

**Perez v Folio House, Inc.**

2014 NY Slip Op 31062(U)

April 24, 2014

Sup Ct, New York County

Docket Number: 109002/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

JAMIE PEREZ,  
Plaintiff,  
- v -  
FOLIO HOUSE, INC., and ANDREWS BUILDINGS,  
CORP.,  
Defendants.

Index No.: 109002/08  
Motion Date: 03/01/13  
Motion Seq. No.: 04  
Motion Cal. No.: \_\_\_\_\_

FOLIO HOUSE, INC., and ANDREWS BUILDINGS,  
CORP.,  
Third-Party Plaintiffs,  
- v -  
WEST NEW YORK RESTORATION OF CT. INC.,  
Third-Party Defendant.

**FILED**

APR 28 2014

COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Notice of Cross-Motion/Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED
1, 2
3 - 6
7 - 9

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendants move for summary judgment dismissing plaintiff's complaint and plaintiff cross-moves for partial summary judgment on the cause of action for a violation of Labor Law 240 (1). Plaintiff sues under the Labor Law as a result of injuries

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

allegedly suffered in an accidental fall from a scaffold at premises owned and operated by the defendants that occurred while plaintiff was working for the third-party defendant painting the facade of the building. Plaintiff claims that on June 6, 2008, he was working on top of a scaffold between the fourth and fifth floors of the building utilizing a sprayer to apply liquids to remove paint when he stepped on a part of the scaffold where there was no platform and slipped and fell approximately eight feet. Plaintiff's deposition testimony is that he was not provided with any safety devices such as "tie-off lines" and that the scaffold had no rail on the side that faced the building where plaintiff fell.

Plaintiff's testimony is sufficient to meet the burden of demonstrating a prima facie case of defendant's violation of Labor Law 240 (1) as plaintiff has demonstrated that he was working at an elevation, he was injured in a fall from such elevated work height, and the safety devices he was provided with, i.e. the scaffold, fail to prevent the fall that led to his injuries. Lopez v Melidis, 31 AD3d 351 (1<sup>st</sup> Dept 2006) ("since the scaffold . . . did not prevent plaintiff from falling - the core objective of Labor Law § 240 [1], and plaintiff's injuries were caused by the fall, plaintiff established a prima facie case for relief under Labor Law § 240 [1]"). As stated by the Court

A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a

material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff mis-stepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident

Vergara v SS 133 W. 21, LLC, 21 AD3d 279, 280 (1<sup>st</sup> Dept 2005).

Defendants and third-party defendant argue that plaintiff's motion must be denied because the testimony of an employee of the third-party defendant who was working in the vicinity of the plaintiff was that although he did not witness the accident he did not believe that plaintiff was working at the claimed elevation at the time of the accident. The witness stated that "I did not see him [plaintiff] fall eight feet." The witness also stated that the plaintiff was on the same level "as far as I can tell you." The witness further stated that the plaintiff was some distance away from him at the time of the accident testifying that

It's not exactly forty feet because I don't remember the entire length of the building, but more or less forty, thirty feet or somewhere around there. But he would cut that in half from the accident because I heard when something, like, thump and I turned around, I looked and I told him - what I should say, I asked him what happened. An he said he slipped and fell and hit his knee. So I said, okay, so stop Bsing and come get your coffee because I'm not going to sit here all day, I have other things I have to take care of.

The witness further indicated that he observed plaintiff limping and that his leg was cut; the witness could not bandage plaintiff's leg with the first aid kit and advised plaintiff that

he needed to go to the hospital for stitches. In addition a non-party nurse and a physician's assistant who treated plaintiff testified at their depositions that plaintiff never told either of them that he fell off a scaffold. Defendants rely upon this testimony to question the veracity of plaintiff's account of the accident and argue that at a minimum there is an issue of fact, based upon the plaintiff's alleged lack of credibility as to how the accident occurred.

Defendants' arguments are, however, insufficient to support their application for summary judgment and fail to raise an issue of fact as to plaintiff's Labor Law 240 (1) claim. In this case, the testimony of plaintiff's co-worker does not raise an issue of fact as to how the accident occurred because the co-worker concedes he did not see the accident occur. Rather, the testimony is consistent in that as cited above the witness stated that at the time of the accident he "heard when something, like, thump" and he turned around to see plaintiff and "I asked him what happened. And he said he slipped and fell and hit his knee." The witness further confirmed he did not see the accident stating "[T]he noise I heard when I turned around because my back was to him."

As the testimony of plaintiff's co-worker was not inconsistent with that of the plaintiff, no issue of fact is raised. See Noah v 270 Lafayette Assoc., L.P., 233 AD2d 108 (1<sup>st</sup>

Dept 1996) ("That plaintiff was the only witness to the accident did not preclude summary judgment since his testimony concerning the manner in which the accident occurred is neither inconsistent with his own account provided earlier nor contradicted by other evidence"). Moreover, the defendants' supposition that plaintiff would have complained to his care givers that he had fallen from the scaffold at the time they treated him is speculative argument and not probative. Therefore, the court shall grant plaintiff's cross-motion for partial summary judgment on the cause of action for violation of Labor Law 240 (1).

With respect to plaintiff's cause of action for violation of Labor Law and 241(6), the court shall deny defendants' motion seeking summary dismissal. Defendants produce no evidence to contradict plaintiff's expert affidavit that the scaffold in question violated Industrial Code (12 NYCRR) 23-1.7(b) and therefore irrespective of plaintiff's evidence the motion must be denied. See Burton v CW Equities, LLC, 97 AD3d 462 (1st Dept 2012) (fall from elevated walkway with no guardrails or barriers at under construction building within 12 NYCRR §23-1.7[b] and Labor Law 241[6]).

However, the court shall grant summary judgment dismissing plaintiff's claims alleging negligence and violation of Labor Law 200 because there is no evidence that the defendants controlled

the work which caused the accident. See Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (1st Dept 2012).

Accordingly, it is

ORDERED that plaintiff's cross-motion for partial summary judgment on the cause of action for violation of Labor Law 240 (1) is GRANTED; and it is further

ORDERED that the defendants' motion for summary judgment dismissing plaintiff's claims for negligence and violation of Labor Law 200 is GRANTED and those claims are hereby dismissed; and it is further

ORDERED that defendants' motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend any previously scheduled conferences in the Mediation Part and if the case is not settled within the Part the parties are directed to appear for a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 on June 17, 2014 at 2:30 P.M. to schedule a date for trial of this action.

This is the decision and order of the court.

Dated: April 24, 2014

ENTER:

**FILED**

**DEBRA A. JAMES**

J.S.C.

APR 28 2014

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