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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION–FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Numbers CA 19-01402 and CA 19-01403

JAMES HEALY,

Plaintiff-Respondent,

vs.

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

Defendant-Appellant.

Erie County Index No. 805232/17.

BRIEF FOR PLAINTIFF-RESPONDENT JAMES HEALY

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the plaintiff-respondent, James Healy, from an appeal taken from an Order of the State of New York Supreme Court, Erie County (Hon. Frank A. Sedita, III, Justice of the Supreme Court) granted on July 2, 2019 and entered with the Erie County Clerk on the same date. That Order granted the plaintiff's motion for summary judgment, which sought a finding of liability under Labor Law § 240(1) and further sought to strike the affirmative defense that the action is barred by Section 11 of the Workers' Compensation Law. [R.4-32]. That Order further denied the defendant's motion to the extent that it sought a dismissal of the Labor Law § 240(1) cause of action and granted the defendant's motion to the extent that it sought to dismiss the Labor Law §§ 241(6), 200 and common law negligence causes of action. [R. 4-32].

This action arises out of an incident that occurred on May 16, 2014, wherein the plaintiff was injured as the result of falling approximately five feet from a ladder that "walked" or moved underneath him as he was performing cleaning and repair work. More specifically, the plaintiff was employed as a repair and maintenance worker for First Amherst Development Group and was injured at a building owned by the defendant. The defendant retained the plaintiff's employer to act as the property manager for the subject property. At the time of his incident, the plaintiff

was tasked with removing a bird's nest from a gutter and repairing a hole that was left in the gutter after a separate contractor had installed a new roofing membrane system in the gutter system to address on-going leaks. The plaintiff fell from the ladder as he was performing that work.

The defendant's appeal is limited to the lower court's determinations on the Labor Law § 240(1) cause of action. Specifically, the defendant argues that the statute does not apply because plaintiff was not engaged in "covered work" or "protected activity"; that the defendant did not have the authority over the plaintiff's work and/or that the plaintiff was a "volunteer" and thus that the statute did not apply; and that the plaintiff's incident was not caused by a reasonably foreseeable elevation-related hazard. As such, the defendant argues that the plaintiff's summary judgment motion should have been denied and that its motion should have been granted at to that cause of action.

The plaintiff respectfully submits that the lower court properly rejected those defense arguments below and properly held that the plaintiff was entitled to a finding of liability under Labor Law § 240(1). As such, the plaintiff respectfully submits that this Court should affirm the lower court's Decision and Order in its entirety.

QUESTIONS PRESENTED

1. Labor Law § 240(1) provides protections to workers that are engaged in the repair, alternation or cleaning of a structure, as well as any task ancillary to those types of work. Did the lower court properly determine that the plaintiff was engaged in covered work under the statute where he was engaged in the work of repairing and cleaning a gutter, as ancillary to a previous incomplete gutter repair and alteration?

Answer: Yes.

2. Labor Law § 240(1) imposes liability on property owners for injuries on their property so long as there is some nexus between the property owner and the work, and so long as the plaintiff is not trespassing or volunteering when undertaking the work. Did the lower court properly determine that the defendant was liable to the plaintiff where the defendant hired and gave the plaintiff's employer full authority to manage and repair the property, and where the plaintiff was in the course of his employment?

Answer: Yes.

3. Labor Law § 240(1) requires that owners construct, place and operate safety devices to protect against elevation-related hazards. Did the lower court properly determine that the plaintiff's injury resulted from the defendant's failure to properly place and operate a ladder, where he fell five feet from that ladder after it "walked" beneath him as he was using it?

Answer: Yes.

STATEMENT OF FACTS

The defendant and its relationship to the plaintiff employer

Defendant EST Downtown, LLC (hereinafter "defendant") is the title owner of the Lofts at Elk Terminal, located at 250 Perry Street, Buffalo, New York, the location where the plaintiff's incident occurred. [R. 322]. The Lofts at Elk Terminal is a commercial property with commercial and residential space, with commercial and residential tenants. [R. 104, 257-258, 286-287].

The plaintiff's employer First Amherst Development Group (herein after "First Amherst") is a property management and maintenance company [R. 316-317]. The Lofts at Elk Terminal is one of a number of properties for which First Amherst Development Group provided property management services in 2014. [R. 99-104]. There is a Property Management agreement between the defendant and First Amherst that gave First Amherst Development "full authority and complete responsibility for managing, maintaining and administering the premises." [R. 402-403]. The Property Management agreement further provides that First Amherst "shall have all right, power, and authority both express and implied, to act on behalf of or as agent for Owner pursuant to this agreement." [R. 402-403].

The plaintiff was employed by First Amherst as a maintenance and repair technician on the day of the incident. [R. 94, 99]. That job included performing daily

maintenance around various properties. [R. 99-100]. The job also included reviewing work orders and performing repair work delineated in those work orders. [R. 99]. Those work orders would come from tenants calling in to First Amherst, or logging in to an online system, and notifying of non-routine work needed in their leased space. [R. 260-262]. In the time period surrounding his incident, the plaintiff received his repair work assignments through work orders that he received on a company phone. [R. 103-104].

There were no written policies or procedures at First Amherst that required the workers, such as the plaintiff, to seek permission to perform repair tasks not specifically spelled out in work orders if such task were necessary to properly address the problems identified in the work order, although the plaintiff's supervisor testified he asked his workers to "see" him before completing any work in furtherance of work orders. [R. 271-272].

The gutter system and plaintiff's assignment on May 16, 2014

The photographs in the Record at pages 418-421 depict the area where the plaintiff's incident occurred, but were taken subsequent the work at issue [R. 108-113]. The plaintiff described, as the photographs depict, that the subject gutter was part of a reverse canopy system, or a canopy that pitched back toward the building structure, as opposed to away from the building. [R. 117-118]. As such, rain water

would run towards the building, and catch in the gutter that ran along the edge of the building at the back of the canopy. [R. 115-120]. The gutter is approximately 12 inches wide and runs water run-off into the down spouts depicted in the photographs. [R. 122-123].

The plaintiff described that, prior to the day of the incident, a hole had rotted in the old steel gutter system that was in place. [R. 124]. Prior to the plaintiff performing his work, a roofing company had come in and lined the old gutter with a roofing membrane, anchored the membrane to the brick wall and tucked it under the canopy for the purpose of making the gutter watertight again. [R. 124]. The plaintiff explained, however, that the rotted hole itself was not actually repaired by that roofing company, and thus left an opening in the gutter system. [R. 124-17]. As such, a bird made a nest in the hole between the metal and the membrane that had been placed by the roofing company.[R. 125].

In the days leading up to his incident, the plaintiff received a work order from a commercial tenant, Progressive Art Studio. [R. 105-106, 132, 348, 352, 416]. The following description was provided concerning the issue that needed to be addressed: "Birds keep pooping by her door and has become a constant issue. Please see Suima [tenant] as to what we can do to keep the birds from pooping." [R. 348]. The subject work order documenting the request for work does not expressly spell out the scope

of the work necessary to address the issue described in the document. [R 348]. An email separately sent by the plaintiff's supervisor, Bruce Marchese, sets forth that one of the plaintiff's tasks for the week was to "get rid of bird nest." [R. 352].

The plaintiff described that there was there was a six inch hole in the gutter which permitted a bird to build a nest in the gutter. [R. 105-106, 115, 124]. Thus the gutter need to be cleaned and repaired. [R. 105-106, 115, 124]. As such, the plaintiff's understanding of his assignment was to remove the bird's nest and repair the hole in the gutter that permitted the nest to exist in the first instance. [R. 105-106, 115, 124, 127-128, 133, 278]. He could not perform the repair before removing the bird's nest, or in other works, removing the nest was an essential part of the repair task. [R. 222-223]. He also would have had to clean the metal in the area around the repair. [R. 220-221].

The plaintiff's supervisor, Mr. Marchese, testified that the removal of the bird's nest from the gutter system was considered non-routine cleaning work for the plaintiff as a First Amherst employee. [R. 282-284]. The plaintiff's supervisor further testified that the task of removing a bird's nest was not analogous to the task of cleaning leaves out of a gutter. [R. 283]. The plaintiff similarly testified that he had never removed a bird's nest from the gutter in the course of his employment before the incident. [R. 222]. He further testified that he had previously never performed a

gutter repair. [R. 222].

The tools needed for the work included snips, a tape measurer, silicone adhesive, a caulk gun, a wire brush, sheet metal, and an eight foot step ladder. [R. 133-134, 221]. The sheet metal, the material that would cover the hole, is not something that First Amherst typically stocked for its maintenance workers. [R. 282].

The plaintiff's incident

Just prior to his incident, the plaintiff set up an eight-foot A frame step ladder on the concrete walkway underneath the gutter and locked the spreader bars. [R.139-141, 218]. The plaintiff explained that the eight-foot step ladder was the appropriate height to permit him to access the work area. [R. 141-143]. He explained that a shorter ladder would have been too short. [R. 142]. He further explained that a straight ladder leaned against the wall would not have been appropriate because he would have been facing in the wrong direction and likely would not have fit in the area. [R. 141-142].

The plaintiff testified that he climbed up the ladder such that his feet where on the fifth or sixth rung, approximately five feet above the ground, and such that his head was eye level with the gutter and the bird's nest that he needed to removed. [R. 143]. The plaintiff testified that he maintained three points of contact, with both feet on the same rung and one hand holding the rail of the ladder. [R. 144-145]. He was

wearing work boots at the time. [R. 145].

The plaintiff testified that as he stood on the fifth rung, he pounded on the gutter twice to ascertain whether there was still a bird inside and no bird flew out. [R. 147-148]. He then put his hand inside the gutter to reach the nest and a bird flew out and startled him, causing his body to shift on the ladder. [R. 148]. The ladder then walked, or moved, underneath him, causing him to fall backwards. [R. 148-149, 219]. The ladder moved a couple of feet from its initial position but did not fall with the plaintiff. [R. 149].

The plaintiff completed an incident report shortly following the incident documenting the same details to which he testified. [R. 349-351]. Specifically, the incident report references the bird flying out and startling him, the fact that he lost his balance, the fact that the ladder walked, and that fact that he fell from the ladder as a result. [R. 349-351].

The plaintiff fell on his right hip, right elbow and back. [R. 150-151]. He felt immediate pain and laid on the ground for a few seconds. [R. 151]. When he attempted to get up, he could not put weight on his right leg and felt extreme radiating pain in his mid-section, hip and pelvis.[R. 151-152]. He was ultimately able to walk himself into the warehouse on the property and sat down. [R. 152]. He told his co-worker what had happened and then drove himself to the hospital. [R. 152-153].

ARGUMENT

THE LOWER COURT PROPERLY GRANTED THE PLAINTIFF'S MOTION FOR A FINDING OF LIABILITY UNDER LABOR LAW § 240(1)

Section 240(1) of the New York Labor Law provides:

> 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.

N.Y. Labor Law § 240(1)(McKinney's 2014)

Labor Law § 240(1) is to be construed as liberally as possible to effectuate its purpose of providing for the health and safety of employees. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513 (1991). The statute requires that owners, contractors, and their agents sufficiently and properly protect workers on a construction sites from elevation-related hazards. Ross v. Curtis-Palmer Hyrdo-Electric Co, 81 N.Y.2d 494, 500 (1993).

To establish absolute liability under Labor Law § 240(1), an injured worker need only show that:

1) the defendant is a statutory owner, contractor, or agent as defined by labor

law § 240(1);

2) the plaintiff was engaged in "covered work," or activity protected by the statute;

3) the defendants failed to provide adequate protection from an elevation-related hazard, and

4) the statutory violation was a contributing cause of the worker's accident and some injury. Smith v. Hooker Chemicals & Plastics Corp., 89 A.D.2d 361, 363 (4th Dept 1982).

Comparative fault by the injured worker is not a defense and is irrelevant to the analysis. Zimmer v. Chemung County of Performing Arts, Inc., 65 N.Y.2d 513, 521 (1985).

a. The lower court properly determined that the plaintiff was engaged in covered work

Labor Law § 240(1) expressly applies to the "erection, demolition, ***repairing***, ***altering***, painting, ***cleaning*** or pointing of a building or structure." Labor Law 240(1)(McKinney's 2014). It is well-settled that not only does the statute protect workers actively engaged in those types of work, but also protects workers engaged in tasks that are ancillary to the completion of those types of work. See Lombardi v. Stout, 80 N.Y.2d 290, 296 (1992); Palmer v. Butts, 256 A.D.2d 1178 (4th Dept

1998); D'Alto v 22-24 129th St., LLC, 76 A.D.3d 503 (2d Dept 2010); Smith v. Innovative Dynamics, Inc, 24 A.D.3d 1000, 1001 (3d Dept 2005). As such, in making a determination whether the work is covered, one must look to the general context of all the work. Prats v. Port Auth., 100 N.Y.2d 878, 882 (2003); Smith, 24 A.D.2d at 1001; D'Alto, 76 A.D.3d at 506. "It is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work" and, as such the task being performed by the plaintiff at the moment of injury cannot be viewed in isolation. Prats, 100 N.Y.2d at 882; see also Smith, 24 A.D.2d at 1001.

i. The plaintiff's was engaged in work that was ancillary to a larger repair/ alteration project

The activity of "repair" is expressly afforded protection under Labor Law §240(1). "Generally, work is a repair within the purview of Labor Law §240(1) if it involves fixing something that is malfunctioning, inoperable, or operating improperly." Bissell v. Town of Amherst, 13 Misc.3d 1216A (Sup. Ct. Erie County 2005), aff'd Bissell v. Town of Amherst, 32 A.D.3d 1287(4th Dept. 2006)(citations omitted). The Courts have held that the plaintiff was engaged in protected "repair" work as contemplated by the statute in the following cases: Bissell v. Town of Amherst, 13 Misc.3d 1216A (holding that the task of inspecting a roof in

contemplation of repairing a leaking roof was covered "repair work"); Crossett v. Shofell, 256 A.D.2d 881 (3d Dept 1998)(holding that plaintiff engaged in covered repair work when fixing a silo fill pipe that became plugged); Ozimek v. Holiday Valley, Inc., 83 A.D.3d 1414 (4th Dept 2011)(holding that troubleshooting an uncommon freezer malfunction was covered activity); Pieri v. B&B Welch Associates, 74 A.D.3d 1727 (4th Dept 2010) (holding that plaintiff engaged in covered repair work when troubleshooting an uncommon lift station malfunction); Bruce v. Fashion Square Assoc., 8 AD3d 1053 (4th Dept 2004)(holding that the repair of a malfunctioning HVAC unit was covered work within the meaning of the statute).

Similarly, the activity of "alteration" is also expressly afforded protection under Labor Law §240(1). The work of "altering" within the meaning of the statute is defined as "making a significant physical change to the configuration or composition of the building." See Joblon v. Solow, 91 N.Y.2d 457, 465 (1998). Accordingly, the Courts have held that the plaintiff was engaged in "alteration" work covered by the statute in the following cases: Joblon, 91 N.Y.2d at 465 (holding that the task of drilling a hole in a concrete wall for the purpose of running an electrical wire is covered "alteration" work); Di Giulio v. Migliore, 258 A.D,2d 903 (4th Dept 1999)(holding that the task of turning a satellite dish assembly is covered alteration

work); Santiago v. Rusciano & Son, Inc, 92 A.D.3d 585, 586 (1st Dept 2012)(holding that the task of board up windows is covered alteration work).

In light of the body of case authority, it is clear that the plaintiff in the instant case was engaged in activity ancillary to, or necessitated by, covered "repair" and/or "alteration" work at the time of his incident. Indeed, the work that the plaintiff was performing at the time of his incident was necessitated after a separate contractor repaired and altered the existing gutter system on the building structure. The pre-existing gutter system was not operating properly inasmuch as it was leaking. The outside contractor installed roofing membrane in the gutter system, anchored that membrane to the building and installed it around the existing metal gutter structure. That contractor failed to complete the repair inasmuch as they failed to close and cover a six inch hole in the structure of the existing metal gutter.

At the time of his incident, the plaintiff was removing a bird's nest that had formed in the hole that was left unfixed and intended to complete the larger repair/ alteration work on the gutter system by ultimately installing sheet metal over the hole. As such, there can be no doubt that the tasks that the plaintiff was carrying out on the day of the incident were ancillary to, or necessitated by, the larger gutter repair and alternation project.

The defendant does not seem to dispute that the larger gutter alteration project

constitutes covered repair work under the statute, as it does not address the same in its Brief. It would be difficult for the defendant's to do so in light of the body of case law set forth above. Rather, the defendant focuses singularly on the act of fixing the hole in the gutter structure and argues that such work cannot constitute a repair for the purposes of the statute. See Appellant's Brief at 7-11.

Although the lower court did not specifically cite the larger repair and alternation as a ground for finding that the plaintiff was engaged in covered work, the plaintiff's respectfully submits that the lower court's holding should not be disturbed for this reason alone.

ii. The task of fixing the hole in the gutter was itself covered repair and/or alteration work

Assuming, arguendo, that it is appropriate to review the task of repairing the hole in the gutter in isolation under the facts at issue in this case, those facts still support a finding that the plaintiff was engaged in covered repair work. The plaintiff's task to repair the hole in the metal gutter was prompted by a complaint from one of the building's tenants concerning persistent bird dropping in front of its leased space. More specifically, the tenant complained that the "Birds keep pooping by her door and has become a constant issue." As such, the plaintiff was tasked to address the issue, or as per the language of the work order, to see "what we can do to

keep the birds from pooping."

The plaintiff ultimately concluded that he would need to repair and/or alter the gutter by installing sheet metal over the hole after cleaning the bird's nest from the gutter. The plaintiff needed an eight-foot A frame ladder to complete the cleaning and repair work, among other tools and materials, including snips, a tape measurer, silicone adhesive, a caulk gun, a wire brush, and sheet metal. The plaintiff testified that he had never repaired a gutter in the course of his employment for First Amherst prior to the subject incident. The plaintiff's supervisor relatedly testified that the associated task of removing the bird's nest from the gutter was considered "non-routine" in nature.

This evidence is sufficient to establish that the plaintiff was altering, or making a significant physical change to the configuration of the gutter. Further, the evidence is sufficient to establish that the plaintiff was engaged in a repair of the gutter, as opposed to "routine maintenance." As set forth above, work will constitute covered repair work where it involves fixing something that is malfunctioning, inoperable, or operating improperly." Bissell v. Town of Amherst, 13 Misc.3d 1216A (Sup. Ct. Erie County 2005), aff'd Bissell v. Town of Amherst, 32 A.D.3d 1287(4th Dept. 2006)(citations omitted).

In light of the the complaints that prompted the need for the repair, it would

be difficult to dispute that the gutter system was "improperly operating" or was experiencing an "uncommon malfunction." Thus the condition of the gutter falls under at least one or two of the three categories of operability on which a finding of covered repair work can be predicated based on the controlling case law. Indeed, it is clear that the gutter was not operating in the manner for which it was intended, creating unintended consequences and impairing the tenant's use of the subject property. Moreover, both the plaintiff and his supervisor expressly testified that the work that the plaintiff was performing on the day of the incident was not routine in nature.

The defendant relies primarily on the case Azad v. 270 5th Realty Corp, 46 A.D.3d 728 (2d Dept 2007) to advance its argument that fixing a hole in a gutter cannot be considered covered repair work, but rather that such as task must always be considered "routine maintenance." See Appellant's Brief at 7-12. In Azad, the plaintiff was injured as the result of falling from a ladder while attempting to patch holes in a gutter on an apartment building that an animal had used to burrow itself in to the building structure. The Second Department held that the work was not considered "repair work" under the statute but rather was more akin to "routine maintenance," noting that the proof established that the hole was caused by wear and tear and that the hole did not make the gutter "inoperable." Azad. 46 A.D.3d at 730.

The plaintiff respectfully submits that the Second Department's does not accurately state the Court of Appeals and Fourth Department holdings with respect to what work constitutes a "repair," as those Courts have expressly held that repair work includes all work that involves "involves fixing something that is malfunctioning, inoperable, or operating improperly." Bissell v. Town of Amherst, 13 Misc.3d 1216A (Sup. Ct. Erie County 2005), aff'd Bissell v. Town of Amherst, 32 A.D.3d 1287(4th Dept. 2006)(citations omitted) see also Izrailev v. Ficarra Furniture of Long Island, Inc, 70 N.Y.2d 813, 815 (1987) Beehner v. Eckerd Corp, 307 A.D.2d 699, 699 (4th Dept 2003). In other words, a determination of whether a task is "repair" work extends beyond the narrow circumstances in which the structure at issue is entirely "inoperable," as the Second Department's Azad decision seems to suggest. This distinction is significant given the proof of "improper operation" and/or uncommon malfunction in the instant case.

Moreover, there is no evidence in the Azad case that both the plaintiff and his employer expressly testified as to the non-routine nature of his tasks on the date of the incident. Given those admissions in this case, a finding that the plaintiff was engaged in "routine maintenance" at the time of the subject incident factually cannot stand.

In finding that the plaintiff was engaged in covered repair work, the lower court

held that the task of removing the bird nest from the gutter was akin to "troubleshooting an uncommon malfunction" of the gutter. [R. 17-18]. The plaintiff submits that the lower court properly determined that the gutter was experiencing an "uncommon malfunction," which necessitated the repair of the gutter that the plaintiff was planning to undertake. As such the plaintiff submits that the lower court properly determined that the plaintiff's task of fixing the hole in the gutter constituted covered repair work under the statute. The plaintiff respectfully submits that the Court's finding in that regard should not be disturbed.

iii. The plaintiff's work also constituted non-routine cleaning.

Another category of work expressly afforded protection under the statute is "cleaning." In Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 680 (2007), the Court of Appeals held that "cleaning is expressly afforded protection under section 240(1) whether or not incidental to any other enumerated activity."

Appellate Courts have referenced the standard dictionary definition to define "cleaning" in the context of Labor Law §240(1). The standard dictionary definition indicates that "cleaning" constitutes "the rid[ding] of dirt, impurities, or extraneous material." Wicks v. Trigen-Syracuse Energy Corp., 64 A.D.3d 75, 79 (4th Dept 2009) quoting Vernum v. Zilka, 241 AD2d 885, 885-886 (3d Dept 1997), in turn quoting Webster's Ninth New Collegiate Dictionary, 247 (1988).

The Court of Appeals has recently clarified that routine cleaning, or the type that would be ordinary in the care of residential or commercial property, is not afforded the statute's protections. See Soto v. J. Crew, 21 N.Y.3d 562, 566-568 (2013). The Soto Court set forth a number of factors to consider in determining whether a particular type of cleaning should be excluded from the purview of the statute, which includes whether the task::

> (1) 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; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project.

Soto., 21 N.Y. at 568.

"Whether the activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other." Id.

In that framework, consider the case of Fox v. Brozman-Archer Realty Services, Inc, 266 A.D.2d 97 (1st Dept 1999), which is similar to the case at bar. There, the plaintiff was employed as a maintenance worker for a company that

provided property management service and was assigned to power-washing the plexiglass canopy of the defendant's condominium. As he was performing that task, the ladder from which he was performing the work slipped and caused him to fall. Fox, 226 A.D.2d at 98. The Court held that the plaintiff was involved in the cleaning of a structure as contemplated by the statute, and thus held that the plaintiff was entitled to a finding of liability under Labor Law § 240(1). Id. The Court further noted that the cleaning in which the plaintiff was involved was not "truly domestic household cleaning" that may be excluded from the statute's purview. Id.

At the moment of his incident, the plaintiff in this case was in the process of removing a bird's nest from the gutter system on the subject property, prior to repairing the gutter. It cannot be disputed that the task at-hand was not routine in nature. Indeed, the task was done pursuant to a work order placed by a commercial tenant of the subject property, made because the birds that were living in the nest in the gutter were leaving dropping outside of their store. The plaintiff testified that he had never performed the work of cleaning a bird's net out of a gutter before the subject occasion and plaintiff's supervisor admitted that the cleaning of the bird's net from the gutter was non-routine in nature. Thus, there is no legitimate dispute that the subject task was "non-routine" in nature.

Similarly, the facts support a finding that cleaning and ridding the gutter of the

bird's nest required the unusual deployment of labor given the fact that it was a task was one that the plaintiff was not previously asked to engage in and given the fact that he needed a ladder to preform that cleaning work.

Relatedly, the task involved a significant elevation risk as compared to that involved in domestic cleaning, in that the portion of the gutter that needed to be cleaned was located within a canopy above and overhanging the door of the commercial property. Indeed, the plaintiff's feet where positioned on a rung of the ladder approximately five feet above the ground at the time that he fell.

Finally, it is clear that the subject task was related to other repair/ alteration work covered by the statute, as fully set forth above.

In arguing that the plaintiff was not engaged in a type of covered cleaning work, the defendant appears to be arguing that there is a blanket rule holding that the removal of objects from gutters can never be considered the type of covered "cleaning" work contemplated by the statute. See Appellant's Brief at 5-6. The plaintiff submits that a review of the defendant's case law makes clear that there is no such bright-line rule. Rather, the test set forth in Soto must be applied to each unique set of facts.

In support of its argument, the defendant first cites to the case of Hull v. Fieldpoint Community Assn, Inc, 110 A.D.3d 961 (2d Dept 2013), where the plaintiff

was injured while engaged in the task of cleaning leaves from the roof gutters of a residential structure. The evidence established the defendant had retained the plaintiff's employer to "clean gutters and leaders, inspect, and caulk openings three times per year." Id. At 962. Under those facts, the Court held that the plaintiff was not engaged in covered cleaning work, noting that the statute does not apply to "work that is incidental to regular maintenance such as cleaning gutters of debris." Hull, 100 A.D.3d 962.

Hull is inapposite from the instant case inasmuch as the cleaning task at hand in the instant case was not maintenance work scheduled to take place at regular intervals. Rather, the work at hand was performed in response to a specific complaint lodged by a commercial tenant whose use of the rental property was being impaired by bird droppings coming from the subject bird's nest, thus rending the work unexpected and non-routine in nature. The condition that resulted in the tenant's complaint was a hole in the gutter that had been left unaddressed by a contractor previously hired to perform repair work, not the routine accumulation of debris in the gutter that necessitated the regularly scheduled maintenance work in the Hull case. Indeed, subject cleaning work was incidental to a repair of the gutter necessary to prevent the issue, and thus the cleaning, from recurring.

The defendant further cites to the trial court case of Catania v. St. Rose of Lima

Sch, 40 Misc.3d 1209(A)(Kings Co Sup Ct 2013), where the plaintiff was employed as a pest control worker in the defendant's school building. The plaintiff's job included visiting the school property on a monthly basis to address pest control issues that arose at the school and he was injured when he fell off a ladder while attempting to scare a squirrel out of a ventilation duct. The court held that such work of "cleaning squirrels from the air vents" constituted routine maintenance, as oppose to cleaning. The facts of Cantania are again distinguishable from the instant case, inasmuch as the plaintiff's task in Catania was a regular part of the plaintiff's job, was not caused by an underlying issue with the structure of the vent, and was thus unrelated to a repair to the vent necessary to prevent the issue from recurring.

Finally, the defendant cites to the case of Berardi v. Coney Is. Ave Realty, LLC, 31 A.D.3d 590 (2d Dept 2006), where the plaintiff was cleaning leaves from gutter. Unlike the task of removing a bird's nest, the task of cleaning leaves from a gutter being performed by the Berardi plaintiff is necessarily a task that would have to be performed with routine regularity during the appropriate seasons. Moreover, there are no facts in the Berardi decision concerning what company the plaintiff was working for, the plaintiff's normal work tasks, or the entire scope of the plaintiff's work on the day of his incident. Rather, the decision simply states the Court's holding that the plaintiff was engaged in "routine cleaning in a nonconstruction,

nonrenovation context." Thus, that case is of no assistance to the defendant here.

In sum, since it is clear that the task of removing the bird's nest was non-routine in nature, involved the unusual deployment of labor, involved a significant elevation differential compared to normal house hold cleaning and was associated with a structural issue with the gutter that necessitated a repair to address the root issue, that task falls squarely within the protection of the statute as "cleaning" work.

For all of the reasons set forth above, this Court should affirm the lower court's finding that the plaintiff was engaged in "covered work," or activity to which the protections of the statute extend.

b. The lower court properly determined that the defendant was a proper Labor Law defendant and that the plaintiff was not a volunteer

The defendant next appears to be arguing that the plaintiff was not engaged in "covered work" because, to the extent that the plaintiff was performing a repair, the "plaintiff's employer First Amherst did not assign him to patch the hole in the gutter." See Appellant's Brief at 16. The defendant more specifically argues that "[i]f the 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 protections of Labor Law § 240(1)."

While framed by the defendant as a "covered work" issue, the argument is in reality that the defendant is not a proper defendant under the statute. Indeed, implicit in the defendant's argument is that, because the plaintiff was not expressly directed to perform one of the tasks at issue, the defendant must have lacked the authority to control that task. Defendant entirely misconstrues the law regarding the liability of property owners under the Labor Law in making this argument.

The legislative history underlying Labor Law § 240(1) makes clear that the "non-delegable duty imposed by the statute to maintain safe working conditions devolves on those who have the power to enforce safety standards and to choose responsible contractors." Bohrer v. Pyramid Companies, 233 A.D.2d 841, 842 (4th Dept 1996), quoting Clute v. Ellis Hospital, 184 A.D.2d 942 (3d Dept. 1992). The Courts have consistently observed that the purpose of the Labor Law is to protect workers by placing the ultimate responsibility for safety practices on owners and contractors instead of on workers themselves. Abbatiello v. Lancaster Studio Assocs., 3 N.Y. 3d 46 (2004), citing, Panek v. County of Albany, 99 N.Y.2d 452, 457 (2003).

In light of the underlying purpose of the statute, is well-settled law that owners of property will be held liable regardless of whether they contracted for the work at issue or have any involvement in that work, so long as there is some legal nexus between the owner and the work. Morton v State of New York, 15 N.Y.3d 50, 56-58

(2010); Gordon v Eastern Ry. Supply, 82 N.Y.2d 555, 560 (3d Dept 1993); Celestine v City of New York, 86 A.D.2d 592 (2d Dept 1982). A contractual agreement with the entity that undertook the work -- such as a lease agreement, construction contract, or property management agreement – is sufficient to create that legal nexus. See Morton, 15 N.Y.3d at 56-57, see e.g., Fox v. Brozman-Archer Realty Services, Inc, 266 A.D.2d 97 (1st Dept 1999).

A review of the case law makes clear that the circumstances under which property owners can avoid Labor Law § 240(1) liability are narrow, any typically arise only in circumstances where the property owner is legally prohibited from preventing contractors from coming on to their property as a result of public benefit laws, or where the plaintiff is deemed a trespasser. See Morton, 82 N.Y.2d at 56 citing Abbatiello v. Lancaster Studio Assoc, 3 N.Y.3d 46, 51(2004); Scaparo, 13 N.Y.3d 864, 866 (2009). Indeed, in every other circumstance the property owner will have the ultimate authority to control the property, and thus any work being performed thereon.

The statute could also be found inapplicable for a conceptually distinct reason that the defendant is attempting to conflate with the question concerning the limits of the defendant's authority: if the plaintiff's is a volunteer. More specifically, the statute does not apply to plaintiffs that are volunteering when performing work that

would otherwise be considered "covered work" under the statute, since the statute language of the statute limits its application to those "employed." See Labor Law § 240(1); see also Appellant's Brief citing Pelonero v. Strum Roofing, LLC. 175 A.D.3d 1062 (4th Dept 2019); Whelen v. Warwick Valley Civiv & Soc Club, 47 N.Y.2d 970 (1979).

In the instant case, the defendant retained the plaintiff's employer First Amherst to act as Property Manager for the subject property. Pursuant to the Property Management agreement, First Amherst had "full authority and complete responsibility for managing, maintaining and administering the premises." First Amherst expressly had "all right, power, and authority both express and implied, to act on behalf of" the defendant.

In turn, the plaintiff's responsibilities as maintenance and repair technician for First Amherst included addressing the complaints of tenants on the subject property, which were communicated to him through work orders. The work order at issue documents a tenant complaint that "Birds keep pooping by her door and has become a constant issue." The work order further reflects that the plaintiff was to "see what we can do to keep the birds from pooping." On the day of the subject incident, the plaintiff understood that his assignment was to remove a bird's nest from a gutter and to repair a gutter.

The plaintiff's supervisor testified that the plaintiff was not specifically instructed to repair the gutter and further testified that he told his employees to "see" him before carrying out work pursuant to work orders assigned to them. Nevertheless, there is no evidence in the record to demonstrate that the plaintiff was forbade from performing the subject repair work in furtherance of his responsibilities as an employee of First Amherst. There were further no written policies or procedures that precluded the plaintiff undertaking the task he thought necessary to adequately address the issue. Finally, the work was squarely within the scope of the duties and responsibilities for which First Amherst was hired on the subject premises.

In addition, there is no evidence in the record documenting that the plaintiff was not paid for the work that he was performing at the time of his incident. To the contrary, the defendant embraced the fact that the plaintiff was indeed employed at the time of his incident in attempting to advance an "alter ego" defense that it has now abandoned. [R. 52-54].

Indeed, then, there is no evidence on the Record to demonstrate that the defendant lacked a legal nexus to the work, that the plaintiff was trespassing on the property or that the plaintiff was acting as a volunteer at the time of the incident.

The only cases to which the defendant cite in support of this improper defendant/ covered work theory are Pelonero v. Strum Roofing, LLC. 175 A.D.3d

1062 (4th Dept 2019) and Whelen v. Warwick Valley Civiv & Soc Club, 47 N.Y.2d 970 (1979). In the Pelonero case the plaintiff testified that he was "working as an assistant to a roofer employed by the defendant," the general contractor on the construction project." The defendant-general contractor, however, testified that the plaintiff was not working for it "in any capacity" and further denied being the contractor on the project at all. As such, based on the conflicting evidence, this Court held that there were questions of fact as to whether the plaintiff was a "worker" and whether defendant was an "owner or contractor within the meaning of the statute." Pelonero, 175 A.D.3d at 1063-64.

In Whelen, the evidence established that plaintiff was working "voluntarily and without pay" in furtherance of the construction of a storage unit on defendant's property." The Court held that the statute's protection extend only to individuals that are "employed" and not to a "volunteer who offers his services gratuitously." Whelen, 47 N.Y.2d at 970-71. Thus, the statute did not apply to those facts.

In the instant case, the evidence clearly substantiates that the plaintiff was not volunteering but rather was working within the scope of his employment for First Amherst at the time of his incident. The evidence further clearly substantiates that the that the defendant retained the plaintiff's employer to perform the type of work at issue – maintenance and repair of its premises. As such, this case is readily

distinguishable from Pelonero and Whelen.

In light of the foregoing, the plaintiff submits that the lower court properly rejected this defense argument when it determined that the plaintiff was engaged in covered work under the statute and granted liability under Labor Law § 240(1) against the defendant.

c. The lower court properly determined that the defendant's failure to properly construct, place and operate a safety device was a cause of the subject incident.

Labor Law §240(1) provides that safety devices, such as ladders, be constructed, placed, and operated so as to give adequate protection to laborers in the course of covered work. See Labor Law §240(1). The statute "was designed to prevent those types of accidents in which the ladder or other protective device proved inadequate to shield he injured worker from harm directly flowing from the application of the force of gravity to an object or person." Runner v. New York Stock Exchange, Inc 13 N.Y.3d 599 (2009) citing Ross, v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993).

As such, the statute requires that owners and general contractor do more than just make safety devices generally available to worker on a construction site. DePalma v. Metropolitian Tranp. Authority, 304 A.D.2d 461, 462 (1st Dept. 2003). Rather, it imposes the duty to provide the proper safety devices for the type of work

being performed. See Mata v Park Here Garage Corp., 71 A.D.3d 423, 424 (1st Dept 2010); Rudnik v. Broger Realty, 45 A.D.3d 828, 829 (2d Dept 2007). It further imposes the duty to adequately construct, place and operate the proper safety device. See Bland v. Manocherian, 66 N.Y.2d 452, 460 (1985).

The Appellate Courts have consistently held that summary judgment on the issue of liability under Labor Law § 240(1) is warranted in cases where a ladder slips, shifts, or walks as the plaintiff is using it, resulting in injury. See Klein v. City of New York, 89 N.Y.2d 833, (1996); Petit v. Board of Ed., 307 A.D.2d 749 (4th Dept 2003); Burke v. APV Crepaco, Inc, 2 A.D.3d 1297 (4th Dept 2003); Dahl v. Armor Bldg. Supply, 280 A.D.2d 970 (4th Dept 2001); Evans v. Anheuser Busch, Inc, 277 A.D.2d 874 (4th Dept 2000); Adderly v. ADF Const Corp, 273 A.D.2d 795 (4th Dept 2000); McCarthy v. Turner Const., Inc., 52 A.D.3d 333 (1st Dept 2008).

In the instant case, the plaintiff testified that he was standing on the fifth or sixth rung of an A-frame ladder, with his feet approximately five feet above the ground ant the time that his incident occurred. He was properly using the A-frame ladder, with the spreader bars fully open but the ladder was not otherwise secured – either mechanically or by another worker. As the plaintiff stood on the ladder and attempted to remove the bird's nest from the gutter, a bird flew our of the gutter and startled him, causing his body to shift and thereby causing the ladder to walk. The

plaintiff lost his balance as a result of the ladder walking, causing him to fall to the ground below.

Nevertheless, the defendant argues that the plaintiff's incident did not involve and/or was not caused by an elevation-related hazard. See Appellant's Brief at 17-20. More specifically, the defendant argues that the "sudden appearance of the bird is not an elevation-related hazard requiring a safety device" and thus the case does not involve the "foreseable risk of injury from an elevation-related hazard." See Appellant's Brief at 17. The defense argument seems to be that, because the plaintiff testified that being startled by a was bird part of the sequence of events that occurred before he fell off the ladder, the incident did not involve an elevation related risk, nor require an enumerated safety device.

This defense argument asks the Court to deny the reality that the ladder in fact walked and that the plaintiff in fact ultimately fell from the ladder after being after being startled as he worked at an elevation. In light of the un-controverted facts, the defense argument that the plaintiff was not exposed to an elevation related hazard must be reject. Indeed, if the defense argument was accepted, it would preclude liability in almost all cases in which a worker falls from a ladder, as the defense can almost always point to proof that a "non-gravity related" hazard – such as a slipping hazard on the floor, an unlevel floor, or a co-worker bumping the ladder –

precipitated or contributed to ladder movement and the plaintiff's ultimate fall. Any review of the cases cited by the plaintiff herein above and any fair review of Labor Law §240(1) jurisprudence more generally as it pertains to ladders demonstrates that the law does not hold what the defendant purports.

The cases relied on by the defendant are distinguishable. In Cohen v. Mem'l Sloan-Kettering Cancer, Ctr, 11 N.Y.3d 823 (2008) the plaintiff tripped over pipes that were protruding from an adjoining wall when attempting to navigate the two last steps of a ladder. The ladder did not move and the plaintiff did not fall from an elevation as he was working on the ladder. Rather, a trip on the pipes near ground level was the cause of the plaintiff's incident. Similarly, in the case of Smith v. Nestle Purina Petcare Co, 105 A.D.3d 1384 (4th Dept 2013), the plaintiff slipped on grain dust on the floor of a grain siloe while stepping off of a ladder, causing him to twist his ankle and fall to the ground. Finally, in Melber v. 633 Main Street, Inc, 91 N.Y.2d 759 (1998), the plaintiff was caused to trip and fall on electrical conduit as he was walking on stilts and the proof did not reveal that any issue with the stilts was a contributing cause of the incident.

On the fact of all those defense cases those cases the Courts properly held that the incidents did not result from an elevation-related risk. On other words, that the risks that resulted in the injuries were separate from the elevation-related risks for

which the safety devices were needed. Those cases are of no assistance to the defense here.

In light of the foregoing, the plaintiff submits that the lower court properly held that plaintiff's incident was the result of the elevation-related risk to which he was exposed while performing work on a ladder approximately five feet in the air. As such, the plaintiff respectfully submits that this Court should affirm the Decision and Order that granted liability to the plaintiff under Labor Law § 240(1).

d. The fact that the incident was unwitnessed does not preclude summary judgment

The defendant argues for the first time on appeal that the plaintiff's summary judgment motion should have been denied because "he is the only witness with direct knowledge of how the accident happened." See Appellant's Brief at 14-15. In other words, the defendant is arguing that the Court can and should find that there was a question of fact concerning how the incident occurred, and thus whether the statute was violated, on the basis that there were no witnesses to the subject incident. This argument should not be considered because it was not raised below and thus it was not properly preserved for appellate review. See generally, Bundnack v. Crymes, 288 A.D.3d 827 (4 th Dept 2001).

Even if the Court is to consider the merits of the argument, it still must be

rejected pursuant this Court's authority of Kirbis v. LPCiminelli, Inc., 90 A.D.3d 1581, 1583 (4th Dept 2011) and Ewing v. ADF Const. Corp., 16 A.D.3d 1085, 1086 (4th Dept 2005). Specifically, in Kirbis the Fourth Department held that "the fact that the accident was unwitnessed does not provide a basis to defeat plaintiff['s] motion where, as here, 'there are no bona fide issues of fact with respect to how it occurred.'" Kirbis v. LP Ciminelli Inc., 90 A.D.3d at 1583 citing Ewing, 16 A.D.3d 1085. In so holding, this Court refused to take into account mere criticisms of the "plaintiff's account as unwitnessed and unsubstantiated by independent sources." Id.

Since there is no proof in this Record that even remotely supports an inference that the incident happened in a manner other than the manner in which the plaintiff testified, the fact that the incident was unwitnessed cannot be a basis for denying summary judgment.

CONCLUSION

For the reasons set forth herein, the plaintiff respectfully submits that the defendant failed to demonstrate that the lower court erred in granting the plaintiff's summary judgment motion below. As such, the plaintiff respectfully submits that this Court should affirm the lower court's holding that the plaintiff was entitled to finding of liability against the defendant under Labor Law § 240(1).

Respectfully submitted,

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