At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of September, 2011.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

- -X

CIRO H. ALFONSO,

Plaintiff,

- against -

Index No.12885/06

PACIFIC CLASSON REALTY, LLC AND DELMAR SALES, INC.,

Defendants.

- -X

The following papers number 1 to 10 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	8
Supplemental and Further Affidavits (Affirmations)	9, 10
Other Papers	

Upon the foregoing papers, defendants Pacific Classon Realty, LLC (PCR) and Delmar Sales, Inc. (Delmar) moves for an order, pursuant to CPLR 3212: (1) granting summary judgment dismissing the complaint as against PCS; and (2) granting summary judgment dismissing the complaint as against Delmar on the

ground that the claims against Delmar are barred by the Workers' Compensation Law; or, in the alternative, granting summary judgment dismissing plaintiff's Labor Law _ 240 (1) and _ 241 (6) claims as against Delmar. Plaintiff Ciro H. Alfonso cross-moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of Labor Law _ 240 (1) liability against Delmar.

Background and Procedural History

Plaintiff commenced the instant action on April 27, 2006. The verified complaint states that at relevant times, plaintiff was an employee of non-party D.S. Imports, Inc. (DS Imports) who worked in the building located at 1101 Pacific Street in Brooklyn. The pleading further states that on December 15, 2004, plaintiff was attempting to remove a heating unit from the ceiling of the subject building; the unit fell and struck plaintiff while he stood on a skid, elevated approximately fourteen feet by a forklift. Plaintiff states that the force of the impact caused him to fall to the ground and suffer injuries as a result.

Plaintiff alleges, inter alia, that defendants are owners of the subject property, contractors hired by the owners to perform construction work, or agents thereof, and, as such, the defendants are subject to absolute vicarious liability under the Labor Law. Plaintiff further alleges that the accident occurred while he performed work that is covered by the Labor Law. Moreover, plaintiff contends that defendants and their agents breached their common-law duty to maintain a safe construction site and also violated sections 200, 240, 241 and 241-a of the Labor Law. Lastly, plaintiff argues

that the breaches of the common-law duty and violations of the Labor Law were the proximate cause of the accident, and defendants are vicariously liable for his injuries.

Shortly thereafter, defendants interposed an answer that generally denies plaintiff's claims. Discovery and motion practice ensued, and on June 30, 2010, plaintiff served and filed a note of issue, indicating that the action is ready for trial. The parties now move for summary judgment.

Defendants' Arguments in Support of their Motion for Summary Judgment

In support of their motion for summary judgment, defendants first assert that in this action, PCR is not subject to either common-law premises liability or vicarious owner or contractor liability pursuant to the Labor Law. Defendants refer to the affidavit[1] of Leon Minzer (hereinafter Minzer), who avers that he and Ingar Blonder (hereinafter Blonder) are the owners of PCR, which had no connection to the premises until a day after the accident. Defendants reason that since PCR had no ownership interest in the subject premises on the date of the accident, and PCR is not subject to premises or vicarious liability for plaintiff's injuries.

[1] Attached as Exhibit G to defendants' Notice of Motion, _ 8. Counsel for defendants states that "[PCR] did not own the premises in question until December 16, 2004, which is **AFTER** [*sic*] the date of the plaintiff's accident" (Affirmation in Support of defendant's Notice of Motion, _ 38).

Next, defendants assert that the Workers' Compensation Law bars this action as against Delmar. Defendants claim that both DS Imports (plaintiff's employer) and Delmar are wholly owned by the same principals (Minzer and Blonder); furthermore, both entities operate in the same location and both are engaged in the business of selling and distribution of housewares. Defendants further claim that there is no contractual relationship between Delmar and DS Imports. Therefore, defendants conclude that this court should find that Delmar and DS Imports are either alter egos of each other, or participants in a joint venture. Alternatively, defendants claim that this court should find that plaintiff is a "special employee" of Delmar. In any case, defendants conclude, plaintiff's action against Delmar is barred by the Workers' Compensation Law.

Lastly, defendants argue that Delmar did not own the subject premises and is, therefore, not subject to liability pursuant to Labor Law _ 240 (1) or _ 241 (6) for the subject accident. Defendants note the Minzer affidavit states that Delmar did not own the premises on the date of the accident. Defendants reason that Delmar is thus not subject to vicarious owner liability pursuant to Labor Law _ 240 (1) or _ 241 (6), and these claims must be dismissed as against Delmar.

Plaintiff's Arguments in Support of his Motion for Summary Judgment

In support of his motion for partial summary judgment, and in opposition to defendants' arguments, plaintiff first asserts that issues of fact preclude summary judgment in defendants' favor. Plaintiff rejects defendants' contention that DS

Imports—plaintiff's employer—is an alter ego of defendant Delmar Sales. Instead plaintiff contends that the record indicates that DS Imports and Delmar Sales are two distinct New York corporations with distinct business purposes (DS Imports imported goods; Delmar Sales sold goods). Plaintiff further argues that during proceedings before the State of New York Workers' Compensation Board, neither Minzer nor Blonder disputed that DS Imports was plaintiff's employer; there was also no suggestion that plaintiff was employed by another business company. Plaintiff notes that DS Imports and Delmar Sales are owned by the same principals; plaintiff nevertheless claims that additional facts, which are not present here, are necessary to demonstrate that one corporation is an alter ego of another.

Similarly, plaintiff rejects defendants' contention that he was a special employee of a single integrated entity. Plaintiff argues that the record indicates that he was paid by DS Imports and no other corporate entity. Plaintiff further argues that there is no indicia —such as a combined financial statement or tax return, a combined budget or a combined workers' compensation insurance premium —that DS Imports and Delmar are a single integrated entity. Moreover, plaintiff reiterates that his payroll records, as well as all documents submitted to the Workers' Compensation Board indicate that plaintiff was an employee of DS Imports only.

Plaintiff contends that issues of fact preclude dismissing the action based on defendants' special employment, alter-ego or joint-venture defenses. Plaintiff also claims that the Minzer's deposition testimony establishes that the subject forklift was

used in the everyday business of DS Imports, and, as such, this court should ignore defendants' present contention that the machine was used to perform Delmar's business. Moreover, plaintiff notes that the Minzer affidavit states that plaintiff was injured while working for DS Imports. Plaintiff further notes that the Minzer affidavit does not allege any "special" employment of plaintiff by Delmar. Additionally, plaintiff claims that defendants are precluded from affirming the alter-ego or joint-venture defense because this affirmative defense was not listed as such in the answer. Lastly, plaintiff notes that Delmar never challenged the finding made by the State of New York Workers' Compensation Board, which determined that DS Imports alone was plaintiff's employer.

Plaintiff next asserts that Delmar is subject to vicarious liability pursuant to the Labor Law for his injuries. Plaintiff notes defendants' assertion that Delmar was not the owner of the subject premises on the date of the accident, and, therefore, not subject to vicarious liability pursuant to the Labor Law. However, plaintiff claims that, under the Labor Law, vicarious liability is not limited (by either the text of the applicable statutes or by courts applying them) to owners of property; lessees of property are also subject to vicarious Labor Law liability. According to plaintiff, it is not disputed that on the date of the accident, Delmar was the lessee of non-party and landlord New York City Industrial Development Agency ("NYCIDA"). Plaintiff claims that courts of this State consider a company that controls the leased premises—such as Delmar in this action—an "agent" of the owner and thus subject

to vicarious Labor Law liability. Similarly, plaintiff rejects the contention that PCR is not subject to liability because it did not own the property. Plaintiff argues that common ownership of the defendant entities—specifically, the fact that Minzer and Blonder own both Delmar and PCR—suggests the existence of issues of fact about PCR's genuine interest in the subject property. Moreover, plaintiff implies that the fact that transfers of ownership of the premises took place on December 16, 2004—the day after the subject accident—should arouse suspicion; on that date, NYCIDA conveyed the subject premises to Delmar, which then conveyed the premises to PCR. Plaintiff concludes that, therefore, this court should not grant summary judgment dismissing the action as against PCR.

Lastly, plaintiff argues that he is entitled to partial summary judgment against Delmar on the issue of Labor Law _ 240 (1) liability. Plaintiff notes that it is undisputed that he fell to the floor from a skid, held by a forklift, while attempting to disconnect heating equipment from the ceiling of the subject premises. He further notes that no safety devices, which could have prevented either his fall or the falling equipment from striking him, were provided or available. He maintains that the accident and injury occurred while he was disconnecting the heating equipment, and thus occurred while he was materially altering the subject building. Plaintiff reasons that he has thus demonstrated a violation of _ 240 (1) of the Labor Law, and he contends that Delmar, either as the owner of the subject premises or an agent of the owner, is vicariously liable for the violation.

Defendants' Arguments in Opposition and Reply

Defendants submit additional arguments in opposition to plaintiff's motion, and in reply to plaintiff's opposition to defendants' motion. First, defendants reiterate that Delmar and DS Imports are integrated entities, owned by the same principals, operating from the same address, and that both were engaged in the distribution and sale of housewares. Defendants reason that since DS Imports was plaintiff's employer, the Workers' Compensation Law bar applies equally to Delmar, an alter ego or joint venture partner of DS Imports. Alternatively, defendants reiterate that when plaintiff was performing the work that led to the subject injury, he was a special employee of Delmar. Lastly, defendants assert that, contrary to the suggestion of plaintiff, the alter ego, joint venture and special employee defenses now asserted were not required to be listed as affirmative defenses in the answer; in any event, these defenses are encompassed by the Workers' Compensation Law bar, which was listed in the answer as an affirmative defense.

Next, defendants reject plaintiff's arguments in favor of his summary judgment motion. First, defendants state that Delmar is not subject to vicarious Labor Law _ 240 (1) liability since it was not the owner of the premises on the date of the accident; NYCIDA was the owner on that date. Defendants also reason that since plaintiff chose the manner in which he attempted to remove the subject heating unit, plaintiff's actions were the sole proximate cause of his injury, and as such, he is not entitled to recover damages under Labor Law _ 240 (1). Lastly, defendants state

that the attempted removal of the subject heating unit constituted routine building maintenance, and, therefore, plaintiff was not engaged in an activity protected by Labor Law _ 240 (1) when he fell.

Lastly, defendants address the question of whether DS Imports had obtained workers' compensation insurance coverage that was in effect on the date of the accident. Defendants note that plaintiff was compensated for his medical expenses by both the State of New York uninsured employers fund and by DS Imports' operating account. Defendants argue that since plaintiff elected to proceed before the Workers' Compensation Board over commencing an action against DS Imports, he may not presently maintain this action against the alter ego of his employer (here, Delmar), even if his employer had not obtained workers' compensation insurance coverage that was in effect at relevant times.

Plaintiff's Arguments in Reply

In reply to defendants' contentions, plaintiff reiterates his prior arguments but also advances new contentions. First, plaintiff asserts that defendants have not demonstrated any issue of fact with respect to their liability under Labor Law _ 240 (1). Plaintiff argues that the accident occurred while he was removing a heating unit; this action constituted an alteration, which is a protected activity listed in the text of Labor Law _ 240 (1). Plaintiff reiterates that he was not given safety devices to

prevent his fall, and he suffered injuries as a consequence. Thus, reasons plaintiff, he has established the elements of a Labor Law _ 240 (1) violation and claim.

Moreover, plaintiff asserts that Delmar is vicariously liable for the violation. Plaintiff does not dispute that NYCIDA owned the subject premises on the date of the accident; however, plaintiff argues that Delmar is subject to vicarious liability pursuant to Labor Law _ 240 (1) as an agent of the owner, NYCIDA. To support this argument, plaintiff first claims that Delmar, and not NYCIDA, was in fact responsible for the maintenance and commercial operation of the premises. Also, plaintiff states that he was removing the heating unit for the benefit of Delmar's business operations. For these reasons, plaintiff concludes that Delmar is subject to vicarious Labor Law _ 240 (1) liability as an agent of the owner of the subject premises.

Plaintiff next rejects defendants' contention that plaintiff's actions were the sole proximate cause of his injuries. Plaintiff reiterates that no safety devices capable of preventing his fall were provided to him or available for his use. Moreover, plaintiff states that, contrary to defendants' present contention, Minzer directed the manner of plaintiff's work. Plaintiff asserts that there is no merit to the suggestion that his own actions proximately caused his injuries.

Plaintiff concludes by advancing two additional arguments. First, plaintiff contends that this court should disregard defendants' opposition papers as untimely. Plaintiff notes that, pursuant to stipulation, defendants agreed to submit opposition papers to plaintiff's cross motion on or before January 18, 2011; however, plaintiff

states that the papers were not served until January 19, 2011. Lastly, plaintiff has filed a supplemental affirmation in opposition to defendants' motion; plaintiff argues therein that (among other reiterated arguments) since DS Imports did not have a workers' compensation insurance policy in effect on the date of the accident, this court should preclude Delmar from asserting the Workers' Compensation Law bar, by claiming either that Delmar and DS Imports are alter egos (or the like) or that plaintiff was a special employee of Delmar.

Discussion

1. Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

The proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the

merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2007]).

2. Workers' Compensation Law Bar

Workers' Compensation Law § 10 states, in applicable part:

> "1. Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . . ."

Further, Workers' Compensation Law § 11 states, in applicable part:

> "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative

> in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee."

Lastly, Workers' Compensation Law _ 29 (6) states, in applicable part:

> "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . ."

Cases interpreting these sections state that "the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (*Siklas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2010], citing *Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 779 [1998]; *Hofweber v Soros*, 57 AD3d 848, 849 [2008]; *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2008]). Here, it is undisputed that plaintiff received benefits awarded by the Workers' Compensation Board for his injuries. Nevertheless, this court rejects the contention by defendants that the instant action is barred by the Workers' Compensation Law.

The court notes that it is undisputed that Delmar, PCR and DS Imports are separate entities. It is also undisputed that before the Workers' Compensation Board, DS Imports—and not any other entity—appeared as plaintiff's employer. Although defendants correctly note that in some instances, multiple entities that are

alter egos or engaged in a joint venture are each considered an employer for the purposes of the Workers' Compensation Law (*see e.g. Paulino v Lifecare Transp.*, 57 AD3d 319 [2008] [special employment established where defendant and nonparty employer were all part of a single integrated entity in that they operated under the control of the same parent corporation, shared payroll services and an employee manual, and were covered by the same workers' compensation insurance policy]), the question of alter ego or special employment is generally reserved for the trier of fact (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] ["We recognize that a person's categorization as a special employee is usually a question of fact"]). And, notably, in this matter, one of the factors identified in *Paulino*—a workers' compensation insurance policy, common or otherwise—was absent.

In short, defendants failed to demonstrate, as a matter of law, that plaintiff was their special employee (*see e.g. Martin v Baldwin Union Free School Dist.*, 271 AD2d 579, 580 [2000]; *Kramer v NAB Constr. Corp.*, 250 AD2d 818, 819 [1998]) of that they were alter egos of, or engaged in a joint venture with, DS Imports, plaintiff's employer (*see e.g. Degale-Selier v Preferred Mgt. & Leasing Corp.*, 57 AD3d 825 [2008]; *Masley v Herlew Realty Corp.*, 45 AD3d 653, 654 [2007]; *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 965-966 [2003]). Nor can defendants claim the Workers' Compensation Law bar merely because the relevant entities are owned by the same principals and plaintiff received workers' compensation law benefits (*Kaplan v Bayley Seton Hosp.*, 201 AD2d 461, [1994] [corporation financially

interrelated with distinct corporation that employed plaintiff not entitled to Workers' Compensation Law defense]).

In any event, the mere fact that Delmar, DS Imports and/or PCR are controlled and wholly owned solely by Minzer and Blonder does not permit this court to disregard distinct corporate identities. "The mere fact that . . . corporations were owned and operated by the same . . . individuals, without more, is not sufficient to justify a disregard of corporate identities" (*Custer Bldrs. v Quaker Heritage*, 41 AD2d 448, 451 [1973], citing *Crowell Corp. v Merrie Paper Co.*, 35 A D 2d 803, 804 [1970] [the fact that there was a close working relationship between two corporations is insufficient to allow a disregard of their legally separate and distinct entities]; *see also Berkey v Third Ave. Ry. Co.*, 244 NY 84 [1926]). Put simply, DS Imports was plaintiff's employer; Delmar and PCR were not, and, therefore, the instant action against them is not barred by the Workers' Compensation Law.

3. Labor Law § 240 (1)

Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . ."

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 force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The duties delineated in § 240 (1) are nondelegable and owners and contractors are liable for the violations of their agents even if they have not exercised supervision and control (*Rocovich*, 78 NY2d at 513).

This court denies both defendants' motion and plaintiff's cross motion with respect to Labor Law _ 240 (1). First, since there is no indication that plaintiff was provided with safety devices to prevent a fall, this court thus cannot find that plaintiff was the sole proximate cause of his injuries (*see e.g. Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2006] [plaintiff not sole proximate cause of accident if adequate safety devices not provided]). Next, since it is undisputed that plaintiff was removing the subject heating unit (which measured four feet tall and five feet wide, and weighed approximately 500 pounds) because one of two support brackets that connected the unit to the ceiling was broken, his actions constituted repair, an activity within the purview of Labor Law _ 240 (1). Defendants characterize plaintiff's work as "routine maintenance" because Labor Law _ 240 (1) does not cover "routine maintenance in a nonconstruction, nonrenovation context" (*Diaz v Applied Digital Data Sys.*, 300 AD2d 533, 535 [2002]; *see also Koch v E.C.H. Holding Corp.*, 248 AD2d 510, 511 [1998]). Here, it is undisputed that plaintiff was not involved in

construction or renovation of the subject building. However, "routine maintenance" normally entails replacement of parts due to wear and tear (*Abbatiello v Lancaster Studio Assocs.*, 3 NY3d 56, 53 [2004]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Deoki v Abner Properties Co.*, 48 AD3d 510 [2008]; *English v City of New York*, 43 AD3d 811 [2007]; *Barbarito v County of Tompkins*, 22 AD3d 937 [2005]). Here, in contrast, plaintiff was injured while attempting to remove the subject unit because of a broken—not worn out—support bracket. The instant facts are akin to the many situations identified by the Appellate Division as "repair; indeed, in *Riccio v NHT Owners LLC*, (13 Misc 3d 1209[A], 2006 NY Slip Op 51752[U] Sup Ct, Kings County, Aug. 23, 2006, Partnow, J., *affd* 51 AD3d 897 [2008]) this court identified appellate authority for examples of repair:

> "(*Fitzpatrick v State*, 25 AD3d 755, 756 [2006] [replacing light fixture on pole to restore lighting to a parking lot]; *Bruce v Fashion Square Associates*, 8 AD3d 1053, 1054 [2004] [replacing transformer on building roof's HVAC unit]; *Alvarez v Long Island Fireproof Door Co., Inc.*, 305 AD2d 343, 343-344 [2003] [replacing electric garage door opener]; *Lang v Charles Mancuso & Son*, 298 AD2d 960, 961 [2002], *lv denied* 302 AD2d 1022 [2003] [replacing beverage supply lines at restaurant and bowling alley]; *Franco v Jemal*, 280 AD2d 409 [2001] [fixing inoperative rooftop central air conditioning unit]; *Craft v Clark Trading Corp.*, 257 AD2d at 886-887 [fixing grocery store's malfunctioning ice cream case]; *Skow v Jones, Lang & Wooton Corp.*, 240 AD2d 194,194 [1997], *lv denied* 94 NY2d 758 [1999] [removing to repair 200-pound hot water circulating pump from ship's engine room]; *Cook v Presbyterian Homes of Western New York, Inc.*, 234 AD2d 906, 907 [1996] [removing and replacing defective 20-pound light fixture on 25 to 27-foot high pole in parking lot]; *Shapiro v ACG Equity Associates, L.P.*, 233 AD2d 857 [1996] [fixing broken door-closing mechanism]; *Benfanti v Tri-Main Development, L.P.*, 231 AD2d 855, 855 [1996], *lv denied* 652 NYS2d 460 [1996] [removing to unclog and

> repair drain pipe leading to building's main sewer line]; *Holka v Mt. Mercy Academy*, 221 AD2d 949 [1995], *lv dismissed* 87 NY2d 1055 [1996] [removing to repair ventilation system's broken motor from building roof])" (*Id.* at *5).

In sum, for the purposes of whether plaintiff was engaged in an activity protected by Labor Law _ 240 (1) at the time of his injury, the instant matter is most analogous to an injured worker who had to remove a broken light fixture from the ceiling of a building in order to accomplish the repair thereof (*Nowakowski v Douglas Elliman Realty, LLC*, 78 AD3d 1033, 1034 [2010] [awarding partial summary judgment to injured plaintiff on the issue of Labor Law _ 240 (1) liability]).However, the existence of an issue of fact precludes summary judgment to any party with respect to Labor Law _ 240 (1).

It is undisputed that neither defendant was a contractor or an owner of the subject premises on the date of the accident, and NYCIDA was the subject property owner. However, an issue of fact exists as to whether Delmar is subject to vicarious liability pursuant to Labor Law _ 240 (1) and _ 241 (6) as a an agent of the owner (*see e.g. Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2011] ["A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the 'ability to control the activity which brought about the injury'"], quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 99 [1999]). Also, given that PCR is the present owner

of the subject premises, and that the transfer of ownership from NYCIDA to Delmar to PCR occurred the day after plaintiff was injured, an issue of fact exists as to whether PCR is subject to vicarious liability pursuant to Labor Law _ 240 (1) through "some nexus between the owner and the worker" (*see e.g. Muro v State of New York* 19 Misc 3d 1116[A], 2008 NY Slip Op 50748[U] [2008], *2; *see also Vigliotti v Executive Land Corp.*, 186 AD2d 646, 647 [1992] [owner may not avoid Labor Law _ 240 (1) liability by engaging in disingenuous transfer of ownership]).

Based on the above, and since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]), the motion and cross motion are denied.

Conclusion

The motion of defendants Pacific Classon Realty, LLC, and Delmar Sales, Inc. is denied. The cross motion of plaintiff Ciro H. Alfonso is also denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.