To Be Argued By:
Louis Grandelli
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

MICHAEL CUTAIA,

Plaintiff-Appellant,

against

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, PATRIOT ELECTRIC CORP.,

Defendants,

and

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC., MICHILLI INC.,

Defendants-Respondents.

(Additional Caption on the Reverse)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third-Party Plaintiffs-Respondents,

against

A+ INSTALLATIONS CORP.,

Third-Party Defendant-Respondent.

160/170 VARICK STREET CONDOMINIUM, IMPROPERLY NAMED AS BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Second Third-Party Plaintiffs,

against

THE TRAVELERS COMPANIES, INC. d/b/a TRAVELERS INSURANCE COMPANY
485 Lexington Avenue New York NY 10017,

Second Third-Party Defendants.

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third Third-Party Plaintiffs,

against

ATLAS-ACON ELECTRIC SERVICE CORPORATION,

Third Third-Party Defendant.

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Fourth Third-Party Plaintiffs,

against

FIRST QUALITY MAINTENANCE II, LLC and ALEXANDER WOLF & SON,

Fourth Third-Party Defendants.

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Michael Cutaia ("Cutaia"), submits this reply brief in response to the briefs submitted by the Defendants-Respondents, The Rector, Church Wardens and Vestrymen of Trinity Church in The City of New York ("Trinity Church"), Michilli Construction, Inc. and Michilli, Inc. (collectively "Michilli"), and Third-Party Defendant-Respondent, A+ Installations Corp. ("A+"), and in further support of his Appeal from the Decision of the Supreme Court of the State of New York (Edmead, JSC), dated August 8, 2018 which denied plaintiff's motion seeking summary judgment on his Labor Law §240(1) claim, and plaintiff's request that this Court modify the Supreme Court's holding that Cutaia be granted summary judgment due to the defendants' violation of Labor Law §241(6), as the Court did not specifically determine that Cutaia was not comparatively negligent.

Assuming familiarity with the briefs and the record before this Court, we respond directly to the arguments raised by the respondents in their respective briefs.

Labor Law §240(1)

The respondents' argument that an electrical shock to a worker who is working at an elevated height is an unforeseeable risk which requires distinct treatment under Labor Law §240(1) is meritless. There is nothing in the statute providing any indication whatsoever that the legislature intended to carve out such an exception, and, as in any §240(1) case, the statute is to be liberally construed with

the focus on whether the plaintiff was protected from the "pronounced risks arising from construction work site elevation differentials". (Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 [2009]).

While we agree with the proposition that the mere fact that a ladder falls, standing alone, does not provide a basis for granting summary judgment under §240(1) when the record contains a question of fact as to whether the failure of the ladder was a proximate cause of the incident, in this case there is no doubt whatsoever that the ladder provided to Cutaia was inadequate to provide him with the protection required by the statute. Notwithstanding the respondents' attempts to muddy the waters, the following material facts are undisputed: 1) Cutaia was not provided with a proper safety device, such as a manlift or bakers' scaffold, which would have enabled him to perform his work from a secure platform with railings; 2) the A-frame ladder provided to Cutaia needed to be folded and leaned against the wall in order to access his work area because it could not be used in an open and locked position; 3) the ladder failed in its core purpose of preventing Cutaia from falling from an elevated height after receiving an electric shock; 4) Cutaia was not provided with a harness or safety belt, and the ladder was not anchored or secured; 5) the wire that electrocuted Cutaia was not "de-energized" or properly insulated; and 6) no warnings of an electric hazard were given to plaintiff prior to the incident.

The Supreme Court's determination that Cutaia did not establish a prima facie case under Labor Law §240(1) is completely undermined by the record, as there is an absence of *any* evidence sufficient to raise a material issue of fact as to whether the ladder provided to Cutaia was an adequate safety device for his task. In order to rebut Cutaia's proof that the defendants violated §240(1), the respondents were required to show that an appropriate safety device was provided to Cutaia which would have protected him from the elevation-related hazard. (Angamarca v. Silverstein Properties, 16 A.D.3d 242 [1st Dept. 2005]). However, in opposition to plaintiff's brief, both respondents provide submissions which merely raise feigned issues of fact, which are either inaccuracies, or completely irrelevant to a Labor Law §240(1) inquiry. Most importantly, the respondents have not made any evidentiary showing that the subject ladder was adequate for Cutaia's task, or rebut the opinion of plaintiff's expert that a manlift, scaffold, or alternative safety device was required for Cutaia to safely access his work area.

[a]

The respondents rely upon the baseless argument that Cutaia is required to prove that the failure to provide adequate safety equipment was *the* sole proximate cause of the accident. However, it is well-known that the statutory violation need merely be *a* proximate cause of the accident, not necessarily the sole cause. (Hernandez v. Bethel United Methodist Church of NY, 49 A.D.3d 251 [1st Dept.

2008]). As set forth by the Court in Blake v. Neighborhood Hous. Servs. of NY City Inc., 1 N.Y.3d 280 [2003]), while a plaintiff's actions could constitute the sole proximate cause of his accident, such a finding is conceptually impossible where plaintiff has established a violation of §240(1) which led to his injury. In addition, as this Court noted in Pardo v. Bialystoker Center & Bikur Cholim, Inc., 308 A.D.2d 384, 385 (1st Dept. 2003):

> "A plaintiff under Labor Law §240(1) need only show 'that his injuries were at least partially attributable to defendant[s'] failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential'...[since] [t]here may be more than one proximate cause of a workplace accident." (Internal citations omitted).

In Hoffman v. SJ PTS, LLC, 111 A.D.3d 467 (1st Dept. 2013), the plaintiff, a glazier, was provided a scissor lift to perform caulking in a glass lobby. However, because of the "V-shape" of that portion of the lobby, the workers could not place the lift directly adjacent to the windows, leaving a gap of about three feet between the workers and the space they needed to access. This resulted in the need for the plaintiff to lean out over the lift's railing resulting in his fall. Under these facts, this Court held,

> "While there was no defect in the device, it was clearly inappropriate for the task at hand in light of the configuration of the building. Defendants' argument that triable issues exist as to whether plaintiff was the sole proximate cause of the accident, is unavailing, since they failed to provide an adequate safety device in the first instance." Id. at 467 (internal citations omitted).

Similarly, in Crimi v. Neves Assoc., 306 A.D.2d 152 (1st Dept. 2003), this Court affirmed the granting of the plaintiff's summary judgment motion on the issue of liability under §240(1) where the plaintiff fell from a permanently affixed ladder, which was the only means of gaining access to his elevated work site. Under these facts, this Court determined:

> "Because the record demonstrates plaintiff fell down a steep ladder with very narrow rungs, 'there is no question that his injuries were at least partially attributable to defendant[s'] failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law 240(1) were established.'" Id. at 153.

[b]

In the present case, the respondents are also relying heavily on the premise that the electric shock to Cutaia was an unforeseeable and superseding cause of the incident absolving them of liability. However, we need to look no further than the numerous cases cited by the parties herein which illustrate that an electric shock to a construction worker is a foreseeable occurrence. The potential danger of an electric shock was especially present in this case as the evidence demonstrates that there was a hazard posed by the electrical system in Cutaia's work area which the defendants were on notice of. Michilli's project manager claimed that he inspected the electrical wiring in the ceiling several months before the incident and acknowledged that it was not permissible to use that type of wiring for construction work. (R.1168-1172). Despite this, Michilli's project manager did not recall conducting any safety

inspection of the subject room on the date of incident. (R.1174-1175, 1187, 1236-1237). Moreover, while the electrical wiring had caps, there was no tape used to secure the caps in violation of industry standards. (R.1221-1222, 1238 and 1688-1689). Indeed, the electrical contractors' foreman inspected the area after the incident and noted that the manner in which the electric wires were permitted to exist in the area without any caution tape constituted a "dangerous condition". (R.1461-1463, 1514-1515 and 1520-1523).

In view of this evidence, the Supreme Court properly determined:

> "A clear of violation of both 12 NYCRR 23-1.13(b)(3) and 12 NYCRR 23-1.13(b)(4) is present here. The record shows that defendants did not investigate the work area for potential electrical hazards, or warn plaintiff of such hazards in violation of 12 NYCRR 23-1.13. Nor, in violation of 12 NYCRR 1.13(b)(4), did defendants take steps to protect plaintiff from the uncapped wire involved in his accident by de-energizing, grounding, or guarding it".

(R.23).

In addition to the dangerous condition posed by the defective electrical system, Cutaia's work also entailed the risks posed by working at an elevated height, and performing tasks including cutting pipes with hand tools, cleaning and fluxing a pipe, then inserting a "T" into the pipe, before moving the pipes together with both hands, at which time he was electrocuted. All of this work had to be done while Cutaia stood on an unsupported and folded A-frame ladder since it was the only piece of equipment provided to him to access the area. As noted by the Court in

Felker v. Corning Inc., 90 N.Y.2d 219 (1997), there may be more than one risk associated with construction work at an elevated height. In Felker, one of the risks to the worker involved the danger posed by the plaintiff's need to reach over an elevated, open area to do his work. As the worker attempted to access his area, he fell from a ladder over the wall of the alcove and through a suspended ceiling. Under these facts, the Court stated:

> "It is the contractor's complete failure to provide any safety device to plaintiff to protect him from this second risk of falling over the alcove wall and through the suspended ceiling to the floor below that leads to liability under Labor Law §240(1) in this case". (Internal citations omitted). Id. at 224.

Here, it is abundantly clear that an accident related to the defective electrical system at this construction site was not so unforeseeable to constitute a "superseding act" relieving the defendants of liability. The decision by the Court in Gordon v. Eastern Railway Supply Inc., 82 N.Y.2d 555 (1993), is also instructive on this issue. In Gordon, the Court granted the plaintiff's motion for summary judgment under §240(1) as the facts show that as he was using a sandblaster with a defective trigger, the ladder the plaintiff was standing on tipped over. While the injuries the plaintiff sustained were due to being sprayed with sand from the sandblaster, rather than the fall, the Court nevertheless held that Labor Law 240(1) applied, and stated:

> "In this case, plaintiff was working on a ladder and thus was subject to an 'elevation-related risk.' The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240(1) was not met. Accordingly, plaintiff is within the protection of the statute if his injury

> was proximately caused by the risk, i.e., defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Id. at 561.

As in the instant case, wherein the respondents are arguing that the live electrical wire was the proximate cause of the incident absolving them of liability under 240(1), in Gordon, supra, the Court noted "In essence, they contend that the sandblaster was a superseding cause of plaintiff's injuries, completely independent of defendant's violation of the statute." Id. In rejecting this argument, the Court held:

> "Defendants are liable for all normal and foreseeable consequences of their acts. To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate the risk of some injury from defendants' conduct was foreseeable. An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them." Id. at 561-562.

Further, in Montalvo v. J. Petrocelli Constr. Inc., 8 A.D.3d 173 (1st Dept. 2004), the plaintiff and his co-worker were installing duct work for an HVAC system. The plaintiff was standing on an A-frame ladder approximately 6 feet above the floor, holding a device known as a "plenum". As the plaintiff held the plenum, his co-worker was standing on another ladder using a mechanized tool to cut a hole in it. The plenum, which weighed 40 to 50 pounds, then came loose from the plaintiff's grasp and fell hitting both the ladder and the plaintiff, resulting in the ladder shaking and causing the plaintiff's injuries. Under these facts, this Court held:

> "Nor does the fact that the accident was precipitated by the falling plenum eliminate Petrocelli's negligence as a proximate cause of Montalvo's accident.... Likewise, because the actions of Montalvo and his co-worker with respect to the plenum in this case were not a superseding cause under the circumstances, proximate cause is established as a matter of law." Id. citing Blake v. Neighborhood Hous. Servs. of NY City Inc., 1 N.Y.3d 280, 290 (2003).

Similarly, in Dasilva v. A.J. Contracting Co., 262 A.D.2d 214, 214-215, (1st Dept. 1999), the plaintiff fell off an unsecured ladder when a section of pipe he was cutting fell off and hit the ladder. In granting plaintiff partial summary judgment on liability on his Labor Law §240(1) claim, this Court held that "[t]he striking of the ladder by a pipe cut...was not such an extraordinary event as to constitute a superseding cause and, accordingly, it cannot be said that plaintiff's actions in cutting the pipe were the sole proximate cause of his injuries."

[c]

Here, in considering Cutaia's §240(1) claim, the Supreme Court erroneously evaluated the issue of causation of plaintiff's injuries as it relates to the electrical shock and plaintiff's fall from the ladder. In this connection, after granting Cutaia summary judgment under Labor Law §241(6), the Supreme Court discussed Cutaia's §240(1) claim, and stated:

> "The electrical shock, and defendants' violation section 241(6), is clearly a proximate cause of all of plaintiff's injuries, as the electrical shock both preceded and caused the fall. However, it is less clear which injuries plaintiff would have been sustained, even without the fall by the electrical shock itself. As plaintiff has not shown, or endeavored to show, that the fall alone caused any of his injuries, he has not made a

> *prima facie* showing as to proximate causation. Thus, the branch of plaintiff's motion seeking partial summary judgment as to liability under Labor Law §240(1) must be denied."

(R.25).

In this case, it is evident that the burns sustained by Cutaia are attributable to the electrical shock and the injuries to his shoulders and spine resulted from his fall from the ladder onto the ground. However, the Supreme Court applied an improper analysis of the plaintiff's burden under §240(1) in view of settled precedent from this Court that the question of which injuries were caused by electric shock versus those caused by a fall to the ground goes to the issue of damages, not liability.[1] (See O'Leary v. S&A Elec. Contr. Corp., 149 A.D.3d 500 [1st Dept. 2017]).

[d]

The contention by A+ that this Court's holdings in Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 (1st Dept. 2009) and Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 (1st Dept. 2013) were "overturned" by the Court of Appeals in Nazario v. 222 Broadway, LLC., 28 N.Y.3d 1054 (2016) is simply not true, and A+ completely ignores the point made in Cutaia's brief that the trial courts have continued to cite these cases as controlling the law. (Wolodin v. Lehr Construction Corp., 2017 WL 3263217 [Sup. Ct. NY Co. 2017]; Kim v. E. 7th ISS LLC, 2017 WL

[1] Clearly, should Cutaia prevail on his Labor Law §240(1) claim, the defendants are still free to argue at trial that his injuries are not causally related to their violation of the statute.

5513327 [Sup. Ct. NY Co. 2017]; and Rivera v. Home Depot USA Inc., 312 F. Supp.3d 406 [S.D.N.Y. 2018]). In addition, the respondents fail to discuss Wolodin, supra, where the Court observed that the decision in Nazario:

> "Does not constitute a 'change in law'. ...Rather, the Court of Appeals determined that, under the specific circumstances of that case, there were triable issues of fact as to whether the particular ladder provided to the plaintiff there was sufficient to protect him from the effects of gravity after he received an electric shock".

The respondents' reliance upon Jones v. Nazareth College of Rochester, 147 A.D.3d 1364 (4th Dept. 2017), is misguided as that case is easily distinguishable. While the facts in Jones, supra, are scant, there is a notable absence of any discussion as to whether the worker could have opened the subject A-frame ladder in the space provided to perform the subject task. In addition, there is no evidence that the ladder being used by Jones actually fell to the ground. In contrast, here it is undisputed that Cutaia could not access his work area with the ladder in an open and locked position, and that the ladder fell to the ground at the same time as Cutaia after he received an electric shock. Further, unlike here, it is critical that the Jones plaintiff failed to provide any expert opinion supporting his argument that the defendants failed to provide adequate safety devices as required by Labor Law §240(1).

[e]

Although the respondents argue that "Cutaia has identified no defect" in the ladder, the facts prove that the ladder was unsecured and inadequate for his task. As

this Court has noted, even if there is no defect with the ladder, per se, where the furnished protective device fails to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to summary judgment under Labor Law §240(1). (Cruz v. Turner Construction Company, 279 A.D.2d 322 [1st Dept. 2001]). Thus, the defendants' argument that the ladder was sufficient since Cutaia believed it was "sturdy" is baseless, as it was obviously not sturdy enough to prevent him from falling to the ground after receiving an electric shock, and plaintiff's expert's uncontested opinion is that:

> "Cutaia should have been furnished with a more stable device equipped with a platform and rails, such as a baker scaffold or man lift. Had Cutaia been provided with a scaffold, or other appropriate device for his work, he would have been protected from falling to the ground when he received an electric shock."

(R.1848).

In support of its assertion that this Court's holding in Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580 (1st Dept. 2017) is distinguishable from the facts present here, A+ advances the non-sensical assertion that "The important distinction in [Faver] was that the plaintiff was not electrocuted and there was no question of fact that the unsecured ladder was the cause of his fall". However, this argument is wholly without merit as similar to here, in Faver, there was a precipitating event, an electric wire which hit the worker in his arm, that caused the unsecured ladder he was standing on to wobble, resulting in the plaintiff losing his

balance and falling to the ground. This is essentially what happened to Cutaia as he only lost his balance, causing him and the ladder to fall to the ground, after he sustained an electric shock. These facts are also materially the same as the other cases relied upon by plaintiff, which the respondents fail to distinguish, such as Messina v. City of New York, 148 A.D.3d 493 (1st Dept. 2017) where the worker applied pressure to the ladder he was standing on while trying to remove a part of the drop ceiling he was demolishing resulting in the accident, and the worker in Plywacz v. 85 Broad Street LLC, 159 A.D.3d 543 (1st Dept. 2018) who lost his balance, causing the ladder he was using to wobble, when the suction cup he had affixed to the panel came loose. Under all of these scenarios, including the facts present here, there was a foreseeable external force which caused the worker to lose his balance, and the subject ladder failed to remain steady and protect the plaintiff from falling as he performed a task at an elevated height.

[f]

The argument by A+ that "there is a question of fact whether it was the unsecured ladder that caused a fall, or the jolt of electricity which coursed through his body, which irrespective of the unsecured ladder, propelled him off the ladder" is based upon nothing more than pure speculation. There is no evidence whatsoever that Cutaia was "propelled" off the ladder, and the only evidence is that both Cutaia and the ladder both fell to the ground at the same time after he received the electric

shock, and this was admitted by Michilli's project manager who arrived at the scene a moment later and observed the ladder on the floor directly under the pipes Cutaia was working on. (R.1239-1241). The fact that Cutaia has no memory of falling to the ground along with the ladder is irrelevant. (See Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 [1st Dept. 2009]). Michilli's project manager also conceded that Cutaia's co-worker immediately stated after the incident that the ladder Cutaia was using, "Slid from under him". (R.1159, 1167). Moreover, Cutaia's testimony that when he landed on the floor he was a few feet from the ladder also undermines the "propulsion theory" advanced by A+. (R.539). Thus, the assertion that Cutaia was "propelled" to the floor, and that the ladder somehow fell to the floor on its own within that one moment, is pure conjecture, and is irrelevant to the §240(1) analysis.

[g]

The defendants' assertion that "plaintiff's own self-serving testimony" is the only proof that the area he was working on was too small to open the ladder is a distortion of the record. Similarly, A+ has no support for its argument that a manlift or scaffold could not be used "in the tight space of the bathroom where plaintiff could not even open an A-frame ladder". The facts demonstrate that these assertions are completely untrue as Cutaia was easily able to open the ladder anywhere in the room prior to the subject task, but he simply could not access the pipes in the ceiling

adjoining the wall with the ladder open. In fact, there is no evidence to dispute Cutaia's testimony that:

> "Originally I tried to - I opened the ladder and I was trying to position it where I could get it to the pipe that I was working on, but I couldn't. So I had to fold the ladder and lean it up against the wall and that's what I did".
>
> (R.490).

Moreover, when asked whether Cutaia could access the pipes in this area with the ladder in an open position, Michilli's project manager stated "I don't know". (R.1186-1187). Further, the defendants provide no evidence to controvert Cutaia's testimony that at no time prior to the incident did anyone instruct Cutaia not to fold up the ladder and lean it against the wall in order to access the area, and Michilli's project manager even admitted he was aware that "sometimes they leaned it on the wall to get close to the wall". (R.884, 1241).

In the same vein, A+ argues that plaintiff's expert does not address whether a scaffold or manlift "would have fit in such a confined space", but the unsupported assertion by its counsel conveniently ignores the statement by the plaintiff's expert that he reviewed all of the evidence in the record which shows that the subject bathroom was large enough to contain two sinks, two toilets and a urinal. (R.1142, 1847). This evidence also included the floor plan attached to the subject lease and photographs of the room annexed to the plaintiff's submission which clearly show the room was not the "confined" or "tight" space that A+ disingenuously asserts it

is. (R.1095 and 1791-1798). In addition, Cutaia described the length of the subject room as being approximately 15 to 20 feet, and that just before his last task, Cutaia moved the ladder approximately five to seven feet so that he could perform his work in that area. (R.489-490, 527 and 737).

[h]

Although A+ argues that the plaintiff's expert does not cite any codes or regulations requiring the protective measures he recommends should have been taken, this Court has held that it is not necessary to show that a rule or regulation was violated in order for a plaintiff to establish that the defendants violated §240(1). (Orellano v. 29 E. 37th St. Realty Corp., 292 A.D.2d 289, 290 [1st Dept. 2002]). As this Court stated in Orellano:

> "Regardless of the precise reason for his fall or whether Orellano acted negligently, or whether defendants were in complete compliance with the Industrial Code, Orellano is entitled to summary judgment on the Labor Law §240(1) claim".

In fact, A+ has been unable to distinguish the numerous cases cited by the plaintiff involving essentially similar circumstances where it has been held that the failure to provide a secured ladder, or protective device such as a harness or safety belt violates the statute without having to prove that an OSHA or Industrial Code regulation was violated. (Wasilewski v. Museum of Modern Art, 260 A.D.2d 271 [1st Dept. 1999], Bonanno v. Port Auth. of NY & NJ, 298 A.D.2d 269 [1st Dept. 2002], and Deng v. A.J. Contracting Co., Inc., 255 A.D.2d 202 [1st Dept. 1998]).

Once again, the respondents fail to contest plaintiff's expert's opinion that in the absence of a manlift or scaffold, at the very least, the ladder should have been supported or secured in some fashion, and that Cutaia should have been supplied with an additional safety device such as a safety belt or harness. The respondents have not submitted any evidence, expert or otherwise, to rebut Mr. Fuch's opinions regarding these industry standards and their reliance on their attorneys' affirmations are insufficient to raise a bona fide issue of fact.

[i]

In support of its misguided argument premised on the applicability of OSHA violations, A+ also relies upon OSHA §1926.1053(a)(19) and a January 13, 2000 OSHA Standard Interpretation letter, but this section and OSHA's interpretation of its requirements are not applicable to the facts of the present case. In this regard, while A+ goes to great lengths to criticize plaintiff's expert affidavit regarding OSHA requirements for "fixed ladders" versus "portable ladders", its argument is based upon the incorrect premise that the subject A-frame ladder was being used as intended, to wit, in an open and locked position. However, 29 CFR 1926.1053(b)(4) demonstrates that the OSHA guidelines under 1926.1053 are only applicable to ladders which are only used for the purpose for which they were designed. Indeed, while counsel for A+ contends that OSHA only requires safety harnesses and lifelines be provided with the use of a fixed ladder when the height exceeds twenty-

four feet, he wholly ignores that the plaintiff was compelled to utilize an A-frame ladder in a closed position to access his work area and could not use it in an open and locked position. Moreover, A+'s argument is based on the incorrect premise that OSHA is the exclusive source for construction industry standards. Accordingly, the OSHA regulations discussed by A+ are immaterial to the Labor Law §240(1) inquiry in this case.

[j]

Similarly, the defendants' argument that a material issue of fact is raised by Michelli's project manager's denial that he had a conversation with Cutaia about the adequacy of the ladder is completely irrelevant as the defendants admittedly failed to ensure proper safety equipment was provided to Cutaia, and, in fact, denied that they were required to do so. In addition, contrary to the defendants' assertion, the issue of whether the subject ladder had black non-skid surfaces at the bottom is unclear (R. 476, 479, 1202), but even, assuming arguendo, that this was accurate, it is irrelevant here as the ladder was clearly an inadequate safety device for Cutaia's task. Lastly, the defendants' argument that the plaintiff's use of the ladder by leaning it against the wall is a "misuse of the ladder" is immaterial to the §240(1) analysis in this case as his conduct is not an issue. As this Court explained in Nacewicz v. Roman Catholic Church of the Holy Cross, 105 A.D.3d 402-403 (1st Dept. 2013):

> "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence

> that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained".

[k]

Labor Law §241(6) - The Affirmative Defense of Culpable Conduct

In opposition to the plaintiff's request that this Court modify the Supreme Court's determination that the defendants violated Labor Law §241(6), and hold that the plaintiff was not comparatively at fault, the defendants incorrectly argue that any plaintiff who is successful in obtaining summary judgment on his or her Labor Law §241(6) claim, is still subject to a comparative negligence charge at trial "[w]here he has proffered no evidence exonerating himself of any negligence". However, the respondents inexplicably ignore the recent Court of Appeals' decision in Rodriguez v. City of New York, 31 N.Y.3d 312 (2018) which unequivocally demonstrates that it is the defendants' burden to prove that a plaintiff was comparatively at fault.

Thus, while a worker who establishes a violation of §241(6) may still be subject to a comparative negligence charge at trial if there is evidence that the worker was at fault, here, there is not a scintilla of evidence that Cutaia was negligent. More specifically, the defendants have not proffered any evidence proving that Cutaia, who had no OSHA or formal construction safety training, violated any instructions or failed to use equipment that he was instructed to use. Further, the defendants do not

rebut the evidence establishing that Cutaia was not warned that there was a potentially dangerous condition in his work area due to the defective electrical system.

Significantly, the defendants fail to distinguish the numerous cases relied upon by Cutaia where this Court found that the defendants were liable as a matter of law under Labor Law §241(6) when a violation of the statute was established, and there was no evidence of the plaintiff's comparative fault. (O'Leary v. S & A Elec. Contracting Corp., 149 A.D.3d 500 [1st Dept. 2017], Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603 [1st Dept. 2017] and Capuano v. Tishman Construction Corporation, 98 A.D.3d 848 [1st Dept. 2012]).

In their brief, for the first time[2], the defendants make the unsubstantiated assertion that Cutaia was at fault as he was "working without protective gloves in close proximity to electrical wires which he knew were present and readily apparent...". However, by the admission of Michilli's project manager, and plaintiff's supervisor, as a plumber, Cutaia was not required to wear protective gloves while performing this work. (R.783-784, 866, 875 and 1192). Furthermore, the defendants' reliance on Lorefice v. Reckson Operating Partnership, 269 A.D.2d 572 (2d Dept. 2000) is entirely misplaced as in that case, the plaintiff-electrician had "full knowledge" of the risks of an electrical shock at his work site and failed to use

[2] The defendants did not argue that the plaintiff was required to wear gloves in the Supreme Court. (R. 1880-1892).

a readily available insulated mat. In the instant case, Cutaia is an unlicensed plumber, not an electrician, and was not warned of the potentially dangerous condition in the ceiling, or provided with safety devices which he refused to use.

[I]

Contrary to the defendants' argument that the plaintiff never specifically petitioned the Supreme Court for a determination that he was not negligent as a matter of law in support of their assertion that this issue has not been preserved for appellate review, we, in fact, requested that the trial court determine that the defendants be held liable as a matter of law for their violation of §241(6) since there was no evidence in the record of Cutaia's culpable conduct. Specifically, in both of our underlying motion and reply affirmation, after citing numerous precedents from this Court in support of our argument that the defendants be held liable as a matter of law under the statute, the plaintiff argued that:

> "Simply stated, there is no evidence in the record that plaintiff was not careful. While plaintiff may have been aware that electrical wires were in the ceiling, he certainly was not aware that the live wires were not 'safed-off' or that they were in dangerous proximity to the copper pipes he was working on. Thus, there is no relationship between plaintiff's knowledge that electrical wires were present above the ceiling and comparative negligence."

(R.78).

Further, in our reply affirmation we relied upon O'Leary, supra, and specifically argued as follows:

> "The Court rejected the owner's contention that an issue of fact existed as to plaintiff's comparative negligence since plaintiff had objected to having temporary lighting work performed in the manner it was done, but plaintiff was overruled. Although we acknowledge Cutaia did not make any complaints about the electrical system prior to the incident, there is simply no evidence that Cutaia was warned, or in any way put on notice, that there was a potential electrical hazard in the work area. Therefore, similar to the workers in Rubino, supra, Del Rosario, supra, and Lodato, supra, in this case, Cutaia was simply acting in accordance provided to him by his supervisor at A+ Installations and the general contractor, and there is not a scintilla of evidence that he acted unreasonably or was comparatively negligent in any way."

(R.1911-1912).

As demonstrated by this Court's decisions in Rubino, supra and O'Leary, supra, Cutaia was not required to affirmatively move to dismiss the affirmative defense of culpable conduct as this Court will search the record and make that determination based on the evidence. (See also Once v. Service Center of N.Y., 96 A.D.3d 483 [1st Dept. 2012]; Hayden v. 845 UN Ltd. Partnership, 304 A.D.2d 499 [1st Dept 2003]). Significantly, in this case while the Supreme Court relied upon this Court's holdings in O'Leary and Rubino in finding that the defendants violated Labor Law §241(6), the Court did not address Cutaia's argument that the Court should also determine that he was not comparatively negligent in accordance with these precedents. In fact, there was no discussion whatsoever in the Court's

opinion, or any factual determinations, showing that Cutaia was comparatively negligent.[3]

The defendants' reliance on Scheemaker v. State of New York, 70 N.Y.2d 985 (1998) and Wittorf v. City of New York, 144 A.D.3d 493 (1st Dept. 2016) are entirely misplaced. Both cases involved a different procedural posture than what is involved here as both appeals were from the apportionment of fault found at trial, not following summary judgment. Moreover, the facts of both cases are easily distinguishable. In Wittorf, supra, the plaintiff made no argument to the Supreme Court that she was not comparatively negligent, as she did not move for a directed verdict at the close of the evidence, and accordingly, her argument on appeal was unavailing. However, the Court in Wittorf did, in fact, review the evidence and found that the apportionment at trial was fairly supported by the verdict. In contrast, in the instant case, the plaintiff moved for summary judgment on liability under §241(6) and argued to the Supreme Court that he was not comparatively at fault, and the evidence demonstrates that he is not comparatively negligent. Furthermore Scheemaker, supra, has absolutely no bearing on the instant case, and there the Court

[3] While the defendants set forth in their brief that the parties were informed by "the Court" that a plaintiff who prevails on summary judgment under Labor Law §241(6) is still subject to comparative negligence charge at trial, it should be noted that the parties did not meet with Justice Edmead at this August 7, 2018 conference, and these discussions were held with a court assistant who identified himself as "John". Notably, the actual decision is completely silent on this issue and Justice Edmead did not hear oral arguments on the motion.

merely prevented the appellant from bringing up a completely new legal theory for the first time on appeal.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that this Court should issue an Order granting Cutaia partial summary judgment on the issue of liability under Labor Law §240(1), and determine that the plaintiff was not negligent as a matter of law as it relates to the defendants' violation of Labor Law §241(6), and grant any other relief this Court deems just, proper and equitable.

LOUIS GRANDELLI

PRINTING SPECIFICATIONS STATEMENT

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