To be Argued by:
JAMES J. NAVAGH
(Time Requested: 30 Minutes)

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Appellate Division–Fourth Department Docket Nos.
CA 19-01402 and CA 19-01403

Court of Appeals

of the

State of New York

JAMES HEALY,

Plaintiff-Respondent,

– against –

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

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This brief is submitted by defendant-appellant EST Downtown, LLC c/o First Amherst Development Group, ("defendant") in reply to the opposing brief of plaintiff-respondent James Healy ("plaintiff").

ARGUMENT

Plaintiff claims that he is entitled to the protections of Labor Law § 240 (1) because he fell from the fifth rung of a ladder while attempting to remove a bird's nest from a rain gutter. Plaintiff's counsel argues in his Respondent brief that the Appellate Division order determining liability as a matter of law is not a final order even though damages have been resolved (Respondent brief pages 12-23). Plaintiff's counsel claims that birds' nests are "extraordinary" and even "unique" (Respondent brief page 33). Plaintiff's counsel argues that a worker removing leaves from a gutter should be treated differently than a worker removing a nest from the same gutter (id.). Plaintiff's counsel argues that five Appellate Division justices incorrectly determined that two of the four Soto factors indicate that Labor Law § 240 (1) should not apply (Respondent brief page 31). Plaintiff's counsel argues that the absence of a defective device is irrelevant to liability under Labor Law § 240 (Respondent brief page 49). These arguments, and the other arguments raised in plaintiff's brief, are not supported by authority or logic.

Point I

THE APPELLATE DIVISION ORDER IS A FINAL ORDER

This Court conducted a jurisdictional inquiry and determined that the order appealed from is a final order. After the trial court ruled on the summary judgment motions, the parties entered into a stipulation regarding damages. The written stipulation provides that the parties agree to a high figure and a low figure and plaintiff will recover the high figure if the appeal of the summary judgment order at issue herein is ultimately resolved in his favor (after review by the Appellate Division and, if appropriate, the Court of Appeals) and he will recover the low figure if the appeal is ultimately resolved in defendant's favor. Because of this stipulation there is no longer a damages issue and there will be no damages trial.

According to the NYSCEF website, the lower court has marked this case as "disposed." Once the present appeal is resolved there will be no additional judicial action required.

This Court has discussed finality as follows:

> The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing (see generally, Cohen and Karger, Powers of the New York Court of Appeals § 9, at 39; Scheinkman, The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality, 54 St. John's L.Rev. 443). Nonetheless, a fair working definition of the concept can be stated as follows: a "final" order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial

matters (see generally, Cohen and Karger, op. cit., §§ 10, 11). (*Burke v Crosson,* 85 NY2d 10, 15, 647 N.E.2d 736, 739 [1995])

The Appellate Division order "disposes of all of the causes of action between the parties" (85 NY2d at 15). The trial order giving rise to the initial appeal dismissed all causes of action except liability based on Labor Law § 240. The Appellate Division order at issue resolves that cause of action in plaintiff's favor. There is no further judicial action remaining (apart from resolution of this appeal). The Appellate Division order "leaves nothing for further judicial action apart from mere ministerial matters." The execution and exchange of closing papers and the tendering of settlement funds are mere ministerial matters.

Plaintiff's counsel argues that the damages stipulation is an improper attempt to force this Court to review an interlocutory order ("parties cannot enlarge the scope of jurisdiction by entering into stipulations regarding jurisdictional predicates" [Respondent brief page 15]). The damages stipulation does not enlarge, or attempt to enlarge, the scope of the Court's jurisdiction. It does not attempt to convert an interlocutory order into a final order. Rather it resolves damages. Because there is no longer a damages issue, the order resolving liability in plaintiff's favor is a final order.

After this Court issues its ruling the plaintiff will provide a general release, as required by the stipulation, and the matter will be terminated. Exchanging closing documents is a ministerial matter (85 NY2d 10, 15) which has no bearing

on the issue of finality. Plaintiff argues that the issue of damages might still have to be decided by a trial if the parties cannot agree on the terms of a general release (Respondent's brief pages 21-22). The parties entered into a damages stipulation enforceable under CPLR Rule 2104 with the specific intention of resolving damages and avoiding a damages trial. Defendant intends to comply with the terms of the stipulation and expects plaintiff to do the same. If plaintiff failed to comply with the stipulation the remedy would be enforcement of the stipulation, not a damages trial.

Point II

UNDER SOTO PLAINTIFF'S ACTIVITY IS NOT CLEANING

The Appellate Division justices unanimously agreed that two of the four Soto factors (*Soto v J. Crew Inc*., 21 NY3d 562, 568–69 [2013]) favor the conclusion that plaintiff was not engaged in a type of cleaning covered by Labor Law § 240. Only three of five justices found that the other two factors favored the opposite conclusion. Plaintiff's counsel argues that all five justices wrongly concluded that (1) removing a bird's nest from a gutter does not require specialized equipment or expertise, or the unusual deployment of labor (the second Soto factor); and that (2) removing a nest from a gutter in response to a tenant complaint is unrelated to any ongoing construction, renovation, painting, alteration or repair project (the fourth Soto factor) (Respondent brief page 31).

Plaintiff's counsel argues that the work required the unusual deployment of labor because plaintiff had never removed a bird's nest from a gutter (id.). Reaching into a rain gutter to remove debris does not involve "the unusual deployment of labor" (21 NY3d 562, 568–69) regardless of the nature or content of the debris.

Plaintiff argues that the removal of the bird's nest was ancillary to the previous work of an outside contractor hired to line the gutter (Respondent brief page 31-32). Plaintiff testified that sometime before the day of the accident "[t]he entire gutter around the entire building circling this entire building was lined with a membrane" (R. 126), and "[t]he membrane lining of the gutter itself that was done by an outside roofing contractor was what would make the gutter itself watertight" (R. 135).

The outside contractor was hired to line the gutter so that it was watertight. The contractor completed that job. There is no evidence indicating that plaintiff was working in conjunction with the contractor. Rather plaintiff's work was triggered by a complaint from a tenant (R. 348). Plaintiff's work was defined by his supervisor in an email that stated "get rid of bird's nest" (R. 269, 352). There was no connection between the work of the contractor and plaintiff's removal of the nest.

A. Routine Maintenance

The first Soto factor is whether the job "is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" (21 NY3d 562, 568–69). Plaintiff's counsel argues that this factor supports his position that section 240 applies because plaintiff was not performing his usual activities, he never removed a bird's nest before, and his supervisor characterized this activity as nonroutine in his deposition testimony (Respondent brief pages 26-27).

Plaintiff worked for a property maintenance company. He was a maintenance worker assigned to a mixed-use commercial property. (R. 94-100). Removing debris from a gutter is a regularly recurring task for owners of commercial and residential properties. These facts are not in dispute. Plaintiff's argument is that, while removing leaves from a gutter is not protected cleaning, removing a nest is protected. He argues that

> Mr. Healy's task involved the removal of extraneous materials that had formed in the gutter not due to its normal operation (unlike water leaves and dirt). The fact that the materials were extraneous and created independent of the normal function of the gutter further emphasizes the nonroutine nature of the work. (Respondent brief page 27).

I question this logic. What definition of "extraneous," when applied to a gutter, includes dirt and leaves but excludes a bird's nest? A person removing any

of these materials from a gutter should receive the same treatment under Labor Law § 240 regardless of whether he or she is removing dirt, leaves, or a bird's nest. Rather than parsing the definition of "extraneous," plaintiff's counsel could try to show why section 240 should apply one way to a worker removing a bird's nest and another way to a worker removing leaves. Plaintiff's counsel makes no attempt to justify this distinction. There is no logical or legal basis to make such a distinction. It would make as much sense to argue that removing maple leaves from a gutter is protected by 240, but removing elm leaves is not because elm trees are less common than maple trees in New York, and a person removing elm leaves from a gutter has probably never removed elm leaves before.

The Soto decision does not refer to a particular job performed on a relatively frequent basis. Rather it refers to "*the type of job* that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" (21 NY3d 562, 568–69, emphasis added).

Whether plaintiff's work was routine or not as that term is used in court decisions interpreting Labor Law § 240, is a legal question. In this case Appellate Court justices disagreed about the application of that term to the facts of this case. Therefore the fact that plaintiff's supervisor characterized plaintiff's work as non-routine is not determinative. I question that his opinion on this issue is even relevant to this Court's decision.

B. Elevation

Plaintiff's counsel argues that "[t]he Appellate Division dissenters' interpretation and analysis of this factor [referring to elevation] is much too narrow as it would result in this factor being decided in favor of the defendant in every cleaning case involving an A-frame step ladder" (Respondent brief page 29). There is nothing in the two-justice dissent that supports this conclusion. Rather the dissenters referred to the height of the plaintiff (five feet off the ground) rather than the type of ladder (191 AD3d 1274, 141). The dissenters pointed out that the height of plaintiff in this case was similar to the height of the plaintiff in Soto. They stated:

> In the case before us, plaintiff's task of standing on a stepladder approximately five feet above the ground in order to remove extraneous material from a gutter located slightly below a hard canopy over the entrance to a retail storefront presents a scenario analogous to the bookstore and light fixture examples cited in Dahar, and is akin to the injured janitorial worker's task in Soto of standing on a four-foot-tall ladder in order to dust a six-foot-high display shelf. (191 AD3d 1274, 141, quotation marks and brackets omitted)

Plaintiff's counsel argues that his position regarding the elevation factor is supported by *Swiderska v New York Univ*., 10 NY3d 792 (2008) and *Broggy v Rockefeller Grp., Inc*., 8 NY3d 675 (2007) (Respondent brief page 29). However both of those cases were decided before Soto (which was decided in 2013). Therefore the Swiderska and Broggy decisions did not address the application of the Soto factors.

Point III

PLAINTIFF WAS NOT REPAIRING THE GUTTER; IT WAS NOT BROKEN

Plaintiff testified that he intended to patch the hole in the gutter even though the gutter was lined with a membrane and did not leak. He testified at his deposition that he planned to patch the hole because "[t]he work order was to remove the bird's nest and repair the gutter" (R. 106). Plaintiff's testimony about the contents of the work order is the only evidence of record indicating that his work included patching the hole in addition to removing the nest. The work order describes the issue as "pest control" and contains no mention of patching the hole (R. 348). The work order instructs plaintiff to see the tenant (named Sulma) for instruction regarding her complaint (R. 348). As indicated in my appellant brief, plaintiff's supervisor sent texts instructing plaintiff to remove the nest and the property owner stated in an affidavit that he did not request any patching of the gutter (R. 269, 281-82, and 352).

It is undisputed that the gutter did not leak (R. 124). Plaintiff's counsel agrees that "work is a repair within the purview of Labor Law§ 240(1) if it involves fixing something that is malfunctioning, inoperable, or operating improperly" (Respondent brief page 35, quoting *Bissell v Town of Amherst*, 13 Misc 3d 1216A, 2005 WL 4797201 [Sup. Ct. Erie County 2005] affd 32 AD3d 1287 [4th Dept 2006]). Plaintiff's counsel argues that "it cannot be disputed that

the gutter system was 'operating improperly' and/or experiencing a 'malfunction' necessitating a repair" (Respondent brief page 36). The gutter in question was not malfunctioning, inoperable, or operating improperly. The hole did not interfere with the gutter's ability to carry rainwater to a downspout. Even the bird's nest in the hole did not interfere with the gutter's function.

As stated above and in my appellant brief, the documentary evidence and the testimony of plaintiff's supervisor indicate that his assignment was to remove the nest. He was never assigned to patch the hole. The only evidence to the contrary is plaintiff's testimony which mischaracterizes the contents of the work order, as discussed above. Therefore plaintiff's work at the time of his fall, removing the nest, was not a repair.

If there were evidence that his work included patching the hole, such work still would not be a repair because the gutter was not broken. The meaning of the word "repair" cannot be stretched to include putting a patch on a gutter that does not leak. As discussed in detail in my appellant brief, patching a hole in a functional gutter is better characterized as component replacement (*Azad v 270 5th Realty Corp*., 46 AD3d 728 [2d Dept 2007], lv denied 10 NY3d 706 [2008]) which is not covered by section 240. Plaintiff's counsel argues that "covering the hole in the gutter is protected alteration work" (Respondent brief page 38). Patching a six-inch hole in a gutter that does not leak does not qualify as "making a significant

physical change to the configuration or composition of [a] building or structure" (*Joblon v Solow*, 91 NY2d 457, 465[1998]).

Point IV

THE LADDER WAS NOT DEFECTIVE

In his brief plaintiff's counsel argues that "the fact that the stepladder was not defective is irrelevant" (Respondent brief page 50). He argues that section 240 liability is established because plaintiff failed to place the ladder properly. He states that the ladder caused plaintiff to fall because it was not properly placed, and section 240 liability is appropriate based on plaintiff's negligent failure properly to place the ladder ("[h]ere the ladder was not properly placed and operated inasmuch as it moved/walked causing the plaintiff to fall" [Respondent brief page 51]). This argument is a concession that the ladder was not defective. There is no evidence that the placement of the ladder was improper. The evidence indicates that plaintiff fell off the ladder because he was startled by a bird (R. 144-49, 349).

Plaintiff's counsel next argues that the fact of the fall alone is sufficient to establish 240 liability. "It has been consistently held summary judgment in favor of the plaintiff under Labor Law § 240 is warranted where, as here, the provided safety device fails to prevent the plaintiff from falling" (Respondent brief page 51). In support of this position, plaintiff's counsel cites to the following excerpt from *Gordon v E. Ry. Supply, Inc*., 82 NY2d 555, 561 (1993):

> [P]laintiff was working on a ladder and thus was subject to an "elevation-related risk". The ladder did not prevent plaintiff from falling; thus the "core" objective of section 240(1) was not met.

Plaintiff's argument has been continually rejected. Plaintiff's counsel's interpretation of the above decision was addressed in *Blake v Neighborhood Hous. Servs. of New York City, Inc*., 1 NY3d 280, 288–89 (2003) where this Court stated:

> Given the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise. As we stated in Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001], "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)." Also, the Appellate Division had recognized as much in Beesimer v. Albany Ave./Rte. 9 Realty, 216 A.D.2d 853, 854, 629 N.Y.S.2d 816 [3d Dept.1995], stating: "the mere fact that [a plaintiff] fell off the scaffolding surface is insufficient, in and of itself, to establish that the device did not provide proper protection" (see also Alava v. City of New York, 246 A.D.2d 614, 615, 668 N.Y.S.2d 624 [2d Dept.1998] ["a fall from a scaffold does not establish, in and of itself, that proper protection was not provided"]).

See also O'Brien v Port Auth. of New York & New Jersey, 29 NY3d 27, 33 (2017) ("As we have made clear, the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240[1]"); *and Sanatass v Consol. Investing Co*., 10 NY3d 333, 339 (2008).

The ladder was not defective. There is no evidence to support plaintiff's claim that the ladder was improperly placed. Therefore there is no violation of Labor Law § 240.

Point V

PLAINTIFF HAS FAILED TO REFUTE DEFENDANT'S OTHER ARGUMENTS

In my initial appellant brief, I addressed several other arguments supporting the conclusion that Labor Law § 240 does not apply to the facts herein. Plaintiff's counsel has failed to refute those arguments.

In spite of the evidence to the contrary discussed above, plaintiff's counsel argues that plaintiff intended to patch the hole in the gutter. Defendant never hired plaintiff to patch the hole in the gutter. Plaintiff's counsel argues that one of the purposes of Labor Law § 240 is to place "the ultimate responsibility for safety practices at construction sites on the owner instead of on workers who are scarcely in a position to protect themselves" (Respondent brief page 41). Assuming that plaintiff herein was "scarcely in a position to protect" himself in this scenario, the question arises as to how an owner can be expected to protect a worker when the worker is performing work that the owner did not request. In this scenario an owner has no ability to assure the use of proper protective devices. How can liability based on fault be assigned to the owner in this scenario? An owner found to be liable in this scenario is simply an insurer for any damages that occur. Under

the facts herein, there is no meaningful nexus between the owner and plaintiff's alleged intention to patch the hole. The fact that the owner had a contract with plaintiff's employer does not change this conclusion, because plaintiff's employer never assigned him to patch the hole.

Plaintiff fell, not because of an absent or defective safety device, but rather because he was startled by a bird. The risk of being startled by a bird is not a risk intended to be addressed by an enumerated safety device. Plaintiff's counsel argues that because plaintiff was working at an elevation, therefore any gravity related injury is covered by Labor Law § 240. This statement is inaccurate. 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 section 240 liability exists (*Cohen v Mem'l Sloan-Kettering Cancer Ctr*., 11 NY3d 823 [2008]). The purpose of the ladder was not to prevent plaintiff from being startled by a bird and lose his balance. This type of risk is an ordinary risk not covered by section 240. A worker injured as a result of such a risk has recourse through Labor Law §§ 200 and 241 (6) and common law negligence principles.

CONCLUSION

The extraordinary protections of Labor Law § 240 were intended for workers performing construction and related activities which required working at heights. The intention was to make owners responsible for safety regarding elevation risks at

construction sites and areas where similar hazardous work was occurring at the request of the owners. The intention was not to treat owners as insurers and convey liability in the absence of fault, but rather to base liability on a statutory violation for which owners could reasonably be considered responsible.

Plaintiff, a property maintenance worker, is seeking the protection of Labor Law § 240 for using an appropriate and non-defective step ladder to remove a bird's nest where his fall occurred not because of any problem with the ladder but because he was startled by the bird and lost his balance. Section 240 was never intended to apply in this context, far removed from construction or renovation work. It was never intended to confer liability where a proper device (the ladder) was provided and the worker was injured because of an ordinary risk of his work.

This Court has repeatedly rejected the idea that every fall results in section 240 liability. This court has stated that:

> to impose liability for a ladder injury even though all the proper safety precautions were met would not further the Legislature's purpose. It would, instead, be a sweeping and dramatic turnabout that the statute neither permits nor contemplates. As we recognized in a related context, the language of Labor Law § 240(1) must not be strained to accomplish what the Legislature did not intend. If liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers. (*Blake v Neighborhood Hous. Servs. of New York City, Inc*., 1 NY3d 280, 292 [2003] citations and quotation marks omitted).

Those principles applied to the facts of this case require a ruling that section 240 does not apply, and therefore plaintiff's complaint should be dismissed.

Dated: Buffalo, New York
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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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