

<b>Perreira v Omnibuild Constr. Inc.</b>
2026 NY Slip Op 30478(U)
February 5, 2026
Supreme Court, New York County
Docket Number: Index No. 152621/2021
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 152621/2021

VAILTON PERREIRA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

OMNIBUILD CONSTRUCTION INC., TMHCR 48TH STREET LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

OMNIBUILD CONSTRUCTION INC., TMHCR 48TH STREET LLC

Third-Party Index No. 595739/2021

Plaintiff,

-against-

PRECISE CONSTRUCTION CONTRACTING, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions are determined as follows:

In this action, Plaintiff, Vailton Perreira, seeks to recover for injuries sustained on February 8, 2021, when he fell while engaged in stripping forms from a concrete wall. At the time of the incident, Plaintiff was employed as a carpenter by Third-Party Defendant Precise Construction Contracting ("Precise"), who was a subcontractor retained by general contractor Omnibuild Construction Inc. ("Omnibuild"). Defendant TMHCR 48th Street LLC ("TMHCR") was the owner of the premises where the accident occurred, and it retained Defendant Omnibuild to perform the work at issue. Plaintiff commenced this action and pled, inter alia, causes of action under Labor Law §§ 200, 240[1] and 241[6]. Defendants Omnibuild and TMHCR commenced a third-party action against Precise seeking indemnification. Plaintiff now moves for partial summary judgment on liability for the causes of action under Labor Law §§ 240[1] and 241[6]. Defendants oppose this motion, and cross-move for summary judgment dismissing these causes of action.

Plaintiff testified that at the time of the incident, he was assigned to remove forms from a concrete wall with a co-worker he only knew as Beto. The forms, secured by clamps, would constitute a

mold into which concrete would be poured. The forms were arranged in two layers, an upper and a lower. After the concrete hardened, and cured, the clamps would be removed and the forms stripped from the concrete. Plaintiff described the removal of the upper forms that date as a two-step process. Beto, on the ladder, would remove the clamps and drop them to the floor, after which Plaintiff removed the form. Plaintiff averred that the forms “stay a little stuck on the walls so you force them a little bit, turn them loose and slowly you let them drop to the ground”. Prior to the incident, Plaintiff and Beto removed six or seven forms that day.

When the incident occurred, Plaintiff averred that he and Beto removed the lower layer of forms on a concrete wall and were starting to work on the upper layer. Plaintiff testified that Beto was using the only ladder they had been provided, an A-frame type, to reach the upper form. Plaintiff stated he stood on a stack of previously stripped forms to access the upper form. Plaintiff was standing on “about eight forms” and his feet were some six feet off the ground. Plaintiff testified that immediately before he fell, Beto released the clamps from the upper form and rather than remaining stuck, it fell, struck Plaintiff, knocked him off the pile of forms and caused him to fall to the ground.

As to Plaintiff’s motion for summary judgment on his claims under Labor Law §§240[1] and 241[6], he was required to establish *prima facie* proof of each element of these claims (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941 [2d Dept 2019]; *see also Davis v Commack Hotel*, 174 AD3d 501, 502 [2d Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]). The purpose of Labor Law § 240[1] is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). “In order to recover under [Labor Law §] 240(1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his or her injury” (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *see also Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1<sup>st</sup> Dept 2017]).

As drafted, Labor Law §240[1] does not “specify the hazards to be avoided” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The Court of Appeals has held the protections of the statute are triggered where a worker’s “task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against” (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *see also Soto v J.Crew Inc.*, 95 AD3d 721, 722 [1st Dept 2012]). Liability is contingent upon “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]; *see also Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 453-454 [1st Dept 2017]). Safety devices, therefore, “predominantly concern those used on elevated work sites” (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]) and fall into two main types: [1] those used to protect workers “in gaining access to or working at sites where elevation poses a risk” (ie., scaffolds and ladders) and [2] devices “used for lifting or securing loads and materials employed at work” (ie., hoists, blocks, braces, irons and stays) (*id.* at 513-514).

A Labor Law §240[1] cause of action predicated on an allegation that a safety device failed to protect against an elevation risk is commonly referred to as “falling worker” claim. In that instance, the plaintiff must show that necessary protection from the gravity-related risk of his construction work was not provided and/or that the safety device in use failed to provide proper protection (*see eg Badzio v East 68th St. Tenants Corp.* 200 AD3d 591 [1st Dept 2020]; *Carpentieri v 309 Fifth Ave., LLC*, 180 AD3d 571 [1st Dept 2020]; *Camacho v Ironclad Artists Inc.*, 174 AD3d 426 [1st Dept 2019]). Where the inadequacy of a lifting or securing device is raised, that claim is referred to as “falling object” case. “In order to prevail on summary judgment in a Labor Law § 240[1] ‘falling object’ case, the injured

worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 662 [2014]). Specifically, a plaintiff must prove when the object fell it was being “hoisted or secured” or “required securing for the purposes of the undertaking” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

When a worker’s fall from an elevation is precipitated by a falling object, whether viewed as a falling worker or falling object case, Labor Law §240[1] is applicable (*see eg Molina v 114 Fifth Ave. Asso., LLC*, 231 AD3d 543, 543-544 [1<sup>st</sup> Dept 2024]; *Rzymski v Metro. Tower Life Ins. Co.*, 94 AD3d 629, [1<sup>st</sup> Dept 2012][Plaintiff’s “claims encompass both a falling object and a fall from an elevation due to inadequate safety devices”). Here, Plaintiff established, as a matter of law, with his deposition testimony that a violation of Labor Law §240[1] occurred. The stack of detached forms was being used to facilitate Plaintiff’s access the upper form which exposed him to an elevation-related hazard without a proper safety device (*see Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455 [1<sup>st</sup> Dept 2025]; *Velez v LSG 105 W. 28th, LLC*, 236 AD3d 617 [1<sup>st</sup> Dept 2025]; *see also Braganca-Ferreira v SREP 10th Ave. Venture LLC*, 238 AD3d 656 [1<sup>st</sup> Dept 2025] *De Souza v Hudson Yards Constr. II LLC*, 231 AD3d 614 [1<sup>st</sup> Dept 2024]). Further, dislodging the upper forms from the newly completed concrete wall involved a load that required securing (*see Tejada-Rodriguez v 76 Eleventh Ave. Prop. Owner LLC.*, 231 AD3d 419 [1<sup>st</sup> Dept 2024]; *Diaz v Raveh Realty, LLC*, 182 AD3d 515 [1<sup>st</sup> Dept 2020]; *Bartley v 76 Eleventh Ave. Prop. Owner LLC*, 226 AD3d 528 [1<sup>st</sup> Dept 2024]). Defendants’ attempt to distinguish *Tejada-Rodriguez*, supra is unavailing. That the form fell from a wall as opposed to the ceiling above is a distinction without difference as to the gravity-relatedness of the incident (*see Brito v City of New York*, 238 AD3d 508, 508-509 [1<sup>st</sup> Dept 2025]; *Kun Sik Kim v State St. Hospitality, LLC*, 94 AD3d 708 [2<sup>d</sup> Dept 2012]).

In opposition, Defendants argument that Plaintiff and Beto could have accomplished their tasks by taking turns with the ladder and that Plaintiff should have positioned himself differently does not raise a material question of fact. This analysis constitutes nothing more than a claim of comparative negligence which is no defense under Labor Law §240[1] (*see generally Cardona v New York City Hous. Auth.*, 153 AD3d 1179, 1180 [1<sup>st</sup> Dept 2017]; *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 434 [1<sup>st</sup> Dept 2015]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430, 430 [1<sup>st</sup> Dept 2015]). Defendants’ reliance on the defense of sole proximate cause also does not defeat Plaintiff’s motion (*see generally Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]). There is no proof that another safety device was readily available, known to Plaintiff and he nonetheless disregarded its use (*see Gallagher v. New York Post*, 14 NY3d 83, 88-89 [2010]; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1<sup>st</sup> Dept 2018]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589; *Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1<sup>st</sup> Dept 2013]).

Defendants’ claim that liability under Labor Law §240[1] does not lie when causing the falling object was the goal of the work and their reliance on *Wilinski v 334 East 92nd Housing Development Fund Corp* (18 NY3d 1, 11 [2011]) is misplaced. At the outset, the precept cited in *Wilinski* for authority is only dicta. To the extent this argument constitutes an “integral to the work” defense, it does not demonstrate an issue of fact since Defendants proffered no evidence that the “use of safety devices would have ‘defeated the task of stripping the forms from concrete beams’” *Tejada-Rodriguez v 76 Eleventh Ave. Prop. Owner LLC.*, supra at 420, citing *Bartley v 76 Eleventh Ave. Prop. Owner LLC*, supra at 529).

The branch of Plaintiff motion for summary judgment on liability under Labor Law § 241[6] has been rendered academic by the determination above (*see Corleto v Henry Restoration Ltd.*, 206 AD3d 525, 526 [1<sup>st</sup> Dept 2022]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617 [1<sup>st</sup> Dept 2014]). As to the branch of Defendants' cross-motion for summary judgment dismissing this cause of action, they were required to show that all the sections pled by Plaintiff were not concrete, inapplicable or did not cause his injuries (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1<sup>st</sup> Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1<sup>st</sup> Dept 2020]). In the bill of particulars, Plaintiff relies on alleged violations of Industrial Code §§ 23-1.5, 23-1.7, 23-2.1, 23-2.2, 23-3.3, 23-5.1, 23-5.2, 23-5.3, 23-6.1 and 22-6.2. However, since only offered arguments in support of sections 23-2.2[a] and [b], Plaintiff has abandoned his reliance on the other Industrial Code provisions alleged (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1<sup>st</sup> Dept 2012]).

Liability under Labor Law § 241[6] is predicated on violation of a specific, applicable Industrial Code regulation that caused the complained-of injury (*see Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1<sup>st</sup> Dept 2012]; *citing Ross v Curtis-Palmer Hydro-Elec.*, 81 NY2d 494 [1993]). Each section of the Industrial Code relied upon by a claimant must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1<sup>st</sup> Dept 2015], *quoting Misicki v Caradonna, supra* and *Ross v Curtis-Palmer Hydro-Elec. Co., supra*). Industrial Code §23-2.2[a] and [b] provide as follows:

- (a) General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.
- (b) Inspection. Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately.

Section 23-2.2[b] is inapplicable in this case as its requirements are temporally limited to "during the placing of concrete" (*see Cody v State of New York*, 82 AD3d 925, 928 [2d Dept 2011]). That portion of section 23-2.2[a] which requires forms to be "structurally safe" is not sufficiently specific to be actionable, but the provision "braced or tied together so as to maintain position and shape" meets the specificity threshold (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]). To establish this section is inapplicable "where the forms are in the process of being stripped" Defendants must proffer expert opinion addressing the issue (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dept 2013]). Here, Defendants submitted the affirmation of Charles temple, a professional engineer, who opined that the directive that forms be "properly braced applies to the stage when they are in use, not when they are intentionally being removed/dismantled". In contrast, Herman Silverberg, Plaintiff's professional engineer, opines in an affirmation that it "was necessary for worker safety to ensure that the components remained structurally safe and properly braced or tied together so as to maintain position and shape during that removal process . . . to ensure that they did not fall onto workers below in an uncontrolled fashion". Contrary to all the parties' arguments, these affirmations raise issues of fact as to the application of this section (*see Moyna Huaylla v Chestnut Commons Hous. Dev. Fund Corp.*, \_\_\_ Misc3d \_\_\_, 2025 NY Slip Op 31198[U][Sup Ct NY Cty 2025]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for partial summary judgment on liability under Labor Law §§ 240[1] is granted, otherwise the motion is denied, and it is further

ORDERED that Defendants' cross-motion is only granted to the extent that Plaintiff's Labor Law §241[6] claim shall continue as predicated on alleged violation of Industrial Code 12 NYCRR §§23-2.2[a] only.

2/5/2026

DATE



FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III

J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE