

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

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CA 19-01322

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THEODORE NALBONE AND JENNIFER NALBONE,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

VANDERBILT PROPERTIES, INC., AND DAVID HOME
BUILDERS, INC., DEFENDANTS-RESPONDENTS.

VANDERBILT PROPERTIES, INC, THIRD-PARTY
PLAINTIFF,

V

CMC CONCRETE, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.

DAVID HOME BUILDERS, INC.,
THIRD-PARTY PLAINTIFF,

V

CMC CONCRETE, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

TREVETT CRISTO, ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme
Court, Erie County (Mark A. Montour, J.), entered April 24, 2019. The
order and judgment, among other things, dismissed the complaint in its
entirety.

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

Memorandum: Plaintiffs commenced this action to recover damages

for injuries that Theodore Nalbone (plaintiff) sustained while working on a construction project. Plaintiffs appeal from an order and judgment that, inter alia, effectively denied their cross motion for partial summary judgment on their Labor Law § 240 (1) cause of action and granted those parts of the respective motion and cross motion of defendants-third-party plaintiffs and of third-party defendant CMC Concrete, LLC (collectively, defendants) for summary judgment dismissing the section 240 (1) and 241 (6) causes of action. We affirm.

Contrary to plaintiffs' contention, Supreme Court properly concluded that section 240 (1) is inapplicable to this case because plaintiff was not injured as a result of an elevation-related risk (see *Desharnais v Jefferson Concrete Co., Inc.*, 35 AD3d 1059, 1060 [3d Dept 2006]; see generally *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]). Contrary to plaintiffs' further contention, the court properly determined that defendants were entitled to judgment as a matter of law on the section 241 (6) cause of action inasmuch as defendants demonstrated that 12 NYCRR 23-1.7 (a) (1); 23-6.1 (e); 23-9.3 (d) and (e); and 23-9.7 (d) are all inapplicable to the facts of this case (see *McLaughlin v Malone & Tate Bldrs., Inc.*, 13 AD3d 859, 861 [3d Dept 2004]; *Flihan v Cornell Univ.*, 280 AD2d 994, 994 [4th Dept 2001]; *Brechue v Town of Wheatfield*, 241 AD2d 935, 936 [4th Dept 1997], *lv denied* 94 NY2d 759 [2000]), and plaintiffs failed to raise a triable issue of fact in opposition.