To be Argued by:
JONATHAN M. GORSKI
(Time Requested: 20 Minutes)

APL-2021-00052
Erie County Clerk's Index No. 805232/17
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.

BRIEF FOR PLAINTIFF-RESPONDENT

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Date Completed: January 24, 2022

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PRELIMINARY STATEMENT

This personal injury action arises out of a workplace incident which occurred on May 16, 2014 at a mixed-use property located at 230 Scott Street, Buffalo, New York 14204.

On that date, James Healy (hereinafter Mr. Healy or plaintiff) was injured when, while performing cleaning/repair/alteration work to a gutter system, the eight-foot A-frame stepladder upon which he was working walked (moved), causing him to fall to a concrete deck below. As a result of the incident, Mr. Healy sustained serious injuries to, among other body parts, his right hip, low back, and neck.

Mr. Healy commenced this action against the owner of the property, EST Downtown, LLC (hereinafter EST Downtown or defendant). The plaintiff alleged causes of action under Labor Law §§ 200, 240(1), and 241(6) and common law negligence.

After discovery, the defendant moved for summary judgment dismissal of the complaint in its entirety and the plaintiff moved for, inter alia, partial summary judgment on the issue of liability under Labor Law § 240(1). As relevant here, Supreme Court granted the plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and denied the portion of the

defendant's motion seeking dismissal of that cause of action. In a split decision, the Appellate Division, Fourth Department, affirmed. This appeal arises therefrom.

This brief is submitted on behalf of the plaintiff. As discussed in more detail below, the Court should dismiss the appeal for lack of subject matter jurisdiction because the order appealed from does not finally determine the action within the meaning of the New York State Constitution.

In the alternative, should the Court reach the merits, it should affirm the order of the Appellate Division because the plaintiff was engaged in protected activity when he fell and the defendant's violation of Labor Law § 240(1) was a proximate cause of the incident.

QUESTIONS PRESENTED

1. The Appellate Division affirmed the lower court's order granting the plaintiff partial summary judgment on the issue of liability under Labor Law § 240(1) and consequently, denied the defendant's motion to dismiss that cause of action. The Appellate Division's order is a nonfinal interlocutory judgment because it leaves pending the issue of damages thereby contemplating further proceedings/litigation.

Prior to the appeal to the Appellate Division, the parties entered into a stipulation regarding damages. However, the stipulation is contingent upon certain specified actions by the parties and therefore, even if the order is considered in conjunction with the stipulation, the order is not final because it is not immediately effective as final determination.

In light of the foregoing, should this Court dismiss the appeal for lack of subject matter jurisdiction because the order appealed from does not finally determine the action within the meaning of the New York State Constitution?

Answer: Yes. This Court should, on its own motion, dismiss the appeal for lack of subject matter jurisdiction.

2. Mr. Healy was injured when, while removing a bird's nest from a gutter, the eight-foot A-frame stepladder upon which he was working walked,

causing him to fall approximately five feet to a concrete deck below.

Mr. Healy's supervisor testified that the removal of the nest from the gutter system was nonroutine cleaning which was not analogous to removing leaves or other debris from a gutter – a routine cleaning activity. Mr. Healy testified that he had never removed a bird's nest from a gutter prior to the incident as part of his employment.

In light of the nonroutine nature of the cleaning and the elevation-related risk created by the work, did the Appellate Division correctly conclude that the plaintiff was engaged in protected activity, i.e., cleaning, under Labor Law § 240(1)?

Answer: Yes. The Appellate Division correctly concluded that the plaintiff was engaged in protected activity, i.e., cleaning, under Labor Law § 240(1).

3. Under Labor Law § 240(1), the statutory duty to provide "proper protection" requires devices that are appropriate for the task at hand be adequately placed and operated to protect workers from elevation-related risks. Evidence that a ladder was structurally sound and not defective is irrelevant on the issue of whether it was properly placed. Moreover, a ladder that fails to prevent a worker from falling fails to achieve the core objective of Labor Law § 240(1).

Here, the stepladder walked causing the plaintiff to fall from the ladder and sustain injuries. In light of the foregoing, did the Appellate Division correctly conclude that the defendant failed to provide proper protection and that the defendant's failure was a proximate cause of the incident?

Answer: Yes. The Appellate Division correctly concluded that the defendant failed to provide proper protection and that the defendant's failure was a proximate cause of the incident and as such, properly affirmed the lower court's order granting the plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1).

COUNTERSTATEMENT OF FACTS

I. The Incident

This personal injury action arises out of a workplace incident which occurred on May 16, 2014 at a mixed-use property located at 230 Scott Street, Buffalo, New York 14204.[1] The property is commonly referred to as The Lofts at Elk Terminal. [R. 322]. The property is owned by EST Downtown. [R. 322].

On the date of the injury, Mr. Healy was employed as a maintenance and repair technician by First Amherst Development Group (hereinafter First Amherst). [R. 94, 99]. First Amherst provided property management services at 230 Scott Street. [R. 99-104]. Per the Property Management Agreement by and between EST Downtown and First Amherst, First Amherst had "full authority and complete responsibility for managing, maintaining and administering the premises." [R. 402]. In addition, the Property Management Agreement provided First Amherst with "all right, power, and authority both express and implied, to act on behalf of or as agent for Owner." [R. 402-403].

As a maintenance and repair technician, Mr. Healy performed maintenance work, repair work, and responded to work orders. [R. 99]. Work orders were

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[1] The address of the property is also referred to in the record as 250 Perry Street, Buffalo, New York 14204.

created in response to tenant complaints and tenant requests for work other than routine maintenance work. [R. 260-262].

Prior to May 16, 2014, Mr. Healy received a work order from a commercial tenant at the property concerning birds depositing excrement at the tenant's entryway. [R. 105-106, 132, 348, 352, 416]. It was determined that a bird entered one of the building's gutters through a six-inch hole and built a nest. [R. 106, 115, 124]. To remedy the problem, Mr. Healy was required to remove the bird's nest (i.e., clean the gutter) and cover the hole to prevent further issues (i.e., repair/alter the gutter). [R. 125, 133, 135, 222-223].

Mr. Healy's supervisor testified that the removal of the nest from the gutter system was nonroutine cleaning. [R. 282-283]. The supervisor further testified that the removal of the nest was not analogous to removing leaves or other debris from a gutter – a routine cleaning activity. [R. 283]. Mr. Healy similarly testified that he had never removed a bird's nest from a gutter prior to the incident as part of his employment with First Amherst. [R. 221].

In order to perform the cleaning and repair/alteration work, Mr. Healy required snips (cutting pliers), a tape measurer, silicone adhesive, a caulk gun, a wire brush, sheet metal, and an eight-foot A-frame stepladder. [R. 133-134, 219-221].

On the date of the incident, Mr. Healy positioned an eight-foot A-frame stepladder on the concrete deck beneath the gutter. [R. 139-141, 218-219]. The ladder was fully open and the spreaders were locked. [R. 140-141, 218-219]. He climbed the ladder to the fifth or sixth rung with his feet approximately five feet from the concrete deck below. [R.143]. As he reached inside the gutter to remove the nest, a bird flew out and startled him causing his body to shift. [R. 148]. As a result of his body shifting, the ladder walked approximately two feet causing Mr. Healy to fall off the ladder onto the concrete deck below. [R. 148-149, 219].

As a result of the incident, Mr. Healy sustained serious injuries to, among other body parts, his right hip, low back, and neck.

II. Procedural History

After discovery, the defendant moved for summary judgment dismissal of the complaint in its entirety. [R. 37-38]. A day later, the plaintiff moved for, inter alia, partial summary judgment on the issue of liability under Labor Law § 240(1). [R. 370-371].

As relevant here, Supreme Court (Hon. Frank A. Sedita, III) granted the plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and as a consequence, denied the portion of the defendant's motion seeking dismissal of the Labor Law § 240(1) cause of action. An amended

order was entered in the Erie County Clerk's Office on July 22, 2019. [R. 34-35].

The defendant appealed from the amended order. [R. 1-2]. The appeal was argued on June 25, 2020. After reviewing the submissions and hearing oral argument, the Appellate Division issued its decision on February 5, 2021. The appellate court affirmed the amended order and determined, as a matter of law, that the plaintiff was engaged in 'protected activity,' i.e., cleaning, at the time of the incident. Healy v. EST Downtown, LLC, 191 A.D.3d 1274, 1275 (4th Dep't 2021).

On March 12, 2021, the defendant filed a Notice of Appeal asserting that it is entitled to appeal to this Court as of right pursuant to CPLR 5601(a). [R. 477-478]. On the same date, the defendant filed a motion with the Appellate Division for leave to appeal to this Court pursuant to CPLR 5602(b)(1).[2]

In accordance with 22 NYCRR 500.9(a), the defendant filed a preliminary appeal statement with the Clerk of the Court. After review of the preliminary appeal statement, the Clerk, by letter dated March 25, 2021 ("Jurisdictional Inquiry"), notified the parties that the Court would examine subject matter jurisdiction pursuant to 22 NYCRR 500.10(a) to determine whether the order

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[2] The defendant's motion was denied by order dated June 11, 2021. Healy v. EST Downtown, LLC, 195 A.D.3d 1504 (4th Dep't 2021).

appealed from finally determined the action within the meaning of the Constitution.

The parties filed comments regarding subject matter jurisdiction in letter format ("Jurisdictional Response"). By letter dated August 13, 2021, the Court "terminated the examination of its subject matter jurisdiction" and, on its own motion, designated this appeal for review by alternative procedure pursuant to 22 NYCRR 500.11.

Pursuant to 22 NYCRR 500.11(c)(2) and 22 NYCRR 500.11(d), the defendant and the plaintiff submitted letter briefs dated September 7, 2021 and September 23, 2021, respectively.

By letter dated November 29, 2021, the Court terminated its review of this appeal by alternative procedure and designated the appeal to proceed in the normal course of briefing and argument.

ARGUMENT

POINT I

THE COURT SHOULD DISMISS THIS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE ORDER APPEALED FROM DOES NOT FINALLY DETERMINE THE ACTION

With respect to the Court's jurisdiction, Section 3 of Article VI (Judiciary) of the New York State Constitution provides in pertinent part:

> Appeals to the court of appeals may be taken. . . (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action . . .

N.Y. Const. Art. VI, § 3 [emphasis added].

The CPLR provides further guidance. CPLR 5601(a) permits appeals to be taken to the Court of Appeals as of right "from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal." CPLR 5601(a) (McKinney's 2020)[emphasis added].

The only jurisdictional question at issue here is whether the order appealed from finally determines the action within the meaning of the Constitution.

As discussed above, the Court examined subject matter jurisdiction pursuant to 22 NYCRR 500.10(a) and ultimately terminated the examination. However, the

fact that the Court terminated its inquiry into subject matter jurisdiction does not preclude it from addressing jurisdictional concerns here. 22 NYCRR 500.10(a) provides, "[the] examination of subject matter jurisdiction [pursuant to this section] shall not preclude the Court from addressing any jurisdictional concerns at any time." 22 NYCRR 500.10(a).

The plaintiff respectfully requests that the Court address subject matter jurisdiction here and, on its own motion, dismiss the appeal because the order appealed from does not finally determine the action.

A. The Appellate Division's order is an interlocutory judgment which by definition is nonfinal.

The most basic and obvious reason why the Appellate Division's order is not final is the fact that the order is an interlocutory judgment. An interlocutory judgment, by its very definition, is nonfinal.

The CPLR defines "judgment" as a final or interlocutory judgment. CPLR 105(k), 5011 (McKinney's 2020). The former is appealable to the Court of Appeals while the latter, with limited exceptions, is not.

On the one hand, "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." Burke v.

Crosson, 85 N.Y.2d 10, 15 (1995). On the other hand, "[a]n interlocutory judgment is an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done." Cambridge v. Val. Natl. Bank v. Lynch, 76 N.Y. 514, 514 (1879).

Under the foregoing definitions, it is well-settled that an order in a personal injury action which grants summary judgment in the plaintiff's favor on the issue of liability only is nonfinal and therefore, not appealable because there still remains a trial or inquest on the issue of damages. Karger, Powers of the New York Court of Appeals § 4:7; Caggiano v. Pomer, 36 N.Y.2d 753, 754 (1975); Chairmasters, Inc. v. North American Van Lines, Inc., 17 N.Y.2d 484, 484 (1965); Terry Contracting v. Commercial Ins. Co. of Newark, 2 N.Y.2d 995, 996 (1957).[3]

A nonfinal interlocutory judgment is exactly what we have here. Both parties moved for summary judgment. The defendant moved for summary judgment dismissal of the complaint in its entirety. The plaintiff moved for partial summary judgment on the issue of liability. The defendant's motion was denied and the plaintiff's motion was granted. The Appellate Division affirmed. As

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[3] The New York Court of Appeals Civil Jurisdiction and Practice Outline lists "Interlocutory Judgment (e.g., fixing liability but leaving damages to be tried)" as an example of an order that is too early on the 'Finality Continuum' to be appealable to the Court of Appeals. The New York Court of Appeals Civil Jurisdiction and Practice Outline, September 2020, at pp. 41.

such, the order of the Appellate Division is facially nonfinal since it left pending the issue of damages thereby contemplating further proceedings/litigation. See Tompkins v. Hyatt, 19 N.Y. 534, 536 (1859). Stated differently, the order "[disposed] of some but not all of the substantive and monetary disputes between the same parties" and therefore, is nonfinal. Burke, 85 N.Y.2d at 15.

By contrast, had the Appellate Division reversed the trial court and dismissed the complaint and everything else remained the same (split decision with two justices dissenting on the law), the order would be final because it would have put an end to the case leaving nothing for further judicial action.[4] But that is not the case here.

In sum, the order of the Appellate Division does not "finally determine" the action because it does not end the case (i.e., finally settle the controversy between the parties) and accordingly, the Court should dismiss the appeal.

B. The fact that the parties entered into a stipulation does not render the nonfinal order of the Appellate Division final.

Prior to the appeal to the Appellate Division, the parties entered into a stipulation. The stipulation was denominated 'High-Low Agreement.' Essentially the parties entered into an agreement regarding damages, subject to certain

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[4] Pragmatically, "final" means a judgment or order that puts an end to a case and leaves nothing else to be decided. Siegel, N.Y. Prac. § 527 [6th ed. 2020].

conditions being met, depending upon the outcome of the appeal.

In its Notice of Appeal, the defendant referenced the stipulation stating, "the issue of damages having been resolved by stipulation between the parties." [R. 477]. The defendant was required to insert this language into the Notice of Appeal because, as explained in Point I(A) supra, the order, on its face, is nonfinal. By referencing the stipulation, the defendant contends that the stipulation converted the nonfinal order of the Appellate Division into a final order for the purposes of determining appealability to the Court of Appeals. But, contrary to the defendant's contention, the stipulation does no such thing.

1. The parties cannot enlarge the scope of jurisdiction of the Court of Appeals by stipulation.

As a preliminary matter, and as a matter of public policy, a stipulation cannot convert a nonfinal order into a final order. If it were the other way around, parties would usurp the power of the Legislature and expand the class of cases to be heard by the Court of Appeals. In other words, parties cannot enlarge the scope of jurisdiction of the Court of Appeals by entering into stipulations regarding jurisdictional predicates. One can only imagine the flood of cases which would find their way to the Court of Appeals if this door was opened. Parties would essentially be permitted to pick and choose which cases would be appealable to

the Court of Appeals irrespective of the New York State Constitution and irrespective of the CPLR.

This practice would fly in the face of the purpose of the 1985 changes to the CPLR which sharply curtailed appeals as of right to the Court of Appeals under CPLR 5601 and simultaneously expanded appeals by permission under CPLR 5602. By amending the rules, the Legislature provided more discretion to the Court of Appeals over which cases it heard.

But even if the parties were able to make an end-run around appellate practice rules and enter into stipulations regarding finality of an order thereby enlarging the scope of jurisdiction of the Court of Appeals (which it is respectfully submitted they cannot), the stipulation here does not convert the nonfinal order into a final order for the reasons explained below.

2. The intent of the stipulation was not to convert a nonfinal order into a final order and create an appeal as of right to the Court of Appeals of an interlocutory judgment.

In determining jurisdiction, the Court should consider the intent of the parties to the stipulation. After all, the agreement is a contract and "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002) citing Slatt v. Slatt, 64 N.Y.2d 966, 967 rearg. denied

65 N.Y.2d 785 (1985); Wheeler v. Wheeler, 174 A.D.3d 1507, 1508 (4th Dep't 2019). Indeed, "[t]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield, 98 N.Y.2d at 569 [citations omitted][internal quotation marks omitted].

The stipulation provides, "[i]n the event of a split (3-2) decision on the appeal by the New York State Supreme Court Appellate Division – Fourth Department, the aggrieved party shall have the right to seek final review by the New York State Court of Appeals." [emphasis added]. This language is important because it clearly and unambiguously states that the aggrieved party will have "the right to seek final review."

The use of the word "seek" is important because "seek" indicates the parties intention not to permit the defendant to appeal as of right but rather, require the defendant to "seek" review by way of a motion for leave to appeal to the Court of Appeals. The defendant availed itself of that right and moved at the Appellate Division for leave to appeal to the Court of Appeals. The motion was denied. Healy, 195 A.D.3d at 1504.

When the stipulation is read in accordance with the intent of the parties, it is

clear that the parties did not intend to convert the otherwise nonfinal order of the Appellate Division into a final order. Had the parties intended to do so, the parties would have clearly and unambiguously so stated. Instead, and quite the opposite, the parties clearly and unambiguously agreed that the defendant would have an opportunity to seek permission to appeal to the Court of Appeals through the proper channels (i.e., a motion for leave to appeal). The parties never intended to create an appeal as of right in favor of the defendant. The Court should reject the defendant's invitation to read into the stipulation something the parties never intended.

3. The stipulation does not convert the nonfinal order into a final order because the order is not immediately effective as final determination.

This Court has defined the concept of finality:

> [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. Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a defendant or where the court disposes of a counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial

proceedings.

Burke, 85 N.Y.2d at 15-16 [citations omitted].

In addition to the above definition, one of the requirements for a finding of finality is that the order must be immediately effective.

> One of the requirements for a finding of finality is that the order involved be immediately effective as final determination. Thus, there is no finality where the effectiveness of the order as final determination is by its terms contingent on certain specified action by one of the parties.

Karger, Powers of the New York Court of Appeals § 4:2.

Even if the parties could enlarge the scope of jurisdiction of the Court by stipulation (which they cannot) and even if the parties intended to convert the nonfinal order into a final order (which they did not), the stipulation does not make the order of the Appellate Division final and appealable as of right because the final disposition of the action, by the very terms of the stipulation, is contingent upon certain specified actions by both of the parties.

The stipulation provides, "[o]nce the liability-issues (sic) set forth above have been resolved, Plaintiff agrees to execute and deliver a General Release in a form acceptable to Defendant and a signed stipulation of discontinuance."

Per the terms of the stipulation immediately above, the case is not fully and

finally disposed of until the plaintiff executes and delivers a mutually agreeable release. Therefore, the order is not immediately effective as final determination.

The immediately effective rule makes a great deal of sense in this context. If the parties are unable to agree upon a general release and/or the plaintiff does not execute and deliver a release in a form acceptable to the defendant, the action would proceed to a trial on the issue of damages. Because the stipulation does not render the order immediately effective, it cannot be said that the order finally determined the action and foreclosed future judicial action and/or proceedings. In other words, there is no finality within the meaning of the New York State Constitution and the CPLR.

Furthermore, agreeing upon a general release is not a ministerial act.[5] Black's law dictionary defines "ministerial act" as "[a]n act performed without the independent exercise of discretion or judgment." Black's Law Dictionary [11th ed. 2019]. Reviewing and agreeing upon a general release, especially this day and age, is anything but ministerial and requires the exercise of discretion and judgment. Therefore, the stipulation leaves more than mere ministerial matters. In

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[5] The ministerial act(s) analysis is most commonly used when cases are remitted for further action. Here, although not expressly stated in the order, the Appellate Division did technically remit the action to the lower court for a trial on the issue of damages having found Labor Law § 240(1) applicable and violated. As such, the order contemplates further judicial action.

fact, it is possible that there could be an entire trial on the issue of damages.[6]

The nonfinal order of the Appellate Division, even when considered in conjunction with the stipulation, contemplates further judicial action or, at the very least, does not foreclose further judicial action. Moreover, due to the conditions of the stipulation, the order is not immediately effective as final determination because final disposition is contingent upon specified actions by the parties. Accordingly, the defendant's appeal should be dismissed because the order is not final.

C. The defendant's reliance on Misseritti and Somereve is misplaced.

In its Jurisdictional Response, the defendant relied upon Misseritti v. Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995) and Somereve v. Plaza Constr. Corp., 31 N.Y.3d 936 (2018) in support of its argument that the Appellate Division's order here is final. However, neither case provides support for the defendant's contention.

First, the Appellate Division in Misseritti modified, with two justices dissenting, the Supreme Court decision to the extent of granting the defendant's

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[6] Additionally, the plaintiff will be required to obtain consent from the workers' compensation carrier as the carrier will have a lien against any recovery pursuant to New York Workers' Compensation Law § 29. If consent is withheld for one reason or another, the action will proceed to trial on the issue of damages only. This is yet another example of a non-ministerial act that must be taken by a party in order to fully and finally dispose of this action.

motion for summary judgment and dismissing the plaintiff's cause of action under Labor Law § 240(1). Misseritti, 86 N.Y.2d at 490. Thereafter, the parties discontinued all remaining causes of action thereby disposing of the case in its entirety. Id. As such, the order of the Appellate Division was final and the plaintiff appealed to this Court as of right. Id.

That is not the case here. Here, the Appellate Division merely affirmed an interlocutory judgment in favor of the plaintiff. As stated above, had the Appellate Division reversed and dismissed the plaintiff's cause of action under Labor Law § 240(1) like it did in Misseritti, there would be no doubt that the order was final.

Second, Somereve was not an appeal as of right but rather an appeal by permission of the Appellate Division, First Department. The order of the First Department granting defendant's motion for leave to appeal to the Court of Appeals is attached hereto as Addendum A.

In conclusion, there is no definition of finality in the State Constitution or the CPLR. Karger, Powers of the New York Court of Appeals § 3:1. As the Court has observed, the concept of finality can be complex. Burke, 85 N.Y.2d at 15. But while the concept of finality can be complex, it does not always need to be – such is the case here. The order of the Appellate Division is not final because it

does not finally determine the action. As a consequence, the defendant's appeal is lacking the jurisdictional predicate of finality and therefore, this Court does not have subject matter jurisdiction.[7]

In light of the foregoing, it is respectfully requested that the Court dismiss the appeal.

POINT II

THE APPELLATE DIVISION'S ORDER SHOULD BE AFFIRMED BECAUSE THE PLAINTIFF WAS ENGAGED IN PROTECTED CLEANING ACTIVITY UNDER LABOR LAW § 2401(1) WHEN HE FELL

Should the Court determine that the Appellate Division order is final (a determination with which the plaintiff would respectfully disagree) and reach the merits of the appeal, the Court should affirm the Appellate Division's order because the plaintiff was engaged in protected activity, i.e., cleaning, when he fell from the stepladder.

A. The Appellate Division properly applied the Soto factors and correctly concluded that the plaintiff was engaged in cleaning, a protected and specifically enumerated activity under Labor Law § 240(1), at the time of his injury.

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[7] If the Court has any doubt, such doubt should be resolved against a finding of finality. Karger, Powers of the New York Court of Appeals § 4:10; Rochester Gas & Electric Corporation v. Maltbie, 298 N.Y. 103, 104-105 (1948).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with proper and adequate protection against gravity-related hazards when engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. N.Y.S. Labor Law § 240(1)(McKinney's 2020). This appeal involves the proper scope and application of the specifically enumerated protected activity of cleaning.

In Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 (2007), a case involving interior commercial window cleaning, this Court made clear that cleaning is a separately listed covered activity and is "expressly afforded protection under section 240(1) whether or not incidental to any other enumerated activity." Broggy, 8 N.Y.3d at 680; See also Joblon v. Solow, 91 N.Y.2d 457, 464 (1998)(rejecting the idea that Labor Law § 240(1) applies only to work performed on construction sites) .

A year later in 2008, this Court decided Swiderska v. New York University, 10 N.Y.3d 792 (2008), which involved facts similar to Broggy but used the opportunity to make clear that indoor commercial window cleaning is covered activity so long as the work creates an elevation-related risk. Swiderska, 10 N.Y.3d at 793.

Then in 2012, in Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521

(2012), this Court declined to extend Labor Law § 240(1) protection to a factory employee cleaning a product in the course of the manufacturing process. Dahar, 18 N.Y.3d at 526.

These three decisions led to Soto v. J. Crew Inc., 21 N.Y.3d 562 (2013). In Soto, the plaintiff, an employee of a commercial cleaning company hired to provide janitorial services, was injured when he fell from a ladder while dusting a display shelf. Soto, 21 N.Y.3d at 564. The plaintiff was responsible for the daily maintenance of the store which included, among other routine cleaning chores, dusting. Id.

In this context, this Court created a four-factor analysis to be used to determine whether a certain type of commercial cleaning activity is protected under Labor Law § 240(1):

> [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 [factor] 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. at 568-569.

Applying these factors, it is not difficult to understand why the activity undertaken by the Soto plaintiff (i.e., dusting a display shelf – a task within his daily maintenance responsibilities) was not cleaning within the meaning of the statute. After all, dusting a display shelf occurs frequently, and most likely daily, in a retail store; does not require specialized equipment or knowledge, nor the unusual deployment of labor; generally involves an insignificant elevation risk; and is unrelated to another enumerated activity such as construction, renovation, painting, alteration or repair. Id. at 569. Thus, each of the four factors supported a finding against the plaintiff with respect to protected activity.

But, as the majority of the Appellate Division correctly observed here, the one-time task of removing a bird's nest from a gutter located above a tenant entryway bears little resemblance to the daily dusting of a display shelf. Healy, 191 A.D.3d at 1276.

Initially, unlike the plaintiff in Soto, who was employed by a custodial services contractor to provide janitorial services including daily dusting of the

store after it opened (Soto, 21 N.Y.3d at 564), Mr. Healy had never before been given the task of removing a bird's nest. [R. 221]. In fact, Mr. Healy's supervisor, at his deposition, characterized the task of removing a bird's nest as nonroutine cleaning. [R. 282-283].

As such, Mr. Healy was injured while performing a function that was not part of his regular maintenance and repair responsibilities. By contrast, the Soto plaintiff was injured while engaged in routine dusting which was part of his daily work functions.

Moreover, the Appellate Division majority correctly found 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). Healy, 191 A.D.3d at 1276. 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 being performed by the plaintiff at the time of his injury. See Vernum v. Zilka, 241 A.D.2d 885, 885-886 (3d Dep't 1997); Wicks v. Trigen-Syracuse Energy Corp., 64 A.D.3d 75, 79 (4th Dep't 2009).

Put simply, this is not the type of typical household/domestic cleaning that has been excluded from the scope of cleaning under Labor Law § 240(1) such as the mundane, routine, and typical act of dusting a display shelf (an activity no

different than everyday household cleaning) in Soto. Nor is it the type of typical household/domestic cleaning like the examples given in Dahar of dusting off a bookshelf or cleaning a light fixture. Dahar, 18 N.Y.3d at 526.[8] To the contrary, the task of removing a bird's nest was neither routine to the plaintiff nor is it routine in a general sense. It is more akin to cleaning miniledges and bulkheads, washing a plexiglass canopy, or sandblasting a railroad car – all activities that have been held to constitute cleaning under the statute. Vasey v. Pyramid Co. of Buffalo, 250 A.D.2d 906, 906-907 (4th Dep't 1999); Fox v. Brozman-Archer Realty Servs., 266 A.D.2d 97, 98 (1st Dep't 1999); Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 558 (1993).

Because the Appellate Division majority correctly concluded that removing a bird's nest was not routine cleaning, i.e., not 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 a commercial premises, the first factor was correctly decided in favor of the plaintiff.

The Appellate Division majority also correctly concluded that the third factor weighed in favor of the plaintiff. Stated differently, the majority correctly

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[8] Nor is it like the routine task of cleaning a product in the course of the manufacturing process. Id.

concluded that removing a bird's nest from a gutter by use of an eight-foot A-frame stepladder involved an elevation-related risk that is not generally associated with household cleaning. Healy, 191 A.D.3d at 1276. The elevation-related risk to which Mr. Healy was exposed is no different than the risk an electrician faces when installing rough electrical in a ceiling, a plumber when hanging pipes in a ceiling, a painter doing ceiling trim work, or a carpenter framing the upper portion of a window. Indeed, the elevation-related risk must be analyzed in the context of the work being performed to determine whether it is the type of insignificant risk comparable to those inherent in typical domestic or household cleaning. The Appellate Division dissenters' interpretation and analysis of this factor 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 stepladder.

With respect to the elevation-related risk factor, consider Swiderska, discussed above. In Swiderska, decided prior to Soto, the plaintiff was injured when she fell off a bed that she had climbed on to clean ten-foot high interior windows in a dormitory. Swiderska, 10 N.Y.3d at 792-793. This Court unanimously determined that the plaintiff was engaged in protected activity under Labor Law § 240(1) because she was exposed to an elevation-related risk and not provided with a proper safety device. Id. at 793; Cf. Broggy, 8 N.Y.3d 675, 681

(2007)(complaint of plaintiff injured when he fell from a desk while cleaning nine or ten-foot interior windows dismissed because task did not create an elevation-related risk that safety devices listed in Labor Law § 240(1) protect against; plaintiff was provided tools which permitted him to wash the windows while standing on the floor).

Like the plaintiff in Swiderska, and unlike the plaintiff in Broggy, Mr. Healy did not have tools permitting him to work from ground level and therefore, was required to use an eight-foot A-frame stepladder to perform the cleaning task assigned to him thereby creating an elevation-related risk – the exact type of risk that the safety devices listed in Labor Law § 240(1) are designed to protect against. If falling from a bed while cleaning interior windows (a routine and typical task) triggers liability under the statute then certainly falling from an eight-foot A-frame stepladder while removing a bird's nest from a gutter (a nonroutine and atypical task) triggers liability.

The Appellate Division decided the other two factors (namely use of specialized equipment or expertise/the unusual deployment of labor and relation to any ongoing construction, renovation, painting, alteration, or repair project) against the plaintiff. However, despite the absence of these two factors, the Appellate Division majority correctly concluded that, when viewed in its totality,

the work being performed by the plaintiff constituted protected cleaning activity. Healy. 191 A.D.3d at 1274.

Notwithstanding the Appellate Division's correct ultimate conclusion, it is respectfully submitted that its determination that those two factors weighed against a finding of protected cleaning was incorrect.

First, with respect to the second Soto factor (specialized equipment or expertise or the unusual deployment of labor), it is respectfully submitted that the work did involve the unusual deployment of labor inasmuch as Mr. Healy was never assigned such a task and never performed such a task before the date of the incident. [R. 221].

Second, with respect to the fourth Soto factor (relation to any ongoing construction, renovation, painting, alteration or repair project), it is respectfully submitted that the plaintiff's assigned task was related to an ongoing and contemporaneous repair/alteration project inasmuch as he was required to patch the hole in the gutter by which the birds gained entry into the gutter to nest. [R. 125, 133, 135]. It was his intention to cover the hole (i.e., repair/alter the gutter system) with a piece of sheet metal to prevent further issues with the gutter (including recurring nests in the same hole) but before he could cover the hole, he had to remove the nest. [R. 125, 133, 135, 222-223].

Alternatively, it is respectfully submitted that the plaintiff's cleaning work related to a prior project performed by a roofing company which resulted in a membrane shield being placed in the gutter to prevent leakage. [R. 124-126]. The hole, which actually caused the leak, was never repaired as part of the prior project which allowed the bird to nest inside the gutter. [R. 124, 126]. The plaintiff's task on the date of the injury was to clean the gutter by removing the nest and then cover (repair) the hole. [R. 125, 133, 135].

As such, it is the plaintiff's position that all four factors should have been decided in his favor.

The defendant argues that the Appellate Division's decision constitutes a break from precedent. Defendant-Appellant's Brief at pp. 8. The defendant cites four appellate cases and two lower court cases for the proposition that clearing extraneous material from gutters is never protected under Labor Law § 240(1). Berardi v. Coney Is. Ave. Realty, LLC, 31 A.D.3d 590 (2d Dep't 2006); Beavers v. Hanafin, 88 A.D.2d 683 (3d Dep't 1982); Chavez v. Katonah Mgmt. Grp., Co., 305 A.D.2d 358 (2d Dep't 2003); Hull v. Fieldpoint Cmty. Ass'n, Inc., 110 A.D.3d 961 (2d Dep't 2013); Perez v. Sapra, 23 Misc.3d 1137(A), 2009 Slip Op. 51177(U)(Civ. Ct., Kings County 2009); Pascarell v. Klubenspies, 2007 WL 6001212 (Sup. Ct., N.Y. County 2007).

But in making this argument the defendant completely misses the point and the import of the Appellate Division's decision. The Appellate Division majority did not say that regular and ordinary debris removal from gutters such as leaves, dirt, and the like is covered work. As such, this decision does not depart from the above-cited cases which all involved routine gutter cleaning at regular intervals.

Rather, the Appellate Division held that, while routine gutter cleaning is not covered, there is no categorical rule excluding the clearing of extraneous material from gutters from the scope of cleaning under Labor Law § 240(1) should the facts, viewed in their totality, warrant the imposition of liability. Healy, 191 A.D.3d at 1276. Those facts, reserved for limited situations, are present here. The removal of a bird's nest is unique, nonroutine, irregular, and extraordinary. In other words, it is not like removing leaves and dirt from gutters – something that is done on a routine and regular basis several times a year.

The plaintiff was performing the cleaning work in response to a specific complaint from a commercial tenant whose use of the rental property was being impaired and interfered with by bird droppings coming from the nest. [R. 414-415]. The condition resulted from the hole in the gutter structure, not the normal accumulation of debris in the gutter. The work was not "the type of job that occurs on a daily, weekly or relatively frequent and recurring basis as part of the

ordinary maintenance and care of commercial premises." Soto, 21 N.Y.3d at 568. It was not scheduled; rather, it was unexpected and nonroutine. The plaintiff, while carrying out this nonroutine task, was exposed to a significant elevation-related risk for which the defendant failed to provide proper protection. The result in this case is as just as it is correct. The plaintiff was correctly awarded partial summary judgment on the issue of liability under Labor Law § 240(1).

In essence, the defendant (like the dissenters at the Appellate Division) is attempting to improperly restrict the applicability of the statute by creating a blanket rule that clearing of extraneous material from gutters never falls within the reach of Labor Law § 240(1) irrespective of the nonroutine and atypical nature of the work. This is not the law and actually departs from this Court's precedent regarding the proper interpretation of the statute.

With respect to the proper interpretation of Labor Law § 240(1), this Court has repeatedly stated that the statute 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); Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 520-521 (1985); Striegel v. Hillcrest Hgts. Dev. Corp., 100 N.Y.2d 974, 977 (2003)("[t]he statute is to be interpreted liberally to accomplish its purpose").

The Appellate Division majority's decision not only correctly applies the Soto factors but also keeps with this Court's instruction to interpret the statute as liberally as possible to effectuate its purpose of providing for the health and safety of employees required to work at heights.

Accordingly, this Court should affirm the Appellate Division's order.

POINT III

IN ADDITION TO PROTECTED CLEANING, THE PLAINTIFF WAS ENGAGED IN THE SPECIFICALLY ENUMERATED ACTIVITIES OF REPAIR AND/OR ALTERATION AT THE TIME THE INJURY AND THE APPELLATE DIVISION'S ORDER SHOULD BE AFFIRMED ON THIS SEPARATE BASIS

Even if the Court determines that the plaintiff was not performing the type of cleaning protected by Labor Law § 240(1), he is still entitled to partial summary judgment on the issue of liability because he was engaged in the specifically enumerated activities of repair and/or alteration.

A. The plaintiff was engaged in protected repair work.

Repair work is expressly afforded protection under Labor Law § 240(1). N.Y.S. Labor Law § 240(1)(McKinney's 2020); Izrailev v. Ficarra Furniture of Long Is., 70 N.Y.2d 813, 815 (1987). "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, 2005 WL 4797201 (Sup. Ct. Erie County 2005) aff'd Bissell v. Town of Amherst, 32 A.D.3d 1287 (4th Dep't 2006).

The plaintiff's task to remove the bird's nest and repair the gutter was prompted by a complaint/work order from a commercial tenant at the property about birds depositing excrement at the tenant's entryway. [R. 105-106, 132, 348, 414-415]. The work order stated that the excrement had become "a constant issue" and the plaintiff was assigned to address the issue, or per the work order, to see what could be done about it. [R. 348, 414-415].

The plaintiff was required to first remove the nest and then repair the hole. [R. 125, 133, 235, 222-223]. It was his intention to cover, i.e., repair, the hole with a piece of sheet metal to prevent further issues with the gutter (including recurring nests in the same hole). [R. 125, 133, 235, 222-223]. To perform the repair, the plaintiff required the use of snips (cutting pliers), a tape measurer, silicone adhesive, a caulk gun, a wire brush, sheet metal, and an eight-foot A-frame stepladder. [R. 133-134, 219-221].

Thus, in light of the tenant's complaints, it cannot be disputed that the gutter system was "operating improperly" and/or experiencing a "malfunction" necessitating a repair. Stated differently, this was not a common problem. Cf. Abbatiello v. Lancaster Studio Assoc., 3 N.Y.3d 46, 53 (2004)(work caused by a

common problem does not constitute a repair). It further cannot be disputed that the plaintiff was injured while performing the repair.

In arguing that the plaintiff's work does not constitute a repair, the defendant relies heavily upon Azad v. 270 5th Realty Corp., 46 A.D.3d 728 (2d Dep't 2007). However, the Azad court does not accurately state the standard for repair. As stated above, a repair can include fixing something that is: (1) malfunctioning; (2) inoperable or; (3) operating improperly. The Azad court only addressed inoperability. The mere fact that the gutter was functional at the time of the incident is not dispositive. Here, the gutter was in need of a repair because it was operating improperly and/or experiencing a malfunction which was interfering with the tenant's use of the property. To the extent that the inferior Azad court came to a different conclusion for a similar activity, it should not be followed.

Furthermore, covering the hole in the gutter was part of a larger repair project. Prior to the incident, the gutter system was not operating properly inasmuch as it was leaking due to a hole in the gutter. [R. 124-126]. An outside roofing contractor was hired to line the gutter with a membrane to stop the leaking. [R. 124-126]. The contractor installed the membrane and anchored it to the building. [R. 124-126]. But the contractor failed to repair the hole itself which

permitted the bird to nest inside the gutter. [R. 124-126]. As such, the larger repair project was incomplete. By covering the hole, the plaintiff was completing the larger repair to the gutter system. The defendant does not dispute and has never disputed that the larger repair project constitutes covered work under the statute.

B. The plaintiff was engaged in protected alteration work.

What's more, covering the hole in the gutter is protected alteration work.

This Court has defined alteration as "making a significant physical change to the configuration or composition of [a] building or structure." Joblon, 91 N.Y.2d at 465. In Joblon, the plaintiff was tasked with extending electrical wiring from an adjacent utility room through a concrete wall to install an electric wall clock. Joblon, 91 N.Y.2d at 461. While feeding the electrical wire through the hole, the unsecured ladder upon which the plaintiff was positioned shifted and he fell backward, sustaining injury. Id. at 462. This Court held that the work performed by the plaintiff constituted protected alteration. Id. at 465.

Here, the plaintiff was doing the opposite – instead of creating a hole, he was covering a hole. There is no logical basis for treating his work differently under the law. Whether a worker is creating a hole or covering a hole, the work constitutes a "significant physical change to the configuration or composition of a

building or structure." Id. at 465; Santiago v. Rusciano & Son, Inc, 92 A.D.3d 585, 586 (1st Dep't 2012)(holding that the task of boarding up windows is covered alteration work).

C. The plaintiff's cleaning was in furtherance of, necessary and incidental to, or an integral part of the completion of repair and/or alteration work.

Lastly, the fact that the plaintiff had not yet started the repair and/or alteration work at the time of his injury is irrelevant.

It has been repeatedly held that the statutory protections of the New York State Labor Law are not only limited to workers engaged in enumerated acts but rather, protection is also extended to workers performing tasks in furtherance of, necessary and incidental to, or an integral part of the completion of the type of work delineated in the language of the statute. See Lombardi v. Stout, 80 N.Y.2d 290, 294 (1992); Palmer v. Butts, 256 A.D.2d 1178, 1178 (4th Dep't 1998); D'Alto v. 22 – 24 129th St., LLC, 76 A.D.3d 503, 505-506 (2d Dep't 2010). The job being performed at the moment of injury does not need to in and of itself constitute construction. Campisi v. Epos Contr. Corp., 299 A.D.2d 4, 6 (1st Dep't 2002).

Indeed, one must look to the general context of the work. Prats v. Port Auth. of N.Y. & N.J., 100 N.Y.2d 878, 882 (2003). "[I]t 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. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts." Prats, 100 N.Y.2d at 882 [emphasis added].

So even if the exact time of injury were to be isolated (which it should not) and even if the removal of a bird's nest is not protected cleaning (which it is), the removal of the bird's nest was in furtherance of, necessary and incidental to, or an integral part of the completion of a repair and/or alteration and as such, the plaintiff is entitled to summary judgment on this separate basis.

Based on the foregoing, even if the Court determines that the plaintiff was not performing protected cleaning at the time of the incident, he is still entitled to partial summary judgment on the issue of liability because he was performing protected repair and/or protected alteration work.

POINT IV

THE DEFENDANT'S REMAINING ARGUMENTS DO NOT WARRANT REVERSAL OF THE APPELLATE DIVISION'S ORDER AFFIRMING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF

The defendant's remaining arguments do not threaten the plaintiff's entitlement to summary judgment. Frankly, they are not even close calls.

Moreover, the remaining issues raised by the defendant are not in question. The issue to be decided on this appeal, as addressed in Points II and III supra, is whether the plaintiff was performing covered work at the time of the injury. But because the defendant raised the arguments, the plaintiff is constrained to respond.

A. EST Downtown is a proper Labor Law defendant.

The defendant argues that it is not a proper Labor Law defendant because it did not contract for the specific work.[9] Defendant-Appellant's Brief at pp. 15. The defendant misconstrues the law.

Labor Law § 240(1) requires owners to sufficiently and properly protect workers performing enumerated activities from elevation-related hazards. N.Y.S. Labor Law § 240(1)("All contractors and owners and their agents . . ."); Ross v. Curtis Palmer, 81 N.Y.2d 494, 500 (1993). The purpose of Labor Law § 240(1) is "to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility." Id. Labor Law § 240(1) seeks to protect workers by placing the ultimate responsibility for safety practices at construction sites on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves. Zimmer, 65 N.Y.2d at 520 citing Koenig v. Patrick Construction Co., 298 N.Y. 313, 318 (1948).

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[9] This defense argument is only made in the context of repair.

Keeping with the underlying purpose of the statute, it 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 whatsoever in the 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, 82 N.Y.2d at 560; Celestine v. City of New York, 86 A.D.2d 592, 592 (2d Dep't 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. Morton, 15 N.Y.3d at 56-57; Fox, 266 A.D.2d at 97.

A review of the relevant case law makes clear that the circumstances under which property owners can avoid Labor Law § 240(1) liability are narrow and arise only in circumstances where the property owner is legally prohibited from preventing contractors from coming on to the property as a result of public benefit laws or where the plaintiff is deemed a trespasser. See Morton, 15 N.Y.3d at 56 citing Abbatiello, 3 N.Y.3d at 51; Scaparo v. Village of Ilion, 13 N.Y.3d 864, 866 (2009). Indeed, by virtue of its status as owner, in every other circumstance the property owner will have the ultimate authority to control the property and thus, any work being performed thereon.

Here, the defendant hired the plaintiff's employer, First Amherst, to serve as

property manager. [R. 402-411]. Per the Property Management Agreement by and between EST Downtown and First Amherst, First Amherst had "full authority and complete responsibility for managing, maintaining and administering the premises." [R. 402]. In addition, the Property Management Agreement provided First Amherst with "all right, power, and authority both express and implied, to act on behalf of or as agent for Owner." [R. 402-403].

Accordingly, there was a legal nexus between the defendant and the work being performed and therefore, EST Downtown is a proper Labor Law defendant.

B. The plaintiff is not a volunteer.

Next the defendant argues that the plaintiff is not entitled to summary judgment because he performed the work gratuitously as a volunteer.[10] Defendant-Appellant's Brief at pp. 16.

Labor Law § 240(1) requires owners to give proper protection to persons "employed." N.Y.S. Labor Law § 240(1). The Labor Law defines an individual "employed" as one who is "permitted or suffered to work" and defines an employee as a "mechanic, workingman or laborer working for another for hire." N.Y.S. Labor Law § 2(5)(7). Thus, to be covered under Labor Law § 240(1), a plaintiff must "demonstrate that he was both permitted or suffered to work on a

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[10] This defense argument is also limited to repair.

building or structure and that he was hired by someone, be it owner, contractor, or their agent." Whelen v. Warwick Val. Civic & Social Club, 47 N.Y.2d 970, 970 (1979). The principle objective and purpose of the Labor Law is to provide for the health and safety of employees. Mordkofsky v. V.C.V. Dev. Corp., 76 N.Y.2d 573, 577 (1990).

If a person is employed, s/he is covered by the Labor Law. On the other hand, a volunteer who offers his/her services gratuitously cannot claim the protection of the Labor Law. Whelen, 47 N.Y.2d at 970. "Consequently . . . an individual does not become an employee covered by Labor Law § 240(1) by providing casual, uncompensated assistance to another person with a repair or construction project in an informal arrangement that does not give rise to mutual duties and obligations between them and bears none of the traditional hallmarks of an employment relationship." Stringer v. Musacchia, 11 N.Y.3d 212, 216-217 (2008). The Labor Law is not intended to make owners strictly liable to family members, acquaintances or neighbors who are injured while assisting in the completion of a home repair or improvement project without compensation because no true employment obligation arises in such situations. Id. at 216.

There is absolutely no interpretation of the evidence which could possibly lead to the conclusion that Mr. Healy was acting as a volunteer. On the date of the

injury, and at the time of the injury, Mr. Healy was employed by First Amherst [R. 94-95], the company hired by the defendant to act as its agent and manage the property [R. 402-403]. He was acting within the scope of his employment with First Amherst and was fulfilling his duties and obligations (repair, maintenance, and responding to work words) for which he was paid by First Amherst. [R. 95-96, 99]. His work was neither casual nor was it uncompensated. There was nothing informal or voluntary about it. In fact, it is conceptually impossible for Mr. Healy, or any other person for that matter, to act as a volunteer when being compensated.

Under these facts, there can be no question that Mr. Healy was employed inasmuch as he was "permitted or suffered to work" and an employee inasmuch as he was "hired by someone, be it owner, contractor or their agent." Whelen, 47 N.Y.2d at 970. In other words, he is not a volunteer and is entitled to the protection of Labor Law § 240(1).

C. The plaintiff's injury was caused by an elevation-related hazard.

The defendant again misconstrues the law in arguing that Labor Law § 240(1) does not apply because the plaintiff's injury did not result from an elevation-related hazard. Defendant-Appellant's Brief at pp. 16-18.

With respect to Labor Law § 240(1), "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either

because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich, 78 N.Y.2d at 514. The statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the 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, 604 (2009) citing Ross, 81 N.Y.2d at 501.

Here, the elevation-related hazard is the height at which the plaintiff was required to perform his work. The elevation-related hazard is what necessitated the use of a safety device – an eight-foot A-frame stepladder. The stepladder did not provide proper protection. Stated differently, it walked causing the plaintiff to fall and sustain injury. Summary judgment under Labor Law § 240(1) was properly awarded.

The fact that the plaintiff was startled by a bird does not change the fact that he was exposed to an elevation-related hazard due to the difference in elevation level between the gutter and the concrete deck below. This elevation difference required a properly constructed, placed, and operated safety device.

Gordon, a case cited by the defendant nonetheless, makes this point clear.

In Gordon, the plaintiff was injured when, while cleaning the exterior of a railroad car with a hand-held sandblaster, he fell off a ladder leaning against the side of the railroad car. Gordon, 82 N.Y.2d at 558. The plaintiff sustained injuries not from hitting the ground but from losing control of the sandblaster and being sprayed in the face. Id. at 560-561. The sandblaster continued to spray sand after he hit the ground due to a defective trigger. Id.

The defendants argued that the plaintiff's injury was not caused by a violation of Labor Law § 240(1) but, rather, the injury was solely caused by the defective sandblaster. Id. at 561, 562.

This Court flatly rejected that defense stating "plaintiff was working on a ladder and thus was subject to an elevation-related risk." Id. at 561. In discussing proximate cause, this Court wrote, "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that [the plaintiff] demonstrate that the risk of some injury from the defendants' conduct was foreseeable." Id. at 562.

This Court concluded that the failure to provide a safe scaffold or ladder was a substantial cause leading to the fall and the injuries. Id. In other words, injury was a foreseeable result of cleaning railroad cars from an elevated position. Id.

Here, like Gordon, injury from falling was a foreseeable risk of cleaning and repairing/altering the gutter from an elevated position and as a result, the plaintiff was exposed to an elevation-related hazard. The plaintiff need not demonstrate that the precise manner in which the accident happened (i.e., a bird startling him) was foreseeable.[11]

Under the law, the defendant was required to construct, place, and operate a proper safety device. The defendant failed to do so.

The cases cited by the defendant are easily distinguishable. In Cohen v. Memorial Sloan-Kettering Cancer Ctr., 11 N.Y.3d 823 (2008), the plaintiff was injured when stepping from the second rung of an A-frame stepladder to the floor. Cohen v. Memorial Sloan-Kettering Cancer Ctr., 50 A.D.3d 227, 229 (1st Dep't 2008). Due to a protruding metal rod, the first rung of the ladder was completely blocked and inaccessible. Id. The plaintiff, therefore, was required to step from the second rung to the floor while descending the ladder. Id. As he stepped from the

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[11] While it is not necessary to demonstrate that it was foreseeable, it is respectfully submitted that the risk of a bird flying from a nest while the nest is being removed is foreseeable and it is foreseeable that a worker could fall from a ladder and sustain injury as a result. The risk is no different than an electrician receiving an electrical shock and falling from a ladder or a laborer being struck by debris and falling from a ladder. The risk of receiving an electrical shock or being struck by debris is not the risk which brings about the need for the safety device. Rather, it is the height at which the work is required to be performed that creates the elevation-related risk and brings about the need for the safety device.

second rung to the floor, his left foot got caught between the second rung and another protruding rod behind the ladder causing his knee to twist and him to fall to the floor. Id. This Court held that the protruding pipes caused the incident – a hazard wholly unrelated to the risk which brought about the need for the safety device. Id.

In Cohen, unlike here, the ladder did not move and the plaintiff did not fall from an elevation as he was working on the ladder. In other words, unlike here, the injury was not the result of the elevation difference between the height at which the work was performed and a lower level but rather, the injury was the result of protruding pipes which caused the plaintiff to trip as he descended the ladder.

In Melber v. 6333 Main Street, 91 N.Y.2d 759 (1998), the plaintiff was installing metal studs in the top of a drywall. Melber, 91 N.Y.2d at 761. In order to reach the height necessary to perform the work, the plaintiff stood on stilts. Id. The stilts supported him without incident while he completed his work. Id. However, at some point, he needed a clamp located some distance away and, without removing his stilts, he walked down an open corridor to obtain the clamp. Id. On the way, he tripped over electrical conduit protruding from an unfinished floor. Id. This Court dismissed the Labor Law § 240(1) cause of action stating

that the injury resulted from a separate hazard (i.e., a tripping hazard) than the hazard the devices listed in the statute were designed to protect against. Id. at 763.

Like Cohen, and unlike the circumstances here, the injury in Melber did not result from an elevation-related risk but rather, from a tripping hazard at ground level. And like Cohen, and unlike here, the safety device did not fail.

In short, the plaintiff's injury was caused by an elevation-related hazard.

D. The fact that the stepladder was not defective is irrelevant.

The defendant's final argument is a red herring. The defendant incorrectly argues that Labor Law § 240(1) does not apply because the plaintiff fell from a non-defective ladder.

Labor Law § 240(1) requires that safety devices be so "constructed, placed, and operated as to give proper protection" to a worker. N.Y.S. Labor Law § 240(1). Indeed, the statutory duty to provide "proper protection" requires devices that are appropriate for the task at hand be adequately placed and operated. Bland v. Manocherian, 66 N.Y.2d 452, 459 (1985); Roberti v. Advance Auto Parts, 55 A.D.3d 1022, 1023 (3d Dep't 2008).

Merely providing a non-defective stepladder is not enough. Evidence that a ladder was structurally sound and not defective is irrelevant on the issue of whether it was properly placed. Woods v. Design Center, LLC, 42 A.D.3d 876,

877 (4th Dep't 2007); Ball v. Cascade Tissue Group-New York, Inc., 36 A.D.3d 1187, 1189 (3d Dep't 2007)(defendant's assertion that the ladder was structurally sound is not relevant on the issue of whether it was properly placed).

Here, the ladder was not properly placed and operated inasmuch as it moved/walked causing the plaintiff to fall to the concrete deck and sustain injuries. It is well-settled that partial summary judgment on the issue of liability under Labor Law § 240(1) is appropriate in cases where, as here, a ladder slips, shifts, tips, or walks as a result of not being properly placed and operated as required by the statute. Klein v. City of New York, 89 N.Y.2d 833, 834-835 (1996); Petit v. Board of Ed., 307 A.D.2d 749, 749 (4th Dep't 2003); Burke v. APV Crepaco, Inc, 2 A.D.3d 1279, 1279 (4th Dep't 2003); Evans v. Anheuser Busch, Inc, 277 A.D.2d 874, 874 (4th Dep't 2000); Dahl v. Armor Bldg. Supply, 280 A.D.2d 970, 970-971 (4th Dep't 2001); Adderly v. ADF Const Corp, 273 A.D.2d 795, 795 (4th Dep't 2000); Mingo v. Lebedowicz, 57 A.D.3d 491, 493 (2d Dep't 2008); McCarthy v. Turner Const., Inc., 52 A.D.3d 333, 333-334 (1st Dep't 2008).

Moreover, it has been consistently held that summary judgment in favor of the plaintiff under Labor Law § 240(1) is warranted where, as here, the provided safety device fails to prevent the plaintiff from falling. See Gordon, 82 N.Y.2d at

561; DelRosario v. United Nations Federal Credit Union, 104 A.D.3d 515, 515 (1st Dep't 2013)(ladder provided to plaintiff inadequate to task of preventing his fall); Vukovich v. 1345 Gee, LLC, 61 A.D.3d 533, 534 (1st Dep't 2009)(ladder inadequate to prevent plaintiff from falling); See also Quackenbush v. Gar-Ben Associates, 2 A.D.3d 824, 825 (2d Dep't 2003)(motion for judgment as a matter of law properly granted where ladder was inadequate to prevent plaintiff from falling); Guillory v. Nautilus Real Estate, 208 A.D.2d 336, 338 (1st Dep't 1995)(directed verdict properly granted where provision and placement of ladder did not prevent the fall).

Like in Gordon, "[i]n this case, plaintiff was working on a ladder and thus was subject to an elevation-related risk." Gordon, 82 N.Y.2d at 561 [internal quotation marks omitted]. The ladder did not prevent the plaintiff from falling; thus the "core" objective of section 240(1) was not met. Id.

The defendant's reliance upon Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003), is misguided.[12] In Blake, the jury found that there was no violation of the statute. Blake, 1 N.Y.3d at 290-291. Furthermore, in Blake,

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[12] The applicability of Blake is, at best, questionable. Blake primarily addresses the issue of sole proximate cause. Nowhere in its brief does the defendant argue that the plaintiff was the sole proximate cause of the incident.

the jury found that the plaintiff, by negligently using the ladder with the extension clips unlocked, was the sole proximate cause of the incident. Id. Here, unlike Blake, the defendant's violation of Labor Law § 240(1) (failure to properly place and operate the safety device) was a proximate cause of the incident. Therefore, unlike the Blake plaintiff, the plaintiff here cannot be solely to blame for the incident. Id. at 290.

The defendant's reliance upon Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914 (1999), is similarly misguided. In Nieves, the plaintiff was injured when, while stepping from the bottom rung of a ladder to a drop cloth covering a carpeted floor, he tripped over a concealed object located underneath the cloth and fell. Nieves, 93 N.Y.2d at 915. This Court held Labor Law § 240(1) inapplicable because the injury resulted from a separate hazard (i.e., tripping hazard) wholly unrelated to the risk which brought about the need for the safety device in the first instance. Id. at 916. The ladder achieved the core objective of the statute by preventing the plaintiff from falling and there was no evidence of instability in the ladder's placement. Id.

Here, unlike Nieves, the stepladder failed to achieve the core objective of Labor Law § 240(1) inasmuch as the plaintiff fell from the ladder. And, unlike Nieves, there is undisputed evidence that the ladder walked/moved and therefore,

was not properly placed.[13]

The applicable case law could not be any more clear. When an individual is working at a height on a ladder, thereby exposed to an elevation-related risk, and the ladder moves or walks causing the plaintiff to fall, Labor Law § 240(1) has been violated because the provided safety device was not properly placed and operated and failed to prevent the fall.

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[13] Nieves is actually more applicable to the defense, addressed in Point IV(C) supra, that the plaintiff was not exposed to an elevation-related risk. The defendant seemingly conflates the two defenses in its Brief.

CONCLUSION

For the reasons stated above, the Court should dismiss the appeal for lack of subject matter jurisdiction because the the order appealed from does not finally determine the action within the meaning of the New York State Constitution. In the alternative, should the Court reach the merits, it should affirm the order of the Appellate Division because the plaintiff was engaged in protected activity when he fell and the defendant's violation of Labor Law § 240(1) was a proximate cause of the incident.

DATED: Buffalo, New York
January 24, 2022

Respectfully submitted,

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ADDENDUM A

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on September 27, 2016.

Present: Hon. Peter Tom, Justice Presiding,
John W. Sweeny, Jr.
Richard T. Andrias
Karla Moskowitz
Judith J. Gische, Justices.

Michael Somereve, et al.,
Plaintiffs-Respondents,

-against-

M-1524
Index No. 150136/12

Plaza Construction Corp.,
Defendant-Appellant.

Defendant-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court entered on February 18, 2016 (Appeal No. 15085),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion, to the extent it seeks reargument, is denied. So much of the motion which seeks leave to appeal to the Court of Appeals is granted, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

CLERK

CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionately spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation (if applicable), the corporate disclosure statement (if applicable), the table of contents, the table of cases and authorities, the statement of questions presented, the certificate of compliance, and any authorized addendum containing statutes, rules, regulations, decisions, cited material, etc., is 11,451.

DATED: Buffalo, New York
January 24, 2022

Jonathan M. Gorski