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September 7, 2021

Court of Appeals
State of New York
20 Eagle Street
Albany, New York 12207-1095
Att.: John P. Asiello, Chief Clerk
& Legal Counsel to the Court

RE: Healv v EST
APL-2021-00052

Dear Mr. Asiello:

I represent defendant-appellant EST Downtown LLC c/o First Amherst Development Group ("defendant") in this matter. This matter pertains to defendant's appeal as of right from the 3-2 Fourth Department Appellate Division order affirming summary judgment in favor of plaintiff-respondent James Healy ("plaintiff") in regard to his Labor Law § 240 cause of action and affirming denial of defendant's summary judgment motion requesting dismissal of the 240 cause of action. This Court conducted a jurisdictional inquiry and determined that the order appealed from is a final order from an Appellate Division decision which had two justices dissenting and therefore this Court has jurisdiction to hear the merits of

this appeal. This Court further indicated that this matter has been chosen for the alternate review procedure pursuant to Court Rule § 500.11. We are submitting the record and briefs from the Appellate Division matter to the Court. This letter is our letter brief addressing the merits of this appeal. The briefs to the Appellate Division generally contain a more detailed explanation and analysis of the arguments made herein.

The activities covered by the extraordinary protections of Labor Law § 240 are "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." "The language of Labor Law § 240 (1) must not be strained to accomplish what the Legislature did not intend" (*Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 292 [2003]; [citations and internal quotation marks omitted]). The question herein is whether the language of section 240 ought to be strained to the extent of affording the extraordinary protections of this statute to a maintenance worker who falls while removing a bird's nest from a gutter in a non-construction, non-renovation context.

Statement of Facts

Plaintiff fell from a ladder while in the course of his employment for a property management company (R. 94-96, and 99). He was attempting to remove a bird's nest from a hole in a gutter (which Special Term found to be a "repair" and the Fourth Department majority found to be a "cleaning" activity) on the outside of

an occupied mixed-use commercial building owned by defendant. (R. 349-50). To accomplish this task, plaintiff used a ladder, rubber gloves, safety glasses and an old shopping bag (to dispose of the nest). (R. 145-46). The ladder was appropriate for this job and functioned properly. (R. 213). Plaintiff testified that he fell because a bird flew out of the nest and startled him causing his body to move, which caused the ladder to move. (R. 144-49, 349). Plaintiff fell off the ladder but the ladder did not fall. (R. 149). He testified that he fell approximately five feet. (R. 143)

The complaint alleged other causes of action in addition to Labor Law § 240. At the close of discovery both parties moved for summary judgment. The trial court granted summary judgment on the Labor Law § 240 (1) cause of action in plaintiff's favor and dismissed the remaining causes of action. Plaintiff did not appeal from the part of the order dismissing the other causes of action and the time to do so has expired.

Defendant's position is that removing a nest from a hole in a gutter is not the type of cleaning or repair that is protected by Labor Law § 240. Defendant raised this argument, and several other arguments briefly addressed below, in the original motion and on appeal to the Appellate Division. The Appellate Division ruled that plaintiff's activity was the type of cleaning covered by the statute and did not address the other arguments. However defendant reserves all of these arguments

and refers the Court to defendant's briefs to the Appellate Division for a full statement of these arguments.

Cleaning

Cleaning is one of the protected activities specifically identified in the text of Labor Law § 240 (1). However not all cleaning activities are covered by the extraordinary protections provided by this statute. Since 2013 when this Court issued its decision in *Soto v J. Crew Inc*., 21 NY3d 562, that case has provided the accepted factors for determining whether an activity is the type of cleaning protected by Labor Law § 240.

Cleaning debris from rain gutters always involves an elevation risk. Nevertheless, before *Soto*, every reported case on this issue of which we are aware held that removing debris from a rain gutter was not the type of cleaning protected by Labor Law § 240 (1). For example in *Berardi v Coney Island Ave. Realty*, LLC, 31 AD3d 590 (2d Dept 2006) the Second Department affirmed summary judgment for defendant on the basis that cleaning leaves from gutters of a building was routine cleaning in a non-construction, non-renovation context, and thus outside scope of Labor Law § 240. In *Beavers v Hanafin*, 88 AD2d 683, 683–84 (3d Dept 1982) the Third Department held that section 240 did not apply to the plaintiff who was injured while cleaning the gutters of a building because he was not performing cleaning "incidental to building construction, demolition and repair work" (citations omitted). *See also Chavez v Katonah Mgmt. Grp., Co.,* 305 AD2d 358, 359 (2d Dept 2003); *Perez v Sapra*, 23 Misc. 3d 1137(A), 889 N.Y.S.2d 507

(Civ. Ct. 2009); *and Pascarell v Klubenspies*, No. 7034/04, 2007 WL 6001212 (N.Y. Sup. Ct. Jan. 30, 2007).

In *Soto*, this Court stated:

> [A]n activity cannot be characterized as "cleaning" under the statute, if 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. 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. (21 NY3d 562, 568–69).

In *Soto* this Court applied these factors and determined that the plaintiff was not engaged in the type of cleaning meant by the Legislature to be covered by Labor Law § 240. The plaintiff in *Soto*, an employee of a commercial cleaning company hired to provide janitorial services for a retail store, was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf. In applying the above factors to this fact situation this Court concluded that:

> The dusting of a six-foot-high display shelf is the type of routine maintenance that occurs frequently in a retail store. It did not require specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting. Further, the elevation-related risks involved were comparable to those encountered by homeowners during ordinary household

> cleaning and the task was unrelated to a construction, renovation, painting, alteration or repair project. (21 NY3d 562, 569).

The only case of which we are aware in which a court addressed the issue herein, whether 240 applies to cleaning debris from gutters, since the *Soto* decision was issued, is *Hull v Fieldpoint Cmty. Ass'n, Inc*., 110 AD3d 961 (2d Dept 2013). The Second Department in *Hull* cites the *Soto* decision as authority for its conclusion that Labor Law § 240 "does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris" (110 AD3d 961, 962).

Here, Special Term and the Fourth Department majority departed from the above precedent and ruled for the first time to our knowledge that the simple task of removing debris (in this case a bird's nest) from a gutter in a non-construction, non-renovation context is an activity protected by section 240.

The majority decision focused on cleaning, specifically the proper application of the four *Soto* factors. Even the Fourth Department majority concluded that two of the four factors (the second and fourth) favor routine maintenance rather than the type of cleaning covered by the statute. The first *Soto* factor indicating that a type of cleaning is routine maintenance 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." Removing debris from a gutter is a regularly recurring task for owners of commercial and residential properties. Gutters tend to

accumulate debris over time which interferes with their function. The type of debris (whether leaves, a bird's nest, or some other type of debris) should have no bearing on whether or not the task is covered by section 240. A worker removing leaves from a gutter should be treated no differently under section 240 than a worker removing a nest from the same gutter. The *Soto* decision refers to "the type of job" that occurs on a recurring basis. Removing debris from a gutter is that type of job. "[T]he clearing of gutters of extraneous material—whether leaves, other debris or, in this case, a bird's nest—in order to keep the storefronts thereunder clean and safe is the type of job that occurs on a relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises." *Healy v EST Downtown, LLC*, 191 AD3d 1274 (dissenting opinion) (citations, ellipses, and internal quotation marks omitted).

The second *Soto* factor is whether the task requires specialized equipment or expertise, or the unusual deployment of labor. If so, then the task is likely not to be routine maintenance. In the present case plaintiff required a ladder and a bag to carry the nest after removing it. (R. 144-46). This factor indicates that the task was routine maintenance.

The third factor is whether the task generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning. If so, then the task is likely to be routine maintenance. In this case plaintiff testified

that he fell five feet (from the fifth rung of a step ladder). Plaintiff in *Soto* fell four feet. It would not be considered unusual to stand on the fifth rung of a step ladder to clean or dust a ceiling fan, a high shelf, or a molding in a residential setting. This factor indicates routine maintenance. "[P]laintiff'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 [by this Court] in *Dahar*, [18 NY3d 521, 523] 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.")

A five-foot elevation is comparable to those encountered by homeowners during ordinary household cleaning. Therefore this third factor favors the conclusion that plaintiff's job at the time of the accident was routine maintenance not covered by 240.

The fourth factor is whether the job is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Plaintiff's job at the time of the accident was not related to an ongoing project. It was the result of a tenant's complaint about bird droppings in front of the tenant's door. There were no ongoing projects at the accident location of the type listed in the statute at the time of the accident.

Plaintiff was not making a repair. The nest was in a hole in the bottom of a rain gutter. The gutter had been lined from above with a waterproof membrane. (R. 115, 123-25). Therefore the gutter functioned properly without water leaking out of it in spite of the hole. (R. 126-27). Plaintiff testified that he intended to place a patch over the hole in the bottom of the gutter after removing the nest. (R. 106, 125, and 133). His supervisor testified to the contrary, that plaintiff's job did not include patching the gutter and that plaintiff was told only to remove the nest. (R. 269-71).

Therefore we submit that all four factors favor the conclusion that plaintiff's work was routine maintenance not covered by section 240. Therefore plaintiff's activity at the time of the accident was not the type of cleaning that is covered by the extraordinary protections of Labor Law § 240.

Other Arguments Raised and Not Waived by Defendant

The following arguments were raised below and are reserved and not waived by defendant. The Court is referred to defendant's briefs below for a more detailed explication of these arguments.

1. Patching a hole in a functional gutter is not a repair (see Appellate Division brief for defendant, Point I [B] and reply brief, Point I). Plaintiff's testimony that he intended to patch the hole after removing the nest is contradicted by most of the evidence on this issue. Nevertheless patching this hole would not

have been a covered activity. One cannot repair something that is not broken (*Smith v Shell Oil Co.,* 85 NY2d 1000, 1002 [1995]). Putting a sheet metal patch on a hole in a functional gutter, where the hole developed through normal wear and tear, has been held to be component replacement which is not covered by Labor Law § 240 rather than repair (*Azad v 270 5th Realty Corp*., 46 AD3d 728 [2d Dept 2007]).

2. Defendant did not hire plaintiff to patch the hole (see Appellate Division Brief for defendant, Point II and reply brief Point IV). Section 240 applies to owners who "contract for" specific types of work enumerated in the statute. Benjamin N. Obletz, the owner of EST, stated in his affidavit that "EST never hired, retained, or contracted with plaintiff or with [his employer] to repair the gutter where the bird's nest was located" (R. 355, paragraph 7).

3. Plaintiff's fall was not caused by an elevation-related hazard (see Appellate Division brief for defendant, Point III and reply brief Point V). Liability under § 240 requires a foreseeable risk of injury from an elevation-related hazard. The risk of being startled by a bird is not intended to be addressed by a safety device. It is a hazard wholly unrelated to the risk which brought about the need for the safety device (*Nieves v Five Boro Air Conditioning & Refrigeration Corp*., 93 NY2d 914, 916 [1999]; *Melber v 6333 Main St., Inc*., 91 NY2d 759 [1998]).

4. Plaintiff's fall was not caused by an absent or defective device (see Appellate Division brief for defendant, Point III and reply brief Point V). The ladder herein was not defective and performed as intended (R. 213). Plaintiff was provided with a proper safety device and fell because he was startled by a bird and lost his balance, not because of an absent or defective safety device.

5. Plaintiff's uncorroborated testimony about the facts of the accident is not sufficient for summary judgment (see Appellate Division brief for defendant, Point I [B] and reply brief Point VI). He is the only witness with direct knowledge of how the accident happened (*Carlos v Rochester Gen. Hosp*., 163 AD2d 894, 894 [4th Dept 1990]). Therefore plaintiff failed to establish entitlement to summary judgment and his motion should have been denied regardless of defendant's opposition.

Conclusion

The record herein establishes as a matter of law that plaintiff was not engaged in any activity covered by Labor Law § 240 at the time of his injury. Therefore plaintiff's motion for summary judgment on his Labor Law § 240 cause of action ought to have been denied, and defendant's motion requesting dismissal of the 240 cause of action should have been granted and the complaint should have been dismissed.

Very truly yours,

James J. Navagh

cc: Jonathan Gorski, Esq. (by regular mail)

Section 500.1 (f) Disclosure Statement

This Preliminary Appeal Statement is filed on behalf of defendant-appellant EST Downtown, LLC. The said business entity does not have any parents or subsidiaries. It is affiliated through common ownership with First Amherst Development Group, LLC.