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NY COURT OF APPEALS ISSUES TRIFECTA OF POSITIVE DECISIONS FOR DEFENSE

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In a trifecta of good news for defense attorneys, three separate cases in the New York Court of Appeals were decided in favor of insurers in bodily injury construction claims. Although it may not yet be considered a trend, a positive decision for the defense, especially in traditionally plaintiff-friendly counties, is good news for insurance companies and the attorneys who defend them.

Cutaia v. Board of Managers of the 160/170 Varick St. Condominium NY Slip Op 02834 (April 28, 2022)

In the *Cutaia* decision, the court was tasked with determining whether a construction worker who was electrocuted during his time on the job and fell from an unsecured ladder was entitled to damages under Labor Law §240(1).

Labor Law § 240 (1) is intended to protect individuals performing various types of work in dwellings and buildings, including construction, repair work, and demolition. To do this, the Legislature sought to place the ultimate burden of responsibility to keep workers safe on the owner and general contractor who have greater ability to ensure that proper safety measures and equipment are utilized during construction projects.
The statute provides that, "All contractors, owners and their agents.... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) "imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]. A

violation of the statute gives rise to absolute liability. *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522 (1985). In order to establish a claim under Labor Law § 240 (1), a plaintiff must show:

- The statute was violated, and
- The violation was a proximate cause of the injury (*Barreto*, 25 NY3d at 433).

In the current case, the plaintiff was moving sinks from one location to another in the building. To complete this job he had to cut and rework pipes in the ceiling that were placed near electrical wires. He used an A-frame ladder to reach the ceiling, but because of the shape of the space he could not fully open and lock the ladder as recommended. He was shocked by a live wire, knocked off the ladder and fell. It is unclear whether he fell due to the shock, the precarious position of the ladder, or both. Plaintiff argued that the defendant violated §240(1) when they failed to furnish him with a more stable lifting device.

The plaintiff moved for summary judgment relying on Labor Law §240(1), but the trial court denied his motion holding that a fall from an unsecured ladder is not enough in and of itself enough to establish a 240(1) violation. The First Department reversed the trial court's decision and granted the motion based upon the reasoning that the ladder provided to the plaintiff for purposes of keeping him safe was inadequate. The Court of Appeals then reversed the First Department finding that legitimate questions of fact existed including:

- Should the plaintiff have been provided an additional safety device?
- Was the ladder's alleged inadequacy or lack of additional safety measures the proximate cause of the injury?
- Would an alternative device have prevented the accident?

The Court of Appeals decision supports the proposition that causation evidence is necessary to prove a 240(1) violation. In other words, a plaintiff cannot simply assert that an alternate safety measure should have been taken, instead they must show:

- That the task at hand necessitated an alternate device to keep them safe, and
- The alternate device was not provided.

Blake v. Neighborhood Hous.Servs. of N.Y. City, 1 NY3d 280,289 (2003)

With this in mind, the court found that the use by the plaintiff of a ladder that was inappropriate for the task at hand without evidence of more, such as the contractor's refusal to provide him another lifting mechanism after a request, etc., was insufficient to establish a violation of the Labor Code. A faulty ladder alone did not pass muster.

Bonczar v. American Multi-Cinema, Inc., No. 2022-02835 (N.Y. Apr. 28, 2022)

The result of this case supports the sole proximate cause defense, which absolved the defendants from liability when a well-functioning ladder fell for unknown reasons.

Here, the plaintiff was injured when he fell from a ladder while working on a fire alarm system at a theatre. The ladder was not defective and became wobbly and shifted suddenly. The plaintiff does not recall if he secured the ladder properly before climbing on it. He brought suit pursuant to the provisions of Labor Code 240(1) and filed a motion for summary judgment, which the trial court granted. The Fourth Department reversed and found that several factual issues remained as to whether a violation

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of the statute had occurred, especially the question of whether the plaintiff had failed to properly use the ladder before his fall. The case went to a jury and it was decided in favor of the defendant. The court held that it was plaintiff's own omission in failing to properly secure the ladder that was the sole cause of the incident.

This decision is significant because the NY Court of Appeals agreed with the jury on appeal that the plaintiff's failure to check the locking mechanism on the ladder was sufficient evidence to establish the sole proximate cause defense. This case will provide an important precedent moving forward for defense attorneys making arguments on this front.

Healy v. EST Downtown, LLC, 2022 NY Slip Op 02836 (Decided on April 28, 2022)

The notable piece from this decision was that the court found a plaintiff who was not engaged in an activity covered by the statute could not establish a claim against the defendant for a § 240(1) violation.

Here, the plaintiff was employed as a maintenance and repair technician by a property manager. His job including maintaining fixtures, updating painting and completing work orders when requested by the defendant. On the day when the injury occurred, the plaintiff was asked to handle pest control involving a mess caused by birds. The plaintiff was attempting to remove the bird nest from one of the building's gutters when he fell from an unsecured eight-foot ladder. The trial court and the Fourth Department both granted the plaintiff's motion for summary judgment, but the Court of Appeals reversed finding that the plaintiff was not performing one of the enumerated tasks provided for by the statute. The Court held that the plaintiff was performing a "routine task" or maintenance and was not "cleaning" or completing any other task protected by the statute. A task cannot be characterized as cleaning, which is protected by law if the activity is:

- Routine- in the sense that it is the type of job that occurs on a daily, weekly, or on a relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial properties
- Requires neither specialized equipment or expertise, nor the unusual deployment of labor
- Generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and
- In light of the core purpose of Labor Law §240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, or painting, alteration or repair project

Soto v. J Crew, Inc. 21 N.Y.3d 562, 568, 976 N.Y.S.2d 421, 998 N.E.2d 1045 (2013)

The court reasoned that in this case the plaintiff's work was routine as it pertained to the first factor and concluded that he was not in fact cleaning as prescribed under the statute. Thus, it found that the plaintiff's work did not fall under the provisions of section 240(1) and therefore, were not protected.