

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 10-00235

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

SCOTT WILD, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARRANO/MARC EQUITY CORPORATION,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WENDY A. SCOTT OF COUNSEL),
FOR DEFENDANT-APPELLANT.

THE BALLOW LAW FIRM, P.C., WILLIAMSVILLE (JASON A. RICHMAN OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 26, 2009 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell into an excavation that was immediately adjacent to the area where he was applying siding to a house. When plaintiff stepped onto a plank that partially covered the excavation, his foot slipped, causing him to fall into the excavation. Supreme Court properly granted plaintiff's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Contrary to the contention of defendant, plaintiff's fall into an excavation from ground level is " 'the type of elevation-related risk for which Labor Law § 240 (1) provides protection' " (*Congi v Niagara Frontier Transp. Auth.*, 294 AD2d 830, quoting *Covey v Iroquois Gas Transmission Sys.*, 89 NY2d 952, 954; see *Jiminez v Nidus Corp.*, 288 AD2d 123; *Bockmier v Niagara Recycling*, 265 AD2d 897). Contrary to defendant's further contention, the record establishes that the plank from which plaintiff fell was not being "used as a passageway or stairway" (*Paul v Ryan Homes, Inc.*, 5 AD3d 58, 60) but, rather, it "served as the functional equivalent of a scaffold" (*id.* at 61).

We have considered defendant's remaining contentions and conclude

that they are without merit.

Entered: July 2, 2010

Patricia L. Morgan
Clerk of the Court