

**Vasquez v Young Mens Christian Assn. of Greater
N.Y.**

2010 NY Slip Op 31868(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 112859/07

Judge: Doris Ling-Cohan

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SCANNED ON 7/8/2010

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

PRESENT: Hon. Doris Ling-Cohan PART 31

Index Number : 112859/2007
VASQUEZ, JOSE M.
vs
YOUNG MEN'S CHRISTIAN
Sequence Number : 002
SUMMARY JUDGMENT

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

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

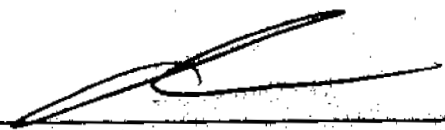
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment*
by plaintiff is granted to the extent provided
in the attached memorandum decision

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

FILED
JUL 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/30/10


JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
JOSE M. VASQUEZ,

Plaintiff,

Index No.: 112859/07
DECISION/ORDER

-against-

YOUNG MENS CHRISTIAN ASSOCIATION OF
GREATER NEW YORK d/b/a THE YMCA OF
GREATER NEW YORK and INTERIOR BUILDING
SERVICES, INC.,

Defendants.

Motion Seq. No.: 002

-----X

YOUNG MENS CHRISTIAN ASSOCIATION OF
GREATER NEW YORK and INTERIOR BUILDING
SERVICES, INC.,

Third-Party Plaintiffs,

Index No.: 590393/08

-against-

VISONE CONSULTING AND CONSTRUCTION
CORP. d/b/a VISON CONSTRUCTION CORP.,

Third-Party Defendants.

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, plaintiff moves for partial summary judgment on a portion of the complaint (motion sequence number 002). For the following reasons, this motion is granted.

BACKGROUND

On August 27, 2007, plaintiff Jose M. Vasquez (Vasquez), a carpenter, was injured when he fell from a scaffold at a work site in a building (the building) located in the County of Richmond, City and State of New York. See Notice of Motion, Dorfman Affirmation, ¶ 11. The defendant Young Mens Christian Association of Greater New York d/b/a the YMCA of Greater

New York (the YMCA) is the owner of the building. *Id.* Defendant Interior Building Services, Inc. (IBS), a licensed New York corporation, was the general contractor that the YMCA had hired to perform the work at the building. *Id.*, ¶ 13. Third-party defendant Visone Consulting and Construction Corp. d/b/a Vison Construction Corp. (Visone), also a licensed New York corporation, was a subcontractor that IBS had hired to perform carpentry work at the building, and was Vasquez's employer. *Id.*

At his deposition on January 7, 2009, Vasquez stated that he was injured while standing on top of a "Baker's scaffold" and engaged in installing framing as part of the construction of the building's interior walls. *Id.*; Exhibit L, at 38-40, 45. Vasquez claimed that he and his brother, Sixto Vasquez (Sixto), had erected the subject scaffold, and that he himself had erected many similar scaffolds in the past. *Id.* at 45-47. Vasquez stated that the plywood platform on top of the scaffold was approximately two feet wide, and five to six feet long, and was elevated six to eight feet off of the ground. *Id.* at 43. Vasquez also stated that the top of the scaffold had no guardrails or handrails. *Id.* at 44. Vasquez further stated that the scaffold had wheels on its bottom that he had locked in place while erecting it, and that it stood on a cement floor next to the wall where he was installing the framing. *Id.* at 43, 53-55. Finally, Vasquez stated that the scaffold had moved away from the wall when he began to use an electric drill/screwdriver to install some framing, and that he consequently fell to the ground. *Id.* at 48-49, 52, 59-61.

In their opposition papers, defendants present the deposition testimony of non party witness Paul Ranallo (Ranallo), another carpenter employed by Visone, who was present at the work site when Vasquez was injured, although he did not observe the accident. *See Ricciardi Affirmation in Opposition*, Exhibit D, at 60, 62. Ranallo stated that he had a conversation with

Vasquez several days after the accident, in which Vasquez stated that he had been working on the ceiling 16 feet above the ground, installing anchors for a drop ceiling rather than installing framing from the top of the scaffold. *Id.* at 43. Ranallo opined that Vasquez might have used a ladder to climb from the top of the scaffold to the ceiling; however, he stated that Vasquez had never admitted this to him. *Id.* at 44-45, 70. Vasquez specifically denied that he had ever placed a ladder on top of the scaffold to reach the ceiling. *See* Notice of Motion, Exhibit L, at 89-90. Defendants also present a copy of the “C-2” accident report that Visone filed with the Worker’s Compensation Board after Vasquez was injured, which recited, in the section entitled “cause of accident,” that “scaffold wasn’t locked in place.” *See* Ricciardi Affirmation in Opposition, Exhibit G.

Vasquez initially commenced this action on September 20, 2007, and his amended complaint (dated June 12, 2008) now sets forth five causes of action for negligence that are grounded in violations of: 1) common-law negligence principles; 2) Labor Law § 200; 3) Labor Law § 240 (1); 4) Labor Law § 241 (6); and 5) various provisions of the Industrial Code. *See* Notice of Motion, Exhibit D. Defendants filed an amended answer containing nine affirmative defenses on July 15, 2008. *Id.*; Exhibit E. Previously, on May 7, 2008, the YMCA had commenced a third-party action against IBS which it discontinued via stipulation on October 1, 2008 after Vasquez filed his amended complaint naming both the YMCA and IBS as defendants.¹ *Id.*; Exhibits A, B, C, F. Subsequently, the YMCA and IBS commenced a second third-party action against Visone on October 13, 2008; however, after filing an answer on

¹ Vasquez’s original complaint had named only the YMCA as a defendant. *See* Notice of Motion, Exhibit A.

December 3, 2008, Visone failed to appear in court on several occasions and the court entered a default judgment against Visone on October 2, 2009. *Id.*; Exhibits G, H, J. Vasquez now moves for partial summary judgment on the issue of liability on his third cause of action against defendants in the main action (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment “only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.” *Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50, 51 (1st Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Applying such principles herein, no triable issues of fact exist which would preclude a grant of Vasquez's motion for partial summary judgment on the issue of liability under his Labor Law § 240 (1) claim.

Labor Law § 240 (1) provides 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.

In interpreting this statute, the Appellate Division, First Department, has held that:

To establish a cause of action under section 240 (1), a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries. The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one [internal citations omitted].

Jones v 414 Equities LLC, 57 AD3d 65, 69 (1st Dept 2008). Here, Vasquez argues that the admitted absence of guardrails, handrails, safety harnesses or any other type of safety equipment for his use on the scaffold in question is prima facie proof that defendants violated Labor Law § 240 (1). See Notice of Motion, Dorfman Affirmation, ¶ 23. This is a correct statement of the law. See e.g. *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 524 (1985) (“The evidence established a breach of the statutory duty, and thus absolute liability, by defendants’ failure to provide any safety devices”); *Morrison v City of New York*, 306 AD2d 86, 86 (1st Dept 2003) (“Defendants’ liability was established as a matter of law by the fact that the scaffold they provided plaintiff, which admittedly had no guard rails, safety nets or lifelines, did not prevent plaintiff from falling”). The court also notes that defendants offer no evidence that they provided Vasquez with any safety equipment. Thus, the court concludes that defendants did, indeed,

violate Labor Law § 240 (1). However, it does not end the inquiry, because it is also incumbent on Vasquez to prove the element of proximate causation.

With respect to that issue, Vasquez cites the recent holding of the Appellate Division, First Department, in *Zengotita v JFK Intl. Air Terminal, LLC* (67 AD3d 426, 427 [1st Dept 2009]), that:

The uncontroverted evidence that the scaffold failed and that no other safety device was provided either to prevent the scaffold from moving or to prevent plaintiff from falling demonstrates as a matter of law that the statute was violated *and that the violation was a proximate cause of plaintiff's injuries* [emphasis added].

Vasquez concludes that the facts of this case disclose proximate causation. *See* Notice of Motion, Dorfman Affirmation, ¶ 24. In opposition, defendants argue that there are issues of fact regarding proximate causation, specifically issues of whether plaintiff failed to install guardrails or other safety devices on the scaffold, and whether or not he locked the scaffold's wheels in place. *See* Ricciardi Affirmation in Opposition, ¶¶ 41-46. The former argument is clearly spurious, since Labor Law § 240 (1) plainly requires the employer - not the worker - to furnish safety devices, and defendants have presented no evidence that they did so. With respect to the latter argument, Vasquez replies that his alleged (and contested) failure to lock the scaffold's wheels is immaterial, since it would only go to contributory negligence, which is not a defense to a Labor Law § 240 (1) claim. *See* Dorfman Reply Affirmation, ¶ 25. Vasquez is correct. *See e.g. Crespo v Triad, Inc.*, 294 AD2d 145, 147 (1st Dept 2002) ("The claims concerning plaintiff's failure to use the locking wheel devices and his movement of the scaffold while standing on it are not determinative, since contributory negligence is not a defense"); *see also Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280, 289 (2003) ("it is

conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"). Therefore, the court rejects defendants' arguments; Vasquez has established a prima facie case that defendants are liable for violating Labor Law § 240 (1).

Defendants nonetheless argue that Vasquez's motion should be denied because "the conflicting accounts of the accident create factual issues which must be resolved by" a jury. *See Ricciardi Affirmation in Opposition*, ¶¶ 34-40. Defendants specifically refer to Ranallo's deposition testimony regarding his post-accident conversation with Vasquez. *Id.* Vasquez replies that Ranallo did not witness his accident, notes that Ranallo admits that his "testimony" regarding Vasquez's alleged use of a ladder on top of the scaffold was merely speculation, and points out that his own testimony was that he never made such use of a ladder. *See Dorfman Reply Affirmation*, ¶¶ 23-24. Vasquez argues that the foregoing does not present evidence from which a reasonable fact-finder could conclude that his actions were the "sole proximate cause" of his injuries. *Id.* The court agrees. In *Blake v Neighborhood Housing Servs. of New York City, Inc.* (1 NY3d at 290-292), the Court of Appeals discussed the rule that a worker whose conduct was the "sole proximate cause" of his own injuries is unable to recover under Labor Law § 240 (1). The Court held that there must be evidence from which a jury could reasonably find that the worker had caused his own injuries. Here, there is simply no such evidence. Ranallo's testimony is admittedly mere speculation. It is well settled that "averments merely stating

conclusions, of fact or of law, are insufficient' to 'defeat summary judgment.'" *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 (2004). Therefore, the court rejects defendants' argument. Accordingly, Vasquez's motion for summary judgment is granted.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Jose M. Vasquez is granted solely to the extent of granting partial summary judgment on the issue of liability on the third cause of action in the amended complaint in favor of plaintiff and against the defendants Young Mens Christian Association of Greater New York d/b/a the YMCA of Greater New York and Interior Building Services, Inc., with the issue of damages to be determined at the trial of this action; and it is further

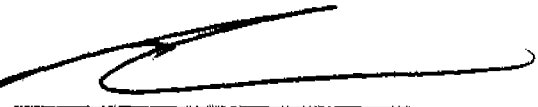
ORDERED that the balance of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York
June 20, 2010



FILED
JUL 07 2010
NEW YORK
COUNTY CLERK'S OFFICE



Hon. Doris Ling-Cohan, J.S.C.