

Ordonez v 730 Assoc., LLC
2025 NY Slip Op 35546(U)
August 21, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 604767/2023
Judge: Paul E. Hennings
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SHORT FORM ORDER

1 of 5
Index No.: 604767/2023

INDEX NO. 604767/2023

Supreme Court - State of New York
I.A.S Part 75 – Suffolk County**PRESENT:****HON. PAUL E HENNINGS**

Justice of Supreme Court

RONALD ROSENDO ORDONEZ ORDONEZ and
IRMA CHUBA,

Plaintiffs,

-against-

730 ASSOCIATES, LLC,

Defendant.

730 ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

SEAN MURPHY CONTRACTING INC.,

Third-Party Defendant.

Mot Date: May 2, 2025

Submitted: July 8, 2025

Mot Seq. # 003/MG

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Notice of Motion/Order to Show Cause: 1Affidavits (Affirmations) Annexed: 2Opposing Affidavits (Affirmations): 3Reply Affidavits (Affirmations): 5Affidavits (Affirmations): 4

It is hereby,

ORDERED, that plaintiffs' motion for an order pursuant to §3212 granting him summary judgment on his Labor Law §§240(1) and 241(6) claims is granted solely with respect to his Labor Law §240 claims.

On January 2, 2023, plaintiff Ronald Rosendo Ordonez Ordonez ("Ordonez") commenced this action against defendant seeking damages for personal injuries allegedly sustained on January 2, 2023, as a result of a fall from an elevated height while building a house at defendant's property. Defendant 730 Associates, LLC ("730 Associates") owned the subject property. By his complaint, plaintiff asserts causes of action based on common law negligence and alleged violations of Labor Law §§200, 240(1) and 241(6). On November 22, 2023, the third-party action against Ordonez's employer was discontinued by stipulation.

Ordonez was deposed on May 9, 2024, and Sean Murphy was deposed on May 16, 2024.

SHORT FORM ORDER

2 of 5

Index No.: 604767/2023

Ordenez testified as follows. He is originally from Ecuador and began working for Sean Murphy, the general contractor, who employed Ordenez around 2018 as a carpenter and homebuilder. He had some carpentry experience working in Ecuador but never received Occupational Safety and Health Administration ("OSHA") training, scaffolding safety training, or instruction on "personal protective equipment" ("PPE") in the United States. Upon entering the United States, he worked for a roofing company until he went to work for Sean Murphy.

On the morning of the accident, Ordenez was building a house with three co-workers, Wilson Ordenez, Carlos Barros, and Boris Sandoval, at 11 Rosewood Drive, Sag Harbor. Together they erected scaffolding at the front of a "wooden" chimney. Sean Murphy instructed them to build the scaffold to reach the chimney and wrap it in black material. Their boss, Sean Murphy, gave only general instructions that morning to set up scaffolding and install house wrap on the chimney, and then left the site. Murphy did not supervise further, did not ask whether his workers had scaffolding or OSHA training, and instructed only that Wilson Ordenez ensure the scaffold was sufficient.

The scaffold was not high enough to reach the top of the chimney. To gain access, Ordenez and Wilson Ordenez screwed wooden pieces into the chimney to serve as steps. Ordenez was not tied off or otherwise secured while using these wooden planks. Standing on the 40–45 degree roof surface, Ordenez stepped onto one of the makeshift planks near the left side of the chimney. He stood there for about one minute attempting to wrap the chimney with material when his foot slipped, causing him to fall, landing on the ground many feet below, suffering serious injuries.

Sean Murphy testified as follows. He has been a general contractor for over 20 years and is a part owner of 730 Associates, and until January 2023 he did not have any scaffolding certifications. He confirmed plaintiff was one of four workers present on the accident date. Murphy was not at the site when the accident occurred but arrived shortly afterward and saw plaintiff on the ground. Carlos Barros told him a secondary wooden plank had been used to access the chimney, and he, Murphy, personally saw the plank on the ground. Photographs taken that day and introduced as deposition exhibits show the scaffold in place without guardrails and with metal planks between towers.

Murphy did not know whether his workers wore protective harnesses and acknowledged that during plaintiff's 5–6 years of employment, he knew plaintiff did not always wear one when working at heights.

Besides his deposition testimony, Sean Murphy gave an affidavit stating he is president of Sean Murphy Contracting Inc., based in East Hampton, New York, the company was formed in 2004 and specializes in residential construction, including renovations and new builds. The project at 11 Rosewood Drive, Sag Harbor, was typical, involving demolition of an existing house and construction of a new single-family home. Murphy explained that on the morning of the accident, he instructed the crew to erect scaffolding in front of the chimney box and begin wrapping it with black tar paper. He stated that sufficient scaffolding had been delivered to the site days before and that, if properly erected, it would have reached the top of the chimney without ladders or planking. Specifically, two scaffold towers were to be erected in close proximity to the chimney, which he contends would have allowed access to all areas of the box without the need for ladders, gang planks, or scaffolding extending to other roof sections. This was work they had performed many times on past jobs. All scaffolding was supplied by Sean Murphy Contracting and delivered to the site days before. Based on his experience, Murphy believed sufficient scaffolding was on site to reach the top of the chimney box. Additionally, his company provided a trailer on site that contained safety equipment, including harnesses, tie-offs, ropes,

and rings, and his workers had been shown how to use them. When he inspected the scaffold after the accident, Murphy admitted it had not been properly erected because it was too low and the towers were too far apart. In his view, had the scaffold been set up as instructed, the accident would not have occurred. Murphy emphasized that plaintiff and Wilson Ordonez made the unilateral decision to screw planks into the chimney, something he had never instructed or observed before. He concluded that plaintiff's own conduct caused the fall.

Plaintiff's Motion for Summary Judgment

Plaintiff now moves for an order pursuant to CPLR §3212 granting summary judgment against the defendants on the issue of liability pursuant to Labor Law §§240(1) and 241(6).

In support of their motion, plaintiffs submitted: Ordonez's deposition transcript; deposition exhibits including photographs of the scaffold; and the contract for construction.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact. (*see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). However, upon the movant establishing prima facie showing of entitlement to a summary judgment, the burden then shifts to the opponent to offer evidence in admissible form sufficient to establish a material issue of fact requiring a trial of the action. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). On summary judgment, the Court must review the evidence in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]).

Under Labor Law § 240 (1), the "Scaffold Law" owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 657 [2d Dept 2021]; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must prove that the defendant violated the statute and that such violation was a proximate cause of his or her injuries (*Hossain v Condominium Bd. of Grand Professional Bldg.*, 221 AD3d 981, 983 [2023]).

In this case, plaintiff established prima facie that he was engaged in covered construction work at an elevated height and was not provided with adequate safety devices. The scaffold lacked guardrails, was too short to reach the chimney, and no harness, safety line, or other protective device was in place. The makeshift planking used was not an adequate safety device within the meaning of the statute. The absence of proper scaffolding and fall protection was the proximate cause of plaintiff's injuries.

Defendant owner 730 Associates contends that plaintiff Ordonez was the sole proximate cause of the accident. For the "sole proximate cause" defense to apply, defendants must show that (1) adequate safety devices were available; (2) the worker knew he was expected to use them; (3) he chose, for no good reason, not to do so; and (4) had he used them, the accident would not have occurred (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39–40 [2004]; *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166 [2020]). Importantly, however, comparative fault is not a defense (*Bakhtadze v Riddle*, 56 AD3d 589, 591, 868 NYS2d 684 [2d Dept 2018]).

SHORT FORM ORDER

4 of 5
Index No.: 604767/2023

The record does not establish that the four elements were met. Although defendant claims safety equipment was in a trailer at the site, there is no evidence plaintiff was mandated to use it or trained in its use. Moreover, the scaffold erected by plaintiff's crew was insufficient in height and lacked safety features, compelling workers to resort to constructing a jerry-rigged means of reaching higher up on the section of the house they were told to wrap. Defendant's arguments therefore sound in comparative negligence. Finally, the defendant did not present evidence that Ordonez was recalcitrant in the sense that he was instructed to tie and untie his harness and refused to do so.

Accordingly, plaintiff has demonstrated entitlement to summary judgment under Labor Law § 240(1), and defendants have not raised a triable issue of fact.

To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards, and that his or her injuries were proximately caused by such Industrial Code violation (*Chiarella v New York State Thruway Auth.*, 230 AD3d 463, 217 NYS3d 573 [2d Dept 2024]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (see *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, [1998]; *Singleton v. Citnalta Constr. Corp.*, 291 AD2d 393, 394, 737 NYS2d 630 [2d Dept 2002]).

Here, Ordonez cites to violations of 12 NYCRR 23-5.1(j)(1)¹; 12 NYCRR 23-1.7(b)(1); and 12 NYCRR 23-1.24(a)(1)(i).

Contributory and comparative negligence are valid defenses to a §241(6) claim. Moreover, breach of a duty imposed by a rule in the Industrial Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Riffo-Veloza v Village of Scarsdale*, 68 AD3d 839, 842, 891 NYS2d 418 [2d Dept 2009]).

Section 23-1.7(b)(1)(i) requires that "every hazardous opening be guarded by a substantial cover fastened in place or by a safety railing installed." Section 23-1.7(b)(1)(iii) provides for the use of a life net or safety belt when working close to the edge of an opening. However, 12 NYCRR 23-1.7(b)(1) is inapplicable to the facts of this case, as it pertains to hazardous openings, not elevated hazards. (*Forschner v. Jucca Co.*, 63 AD3d 996, 999, 883 NYS2d 63 [2d Dept 2009].) Here, Ordonez fell from an elevated height.

Under 12 NYCRR 23-5.1(j)(1), safety railings are required on the open sides of scaffold platforms. Ordonez fell from a wooden plank constructed as an extension of the scaffold. A triable issue of fact therefore exists as to whether the wooden plank may properly be considered part of the scaffold.

Last, 12 NYCRR 23-1.24(a)(1)(i) requires the use of roofing brackets or crawling boards on steep-sloped roofs unless safety belts are provided. The wooden planks at issue were not part of the roof and cannot be so construed. Because Ordonez fell from the plank rather than the roof, this provision is inapplicable.

Accordingly, plaintiffs have not established entitlement to summary judgment under Labor Law §241(6).

¹ Plaintiff cited Section 23-1.5(j)(1) but is clearly referring to section 23-5.1(j)(1).

SHORT FORM ORDER

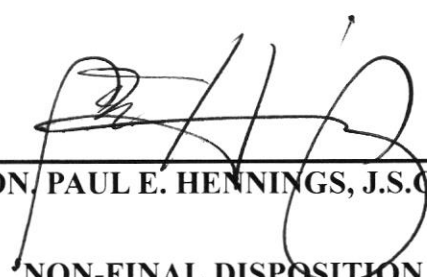
5 of 5

Index No.: 604767/2023

Accordingly, plaintiffs' motion for summary judgment pursuant to Labor Law § 240(1) is granted and denied as to §241(6).

SO ORDERED.

Dated: August 21, 2025



HON. PAUL E. HENNINGS, J.S.C.

_____**FINAL DISPOSITION**

 X **NON-FINAL DISPOSITION**