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September 23, 2021

Clerk of the Court
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

RE: Healy v. EST Downtown
APL-2021-00052

Dear Sir/Madam:

I represent James Healy (hereinafter Mr. Healy or plaintiff-respondent) with respect to the above-referenced matter. Please accept this correspondence as plaintiff-respondent's letter submission under 22 NYCRR 500.11.

As discussed in more detail below, the Court should dismiss EST Downtown, LLC's (hereinafter EST Downtown or defendant-appellant) 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, the order of the Supreme Court of the State of New York Appellate Division, Fourth Department (hereinafter Appellate Division) affirming summary judgment in favor of plaintiff-respondent should be affirmed because plaintiff-respondent was engaged in protected activity under Labor Law § 2401(1) when he fell.

STATEMENT OF THE CASE

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 the gutter). [R. 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 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]. 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 (moved) 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.

B. Procedural History

After discovery, defendant-appellant moved for summary judgment dismissal of the complaint in its entirety. [R. 37-38]. A day later, plaintiff-respondent 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 plaintiff-respondent's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and as a consequence, denied the portion of defendant-appellant'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].

Defendant-appellant 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 plaintiff-respondent 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, defendant-appellant filed a Notice of Appeal asserting that it is entitled to appeal to this Court as of right pursuant to CPLR 5601(a). On the same date, defendant-appellant 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), defendant-appellant 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

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

the order 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.

Under 22 NYCRR 500.11, the parties are invited to submit comments and arguments in support of their respective positions on the merits. This letter is being submitted on behalf of plaintiff-respondent.

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

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 jurisdiction 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." Additionally, 22 NYCRR 500.11(g) states, "[a]n appeal selected for review pursuant to this section is subject to dismissal on the Court's own motion, should it be determined that the Court is without subject matter jurisdiction." Plaintiff-respondent 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 order 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. And 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 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. Arthur 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. Defendant-appellant moved for summary judgment dismissal of the complaint in its entirety. Plaintiff-respondent moved for partial summary judgment on the issue of liability. Defendant-appellant's motion was denied and plaintiff-respondent's motion was granted. The Appellate

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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. See The New York Court of Appeals Civil Jurisdiction and Practice Outline, September 2020, at pp. 41.

Division affirmed. As such, the order of the Appellate Division is facially nonfinal since it left pending the issue of damages thereby contemplating further proceedings/litigation. See generally, 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

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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. See Siegel, N.Y. Prac. § 527 [6th ed. 2020].

the parties entered into an agreement regarding damages, subject to certain conditions being met, depending upon the outcome of the appeal.

In its Notice of Appeal, defendant-appellant referenced the stipulation stating, "the issue of damages having been resolved by stipulation between the parties." Defendant-appellant was required to insert this language into the Notice of Appeal because, as explained in Point I, *supra*, the order, on its face, is nonfinal. By referencing the stipulation, defendant-appellant 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 defendant-appellant'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 to 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 defendant-appellant to appeal as of right but rather, require defendant-appellant to "seek" review by way of a motion for leave to appeal to the Court of Appeals. Defendant-appellant 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 defendant-appellant 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 defendant-appellant.

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

The 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.

Arthur 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, "Once 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 plaintiff-respondent 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 plaintiff-respondent does not execute and deliver a release in a form acceptable to defendant-appellant, 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, defendant-appellant's appeal should be dismissed because the order is not final.

C. Defendant-appellant's reliance on Misseritti and Somereve is misplaced.

In its Jurisdictional Response, defendant appellant 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 order here is final. However, neither case provides support for defendant-appellant's contention.

First, the Appellate Division in Misseritti modified, with two justices

[6] Additionally, plaintiff-respondent 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.

dissenting, the Supreme Court decision to the extent of granting defendant's motion for summary judgment and dismissing 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 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 plaintiff-respondent. As stated above, had the Appellate Division reversed and dismissed plaintiff-respondent'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. Arthur 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, defendant-appellant'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 PLAINTIFF-RESPONDENT WAS ENGAGED IN PROTECTED ACTIVITY UNDER LABOR LAW § 2401(1) WHEN HE FELL

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

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

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

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, 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. 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 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.

Initially, unlike plaintiff in Soto, who was employed by a custodial services

contractor to provide janitorial services including daily dusting of the store after it opened (Id. 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). 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 plaintiff-respondent at the time of his injury. See generally 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 plaintiff-respondent 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. See 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 (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 plaintiff-respondent.

The Appellate Division majority also correctly concluded that the third

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

factor weighed in favor of plaintiff-respondent. Stated differently, the majority correctly 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. 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 defendant in every cleaning case involving an A-frame step ladder.

With respect to the elevation-related risk factor, consider Swiderska, discussed above. In Swiderska, decided prior to Soto, 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 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 plaintiff in Swiderska, and unlike 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 more routine 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 majority and dissent agreed that Mr. Healy's task did not satisfy the other two factors because it did not require the use of specialized equipment or expertise nor the unusual deployment of labor nor did it relate to any ongoing

construction, renovation, painting, alteration, or repair project.[9] However, despite the absence of these two factors, the Appellate Division majority correctly concluded, when viewed in its totality, the work being performed by plaintiff-respondent constituted protected cleaning activity.

Defendant-appellant argues that the Appellate Division's decision constitutes a break from precedent. See Defendant-Appellant's Letter Submission dated September 7, 2021 at pp. 7. Defendant-appellant 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). See 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.

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[9] Plaintiff-respondent respectfully disagrees and submits that his work did involve the unusual deployment of labor inasmuch as he had never performed the task before. [R. 221]. He further submits that his work was related to a larger repair 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]. Alternatively, it is submitted that his 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/covered as part of the prior project. [R. 124, 126]. Part of plaintiff-respondent's task on the date of the injury was to cover/repair the hole. [R. 125, 133, 135].

Ct., Kings County 2009); Pascarell v. Klubenspies, 2007 WL 6001212 (Sup. Ct., N.Y. County 2007).

But in making this argument defendant-appellant 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.

But 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. 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. Plaintiff-respondent while carrying out the nonroutine task was exposed to a significant elevation-related risk for which defendant-appellant failed to provide proper protection. The result in this case is as just as it is correct. Plaintiff-respondent was correctly awarded partial summary

judgment on the issue of liability under Labor Law § 240(1).

In essence, defendant-appellant (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); 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"). In fact, this Court has observed that Labor Law § 240(1) is construed less widely than its text would indicate. Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599, 603 (2009).

The majority's decision not only correctly applies the Soto factors but also keeps with this Court's instruction to interpret the statute as liberal 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 II

DEFENDANT-APPELLANT'S "OTHER" ARGUMENTS DO NOT WARRANT REVERSAL OF THE APPELLATE DIVISION'S ORDER

Defendant-appellant devotes the last few pages of its letter submission to "other arguments raised and not waived by [defendant-appellant]." These arguments only merit brief attention.[10]

First, defendant-appellant argues that plaintiff-respondent was not engaged in a repair as defined under Labor Law § 240(1) at the time of the injury. However, this argument fails because plaintiff-respondent was performing a task in furtherance of, necessary and incidental to, or an integral part of a larger repair/alteration to the gutter system. Prior to the incident, a separate roofing contractor had lined the gutter with a membrane but failed to repair the hole itself which permitted the bird to nest inside the gutter. [R. 124-126]. Plaintiff-respondent was therefore required to remove the nest and cover the hole which was part of the larger repair/alteration project.

In addition, the task of fixing the hole in the gutter through which the bird

[10] For a more thorough analysis and more detailed arguments on these issues, the Court is respectfully directed to plaintiff-respondent's brief.

entered the gutter is itself covered repair and/or alteration work. There can be no dispute that the gutter, with a bird's nest inside resulting in persistent droppings in the tenant's entryway, was "malfunctioning, inoperable, or operating improperly" and therefore, in need of repair and/or alteration.[11]

Second, defendant-appellant argues that it is not a proper defendant because it did not contract for the specific work. Defendant-appellant misconstrues the law.

Here, defendant-appellant, as owner of the property, entered into a Property Management Agreement with plaintiff-respondent's employer and therefore, there was a legal nexus between the owner and the work.

Third, defendant-appellant argues that the fall was not caused by an elevation-related hazard. Again, defendant-appellant misconstrues the law. The elevation-related hazard is the height at which plaintiff-respondent was required to perform his work. The elevation-related hazard is what necessitated the use of a safety device, i.e., an eight-foot A-frame stepladder. The stepladder walked causing plaintiff-respondent to fall and sustain injury. Summary judgment under

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[11] It is respectfully submitted that, whether the work was connected to the larger repair project or not, plaintiff-respondent was engaged in a repair and/or alteration, in addition to cleaning, at the time of the injury and the Appellate Division's order should be affirmed on this separate basis as well.

Labor Law § 240(1) was properly awarded.

Fourth, defendant-appellant argues that because the stepladder was not defective, summary judgment in favor of plaintiff-respondent was improper. Yet again, defendant-appellant misconstrues the law. 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. What's more, the stepladder, even though non-defective, did not serve the core objective of Labor Law § 240(1) – preventing plaintiff-respondent from falling. Gordon, 82 N.Y.2d at 561. Labor Law § 240(1) was violated.

Fifth, defendant-appellant argues that plaintiff-respondent was not entitled to summary judgment because the incident was unwitnessed. This argument should not be considered because it was not raised at the lower court and therefore, not preserved for appellate review. But even if the Court does consider this argument, it should be quickly rejected because the fact that the incident was unwitnessed does not provide a basis to defeat plaintiff-respondent's motion where, as here, there are no bona fide issues of fact with respect to how it occurred.

CONCLUSION

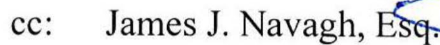
For the reasons stated above, the Court should dismiss the appeal for lack of subject matter jurisdiction because the Appellate Division order does not finally determine the action. In the alternative, if the Court reaches the merits, the Court should affirm summary judgment in favor of plaintiff-respondent on the issue of liability under Labor Law § 240(1) because plaintiff-respondent was engaged in protected activity, i.e., cleaning, when he fell from the stepladder.

Respectfully submitted,

DOLCE FIRM

Jonathan M. Gorski

cc: James J. Navagh, Esq.



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.

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Michael Somereve, et al.,
Plaintiffs-Respondents,

M-1524

-against-

Index No. 150136/12

Plaza Construction Corp.,
Defendant-Appellant.

----------------------------------X

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 letter was prepared on a computer. A proportionately spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14
Line Spacing:	Double

The total number of words in the letter, inclusive of point headings and footnotes and exclusive of corporate disclosure statement (if applicable), status of related litigation statement (if applicable), certificate of compliance, or any authorized addendum containing statutes, rules, regulations, decisions, cited material, etc. is 6,906.

DATED: Buffalo, New York
September 23, 2021

Jonathan M. Gorski

STATE OF NEW YORK
COURT OF APPEALS

JAMES HEALY,

Plaintiff-Respondent,

AFFIDAVIT OF SERVICE

v.

APL – 2021-00052

EST Downtown, LLC,

Defendant-Appellant.

STATE OF NEW YORK)
CITY OF BUFFALO)
COUNTY OF ERIE)

Sherry Hughes, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in Buffalo, New York. On the 23rd day of September 2021, deponent served the within letter submission in the above-entitled action upon James J. Navagh, Esq., Law Offices of John Wallace, P.O. Box 2903, Hartford, CT 06104-2903, the address designated for that purpose by depositing a true copy of the same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
23rd day of September, 2021.

SHAWNA L. BACON
Notary Public, State of New York
Qualified in Erie County
My Commission Expires June 17, 2025

Sherry Hughes