To be Argued by:
JAMES J. NAVAGH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

JAMES HEALY,

Plaintiff-Respondent,

Docket Nos.:
CA 19-01402
CA 19-01403

– against –

EST DOWNTOWN, LLC c/o First Amherst Development Group,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

QUESTIONS PRESENTED

Plaintiff-respondent James Healy ("plaintiff"), a maintenance man, fell from a ladder while removing a bird's nest from the gutter of a retail and residential complex owned by defendant-appellant EST Downtown, LLC c/o First Amherst Development Group, ("EST"). He is alleging herein liability based on Labor Law § 240 (1). The nest was in a hole in the bottom of the gutter. The top of the gutter had been lined with a membrane to prevent water leaking through the hole. There is conflicting evidence as to whether plaintiff was only removing the nest or whether his work also included patching the hole. It is undisputed that the gutter in question was completely functional and not leaking.

1. Is removing a bird's nest from a hole in a functional gutter a protected activity under Labor Law § 240 (1)?

The court below answered this question in the AFFIRMATIVE.

2. Is a property owner liable under Labor Law § 240 (1) for an injury to a worker who allegedly intended to perform work that was not contracted for by the owner?

The court below answered this question in the AFFIRMATIVE.

3. Does Labor Law § 240 (1) apply where plaintiff fell off a ladder because he was startled by a bird?

The court below answered this question in the AFFIRMATIVE.

PRELIMINARY STATEMENT

This brief is submitted by defendant-appellant EST Downtown, LLC c/o First Amherst Development Group, ("EST"). EST is asking the Court to reverse the lower court's order to the extent that it denied EST's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action, and to the extent that it granted plaintiff's motion and awarded summary judgment to plaintiff on plaintiff's Labor Law § 240 (1) cause of action. Plaintiff's activity at the time of the accident is not a protected activity under Labor Law § 240 (1) as a matter of law.

STATEMENT OF FACTS

Plaintiff reported that he was injured in the course of his employment for non-party First Amherst Development Group, LLC ("First Amherst") while attempting to remove a bird's nest from a hole in the rain gutter of a building owned by EST (R. 349-50). Plaintiff was a maintenance and repair technician (R. 99). He worked at a commercial and residential building with tenants at 230 Perry Street, Buffalo, New York (R. 104). The building was called the Lofts at Elk Terminal (R. 100). First Amherst managed the Lofts at Elk Terminal (R. 101). Plaintiff's work included daily care of the grounds, responding to work orders from tenants, and maintaining apartments for new or prospective tenants (R. 19).

Subcontractors, for example plumbers and roofers, would be hired for work that was beyond the scope of plaintiff's work (R. 19).

Building tenants could submit work orders to First Amherst through an internet-based system (R. 103-05). Plaintiff's assignment to remove the bird's nest herein originated in a work order submitted by a commercial tenant (R. 106). The tenant was Progressive Editions and the order stated, "Birds keep pooping by her door and has become a constant issue" (R. 348).

An email from plaintiff's supervisor sent a week before the accident states that plaintiff's job was to "get rid of bird's nest" (R. 352). Neither the work order nor the e-mail mentioned patching the hole in the gutter. Bruce Marchese, plaintiff's supervisor, and Benjamin Obletz, the principal of EST, testified that plaintiff was not assigned to patch the hole in the gutter (R. 269-71, 355-56). The gutter had previously been lined from the top with a membrane so that it functioned without leaking in spite of the hole in the bottom of the gutter where the bird's nest was located (R. 115, 123-25). The nest was in a hole in the bottom of gutter, below the membrane on the top of the gutter. Plaintiff fell while removing the nest and never patched the hole (R. 147-48). Plaintiff was startled by the bird and fell off the ladder (R. 144-49, 349). The ladder did not fall (R. 149). Plaintiff, approximately three months after his fall, closed out the work order indicating that

his assignment was complete (R. 356). He added a note stating "Birds [sic] nest was removed" (R. 348). He did not state that the hole had been patched (R. 348).

ARGUMENT

Point I

PLAINTIFF WAS NOT ENGAGED IN A PROTECTED ACTIVITY UNDER LABOR LAW §240(1)

Labor Law Section § 240 (1) states:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 (emphasis added).

The enumerated activities that are protected by this provision are "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Activities that are not specifically enumerated in the statute are not protected activities (*Melski v Fitzpatrick & Weller, Inc.,* 107 AD3d 1447, 1448 [4th Dept 2013] summary judgment for defendant regarding Labor Law § 240 [1] affirmed because defendants established that "decedent was not performing one of the protected activities enumerated in the statute but, rather, was involved in routine maintenance in a non-construction, non-renovation context"). The

meaning of the statute should not be strained to "encompass the type of maintenance work . . . which was far removed from the risks associated with the construction or demolition of a building" *Manente v Ropost, Inc*., 136 AD2d 681 (2d Dept 1988).

A. Removing a Bird's Nest is Not a Protected Activity

Plaintiff was removing a bird's nest from a gutter when he fell. He was standing on a ladder reaching into a hole in the gutter to remove the nest (R. 349-50). He was not carrying any tools or materials for cleaning the gutter or any other activity (R. 146). The question of whether he intended to patch the hole, and how that question affects liability, is discussed in detail below. The initial question is whether removing the nest itself was a covered activity.

"Cleaning" is one of the enumerated activities in the statute. Certain types of industrial or commercial cleaning are protected and other types are not. Plaintiff was removing debris, a bird's nest, from a gutter. Removing debris from a gutter on a commercial building is not a protected activity under Labor Law § 240 (1) (*Leathers v Zaepfel Dev. Co.,* 121 AD3d 1500, 1503 [4th Dept 2014] "[i]n our view, plaintiff's actions in this case are far more akin to clearing gutters of debris, an activity that is not protected under Labor Law § 240[1];" *Hull v Fieldpoint Cmty. Ass'n, Inc.*, 110 AD3d 961, 962 [2d Dept 2013] "Labor Law § 240(1) . . . does not apply to work that is incidental to regular maintenance, such as clearing

gutters of debris;" *Berardi v Coney Island Ave. Realty, LLC*, 31 AD3d 590, 591 [2d Dept 2006] "[t]he plaintiff allegedly was injured in a fall while cleaning the leaves from the gutters on the roof of a building. . . . [T]he defendant established its entitlement to summary judgment by showing that the activity in which the plaintiff was engaged in at the time of his injury was routine cleaning in a nonconstruction, nonrenovation context, and thus outside the scope of Labor Law § 240(1);" *Beavers v Hanafin*, 88 AD2d 683 [3d Dept 1982]; *and Catania v St. Rose of Lima Sch*., 40 Misc 3d 1209[A] [Sup. Ct., Kings County 2013] "plaintiff's work [attempting to remove a squirrel from a ventilation duct] could fall within only the most expansive definition of cleaning and bears little resemblance to the construction work the hazards of which § 240[1] aims to ameliorate"). Therefore plaintiff was not cleaning as that term is understood in the statute.

Removing a bird's nest from a gutter does not fall under even a broad interpretation of the remaining enumerated activities. It is not demolition, repairing, altering, painting or pointing of a building or structure. There was no construction or renovation activity at the time of the subject accident. Plaintiff was not a construction worker. The accident did not occur at a construction site. Rather plaintiff was a maintenance worker removing debris from a gutter at a fully constructed and occupied retail-residential complex. Removing a nest from a gutter is not a "repair" under the statute.

B. Patching a Six-Inch Hole in a Functional Gutter is not a Protected Activity

Patching a hole in a gutter to prevent an animal infestation is not a protected activity under Labor Law § 240 (1). Such activity is not a repair because the gutter was functional (R. 115, 123-25) – it did not require a repair – and the hole developed through normal wear and tear.

The case directly on point on this issue is the Second Department case of *Azad v 270 5th Realty Corp*., 46 AD3d 728 [2d Dept 2007]. In *Azad* the defendant, the owner of an apartment building, hired the plaintiff to patch two holes in a gutter pipe which a small animal had used to burrow itself into the building. The project involved screwing metal sheets over the two six-inch by six-inch holes, sealing the sheets with caulk, and then painting over them. After plaintiff had completed this work, he was descending a ladder when the ladder shifted, causing him to fall to the ground. The defendant moved for summary judgment and argued that the Labor Law § 240 (1) cause of action should be dismissed because the plaintiff was performing work that was not covered by that statute at the time of the incident. Plaintiff moved for summary judgment in his favor on this issue.

The lower court denied the defendant's motion and granted the plaintiff's motion. The Second Department reversed both rulings.

> Here, [defendant property owner] established its prima facie entitlement to judgment as a matter of law on this cause of action by demonstrating that [plaintiff] was not engaged in any of the activities

> protected by Labor Law § 240(1), but rather, was merely performing "routine maintenance." The task did not involve major structural work, and [plaintiff's] attachment of metal sheets over the holes in the gutter pipe was in the nature of component replacement. Moreover, [plaintiff] was not retained to repair the gutter pipe because it was inoperable, but because an animal had used the holes in the pipe, which had developed in the course of normal wear and tear, to enter the building. (Citations omitted.)

The facts herein are identical to, or more compelling than, the facts in the *Azad* case. In both cases the size of the holes was six inches by six inches (although in *Azad* there were two holes and only one in the present case). In the *Azad* case the court stated that the placement of metal sheets over the holes in the gutter was "in the nature of component replacement." Replacement of component parts is not a protected activity under Labor Law § 240 (1) (*Anderson v Olympia & York Tower B Co.*, 14 AD3d 520, 521 [2d Dept 2005] "[T]he replacement of worn-out parts in a nonconstruction and nonrenovation context . . . did not constitute 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building'"; *DiBenedetto v Port Auth. of New York & New Jersey*, 293 AD2d 399, 399 [1st Dept 2002]).

The court in *Azad* also noted that the holes were not patched because the gutter was inoperable but rather to prevent an animal from getting into the holes. In *DiBenedetto v Port Auth. of New York & New Jersey*, 293 AD2d 399 [1st Dept 2002]), in granting defendant's summary judgment motion regarding Labor Law § 240 (1), the court considered that the "crane [the subject of plaintiff's work] was

operational before and after replacement of the part," (293 AD2d 399, 399). Because the crane was functional, therefore plaintiff's work was not a repair. The same reasoning applies to *Azad* and the present case. The gutter was functional in the present case and did not require a repair.

The court also noted in *Azad* that the holes developed through normal wear and tear. In the case before the court, the hole developed through normal wear and tear ("[t]he old gutter was a steel gutter that a hole was rotted in it around the downspout because water had leaked through it." [R. 124]). In *Esposito v New York City Indus. Dev. Agency,* 1 NY3d 526, 528 (2003) the court affirmed dismissal of plaintiff's Labor Law § 240 (1) cause of action because the "work here involved replacing components that require replacement in the course of normal wear and tear. It therefore constituted routine maintenance and not 'repairing' or any of the other enumerated activities;" (*see also Melski v Fitzpatrick & Weller, Inc.,* 107 AD3d 1447, 1448 [4th Dept 2013] defendants "established that decedent's work involved replacing components that required replacement in the course of normal wear and tear, and thus that work did not involve repairing or any of the other activities enumerated in section 240[1]"; *and Cullen v AT&T, Inc*., 140 AD3d 1588, 1589 (4th Dept 2016) the distinction between routine maintenance and repairs "depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the

work ..., and whether the work involved the replacement of components damaged by normal wear and tear"). In the case before the Court, like *Azad*, if plaintiff's work included patching the hole, then he was replacing a part that was worn out because of ordinary wear and tear. He was not engaged in an activity protected by Labor Law § 240 (1) at the time of the subject accident and the lower court was wrong to rule otherwise.

In spite of an essential identity of relevant facts and issues, the ruling of the lower court (denying defendant's motion to dismiss the Labor Law § 240 (1) cause of action and instead granting plaintiff's motion for judgment in his favor) is directly at odds with the ruling in *Azad*. Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals (*Phelps v Phelps*, 128 AD3d 1545, 1547 [4th Dept 2015]). Here the lower court erred in both denying EST's motion and in granting plaintiff's motion.

The lower court herein failed to understand that the hole in the gutter was the result of normal wear and tear (plaintiff testified that "[t]he old gutter was a steel gutter that a hole was rotted in it" [R. 124]), and that birds nesting in the exterior of a building is not an uncommon or complicated occurrence. The lower court stated in its decision on the record:

> [I]t is uncontroverted that the plaintiff was dispatched to address the issue of a bird burrowed in a gutter causing excrement falling in the gutter. As opposed to routine gutter cleaning or routine gutter repair occasioned by normal wear and tear, the plaintiff's task to rid the gutter of a foul fowl and to repair the hole and the improperly working gutter was akin, in the Court's opinion, to troubleshooting an uncommon malfunction. Accordingly, the Court finds that the plaintiff has demonstrated that he was engaged in covered work under Labor Law 240 subdivision 1. (R. 22-23).

The nest was not located in an "improperly working" gutter. The evidence that the gutter was working properly and not leaking is undisputed. Plaintiff was not told to "troubleshoot an uncommon malfunction". He was told to "get rid of [the] bird's nest" (R. 269, 352). There was nothing to troubleshoot. The nature of the problem was completely understood by all parties and the solution was pre-determined and stated clearly in the work order and the Bruce Marchese email. A bird's nest is not "uncommon" nor is it a "malfunction." It is a common situation, as any homeowner knows, or anyone who has eaten at the outdoor patio of a restaurant. And it has a simple solution, physical removal of the nest by hand. This can be done without altering or repairing the building, and even without using tools.

For all of the above reasons, the lower court should have granted EST's motion to dismiss the Labor Law §240 (1) cause of action and denied plaintiff's motion.

Additionally, the lower court erred in determining as a matter of law that plaintiff's task included patching the hole in the gutter. That issue is in sharp dispute. As noted in the above excerpt from the lower court's decision Justice Sedita states that plaintiff's task was "to rid the gutter of a foul fowl *and to repair the hole*" (emphasis added) (R. 23). Earlier in his decision he included the following as part of his "essential facts" "[plaintiff] intended to remove the bird's nest from the gutter, *and then repair the hole in the gutter with sheet metal*" (emphasis added) (R. 8-9). On the contrary, most of the evidence before the court indicated that plaintiff's work did not include patching the hole. Therefore the lower court compounded its error in finding a Labor Law § 240 (1) violation and failing to see that there was a clear question of fact as to whether or not plaintiff's work included patching the hole.

Plaintiff's supervisor at First Amherst, Bruce Marchese, testified as a non-party that plaintiff was never assigned to patch the hole in the gutter because the hole was in the bottom, "not where the water flows" (R. 269). Mr. Marchese testified as follows:

> Q. And you don't recall if there was a repair [to the hole in the gutter] that had to be done with it?
>
> A. There is no repair, no.
>
> Q. Well if you didn't visualize it, how do you know if a repair had to be done?
>
> A. I didn't ask him [plaintiff] for a repair.

Q. He was a maintenance man on the job, do you expect him to take some initiative and do his work properly? If he made a determination that he had to repair the gutter with a patch, would he be wrong to do that?

A. Yeah.

Q. Why?

A. He was just told to take the nest out of the gutter or get rid of the nest wherever it was.

Q. He couldn't repair the gutter then, he wouldn't be capable of doing that?

A. We didn't ask him to do that. (R. 270-71)

Mr. Marchese sent plaintiff an email one week before the accident with a list of work to be done. (R. 263-64). One of the items on the list was "get rid of bird's nest" (R. 269, 352). The email did not mention patching the hole. In his hand-written accident report plaintiff did not mention that he intended to patch the gutter or that his assignment included patching the gutter (R. 349-51). The work order for this assignment remained open while plaintiff was out of work. It was marked as complete by plaintiff after he returned to work after the accident. He indicated on the work order that the bird's nest was removed. He did not indicate that he patched the hole in the gutter (R. 348). If he understood that his assignment included patching the hole, then he should not have marked the work order complete if the hole was not patched. The overwhelming majority of the credible evidence indicates that plaintiff's activity at the time of the accident was simply to remove the bird's nest and did not include patching the hole in the gutter. As such, the lower court erred in finding a Labor Law § 240 (1) violation as a matter of law

because, despite direct evidence to the contrary, it accepted as true plaintiff's later inconsistent claim that he was also directed to patch the hole in the gutter.

Plaintiff's motion also should have been denied because he is the only witness with direct knowledge of how the accident happened. In *Carlos v Rochester Gen. Hosp*., 163 AD2d 894 (1990) plaintiff alleged that, while performing repair work on defendant's building, the ladder he was on tipped and he fell to the ground. The accident was not witnessed. The Court affirmed denial of plaintiff's Labor Law § 240 (1) summary judgment motion. "Because the manner in which the accident occurred is within the exclusive knowledge of the plaintiff, partial summary judgment [for plaintiff] is not appropriate. Plaintiff's testimonial version should be subjected to cross-examination and his credibility assessed by the fact-finder after a trial," (citations omitted) (163 AD2d 894).

In *Manna v New York City Housing Authority*, 215 AD2d 335 (1st Dept 1995), plaintiff, a construction worker, was struck in the head by debris which was thrown from an upper window. In affirming the lower court's denial of plaintiff's Labor Law § 240 (1) summary judgment motion, the First Department stated:

> There is no witness to the accident other than plaintiff. As we have noted, where the manner of the happening of the accident is within the exclusive knowledge of the plaintiff, an award of summary judgment on liability is inappropriate because the defendant should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact.

See also *Russell v Rensselaer Polytechnic Inst*., 160 AD2d 1215, 1216 (3d Dept 1990) ("We agree with the reasoning of the First Department . . . that since plaintiff was the only person to have witnessed the accident, whether he fell from the ladder, within the scope of Labor Law § 240, is a triable issue of fact [citations and internal brackets and quotation marks omitted]); *and Marine Midland Tr. Co. of N. New York v Macaluso*, 30 AD2d 932, 932 (4th Dept 1968) ("[s]ummary judgment should not have been granted because the facts upon which the motion was predicated are not within the knowledge of the defendant but are exclusively within the knowledge of the plaintiff.")

As noted above, there was ample evidence before the lower court that plaintiff's task on the day of the accident was simply and only to remove the nest from the gutter. Plaintiff's claims as to what he was doing that day and how he fell from the ladder (see *infra* Point III) are disputed. Therefore the lower court erred in (1) ruling that patching the six-inch hole in a functional gutter was a covered activity, directly contradicting the Appellate Division's holding in *Azad*; (2) failing to see voluminous evidence establishing a question of fact as to whether plaintiff's work included patching the hole; and (3) granting summary judgment for plaintiff where the plaintiff is the only witness.

Point II

EST DID NOT HIRE PLAINTIFF OR HIS EMPLOYER FIRST AMHERST TO PATCH THE HOLE IN THE GUTTER AND THEREFORE EST IS NOT LIABLE UNDER LABOR LAW § 240 (1)

As stated above, plaintiff's employer First Amherst did not assign him to patch the hole in the gutter. If plaintiff intended to patch the hole in the absence of an assignment to do so from his employer and in the absence of any request for this work from EST, the property owner, then his activity would not fall under the protection of Labor Law § 240 (1). Labor Law § 240 (1) applies to owners who "contract for" specific types of work (referring to the activities enumerated in the statute). Benjamin N. Obletz, the owner of EST, stated in his affidavit sworn to March 26, 2019 that "EST never hired, retained, or contracted with plaintiff or with First Amherst to repair the gutter where the bird's nest was located" (R. 355, paragraph 7).

A property owner does not incur the drastic remedy of strict liability under Labor Law § 240 (1) for work performed gratuitously as a volunteer (*Whelen v Warwick Valley Civic & Soc. Club*, 47 NY2d 970, 971 [1979] "[t]o come within the special class for whose benefit absolute liability is imposed . . . under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent;" *Pelonero v Sturm Roofing, LLC*, 175 AD3d

1062, 1063 [4th Dept 2019]). The uncontroverted evidence is that EST did not contract for plaintiff to patch the hole in the gutter. Whether plaintiff intended to patch the hole on his own in the absence of an assignment to do so is irrelevant. EST has no Labor Law § 240 (1) liability for work for which it did not contract. The ruling of the lower court is that EST is absolutely liable as a matter of law as a result of work that EST never requested or contracted for. EST's motion to dismiss the Labor Law § 240 (1) cause of action should have been granted. Plaintiff's motion for judgment in his favor should have been denied for this reason.

Point III

PLAINTIFF'S FALL WAS NOT CAUSED BY A FORESEEABLE RISK OF INJURY FROM AN ELEVATION-RELATED HAZARD

Plaintiff fell because he was startled by a bird, lost his balance, and fell off a ladder. The sudden appearance of the bird is not an elevation-related hazard requiring a safety device. Liability under Labor Law § 240 (1) requires a foreseeable risk of injury from an elevation-related hazard (*Shipkoski v Watch Case Factory Assocs.*, 292 AD2d 587, 588 [2002]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

The risk of being startled by a bird is not a risk intended to be addressed by an enumerated safety device. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in

the first instance, no Labor Law § 240 (1) liability exists (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]).

In *Cohen v Mem'l Sloan-Kettering Cancer Ctr.*, 11 NY3d 823 (2008) plaintiff was injured when he attempted to climb off a ladder. He could not clear the first step due to protruding pipes from a nearby unfinished wall. The court affirmed dismissal of plaintiff's Labor Law § 240 (1) claim, stating:

> [T]he presence of two unconnected pipes protruding from a wall was not the risk which brought about the need for the ladder in the first instance but was one of the usual and ordinary dangers at a construction site to which the extraordinary protections of Labor Law § 240(1) do not extend, (citations, internal quotation marks and brackets omitted) (*id*.).

In *Melber v 6333 Main St., Inc*., 91 NY2d 759 (1998) plaintiff had to wear 42-inch stilts to perform work on dry wall. Plaintiff tripped on electrical conduit protruding from an unfinished floor and fell to the ground. The Court of Appeals ruled that this injury was not covered by Labor Law § 240 (1), stating:

> The protective equipment envisioned by the statute is simply not designed to avert the hazard plaintiff encountered here. Thus, we agree with the Appellate Division dissent that the proper erection, construction, placement or operation of one or more devices of the sort listed in section 240(1) would not have prevented plaintiff's injuries. (Internal quotation marks omitted) (91 NY2d at 763).

In *Smith v Nestle Purina Petcare Co*., 105 AD3d 1384 (4th Dept 2013) plaintiff was standing on a ladder while vacuuming grain dust off the top of a hose rack. Plaintiff stepped off the ladder and onto accumulated grain dust and a hose

that was hanging off the rack, whereupon he twisted his ankle and fell. This Court reversed the lower court and granted partial summary judgment to defendants, stating:

> We conclude that Supreme Court erred in denying those parts of [defendants' motions] for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action inasmuch as plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance – an unnoticed or concealed object on the floor. (Citations and internal quotation marks omitted) (105 AD3d at 1385).

In *Neuman v IBM*, 22 Misc 3d 1138(A) (Sup. Ct., Dutchess County 2009) defendants were entitled to summary judgment where plaintiff fell from a ladder because his foot became entangled in a coil of conduit sticking through rungs of the ladder. The court stated that "the plaintiff's accident was not related to any of the extraordinary elevation risks encompassed by Labor Law §240(1) but to the usual and ordinary dangers of a construction site" (internal quotations omitted) (*Id*.).

Plaintiff herein chose an appropriate ladder for the job (R. 143). The ladder was not defective and performed as intended (R. 213). The ladder did not collapse. The risk of being startled by a bird was not the risk that made a protective device (the ladder) necessary. The bird was a separate hazard unrelated to the danger that brought about the need for the ladder in the first instance. "[T]he statute is simply not designed to avert the hazard plaintiff encountered here" (*Melber v 6333 Main*

St., Inc., 91 NY2d 759, at 763). The bird is akin to the hazards in the above cases (pipes protruding from a wall in *Cohen v Mem'l Sloan-Kettering Cancer Ctr.*, electrical conduit in the unfinished floor in *Melber v 6333 Main St., Inc.*, the unnoticed or concealed object on the floor in *Smith v Nestle Purina Petcare Co.*, and the coil of conduit sticking through rungs of the ladder in *Neuman v IBM).* The bird caused plaintiff to shift his body which allegedly caused the ladder to "walk" and caused him to fall (R. 148-49). The ladder remained in an upright position (R. 149).

Uncontradicted affirmative evidence establishes that plaintiff's fall was not caused by an absent or defective protective device. It was caused by a hazard unrelated to the need for the ladder. Plaintiff cannot establish liability under Labor Law § 240 (1) as a matter of law. The holding of the lower court suggests that plaintiff fell because of an absent or inadequate safety device. On the contrary, the evidence establishes that plaintiff was provided a proper safety device (ladder) and that plaintiff fell because he was startled by a bird and lost his balance. EST's motion should have been granted and plaintiff's motion denied because plaintiff's fall was not caused by an absent or defective safety device but rather by a risk wholly unrelated to the need for the ladder.

CONCLUSION

Removing a bird's nest from a gutter is not a protected activity, even if plaintiff's work properly included patching a six-inch hole in a functional gutter that developed from normal wear and tear over time. EST did not hire plaintiff to patch the hole. Plaintiff's fall was not caused by a failure to provide a proper safety device. Therefore EST's motion for summary judgment regarding Labor Law § 240 (1) should have been granted and plaintiff's motion regarding Labor Law § 240 (1) should have been denied. Furthermore plaintiff's motion should have been denied because he was the only witness and EST is entitled to challenge his credibility through cross-examination at trial. Furthermore the lower court failed to see that there is a question of fact as to whether or not plaintiff's work included patching the gutter. Accordingly we respectfully request an order reversing the lower court and granting EST's motion and denying plaintiff's motion as stated above and granting such other and further relief as may seem proper.

Dated: Buffalo, New York
January 15, 2020

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