safety or warning decals later in his deposition, however, he did not correct the counsel inquiring to remind him that he had previously testified that he had recalled not seen any such stickers. Harrigan Tr., exhibit "J" at pp. 223-225.

83. When he arrived in the lift to the southwest corner of the building to pick up Ms. Malone, plaintiff climbed out of the basket and they both put on their harnesses and then climbed into the lift and clipped in their harnesses. Harrigan Tr., exhibit "J" at pp. 105-106. Plaintiff did not speak with Ms. Malone; he went to the control panel, finding the lift stable, steady and safe and moved the lift into position next to the building. Harrigan Tr., exhibit "J" at p. 107. He stood in the right front portion of the basket, operating the controls, and Ms. Malone stood in the left rear of the basket. Harrigan Tr., exhibit "J" at pp. 290-291.

84. Asked what he meant by "steady and safe" in describing the lift on the day of the accident, Mr. Harrigan explained: "the machine was steady, it wasn't rocking, and I felt with my 20-years experience that it was safe to go up. That's what I mean." Harrigan Tr., exhibit "J" at p. 409. Asked to explain further, he described "a feel of [the machine] being steady, being locked in on the ground, it was steady." Harrigan Tr., exhibit "J" at p. 410. He testified that if

the machine had felt wobbly or unsteady he would not have gone up or elevated the basket with another person in it. Harrigan Tr., exhibit "J" at p. 452.

85. Mr. Harrigan did not check the work area once the lift was stopped in position to check for obstructions such as debris. Harrigan Tr., exhibit "J" at p. 274. He testified that if anyone was responsible for such inspections it was likely the site safety officer. Harrigan Tr., exhibit "J" at p. 275. He had viewed the wheel positioned slightly on the ramp and believed that it was safe and stable: "in my 20 years experience, I said it is fine, that's where this machine needed to be, in my experience, 20 years. I got off, helped the girl, got her harness on, we got on the rig, we both hooked in... ." Harrigan Tr., exhibit "J" at p. 293. As the lift was extending upward, Mr. Harrigan testified, he did not change position and stated that he did not know if Ms. Malone had moved; he remained upright and did not look over the railing in any direction. He did not know if Ms. Malone had looked over the railing. Harrigan Tr., exhibit "J" at pp. 295-296.

86. At the corner of the building Ms. Malone indicated, plaintiff started to extend the lift, aiming to get it to 15-20 feet; this is done by eye, as there is no indicator of height on the rig panel. Harrigan Tr., exhibit "J" at p. 108.

87. Mr. Harrigan testified that he is familiar with the tilt warning alarm, which consists of an orange light and siren; he stated that when this warning about the machine being out of level goes off, the machine platform will not continue to elevate. Harrigan Tr., exhibit "J" at pp. 317-318. This alarm did not sound on the day of the accident, but he believes that the machine normally emits a beeping sound as the lift is elevating; he thinks that this sound was occurring, but was not positive about that fact. Harrigan Tr., exhibit "J" at pp. 317; 319; 367-368. Plaintiff was familiar with the sensitivity of the tilt alarm based on his 20 years of

experience with these machines but could not testify in terms of how many degrees off-level would trigger the alarm. Harrigan Tr., exhibit "J" at p. 319.

88. Mr. Harrigan explained that the operator can feel if the machine is not moving by standing in the machine and feeling it; if the machine is not moving and it is stable and feels safe, the next step is to determine if the machine will elevate the basket. "If nothing is going off, the machine doesn't stop, no alarms go off, you should be safe. I never would have gone up that day if I thought that girl would have gotten hurt." Harrigan Tr., exhibit "J" at p. 320.

89. Plaintiff explained further that the operator should be able to feel if the lift is rocking or if something is wrong. If he is able to lift the basket and does so, he is then depending on the (tilt) alarm. Harrigan Tr., exhibit "J" at p. 321.

90. Thus, per his testimony, Mr. Harrigan did perform pre-lift testing to ensure to his satisfaction that the lift was working properly and able to function while lifting without the tilt alarm sounding. Harrigan Tr., exhibit "J" at p. 321.

91. Mr. Harrigan testified that they did not get to the height he intended, as the lift started to topple before they got to the level they sought. He said Ms. Malone started screaming and he looked at the building "and the building was going away from me and I knew we were going over." Harrigan Tr., exhibit "J" at p. 109. He does not know how high they were when the lift started to fall. *Id.* When he was told that OSHA measured the extension height of the lift after the accident as 17.256 feet, he stated that it sounded correct. Harrigan Tr., exhibit "J" at pp. 282-283. He could not testify as to whether the lift was in motion when it began to topple over. Harrigan Tr., exhibit "J" at p. 297.

92. He does not recall anything from when the lift started to fall until he was placed in the ambulance. Harrigan Tr., exhibit "J" at p. 110. He remembers Guy, his super, yelling, "Gary, I am here," and that is the last thing he recalls. Harrigan Tr., exhibit "J" at p. 112. He

does not recall the ambulance ride, or speaking with the EMTs; he believes he was unconscious at the time. *Id.* He estimates that his next conscious memory was two and a half to three months later when he was at Presbyterian Hospital. Harrigan Tr., exhibit "J" at pp. 113-114. He believes someone has told him that he hit his head; but does not recall seeing that fact documented. *Id.* He does not recall being treated for a head injury. Harrigan Tr., exhibit "J" at p. 114.

(vi) Mr. Harrigan is Critically Injured

93. When he awoke, the nurses told plaintiff what had been done for him in the hospital. He had a feeding tube and was restrained in the bed. He had a tube in his mouth and down his throat. Plaintiff testified: "they didn't tell me much, anything else. They didn't go over major injuries." Harrigan Tr., exhibit "J" at p. 115. Mr. Harrigan was told that he was restrained in bed because he "kept pulling [his] stuff out." *Id.* He later testified that he suffered extensive orthopedic injuries requiring multiple surgeries, including an "open book" pelvic fracture requiring three surgeries and external fixation; dislocations of his left elbow and shoulder also requiring (at the elbow) external fixation. Harrigan Tr., exhibit "J" at pp. 136-137. Plaintiff had also severed his urethra, and required a super-pubic catheter, as that injury could not be addressed until four to five months after his injury. Harrigan Tr., exhibit "J" at p. 138. Plaintiff estimated that he has had some four to five surgeries on the urethra, as it repeatedly becomes blocked or closed, requiring further catheterization and surgeries. Harrigan Tr., exhibit "J" at pp. 148-150. After his surgeries. Mr. Harrigan spent at least ten plus weeks in an inpatient rehabilitation facility on Long Island. Harrigan Tr., exhibit "J" at p. 137. He also had extensive

outpatient physical therapy to learn to walk and to strengthen his arm. Harrigan Tr., exhibit "J" at p. 144.[4]

94. During his rehabilitation plaintiff used, at various times, a special hospital bed; a walker, a wheelchair and ultimately, a cane. Harrigan Tr., exhibit "J" at p. 142.

95. Plaintiff does not recall seeing Ms. Malone since the accident, but states that she texted him once, to ask how he was doing. He responded, "just trying to get better." Harrigan Tr., exhibit "J" at p. 111.

(vii) The Accident Scene and Positioning of the Lift

96. Mr. Harrigan was shown pictures of the job site/accident scene. On defendants' Exhibit "E", he identified the ramp in front of the building as being used for pushing dollies with the building "mullions" up. Harrigan Tr., exhibit "J" at pp. 118-120. He testified that his crew had built the ramp, which was last used two months prior to his accident. Harrigan Tr., exhibit "J" at p. 120. The ramp was built over a void, which the crew filled with Styrofoam and then covered with plywood. Harrigan Tr., exhibit "J" at p. 122.

97. He could see the ramp as he was driving the lift prior to the accident and could see it when he came to a stop. He knew that his left front tire was "just barely on the ramp. It was not even on the ramp, it was on the plywood. I wouldn't consider that part of the ramp. It is about one inch on to that plywood." Harrigan Tr., exhibit "J" at pp. 123; 249. He testified that it was the left front wheel that was on the ramp when the lift was stopped in position prior to the accident. Harrigan Tr., exhibit "J" at p. 251.

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[4] As this motion concerns the general contractor's and owner's liability under the Labor Law, we will not further address the details of Mr. Harrigan's injuries; suffice it to say they are extensive, continue to plague him with residual effects and will likely require additional surgeries in the future. All of these matters will be addressed in the damages aspect of the litigation/trial.

98. Mr. Harrigan explained that he could have positioned the lift so that the left front wheel was not on the ramp, but he was attempting to get the lift so that Ms. Malone could photograph the straight portion of the area where she was inspecting: "I was trying to get the machine to where we can take the pictures on the straight portion ... so we can get two points of where she wanted to take pictures, so that was the reason for angling the machine that little bit. Harrigan Tr., exhibit "J" at pp. 256-257. He believed he had the machine "in the perfect position where I needed to be. That's why I stopped where I did." Harrigan Tr., exhibit "J" at p. 257. He testified that "possibly an inch" of the left front wheel was on the ramp ("almost to the point where I really didn't think that it was even on it, but I would say about an inch"). *Id.*

99. Mr. Harrigan testified that he had never operated (driven) the lift while the basket was extended; he similarly, had not operated the other lift while the platform was extended upward. Harrigan Tr., exhibit "J" at p. 273. He could not testify whether the subject lift had the capability to be driven while the basket was extended upward. Harrigan Tr., exhibit "J" at pp. 272-273. He had used other lifts in the past that moved backwards or forward while the lift was in the elevated position. Harrigan Tr., exhibit "J" at pp. 273-274.

(viii) Testimony About Lift Outriggers

100. Looking at Defendants' exhibit "H", Mr. Harrigan identified the lift involved in his accident and testified when asked that he now knows that three small yellow circular things on the bottom of the lift are outriggers. Harrigan Tr., exhibit "J" at pp. 125-126. He learned this when his friend, Ed Jenson, another member of the ironworkers union, brought him pictures of the accident scene and showed him the outriggers. Harrigan Tr., exhibit "J" at pp. 126-127; 311. *This was the first time he learned that the lift involved in his accident was so equipped* (i.e., with outriggers). *Id.* (Emphasis added).

101. Plaintiff had never seen outriggers on this size lift before; he testified that in his experience this was "a very unique machine to have outriggers on it." Harrigan Tr., exhibit "J" at pp. 127; 217: ("because of the outriggers, I don't ever recall using the lift that size without riggers [sic] on it. That's what I said"). He did not know if he had ever used this model of lift in the past: "I don't know the model number and I would never have a reason to check model numbers, it is not my job." Harrigan Tr., exhibit "J" at p. 217. Mr. Harrigan further testified that "the problem is that I and my guys never took notice of it because they are hidden as you can – not hidden but, you know, you don't physically see them unless you are really looking for them. We never really – I never noticed the outriggers." Harrigan Tr., exhibit "J" at pp. 217; 439.

102. He had seen outriggers on other machines; he attempted to explain how they usually appear to the attorneys at the deposition. Harrigan Tr., exhibit "J" at p. 128. Mr. Harrigan emphasized: "you can physically see them, I mean they are part of the machine...." *Id.* Mr. Harrigan testified that he had never seen outriggers on a rig like this before. Harrigan Tr., exhibit "J" at p. 129.

103. In the past, he had used the outriggers on outrigger-equipped machines to level the lift on unleveled or unstable ground. Generally, he testified, that there was no need for labeling on a machine to indicate that it was equipped with outriggers, because "you can pretty much look at the machine and tell that there were outriggers because they were, you know, you can physically see the outriggers." Harrigan Tr., exhibit "J" at p. 130. He testified that he had used outrigger-equipped machines on 10 to 20 times in the past prior to his accident. Harrigan Tr., exhibit "J" at p. 249.

104. Plaintiff could not remember if he had previously seen a lift with a 32-foot height capacity that did not have outriggers. Harrigan Tr., exhibit "J" at p. 423. Mr. Harrigan said that the lifts he had previously been on to go over 30 feet were generally "huge, huge machines, but

of course they had outriggers. Did I ever use a small machine like this to go 30 feet, I can't remember." Harrigan Tr., exhibit "J" at p. 424.

105. Mr. Harrigan was not concerned about the perceived lack of outriggers on the subject lift "because the machine never gave me any reason to think it was out of level or unstable or unsafe so I never thought about outriggers. It is not like somebody said 'he is going this high, make sure we get him a rig with outriggers.'" I don't think that was ever thought of. Harrigan Tr., exhibit "J" at p. 425. He explained the job site was on level ground, with new, smooth concrete; level surfacing was not a problem. Harrigan Tr., exhibit "J" at p. 426.

106. He would engage outriggers he knew were available on a lift machine where the tilt alarm sounded during elevation and he could not get the machine sufficiently level by repositioning. Harrigan Tr., exhibit "J" at p. 411. He did not feel that he needed outriggers at the time of his accident because the lift felt stable and safe and when it began to elevate the lift platform, there were no alarms sounding, and the machine did not stop elevating. "It felt like any other day I was using it and it went and there was no problem at all." Harrigan Tr., exhibit "J" at p. 412.

107. He agreed with the inquiring attorney's suggestion that the decision to engage outriggers is a determination made by the operator of the machine. Harrigan Tr., exhibit "J" at p. 412. The mere fact that a machine is equipped with outriggers does not require that they be engaged at all times, but some machines with outriggers will not operate unless the outriggers are engaged. Harrigan Tr., exhibit "J" at p. 412.

108. Mr. Harrigan explained that the downside of using outriggers is that they are time consuming; each time the rig must be repositioned, the operator must climb down out of the rig, stow the outriggers, move the machine and re-deploy the outriggers. Harrigan Tr., exhibit "J" at p. 427. On a jobsite, time is of the essence:

A. Well, you are using time and if you don't need [outriggers] you are using time and it is all about making the boss the money and getting the job done. I hate to keep saying it but that's the way we think.

Q. I understand.

A. You are out in the field for 20 years you want to impress people and you want to get the job done and you want to make your boss money and for yourself and the Union and everybody else.

Harrigan Tr., exhibit "J" at pp. 427-428.

109. He testified that on the day of the accident, even if he had known the machine had outriggers, in the absence of a feeling of unsteadiness or a tilt alarm, he would not have used the outriggers because he believed the machine was stable. Harrigan Tr., exhibit "J" at p. 413. Even with the left front wheel on the ramp, plaintiff felt that in the absence of the tilt alarm sounding, the rig was sufficiently stable as to be safe; he conceded it was safer with all four wheels on the ground. Harrigan Tr., exhibit "J" at p. 418.

110. Mr. Harrigan only looked at the left front wheel when he positioned the rig; he did not look at the positions of the other wheels. Harrigan Tr., exhibit "J" at p. 419. He was concerned about positioning the basket for the job to be done, in this case, to allow Ms. Malone to get close enough to inspect and photograph the bolts. *Id.* He agreed that he could not state with certainty whether the other three wheels of the lift were firmly on the ground. Harrigan Tr., exhibit "J" at pp. 419-420.

111. Mr. Harrigan also testified that sometimes it is impossible to firmly have all four wheels on the ground and this fact would not preclude the use of the lift. Harrigan Tr., exhibit "J" at p. 417: "Not always. Sometimes you just can't get them all on the ground." However, he *also* testified that he has never used a scissor lift without outriggers and without having all four tires on the ground. *Id.* He did not know with certainty that all four wheels were on the ground when he first started lifting the rig at 50 UN Plaza. Harrigan Tr., exhibit "J" at p. 417.

112. In addition to his own prior-stated feeling for the machine based on years of experience, Mr. Harrigan relies on the tilt alarm to determine if the lift machine is sufficiently level and stable; if it does not sound, he proceeds with the elevation of the lift basket. Harrigan Tr., exhibit "J" at p. 414.

113. He also testified that he has seen other types of outrigger-equipped machinery and vehicles, including cranes (which he has not operated) and fire trucks. Harrigan Tr., exhibit "J" at p. 249. He testified, for example, when the fire company's ladder truck was delivered from its manufacturer in Indiana, three of the firefighters from the company go to the factory to pick up the truck and its builders train them on the use of the truck's features (including the outrigger system). Those firefighters then come back to the company and train the other members. Harrigan Tr., exhibit "J" at pp. 441-442. By the same token, Mr. Harrigan testified that whoever dropped the lifts off at the job site should ensure that someone is familiar with its systems and features so they, in turn, can ensure this information is passed to all other operators on the job. Harrigan Tr., exhibit "J" at p. 442.

114. Mr. Harrigan is familiar with tilt alarms and was aware that the lift he used on the day of his accident was equipped with such an alarm because "I know they all do have them." Harrigan Tr., exhibit "J" at p. 132. He did not test the tilt alarm and did not hear one on the day of his accident. *Id.*

115. He testified that he has not spoken to anyone from Genie or United Rentals since the time of the accident and in no pre-accident discussions had any such persons regarding the use and operation of the lifts. Harrigan Tr., exhibit "J" at pp. 301-302.

116. Mr. Harrigan was asked whether the tilt alarm could be disabled, and, in light of decals that he had been shown stating that the alarm should not be disabled, he responded that he

must assume it is possible, or the decals would not have been created. However, he never heard of anybody doing so. Harrigan Tr., exhibit "J" at pp. 431-432.

117. Asked if the alarm could be inadvertently disabled, he answered: "anything can happen." Harrigan Tr., exhibit "J" at p. 433.

118. Asked why the tilt alarm did not sound, Mr. Harrigan testified that he believed it was because the lift was level. Harrigan Tr., exhibit "J" at p. 435. He was asked: "If a machine is level, to the best of your knowledge and based on 20 years of experience, does it fall over?" Mr. Harrigan replied "No." Harrigan Tr., exhibit "J" at p. 435.

B. Testimony of Guy Zammit for Third-Party Defendant Coordinated Metals, Inc.

119. Mr. Zammit testified as a witness proffered by third-party defendant Coordinated Metals, Inc. ("CMI"), Mr. Harrigan's employer, on April 13, 2016.

120. Mr. Zammit holds the title of Field Super; it is "[his] job to run every job that CMI has conducting in the field." Deposition Transcript of Guy Zammit ["Zammit Tr."], exhibit "K" at p. 10. Like Mr. Harrigan, he is a member of Local 580. Zammit Tr., exhibit "K" at p. 11.

121. He has operated scissor lifts numerous times. *Id.* Prior to the date of Mr. Harrigan's accident, Mr. Zammit did not know if he [Zammit] was certified to operate a scissor lift. Zammit Tr., exhibit "K" at p. 12. He attended no courses to be so trained; he testified, "there is nothing besides just the driver telling us how to use the machine." *Id.*

122. He did not certify other laborers to become aerial lift certified operators. *Id.*

123. CMI conducts weekly "toolbox safety meetings" that every worker is required to attend in order to get paid, including Mr. Harrigan. Zammit Tr., exhibit "K" at p. 13. The foreman on the job conducted these meetings; Mr. Zammit was unaware of any such meetings

that Mr. Harrigan attended which he [Harrigan] did not conduct in his capacity as foreman. Zammit Tr., exhibit "K" at pp. 13-14.

124. Mr. Zammit was unaware of any "actual safety training" provided by anyone at CMI to Mr. Harrigan prior to Jan. 13, 2014. Zammit Tr., exhibit "K" at p. 14.

125. Outside of CMI, Mr. Harrigan received training related to OSHA standards, the 30-hour OSHA course; a 4-hour scaffold or an 8-hour scaffold training program; he is a certified welder; a fire watch and torch operator. Zammit Tr., exhibit "K" at pp. 15-18. There may be additional certifications, but Mr. Zammit was not aware of them without checking for this information from the union. Zammit Tr., exhibit "K" at pp. 15; 18.

126. CMI keeps all certifications and licenses on record for its employees, updating the same as the employee presents them. Zammit Tr., exhibit "K" at p. 16.

127. Mr. Zammit assumed in January 2014 that Mr. Harrigan was a certified aerial lift operator; he never saw any proof of certification. Zammit Tr., exhibit "K" at p. 20. To Zammit's knowledge, certification was not required. *Id.* If Zammit has been aware that certification was required, it would have been his responsibility to ensure that the certification was obtained. Zammit Tr., exhibit "K" at p. 21.

128. Zammit always assumed that the total training for use of a scissor lift was when the driver delivered the machine and demonstrated how the lift was operated. Zammit Tr., exhibit "K" at p. 21.

129. Zammit requested the Genie 3232 model for this job because it was a new model and he had not previously seen stabilizers (outriggers) on a scissor lift before. Approximately one year prior to the subject accident, he saw this model on another job site and decided that, given the height at which they were working, he should order this model going forward. Zammit Tr., exhibit "K" at pp. 24-25; 38. To get the lift, he called the office and said: "give me a 3232

scissor lift." Zammit Tr., exhibit "K" at p. 38. He believed the GS 3232 was safe because of the stabilizers (also referred to as outriggers or levelers during this deposition). Zammit Tr., exhibit "K" at p. 121. "When I saw those levelers, I was, like, that's a great idea. Because I seen them come down where the wheels go totally off the ground and the levelers are the only thing on the ground. So now it has no more wheel motion. It's almost like it's fixed and I liked it." Zammit Tr., exhibit "K" at p. 121.

130. He [Zammit] was trained to use the lift with stabilizers by the driver who delivered it to a different site. Zammit Tr., exhibit "K" at p. 25. Following Mr. Harrigan's accident in January 2014, Mr. Zammit was fully certified at the United Rentals yard office in New Jersey on the operation of aerial lifts. Zammit Tr., exhibit "K" at p. 27.

131. He was aware that the machine also had an auto level function because he saw the gauge on the machine, but did not know if their specific model on this job site had that function. Zammit Tr., exhibit "K" at pp. 25-26.

132. Mr. Zammit initially stated that he was sure Mr. Harrigan had previously operated a Genie 3232 lift prior to being on the 50 UN Plaza job site, but then said "if not, then I can't remember." Zammit Tr., exhibit "K" at p. 26. He did not know if anyone had familiarized Mr. Harrigan with the stabilizer functions of the 3232 machine. Zammit Tr., exhibit "K" at p. 27.

133. At the time of Mr. Harrigan's accident, CMI had no one employed who could provide certification on the use of the lifts. Zammit Tr., exhibit "K" at p. 28.

134. With regard to the jobsite for the 50 UN Plaza job, Mr. Zammit testified that he did not know who the owner was, but identified Lend Lease as the general contractor ("GC"); he identified several officers of CMI and described Gerald Bianco's position with Lend Lease as "Head Honcho". Zammit Tr., exhibit "K" at pp. 28; 32.

135. Mr. Zammit was not involved in any of the contract negotiations between CMI and Lend Lease. Zammit Tr., exhibit "K" at p. 29. His day-to-day responsibility was to keep the job going. Zammit Tr., exhibit "K" at p. 32.

136. Mr. Zammit tries to go to the job site every day; if not he speaks by phone with the foreman. Zammit Tr., exhibit "K" at p. 32. Prior to Mr. Harrigan's accident, Mr. Zammit estimated that for a five-day workweek, he was on site at least three days. *Id.*

137. Mr. Zammit was asked to read from a document proffered by plaintiff's counsel, indicating that "Our powered cranes, hoist, serial [sic] platforms, scissors lifts provided by contractor must have competent driver that are certified by a qualify [sic] third-party." Zammit Tr., exhibit "K" at p. 33. He testified that he had assumed Mr. Harrigan was "a competent driver certified by a qualified third-party" but had no proof of that fact. Zammit Tr., exhibit "K" at p. 34.

138. Mr. Zammit was asked to review an (unidentified) form he explained was filled out be each worker on the job (including himself) and submitted to Lend Lease. He did not review them prior to submission. Zammit Tr., exhibit "K" at p. 35. On the fourth of nine pages, a section entitled "scaffolds and lifts" was brought to his attention, which read, "all persons are required to attend the safety class conducted by the lift rental company prior to using the lift." Zammit Tr., exhibit "K" at p. 35. He did not understand whether or not the rental company would be providing a safety class to CMI employees on the job site.

139. He said that he never considered seeking such a class to be held because "I never knew that it needed to be." Zammit Tr., exhibit "K" at p. 36. He did not know that United Rentals offered such classes at the time the subject lift was delivered to the site and denied that such knowledge would be part of his job. Zammit Tr., exhibit "K" at pp. 36-37.

140. He did not know if any of CMI's employees on the 50 UN Plaza job site were certified by a qualified third-party to operate a scissor lift prior to January 13, 2014. Zammit Tr., exhibit "K" at p. 37.

141. Mr. Zammit did not recall whether he told Mr. Harrigan that the incoming new machine had stabilizers/outriggers. Zammit Tr., exhibit "K" at p. 39.

142. He never told Gary Harrigan that Mr. Harrigan needed to use the outriggers on the GS 3232 lift. Zammit Tr., exhibit "K" at p. 39.

143. He never told Gary Harrigan that Mr. Harrigan needed to use the auto leveling function on the GS 3232 lift. Zammit Tr., exhibit "K" at p. 39.

144. Mr. Zammit does not know if CMI ever requested training from rental companies at the time lifts were delivered to the site prior to January 2014. *Id.*

145. He recalled that six to eight years prior to the accident, "somebody from somewhere came" and had them gather all the men up and demonstrated the features of the machine, offered the opportunity to ask any questions, and had all present sign a paper. He recalled Mr. Harrigan being present for that. Zammit Tr., exhibit "K" at p. 40. He said that this did not necessarily involve a 3232 lift, however. *Id.*

146. He testified that all CMI workers were familiarized with the GS 3232 lift by experience, but did not know specifically with regard to those on the 50 UN Plaza site. Zammit Tr., exhibit "K" at pp. 41-42.

147. The person responsible for safety on the site was the "competent person," who was the foreman, in this case Gary Harrigan. Zammit Tr., exhibit "K" at pp. 42; 102. On paperwork, however, it is Mr. Zammit who is designated by name as the responsible person. *Id.* He has never seen any such paperwork designating anyone, including himself, however. *Id.* He later testified that contract bids were submitted a year in advance of actual work, so his name is

often put in as the competent person, as the actual job staffing is not known when the contract is prepared. Zammit Tr., exhibit "K" at pp. 101-102.

148. The only qualifications he possessed to be the competent person was the OSHA 30 course. He also took a first aid course. He did not lead any toolbox talks at the job site. Zammit Tr., exhibit "K" at p. 43.

149. Mr. Zammit was shown the CMI Safety Manual submitted to Lend Lease as part of its contract for the 50 UN Plaza job. Zammit Tr., exhibit "K" at p. 44. Pursuant to that manual, as the Superintendent, he reported the fact of Mr. Harrigan's accident, but did not document that report in writing. Zammit Tr., exhibit "K" at pp. 45-46. There were many reports in his office from the DOB, Lend Lease, OSHA, the police and the ambulance. He felt this was sufficient. Zammit Tr., exhibit "K" at p. 46. He does not know if anyone else at CMI generated a report of the accident. *Id.*

150. Mr. Zammit was shown a report that indicates it was prepared by "Guy Zammit, Competent Person." He testified that he did not know who had prepared the report. Zammit Tr., exhibit "K" at p. 47.

151. He did not know whose responsibility it was on behalf of CMI to ensure that the provision in the contract stating: "only authorized and trained individuals may operate aerial lifts" was complied with. Zammit Tr., exhibit "K" at p. 51.

152. Mr. Zammit was Mr. Harrigan's supervisor at CMI. Zammit Tr., exhibit "K" at pp. 51-52. Paul Santo, Grank Grippi, and Scott Eisenberg, all of whom are partners in the business, in turn, supervised Zammit. Zammit Tr., exhibit "K" at p. 52. He did not know who owned the company. *Id.*

153. He understood the contract provision reading that CMI would "avail ourselves of the safety and health training programs" to mean that they would keep up with CMI's own safety

training program, which he identified as the weekly toolbox talks. Zammit Tr., exhibit "K" at pp. 53-54.

154. Written materials were disseminated at the toolbox talks; these materials were provided to him by the secretary leaving them on his desk with the payroll (he did not know who designated the topic for the secretary, however). Zammit Tr., exhibit "K" at pp. 54-55; 57. Each week on Thursday, when he goes to the site to pay the workers, he handed the foreman his check and that safety tool talk document. Zammit Tr., exhibit "K" at pp. 54-55. The foreman would get a single document, from which he would conduct the toolbox talk, and then each worker would sign the document. Zammit Tr., exhibit "K" at p. 55. He did not know if any of the talks given by Gary Harrigan concerned the use of aerial lifts, but testified that he has seen the topic "coming across" before. Zammit Tr., exhibit "K" at p. 56.

155. The signed documents relating to the toolbox talks given by Gary Harrigan would be on file in the CMI office. Zammit Tr., exhibit "K" at p. 55.

156. Mr. Zammit believes the source of the documents is a website called "Lovell Safety" because their heading is on the paperwork. Zammit Tr., exhibit "K" at p. 57. He had no contact with Lovell Safety and did not know if CMI had a contract with Lovell. *Id.* He was later shown evidence that indicated to him there was a Lovell "52 toolbox talks program". Zammit Tr., exhibit "K" at p. 89.

157. The CMI document lists four individuals who had OSHA 30 training; Mr. Harrigan was not listed among them. Zammit Tr., exhibit "K" at p. 58.

158. Mr. Zammit was on the job site the morning of Mr. Harrigan's accident and was present when Harrigan went to get the lift machine for the job. Zammit Tr., exhibit "K" at p. 59.

159. He told Mr. Zammit that he was going to show the inspector "the bolt connection." Zammit Tr., exhibit "K" at p. 60. He did not know the requirements of cooperating

with the inspector, but stated that if they refused to cooperate, "she's just going to make my life very difficult." Zammit Tr., exhibit "K" at p. 61.

160. He did not give Mr. Harrigan any direction with regard to using the lift or where to use it on the morning of the accident. Zammit Tr., exhibit "K" at p. 61. He was not aware of Mr. Harrigan failing to cooperate with any direction given to him on the morning of his accident. Zammit Tr., exhibit "K" at pp. 61-62.

161. Mr. Zammit described Gary Harrigan as "a very good worker" who was "dependable, loyal... just had one mission, let's get it done. Let's get this job done." Zammit Tr., exhibit "K" at p. 62. To his knowledge, Mr. Harrigan always used the safety devices he was required to use and abided by the safety rules. *Id.*

162. He testified that Gary Harrigan never refused to follow the rules and never refused to use a safety device he was required to use. On the day of the accident he was doing everything he was expected to do that day, and nothing he was not supposed to do. Zammit Tr., exhibit "K" at p. 63.

163. Mr. Zammit was not on site when the accident occurred; he learned about it via a phone call from Kevin Ahearn, another ironworker on the site, who said, "Gary fell". Zammit Tr., exhibit "K" at pp. 63-64. Asked to elaborate, Mr. Ahearn told Zammit: "Guy, it's bad." In response, Mr. Zammit told him he would be back at the site in five minutes. Zammit Tr., exhibit "K" at p. 64.

164. Upon his arrival he saw the lift on its side, many police officers and a great deal of blood. Mr. Harrigan was being removed by stretcher and Zammit told him "I'm here, I'm here" and Mr. Harrigan asked him to call his wife. Zammit Tr., exhibit "K" at p. 65.

165. He walked around the site and took some pictures. Asked to look at Plaintiff's exhibits 10A through 10G, he identified only a portion of those photographs (10A through 10E)

as having been taken by him. Zammit Tr., exhibit "K" at p. 66. He identified a man in the photograph marked 10A as Lend Lease employee Don Denardo. Zammit Tr., exhibit "K" at p. 67.

166. He testified that it was not CMI's responsibility to clean up debris on the ground that is depicted in the photographs. He believed it was Lend Lease's responsibility. Zammit Tr., exhibit "K" at pp. 68-69.

167. He believes that Lend Lease had a safety inspector on the site on a daily basis; he could not recall this inspector's name. Zammit Tr., exhibit "K" at p. 71. Asked if this inspector had the ability to stop any CMI employee's work if he saw what he determined to be an unsafe condition, Mr. Zammit testified "a hundred percent." Zammit Tr., exhibit "K" at p. 71.

168. Mr. Zammit testified that the fire department had picked up the lift and wedged a 2 x 4 under it to assist them in removing Mr. Harrigan or unstrapping his belt. Zammit Tr., exhibit "K" at p. 72, referring to photograph 10D. Mr. Zammit did not know if the base of the machine changed positions as a result of the fire department moving the basket. Zammit Tr., exhibit "K" at p. 73.

169. Asked if anyone at the site blamed Mr. Harrigan for the accident, Mr. Zammit testified that there were no eyewitnesses to the accident other than Mr. Harrigan and the inspector ("the girl"). Zammit Tr., exhibit "K" at p. 74. He said no one told him that Mr. Harrigan had done anything improperly. *Id.*

170. He learned of OSHA's investigation when he received a call from an OSHA inspector, whose name he could not recall. Zammit Tr., exhibit "K" at p. 75. The conversation was brief; the inspector asked for a convenient time when they could meet to discuss the incident. *Id.*

171. They met some five weeks later on another construction site. In addition to Mr. Zammit and the OSHA investigator, Richie Campos and Paul Sands were present for the meeting. Zammit Tr., exhibit "K" at p. 76. In addition to Mr. Campos and Mr. Sands, CMI also had an employee named Kevin Ahearn present at the 50 UN Plaza site when Mr. Harrigan was injured. Zammit Tr., exhibit "K" at p. 77. Later, on reiteration, Mr. Zammit responded, "yes" when asked if he, Richie, Paul and Kevin were at the meeting with the OSHA inspector. Zammit Tr., exhibit "K" at p. 82.

172. All three (Campos, Sands and Ahearn) were present when Mr. Harrigan was injured. None witnessed the fall. Mr. Campos told Mr. Zammit that he heard the crash and when he responded to the site of the incident, he found the lift on its side, Gary "over there" and "the girl over there" and Gary screaming. Zammit Tr., exhibit "K" at p. 78. Mr. Harrigan had been ejected from the basket, but still had his harness on and it was still connected to the basket. *Id.* Mr. Zammit believes the lanyard was "a 6-footer." *Id.* Mr. Zammit testified that when he arrived at the scene, Mr. Harrigan's harness had been cut, but it was still connected to the machine. Zammit Tr., exhibit "K" at p. 79.

173. Mr. Zammit denied that Richie Campos had heard any alarms going off in advance of hearing the crash. Zammit Tr., exhibit "K" at p. 79.

174. Both Paul Sands and Kevin Ahearn reported the same information to Mr. Zammit; they heard no alarms, they heard the crash, they responded to the scene to find the lift on its side, Ms. Malone and Mr. Harrigan on the ground and Gary Harrigan screaming. Zammit Tr., exhibit "K" at p. 80.

175. Nobody present at the job site reported to Mr. Zammit that the lift's alarm had sounded prior to the crash. Zammit Tr., exhibit "K" at p. 82.

176. Returning to the subject of the OSHA inspector meeting, Mr. Zammit reported that the inspector just asked what he knew about the accident; she did not ask about Mr. Harrigan's training or certification to operate the lift. Zammit Tr., exhibit "K" at p. 83. He does not recall filling out or signing any paperwork as a result of that meeting. *Id.*

177. Mr. Zammit testified that he was not aware of any citation from OSHA or the Department of Labor resulting from Mr. Harrigan's accident. Zammit Tr., exhibit "K" at pp. 84-86. He was unaware of any additional meetings between CMI officials and OSHA after his meeting on the job site with OSHA's investigator, Mr. Compos and Mr. Sands. Zammit Tr., exhibit "K" at p. 87. He was unaware of any stipulated settlement between CMI and OSHA/Department of Labor related to Mr. Harrigan's accident or payments made as a result of such settlement. Zammit Tr., exhibit "K" at pp. 97-98.

178. Scott Eisenberg from CMI asked Mr. Zammit if Mr. Harrigan was trained to operate the GS 3232 lift involved in the accident; Mr. Zammit told him to look in the license book in the CMI office. Zammit Tr., exhibit "K" at p. 86. What they found was the paper all of the crew had signed when trained by United Rentals some six to eight years earlier. Zammit Tr., exhibit "K" at p. 87.

179. Mr. Zammit was shown a letter (Plaintiff's Exhibit 5) on CMI letterhead to the US Department of Labor/OSHA dated May 30, 2014. He testified he had not seen it before. Zammit Tr., exhibit "K" at p. 88. It mentioned certifications for aerial lifts, which he believed was the certifications obtained after Mr. Harrigan's accident. Zammit Tr., exhibit "K" at pp. 89, 95-96.

180. He was shown another letter from CMI, dated June 3, 2014 (marked as Plaintiff's Exhibit 6). He testified that he had not seen it before and that Frank Grippi, the signer of the letter, had not discussed the content with him. Zammit Tr., exhibit "K" at pp. 90-91.

181. Mr. Zammit was unaware whether the operator's manual was delivered with the Genie 3232 lift. Zammit Tr., exhibit "K" at p. 93.

182. He stated that Mr. Harrigan was never told to perform a daily aerial lift inspection or complete a form for the same. Zammit Tr., exhibit "K" at p. 93. He stated there were no inspection forms of any kind with the Genie lift at the job site. Zammit Tr., exhibit "K" at p. 94.

183. CMI did not require an aerial spotter to assist Mr. Harrigan when operating the lift and he did not assign any employee to serve in this capacity. Zammit Tr., exhibit "K" at p. 94.

184. On questioning by Lend Lease's counsel, Mr. Zammit testified that Mr. Harrigan was likely on the 360 Madison Avenue job site where a 3232 lift was utilized prior to the 50 UN Plaza job site. Zammit Tr., exhibit "K" at p. 100. He did not recall if Mr. Harrigan was there when the 3232 lift was present or being used. *Id.*

185. Because he uses the GS 3232 lift on 75 percent of his job sites, he testified that Mr. Harrigan was likely present on some of these other jobs. Zammit Tr., exhibit "K" at p. 101. He uses other lifts of various types, but when the job requires a lift over 32 feet tall, he routinely orders the GS 3232. *Id.*

186. He does not know if Mr. Harrigan was aware the GS 3232 had outriggers. *Id.*

187. Mr. Harrigan was the person responsible for making all executive decisions on the job site about how CMI was going to go about their day's work and how [he's] going to co-exist with other trades working in the area. Zammit Tr., exhibit "K" at p. 102.

188. He was aware that there had been foreman's meetings on the job approximately once weekly. Zammit Tr., exhibit "K" at pp. 102-103. He did not attend these, as he (Zammit) was not a foreman. Mr. Harrigan attended. Zammit Tr., exhibit "K" at p. 103.

189. The Lend Lease site safety "guy" provided the CMI employees a site orientation when they first arrived to work. Zammit Tr., exhibit "K" at p. 103. Zammit, and project

managers Steve Lean and Bob Lentus attended this orientation; later Bob Lentus was the only project manager on the job. Zammit Tr., exhibit "K" at p. 104.

190. Mr. Zammit described a cursory meeting. "They presented, like, you guys have been in business so long, you know, construction. You are - - obviously you know what's safe, what's not safety. Everybody be on the lookout. You don't like something, come down here. We will do something about it. Does anybody have any questions? No. Everybody signs this paper. ... You go over there and get your picture taken. We will give you your I.D." Zammit Tr., exhibit "K" at p. 105.

191. Lend Lease also had periodic safety meetings attended by Gary Harrigan; CMI was awarded a prize for being the safest "outfit" on the job. Zammit Tr., exhibit "K" at p. 106.

192. Mr. Zammit testified that he just "looked around" to investigate the accident; that "we all looked around." Zammit Tr., exhibit "K" at p. 106. Neither he, nor other CMI personnel, reached any conclusions. "Just assumptions." Zammit Tr., exhibit "K" at p. 107. He later backed off of the word assumptions, stating, "we look at the machine how its laying and what we think could of [sic] happened." Zammit Tr., exhibit "K" at p. 107.

193. Mr. Zammit testified that he was and still is friends with Mr. Harrigan and they keep in touch; he stated that Mr. Harrigan does not recall how the accident occurred, his memory is that one minute he was up on the lift and next minute, he was in the hospital. Zammit Tr., exhibit "K" at p. 108.

194. Asked if it was safe to elevate the lift while one wheel was on the ramp, Mr. Zammit testified that if the lift elevates, it senses that the ground is level and lifting is safe. He testified that the ground is never perfect on any construction site and "it's a chance we take" to elevate the lift. Zammit Tr., exhibit "K" at pp. 108-109. Pushed further about the ramp, Mr. Zammit replied, "Like I said, the machine wouldn't go up if the machine senses it's not correct.

... because the sensor will not let it go up. It's going to know it's out of level." Zammit Tr., exhibit "K" at p. 109.

195. Mr. Zammit testified that Mr. Harrigan knew he could ask the driver for instructions if he needed them because they were on a first-name basis and he's been doing it for 25 years ("doing it" apparently referring to accepting and signing for equipment being delivered but not clarified on the transcript). Zammit Tr., exhibit "K" at p. 110.

196. If any CMI worker requested training on the site, they would have gone to Mr. Harrigan; Mr. Harrigan would have gone to Mr. Zammit if he was seeking training. Zammit Tr., exhibit "K" at p. 110. He did not ask for training on the scissor lift. *Id.*

197. Although Mr. Zammit was present when Mr. Harrigan was slightly injured on other jobs (cut fingers, objects in his eye) he had no problem with the way Mr. Harrigan performed his work. Zammit Tr., exhibit "K" at pp. 112-114. He said nothing negative about Mr. Harrigan's work: "Gary was a great worker. Gary was a go-getter. Very much so. Let's get it done. Let's get it done. Just sometimes he didn't think things through until it was too late." Zammit Tr., exhibit "K" at p. 115. Asked to elaborate, he explained: "He was focus – narrow minded. Just on the mission. Focused on the task at hand." *Id.* He discussed this with Mr. Harrigan each time he was injured. *Id.*

198. Mr. Zammit recalled a hydraulic leak on one of the snorkel lifts on the 50 UN Plaza site; he could recall no repairs necessary to the 3232 machine. Zammit Tr., exhibit "K" at pp. 117, 119. He testified that each time he was on the site he would observe the machines to be sure the tires were good, there were no leaks, no debris in the scissors. *Id.*

199. Mr. Zammit uses United Rentals some eighty percent of the time for lifts. Zammit Tr., exhibit "K" at p. 122. He identified two drivers "Jock" (or "Jacques") and "Dave". Zammit Tr., exhibit "K" at pp. 123-124.

200. Mr. Zammit testified that they only ask the driver questions about operation if they don't know how. Zammit Tr., exhibit "K" at p. 124. He explained: "it's always a rush scenario. I'm double-parked. Get the machine off my truck. Sign my paperwork. I got to get out of here. There is no time to stand out there and have a half hour safety meeting on this machine." Zammit Tr., exhibit "K" at p. 125.

201. Asked if they would have a 30-minute meeting if he asked for one, he replied "Yeah. After he found a parking spot and all of that stuff." *Id.*

202. He testified that Mr. Harrigan would have been provided training if he had "told [Zammit] that he needed some training on a lift that United Rentals delivered, could CMI have provided him with that training...." Zammit Tr., exhibit "K" at p. 125.

203. Asked why United Rentals had provided training on a scissor lift six years earlier, Mr. Zammit surmised that the general contractor and his site safety person on the job had "said nobody here is certified, because all companies had to do it on that specific job." Zammit Tr., exhibit "K" at p. 126.

204. Thus, he said, if the GC on a job requires certification, CMI would have gotten certifications for their employees. *Id.*

205. Mr. Zammit testified that he had not spoken to anyone from Genie about the accident. Zammit Tr., exhibit "K" at p. 128. He denied making any complaint about the 3232 lift prior to the accident. *Id.*

206. He testified that he liked the outriggers as a safety feature and now requests them each time he needs a thirty-two foot lift. He does not recall whether Mr. Harrigan was on any of the prior jobs where he had seen or ordered the 3232 and denied discussing the outrigger system with him. Zammit Tr., exhibit "K" at p. 130.

207. Mr. Zammit has operated the 3232 lifts and stated that he was never trained to use the outriggers prior to Mr. Harrigan's accident, he just "figured it out." Zammit Tr., exhibit "K" at p. 131. He said: "I just got on the machine and started playing with it. ... There are controls. And I just turn the machine on and start pressing buttons and see what happened." *Id.*

208. He said there are decals on the machine, which he only read if he was looking for something specific such as where is the charge when he is trying to charge the machine. Zammit Tr., exhibit "K" at p. 131.

209. Operational controls would be in the manual, but Mr. Zammit never took the manual out to read it. "I just figured it out on my own." Zammit Tr., exhibit "K" at p. 132.

210. He testified that since the workers were certified and comply with site safety, they are now responsible for reading the manual as the operators. Zammit Tr., exhibit "K" at p. 132. Prior to Mr. Harrigan's accident, there was no such requirement because there was no training. Zammit Tr., exhibit "K" at p. 133. It was "common sense" that if the operator didn't know how to operate the machine he would look in the manual, but he also testified that if the worker didn't know how to operate the machine he would not be asked to operate it. *Id.*

211. He explained that he stated earlier that operating the lift with one wheel on the ramp was "taking a chance" because "you know it's not right" and it was common sense and the OSHA requirement, which he knew from the OSHA course. Zammit Tr., exhibit "K" at p. 134.

212. He understood that OSHA requirements are mandatory. Zammit Tr., exhibit "K" at p. 135.

213. Mr. Zammit did not know that there is a specific warning in the 3232 manual not to rely on the tilt alarm as a leveling indicator. Zammit Tr., exhibit "K" at p. 136. He did not know it at the time of the accident nor indeed on the day of his deposition. *Id.* If he knew that fact on the day of the accident, and that his men were relying on the tilt alarm to determine if the

machine was level, he would have stopped them from so relying. Zammit Tr., exhibit "K" at p. 136.

214. He testified that it was "common sense" not to use a lift with only three of four wheels in contact with the ground. *Id.* He stated that if he had seen the lift being operated in that fashion he would have stopped it. Zammit Tr., exhibit "K" at p. 137.

215. The person responsible for OSHA compliance is the competent person, in this case Mr. Harrigan (for his own actions and those of the CMI crew). Zammit Tr., exhibit "K" at pp. 137-138.

216. There was no requirement that CMI workers read all the decals on machinery. Zammit Tr., exhibit "K" at p. 140.

217. Mr. Zammit knew that Mr. Harrigan had taken the certification training with the rest of the CMI workers on the site six-to-eight years earlier; he did not know that the certifications expired over time. Zammit Tr., exhibit "K" at p. 143. There was no requirement that the employee keep certifications current. *Id.*

218. He testified that he did not know if Mr. Harrigan had performed a daily operational check on the lift machine. Zammit Tr., exhibit "K" at p. 145. He did not know if Mr. Harrigan had performed an operational check on the morning of his accident. Zammit Tr., exhibit "K" at p. 153.

219. Mr. Zammit testified that he did not specifically ask his workers if they had heard an alarm prior to the lift crashing over; he explained that the alarm is loud and could not be missed. Zammit Tr., exhibit "K" at p. 146.

220. When he arrived at the scene he noted that the outriggers were not in the "down" position on the 3232 machine. Zammit Tr., exhibit "K" at p. 146. He testified that if he had

been present, he would have advised Mr. Harrigan to utilize the outriggers. Zammit Tr., exhibit "K" at p. 147.

221. He was surprised to learn that the machine still worked when righted after the accident, because it lay in the tipped position for four months. Zammit Tr., exhibit "K" at p. 148. It was righted by a crane. Zammit Tr., exhibit "K" at p. 151. It had a bent rail from the fall. Zammit Tr., exhibit "K" at p. 152. Mr. Zammit did not inspect the machine and does not know if there was any other damage from the fall. Zammit Tr., exhibit "K" at p. 153.

222. Mr. Zammit confirmed that if the lift was not level when operated, it would first beep the alarm and would then stop elevating. Zammit Tr., exhibit "K" at p. 156. At that point, it will not extend further, but will only do down. *Id.*

223. He testified that prior to Mr. Harrigan's accident, CMI workers would have relied on these two safety features of the lift, the tilt alarm and the locking mechanism to determine if the machine was level and safe to operate. Zammit Tr., exhibit "K" at p. 157.

224. It was "not uncommon" for a lift operator to proceed with elevation if a wheel or part of a wheel was resting on a piece of wood or debris. In fact, it would happen on any jobsite. Zammit Tr., exhibit "K" at p. 158. This had occurred in his experience when he was operating a lift. Zammit Tr., exhibit "K" at p. 159.

225. Mr. Zammit testified that if he had been present, had seen Mr. Harrigan elevating the lift while one wheel was on a piece of wood, no alarms were sounding and the lift appeared stable and level, and the lift did not lock, he would not stop him from operating the lift. Zammit Tr., exhibit "K" at p. 163. When asked if he would stop the operation if he saw one wheel was off the ground, he said that he would. Zammit Tr., exhibit "K" at p. 164.

226. He was not trained in when to use the outriggers, he did not know if the manufacturer recommended the outriggers in all scenarios and did not know if Mr. Harrigan had

any training on if or when to use the outriggers on the 3232 machine. Zammit Tr., exhibit "K" at p. 165.

C. Testimony of Kenneth Solter for Defendant General Contractor Lend Lease (US) Construction LMB, Inc.

227. Defendant Lend Lease (US) Construction LMB, Inc. ("Lend Lease") produced Kenneth Solter for testimony on March 21, 2016. *See* Deposition transcript of Kenneth Solter ["Solter Tr."] at Exhibit "L".

228. At the time of his deposition Mr. Solter was employed by Gilbane, a Construction Management Firm. Prior to Gilbane, however, he was employed at Lend Lease from 2004 through 2015. Solter Tr., exhibit "L" at p. 9. This period included January 13, 2014 (the date of Mr. Harrigan's accident). *Id.*

229. His title was Senior Superintendent, and he was in charge of "certain area of the construction of the building." *Id.* He worked at the project at 50 UN Plaza in January 2014. Solter Tr., exhibit "L" at p. 10.

230. There he was responsible for overseeing the area of the lobby, the outside of the first floor and amenity space construction for Lend Lease. Solter Tr., exhibit "L" at p. 10.

231. He did not know who owned the premises. *Id.*

232. Lend Lease was the construction manager for the job; Mr. Solter did not know if they were deemed the "general contractor." Solter Tr., exhibit "L" at p. 10. He was not involved in any of the contracts between Lend Lease and the owner of the site. Solter Tr., exhibit "L" at p. 11.

233. He reviewed the contracts between Lend Lease and subcontractors for the purpose of reviewing those contracts to know what they owed to build or construct. Solter Tr., exhibit "L" at p. 11.

234. He was not sure if G-Z/10UNP Realty, LLC was the owner of the site, but stated that the name was familiar. Solter Tr., exhibit "L" at pp. 11-12. He did not know their role in the job site.

235. Mr. Solter was at the job site daily, Monday through Friday from 6:00 am until 4:30 pm. Solter Tr., exhibit "L" at p. 12.

236. On a daily basis, he was responsible for overseeing the different contractors in areas he covered to make sure that placement of construction was in order, that each trade would go in at their assigned times to construct the building, in addition, if there were any design issues that prohibited a trade from installing the construction, he would work with his "PM" to work with the design team to come up with solutions. Solter Tr., exhibit "L" at pp. 12-13.

237. Mr. Solter holds a B.S. in environmental science. He has completed OSHA 10 and a four-hour scaffold course. Solter Tr., exhibit "L" at p. 13.

238. He was not directly in charge of site safety. Solter Tr., exhibit "L" at p. 13. The site safety manager was a Lend Lease employee named "Lenny" whose last name Mr. Solter could not recall. Solter Tr., exhibit "L" at pp. 13-14. He did not know if Lenny was on site the day of Mr. Harrigan's accident. *Id.*

239. The job was new construction of a 50-story building with commercial space on the first floor. Solter Tr., exhibit "L" at p. 15.

240. Mr. Solter's CMI contact was Mr. Harrigan, the foreman. Solter Tr., exhibit "L" at p. 15. He also knew Richie and Guy, who he identified as Gary Harrigan's boss. Solter Tr., exhibit "L" at pp. 15-16. Guy was not on the site on a daily basis. Solter Tr., exhibit "L" at p. 16.

241. He would speak with Guy directly for matters such as scheduling. Solter Tr., exhibit "L" at p. 16.

242. He knew Frank Grippy as CMI's President in January 2014. Solter Tr., exhibit "L" at p. 17.

243. Mr. Solter did not direct Mr. Harrigan's work in January 2014; he stated: "I am having problems with [the deposition question stating] telling him what to do though, because his work is his contract to complete. We schedule how he was going to fit in between trade contractors, so I don't actually tell him to go up and put that bolt in, I am not that type of foreman, all I do is work with him to schedule space available to him." Solter Tr., exhibit "L" at p. 17.

244. Mr. Solter did not direct Mr. Harrigan in terms of saying "go move this here, go put that in here, do this, don't do that...." Solter Tr., exhibit "L" at p. 18. He was unaware of anyone from Lend Lease directing Mr. Harrigan's work in that detailed fashion. *Id.*

245. He testified that if someone from Lend Lease observed a condition they believed was unsafe on the job, Lend Lease had the power to shut down that aspect of the job. Solter Tr., exhibit "L" at p. 99.

246. He never told Mr. Harrigan what to do, if anything, with regard to the operation of a scissor lift. Solter Tr., exhibit "L" at p. 18.

247. He was aware that CMI had a scissor lift on site and saw their employees operating that machine, including Mr. Harrigan. Solter Tr., exhibit "L" at pp. 19-20. He could not estimate how many times he saw Mr. Harrigan operate that machine. Solter Tr., exhibit "L" at p. 20.

248. He did not recall seeing him operate the machine in an improper manner, despite being in close proximity on occasion when Mr. Harrigan was operating the machine. Solter Tr., exhibit "L" at p. 20. He denied ever telling Mr. Harrigan anything about the manner in which he was operating the machine. *Id.*

249. Mr. Solter has been trained in the operation of scissor lifts by United Rentals and has been certified in such training, but he could not recall the date he was certified. Solter Tr., exhibit "L" at pp. 20-21. Later in the deposition the record for this training was found; it was dated February 2014. Solter Tr., exhibit "L" at p. 96.

250. He does not know if Mr. Harrigan was certified to operate the scissor lift[5] he was using at the job site. Solter Tr., exhibit "L" at p. 21. Asked whether he had an "expectation" about whether Mr. Harrigan was supposed to be certified prior to using a scissor lift at the site, Mr. Solter testified that he expected that Mr. Harrigan should have training before using the lift. Solter Tr., exhibit "L" at p. 22.

251. He was "not certain" whether Mr. Harrigan should have been certified by a third party in how to use that scissor lift. Solter Tr., exhibit "L" at p. 22.

252. He took no independent steps to determine whether Mr. Harrigan or any CMI employee had been certified in the use of a scissor lift. Solter Tr., exhibit "L" at p. 22. He denied that doing so was any part of his job. *Id.*

253. He was not certain if it was Lenny's job to determine whether CMI's employees were certified in using a scissor lift. Solter Tr., exhibit "L" at p. 22. He did not know whose job it was to make this determination. Solter Tr., exhibit "L" at p. 23. Nor did he know of any understanding in the construction industry as to who would generally certify operators of aerial lifts, as between their employers, the rental company or some other entity. Solter Tr., exhibit "L" at p. 23.

254. Lend Lease took no role in training any of CMI's employees. Solter Tr., exhibit "L" at p. 23.

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[5] The inquiring attorney did not specify which of the two scissor lifts on the site he was asking about.

255. Mr. Solter was uncertain whether Lend Lease had any type of scissor lift training program available to CMI employees. Solter Tr., exhibit "L" at p. 23. Later in the deposition, he stated with certainty that Lend Lease did not provide safety training for any personnel who operated scissor lifts on the job site at 50 UN Plaza prior to the accident. Solter Tr., exhibit "L" at p. 98.

256. Mr. Solter did not know if CMI was required to provide its employees' certifications to Lend Lease for operation of scissor lifts. Solter Tr., exhibit "L" at p. 23.

257. He was on site the day United Rentals delivered the scissor lifts to the job site and knew that it was United Rentals making the delivery. Solter Tr., exhibit "L" at p. 24. He did not actually witness the delivery, does not know which driver made the delivery and does not know if anyone affiliated with United Rentals "familiarized" CMI employees with the use of the scissor lift when it was delivered. Solter Tr., exhibit "L" at p. 24.

258. Mr. Solter is not certain whether anyone from United Rentals ever trained any CMI employees in any manner on how to use the scissor lift. Solter Tr., exhibit "L" at p. 24.

259. He does not know if Gary Harrigan was ever trained on or familiarized with the specific scissor lift that was delivered by United Rentals to the job site. Solter Tr., exhibit "L" at p. 25. Mr. Solter testified that workers are told in orientation not to operate machines they are not licensed to operate and he expects that workers on the site know that. Solter Tr., exhibit "L" at p. 100.

260. Mr. Solter was on the site the day of Mr. Harrigan's accident. Solter Tr., exhibit "L" at p. 25. He saw Mr. Harrigan working that day prior to the accident. *Id.*

261. Prior to the accident, he attended a meeting with a PM (Preston Roberts), Mr. Harrigan and the inspector (Kristen Malone). Solter Tr., exhibit "L" at pp. 25-26.

262. Mr. Solter said that Ms. Malone did not have the authority to direct the details of Mr. Harrigan's work. Solter Tr., exhibit "L" at p. 27.

263. Ms. Malone never complained to Mr. Solter about Mr. Harrigan prior to the day of the accident. Solter Tr., exhibit "L" at p. 28.

264. Mr. Solter's opinion was that Mr. Harrigan was a "good" worker. To his knowledge, Mr. Harrigan followed directions given him and complied with the rules of the workplace. Solter Tr., exhibit "L" at p. 29.

265. Mr. Solter learned of the accident within a few minutes of it occurring. Solter Tr., exhibit "L" at p. 29. He was downstairs in the PM's office and it came over the radio that there had been an accident. Solter Tr., exhibit "L" at p. 29. He did not recall what was said over the radio. Solter Tr., exhibit "L" at p. 30.

266. He exited the building and saw that other people were caring for Mr. Harrigan; he ran to flag medical personnel from the street as they arrived. Solter Tr., exhibit "L" at p. 30.

267. He did not immediately notice the details of the accident site but discussed it later with most of the people on site. Solter Tr., exhibit "L" at p. 30.

268. He did not speak with Mr. Harrigan before he was removed from the job site; he only saw him being ministered to by other persons. Solter Tr., exhibit "L" at p. 32. He did not hear their conversations with Mr. Harrigan. *Id.*

269. No one told him what occurred and he undertook no investigation. Solter Tr., exhibit "L" at p. 32. They (the supers on the job and the PM's) had a "roundtable" about the accident itself, but no understanding of what exactly happened. *Id.* The "roundtable" consisted of only Lend Lease personnel. Solter Tr., exhibit "L" at p. 33.

270. All he remembers from the roundtable discussion was that the lift went over, and how the injured people looked and the injuries. Solter Tr., exhibit "L" at p. 33. They discussed

why the lift went over, and they believed that the "lift must have been in the up position and fell over because it was already in the upward position." Solter Tr., exhibit "L" at p. 33. There was no discussion as to whether or not Mr. Harrigan was at fault in causing the accident. *Id.*

271. Mr. Solter did not know if Lenny the site safety manager conducted any investigation. Solter Tr., exhibit "L" at p. 34. He does not recall reviewing or seeing any accident reports at all related to this accident. *Id.*

272. He spoke with the CMI employee Richie about the accident; he does not recall speaking with any other CMI employee. Solter Tr., exhibit "L" at p. 34. His discussion with Richie was essentially the same as the roundtable; they had no real idea of what had occurred. Solter Tr., exhibit "L" at p. 35.

273. He does not know if anyone at Lend Lease made a determination as to the cause of the accident. Solter Tr., exhibit "L" at p. 36.

274. He does not know of any witnesses to the accident. Solter Tr., exhibit "L" at p. 36.

275. Mr. Solter was asked to review Lend Lease's contract with CMI, specifically the requirement that the "Contractor must have a safety orientation program for all of its new project workers. Documents of this orientation is [sic] required for the project. Weekly safety meeting with the workers of the contractor and its subcontractors of any tier are also required with evidence of the meeting." Solter Tr., exhibit "L" at pp. 38-39. He expressed his understanding of this contract clause as requiring that "any individual who comes on the project has to go through the site safety orientation." Solter Tr., exhibit "L" at p. 39.

276. Mr. Solter believed that CMI and its employees were part of the site safety orientation because "the foremen's meeting is a combination of the safety meeting also, so, yes."

Solter Tr., exhibit "L" at p. 39. Mr. Solter also took part in the weekly safety meetings at the job site. *Id.*

277. CMI representatives were not at every meeting, but were there most weeks. Solter Tr., exhibit "L" at p. 40. Generally, Mr. Harrigan was CMI's representative at the meeting. *Id.*

278. Minutes were taken and maintained by Lend Lease. Solter Tr., exhibit "L" at p. 40. In addition to Mr. Solter, Lend Lease employees present included Henry Marina and Lenny the site safety manager; supers Steve Nash Weber, Mike Malone and another super named Alex (last name unknown). Solter Tr., exhibit "L" at pp. 40-41.

279. Each subcontractor was supposed to send one individual to attend these meetings. Solter Tr., exhibit "L" at p. 41. Mr. Solter did not know how many subcontractors were on the site in January 2014. *Id.* He estimated 13-14. Solter Tr., exhibit "L" at p. 42.

280. Regarding the requirement for powered cranes, hoists, aerial platforms and scissor lifts provided by contractor to have a competent driver that is certified by a qualified third party, (section 15.20 of the contract), Mr. Solter did not know what the reference to a "qualified third party" meant. Solter Tr., exhibit "L" at p. 42.

281. Reviewing the scaffolds and lifts section of the contract, he stated that he was unaware of the requirement that all persons are required to attend the safety class conducted by the lift rental company prior to using the lift. Solter Tr., exhibit "L" at p. 46. He did not recall Lend Lease having an expectation that the lift rental company would be providing safety classes to the people using the lifts at the job site and did not know why Lend Lease's paperwork contained that language. Solter Tr., exhibit "L" at pp. 46-47.

282. Prior to January 2014, Mr. Solter was unaware of lift rental companies providing safety classes to workers at job sites where Lend Lease was the construction manager. Solter

Tr., exhibit "L" at p. 47. He was not certain if he knew of such lift rental companies providing such training off site. Solter Tr., exhibit "L" at pp. 47-48.

283. Mr. Solter testified that contractors are asked to evaluate the risks on a project and in that evaluation, to write pre-task plans on how to proceed through work to mitigate any hazards. Solter Tr., exhibit "L" at p. 48. He does not recall receiving any such pre-task plans from CMI. *Id.*

284. It would not have been Mr. Solter's job to review such pre-task plans. *Id.* He testified that would have been Lenny's responsibility. Solter Tr., exhibit "L" at pp. 48-49.

285. He did not know who at Lend Lease was responsible for processing the forms filled out by incoming contractor employees, including the verification of licenses and certifications. Solter Tr., exhibit "L" at p. 50. He confirmed that Lend Lease did require that licenses and certifications of workers on its jobs be verified, and that this entailed that whatever licenses were given to them, Lend Lease would take copies of. Solter Tr., exhibit "L" at p. 50.

286. They did not perform background checks, just that their identification was up to date whatever the certification was. Solter Tr., exhibit "L" at p. 50. This was done by the person running the orientation. *Id.*

287. Mr. Solter was familiar with the project safety and fire prevention program documents and stated it was not his job to review the submitted forms. Solter Tr., exhibit "L" at p. 51.

288. Mr. Harrigan did not indicate having completed the OSHA 10 class on his paperwork; according to Mr. Solter, Lend Lease would not allow a worker on the job site without that certification. Solter Tr., exhibit "L" at p. 52. He did not know why the verification of certifications section of Mr. Harrigan's papers were not completed by Lend Lease despite it being Lend Lease's responsibility to do so. Solter Tr., exhibit "L" at pp. 52-53. He

acknowledged that the area was not checked off but denied that this lack of "check off" was an indication that Mr. Harrigan's certifications had not been verified. Solter Tr., exhibit "L" at p. 53. He could not state with certainty that the verification had been done, however. Solter Tr., exhibit "L" at p. 53.

289. Mr. Solter did not know what a "supervisors' skills workshop" was or whether anyone from CMI attended such a workshop. Solter Tr., exhibit "L" at p. 56.

290. Mr. Solter did not participate in daily coordination meetings which included a review of the following day's activities, high risk works, coordinating trades. Solter Tr., exhibit "L" at p. 57.

291. Based on their meeting the morning of the accident, Mr. Solter was aware that Mr. Harrigan was going to take Ms. Malone up in the lift to inspect the work; he did not review the location of where the scissor lift was to be place for this inspection to go forth. Solter Tr., exhibit "L" at pp. 58; 59-60. There was no discussion of the positioning of the lift for the inspection at the meeting. Solter Tr., exhibit "L" at p. 59.

292. Mr. Solter was aware of debris on the ground around the job site prior to the accident; he acknowledged that it was Lend Lease's responsibility to clean the areas before they would roll around with machines. Solter Tr., exhibit "L" at p. 61. Lend Lease had its own laborers on the site; it was their job to clean up the workplace in general. Solter Tr., exhibit "L" at p. 61.

293. CMI had no obligation to do "general cleanup" of their work area. Solter Tr., exhibit "L" at p. 62. Some Lend Lease contracts require the contractors to "center pile" their debris, but he did not know if that was in CMI's contract. *Id.*

294. He did not know if CMI submitted copies of their toolbox talks to Lend Lease; it was the safety manager's job to review them when submitted. Solter Tr., exhibit "L" at pp. 62-63.

295. Mr. Solter did not know if it was CMI's responsibility to ensure that lifts were operated in accordance with all applicable standards, including OSHA, ANSI and manufacturer's guidelines. Solter Tr., exhibit "L" at p. 63. He did not know if anyone with Lend Lease took any steps to determine whether or not CMI was complying. Solter Tr., exhibit "L" at p. 63.

296. He was also unaware whether CMI was daily inspecting the aerial lifts per ANSI guidelines or whether they provided daily inspection records of their aerial lifts to Lend Lease. Solter Tr., exhibit "L" at p. 64. Review of these records was not his duty and he did not know who was responsible. Solter Tr., exhibit "L" at p. 64.

297. He never received documentation from CMI that "all operators of elevating work platforms must have a competent operator certified by a qualified third party." Solter Tr., exhibit "L" at p. 65. He did not know if anyone at Lend Lease had received such documentation, again, guessing that it would be the safety person. *Id.*

298. Mr. Solter knew that Mr. Harrigan was responsible for conducting the weekly toolbox talks for CMI. Solter Tr., exhibit "L" at p. 67. He was asked to review CMI's safety manual, in which Guy Zammit is identified as the safety person responsible for toolbox talks. He objected to the attorney reading the document into the record and seeking his agreement with the statement. Solter Tr., exhibit "L" at p. 70.

299. He also stated that the CMI safety manual naming Guy Zammit was turned in long before the contract was written, so they didn't know the identity of the foreman at the time (just as Mr. Zammit testified). He testified that this was how all companies did this procedure,

i.e., submitting the person who would likely be assigned to the project but the foreman takes over the duties of the on-site safety person. Solter Tr., exhibit "L" at p. 70.

300. He confirmed that the papers do not identify Mr. Harrigan as having OSHA 10 or OSHA 30 certifications. Solter Tr., exhibit "L" at p. 71. But he explained that anyone on the project had to have the minimum OSHA 10 certification and Gary Harrigan was deemed to be a foreman. Solter Tr., exhibit "L" at p. 71.

301. Guy Zammit told him that Harrigan would be the foreman. Solter Tr., exhibit "L" at p. 72. Mr. Solter does not recall Mr. Zammit telling him anything else about Mr. Harrigan's training or qualifications. Solter Tr., exhibit "L" at p. 73.

302. Solter defined the "competent person" as the "person that would be able to take action if there was an issue" and stated that in this case it was the foreman. Solter Tr., exhibit "L" at p. 73. He did not recall seeing that Guy Zammit was so designated in the paperwork. *Id.*

303. He did not know of any Lend Lease personnel speaking with someone from CMI or from Genie about the Harrigan accident. Solter Tr., exhibit "L" at p. 74.

304. He does not recall specifically speaking with Lenny or any other of the safety personnel on site regarding the Harrigan accident. Solter Tr., exhibit "L" at p. 75.

305. In addition to PMs and supers from Lend Lease on site, a representative of the owner was present "a lot." Mr. Solter did not know if it was every day. Solter Tr., exhibit "L" at p. 79.

306. Following the accident, a Lend Lease employee removed the lift's manual from the compartment where it was stored because Lend Lease personnel wanted to review the manual. He knew who had removed the manual but could not recall at the time of the deposition. Solter Tr., exhibit "L" at p. 83.

307. He recalls seeing the manual and that they were looking through it to determine how the lift was operated during their roundtable discussion. Solter Tr., exhibit "L" at p. 84. He believes the last time he saw the manual was in the super's office in the meeting room one level below the first floor of 50 UN Plaza. Solter Tr., exhibit "L" at p. 97. He does not know where it has gone since that time. Solter Tr., exhibit "L" at p. 98.

308. Mr. Solter does not know how long the lift remained on its side on the site; he does not know who investigated the machine or performed an accident investigation for Lend Lease. He thinks it was the site safety manager along with the claims department. Solter Tr., exhibit "L" at p. 86. He never saw any Lend Lease report in connection with the accident. Solter Tr., exhibit "L" at p. 87.

309. Mr. Solter testified that the possibility that the lift had not been on level ground was a possibility that Lend Lease personnel had discussed as a cause of the accident, but he did not know if that had been the case. Solter Tr., exhibit "L" at pp. 91-92. He did not know if anyone from Lend Lease had measured the ramp, but stated: "some engineers were brought out that reviewed the site afterwards." Solter Tr., exhibit "L" at p. 92. He did not know if it was Lend Lease representatives or companies hired by Lend Lease or by the law firms. *Id.*

310. Mr. Solter knew that plywood would be installed to assure lift access to the front of the building. He did not tell Mr. Harrigan not to operate the lift in the vicinity of the plywood. Solter Tr., exhibit "L" at p. 102. He did not tell Mr. Harrigan not to operate the lift on or near the plywood in order to bring Ms. Malone up to do her inspection. *Id.*

311. Mr. Solter said there was no talk about a ramp being built; there was a concrete elevation that stepped down a foot an a half and Mr. Harrigan was going to build up the area so he could drive across and extend out further. Solter Tr., exhibit "L" at pp. 103-104. He

understood this building up was for the express purpose of driving the lift over the plywood to get closer to the building. Solter Tr., exhibit "L" at p. 104.

312. The site safety manager must pass an exam and holds a license or permit that is tracked by the City; they must meet the qualifications of the City. They protect the public in the eyes of the DOB and to ensure that safety precautions are being enforced on job sites. Solter Tr., exhibit "L" at p. 105. They oversee what is being done on the job site. *Id.*

D. Testimony of Non-Party Kristen Malone

313. Non-Party witness Kristen Malone testified pursuant to plaintiff's subpoena on April 7, 2016. See, Deposition Transcript of Non-Party Witness Kristen Malone ["Malone Tr."], Exhibit "M". Ms. Malone has a Bachelor's degree in architecture (Rensselaer Polytechnic Institute) undergrad in 2005 and grad school in 2009. She holds a Master's degree in architectural sciences from the same school. Malone Tr., exhibit "M" at pp. 89-90.

314. Her first employer after school was Stoss, a landscape architecture office in Boston, where she was a Project designer for just under two years between her undergrad and graduate programs. Malone Tr., exhibit "M" at pp. 90-91. Her mother passed away at the end of her grad school time, and she took some time off, and entered a Ph.D. program she did not complete. Malone Tr., exhibit "M" at pp. 91-92. She worked as a research assistant while in grad school, and for a short time, as a salesperson at a Lowes store in early 2013. Malone Tr., exhibit "M" at pp. 92-93.

315. Ms. Malone testified that she is employed as a Senior Engineering Technician at Vidaris, a building envelope consulting firm retained by the premises owner. She explained that Vidaris was serving both as building envelope consultants as well as special inspector because special inspection was required by the Department of Buildings in New York City. She was

performing the services as "Special Inspector" for the building envelope (the outside walls of the building) of the premises. Malone Tr., Exhibit "M" at pp. 5-6.

316. Although she initially identified the premises owner as "Zeckendorf," she later agreed that Vidaris' client, the premises owner, was G-Z/10UNP Realty, LLC. Malone Tr., Exhibit "M" at p. 7. Ms. Malone also identified defendant Lend Lease Construction as the General Contractor for the project and third party defendant Coordinated Metals, Inc. as a subcontractor that was building the store front of the building envelope, which, according to Ms. Malone, was the lower level of the building. Malone Tr., Exhibit "M" at pp. 7-8.

317. She regularly (daily or nearly so) interacted with plaintiff Gary Harrigan, who was the foreman for the project, as well as his colleague "Richie," whose surname she could not recall. Malone Tr., Exhibit "M" at pp. 8; 15.

318. Upon prompting, she recalled Gary Zammit from CMI, and testified that she generally spoke with Mr. Zammit regarding the progress of the installation and "if there were issues... he would update [her] on how they were addressing them and how they were going to address outstanding issues." She was unsure as to Mr. Zammit's position with CMI. Malone Tr., Exhibit "M" at p. 9.

319. Kristen Malone had never been trained or certified as a scissor lift operator. Malone Tr., exhibit "M" at p. 11. She explained that in order to work in and around construction job sites, she was required to have scaffold training, including supported scaffold training, suspended scaffold training and the basic information provided was the importance of tying off, wearing the harness, the hard hat, safety vest, gloves, glasses, safety shoes. Malone Tr., exhibit "M" at pp. 11-12. She estimated that she took this training in or about March-April of 2013. *Id.*, at p. 12.

320. Although she had never operated a scissor lift such as the machine involved in the subject accident, Ms. Malone testified that she had gone up on similar lifts between 10-15 times prior to the accident. Malone Tr., exhibit "M" at pp. 13-14. She was unsure whether she had ever previously gone up in any lift operated by plaintiff Gary Harrigan and could not state whether she had previously been in the same lift involved in the subject accident, as "they all look the same." *Id.*, at p. 14.

321. Ms. Malone testified that she observed Mr. Harrigan to "know what he was doing"... "he seemed like a good foreman. He knew what he was doing, he knew what my role was, he knew how to interact with us...Yeah, he seemed like a fine foreman." Malone Tr., exhibit "M" at p. 16.

322. She testified that she had never observed Mr. Harrigan failing to follow orders or directions given to him by anybody at the job site, nor had she seen him being reprimanded or criticized at the site. *Id.*, at pp. 16-17.

323. Ms. Malone could not direct Mr. Harrigan's work or stop his work if she deemed it unsafe. If she saw him engaging in practices that she believed were unsafe, she would have reported that to Lend Lease "because they're responsible for what goes on at the job site and they would direct him." Malone Tr., exhibit "M" at p. 17. Her contacts at Lend Lease were Steve Nash-Weber and Ken Solter. She did not know their titles, but believed they were "supervisors." Malone Tr., exhibit "M" at p. 18.

324. She recalls speaking with Gary Harrigan and Richie about what needed to be looked at on the building. Malone Tr., exhibit "M" at p. 20. She did not recall speaking with Ken Solter or Steve Nash-Weber. *Id.* She told Gary and Richie that they needed to check the anchors at the top of the storefront; she then "suited up" with her harness and met Gary out by the scissor lift. Malone Tr., exhibit "M" at p. 21. She wore construction boots, jeans, a heavy

canvas coat, her harness over the coat, a retractable lanyard attached to the harness, her safety vest and hardhat. She was not wearing ear protection and could not recall if she wore eye protection. Malone Tr., exhibit "M" at pp. 20-21. In her backpack, she carried her usual inspection tools, including a camera, a clipboard, measuring tape. *Id.*, at p. 22. She did not recall watching Mr. Harrigan don his equipment. *Id.*

325. Although she could not recall what Mr. Harrigan was wearing, she stated that if he had *not* been wearing the appropriate safety gear, "I would have remembered him not being tied into the lift because it's a big no-no." Malone Tr., exhibit "M" at p. 23.

326. Ms. Malone testified that they climbed into the lift, clipped in, and Mr. Harrigan drove the lift a short distance to the area of the building where work had recently been done to allow her to inspect. She could not estimate how far they drove, but stated it was a short distance. Malone Tr., exhibit "M" at pp. 24-26. Ms. Malone could not estimate either her own position in the lift basket (right versus left) or Mr. Harrigan's, but stated that he was in the front, as he was driving and she remained in the rear of the basket. The tie-downs were in the bottom of the basket. Malone Tr., exhibit "M" at pp. 26-28.

327. She testified that Mr. Harrigan was looking forward as he drove and that she did not know if he had inspected the route prior to climbing into the lift. Malone Tr., exhibit "M" at p. 56. She could not recall if the lift had to be maneuvered into position at end of driving. Malone Tr., exhibit "M" at p. 57. She did not know if any portion of the lift was on the ramp depicted in a photo she was shown or on any of the debris depicted in that photo. Malone Tr., exhibit "M" at p. 57. In later questioning, she denied any recollection of looking to see where the lift had been stopped or what it had stopped upon; she did not recall looking to see if all four wheels were physically in contact with the ground. Malone Tr., exhibit "M" at pp. 79-80.

328. As the lift moved into position, she did not notice any bumpy or un-leveled terrain. Malone Tr., exhibit "M" at p. 28. More specifically, Ms. Malone testified: "Nothing seemed off to me, otherwise I wouldn't have gone up." *Id.* Ms. Malone testified that if she felt the lift was not level (side to side) or parked on an incline (front to back), she would have apprised Mr. Harrigan or would have unhooked her harness and climbed out of the basket. Malone Tr., exhibit "M" at p. 29. She denied hearing any alarms sounding before the lift was extended upwards or thereafter. Malone Tr., exhibit "M" at pp. 29; 35; 43-44.

329. Ms. Malone testified that her inspection of the anchorage of the storefront mullions required the lift to be close to the front of the building. Malone Tr., exhibit "M" at pp. 31-32.

330. When the lift had extended fully, the scissor lift "leaned out" and Ms. Malone "knew that was bad." She "felt a sudden movement" and Mr. Harrigan said "uh-oh." Malone Tr., exhibit "M" at p. 36. She was not wearing her backpack at the time and had not yet started her inspection. Malone Tr., exhibit "M" at p. 37. Once she heard Mr. Harrigan say "uh-oh," the next thing she remembers is "seeing the ground coming up at me. There was metal mesh on the ground and it got really close really fast." Malone Tr., exhibit "M" at p. 38. She learned later that she had been ejected from the basket. *Id.*

331. She did not see what happened to Mr. Harrigan and did not know if any part of her body landed on him or his body landed on her. Malone Tr., exhibit "M" at p. 39. She did not know if he had also been ejected from the basket. *Id.*

332. She was later told that she hit her head on the concrete curb, but did not remember doing so. Malone Tr., exhibit "M" at p. 40. Someone she believes was the site "medical guy" was holding her head and told her that she had "a pretty nasty cut on [her] head." *Id.*

333. She was removed from the scene by ambulance, and does not remember seeing or hearing Mr. Harrigan after the fall. Malone Tr., exhibit "M" at pp. 41-42.

334. Ms. Malone did not see Mr. Harrigan being trained in the use/operation of the scissor lift on the job site. Malone Tr., exhibit "M" at p. 42. She did not recall seeing any person being trained in the operation of scissor lifts on the job site. *Id.* She did not know of any person directing Mr. Harrigan not to operate the scissor lift in the area where it was located at the time of the accident. *Id.*

335. She said there was debris all around the area, as it was a construction site and this was typical. Malone Tr., exhibit "M" at p. 43.

336. Ms. Malone testified that "Bob" from Coordinated Metals, Inc. contacted her after the accident to see how she was. She said he did not ask how the accident had occurred and stated that she would have remembered if he had, because she would have found such questions, coming immediately on the heels of her being injured, offensive. Malone Tr., exhibit "M" at p. 47.

337. She denied ever blaming Gary Harrigan for the accident, both in the past and as she sat in the deposition. Malone Tr., exhibit "M" at pp. 47-48. She denied seeing him lean over the rail or doing so herself, and denied seeing him doing anything she believed was improper or unsafe on the day of the accident. Malone Tr., exhibit "M" at p. 52.

338. She stated that she had no independent opinion about the cause of the lift falling because her former attorney had apprised her of the actual cause. Malone Tr., exhibit "M" at p. 48.

339. She was interviewed by an OSHA investigator in the hospital, but never received any information or report related to the OSHA findings. She does not recall the OSHA investigator recording their discussion. Malone Tr., exhibit "M" at pp. 51-51.

340. Ms. Malone testified that when she first began working on the job site she had to attend an orientation provided by Lend Lease. Malone Tr., exhibit "M" at p. 58. This was the only safety meeting she attended on the job site. Malone Tr., exhibit "M" at p. 60. She did not get any orientation, training or rules about operating machinery because her company does not operate any machinery on the jobsite. Malone Tr., exhibit "M" at pp. 58-59.

341. She testified that she has had some general OSHA construction site training, but nothing related to lifts. Malone Tr., exhibit "M" at p. 62. She did not know who was responsible for lift training under OSHA regulations. Malone Tr., exhibit "M" at pp. 62; 64. She never asked Mr. Harrigan whether he was certified in lift operation pursuant to OSHA, stating that there would have been no reason for her to do so. Malone Tr., exhibit "M" at pp. 62-63.

342. She testified that she made the assumption that whatever operator was provided to her for access would be properly certified and trained "because Lend Lease is supposed to provide us access. *And since Lend lease is in charge of the job and they know all about site safety requirements, yes, it's the assumption that they would provide someone who is qualified.*" Malone Tr., exhibit "M" at pp. 64-65 (emphasis added).

343. She did not answer a persistent series of questions by Genie's counsel about whether it was her responsibility or Mr. Harrigan's to know how to safely operate the lift or whether the lift was equipped with outriggers; but conceded that she had nothing to do with its operation and stated that she did not know if it had outriggers for stabilizing the lift. Malone Tr., exhibit "M" at pp. 69-70.

344. She testified that as an architect, she was aware of the basic physics involved in extending a lift that was not level; this would change the center of gravity and if you do that when you're not level, you're going to fall. Malone Tr., exhibit "M" at pp. 76-77.

345. Genie's counsel asked "who was the competent person required to inspect a work area before using a lift" but never established a foundation that such a requirement exists. Ms. Malone testified that as Gary was the operator, he would have been the competent person. She also agreed that as the foreman Mr. Harrigan would have been the competent person. Ms. Malone agreed that she understood the term "competent person" was a term of art originating from OSHA regulations. Malone Tr., exhibit "M" at p. 78.

346. Of the two of them in the lift that day, Ms. Malone testified that Gary would have been responsible to make sure that the lift was stopped on a level surface, but added that she was responsible for her own personal safety and that she would have said something if she felt or observed the lift was not level when stopped. Malone Tr., exhibit "M" at pp. 80-81. Specifically, she stated that if she knew the lift had stopped with one wheel on a ramp, she would not have allowed the lift to be extended. Malone Tr., exhibit "M" at p. 88.

347. She testified that from the time the lift was extended, Mr. Harrigan turned to face her and the lift immediately started to tilt. The movement as it fell was too fast for her and Mr. Harrigan to speak to one another ("we fell over in seconds"). Malone Tr., exhibit "M" at pp. 86-87.

348. Ms. Malone did not recall hearing Mr. Harrigan state that he was having difficulty driving the lift due to debris on the ground. Malone Tr., exhibit "M" at p. 99.

349. Ms. Malone did not know where the plywood ramp depicted in a photograph was in relation to the lift at the time it was stopped. Malone Tr., exhibit "M" at p. 100. She denied ever being told that the ramp had one wheel parked on the ramp; she recalled hearing that one wheel had been on a piece of insulation. Malone Tr., exhibit "M" at p. 101. She understood that one wheel was not in contact with the ground. Malone Tr., exhibit "M" at p. 102.

350. Ms. Malone was unaware of Mr. Harrigan's testimony prior to her own. Malone Tr., exhibit "M" at p. 103. When United Rental's counsel told her for the first time that Mr. Harrigan had observed the wheel of the lift on the ramp before the accident, she stated that she would have told him not to extend the lift if she had known this fact at the time, but remained resolute in her statement that she did not blame Mr. Harrigan for the accident. Malone Tr., exhibit "M" at pp. 102-104.

E. Testimony of United Rentals Witness Barry Davis

351. United Rentals produced its witness Barry Davis for deposition on March 2, 2016. Mr. Davis testified that he is a District Manager for United Rentals, having been with the company for twenty years and holding that position for approximately seven years. Deposition of Barry Davis ["Davis Tr."], exhibit "N", at p. 8.

352. As District Manager he oversees operations in the New York metro area, including five locations: Bohemia, New York, Brooklyn, New York, College Point, Queens, Ridgefield Park, New Jersey and South Plainfield, New Jersey. Davis Tr., exhibit "N" at p. 9.

353. Union Rentals is one of the largest providers of construction equipment; they seek their customers' requests on the equipment they need plus was the manufacturers have to offer and then buy that equipment. Davis Tr., exhibit "N" at p. 11.

354. Genie scissor lifts were part of the United Rentals inventory, including the model 3232. He estimated that this model came out in or about 2011. Davis Tr., exhibit "N" at p. 11. He agreed that the Genie 3232 was in the United Rentals inventory in January 2014. *Id.*

355. He believes that United owns its lift inventory but was not positive; he does not know about the company's financing arrangements. Davis Tr., exhibit "N" at p. 12.

356. He does not physically receive new machines that are delivered from Genie and does not know what written materials are delivered with the lifts. Davis Tr., exhibit "N" at pp. 12-13.

357. All machines have operator's manuals on them; he knows when they leave the United yard or any United Rentals locations in the country, the rentals going out have operation safety handbooks on them. Davis Tr., exhibit "N" at p. 13.

358. He only knows about the operator's manual. He denied knowledge of the ADM Safety Manual or the Operator's Responsibilities Manual, saying, "I'd have to see one." Davis Tr., exhibit "N" at pp. 13-14. He could not define the Operator's Responsibilities Manual. Davis Tr., exhibit "N" at p. 14.

359. The Genie 3232 is unique in that it is 32 inches wide and can go 32 inches [sic] high and in that it has outriggers. Davis Tr., exhibit "N" at p. 15. Other Genie lifts have outriggers. *Id.*

360. Asked about training programs offered by United, Mr. Davis testified that they have a platform called "United Academy" which is an online training as well as hands-on. This included lift training, forklift training, OSHA training and confined space training. Davis Tr., exhibit "N" at pp. 16; 18. Prior to that the company offering something called "IVES" for training their own employees and trainers. Davis Tr., exhibit "N" at p. 16. They also have training provided by manufacturers at the United facilities on a regular basis from sales training, product support services, etc. Davis Tr., exhibit "N" at p. 17. He was unaware of any other training offered by United. *Id.*

361. Mr. Davis did not know if an individual could become certified in lifts by solely finishing the online program without the hands-on component which takes place at United

facilities. Davis Tr., exhibit "N" at pp. 18-19. At the end, the student gets a training card; he is unaware of any course materials, however. Davis Tr., exhibit "N" at p. 19.

362. The previous program referred to as IVES training was ended when United Academy was rolled out. Mr. Davis did not know when that occurred. Davis Tr., exhibit "N" at p. 23. This program trained United certified trainers on the safe operation of the equipment who then, in turn, trained other people. Davis Tr., exhibit "N" at p. 24. Mr. Davis did not know which program was available in January 2014. Davis Tr., exhibit "N" at p. 25.

363. United trainers would train the employees of those companies that rented the aerial lifts from United Rentals. Davis Tr., exhibit "N" at p. 25.

364. United familiarizes its customers with the machinery and if they need additional training, they can request it. Davis Tr., exhibit "N" at p. 27.

365. United equipment is delivered by United employees, not third party service persons; all are certified trainers for the aerial lifts. Davis Tr., exhibit "N" at p. 28. Training is offered based on request, as most of their customers are familiar with the operation of these machines. Davis Tr., exhibit "N" at p. 28. The drivers are instructed to familiarize the end users of the equipment with the machines' features upon delivery. Davis Tr., exhibit "N" at pp. 28-29.

366. The drivers are not required to check off on any type of documentation to indicate that familiarization process has occurred. Davis Tr., exhibit "N" at p. 29.

367. Mr. Davis does not know of Genie providing training materials to United specifically related to the Genie 3232. Davis Tr., exhibit "N" at p. 30.

368. An end user's employees can be trained at United facilities or on the user's job site. Davis Tr., exhibit "N" at p. 31. There is a fee for this training. *Id.*

369. Mr. Davis could not describe the nature and extent of the training provided. *Id.* He testified that he has seen familiarization, but not training. Davis Tr., exhibit "N" at pp. 31-32.

370. He does not perform training and his own certification to operate aerial lifts has expired; it should be renewed every three years. Davis Tr., exhibit "N" at p. 32.

371. The United facility in Elizabeth New Jersey, which provided the machines to the accident site has since closed. Davis Tr., exhibit "N" at p. 35.

372. Mr. Davis did not know if United kept records of training provided to CMI employees. Davis Tr., exhibit "N" at pp. 36-37.

373. The United Rental Agreement does not contain language with regard to service offered by United for training. Davis Tr., exhibit "N" at p. 37. Offering training is not automatically done; it is not part of United's standard. Davis Tr., exhibit "N" at p. 39.

374. Mr. Davis testified that he had "no clue" about whether United offered training to CMI employees in the use of the GS 3232 delivered to the 50 UN Plaza Jobsite. Davis Tr., exhibit "N" at p. 42.

375. He does not know the training history of the driver, David Alscher, who delivered the GS 3232. Davis Tr., exhibit "N" at p. 43.

376. Mr. Davis could not describe a usual familiarization upon delivery of equipment. "Each guy may have his own twist of how he presents it." Davis Tr., exhibit "N" at p. 45.

377. The subject machine's papers were incorrectly labeled to indicate that the job site was the United shop when it should have indicated the 50 UN Plaza job site. Davis Tr., exhibit "N" at p. 48.

378. The work performed at the job site was a quarterly inspection of the lift machine. Davis Tr., exhibit "N" at p. 48. United employee Joe Piazza did the inspection, and Mr. Davis was not aware of whether Mr. Piazza was certified as a trainer. Davis Tr., exhibit "N" at p. 49. A checked box indicated that the functionality of the tilt/level sensor was either found to be ok, adjusted or serviced in January 2013. Davis Tr., exhibit "N" at pp. 50-51. Mr. Davis did not

know whether it was found to be ok, was adjusted or was serviced and he did not know how Mr. Piazza inspects that item. Davis Tr., exhibit "N" at p. 52.

379. He is unfamiliar with the tilt and level sensor features on the GS-3232. *Id.*

380. Mr. Davis did not visit the 50 UN Plaza job site or inspect the fallen lift. He learned of the accident from a sales rep. Davis Tr., exhibit "N" at p. 56.

381. Mr. Davis described the lengthy risk management procedure followed in the event of an accident generally, and the steps he recalls taking in the wake of Mr. Harrigan's accident. Davis Tr., exhibit "N" at pp. 56-58. He only heard "the generic" information that a lift had fallen over resulting in potential injuries. Davis Tr., exhibit "N" at p. 58.

382. He believes United employee Giuseppe Gerardi followed with CMI for the details of the accident. Mr. Davis vaguely recalls his discussions with Mr. Gerardi, only that the lift "went over, potential injury." Davis Tr., exhibit "N" at p. 60.

383. Mr. Davis was not involved in retrieving the lift. Davis Tr., exhibit "N" at p. 60. He knows that it stayed on the job site "more than a couple of days" because it was lying on its side. Davis Tr., exhibit "N" at p. 61.

384. Mr. Davis took no steps to determine the cause of the accident and deferred to his counsel to respond to whether or not United took any steps to determine the cause. Davis Tr., exhibit "N" at pp. 62-63. No investigation was conducted to determine if the delivery person, David Alscher, had familiarized any CMI employees with the use of the lift. Davis Tr., exhibit "N" at p. 64.

385. He was aware, prior to the Harrigan accident, of at least one other Genie scissor lift (a 26-footer) falling over. Davis Tr., exhibit "N" at p. 65.

386. He did not believe he could testify about the details of that incident, but ultimately testified that the operators were pulling wire through rafters on a roof and inadvertently pulled over the machine upon which they were elevated. Davis Tr., exhibit "N" at p. 66.

387. No inspection has been done of the subject lift which is in their Ridgefield Park, New Jersey facility; it is preserved as evidence. Davis Tr., exhibit "N" at pp. 70; 72. It was transported there by truck and is outside, exposed to the elements. Davis Tr., exhibit "N" at p. 72.

388. CMI had at least one other machine on the 50 UN Plaza job site, a boom lift. Davis Tr., exhibit "N" at p. 73.

F. Defendant Genie Witness Jason Berry's Testimony

389. Defendant Genie produced Jason Berry, who is employed by Genie's parent company, Terex as a Product Safety Manager, supporting the Genie product line. Mr. Berry testified on February 10, 2016 by videoconference. Deposition Transcript of Jason Berry ["Berry Tr."], exhibit "O", at pp. 5-6.

390. Mr. Berry wasn't directly involved in the design of the Genie 3232, but he did design work on components that are used on that machine, such as hydraulics, electrical. Berry Tr., exhibit "O" at p. 8. He believes the subject 3232 was manufactured in or about January 2010, in Terex's factory in Redmond Washington. Berry Tr., exhibit "O" at p. 10.

391. Mr. Berry believes the lift fell over due to the positioning with one wheel up on the ramp, leaving the opposite wheel off the ground; this would have caused the machine to lean toward the wheel that was suspended off the ground, resulting in a tip-over. The machine was equipped with outriggers that are designed to level the machine prior to elevating the platform and ultimately the machine was "set up improperly." Berry Tr., exhibit "O" at pp. 11-12.

392. Berry testified that it is Genie's expectation that the machine be level as if a carpenter's level was set on its surface; there is no tolerance built in for unlevel ground. Berry Tr., exhibit "O" at p. 15. The machine has the ability to level itself if it is on uneven ground. There are four outriggers which are hydraulic cylinders that extend down into the ground; they will level the machine if it is on a ramp or other incline. Berry Tr., exhibit "O" at p. 16. As no other similar lift has outriggers, they do not have this auto-leveling function. Berry Tr., exhibit "O" at pp. 64-65.

393. The machine has a built-in sensor that will determine the platform is level automatically when the outriggers are used. Berry Tr., exhibit "O" at p. 17. It does not have a visual carpenter's bubble-type level for the operator to view in determining that the machine is level. Berry Tr., exhibit "O" at p. 17. He was unaware whether such a visual indicated had ever been considered in the design of the GS 3232. *Id.*

394. Mr. Berry was involved in the development of the Operator's Manual for the GS 3232. Berry Tr., exhibit "O" at p. 19. It is developed as a collaborative effort; there is no single person who was "in charge." *Id.*

395. Testing of the Genie machines is done in accordance with the use described in the Operator's Manual, using the machine on level ground. Berry Tr., exhibit "O" at p. 20. Testing is in accordance with ANSI standards, specifically ANSI A92.6-2006. The standards are designed to prevent accidents in personal injury; they set out the criteria for the design, manufacturing, inspection, maintenance and operation of scissor lifts as well as the roles and responsibilities for dealers, owners, users, lessors, lessees. Berry Tr., exhibit "O" at pp. 20-21.

396. Part of the ANSI testing standard involves lifting 150% of rated load on sloped ground for which the alarm sounds to ensure the machine remains upright. Berry Tr., exhibit "O" at p. 21. The machine is also placed on a 5-degree slope with one and a third-rated load raised to full height; it must remain stable and upright in that configuration. Berry Tr., exhibit "O" at p. 22.

397. Most relevant here is ANSI's "depression test" which requires the machine to be driven at full height over a four-inch deep, 24 by 24 inch square depression. The machine must remain upright with full rated load in the platform *and one wheel in the depression, without the outriggers extended.* Berry Tr., exhibit "O" at pp. 21-22; 23-24; 27. The depression test requires that the machine's lift be extended to 22 feet, the maximum drive height. Berry Tr., exhibit "O"

at pp. 28; 24. The machine has a feature called a "pothole guard" that folds down when the lift is elevated, minimizing the distance between chassis and ground during elevation so that if the machine's wheel goes into a pothole, it's not dropping as far. Berry Tr., exhibit "O" at pp. 28-29. The leading edge of the depression with contact the pothole guard, limiting the distance the wheel can go into the depression. Berry Tr., exhibit "O" at p. 29.

398. Mr. Berry agreed that if one of the four wheels was four inches down in the depression, another of the four wheels would be off the ground. Berry Tr., exhibit "O" at pp. 32-33. In that situation, with the front wheel in the four-inch depression and the opposite rear wheel off the ground, *the machine is expected to remain upstanding without engaging the outriggers*. Berry Tr., exhibit "O" at p. 33.

399. *This standard is not communicated to the end users of the lift in the operator's manual, according to Mr. Berry; they only advise to use the machine on a level surface*. Berry Tr., exhibit "O" at p. 34.

400. The tilt alarm is expected to sound if the machine is angled one and a half degrees (or greater) to the right or left. Berry Tr., exhibit "O" at pp. 22-23. Berry testified this would occur when the lift is elevated between three and six-to-eight feet off the ground; he was not sure if the alarm would sound when the lift was retracted. Berry Tr., exhibit "O" at p. 23.

401. *The GS 3232 tilt alarm cannot be de-activated by the operator*. Berry Tr., exhibit "O" at p. 123.

402. The machine has a restricted drive height of 22 feet; over that height, the outriggers need to be extended. It will not drive when extended over 22 feet high. Berry Tr., exhibit "O" at p. 24. This information appears in the Operator's Manual at page 63. *Id.* The manual also indicates (at page 32 in the pre-operation function test section), that for extension of the platform above 22 feet, the outriggers must be extended. Berry Tr., exhibit "O" at p. 24.

403. If the lift is operated on level ground, and the lift does not extend over 22 feet, there is no requirement to use the outriggers on the GS 3232. Berry Tr., exhibit "O" at p. 122.

404. Genie expects that all operators will conduct the above-described pre-operation function testing and inspection before using the machine. Berry Tr., exhibit "O" at p. 25. Genie attempts to advise operators of this expectation by placing the information in the Operator's Manual delivered with each machine; it also places warning decals below the control panel reading "Danger: Read and understand the manuals". Berry Tr., exhibit "O" at p. 26.

405. In addition to the Operator's Manual Mr. Berry referred to OSHA and ANSI standards requiring that employers only allow trained operators to operate Genie machines, per the manufacturer's instructions. Berry Tr., exhibit "O" at p. 27, referring to C.F.R. 29.1926 sub sections 435 (aerial lifts), 451, 452. Mr. Berry testified that "being a trained operator is critical to safe operation." Berry Tr., exhibit "O" at p. 120.

406. He also referred to the ANSI Manual of Responsibilities, ANSI A92.6-2006, essentially the same standard Genie uses to design the lift. Berry Tr., exhibit "O" at p. 27.

407. Mr. Berry testified that the GS 3232 is the only Genie lift in its size class with outriggers. An operator would know that the outriggers were available because both the ANSI requirement and Genie's requirement is that the employers familiarize the operators when they direct the employee to operate the lift. Familiarization includes knowing where the operator's manuals are located on the machine, a review of the control features specific to the model. All of this, in addition to the required training and certification of the operator, would apprise the operator of the outrigger feature. Berry Tr., exhibit "O" at p. 41.

408. Genie creates training manuals that are made available to dealers who can use them or create their own training program. Berry Tr., exhibit "O" at p. 42. These training materials are part of a part classroom, part hands-on training that is designed to meet OSHA

requirements. *Id.* Genie's training class generally takes a full day. Berry Tr., exhibit "O" at p. 44. The training is general and does not address the use of outriggers on a specific machine, but only in a general sense, how outriggers function and what they are for. Berry Tr., exhibit "O" at pp. 118-119. The training would warn to use the machine only on a level surface, except in those limited instances where, like the GS3232, the machine has an auto-leveling system. Berry Tr., exhibit "O" at pp. 119-120.

409. United Rentals has been a long-time Genie dealer; they have training, but Mr. Berry did not know if it was utilizing Genie's training materials or if United has their own program. Berry Tr., exhibit "O" at p. 46.

410. An individual operator like Mr. Harrigan could not obtain Genie's training materials directly from Genie; he would have to go to the dealer to seek training. Berry Tr., exhibit "O" at p. 48.

411. Genie's training program is general; it trains for all scissor lifts, not just a particular model such as the GS 3232. Berry Tr., exhibit "O" at p. 57. On site familiarization is more specific, where the controls and safety features unique to that model would be covered. Berry Tr., exhibit "O" at p. 57. Mr. Berry did not agree that the GS 3232, as the only machine with outriggers in its class, required more specific familiarization than any other Genie lift. Berry Tr., exhibit "O" at pp. 59-60.

412. Mr. Berry testified that he was not aware that operators in the field rely on the tilt alarm to determine if the lift is sufficiently level to be safely used; he was not involved in putting the warning in the operator's manual that the tilt alarm should not be relied on to determine level grounding. Berry Tr., exhibit "O" at pp. 73-74.

413. Mr. Berry did not know if the warning to not rely on the tilt alarm is part of Genie's training program. Berry Tr., exhibit "O" at p. 77.

414. Mr. Berry testified that the operator would know if the lift was on a great enough slope to trigger the tilt alarm if proper pre-use function testing is performed according to the manual; the test includes driving the lift onto a 2 x 4, the operator standing on the ground holding the control, and testing when the machine will stop and the alarm sounds; it will flash a code at a level. Berry Tr., exhibit "O" at p. 80. They may not know the exact degrees of the tilt, but they will know that the maximum level has been reached. *Id.* This test requires both wheels on one side of the lift to be on the two by four; there is no test requiring only one wheel to be so elevated. Berry Tr., exhibit "O" at p. 82. The function testing is part of Genie's training program. Berry Tr., exhibit "O" at p. 83.

415. The test described simulates the machine tilting greater than one and a half degrees right to left. Berry Tr., exhibit "O" at pp. 83-84.

416. The outrigger system has a pressure-sensitive function on the bottom of each outrigger leg to indicate whether the legs are firmly on the ground. There is no similar system for the wheels of the machine, however. Berry Tr., exhibit "O" at p. 85.

417. In addition to the Operator's Manual and the Responsibilities Manual, there is the AEM (Association of Equipment Manufacturers) Safety Manual, created the industry group, AEM. Berry Tr., exhibit "O" at pp. 99-100. All three are shipped with the machine and all three are expected to be delivered with the machine to the job site. Berry Tr., exhibit "O" at p. 101. But Berry then backed off the "required" standard with regard to the AEM when asked if United Rentals would have delivered that document with the machine to the job site. *Id.*

418. Mr. Berry was not aware if anyone from Genie had discussions with anyone from United Rentals about Gary Harrigan's accident. Berry Tr., exhibit "O" at p. 109. He was unaware of any discussions with CMI or the premises owner or general contractor at the 50 UN Plaza job site regarding Mr. Harrigan's accident. Berry Tr., exhibit "O" at p. 109.

419. He was unaware of any change by Genie in any of its protocols resulting from Mr. Harrigan's accident. Berry Tr., exhibit "O" at p. 110.

420. Mr. Berry did not inspect the subject 3232 lift and was unaware of whether anyone else from Genie conducted an inspection of the lift. Berry Tr., exhibit "O" at p. 110.

421. Genie has a written protocol for investigating an accident with its machine. It is found on the intranet (internal website), designated as TPSR-004. Berry Tr., exhibit "O" at p. 124. The protocol instructs all Terex team members to alert product safety of any accidents and requires the collection of certain data. Berry Tr., exhibit "O" at p. 139. This can be written or oral notification. Berry Tr., exhibit "O" at p. 124. Mr. Berry did not know if it requires a written notice. Berry Tr., exhibit "O" at p. 125. He does not know if this protocol was followed with this accident. Berry Tr., exhibit "O" at p. 126. Mr. Berry did not know who at Genie or Terex is responsible to ensure that TPSR-004 is followed. Berry Tr., exhibit "O" at p. 137.

422. Mr. Berry was unaware of any protocol or factors used in a given case to determine if Terex will go investigate or not. Berry Tr., exhibit "O" at p. 128. He did not take part in any such considerations with regard to Mr. Harrigan's accident and is unaware if any such conversations/considerations occurred. Berry Tr., exhibit "O" at p. 128. He does not know if Terex generated a report related to the Harrigan accident. Berry Tr., exhibit "O" at p. 129.

423. Generally, if an accident report is generated the product safety team would keep an electronic record of that information. Berry Tr., exhibit "O" at p. 129.

424. When the lift topples to its side, the alarm will sound as it reaches one and a half degrees, side to side. Assuming no physical damage stopping the alarm, it will continue to sound as long as the angle of the machine is greater than the one and a half degree limit. Berry Tr., exhibit "O" at pp. 133-134. It does not have an automatic or timed turn-off. Berry Tr., exhibit

"O" at p. 134. Hitting the emergency stop button would turn off the alarm. Berry Tr., exhibit "O" at p. 134.

ARGUMENT[6]

POINT I.

PLAINTIFF IS ENTITLED TO JUDGMENT IN HIS FAVOR UNDER LABOR LAW §240(1)

425. Labor Law §240(1) states:

> 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...scaffolds, hoists, stays, and other devices, which shall be so constructed, placed and operated as to give proper protection to a person so employed.

426. Violation of the duties imparted by the statute results in strict liability for the general contractor (here Lend Lease) and the owner (here G-Z/10UNP Realty, LLC). *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513 (1985). The duly imposed by the statute is non-delegable; when a violation causes injury to a construction worker, the owner and the general contractor are strictly liable. *Haimes v. N.Y. Telephone*, 46 N.Y.2d 132 (1978).

427. Thus, the absolute liability provision exists even though the owner exercised no supervision, control or direction of the plaintiff's work and even if the person injured was a self-employed contractor hired by the owner. *Haimes, supra.*

428. Labor Law § 240(1) was enacted 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*

[6] Plaintiffs' legal points and authorities are fully set forth in the Memorandum of Law served in conjunction with this motion; the within "Argument" section is simply a brief outline of the scope of the issues addressed on the present motion.

person." *Runner v New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604 (2009), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 491, 501 (1993) (emphasis in original). To accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility." *Ross*, 81 N.Y.2d at 500.

429. This section of the Labor Law is to be construed "as liberally as may be for the accomplishment of the purpose for which it was thus framed," *Zimmer, supra*, 64, N.Y.2d at 514, since the purpose of the statute was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor." (1969 N.Y. Legis. Anno., at 407). *Lombardi v. Stout*, 80 N.Y.2d 290, 296 (1992).

430. Comparative negligence is not a defense to a Labor Law §240(1) claim. *Bland v. Mancherian*, 66 N.Y.2d 452 (1985). Thus, a worker's exercise of his own discretion in the use of a particular safety device (in this case the aerial lift) is insufficient basis to defeat his Labor Law §240(1) claim. *Dwyer v. Central Park Studios*, 98 A.D.2d 882 (1st Dep't 2012) or to defeat his summary judgment motion on the claim. *Gove v. Pavarini*, 110 A.D.3d 601, 603 (1st Dep't 2013).

431. To prove liability under this statute, plaintiff need only show that it was violated and that the violation was the proximate cause of the injuries sustained. *Gandley v. Prestige Roofing & Siding*, 148 A.D.2d 666 (2d Dep't 1989) *appeal dismd.*, 74 N.Y.2d 791 (1989); *Vencebi v. Waldorf Astoria Hotel*, 143 A.D.2d 1004 (2d Dep't 1988). As the Court of Appeals remarked, "[o]nce it is determined that the worker or contractor failed to give a worker proper protection, absolute liability is unavoidable under Section 240[1]." *Bland v. Manocherian*, 66 N.Y.2d at 453; *Zimmer*, 65 N.Y.2d at 514.

432. The owner's and general contractor's failure to provide adequate training for the use of the GS 3232 aerial lift and the failure to ensure that adequate training was being provided by Mr. Harrigan's employer, while allowing him to use the machine on the job site is a prima facie violation of §240(1) by both Lend Lease and G-Z/10UNP Realty, LLC.

433. The policy purpose underlying Labor Law § 240 is to impose a "flat and unvarying" duty upon the owner and contractor despite any contributing culpability on the part of the worker. *Zimmer, supra* , 64 N.Y.2d at 521. In *Arbegast v. Board of Education*, 65 N.Y.2d 161 (1985), the Court of Appeals specifically recognized that the diminishment of liability by a comparative evaluation of the injured party's culpability would, indeed, be disallowed where thus proscribed by public policy. *Arbegast*, 65 N.Y.2d at 170; *cf. Rosado v Proctor & Schwartz*, 66 N.Y.2d 21 (1985).

434. The Court of Appeals has consistently reaffirmed that the broad scope of this statute is designed to protect construction workers from gravity related risks. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991); *Ross v. Curtis-Palmer Hydroelectric Co.*, 81 N.Y.2d 491 (1993). As the same court noted in *Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 318 (1948), such broad construction is warranted because such workers "are scarcely in a position to protect themselves from accidents."

POINT II.

PLAINTIFF HAS ALSO PROVEN HIS PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT ON HIS LABOR LAW §241(6) CLAIM

435. Labor Law § 241(6) provides, in relevant part, as follows:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavation in connection therewith, shall comply with the following requirements:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

436. Thus, Labor Law § 241(6) requires owners, contractors and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover for injuries under Labor Law § 241(6), a plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 348 (1998); *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 271 (1st Dep't 2007) *lv denied* 10 N.Y.3d 710 (2008).

437. As noted in Argument Point I., *supra*, with regard to Labor Law §240(1), the obligations of Labor Law § 241(6) are nondelegable (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 502; *Long v Forest-Fehlhaber*, 55 N.Y.2d 154, 159 (1982); *Allen v Cloutier Constr. Corp.*, 44 N.Y.2d 290, 301 (1978); *Misicki v. Caradonna*, 12 N.Y.23d 511 (2009).

438. Causes of action invoking §241(6) must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident. *See Ross*, 81 N.Y.2d at 502; *Ares v State of New York*, 80 N.Y.2d 959, 960 (1992); *Adams v. Glass Fab*, 212 A.D.2d 972, 973 (2d Dep't 1995); *Ortega v Puccia*, 57 A.D.3d 54, 60 (2d Dep't 2008).

439. The Court of Appeals has explained that in order to support a claim under Labor Law §241(6), the particular provision of the Industrial Code relied on must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles. *Misicki, supra*, 12 N.Y.3d at 515.

440. Here, plaintiff relies on Industrial Code sections 12 NYCRR 23-9.2(a) and 12 NYCRR 23-9.6(a). Pursuant to the analysis set forth in *Misicki, supra*, 12 N.Y.3d at 520, these sections both mandate a distinct standard of conduct, rather than a general reiteration of common-law principles, and are precisely the type of "concrete specification" required by *Ross v. Curtis-Palmer Hydro-Elec. Co.*, (81 N.Y.2d 494, 504-505 [1983]). *Misicki*, 12 N.Y.3d at 520 citing *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 (1998).

441. The fact that these sections may not have been precisely set forth in plaintiff's Bills of Particulars is not fatal to this reliance, moreover. The Appellate Division has held that the plaintiff's failure to identify a specific code provision in his complaint of bill of particulars is not fatal to his Labor Law 241(6) claim in the absence of surprise or prejudice. See, *Mejia v NYC*, 81 A.D.3d 682 (2d Dep't 2012); *Latino v Nolan & Taylor*, 300 A.D.2d 631 (2d Dep't 2002); *Kelleir v Supreme Industries*, 293 A.D.2d 513 (2d Dep't 2002); *Pasquarello v Citicorp/Quotron*, 251 A.D.2d 477 (2d Dep't 1998).

442. Of course, New York appellate courts do not resolve cases on grounds raised for the first time on appeal; indeed the Court of Appeals cannot consider such an issue except in very limited circumstances. *Misicki*, 12 N.Y.3d at 519. That exception to the Court of Appeals' general rule, however, is that the Court of Appeals will consider a "newly raised point of law" that is "decisive" in a civil case and "could not have been obviated by factual showings or legal counter steps if it had been raised below." *Misicki*, 12 N.Y.3d at 519 *citing* Karger, Powers of the New York Court of Appeals § 17:1, at 591-592 [3d Ed. Rev.] (internal quotation marks and footnote omitted).

443. By contrast, the Appellate Division has a somewhat broader mandate. Addressing a defendant's lack of preservation argument, in *Baker v. Bronx Lebanon Hosp. Ctr.* (53 A.D.3d 21, 27 [1st Dep't 2008]) that Court held where the plaintiff had raised a legal argument that

appeared on the face of the record and could not have been avoided if brought to defendants' attention at the proper juncture, it could be properly raised – and considered by the Appellate Division – on appeal. *See also DiFilippo v. Parkchester N. Condominium*, 65 A.D.3d 899 (1st Dep't 2009); *Schoeps v. Andrew Lloyd Webber Art Found.*, 66 A.D.3d 137, 142 (1st Dep't 2009). Because the record on appeal was found to be sufficient for that issue's resolution, and the issue was determinative, the Court rejected the preservation argument. *Baker*, 53 A.D.3d at 27 *citing Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205, 209 (1996), *lv denied* 88 N.Y.2d 811 (1996). But *cf., Park v. Kovachevich*, 116 A.D.3d 182, 192 (1st Dep't 2014)(the factual issue related to expert's contention that hospital should have called plaintiff while treating suicidal decedent was improperly raised for the first time in plaintiff's opposition papers).

444. Similarly, the testimony in the record has established prima facie that these codes were violated and that the general contractor and the premises owner took no steps to ensure that proper training was provided to operators of the aerial lifts and no steps were being taken to ensure that the workers on site had obtained the requisite certifications for operation of the aerial lifts.

445. As no operator on the site, including Mr. Harrigan, had been properly trained or familiarized with the GS3232 machine and it's outrigger system, they could not possibly have complied with their obligation under ANSI and OSHA standards, as well as Industrial Code 23-9.6(a) to inspect and test, among other things, the leveling system of the GS3232 before each day's use of the lift.

446. Hence plaintiff's reliance here on the Industrial Code violations fit squarely within the parameters defined in *Baker*: the Industrial Code sections cited, and the testimony and documentary evidence establishing the violations of those codes, together constitute " a legal

argument that appeared on the face of the record and could not have been avoided if brought to defendants' attention at the proper juncture." Hence they are properly raised in plaintiff's summary judgment motion in this Court as they certainly would have been if raised later on these conditions in the Appellate Division. See, *Block v Magee*, 146 A.D.2d 730 (2d Dep't 1989).

POINT III.

PLAINTIFF GARY HARRIGAN IS NOT THE SOLE PROXIMATE CAUSE OF THIS ACCIDENT.

447. The evidence adduced in the discovery phase of this matter is clear: OSHA and ANSI standards notwithstanding, the general contractor/construction manager (Lend Lease) and the premises owner (G-Z/10UNP Realty, LLC) on the 50 UN Plaza job site where Mr. Harrigan was injured did not provide aerial lift training. They did not require operators of aerial lift machinery to be trained on site by their employer, the union or the rental company delivering the machinery to the job site and they took no steps to compel workers on the site to demonstrate prior-existing training and resultant certification for the operation of these machines.

448. As plaintiffs' expert Mr. Knoll has opined, this failure was the proximate cause of the subject accident because if Gary Harrigan had been properly trained before using the GS 3232 lift on the day of his accident, he would have utilized the outrigger and auto-leveling capabilities of the machine and he would have been aware, from a review of the manuals that should have been delivered to him, that it is not safe to rely on the tilt alarm to determine if the machine is sufficiently level to safely elevate the lift platform.

449. It is well settled that the mere happening of an accident does not permit the inference of negligence against any party to a personal injury case. See, *Manley v. NY Telephone Co.*, 303 N.Y. 18 (1951); *Eaton v. NY Central & Hudson River RR Co.*, 195 N.Y. 267 (1906); *Loudoun v. 8th Ave. R. Co.*, 162 N.Y. 380 (1900).

450. There is no proof on this record sufficient to find that Mr. Harrigan was comparatively negligent in causing the accident. Comparative negligence is an affirmative defense that must be proven. It is, moreover, a material fact question for the trier of fact and does not lend itself to summary determination, in any case. *Johnson v. New York City Tr.*, Auth., 88 A.D.3d 321, 324 (1st Dep't 2011); *Shea v. New York City Tr. Auth.*, 289 A.D.2d 558, 559 (1st Dep't 2001).

451. In any case comparative negligence is not a defense to a claim under Labor Law §240(1). *Bland v. Manchertan*, 66 N.Y.2d 452 (1985). Thus, a worker's exercise of his own discretion in the use of a particular safety device (in this case the aerial lift) is insufficient basis to defeat his Labor Law §240(1) claim. *Dwyer v. Central Park Studios*, 98 A.D.2d 882 (1st Dep't 2012) or to defeat his summary judgment motion on the claim. *Gove v. Pavarini*, 110 A.D.3d 601, 603 (1st Dep't 2013).

452. Moreover, the Court of Appeals has consistently held that "contributory negligence should not be charged if there is no or insufficient evidence to support it." *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 517 (1980), quoting *Willis v. YMCA of Amsterdam*, 28 N.Y.2d 375, 378 (1971); see also 65A CJS, Negligence, § 293, p. 1032.

453. Comparative negligence has been defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." *Sundt v. NYS Electric & Gas Corp.*, 103 A.D.2d 1014, 1015 (4th Dep't 1984) quoting Prosser, Law of Torts, 4th Ed., §65, pp. 416-7 and Restatement, 2d, Torts, § 463.

454. A defendant claiming comparative negligence "has the burden of showing it," since "an injured person is presumed to have used due care" in his actions. *Rossman v. LaGrega*, 28 N.Y.2d 300, 304 (1971).

455. Indeed, Mr. Harrigan's testimony, and that of his immediate supervisor and the Construction Manager, Lend Lease's representative all established that Gary Harrigan was a dependable, experienced, knowledgeable and hard working employee who comported his conduct to meet all *known* safety standards. He wore his hard hat, harness and clipped in to the lift basket immediately upon entering the lift; he testified that he carefully observed the ground around the lift and the area where he was driving the lift forward and that he carefully positioned the lift in a manner that he believed was safe, level and steady before commencing the elevation of the basket.

456. As he had no way to know that the lift he was then using had hidden attributes of which he was unaware, and as he was never trained on the use of the machine or even familiarized with the outrigger system by the United Rentals delivery person who was trained to provide such information, there was no reason to expect that he would engage the outrigger or automatic leveling system before elevating the lift basket on the day of his accident. Similarly, in the absence of a manual that advised it was not safe to rely upon the tilt alarm to determine if the lift was level, Mr. Harrigan cannot be charged with being comparatively negligent in continuing to rely on that known attribute of the machine. As such, on this record, Mr. Harrigan is not even guilty of comparative negligence. See, *Perales v. City of New York*, 274 A.D.2d 349 (1st Dep't 2000).

WHEREFORE, upon the foregoing, the annexed exhibits, the Affidavit of Expert Engineer Les Knoll and the plaintiffs' Memorandum of Law in Support, this Court should grant the within motion for partial summary judgment on plaintiffs' Labor Law §§240(1) and 241(6) claims, remanding the same for an inquest on damages, along with such other and additional relief as the Court deems just and proper.

Dated: New York, New York
May 31, 2016

Brian J. Isaac

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

Danielle Henderson being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York. I served a true copy of the annexed ***Notice of Motion*** **and Plaintiffs' Memorandum of Law in Support of their Motion for Partial Summary Judgment on Gary Harrigan's Causes of Action Pursuant to Labor Law §§240(1) and 241(6)** on May 31, 2016 via ECF, addressed to the last known address of the addressee as indicated below:

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Danielle Henderson
Danielle Henderson

Sworn to before me this
31st day of May, 2016

NOTARY PUBLIC
MARIA C. DONOFRIO
Notary Public, State of New York
No. 01DO6077733
Qualified in Richmond County
Commission Expires 7/15, 2018

Index No.: 156824/2014 TP Index No. 595582/2015
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GARY HARRIGAN and KATHY HARRIGAN,

Plaintiffs,

- against -

G-Z/10UNP REALTY, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.

Defendants.

----------X

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff,

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

NOTICE OF MOTION

SMILEY & SMILEY, LLP
BY: POLLACK, POLLACK, ISAAC & DE CICCO
Attorneys for the Plaintiffs
225 Broadway, Suite 307
New York, NY 10007
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To:
Attorney(s) for

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.

Dated: _____ *Signature*: _____

Print Signer's Name: _____

Service of a copy of the within
Dated:

.....
Attorney(s) for

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

GARY HARRIGAN and KATHY HARRIGAN, Index No.: 156824/2014

Plaintiffs,

-against-

G-Z/10UNP REALTY, LLC; LEND LEASE (US) CONSTRUCTION LMB, INC.; GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.,

Kindly refer to the Hon. Joan Kenney, J.S.C.

Defendants.

----------X

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff, Index No.: 595582/2015

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

----------X

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON GARY HARRIGAN'S CAUSES OF ACTION PURSUANT TO LABOR LAW §§240(1) AND 241(6)

Of Counsel
Denise A. Rubin

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PRELIMINARY STATEMENT

Plaintiffs[1] GARY HARRIGAN and his wife KATHY HARRIGAN respectfully offer the within Memorandum of Law in Support of GARY HARRIGAN'S Motion for Partial Summary Judgment Against the DEFENDANTS G-Z/10UNP REALTY, LLC and LEND LEASE (US) CONSTRUCTION LMP, INC. on his causes of action arising from Labor Law §240(1) and §241(6).

STATEMENT OF THE CASE

The procedural and factual history of this matter by citation to the exhibits including the pleadings, the Affidavit of Expert Mechanical Engineer Les Knoll, and the testimony of the parties and non-party witness Kristen Malone, is duly set forth in the Affirmation of Brian J. Isaac, Esq. dated May 31, 2016, served in conjunction with this Memorandum of Law. It is included here by reference as if fully set forth herein.

ARGUMENT

POINT I.

PLAINTIFF HAS DEMONSTRATED HIS PRIMA FACIE ENTITLEMENT TO JUDGMENT UNDER LABOR LAW §240(1)

Labor Law §240[1] states:

> 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...scaffolds, hoists, stays, and other devices, which shall be so constructed, placed and operated as to give proper protection to a person so employed.

[1] Unless otherwise specified, references to the "Plaintiff" herein, in the singular, are to the plaintiff-husband Gary Harrigan.

Violation of this statute results in strict liability. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513 (1985). The duty imposed by the statute is nondelegable; when a violation causes injury to a construction worker, the owner of the premises (here, defendant G-Z/10UNP REALTY, LLC) and general contractor (here, defendant LEND LEASE (US) CONSTRUCTION, LMB, Inc. ["Lend Lease"]) are strictly liable. *Haimes v. NY Telephone*, 46 N.Y.2d 132 (1978). Thus, the absolute liability provision exists even though the owner exercised no supervision, control or direction of the work and even if the person injured was a self-employed contractor hired by the owner. *Haimes, supra.*

The law is clear: the general contractor and owner cannot avoid their non-delegable duty under Labor Law §240(1) and Labor Law §241(6) by asserting that the worker's employer (here third-party defendant COORDINATED METALS, INC. ["CMI"]) supplied inadequate safety equipment or instructions to the injured worker. The GC's liability is statutorily imposed by virtue of its status as general contractor. Case law interpreting application of Labor Law §240(1) and § 241(6) imposes liability against general contractors where an employee of the contractor retained to perform construction is injured:

> Section 240 (1) of the Labor Law, like section 241 (6), provides that the statutory duty is nondelegable. It does not require that the owner exercise supervision or control over the worksite before liability attaches (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d, at 501-502, 618 NE2d 82, 601 NYS2d 49, *supra*). Although sections 240 and 241 had been construed before the 1969 amendment as requiring that an owner or general contractor actually exercise control or supervision before either could be held responsible, when the Legislature amended the Labor Law, as we noted in *Haimes* (*supra*), it referred to both sections and stated its purpose in redrafting them was to fix ' "ultimate responsibility for safety practices ... where such responsibility actually belongs, on the owner and general contractor" (NY Legis Ann, 1969, p 407)' (*Haimes v New York Tel. Co.*, 46 NY2d, at 136, 385 NE2d 601, 412 NYS2d 863, *supra*). Thus, the reasoning adopted in *Celestine* is controlling here.

> Liability rests upon the fact of ownership and whether Eastern had contracted for the work or benefitted from it are legally irrelevant."

Gordon v Eastern Ry. Supply, 82 N.Y.2d 555, 560 (1993); *Miraglia v H&L Holding Corp.*, 17 Misc 3d 852, 854-855 (Sup Ct., Bronx Cty. 2007) *aff'd* 67 A.D.3d 513 (1st Dep't 2009).

It is hornbook law that this section of the Labor Law shall be construed "as liberally as may be for the accomplishment of the purpose for which it was thus framed," *Zimmer, supra*, 64 N.Y.2d at 514, given the stated purpose of the statute to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor." *Gordon, supra, citing* 1969 NY Legis. Anno. at 407. The policy purpose underlying Labor Law § 240 is to impose a "flat and unvarying" duty upon the owner and contractor despite any contributing culpability on the part of the worker. *Zimmer, supra*, 64 N.Y.2d at 521. In *Arbegast v. Board of Education*, 65 N.Y.2d 161 (1985), the Court of Appeals specifically recognized that the diminishment of liability by a comparative evaluation of the injured party's culpability would, indeed, be disallowed where thus proscribed by public policy. *Arbegast*, 65 N.Y.2d at 170; *cf. Rosado v Proctor & Schwartz*, 66 N.Y.2d 21 (1985).

The Court of Appeals has consistently reaffirmed that the broad scope of this statute is designed to protect construction workers from gravity related risks. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991); *Ross v. Curtis-Palmer Hydroelectric Co.*, 81 N.Y.2d 491 (1993). As the same court noted in *Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 318 (1948), such broad construction is warranted because such workers "are scarcely in a position to protect themselves from accidents."

Thus, comparative negligence is *not* a defense to a Labor Law §240(1) claim. *Bland v. Mancherian*, 66 N.Y.2d 452 (1985). A worker's exercise of his own discretion in the use of a particular safety device (in this case the aerial lift) will not defeat his Labor Law §240(1)

claim (*Dwyer v. Central Park Studios*, 98 A.D.2d 882 [1st Dep't 2012]) nor will it defeat his summary judgment motion on the claim. *Gove v. Pavarini*, 110 A.D.3d 601, 603 (1st Dep't 2013); *Prozyborowski v. Ann Cook*, 120 A.D.3d 651 (2d Dep't 2014) ("plaintiff's exercise of discretion in connection with whether to use the ladder or the staircase cannot be said to be the sole proximate cause of his injuries"); *Kin v. State*, 101 A.D.2d 1606 (4th Dep't 2012); *see also Mutadir v. 80-90 Maiden Lane*, 110 A.D.3d 641 (1st Dep't 2013). Plaintiff is not required to be completely free from negligence. *Kielar v. Metropolitan Museum*, 55 A.D.3d 456, 458 (1st Dep't 2008), *citing Hernandez v. Bethel UMC*, 49 A.D.3d 251, 253 (1st Dep't 2008).

It is the responsibility of the Labor Law defendants, not the workers, to provide for the workers' protection. *Collins v. W. 13th St. Owners*, 63 A.D.3d 621 (1st Dep't 2009); *Ramos v. PA.*, 306 A.D.2d 147-8 (1st Dep't 2003), *quoting Singh v. Barrett*, 192 A.D.2d 378 (1st Dep't 1993). This includes giving them proper instructions and training; there is no evidence controverting plaintiff's contention that he was never trained, never required to be certified on the use of the aerial lift and never provided an operator's manual or familiarization with the outrigger system and automatic leveling capabilities of the GS 3232. *Campuzano v. Board of Education of City of NY*, 54 A.D.3d 268 (1st Dep't 2008) ("there was no evidence controverting Campuzano's assertions that ...*Campuzano was never instructed* not to use a ladder in addition to the scaffold."); *Hartman v. Galasso*, 226 A.D.2d 256 (1st Dep't 1996)("defendant, who appeared at the worksite only on weekends, never instructed him as to how to use the materials or perform the work").

Moreover, the Court of Appeals has consistently held that "contributory negligence should not be charged if there is no or insufficient evidence to support it." *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 517 (1980), quoting *Willis v. YMCA of Amsterdam*, 28 N.Y.2d 375,

378 (1971); see also 65A CJS, Negligence, § 293, p. 1032. Indeed, although comparative negligence is generally a jury question, in *Perales v. City of New York*, 274 A.D.2d 349 (1st Dep't 2000), the First Department held that a comparative negligence charge is inappropriate where there are no specific factual allegations (or here, no evidence) to support it and no valid line of reasoning could lead a jury to find the plaintiff comparatively negligent.

Comparative negligence has been defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." *Sundt v. NYS Electric & Gas Corp.*, 103 A.D.2d 1014, 1015 (4th Dep't 1984) quoting Prosser, Law of Torts, 4th Ed., §65, pp. 416-7 and Restatement, 2d, Torts, § 463. A defendant claiming comparative negligence "has the burden of showing it," since "an injured person is presumed to have used due care" in his actions. *Rossman v. LaGrega*, 28 N.Y.2d 300, 304 (1971).

Mr. Harrigan's testimony showed, and the testimony of his immediate supervisor from CMI, Guy Zammit, of Lend Lease's witness Ken Solter and of the non-party witness Ms. Malone supported Zammit's opinion that Gary Harrigan is a dependable, experienced, knowledgeable and hard working employee who comported his conduct to meet all *known* safety standards. He wore his hard hat, harness and clipped in to the lift basket immediately upon entering the lift; he testified that he carefully observed the ground around the lift and the area where he was driving the lift forward and that he carefully positioned the lift in a manner that he believed was safe, level and steady before commencing the elevation of the basket.

As he had no way to know that the lift he was then using had hidden attributes of which he was unaware, and as he was never trained on the use of the machine or even familiarized with the outrigger system by the United Rentals delivery person who was trained to provide such

information, there was no reason to expect that he would engage the outrigger or automatic leveling system before elevating the lift basket on the day of his accident. Similarly, in the absence of a manual that advised it was not safe to rely upon the tilt alarm to determine if the lift was level, Mr. Harrigan cannot be charged with being comparatively negligent in continuing to rely on that known attribute of the machine. See, *Rountree v. MABSTO*A, 261 A.D.2d 324 (1st Dep't 1999); *Gotoy v. NYC*, 249 A.D.2d 268 (2d Dep't 1988); *Conigliaro v. Golfo Pizza,* 237 A.D.2d 320 (2d Dep't 1997); *Linszer v. Wachsman*, 232 A.D.2d 530 (2d Dep't 1996); *Arpino v. Lombardo,* 215 A.D.2d 614 (2d Dep't 1995); *Bukoff v. NYCTA*, 211 A.D.2d 549 (1st Dep't 1995); *Kelleher v. FME Auto*, 192 A.D.2d 581 (2d Dep't 1993); *Livereri v. O'Connell*, 188 A.D.2d 279 (1st Dep't 1992); *Korman v. Public Service Trucking*, 116 A.D.2d 631 (2d Dep't 1996).

Indeed, as the Appellate Division of this Department noted in *Marshal v. Handler*, 237 A.D.2d 158 (1st Dep't 1997): "Nor did the trial court err in not charging comparative negligence absent evidence tending to show that plaintiff had negligently exited her tub. It was not plaintiff's burden to prove freedom from negligence by providing evidence of her cautionary measures."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device including, as here, a powered aerial lift such as the Genie-manufactured GS 3232, 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 N.Y.3d 599, 604 (2009), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 491, 501 (1993) (emphasis in original). To accomplish this goal, the statute places the responsibility for safety practices and safety devices

on owners, contractors, and their agents, who are "best situated to bear that responsibility." *Ross*, 81 N.Y.2d at 500. Thus, the statute has been liberally construed to achieve its objectives. *See Lombardi v Stout*, 80 N.Y.2d 290, 296 (1992).

To prove liability under this statute, plaintiff need only show that it was violated and that the violation was the proximate cause of the injuries sustained. *Gandley v. Prestige Roofing & Siding*, 148 A.D.2d 666 (2d Dep't 1989) *appeal dismd.*, 74 N.Y.2d 791 (1989); *Vencebi v. Waldorf Astoria Hotel*, 143 A.D.2d 1004 (2d Dep't 1988). As the Court of Appeals remarked, "[o]nce it is determined that the worker or contractor failed to give a worker proper protection, absolute liability is unavoidable under Section 240[1]." *Bland v. Manocherian*, 66 N.Y.2d at 453; *Zimmer*, 65 N.Y.2d at 514.

A plaintiff has demonstrated his entitlement to summary judgment if a plaintiff can establish that [1] a ladder, scaffold or device collapses. *Drew v. Correct Mfg. Corp.*, 149 A.D.2d 893 (3d Dep't 1989); *Braun v. Dormitory Authority of the State of NY*, 118 A.D.2d 614 (2d Dep't 1986); *Hauf v. CLXXXII Magna Corp.*, 118 A.D.2d 485 (1st Dep't 1986); *D'Amico v. Manufacturers Hanover Trust Co.*, 177 A.D.2d 441 (1st Dep't 1991); *Noah v. 270 Lafayette Assoc. LP*, 233 A.D.2d 108 (1st Dep't 1996); *Cosban v. NYCTA*, 227 A.D.2d 160 (1st Dep't 1996); [2] a ladder, scaffold or device falls because it is not properly secured. *Haimes*, *supra*; *Rodriguez v. NYCHA*, 191 A.D.2d 460 (1st Dep't 1993); *Urrea v. Sedgwick Assoc.*, 191 A.D.2d 319 (1st Dep't 1993); *Fernandez v. MHP Land Assoc.*, 188 A.D.2d 417 (1st Dep't 1992); *Schultze v. 585 West 214St. Owners Corp.*, 228 A.D.2d 381 (1st Dep't 1996); [3] if a construction worker falls from a ladder, scaffold or device containing no safety equipment to prevent or cushion such fall, and is injured as the result or sustains in injury while trying to prevent or safeguard against a fall. *Bland v. Manocherian, supra*; Zimmer *v. Chemung, supra*;

Draiss v. Ira S. Salk Constr. Corp., 201 A.D.2d 698 (2d Dep't 1994); *Desrosiers v. Barry Betty & Led Duke Inc.*, 189 A.D.2d 947 (3d Dep't 1993); *Conway v. NYS Teachers Retirement System*, 141 A.D.2d 957 (3d Dep't 1988); *Region v. W.J. Woodwork Constr. Inc.*, 140 A.D.2d 758 (3d Dep't 1988); *Cartella v. Margert Woodbury Strong Museum,* 135 A.D.2d 1089 (4th Dep't 1987); *McGurk v. Turner Constr. Co.*, 127 A.D.2d 526 (1st Dep't 1987); *Goldthwait v. State of NY*, 120 A.D.2d 969 (4th Dep't 1986); *Brant v. Republic Steel Corp.*, 91 A.D.2d 841 (4th Dep't 1982) *appeal dismd.*, 59 N.Y.2d 761 (1983); *Robinson v. NAB Construction*, 210 A.D.2d 86 (1st Dep't 1994); *Rich v. State of NY*, 231 A.D.2d 942 (4th Dep't 1996); *Dawson v. Pavarini Constr. Co. Inc.*, 228 A.D.2d 446 (2d Dep't 1996); and [4] if a construction worker working at a construction site is injured by an object which falls from an elevated height and strikes him. *McCloud v. Rochester Gas & Elec. Corp.*, 203 A.D.2d 923 (4th Dep't 1994); *Murray v. Niagara Frontier Transportation Authority*, 199 A.D.2d 984 (4th Dep't 1993); *Desrosiers v. Barry Betty & Led Duke, Inc., supra*; *Brust v. Estee Lauder Inc.*, 184 A.D.2d 474 (1st Dep't 1992); *Oden v. Chemung Co. Industrial Dev. Agency*, 183 A.D.2d 998 (3d Dep't 1992); *Fitzgibbons v. Olympia & York Battery Park Co.*, 182 A.D.2d 1069 (4th Dep't 1992); *Santos v. Sure Iron Works*, 166 A.D.2d 571 (2d Dep't 1990); *Litizia v. Jonathan Woodner Co.*, 150 A.D.2d 274 (1st Dep't 1989); *Lockwood v. National Valve Mfg. Co.*, 143 A.D.2d 509 (4th Dep't 1988); *Sherman v. Babylon Recycling Center*, 218 A.D.2d 631 (1st Dep't 1995) *appeal dismd.*, 87 N.Y.2d 895 (1995).

Given the foregoing, then, it is axiomatic that in order to succeed under Labor Law § 240(1), the plaintiff need only prove: (1) a violation of the statute (*i.e.,* that the owner or General Contractor failed to provide adequate safety devices); and (2) that the statutory violation was a proximate cause of the injuries sustained. *Blake v Neighborhood Hous. Servs. of NY City*,

1 N.Y.3d 280, 290 (2003). Here the allegation is that in failing to ensure that any operator of the GS3232 lift on the job site, including plaintiff Gary Harrigan, was properly trained and duly certified in the operation of the lift devices, and in turn was duly familiarized with the unique safety features of this particular model, which featured concealed outriggers and an automatic leveling system that are not readily apparent to the casual observer of the machine, the defendants rendered that lift, necessary for the completion of plaintiff's work on the site, an ineffective and dangerous instrumentality.

Plaintiff has demonstrated that the aerial lift machine he was provided for his work did not provide "proper protection" by virtue of the general contractor's non-existent safety and training program. This is because the GC and its site safety officer never confirmed that he had been adequately trained in the operation of the aerial lift machines and never sought proof that he had obtained the required certification of completion of that training. At the same time, the GC failed to offer adequate training on the job site or to make such training available to the workers where they had not been properly certified. Finally, having failed to ensure that the machine operators including Mr. Harrigan were fully trained and certified and familiarized with the particular attributes of the specific machine(s) on the job site, the GC failed to provide those workers with any sufficient substitute devices to prevent him from being injured as a result of his operating the lift in a matter that was at odds with the manufacturer's instructions, ANSI and OSHA regulations and the site safety programs of the GC and CMI.

As a result of all of these failures, when the aerial lift he was then operating tipped over and fell to the ground, ejecting him and a non-party from the basket, plaintiff was prima facie entitled to partial summary judgment on liability on his Labor Law § 240(1) claim. *See Vergara v. SS 133 W. 21, LLC*, 21 A.D.3d 279, 280 (1st Dep't 2005) (worker who was injured in fall from

scaffold was not provided with proper protection where the scaffold had no side rails, and no other protective devices were provided to prevent plaintiff from falling); *Morrison v. City of New York*, 306 A.D.2d 86 (1st Dep't 2003) (defendants' liability was established by the fact that the scaffold they provided to plaintiff, which admittedly had no guardrails, safety nets or lifelines, did not prevent plaintiff from falling).

Plainly, the improper operation or movement of elevation devices which causes construction workers to fall or be launched to the ground constitutes a violation of Labor Law §240[1] as a matter of law. See, *Williams v. 520 Madison*, 38 A.D.3d 464 (1st Dep't 2007) (Wind moved basket in which plaintiff was working; plaintiff entitled to summary judgment); *Bilderback v. Agway Petroleum*, 185 A.D.2d 372 (3d Dep't 1992), *app. dismd.* 80 N.Y.2d 971 (1991) (Plaintiff launched from forklift he used his weight to balance); *Cosban v. NYCTA*, 227 A.D.2d 160 (1st Dep't 1986) (Crane toppled causing injury to operator; general contractor absolutely liable).

Toppling or movement of a scissor lift which causes a worker to sustain an elevation related injury entitles plaintiff to partial summary judgment pursuant to §240[1] of the Labor Law. See, *Prenty v. Cava*, 289 A.D.2d 120 (1st Dep't 2011); *Ward v. Uniondale WG LLC*, 2015 NY Misc. LEXIS 2526 (Sup. Ct. 2015). The same is true where a non-defective scissor lift is inappropriate for the task at hand and its use results in plaintiff's fall. See, *Hoffman v. SJP TS LLC*, 111 A.D.3d 467 (1st Dep't 2013).

Recently, in *Somereve v. Plaza Constr.*, 136 A.D.3d 537 (1st Dep't 2016),[2] plaintiff testified that a mini-forklift was being used to hoist a load of bricks onto a scaffold; the forks had to be placed 4-6" from the edge of the scaffold so they did not strike it; once the forks cleared the

[2] Our office represented the plaintiff in that case.

top of the scaffold, plaintiff would drive them forward and rest them on it to deliver the load. Co-workers would spot to be sure the maneuver was proceeding safely. On the day of the accident, plaintiff received a hand signal informing him the forks were clear; when he proceeded, the prime mover "flipped forward" and "plaintiff was ejected off the back of the machine onto the concrete floor." Defendants opposed summary judgment on liability, seeking further discovery or claiming there were varying accounts of the accident or plaintiff's actions constituted the sole proximate cause of same. The majority of the Appellate Division of this Department found that plaintiff was entitled to summary judgment on liability, as the movement of the prime mover was a violation of the Labor Law under any of the versions of the accident presented on the record. Even if plaintiff negligently lowered the pallet, he could not be solely to blame because the statute was violated and imposed absolute liability. See, *Blake v. Neighborhood Hous.*, 1 N.Y.3d 280, 290 (2003); *Orellano v. 29 E. 37 St.*, 292 A.D.2d 289, 291 (1st Dep't 2002).

Accordingly, we submit that plaintiff has a "perfect" Labor Law §240[1] claim here.

As a matter of law, plaintiff was injured while working on a "structure" within the meaning of §240 (1). Plainly, the defendants' building at 50 UN Plaza, a new construction residential building with commercial space on the first floor, constitutes a structure. A structure is "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Joblon v Solow*, 91 N.Y.2d 457, 464 [1998][internal quotation marks omitted]). The Appellate Division, Second Department has instructed that whether an item is a "structure" requires an examination of "the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist." *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 A.D.3d 13, 17 (2d Dep't

2012)(holding that a temporary ritual wedding canopy or "chuppah" was a structure for §240(1) analysis). The fact that a structure may be temporary, standing alone, is insufficient to outweigh other factors which strongly support an inference that the [...] was a structure within the meaning of § 240 (1) (*see Kharie v. South Shore Record Mgt., Inc.*, 118 A.D.3d 955, 956 (2d Dep't 2014) [a set of shelves which were connected in a tongue-and-groove fashion, some of which required the use of a hammer to separate the pieces, constituted a structure]; *McCoy v Kirsch*, 99 A.D.3d 13, 17 (2d Dep't 2012) [a ritual canopy at a Jewish wedding ceremony was a structure]; *Sinzieri v Expositions, Inc.*, 270 A.D.2d 332, 333 [2d Dep't 2000] [an exhibit of windows at a trade show constituted a structure]).

Additionally, at the time of the accident, plaintiff was engaged in the "erection . . ., repairing, altering, [or] painting" work within the ambit of § 240 (1), so he has established entitlement to summary judgment as a matter of law.

We note that the statute may be applicable "despite the fact that the particular job being performed at the moment plaintiff was injured did not in and of itself constitute construction." *Covey v. Iroquois Gas Transmission Sys.*, 218 A.D.2d 197, 199 aff'd 89 N.Y.2d 952 (1997); *see also O'Connor v. Lincoln Metrocenter Partners*, 266 A.D.2d 60, 61 (1st Dep't 1999) [employee who fell en route to 24th floor work site where he stripped forms from recently poured concrete was covered]; *Reinhart v. Long Is. Light. Co.*, 91 A.D.2d 571, 571(1st Dep't 1982) appeal dismissed 58 N.Y.2d 1113 (1983) [plumbers who fell while discussing payroll and timesheet problems "were employed, and they were not interlopers, and the scaffold was defective, and accordingly, summary judgment should have been granted as to liability"]).

Affirming *Covey*, the Court of Appeals held that the plaintiff, who was injured while doing maintenance work to keep the heavy equipment being used in a pipeline project operating,

"was engaged in an activity protected under Labor Law § 240(1), inasmuch as the work performed by plaintiff was part of the construction of the pipeline." *Covey v. Iroquois Gas Transmission Sys.*, 89 N.Y.2d at 953-954. Thus, where plaintiff perform(s) work that is "part of" the construction project, he will be found properly covered under §240(1). By virtue of their exposure to the risks inherent in an elevated work site and their involvement in the erection, etc., of a building or structure (*see Iannelli v Olympia & York Battery Park Co.*, 190 A.D.2d 775 [2d Dep't 1993]), inspectors of construction projects are "workers on the job" and, as such, are within the class of persons protected by §240 (1) (*Kirkpatrick v. Diversified Sports*, 216 A.D.2d 891, 892 (4th Dep't 1995), *citing Haimes v New York Tel. Co.*, 46 N.Y.2d 132 (1978).

The burden now shifts to the defendant general contractor and owner to come forward with sufficient evidence to raise a triable issue of fact (*see Ernest v. Pleasantville Union Free School Dist.*, 28 A.D.3d 419 [2d Dep't 2006]; *Canfield v. Forman Jay LLC*, 2015 N.Y. Slip Op 50031[U], *3 [Sup Ct, Kings County 2015].)

Because the toppling of the aerial lift establishes a violation of the statute as a matter of law, defendants can set forth no proper defense to this claim, and plaintiff is entitled to partial summary judgment on the issue of liability. See, *Matter of E. 51 St. Index Crane Collapse Litigation*, 89 A.D.3d 426 (1st Dep't 2011); *Potter v. Jay & Potter Lib.*, 71 A.D.3d 1565 (4th Dep't 2010); *Thompson v. St. Charles Condominiums*, 300 A.D.2d 152 (1st Dep't 2003), *lv. dismd.* 100 N.Y.2d 556 (2003).[3]

[3] Owners and general contractors, of course, are absolutely liable for any breach of the statute, even if they do not have a continuing duty to supervise the use of safety equipment; Lendlease cannot claim it is absolved because it is a construction manager. *McCarthy v. Turner Constr.*, 17 N.Y.3d 369, 374 (2011); *Matter of E. 51 St. Index Crane Collapse Litigation, supra; Walls v. Turner Constr.*, 4 N.Y.3d 861 (2005).

POINT II.

PLAINTIFF HAS ALSO PROVEN HIS PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT ON HIS CLAIMS UNDER LABOR LAW §241[6]

Labor Law § 241(6) provides, in relevant part, as follows:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavation in connection therewith, shall comply with the following requirements:
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Thus, Labor Law § 241(6) requires owners, contractors and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover for injuries under Labor Law § 241(6), a plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 348 (1998); *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 271 (1st Dep't 2007) *lv denied* 10 N.Y.3d 710 (2008).

The obligations of Labor Law § 241(6) are nondelegable (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 502; *Long v Forest-Fehlhaber*, 55 N.Y.2d 154, 159 (1982); *Allen v Cloutier Constr. Corp.*, 44 N.Y.2d 290, 301 (1978); *Misicki v. Caradonna*, 12 N.Y.23d 511 (2009). Causes of action invoking that statute must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident. *See Ross*, 81 N.Y.2d at

502; *Ares v State of New York*, 80 N.Y.2d 959, 960 (1992); *Adams v. Glass Fab*, 212 A.D.2d 972, 973 (2d Dep't 1995); *Ortega v Puccia*, 57 A.D.3d 54, 60 (2d Dep't 2008).

The Court of Appeals has explained that in order to support a claim under Labor Law §241(6), the particular provision of the Industrial Code relied on must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles. *Misicki, supra*, 12 N.Y.3d at 515.[4]

Here, plaintiff relies on Industrial Code sections 12 NYCRR 23-9.2(a) and 12 NYCRR 23-9.6(a). Pursuant to the analysis set forth in *Misicki*, *supra*, 12 N.Y.3d at 520, these sections both mandate a distinct standard of conduct, rather than a general reiteration of common-law principles, and are precisely the type of "concrete specification" required by *Ross v. Curtis-Palmer Hydro-Elec. Co.*, (81 N.Y.2d 494, 504-505 [1983]). *Misicki*, 12 N.Y.3d at 520 citing *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 (1998).

The fact that these sections may not have been precisely set forth in plaintiff's Bills of Particulars is not fatal to this reliance, moreover. The Appellate Division has held that the plaintiff's failure to identify a specific code provision in his complaint of bill of particulars is not fatal to his Labor Law 241(6) claim in the absence of surprise or prejudice. See, *Mejia v. NYC*,

[4] We acknowledge that the requirement that power operated equipment be maintained in good repair and inspected often enough to ensure good repair, under *Misicki*, was held not sufficiently specific to support a Labor Law §241[6] cause of action. But the same court held that the portion of the regulation requiring correction of structural defects or "unsafe conditions" upon discovery was specific enough to do so. The fact that defendants did not know of the condition is not a precursor to liability (*Mitchell v. NRG Energy*, 125 A.D.3d 1542 [4th Dep't 2014]). The use of the aerial lift without outriggers and without training constitutes an unsafe condition; therefore, we submit that the regulation here was violated as a matter of law. And 12 NYCRR §23-9.6[a][1][iii] requires daily inspections for aerial baskets including "all exposed ropes, machines and **leveling devices** for both excessive wear and security of attachment." Subdivision [iv] requires that all conditions found during such inspection "which may affect the safe operation" of the basket be "corrected before such aerial basket is placed in operation." Accordingly, failure to inspect as required in the Industrial Code constitutes a proximate cause of the accident. Read in connection with §23-9.2[a] which requires that power operated equipment be maintained properly and inspected often enough to ensure such maintenance, and [b][1] which requires that such equipment be "operated only by trained, designated persons", these regulations are sufficiently specific to constitute a concrete commandment under the Labor Law. While §23-9.2 has been held to be general (*Penaranda v. 4933 Realty*, 115 A.D.3d 482 [1st Dep't 2014]), it may be read together with the specific regulations as set forth herein to establish a violation of the statute. See, *McCormack v. Helmsley-Spear*, 233 A.D.2d 203 [1st Dep't 1996].

81 A.D.3d 682 (2d Dep't 2012); *Latino v. Nolan & Taylor*, 300 A.D.2d 631 (2d Dep't 2002); *Kelleir v. Supreme Industries*, 293 A.D.2d 513 (2d Dep't 2002); *Pasquarello v. Citicorp/Quotron*, 251 A.D.2d 477 (2d Dep't 1998).

Of course, New York appellate courts do not resolve cases on grounds raised for the first time on appeal; indeed the Court of Appeals cannot consider such an issue except in very limited circumstances. *Misicki*, 12 N.Y.3d at 519. That exception to the Court of Appeals' general rule, however, is that the Court of Appeals will consider a "newly raised point of law" that is "decisive" in a civil case and "could not have been obviated by factual showings or legal counter steps if it had been raised below." *Misicki*, 12 N.Y.3d at 519 *citing* Karger, Powers of the New York Court of Appeals § 17:1, at 591-592 [3d Ed. Rev.] (internal quotation marks and footnote omitted).

By contrast, the Appellate Division has a somewhat broader mandate. Addressing a defendant's lack of preservation argument, in *Baker v. Bronx Lebanon Hosp. Ctr.* 53 A.D.3d 21, 27 (1st Dep't 2008) that Court held where the plaintiff had raised a legal argument that appeared on the face of the record and could not have been avoided if brought to defendants' attention at the proper juncture, it could be properly raised – and considered by the Appellate Division – on appeal. *See also DiFilippo v. Parkchester N. Condominium*, 65 A.D.3d 899 (1st Dep't 2009); *Schoeps v. Andrew Lloyd Webber Art Found.*, 66 A.D.3d 137, 142 (1st Dep't 2009). Because the record on appeal was found to be sufficient for that issue's resolution, and the issue was determinative, the Court rejected the preservation argument. *Baker,* 53 A.D.3d at 27 *citing Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205, 209 (1996), *lv denied* 88 N.Y.2d 811 (1996). But *cf., Park v. Kovachevich*, 116 A.D.3d 182, 192 (1st Dep't 2014)(the factual issue

related to expert's contention that hospital should have called plaintiff while treating suicidal decedent was improperly raised for the first time in plaintiff's opposition papers).

Similarly, the testimony in the record has established prima facie that these codes were violated and that the general contractor and the owner took no steps to ensure that proper training was provided to operators of the aerial lifts and no steps were being taken to ensure that the workers on site had obtained the requisite certifications for operation of the aerial lifts. As no operator on the site, including Mr. Harrigan, had been properly trained or familiarized with the GS3232 machine and it's outrigger system, they could not possibly have complied with their obligation under ANSI and OSHA standards, as well as Industrial Code 23-9.6(a) to inspect and test, among other things, the leveling system of the GS3232 before each day's use of the lift.

Hence plaintiff's reliance here on the Industrial Code violations fit squarely within the parameters defined in *Baker*: the Industrial Code sections cited, and the testimony and documentary evidence establishing the violations of those codes, together constitute " a legal argument that appeared on the face of the record and could not have been avoided if brought to defendants' attention at the proper juncture." Hence they are properly raised in plaintiff's summary judgment motion in this Court as they certainly would have been if raised later on these conditions in the Appellate Division. See, *Block v Magee*, 146 A.D.2d 730 (2d Dep't 1989).

Accordingly, Mr. Harrigan has made out the elements of his cause of action under Labor Law §241(6), which provides that those defendants have a non-delegable duty to provide such safety protection on the work site and strict liability for their failure to do so, by his sworn admissible testimony that he was working on the aerial lift, had not been provided adequate training, certification and familiarization with the GS 3232 nor even an operator's manual for the machine that would have revealed the presence of the outrigger system, the automatic self-

leveling capability of the machine and significantly, would have told him that the manufacturer warns operators not to rely on the absence of the tilt alarm to determine that the machine is sufficiently level to operate the lift.

POINT III.

WHETHER THE PLAINTIFF IS THE SOLE PROXIMATE CAUSE OF HIS INJURIES IS INHERENTLY A FACT QUESTION THAT PRECLUDES SUMMARY JUDGMENT FOR DEFENDANTS.

To show that the plaintiff was the sole proximate cause of an injury, the defendant must establish that "plaintiff had adequate safety devices available; *that he knew both that they were available and that he was expected to use them*; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.'" *Auriemma v. Biltmore Theatre*, LLC, 82 A.D.3d 1, 10 (1st Dep't 2011), *quoting Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 (2004). However, even "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." *Blake*, 1 N.Y.3d at 290. Where the lack of adequate training for a worker to operate a certain machine (as here) results in an otherwise safe machine being rendered unsafe, that failure to ensure proper training and familiarization with the machine's attributes is a proximate cause of the injury; hence plaintiff cannot be the "sole proximate cause" of his injury as a matter of law.

In any event, any attempt to lay the blame for this accident at Gary Harrigan's feet goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law §240(1) cause of action, because the statute imposes absolute liability once a violation is shown. *Bland v Manocherian*, 66 N.Y.2d at 460; *Velasco v Green-Wood Cemetery*, 8 A.D.3d 88, 89 (1st Dep't 2004)("Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"); *Klein v City of New York*, 222 A.D.2d 351, 352 (1st Dep't

1995). "[T]he Labor Law does not require plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.'" *Hernandez v Bethel United Methodist Church of N.Y.*, 49 A.D.3d 251, 253 (1st Dep't 2008), *quoting Blake v Neighborhood Hous. Servs. of N.Y.*, 1 N.Y.3d at 290.

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]. " *Tavarez v Weissman*, 297 A.D.2d 245, 247 (1st Dep't 2002); *see Velasco v Green-Wood Cemetery*, 8 A.D.3d at 89 ("(p)laintiff's use of the ladder without his coworker present amounted, at most, to comparative negligence"); *Ranieri v Holt Constr. Corp.*, 33 A.D.3d 425 (1st Dep't 2006) (Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries); *Lopez v Melidis*, 31 A.D.3d 351 (1st Dep't 2006); *Torres v Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004)(Court noted that, even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident); see, *Howard v. Turner Constr.*, 134 A.D.3d 523 (1st Dep't 2015).

The record does not support a finding that Gary Harrigan was a recalcitrant worker. See, *Howard v. Turner Constr.*, 134 A.D.3d 527. It is undisputed that the defendants failed to furnish the plaintiff with the requisite training or to confirm that he had already been properly trained and certified in the operation of the aerial lift devices and in particular, with the GS3232. They also failed, in the alternative, to provide him with "immediate specific instructions to use an another actually available safety device or to avoid using [this] particular unsafe device" [rendered unsafe by inadequate training]. *Ortiz v 164 Atl. Ave., LLC*, 77 A.D.3d 807, 809 (2d Dep't 2010); *Walls v Turner Constr. Co.*, 10 A.D.3d 261, 262 (2004), *affd on other grounds* 4 N.Y.3d 861, 862 (2005); *see Zong Mou Zou v Hai Ming Constr. Corp.*, 74 A.D.3d 800 (2d Dep't 2010); *Santo v Scro*, 43 A.D.3d 897, 898-899 (2d Dep't 2007); *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39-40 (2004). Moreover, "'[t]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures.'" *Nimirovski v Vornado Realty Trust Co.*, 29 A.D.3d 762, 762 (2d Dep't 2006), quoting *Conway v New York State Teachers' Retirement Sys.*, 141 A.D.2d 957, 958-959 (3d Dep't 1988).

Questions about whether plaintiff had ever asked for better safety devices or training on the aerial lift, or whether he affirmatively sought out the operator's manual for the subject machine, will not successfully shift the liability away from the general contractor under the Labor Law.

As the Appellate Division, First Department held in 2014, the Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding

hostile behavior. *DeRose v Bloomingdale's Inc.*, 120 A.D.3d 41, 47 (1st Dep't 2014). The *DeRose* Court held that placing that burden on employees would effectively eviscerate the protections that the legislature put in place. Indeed, workers would be placed 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. *DeRose*, 120 A.D.3d at 47, citing *Lombardi v Stout*, 80 N.Y.2d at 296 (explaining that Labor Law §240 "is intended to place the ultimate responsibility for building practices on the owner and general contractor in order to protect the workers who are required to be there but who are scarcely in a position to protect themselves from accidents"); *see also Haimes*, 46 N.Y.2d at 136, *quoting* NY Legis Ann, 1969, p 407).

When faced with an employer's instruction to use an inadequate device, many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods. Labor Law § 240(1) speaks for those workers and, through the statute, the legislature has made clear that the provision of adequate safety devices at worksites is imperative and that worker safety depends on absolute liability for contractors and owners who fail to furnish such devices (*see Lombardi*, 80 NY2d at 296).

Plaintiff's operation of the GS 3232 on the day of his accident was not the sole proximate cause of his injuries. *See Crespo v. Triad, Inc.*, 294 A.D.2d 145, 147 (1st Dep't 2002) (painter's failure to use locking wheel devices on scaffold and movement on scaffold were not determinative on his § 240(1) claim since contributory negligence is not a defense); *Lawrence v. Forest City Ratner Cos.*, 268 A.D.2d 380, 380-381 (1st Dep't 2000) (even if plaintiff failed to lock the wheels of the scaffold, it could not be said that he was the sole proximate cause of his

accident); *Vanriel v. Weissman Real Estate*, 262 A.D.2d 56 (1st Dep't 1999) (plaintiff's failure to activate locking device for scaffold wheels was not the sole proximate cause of accident).

Nor will minor inconsistencies in plaintiff's testimony or an inability to testify with certainty about the precise mechanism of the machine falling over warrant denial of plaintiff's motion. Plaintiff is not required to prove the precise reason for his fall. *See Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dep't 2002) (possible discrepancies as to plaintiff's description of how or why he fell off the scaffold were irrelevant since there was no dispute that his injuries were caused by his fall from the scaffold); *Laquidara v. HRH Constr. Corp.*, 283 A.D.2d 169 (1st Dep't 2001) (where there was no question that plaintiff's injuries were at least partially attributable to the defendants' failure to provide guardrails, safety netting or other proper protection, "(t)he precise manner in which plaintiff's fall occurred is immaterial").

Plaintiff has submitted his admissible deposition transcript demonstrating that (1) plaintiff was working at an elevation; (2) the aerial lift model GS3232 constituted a "scaffold, hoist, stay or other device as contemplated by § 240(1); and (3) he fell from a height (as the lift machine itself fell over) sustaining injuries. It is self-evident that plaintiff was not provided with (1) adequate training and certification before he was allowed to operate the lift in question which is one of the protective devices enumerated in §240 (1); and/or (2) another type of protective device within the ambit of § 240 (1) (*see Tabickman v. Batchelder St. Condominiums By Bay, LLC*, 52 A.D.3d 593, 595 [2d Dep't 2008]; *Dzieran v. 1800 Boston Rd., LLC*, 25 A.D.3d 336, 337 [1st Dep't 2006]).

The burden now shifts to the defendant General Contractor/Construction Manager Lend Lease and the owner G-Z/10UNP Realty, LLC, to come forward with sufficient evidence to raise

a triable issue of fact (*see Ernest v. Pleasantville Union Free School Dist.*, 28 A.D.3d 419 [2d Dep't 2006]; *Canfield v. Forman Jay LLC*, 2015 N.Y. Slip Op 50031[U], *3 [Sup Ct, Kings County 2015].)

The *Zimmer* Court held that "where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage". *Zimmer*, 65 N.Y.2d at 523. The Appellate Division, First Department cited *Zimmer* in 2008 as authority for rejecting certain defendants' argument that "to provide an appropriate safety device was ... impracticable under the circumstances." *Pichardo v. Urban Renaissance Collaboration Ltd. Partnership*, 51 A.D.3d 472, 473 (1st Dep't 2008); *Salazar v. Novalex Contracting Corp.*, 72 A.D.3d 418, 422 (1st Dep't 2010); *see also Hamilton v. Kushnir Realty Co.*, 51 A.D.3d 864, 865 (2d Dep't 2008) ("When an owner or contractor fails to provide any safety device, liability is mandated by the statute without regard to external considerations such as custom or usage"). Specifically, the First Department in *Pichardo* found that "Defendants' argument that failure to provide an appropriate safety device was either impracticable under the circumstances or would not have prevented the accident is unavailing." *Pichardo*, 51 A.D.3d at 472-473, citing *Zimmer*.

Moreover, a plaintiff need not prove what safety devices would have prevented the accident. *See e.g. Kindlon v. Schoharie Central School District*, 66 A.D.3d 1200, 1202 (3d Dep't 2009); *Cody v. State of New York*, 52 A.D.3d 930, 931 (3d Dep't 2008); *Noble v. AMCC Corp.*, 277 A.D.2d 20, 21 (1st Dep't 2000). Accordingly, liability under Labor Law § 240 (1) has been clearly established, and plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) should be granted against defendants, the General Contractor and Construction Manager.

POINT IV.

SUMMARY JUDGMENT SHOULD BE GRANTED WHERE PLAINTIFF HAS DEMONSTRATED HIS PRIMA FACIE ENTITLEMENT TO JUDGMENT IN HIS FAVOR.

The parties seeking summary judgment bear the initial burden of establishing their prima facie entitlement to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003); *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 (1979).

Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. *Millerton Agway Coop. v. Briarcliff Farms*, 17 N.Y.2d 57 (1966). But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

Summary judgment should be granted where no material facts are in dispute. Section 3212(b) of the CPLR states that: "the motion shall be granted if, upon all the papers and proof submitted, the...defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Once the proponent of the summary judgment motion has submitted such proof, the burden shifts to the opposing party to show facts sufficient to require a trial of any issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); Friends *of Animals v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

Under *Zuckerman* and the myriad cases that have applied its principles, when faced with the situation where sufficient proof for a directed verdict is submitted on a summary judgment motion, the opponent of the motion must:

> "show facts sufficient to require a trial of any issue of fact"... if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form.

Zuckerman, 49 N.Y.2d at 562; *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276 (1978). Where, as here, the movants has demonstrated his *prima facie* entitlement to judgment in his favor, the motion must be granted if the opponent fails to demonstrate a material fact question exists for resolution at trial. Here, the defendants cannot do so in light of their unequivocal testimony on the core issues of control and ownership, and this Court should accordingly grant the motion for partial summary judgment in plaintiff's favor.

CONCLUSION

This Court should grant plaintiffs' motion for partial summary judgment on Gary Harrigan's Labor Law §§240(1) and 241(6) claims against the General Contractor Lend Lease and the owner, G-Z/10UNP Realty, LLC, remanding those claims for an inquest on damages and granting such other and further relief as this Court deems appropriate.

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Respectfully submitted,

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Index No.: 156824/2014TP Index No. 595582/2015
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GARY HARRIGAN and KATHY HARRIGAN,

Plaintiffs,

- against -

G-Z/10UNP REALTY, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.

Defendants.

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UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff,

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON GARY HARRIGAN'S CAUSES OF ACTION PURSUANT TO LABOR LAW §§240(1) AND 241(6)

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To:
Attorney(s) for

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.

Dated: _____ *Signature*: _____
Print Signer's Name: _____

Service of a copy of the within
Dated:

.....
Attorney(s) for

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GARY HARRIGAN and KATHY HARRIGAN, Plaintiffs, -against- G-Z/10UNP REALTY, LLC; LEND LEASE (US) CONSTRUCTION LMB, INC.; GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC., Defendants.	Index No.: 156824/2014 **AFFIRMATION IN REPLY**
UNITED RENTALS (NORTH AMERICA), INC., Third-Party Plaintiff, -against- COORDINATED METALS, INC., Third-Party Defendant.	Index No.: 595582/2015 Kindly refer to: The Hon. Joan Kenney

BRIAN J. ISAAC, an attorney duly licensed to practice before the courts of the State of New York, hereby affirms the following to be true or, if stated upon information and belief, that I believe it to be true under penalty of perjury:

I am a member of the law firm Pollack, Pollack, Isaac & DeCicco, LLP, special and appellate counsel to the law office of Smiley & Smiley, LLP, attorneys for plaintiffs GARY HARRIGAN and KATHY HARRIGAN.

By virtue of my review of the pertinent pleadings, deposition transcripts, bills of particulars and other file materials maintained by the law firms for the prosecution of

plaintiff's claims herein, I am fully familiar with the facts, pleadings and prior proceedings in this case.

This affirmation is submitted in reply to defendants G-Z/10UNP REALTY, LLC and LEND LEASE (US) CONSTRUCTION LMB, INC.'s opposition papers filed in response to plaintiffs' motion for partial summary judgment on the issue of liability pursuant to Labor Law §§240(1) and 241(6).

As will be shown here, defendants cannot prevail on the "evidence" they offer in opposition to the motion including, but not limited to, speculative "accident reconstruction" animations offered without foundation to establish they are even related to the facts that were set forth in the witness' testimony; demonstrably inaccurate recitations of the facts in defendants' expert affidavit and misapprehension of the relevant law, particularly with regard to the standards necessary to establish that a Labor Law claimant's conduct constitutes the "sole proximate cause" of an accident[1] and false assertions rejecting the nondelegable duties owed by a general contractor and owner under the Labor Law.[2]

[1] An expert cannot assume facts not supported by or flatly contradicted by the record. See, *Parnell v. Montefiore*, 63 AD3d 573 [1st Dept. 2009].

[2] An expert may not testify to a standard that is in conflict with a statute or settled rule of law. See, *Vetere v. Garcia*, 211 AD3d 631, 632 [2d Dept. 1995] (Testimony of defendant's expert improperly received in evidence where it was "inconsistent with certain provisions of the Vehicle and Traffic Law applicable to the circumstances herein"); *Marquart v. Yeshiva Machezikel Torah*, 53 AD2d 688 [2d Dept. 1976]; *Rodriguez v. NYCHA*, 289 AD2d 260 [1st Dept. 1994].

Nor should this Court accept defendants' invitation to grant summary judgment in their favor without a motion or cross motion seeking such relief. Plaintiff has demonstrated his entitlement to judgment in his favor on the Labor Law causes of action; calling him "reckless" or "recalcitrant" when the record is devoid of support for those labels cannot suffice to overcome defendants' nondelegable duty under the Labor Law.[3]

In addition to the testimony outlined herein, plaintiffs adopt by reference their primary motion papers and exhibits annexed thereto, as well as the expert affidavit of Senior Mechanical Engineer Les Knoll and plaintiffs' Memorandum of Law in Support of the Motion.

However, before discussing defendants' attempt to avoid summary judgment, it is important for this Court to note, at the outset, that settled precedent from the Appellate Division of this Department, as well as other Departments, establishes definitively that the collapse or tipping of a scissor lift or similar device constitutes a violation of §240(1) of the Labor Law as a matter of law. See, *Somereve v. Plaza Construction*, 136 AD3d 537 [1st Dept. 2016]; *Potter v. Jay E. Potter Libr.*, 71 AD3d 1565-7 [4th Dept. 2010]; *Penaranda v 4933 Realty*, 118 AD3d 596 [1st Dept. 2014]; *Ward v Cedar Key Assoc.*, 13 AD3d 1098 [4th Dept.

[3] Of course, an affirmation by counsel with no knowledge of the facts is insufficient to raise a triable issue of fact in opposition to a motion for summary judgment. See, *Delgado v. Martinez Family Auto*, 113 AD3d 426 [1st Dept. 2014].

2004]; *Prenty v Cava Construction*, 289 AD2d 120, 121 [1st Dept. 2001](“Since Cava did not provide plaintiff with any appropriate safety devices, it does not avail White to argue that the lift was not defective and that the sole cause of the accident was plaintiff's attempt to level the lift on a slanted sidewalk by the use of planks without any bracing or support”).

Since owners and general contractors are statutorily mandated to comply with §§240 and 241 of the Labor Law, under this precedent, the tipping, collapse or movement of a scissor lift or similar device establishes a violation of the statute by a building owner or a general contractor who oversees construction work at the site as a matter of law.

Relatedly, in *Blake v Neighborhood Housing Services*, 1 NY3d 289, 290 [2003], the Court of Appeals held that it is “conceptually impossible” for a plaintiff’s act to be the “sole proximate cause” of an accident where a defendant’s violation of the statute constitutes a proximate cause of that accident. If “a statutory violation is a proximate cause of an injury, plaintiff cannot be solely to blame for it.” Or, as stated by the Appellate Division of this Department in *Hernandez v Argo Corp*, 95 AD3d 782,783 [1st Dept. 2014], “Given defendant’s statutory violation, plaintiff’s conduct cannot have been the sole proximate cause of the accident.” See also, *Hoffman v SJP TS, LLP*, 111 AD3d 467 [1st Dept. 2013] (Where plaintiff fell from

a scissor lift when leaning over to perform calking, defendant's "argument that triable issues exist as to whether plaintiff was the sole proximate cause of the accident" was "unavailing" because defendant "failed to provide an adequate safety device in the first instance"). In this regard, defendants' attempt to blame plaintiff for the subject accident fails as a matter of law as it is nothing more than a claim of comparative negligence which does not constitute a defense to a Labor Law §240(1) claim.

We submit that the First Department's decision in *Prenty*, *supra*, is outcome determinative. In that case, plaintiff was injured when the scissor lift he was using toppled over. The Appellate Division of this Department, rejecting defendant's claim that plaintiff was solely responsible for the accident, stated, "Since [the general contractor] did not provide plaintiff with appropriate safety devices, it does not avail [the owner] to argue that the lift was not defective and that the sole cause of the accident was plaintiff's attempt to level the lift on a slanted sidewalk by the use of planks without any bracing or support" (289 AD2d at 121). To the same effect, is the Fourth Department's decision in *Ward*, where the court noted that "the fact that the scissor lift tipped establishes that it was not so 'placed … as to give proper protection' to plaintiff," negating, as a matter of law, defendant's contention

that “plaintiff was the sole proximate cause of his injuries” (13 AD3d at 1099).

As such, all of defendants’ recriminatory accusations regarding plaintiff’s alleged careless operation of the subject scissor lift fail, and fail as a matter of law, to establish a valid defense to plaintiff’s Labor Law §240(1) cause of action. Because the tipping of the lift establishes that it was not placed and operated to afford plaintiff proper protection and because defendants’ are charged with the duty of insuring that the scissor lift did not collapse, tip over or otherwise fail, defendants’ liability on this record is established as a matter of law.

Moreover, despite defendants’ protestations to the contrary, it is actually clear that plaintiff did not act inappropriately or contrary to his training at the site. The record, even when construed in a light most favorable to the defendants, establishes 1) that plaintiff was never trained on how to properly use this scissor lift, a lift that contained features that were not on other lifts he had used in the past, including outriggers that were concealed from his view when not activated and that plaintiff did not know were incorporated into the lift’s design, 2) that plaintiff was never instructed on how to use outriggers or auto-leveling features that were incorporated into the design of this lift, 3) that it was custom

and practice in the industry to rely on tilt alarms and extension locks to warn of potential tipping or falling hazards associated with scissor lifts and that those devices failed to prevent this lift from collapsing because they did not activate due to the way this lift was designed, 4) that plaintiff was never told or instructed not to rely on tilt alarms or extension locks when operating machinery at this site, and 5) that plaintiff was never told that he had to use outriggers or auto leveling devices when operating the subject lift -- in fact, plaintiff did not know that the lift he was using at the time of the accident had outriggers. Indeed, the record shows that plaintiff acted in accordance with his instructions and accepted practices that were in place at this work site. In this regard, as we set forth in our motion in chief, OSHA cited plaintiff's employer for failing to provide plaintiff with the training necessary to allow him to properly operate the lift at the site. Since First Department case law makes clear that a plaintiff cannot be faulted, legally, for not performing an act for which he was not given proper training (See, *McCrea v. Arnline Realty*, 140 AD3d 427 [1st Dept. 2016]), defendants have not asserted any cognizable defenses in opposition to plaintiff's motion for summary judgment. Accordingly, plaintiff's motion should be granted in full.

A. Defendants and Their Experts Rely on Misstatements of the Parties' Respective Obligations under the Labor Law.

Defendants argue in their attorney's affirmation in opposition, as well as in their two (cumulative) expert affidavits, that the outrigger system was "open and obvious," (Pollack Aff. in Opp. at p 3); "both the control panel for the outriggers and the outriggers themselves were patently obvious" (Pollack Aff. at p. 3); and that Gary Harrigan's "reckless" use of the Genie GS3232 is the sole proximate cause of his accident.

They further claim that plaintiff has failed to explain why the cited Industrial Code sections he identifies, inter alia, as supporting his Labor Law §241(6) cause of action entitle plaintiff to the grant of partial summary judgment on the issue of liability. In fact, these sections and their applicability to this record were discussed in plaintiff's Memorandum of Law at pp. 15-17, including footnote 4 at page 15.

Defendants offer two expert affidavits in opposition to plaintiff's motion for summary judgment; the first one by an "Engineering Design Professional" and "safety expert," Dennis Eckstine, states that defendants retained him to offer an opinion on "accepted operational techniques" for aerial lift machines. The affidavit makes unwarranted assumptions of fact that are plainly refuted by Mr. Harrigan's unswerving testimony (for example, claiming that Mr. Harrigan "had to know the lift

was not level" when Harrigan testified that it felt level and stable and he believed it was stable and he would not have extended the lift if he believed it was not (Harrigan Tr., at pp. 319-323 [machine felt stable; would not extend lift otherwise]; pp. 414-415 [machine will not extend if not level]; p. 435 [alarm did not sound because machine was level]; p. 440: ["the machine was never out of level"]). The second expert, Jack Caloz, states he is a "Professional Engineer" retained by defendants to opine on the cause of the accident.

Both experts essentially make identical arguments and findings. Both posit that the lift was in working order, was not defective in design and was the proper piece of equipment for the job. Both experts also claim that notwithstanding Mr. Harrigan's testimony that he could not tell that the GS3232 lift was different from any other lift he had previously operated, the outrigger system was "open and obvious" (Eckstine Aff. at ¶ 20; Caloz Aff. at ¶11). Both experts posit that Mr. Harrigan's testimony to the contrary, stating that he could not see the outriggers when they were in their "stowed" position under the lift, should be rejected by this Court as incredible[4] and that Mr. Harrigan's own negligence in failing to read the Operator's Manual and in extending the lift mechanism while one wheel was

[4] Of course, the court may not weigh the credibility of an affiant on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned (*Curry v. Mackenzie*, 239 N. Y. 267, 269-270 [1925]; *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 [1968]).

on a slight ramp was the sole proximate cause of the machine falling over. The experts opine that Mr. Harrigan's placement of the lift with one wheel on the inch-high ramp was negligent and that such placement, in which all four wheels were not on solid level ground, when combined with plaintiff's failure to activate the outriggers, should be deemed the sole proximate cause of the accident. Setting aside for a moment the misstatement of law, this is an inaccurate statement of Mr. Harrigan's testimony (and he is the only witness who could testify on personal knowledge about the placement of the wheel). As noted in our primary papers, Mr. Harrigan testified that he could see the ramp as he was driving the lift prior to the accident and could see it when he came to a stop. He knew that his left front tire was "just barely on the ramp. It was not even on the ramp, it was on the plywood. I wouldn't consider that part of the ramp. It is about one inch on to that plywood." Harrigan Tr., exhibit "J" at pp. 123; 249.

Unfortunately for defendants, New York Labor Law does not absolve a general contractor or owner of property from their non-delegable duty to provide adequate fall protection and other necessary safety equipment for workers who are required to work at elevations. As demonstrated herein, and in plaintiff's primary motion papers (particularly at pp. 10-11 of the memorandum of law in support of the motion), falls or ejectment

from falling aerial lift machines have frequently resulted in summary judgment awards against the contractor and owner under Labor Law §240(1).

B. The Record Does Not Support A Finding that Plaintiff's Conduct was the "Sole Proximate Cause" of the Subject Accident

Both defendants' counsel and their experts opine that Gary Harrigan's conduct in operating the subject scissor lift was the sole proximate cause of the accident, thus precluding summary judgment on his causes of action under Labor Law §240(1) and §241(6). They are incorrect and indeed, their argument belies a failure to understand the very high threshold necessary to establish "sole proximate cause". On the record at bar, Mr. Harrigan's conduct cannot be deemed to be the sole proximate cause of his injury.

In *Haimes v. New York Tel. Co*., (46 NY2d 132, 136 [1978]) and again, in *Gordon v. Easter Ry. Supply*, (82 NY2d 555, 560 [1993]), the Court of Appeals explained that when the Legislature amended the Labor Law, it referred to both Labor Law §240(1) and §241(6) and stated its purpose in redrafting them was to fix "'ultimate responsibility for safety practices … where such responsibility actually belongs, on the owner and general contractor. (N.Y. Legis Ann, 1969, p. 407)." The *Gordon* and *Haimes* courts explained that this was because the prior version of the statutes were (inappropriately) being construed

as requiring that an owner or general contractor actually exercise control or supervision before such entity could be held responsible for the negligent acts of others under the Labor Law (*Haimes*, 46 NY2d at 135-136; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290, 299-300 [1978]).

Thus, the amendments and the subsequent precedential recognition of the reasoning behind those amendments, mandate that general contractors and owners are responsible for violations of Labor Law §240[1] and §241[6] even where they exercise no supervision or control of the work. Indeed, liability is determined by the status of the defendant. See, *Coleman v. NYC*, 91 NY2d 821 [1997]. To be clear: defendant need not know that plaintiff is performing work at a premise to be liable. See, *Sanatass v. Consolidated Investing*, 10 NY3d 333 [2008]. In *Sanatass*, the Court of Appeals held that even where the work that led to plaintiff's accident was done in violation of lease provisions, the owner was still liable.

This is the result of the legislature's (and the courts') recognition, moreover, of the realities of work conditions on any construction site, a point that Mr. Harrigan made clearly during his deposition.

As Mr. Harrigan testified when he was asked about whether he had performed "pre-operation function testing" of the Genie lift before using it on the day of his accident (Harrigan Tr.,

exhibit “J” at p. 280-81), he had never seen anybody do such a pre-operation inspection on any machine:

> we go to the work and we get on the machine and try to get the job done, that’s what we do. You have all of this stuff about having to read these manuals and doing this and doing that, *in the real world that’s not how it happens*. You got to get the job done and that’s what we get paid to do and that’s what we do. We get on the machine and we know how it runs and you get where it’s got to go and you do what you have to do with it and you come down and go home (emphasis added).

Guy Zammit’s testimony supported Mr. Harrigan’s testimony on this point completely. Mr. Zammit was plaintiff’s supervisor and employer at the site. He also testified that he was never trained to use the outriggers prior to Mr. Harrigan’s accident, he just “figured it out.” Zammit Tr., exhibit “K”[5] at p. 131. Said Zammit: “I just got on the machine and started playing with it. ... There are controls. And I just turn the machine on and start pressing buttons and see what happened.” *Id*. Zammit also affirmed that although there are decals on the machine, he only read them if he was looking for something specific (Zammit Tr., at p. 131) and that he never took the manual out to read it when he learned how to operate the GS3232: “I just figured it out on my own” (Zammit Tr., at p. 132). Finally, addressing the positioning of the lift with one wheel on the ramp, Zammit

[5] Exhibits referenced here are annexed to plaintiff’s primary motion papers, unless otherwise expressly stated.

testified that this was commonly done and he had seen lifts so positioned on many other job sites (presumably without incident)(Zammit Tr. at pp. 158-159). In fact, Mr. Zammit went so far as to testify that if he had been present on the day of Mr. Harrigan's accident, had seen Mr. Harrigan elevating the lift while one wheel was on a piece of wood, if no alarms were sounding and the lift appeared stable and level, and the lift did not lock (inhibiting the extension of the lift basket upward), he would *not* have stopped him from operating the lift. (Zammit Tr., exhibit "K" at p. 163). He thus ratified and condoned the way plaintiff was working immediately prior to the subject accident.

As argued in plaintiff's primary motion, Labor Law § 240(1) was enacted 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 491, 501 (1993) (emphasis in original). To accomplish this goal, the statute places the responsibility for safety practices on owners, contractors, and their agents, who are "best situated to bear that responsibility." *Ross*, 81 NY2d at 500.

The amended Labor Law statutes place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (NY Legis Ann, 1969, p 407). *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 300. These statutes, and the cases construing their application, acknowledge that a worker on a construction site, even a "competent person" like Mr. Harrigan, is not in a position to argue that he cannot proceed with his work unless or until the general contractor or the owner provides adequate safety or health training, safety equipment or training for each piece of equipment provided in the course of his work. Indeed, in *Koenig v. Patrick Const. Co.,* 298 NY313, 318-9 [1948], the Court of Appeals stated, "Workmen such as the present plaintiff, who ply their livelihoods on ladders and scaffolds, are scarcely in a position to protect themselves from accident. They usually have no choice but to work with the equipment at hand, though danger looms large."

This is why it is "well settled that the injured plaintiff's contributory negligence is not a defense to a claim based on Labor Law § 240(1) and that the [injured plaintiff's] culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices." *Stolt v. General Foods Corp*., 81 NY2d 918, 920 (1993); *Belen v. 157 Hudson LLC*, 2009 NY Misc. LEXIS 4896 (Sup.

Ct., NY Cty., 2009). Liability imposed under Labor Law § 240 (1) is absolute, rendering any alleged negligence on the part of the plaintiff irrelevant. *Kyle v. City of New York*, 268 AD2d 192, 196 (1st Dept. 2000); *Angeles v. Goldhirsch*, 268 AD2d 217 (1st Dept. 2000); *Public Adm'r of Bronx County v. Trump Vil. Constr. Corp.,* 177 AD2d 258 (1st Dept. 1991).

A worker's exercise of his own discretion in the use of a particular safety device (in this case the aerial lift) will not defeat his Labor Law §240(1) claim (*Dwyer v. Central Park Studios,* 98 AD2d 882 [1st Dept. 2012]) nor will it defeat his summary judgment motion on the claim. *Gove v. Pavarini*, 110 AD3d 601, 603 (1st Dept. 2013); *Przyborowski v. A&M Cook,* 120 AD3d 651 (2d Dept. 2014) ("plaintiff's exercise of discretion in connection with whether to use the ladder or the staircase cannot be said to be the sole proximate cause of his injuries"); *Kin v. State,* 101 AD2d 1606 (4th Dept. 2012); see also, *Mutadir v. 80-90 Maiden Lane,* 110 AD3d 641 (1st Dept. 2013). "The Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence." *Kielar v. Metropolitan Museum,* 55 AD3d 456, 458 (1st Dept. 2008), citing *Hernandez v. Bethel UMC,* 49 AD3d 251, 253 (1st Dept. 2008).

It is the responsibility of the Labor Law defendants, not the workers, to provide for the workers' protection. *Collins v. W. 13th St. Owners*, 63 AD3d 621 (1st Dept. 2009); *Ramos v. PA.,*

306 AD2d 147-8 (1st Dept. 2003), *quoting Singh v. Barrett,* 192 AD2d 378 (1st Dept. 1993). This includes providing workers with proper instructions and training.

In this case, there is no record evidence controverting plaintiff's contention that he was never trained, never required to be certified on the use of the aerial lift and never provided an operator's manual or familiarized with the outrigger system and automatic leveling capabilities of the GS 3232. *Campuzano v. Board of Education of City of NY*, 54 AD3d 268 (1st Dept. 2008) ("there was no evidence controverting *Campuzano's* assertions that ... *Campuzano was never instructed* not to use a ladder in addition to the scaffold."); *Hartman v. Galasso*, 226 AD2d 256 (1st Dept. 1996) ("Defendant, who appeared at the worksite only on weekends, never instructed [plaintiff] as to how to use the materials or perform the work").

Where plaintiff has demonstrated that a defendants' violation of Labor Law 240(1) or 241(6) was *a contributing cause* of his accident (See, *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]), no contributory negligence on the part of plaintiff will relieve defendant of liability, notwithstanding defendants' experts' affidavits urging this Court to overlook this primary tenet of Labor Law §§240(1) and 241(6). Thus, the Court of Appeals has noted in such a case under section 240: "Consequently, *regardless of any carelessness*

on plaintiff's part which might also have contributed to his fall, defendants were properly held absolutely liable for the full extent of the damages proximately resulting from the improper placement of the ladder" (*Bland v. Manocherian*, 66 NY2d 452, 460 [emphasis added]). Both the Court of Appeals (*Blake v. Neighborhood Housing Services, 1* NY3d 280, 287 [2007]) and the Appellate Division of this Department (*Hoffman v. SJP TS,* LLC, *supra*, *Hernandez v. Argo Corp.*, *supra*, Kielar *v. Metropolitan Museum of Art, supra, Hernandez v. Bethel United Methodist Church, supra)* have held that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it."

Indeed, attempts to disguise comparative negligence claims under color of sole proximate cause or reckless conduct defenses as defendants have done in their opposition papers, have been routinely rejected by the Appellate Division of this Department. See, e.g., *Figueiredo v. New Palace Painters Supply Co. Inc.,* 39 AD3d 363, 365 (1st Dep't 2007); *Williams v. 520 Madison Partnership*, 38 AD3d 464 (1st Dep't 2007) ("William's failure to hold onto the railing of either the basket or the loading platform to steady himself raises, at most, an issue of comparative negligence, which is not a defense to a cause of action under Labor Law §240(1)"). This principle applies even to a plaintiff who set up a safety device negligently. See, *Vega v.*

Ratner Mgmt., 40 AD3d 473 (1st Dept. 2007); *Velasco v. Green-Wood Cemetery,* 8 AD3d 88-89 (1st Dept. 2004).

The "sole proximate cause" defense should be limited to the situation where a worker has been provided with "proper protection," and the worker thereafter, through *intentional misuse* of the safety device, a willful refusal to utilize the safety equipment, or via other egregious misconduct, neutralizes the protections afforded by the safety device (*Robinson v. City of New York*, 4 Misc.3d 542 [Sup. Ct. Bronx County 2004]; *McMahon v. 42nd St. Dev. Project, Inc.,* 188 Misc 2d 25, 726 NYS2d 203 [Sup Ct Bronx County 2001]); *Belen v. 157 Hudson LLC*, 2009 NY Slip Op 30944(U), ¶ 14 (Sup. Ct.)

There can be no dispute that defendants failed to meet their obligations under Labor Law §§240(1) and 241(6). Lend Lease's witness Kenneth Solter reviewed Lend Lease's contract with Mr. Harrigan's employer, particularly the requirement that powered cranes, hoists, aerial platforms and scissor lifts had to have "a competent driver that is certified by a qualified third party" (section 15.20 of the contract), and Mr. Solter testified that he did not know what the reference to a "qualified third party" meant (Solter Tr., exhibit "L" at p. 42). Solter also testified that he was unaware of the mandate that all persons who might use the lift were required to attend the safety class conducted by the lift rental company prior to

any lift operation (Solter Tr., at p. 46). Mr. Solter did not recall that Lend Lease expected the lift rental company to provide safety classes to those persons who would be using the lifts at the job site and he did not know why Lend Lease's paperwork contained that language (Solter Tr., at pp. 46-47).

The record plainly demonstrates that the general contractor, notwithstanding its own contract language to the contrary, did not require every worker on the site to produce a certification to show he was appropriately trained on each of the aerial lifts utilized on the site; Lend Lease did not insist that no worker use these machines until the worker could prove he had undergone such training and it did not require that the lift rental company provide such training classes and certification to site workers. Allowing the use of the aerial lifts in this circumstance, without ensuring proper training, certifications and familiarization with the attributes of the machine, was a violation of the general contractor's obligations under Labor Law §240(1), as was the fact that Lend Lease did not ensure that the lift was properly positioned prior to Mr. Harrigan engaging the extension.

C. Nor Can Plaintiff Properly Be Deemed a "Recalcitrant Worker" Under Case Law Defining that Standard.

Contrary to defendants' argument in opposition to the present motion, this was not a recalcitrant worker scenario; Mr.

Harrigan had not been warned to read all documentation before using the GS3232; he had not been cautioned that the outriggers had should not be engaged on any surface that was not perfectly level and he had not even been apprised that the lift was equipped with outriggers. Mr. Harrigan had not been told that the lift had hidden attributes that would only be discerned by reading the written documentation or by the failure of the machine to work like other lifts (which is ultimately what occurred; the machine tipped over upon extension of the mechanism without sounding any tilt alarm or inhibiting the extension of the scissor despite the fact that all four wheels were not on solid level ground).

Although the courts have provided defendants with the recalcitrant worker defense, which defendants attempt to invoke here, that defense "requires a showing that the injured worker *refused* to use the safety devices that were provided by the owner or employer." *Stolt v. General Foods Corp*., 81 N.Y.2d 918, 920. The defense is not available unless defendant establishes the following: 1) that plaintiff had adequate safety devices available for his use; 2) that plaintiff knew both that such devices were available and that he was expected to use them; 3) that plaintiff chose not to use the device for no good reason; and 4) that had plaintiff not made the choice not to use an available safety device that he had been told to use he would

not have been injured. See, *Gallagher v. NY Post,* 14 NY3d 83, 88 [2010]; *Cahill v. Triborough Bridge & Tunnel Authority,* 4 NY3d 35, 40 [2004]; *Auriemma v. Biltmore Theatre,* 82 AD3d 1 (1st Dept. 2011).

Thus, the Appellate Division of this Department has held that defendants' recalcitrant worker defense was properly dismissed in the absence of any evidence tending to show that plaintiff, who fell from an elevated platform that he described as a "fixed scaffold" and other witnesses describe as a "canopy" with wooden planks on top, was ever instructed to use a rolling scaffold and extension ladder *and refused to do so*. *Correia v. Professional Data Mgmt., Inc.*, 259 AD2d 60, 63 (1st Dept. 1999) (emphasis added).

In *Garcia v. 1122 East 180th St. Corp*., (250 AD2d 550, 551 [1st Dept. 1998]), a worker fell from a rolling scaffold where he had piled sheetrock around the wheels to overcome broken wheel locks. Defendant argued that plaintiff was a "recalcitrant worker" because he failed to use the wheel locks properly. The Appellate Division of this Department held that argument was unavailing because there was no showing that plaintiff *purposefully declined* to use safety devices provided (*Stolt v. General Foods Corp*., 81 NY2d 918). Furthermore, an instruction simply to avoid using unsafe equipment or engaging in unsafe

practices is not a "'safety device'" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563).

Most importantly, nothing in this record supports the suggestion that Mr. Harrigan willfully refused to use the safety devices available to him; simply failing to understand the safety aspects of a device, or to properly engage those safety attributes due to inadequate training is insufficient to establish the intentional refusal that is required to support a finding that the injured plaintiff was a recalcitrant worker. See, *Hill v. City of New York,* 140 AD3d 568 [1st Dept. 2016]; *DaSilva v. Everest Scaffolding,* 136 AD3d 423 [1st Dept. 2016]; *Kristo v. Bd. Of Educ.,* 134 AD3d 550 [1st Dept. 2015].

D. Defendants' Expert's Accident "Reconstruction" Animations Are Speculative and Lack Proper Foundation. As Such, the Animations are Inadmissible and Should Not Be Considered on This Motion.

An accident reconstruction animation video is not proof of how the accident happened; it is admissible only if it will aid the trier of fact in understanding expert testimony regarding the theory of reconstruction (see *Kane v. Triborough Bridge & Transp. Auth.*, 8 AD3d 239, 242 [2d Dept. 2004]; *People v. Yates*, 290 AD2d 888, 890 [3d Dep't 2002]; *People v. Demetsenare*, 14 AD3d 792, 795 [3d Dept. 2005]).

The only actual witnesses to this accident were plaintiff Gary Harrigan and the non-party witness who was in the lift basket with him at the time of the accident, Kristen Malone.

As defendants' engineering expert Mr. Caloz did not witness the accident, his assertions that Mr. Harrigan had to see the outriggers and had to know the machine was not level before extending the lift (Caloz Aff. at ¶¶11-12) and the animations he caused to be created which purport to show (1) how the lift appeared and was positioned prior to extending, (2) how the lift's outriggers should have been used and (3) what Mr. Harrigan could see while operating the lift (Caloz Aff. at ¶¶15-18), are wholly speculative and should not be considered on the motion because, contrary to Caloz's assertions, the animations do not comport with the sworn testimony on this record. See, e.g., *Bonforte v. M.K.'s Landscaping of Liberty, LLC*, 131 AD3d 910, 912 (2d Dept. 2015)(affidavit of the plaintiffs' accident reconstruction expert was conclusory and speculative and, hence, insufficient to raise a triable issue of fact).

Moreover, neither expert identified any specific binding industry standard, code, rule, or regulation allegedly violated by Mr. Harrigan in his use of the GS3232 lift without first reviewing the Operator's manual, demanding training or performing a work site inspection of the machine and neither expert, nor defense counsel's affidavit offered authority

sufficient to override the clear language of the Labor Law sections cited and the courts' well-worn construction of those sections to place the obligation to ensure safe operation of work site equipment and, in particular, fall prevention equipment, on the general contractor and the owner (see *Chunhye Kang-Kim v. City of New York*, 29 AD3d 57, 61 [1st Dept. 2006]; *Hanley v. City of New York*, 139 AD3d 800, 802 [2d Dept. 2016]).

Where the affidavit of a certified accident reconstruction expert was speculative and conclusory, and is belied by the collective testimony of the parties and witnesses to the occurrence, the expert's affidavit is properly rejected by the court (see *Murphy v. New York City Tr. Auth*., 73 AD3d 1143-44 [2d Dep't 2010]; *Rodrigues v. Village of Ossining*, 76 AD3d 962, 962-63 [2d Dep't 2010]). In this regard, expert affidavits that are not predicated on rules, laws, regulations or industry standards are insufficient to forestall summary judgment. See, *Blumenthal v. Bronx Equestrian,* 137 AD3d 432 [1st Dept. 2016]; *Dean v. Ruppert Tower,* 274 AD2d 305 [1st Dept. 2000]. An opinion, especially from an expert, is only as good as the facts on which it is based. See, *Fasano v. Euclid Hall Assoc.,* 136 AD3d 478 [1st Dept. 2016]; *Santoni v. Bertelsmann Prop.,* 21 AD3d 712 [1st Dept. 2005]. In this regard, expert opinion that misstates facts, like those submitted by defendants here, lack probative value as a

matter of law. See, *Casiano v. Deco Tower Assoc.,* 92 AD3d 606 [1st Dept. 2012].

E. Recent Appellate Precedent Establishes That Defendants are Attempting to Use Plaintiff's Alleged Comparative Negligence as a Complete Defense to a "Perfect" Labor Law §240[1] Claim.

In addition to the precedent set forth herein, we submit that on any fair reading of the record, defendants are seeking to convert a claim of comparative negligence into a complete defense to plaintiff's Labor Law §240[1] claim. Recent Appellate Division precedent, much of it from the Appellate Division of this Department, thoroughly indicts that attempt.

Defendant's papers offer no legitimate defense to this claim and this Court should not be misled by its attempt to create defenses that do not exist. Where, as here, plaintiff was "engaged in activity protected by Labor Law §240[1]", owners and general contractors are subject "to absolute liability for injuries which result from [their] failure to provide plaintiff with proper safety devices … without regard to the comparative fault of the plaintiff" (*McCrea v. Arnline Realty*, 140 AD3d 427-9 [1st Dept. 2016]). And while actions of the plaintiff that constitute the sole proximate cause of an accident do absolve a Labor Law defendant of liability (*Robinson v. Eastmed Ctr.*, 6 NY3d 550, 554 [2006]), "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident,

the defendant must produce evidence that adequate safety devices were available, that plaintiff knew that they were available and he was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injuries sustained" (*Quinones v. Olmstead Properties*, 133 AD3d 87, 89 [1st Dept. 2015], quoting *Nacewicz v. Roman Catholic Church*, 105 AD3d 402-3 [1st Dept. 2003]).

This case presents a situation similar to *McCrea*, where there was "no indication that plaintiff refused or misused available safety equipment" (140 AD3d at 429) or that he "was aware of the 'kill switch' located in the building, and it is uncontroverted that the superintendent failed to alert him to the location of the switch or remain on the premises while the repair was ongoing, as required by the service contract" (id. at 427). Here, plaintiff's unawareness of the outriggers and that using the lift with a wheel off the ground, at most, establishes plaintiff's potential comparative negligence (and we note that there is no evidence Mr. Harrigan *knew* the contralateral wheel was off the ground). In actuality, plaintiff was not told about the outriggers or told to use them in a certain way; he was not told he must scrutinize the decals or secure a manual and read it cover to cover before commencing work. Accordingly, plaintiff did not refuse to do anything, and the sole proximate cause defense does not lie.

And misuse is not the same as negligence. In this regard, the Appellate Division of this Department has written, “It is the responsibility of the contractor and owner – not the individual worker – to provide and place appropriate safety devices at the particular work site so ‘as to give proper protection to a person so employed’.” See, *Ramos v. PA*, 306 AD2d 147-8 [1st Dept. 2003]; *Singh v. Barrett*, 192 AD2d 378 [1st Dept. 1993]. Defendants may not shift the “onus” to plaintiff on a Labor Law §240[1] or §241[6] claim (*Collins v. W. 13 St. Owners*, 63 AD3d 621 [1st Dept. 2009]).

A worker is not required to “demand an adequate safety device by challenging his or her supervisor’s instructions and withstanding hostile behavior.” To require this “would effectively eviscerate the protections that the Legislature put in place … workers would be placed in a nearly impossible position” ” (*DeRose v. Bloomingdales*, 120 AD3d 41, 47 [1st Dept. 2014]). See also, *Blake v. Neighborhood Hous., supra* at 290 (Plaintiff’s actions could not be the sole proximate cause of an accident where a violation of the Labor Law resulted in plaintiff’s injuries). Indeed, “Even if another cause of the accident was plaintiff’s own improper use of an unopened A-frame ladder leaned against the wall from the top of a scaffold, negligence on the plaintiff’s part cannot serve as a defense to a §240[1] [claim], as long as his negligence is not the sole

proximate cause of the accident (*Torres v. Monroe College*, 12 AD3d 261-2 [1st Dept. 2014]).

Disguised claims of comparative negligence cannot be equated with sole proximate cause under settled First Department decisional law (*Romanczuk v. Metropolitan Ins.*, 72 AD3d 592 [1st Dept. 2010]; *Picciano v. Rockefeller Center*, 68 AD3d 425 [1st Dept. 2009]; *Aponte v. NYC*, 55 AD3d 485 [1st Dept. 2008]). In *Miranda v. NYC Partnership*, 122 AD3d 445 [1st Dept. 2014], the First Department stated that where defendants do not provide plaintiff with an adequate safety device or provide one that fails, they "cannot avail themselves of the 'sole proximate cause' or 'recalcitrant worker' defense, and summary judgment in plaintiff's favor is appropriate on the issue of liability."

In the case at bar, the collapse and movement of the lift establishes a violation of the statute as a matter or law. See, *Somereve v. Plaza Constr.*, 136 AD3d 537 [1st Dept. 2016] (The pitching forward of a prime mover due to the force of gravity established a violation of Labor Law §240[1] as a matter of law); *Potter v. Jay E. Potter Libr.*, 71 AD3d 1565-7 [4th Dept. 2010] (Tipping forward of fork lift); *Penaranda v. 4933 Realty,* 118 AD3d 596 [1st Dept. 2014] (Bobcat that lifted up unexpectedly when plaintiff was on it acting as a counterweight to a heavy

load[6]). The Appellate Division of this Department has held that the collapse or fall of a structure on which plaintiff is working is also sufficient to set forth a prima facie case of liability under the statute (*Noah v. 270 Lafayette*, 233 AD2d 108-9 [1st Dept. 1996]). And the fact that a safety device is not defective in itself does not prevent plaintiff from securing partial summary judgment on the issue of liability (*Nazario v. 222 Broadway*, 135 AD3d 506-8 [1st Dept. 2016]). The same is true of a device that is complaint with safety regulations.

What plaintiff must show is merely that the "absence of adequate safety devices, or the inadequacy of the safety devices provided to protect a worker from a fall, was a proximate cause of her injuries." An argument that plaintiff caused the accident by not complying with safety features or regulations "at most established comparative negligence, which is not a defense to the Labor Law §240[1] claim" (135 AD3d at 509).

Here, the lift failed to serve the "core objective" of preventing fall injuries. See, *Susko v. 337 Greenwich*, 103 AD3d 434 [1st Dept. 2013]; *Montalvo v. J. Petrocelli Constr.*, 8 AD3d 173 [1st Dept. 2004]; *Lopez v. Melidis*, 31 AD3d 351 [1st Dept. 2006]. That plaintiff supposedly failed to use the lift properly does not present a defense to the claim as a matter of law

[6] Even in *Penaranda*, *supra*, where plaintiff was standing on the back of the Bobcat acting as a counterweight, certainly not the recommended use of the machine, the Court rejected the comparative negligence and sole proximate cause finding(s) urged by defendants.

(*Ernish v. NYC*, 2 AD3d 256-7 [1st Dept. 2013]; *Hauff v. CLXXXII Via Magna Corp.*, 118 AD2d 485 [1st Dept. 1986]). Plaintiff's alleged error in judgment cannot be equated with "sole proximate cause" as a matter of law (*Przyborowski v. A&M Cook*, 120 AD3d 651 [2d Dept. 2014]; *Nacewicz v. Roman Catholic Church*, 105 AD3d 402 [1st Dept. 2013]; *Kin v. State*, 101 AD3d 1606 [4th Dept. 2012]; *Dwyer v. Central Park Studios*, 98 AD3d 882-3 [1st Dept. 2012]). This rule applies with even greater force where, as, here, there is "no showing that plaintiff was expected or instructed" to do or not do a specific thing with regard to the device and "for no good reason chose" to disobey the order (*Dwyer v. Central Park Studios, supra* at 883; see generally, *Torres v. Our Townhouse,* 91 AD3d 549 [1st Dept. 2012]).

As we set forth previously, the First Department's decision in *Prenty v Cava Construction*, *supra*, is directly on point and compels this Court to grant plaintiff's motion for partial summary judgment on the issue of liability. By force of logic, it also requires this Court to reject defendants' "defenses" as nothing more than disguised claims of comparative negligence. In *Prenty*, like here, a scissor lift toppled over because of plaintiff's alleged negligent operation. The First Department's recognition that plaintiff's negligence did not relieve the owner and general contractor of their duties to insure that the lift was properly operated, placed and used at the site puts the

lie to defendants' claims that plaintiff is solely responsible for the injuries he sustained in the subject accident. The Fourth Department's decision in *Ward v Cedar Key Assoc.*, *supra*, only reinforces the point.

In *Howard v. Turner Constr.*, 134 AD3d 523-4 [1st Dept. 2015], the First Department stated, "Contrary to defendant's contention, plaintiff was not the sole proximate cause of his accident, and any negligence on his part in leaning an unopened A-frame ladder against the wall is not a defense to his Labor Law §240[1] claim."

In *Stankey v. Tishman Constr.*, 131 AD3d 430 [1st Dept. 2015], plaintiff elected to use the top half of an extension ladder which did not have footings, and fell. Defendant's assertion that plaintiff's conduct was the sole proximate cause of his injuries was rejected, because, given the defendant's failure to provide an adequate safety device in the first place, plaintiff's conduct constituted, at most, comparative negligence, which is not a defense to a claim based on Labor Law §240[1]. See also, *Jerdonek v. 41 W. 72,* 36 NYS3d 17 [1st Dept. 2016]. A defendant is not absolved of liability under the statute where plaintiff's injuries are "at least partly attributable to the defendant's failure to provide proper protection as mandated by the statute" (*Cammon v. NYC*, 21 AD3d 196, 201 [1st Dept. 2005]). This is true even where plaintiff

fails to use an available harness, if a device moves, fails or collapses, because the breach of defendant's duty in such case is a "more proximate cause of the accident" (*Berrios v. 735 Ave. of Amer.*, 82 AD3d 552 [1st Dept. 2011]; *Milewski v. Caiola*, 236 AD2d 320 [1st Dept. 1997]). And where the Labor Law is violated, competing affidavits of experts are insufficient to forestall summary judgment in favor of the plaintiff (*O'Brien v. PA,* 131 AD3d 823 [1st Dept. 2015]).

In sum, defendants have merely asserted a disguised claim of comparative negligence, which is not a defense to a Labor Law §240[1] cause of action. The lift toppled or fell over; there is no record evidence that plaintiff was instructed to operate it in a way that he disregarded, or that he was told to read a manual (which may not have been present). There is no dispute that the tilt alarm did not function when a wheel was off the ground. Plaintiff's supervisor testified that had he seen plaintiff operate the lift the way he was doing just before it fell, he would not have stopped him unless an alarm had gone off. In this situation, any error made by plaintiff does not furnish a defense to the claim.

After all, §240[1] and §241[6] apply to supervisors (*Szpakowski v. Shelby Realty*, 48 AD3d 268 [1st Dept. 2008], app. dismd., lv. den. 11 NY3d 783 [2008], lv. den. 12 NY3d 708 [2009]; *Spages v. Gary Null Assoc.*, 14 AD3d 425 [1st Dept.

2005]); they even apply to persons in charge of the activity giving rise to the accident (*Ernish v. NYC*, *supra*; *LaLima v. Epstein*, 143 AD2d 886 [2d Dept. 1988]; *Hauff v. CLXXI Via Magna Corp.*, 118 AD2d 485 [1st Dept. 1986]).

Here, the device on which plaintiff was working collapsed, so there is no merit to a sole proximate cause defense under First Department precedent on point. See, *Bisram v. LIJ*, 116 AD3d 475 [1st Dept. 2014] (Plaintiff's failure to "tie his harness into the retractor" not sole proximate cause where defendant's failure to secure the beam which shifted, causing plaintiff to fall, was a proximate cause of same).

The realities of construction work simply do not accord defendant's assumptions as to who is properly responsible for safety at a construction site. As noted in *Koenig v. Patrick Constr.*, *supra*, construction workers have little choice but to follow the mandates of their superior, and they cannot be expected to provide for their own safety. It defies credulity to require that plaintiff refuse to begin working until he had searched for a manual and reviewed it cover to cover, then scrutinized all decals on the lift and inspected it to be sure he knew how to use it. No construction worker would last a day if he behaved in that manner. When a superior "assumes control over a workman on a job, and directs him to proceed under circumstances recognizable as dangerous, the subordinate workman

has little, if any, choice in the matter" (*Broderick v. Caldwell-Wingate*, 301 NY 182, 188 [1950]).

Logically, given the fixed obligations of the owner and general contractor to provide for safety, if expertise was needed to use the lift, then defendants negligently and in violation of the statute failed to provide needed training and information before ordering plaintiff to work with it.

Defendant's opposition papers, then, despite taking a strong tone against the plaintiff, actually support plaintiff's position.

WHEREFORE, based upon the foregoing, this Court should grant plaintiffs' motion for partial summary judgment on plaintiffs' Labor Law §§240(1) and 241(6) claims, remanding the same for an inquest on damages, along with such other and additional relief as the Court deems just and proper.

Dated: New York, New York
September 13, 2016

Brian J. Isaac, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

Danielle Henderson being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York. I served a true copy of the annexed ***Affirmation in Reply*** on September 13, 2016 via ECF, addressed to the last known address of the addressee as indicated below:

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Danielle Henderson
Danielle Henderson

Sworn to before me this
13th day of September, 2016

NOTARY PUBLIC

BRIAN J. ISAAC
NOTARY PUBLIC, State of New York
No. 02IS4920550
Qualified in Nassau County
Commission Expires April 2, ~~20~~ 2019

Index No.: 156824/2014 TP Index No. 595582/2015
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GARY HARRIGAN and KATHY HARRIGAN,

Plaintiffs,

- against -

G-Z/10UNP REALTY, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.

Defendants.

----------X

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff,

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

AFFIRMATION IN REPLY

SMILEY & SMILEY, LLP
BY: POLLACK, POLLACK, ISAAC & DE CICCO
Attorneys for the Plaintiffs
225 Broadway, Suite 307
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To:
Attorney(s) for

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.

Dated: _____ *Signature*: _____

Print Signer's Name: _____

Service of a copy of the within
Dated:

.....
Attorney(s) for

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 156824/2014
HARRIGAN, GARY
vs.
G-Z/10UNP REALTY, LLC
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/28/17

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

FILED: NEW YORK COUNTY CLERK 03/24/2017 04:45 PM INDEX NO. 156824/2014
NYSCEF DOC. NO. 144 RECEIVED NYSCEF: 03/24/2017
FILED: NEW YORK COUNTY CLERK 03/01/2017 01:33 PM INDEX NO. 156824/2014
NYSCEF DOC. NO. 142 RECEIVED NYSCEF: 03/01/2017
FILED: NEW YORK COUNTY CLERK 03/01/2017 10:44 AM INDEX NO. 156824/2014
NYSCEF DOC. NO. 140 RECEIVED NYSCEF: 03/01/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------x

GARY HARRIGAN and KATHY HARRIGAN,

Index No. 156824/2014

Plaintiffs,

-against-

G-Z/10UNP REALTY, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.,

Defendants.

----------x

UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff, Third-Party Index No. 595582/2015

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

----------x

Kenney, J.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a union ironworker on January 13, 2014, when, while operating a scissor lift at a construction site located at 50 UN Plaza, New York, New York 10017 (the Premises), the scissor lift toppled, causing him to fall and sustain injuries.

In motion sequence number 001, plaintiffs Gary Harrigan (plaintiff) and Kathy Harrigan move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants G-Z/10UNP Realty, LLC (GZ10) and Lend Lease (US) Construction LMB, Inc. (Lend Lease).

In motion sequence number 002, defendant/third-party plaintiff United Rentals (North America), Inc. (URNA) moves, pursuant to CPLR 3212, for summary judgment dismissing the

complaint and all cross claims against it, as well as for summary judgment in its favor on the third-party claims against third-party defendant Coordinated Metals, Inc. (Coordinated).

In motion sequence number 003, defendant Genie Industries, Inc. (Genie) moves, pursuant to CPLR 3212, for summary judgment dismissing the negligence claim as against it.

In the complaint, plaintiffs allege claims sounding in common-law negligence and Labor Law §§ 200, 240 (1), 241 (6), as well as derivative claims by Kathy Harrigan for, inter alia, loss of services and loss of consortium, against all defendants.[1] In their answers, defendants GZ10 and Lend Lease cross-claimed against all other defendants for contribution and common-law indemnification. URNA and Genie cross-claimed against GZ10 and Lend Lease for contribution and common-law indemnification. URNA initiated a third-party action against third-party defendant Coordinated for contractual indemnification and breach of contract for failure to procure insurance.

BACKGROUND

On the day of the accident, the Premises was owned by GZ10. GZ10 contracted with Lend Lease to serve as a contractor and construction manager on a project underway at the Premises which entailed the construction of a 50-story building (the Project). Lend Lease hired plaintiff's employer, Coordinated, an ironwork subcontractor, to install the first floor storefront at the Premises. Coordinated entered into an agreement with defendant URNA, an equipment rental company, for the rental of two scissor lifts for use on the Project. The scissor lift at issue in this action, model no. GS-3232 (the Lift), was manufactured by Genie, a designer and manufacturer of construction equipment.

Plaintiff's Deposition Testimony

[1] The consolidated motions do not address the claims of Kathy Harrigan.

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NYSCEF DOC. NO. 144 RECEIVED NYSCEF: 03/24/2017
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FILED: NEW YORK COUNTY CLERK 03/01/2017 10:44 AM INDEX NO. 156824/2014
NYSCEF DOC. NO. 140 RECEIVED NYSCEF: 03/01/2017

During his deposition, plaintiff testified that, on the date of the accident, he was working at the Premises as a foreman for Coordinated, in charge of three workers. To perform his work, plaintiff regularly utilized the Lift.[2] The Lift and all plaintiff's safety gear was provided by Coordinated.

Plaintiff testified that he was not trained in the use or operation of scissor lifts while on the Project. However, he had used scissor lifts regularly over the course of his lengthy career as a member of his union, and he felt familiar with the general use and operation of such equipment. At his orientation, Lend Lease required him to sign papers notifying him that he was required to attend a safety class conducted by the lift rental company. However, no class was offered or conducted. Plaintiff did attend weekly toolbox meetings conducted by Coordinated, which covered topics ranging from general site safety to project goals. He also attended weekly foreman meetings held by Lend Lease.

Although he was aware that OSHA required workers to be certified in machine operation, plaintiff did not seek to become certified on the Lift because "if you stop and get certified on every machine, you know, you wouldn't have time to get the job done" (plaintiff's tr at 390). Plaintiff also explained that scissor lifts have compartments built into the equipment that contain operator's manuals, and that the Lift had such a compartment. However, he never checked the Lift's compartment for a manual, nor did he read one. In addition, although he was aware that the scissor lift had warning labels and decals regarding its safe operation and use, he did not read them.

Plaintiff further testified that, on January 13, 2014, he was approached by Kristen Malone, an employee of the Project's architect. Malone needed to photograph structural details

[2] A review of the record reveals that the Lift is a rectangular piece of equipment that consists of a four-wheeled base upon which sits a scaffold-like platform. The platform can rise to a height of 32 feet and holds two occupants. The Lift is operated directly from the platform.

on a section of the building worked on by Coordinated. The section was located approximately 20 feet in the air. In order to reach the area, it was necessary for plaintiff to move the Lift approximately 500 feet. Plaintiff then parked the Lift with one wheel slightly up on a piece of plywood that was covering a three-foot "void" in the concrete floor (*id.* at 121-122), that plaintiff termed a "ramp." Specifically, plaintiff recalled, "I knew that my left front tire was just barely on the ramp . . . . It is about one inch on to that plywood" (*id.* at 123). Plaintiff maintained that he felt that the Lift "was stable and safe . . . . In my twenty years experience . . . it is fine." (*id.* at 292-293). When asked how he knew that the scissor lift was stable, plaintiff testified that he could tell by "[j]ust standing in the machine and feeling it, with my experience, you can tell if the machine is not moving and that it is stable and it feels safe" (*id.* at 320).

After parking the Lift, plaintiff exited it and assisted Malone onto the platform of the machine. He then returned to the Lift. Plaintiff explained that he engaged the Lift's hydraulic lift and the Lift's platform began to rise. At approximately 17 feet up, the Lift tilted to the right and toppled to the ground. Plaintiff and Malone fell along with the Lift.

Plaintiff testified that, in his experience, scissor lifts were typically equipped with tilt alarms, which would stop the lift from rising further in the event that the equipment was at risk of tilting/toppling. However, at the time of the accident, the tilt alarm on the Lift did not go off. Plaintiff further testified that he did not know whether the Lift had outriggers (stabilizers). In any event, even if he had known that the Lift was so equipped, he would not have deployed the outriggers because "the rig was stable and safe and it felt fine . . . [and he] didn't hear any alarms, the machine did not stop and it felt like any other day [he] was using it" (*id.* at 412).

Deposition Testimony of Guy Zammit (Coordinated's Field Superintendent)

Guy Zammit testified that he was the field superintendent for Coordinated on the day of the accident. His duties included running Coordinated's field operations. In addition, Zammit was plaintiff's supervisor. Although he was on site on the date of the accident, he left before it occurred. When he returned to the Premises after learning of the accident, he witnessed paramedics treating plaintiff and observed the Lift lying on its side. At this time, he did not hear any alarms coming from the machine.

Zammit asserted that he was responsible for selecting the GS-3232 model of scissor lift for the Project. He prefers the GS-3232 because it comes equipped with outriggers and an automatic leveler, which, if utilized, offer additional safety and stability. Like plaintiff, he never read the Lift's operator's manual or had any formal training in operating the Lift, as he just "figured it out" (Zammit tr at 131). Zammit could not recall whether he informed plaintiff that the Lift was equipped with outriggers or automatic leveling features. Zammit testified that, while he believed plaintiff was sufficiently certified for the operation of the Lift, he later learned that none of Coordinated's employees was so certified.

With respect to the safety features of scissor lifts in general, Zammit explained that scissor lifts will not raise unless they are on level surfaces. To that effect, "the machine wouldn't go up if the machine senses it's not correct . . . [b]ecause the sensor will not let it go up. It's going to know it's out of level." (*id.* at 109). He further testified that operating the scissor lift with just one wheel on a ramp would be taking "a chance" (*id.* at 108), also noting that "[y]ou know it's not right . . . . You know you are not supposed to do that" (*id.* at 134). He maintained that it is unsafe to operate a scissor lift with only three of four wheels in contact with the ground. If he had witnessed the Lift being operated in that manner, he would have stopped its operation (*id.* at 163).

Deposition Testimony of Kenneth Solter (Lend Lease's Senior Superintendent)

Kenneth Solter testified that he was Lend Lease's senior superintendent on the day of the accident. He explained that Lend Lease was the construction manager for the Project. Lend Lease hired Coordinated to install the first floor storefront at the Premises.

Solter testified that Lend Lease did not direct the means, method or manner of plaintiff's work (Solter tr at 18-20). In fact, other than scheduling matters, Lend Lease had no involvement with plaintiff's work or the operation of the Lift. Rather, Lend Lease was merely responsible for the Project's scheduling. Specifically, Solter stated, "We schedule . . . . I don't actually tell workers to go up and put that bolt in . . . all I do is work with [them] to schedule space available to [them]" (*id.* at 17).

Solter testified that he observed plaintiff operating a scissor lift prior to the date of the accident. He did not know whether plaintiff was certified in the operation of scissor lifts. It was not his job to inquire. He also testified that workers are told during orientation that they should not operate machines that they are not licensed to operate.

Solter also testified that he was present at the Premises on the date of the accident. While he did not see the Lift fall over, afterwards he witnessed it lying on its side. Shortly after the accident, he directed an employee of Lend Lease to retrieve the operator's manual from the compartment on the Lift, which was brought to him directly (*id.* at 83-84).

Deposition Testimony of Barry Davis (URNA's District Manager)

Barry Davis testified that he served as URNA's district manager on the day of the accident. He testified that URNA rented the Lift to Coordinated for use on the Project. He maintained that all rental equipment delivered to customers included operator's manuals.

He explained that URNA typically offers hands-on and computerized safety training for all equipment that they rent to contractors. However, he was unaware as to whether URNA provided such training to Coordinated's workers, or whether such training had been requested. Davis noted that most customers do not request said training, because they are already familiar with the use of the equipment.

Deposition Testimony of Jason Berry (Genie's Product Safety Manager)

Jason Berry testified that he was Genie's product safety manager on the day of the accident, as well as an employee of Genie's parent company, Terex. Berry was involved in the design of certain components that are used on the GS-3232 scissor lift, as well as the design of its operator's manual. He testified that the GS-3232 must be on level ground when used, as it has no tolerance for use on unlevel ground. He further explained that the GS-3232 has a single axel system, meaning that when one wheel is elevated, then its opposite wheel will elevate, as well. In order to aid in stability, the GS-3232 has an auto-level function, wherein outriggers, when utilized, will automatically level the machine.

Berry explained that, during the development of the GS-3232, the machine underwent several ANSI tests to ascertain whether it would stay upright when at a tilt. Specifically, the GS-3232 was subject to a "depression test," wherein the lift is extended to 22 feet and then driven so that one wheel enters into a four-inch depression in the ground. In order to pass the test, the machine must stay upright. The GS-3232 passed this test in development. The GS-3232 was also tested for stability while placed on a five-degree slope, with all four wheels on the ground. The GS-3232 passed this test in development, as well. It should be noted, however, that the GS-3232 did not undergo a test that would rate the stability of the GS-3232 when one of the wheels is elevated off the ground, as under the circumstances of the instant case.

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According to Berry's testimony, the GS-3232 is capable of operating at heights of up to 22 feet without the utilization of the outriggers. Berry also asserted that the GS-3232's outriggers were visible to the naked eye.

Affidavit of Les Knoll, P.E. (Plaintiff's Expert)

In his expert affidavit, Les Knoll stated that he is a mechanical engineer, specializing in product failure analysis. Knoll attended the post-accident inspection of the Lift, and he found that "all functions and safety devices were found to operate correctly" (Knoll aff at 4). He concluded that the accident was caused when the left front wheel of the Lift rode up the incline, leaving the right front wheel suspended and unsupported. Notably, Knoll does not mention the height of the subject incline. However, photographic evidence provided by GZ10 and Lend Lease shows that the portion of the plywood that the Lift was parked on at the time that it tipped over was only approximately one inch in height (GZ10's and Lend Lease's opposition, exhibits A and B, photographs). Knoll concluded that the accident would have been avoided if the outriggers have been utilized to stabilize the Lift.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein,* 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied

(*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim (motion sequence numbers 001 and 002)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants GZ10 and Lend Lease. Defendant URNA moves for summary judgment seeking dismissal of said claim against it.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD3d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensini v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use,

or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]).

To prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning, Inc.*, 90 NY2d 219, 224-5 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 261 [1st Dept 2004]).

Initially, as owner of the Premises where the accident occurred, GZ10 may be liable for plaintiff's injuries under Labor Law § 240 (1). It should also be noted that Lend Lease does not dispute that it was the general contractor for the Project. Therefore, Lend Lease may also be liable under the Labor Law.

However, it must be determined whether URNA, as the equipment rental company, is an "agent" under the Labor Law, so as to also be liable for plaintiff's injuries.

> "When the work giving rise to these [Labor Law] 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. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241."

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Nascimento v Bridgehampton Constr. Corp*, 86 AD3d 189, 193 [1st Dept 2011] citing *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990] [an entity becomes a statutory agent under the Labor Law when it has been "delegated the supervision and control either over the specific work area involved or the work which [gave rise] to the injury"]).

Here, the accident was allegedly caused due to the Lift's failure to stay upright when plaintiff parked it on a one-inch incline. URNA, as the rental company, merely supplied the Lift

and did not design or manufacture it. In addition, while, as UNRA asserts, the Lift came equipped with a manual and contained warning labels, plaintiff chose not to read them. Further, URNA did not direct or supervise plaintiff's operation of the Lift. As such, URNA cannot be considered an agent for the purposes of the Labor Law.

Thus, as URNA is not a proper Labor Law defendant, URNA is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. Therefore, the remainder of the discussion of these claims will be in regard to GZ10 and Lend Lease's liability only.

Plaintiff has established a prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim against GZ10 and Lend Lease, by showing that the Lift that he was working on at the time of the accident was a safety device for the purposes of the statute, and that it "failed to provide adequate protection for the elevation-related work he was performing" (*Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]).

"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 and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]); *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [Labor Law § 240 (1) liability established where makeshift scaffold failed to protect the plaintiff from falling]; *McCann v Central Synagogue*, 280 AD2d 298, 300 [1st Dept 2001]; *Kash v McCann Real Equities Devs*, 279 AD2d 432, 432 [1st Dept 2001]) ["Since the scissors lift did not prevent plaintiff from falling, defendants are liable under section 240 (1)"]).

In addition, construction sites are, by their very nature, often uneven and often strewn with debris, temporary coverings and inclines like the one at hand. Therefore, the fact that the Lift toppled over merely because one wheel was situated on a very slight one-inch incline

establishes that the Lift was not a proper safety device for the task at hand. "'[T]he availability of a particular safety device [here, the Lift] will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

In opposition to plaintiff's motion, GZ10 and Lend Lease argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because at least a question of fact exists as to whether plaintiff was the sole proximate cause of his accident. Where a plaintiff's own actions are the sole proximate cause of his accident, there can be no liability under Labor Law § 240 (1) (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.* 36 AD3d at 1188; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Specifically, GZ10 and Lend Lease argue that plaintiff was solely at fault because he chose to place the Lift in a manner in which one wheel was partially on a slight elevation. In

addition, they argue that plaintiff also failed to properly train himself in the operation of the Lift or read the Lift's manual or warnings. Further, they argue that plaintiff failed to utilize all of the safety features of the Lift, like the outriggers.

In any event, all of these actions on the part of plaintiff go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, as the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]).

Where the "owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002] [internal quotation marks omitted] (citing *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see also Celaj v Cornell*, 144 AD3d 590, 590 [1st Dept 2016] [the plaintiff's failure to use a locking wheel and plaintiff's movement of a scaffold while standing on it was evidence of comparative negligence]).

To the extent that GZ10 and Lend Lease argue that plaintiff has failed to identify a particular defect in the Lift, such argument is unavailing. A plaintiff is not required to demonstrate that the safety device was defective. Rather, "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent [a safety device] from

slipping or to protect plaintiff from falling were absent" (*Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016] [internal quotation marks and citation omitted]; *Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011] [failure to identify defect in pulley did not defeat entitlement to summary judgment]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [1st Dept 2008] [plaintiff not required to identify defect in ladder to make a prima facie showing of entitlement to judgment under Labor Law § 240 (1)]); *Fitzsimmons v City of New York*, 37 AD3d 655, 656 [2d Dept 2007] [falling crane that injured plaintiff establishes prima facie entitlement to judgment].

Finally, GZ10 and Lend Lease have not come forward with any evidence demonstrating that plaintiff was recalcitrant in that he was specifically instructed to use any specific safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against GZ10 and Lend Lease.

The Labor Law § 241 (6) Claim (motion sequence numbers 001 and 002)

Plaintiff also moves for partial summary judgment in his favor as to liability on his Labor Law § 241 (6) claim against GZ10 and Lend Lease. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored,

> [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers . . ." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501). However, to trigger the protections of Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, plaintiff's complaint and bill of particulars do not specifically allege any Industrial Code provisions that were allegedly violated. Despite this oversight, plaintiff now asserts for the first time that defendants GZ10 and Lend Lease violated several sections of Industrial Code provision 23-9, entitled "Power-Operated Equipment." Specifically, plaintiff relies on section 23-9.2 (general requirements), subsection (a) (maintenance), and section 23-9.6 (aerial lifts), subsections (a) (1) (iii) and (a) (4) (equipment inspection). More specifically, the cited subsections of 23-9.6 (a) discuss the inspection of "ropes, sheaves and leveling devices."

GZ10 and Lend Lease argue that plaintiff's failure to plead specific Industrial Code provisions is fatal to the Labor Law § 241 (6) cause of action. However, in fact, "a failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dept 2013]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]).

In any event, the provisions cited by plaintiff are either not sufficiently specific to support a Labor Law § 241 (6) claim, or they do not apply to the facts of this case. Thus,

plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against GZ10 and Lend Lease.

The Common-Law Negligence and Labor Law § 200 Claims (motion sequence number 002)

URNA moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it. 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'" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [citation omitted]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by the contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the work site (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [1st Dept 2005]).

"Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has also been extended to include the tools and appliances [like the Lift in the instant matter] without which the work cannot be performed and completed" (*Chowdhury v Rodriguez*, 57 AD3d 121, 128-129 [2d Dept 2008]). It is "well settled that the duty to provide a safe place to work is not breached when the injury arises out of

a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]). For example, "[i]f the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance, but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency" (*id.* at 146 [internal citations omitted]).

Accordingly, where a defendant provides the worker with a piece of defective equipment, it must be shown that said defendant either created or had actual or constructive notice of the defective condition (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Navarro v City of New York*, 75 AD3d 590, 592 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d at 131).

Initially, while URNA claims that it did not owe plaintiff any duty of care, "[a] party injured as a result of a defective product may seek relief against the product manufacturer or others in the chain of distribution if the defect was a substantial factor in causing the injury" (*Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1008 [2d Dept 2010]).

In opposition, plaintiff argues that URNA, as a casual seller, had a duty to plaintiff to provide warnings of certain defects in the scissor lift that were not readily discernable and that URNA breached that duty. In response, URNA argues that there were sufficient warnings on the scissor lift, but that plaintiff never read the warnings, or the operator's manual.

Notably, a plaintiff asserting a claim for failure to warn must "adduce proof 'that the user of a product would have read and heeded a warning had one been given'" (*Reis v Volvo Cars of N. Am., Inc.*, 73 AD3d 420, 423 [1st Dept 2010], quoting *Sosna v American Home Prods.*, 298 AD2d 158, 158 [1st Dept 2002]). An admission that one did not read the available warnings

"severs the causal connection between the alleged failure to warn and the accident" (*id.* citing *Sosna v American Home Prods.*, 298 AD2d at 158 and *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1st Dept 1998]; *see also Williams v River Place II, LLC*, 145 AD3d 589, 589 [1st Dept 2016] [upholding dismissal of common-law negligence cause of action because "[p]laintiff failed to show that the warnings on the saw and in the manual — warnings that he did not read — were insufficient or that their insufficiency was a proximate cause of the accident"]).

Here, photographic evidence presented to the court shows that the Lift was equipped with several conspicuously placed warning labels that address the function and operation of the Lift, including warnings regarding tipping and use of the Lift on level ground. Further, plaintiff clearly and consistently testified that he did not read the warning labels on the Lift, or the operator's manual prior to the use of the Lift. Therefore, any purported insufficiencies in the warnings cannot have been a substantial factor in bringing about his injury (*Guadalupe v Drackett Prod. Co.*, 253 AD2d at 378; *Williams v River Place II, LLC*, 145 AD3d at 589).

In addition, it is alleged that the accident occurred because plaintiff drove the lift up on the subject incline. Therefore, it can be said that the accident was also due to the means and methods of plaintiff's work. In order to find an owner or his agent liable under Labor Law § 200 for defects arising from a subcontractor's means or methods, it must be shown that the agent exercised some supervisory control over the injury-producing work (*Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [Labor Law § 200 liability does not attach where the plaintiff was injured as he was lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into the method of moving the beam]). Here, there is no evidence in the record establishing that URNA directed or supervised plaintiff's operation of the Lift.

Thus, URNA is entitled to dismissal of the common-law negligence and Labor Law § 200 claims as against it.

GZ10 and Lend Lease's Cross Claims for Contribution and Common-Law Indemnification Against URNA (motion sequence number 002)

URNA moves for summary judgment dismissing the cross claims of GZ10 and Lend Lease, which sound in common-law contribution and indemnification. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citations omitted]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In opposition to URNA's motion, GZ10 and Lend Lease fail to set forth evidence that any negligence on the part of URNA contributed to the cause of plaintiff's accident. Thus, URNA is entitled to dismissal of its contribution and common-law indemnification claims as against it.

URNA's Third-Party Contractual Indemnification Claims Against Coordinated (motion sequence number 002)

URNA moves for summary judgment in its favor on the third-party claim for contractual defense and indemnification against Coordinated. Initially, as plaintiff was an employee of Coordinated at the time of the accident, Workers' Compensation Law § 11 is relevant.

Workers' Compensation Law § 11 sets forth, in pertinent part, as follows:

> "An employee shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, in the bill of particulars, plaintiff does not assert a grave injury as contemplated by the Workers' Compensation Law. In any event, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013] [internal quotation marks and citation omitted]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Additional Facts Relevant To This Issue

Coordinated rented the Lift from nonparty United Rentals Location #P42 (UR#P42), pursuant to a rental agreement (the Agreement).

The Agreement includes an indemnification provision, which states, in pertinent part, as follows:

> "3. INDEMNITY / HOLD HARMLESS: To the fullest extent permitted by law, Customer [Coordinated] agrees to indemnify, defend and hold United, and any of its respective officers, agents, servants or employees and affiliates, parents and subsidiaries harmless from and against any and all liability, claims, loss, damage or costs (including but not limited to attorneys' fees . . .) arising out of or related to the operation, use, possession, or rental of the Equipment"

(URNA's notice of motion, Exhibit A, the Agreement, ¶ 3).

In the Agreement, the term "United" is defined as "the corporate subsidiary of United Rentals Inc. identified on the first page of the Rental Agreement from whom the Customer has rented the Equipment" (*id.*). With that said, as UR#P42 is the entity identified on the first page of the Agreement, the term "United" in the subject indemnification provision refers to UR#P42.

Here, in support of its third-party motion for contractual indemnification of Coordinated, URNA argues that, because it fulfilled its duties under the contract to provide equipment to Coordinated, Coordinated owes it defense and indemnification pursuant to the indemnification provision of the Agreement. However, as Coordinated argues, a question of fact remains as to whether it owes URNA contractual defense and indemnification pursuant to said indemnification provision because URNA was not a party to the Agreement, and URNA has not established that it was an officer, agent, servant, employee, affiliate, parent or subsidiary of UR#P42.

URNA's Third-Party Breach of Contract Claims For Failure to Procure Insurance against Coordinated (motion sequence number 002)

URNA moves for summary judgment in its favor on its third-party claim for breach of contract for the failure to procure insurance against Coordinated.

The Agreement contains the following insurance procurement provision:

> "18. Customer agrees to maintain and carry at customer's sole cost the following insurance; . . . (c) Commercial general liability insurance ('CGL') (providing coverage equal to or greater than the standard ISO CG 00 01 12 04 form) for any property damage, bodily injury or personal or advertising injury arising out of the maintenance, operation, possession or use of the Equipment with combined single limits of insurance not less than $2 million per occurrence and $4 million in the aggregate. Customer shall obtain insurance policies that provide or are endorsed to provide that all insurance required hereunder is primary and non-contributory to any other insurance maintained by United. United shall be named as an Additional Insured for liability insurance and additional loss payee for property insurance"

(*id.*, ¶ 18).

As discussed previously, the Agreement is between nonparty UR#P42 and Coordinated. Moreover, the insurance procurement provision requires Coordinated to procure insurance naming UR#P42, and not defendant URNA, as an additional insured.

Thus, URNA is not entitled to summary judgment in its favor on its claim for breach of contract for the failure to procure insurance as against Coordinated.

The Negligence Claim Against Genie (motion sequence number 003)

Genie moves for summary judgment dismissing the negligence claim as against it.[3]

In support of its motion to dismiss said claim, Genie argues that the Lift was reasonably safe as designed and that sufficient manuals and warnings were provided. In addition, Genie argues that plaintiff was the sole proximate cause of his injuries in that he chose not to read the Lift's manuals or warnings, nor did he obtain proper training in the Lift's operation.

[3] In its motion, Genie does not request the dismissal of the Labor Law causes of action as against it.

In opposition, plaintiff argues that Genie failed to establish that the Lift was free from defects in light of the fact that the Lift's tilt alarm failed to sound when the Lift was subjected to a tilt sufficient enough to cause it to topple over (*see Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d at 1008 ["'if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect' to defeat the motion"], quoting *Schneidman v Whitaker Co.*, 304 AD2d 642, 643 [2d Dept 2003]).

In response, Genie asserts that the Lift is intended to be utilized on only firm and even surfaces. In addition, Genie maintains that the slight, one-inch incline that the Lift was subjected to was too minor in nature to activate the tilt alarm. Here, as the slight, one-inch incline was sufficient to cause the Lift to topple, a question of fact remains as to whether the tilt alarm was negligently designed and whether said design defect caused the accident. Thus, Genie is not entitled to dismissal of the negligence claim as against it.

The court has reviewed the remaining contentions of the parties and finds them to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiffs Gary and Kathy Harrigan's motion (motion sequence number 001) for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants G-Z/10UNP Realty, LLC and Lend Lease (US) Construction LMB, Inc., is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of defendant United Rentals (North America), Inc.'s (URNA) motion for summary judgment seeking dismissal of the complaint and all cross-claims against (motion sequence number 002) it is granted, and the complaint and all cross-claims are

dismissed as to URNA with costs and disbursements to URNA as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of URNA; and it is further

ORDERED that the part of URNA's motion for summary judgment in its favor on the third-party claims for contractual indemnification and breach of contract for failure to procure insurance (motion sequence number 002) is denied; and it is further

ORDERED that Genie Industry, Inc.'s motion for summary judgment in its favor seeking dismissal of the negligence cause of action as against it (motion sequence number 003) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 2/28/17

ENTER:

JOAN M. KENNEY
J.S.C.

Harrigan v G-Z/10UNP Realty, LLC

2018 NY Slip Op 02393

Decided on April 5, 2018

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on April 5, 2018
Acosta, P.J., Tom, Oing, Moulton, JJ.

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[*1]Gary Harrigan, et al., Plaintiffs-Respondents,

v

G-Z/10UNP Realty, LLC, et al., Defendants-Appellants, Genie Industries, Inc., et al., Defendants. [And a Third-Party Action]

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 1, 2017 which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion

for partial summary on the Labor Law § 240(1) claim against defendants G-Z/10UNP Realty, LLC and Lend Lease (US) Construction LMB, Inc., unanimously affirmed, without costs.

Plaintiffs established prima facie that the injured plaintiff (plaintiff) had not been provided with adequate protection from an elevation-related risk pursuant to Labor Law

§ 240(1) by submitting evidence that plaintiff fell when the scissor lift he was operating toppled over and that, moreover, the lift's tilt alarm failed to sound and the lift failed to shut down automatically when the lift unsafely tilted, contrary to the design of the machine. This claim was adequately preserved, since the facts and general theory supporting it were brought to defendants' attention in deposition testimony and expert opinion.

In opposition, defendants failed to raise an issue of fact as to whether the statute was violated. Their evidence is relevant to comparative negligence, which is not a defense to Labor Law § 240(1) (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]).

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 5, 2018

CLERK

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