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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



MICHAEL CUTAIA,

Plaintiff-Appellant-Respondent,

against

THE BOARD OF MANAGERS OF THE
160/170 VARICK STREET CONDOMINIUM,

Defendant-Respondent,

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

Defendants-Respondents-Appellants,

and

PATRIOT ELECTRIC CORP.,

Defendant.

(Additional Caption on the Reverse)

BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third-Party Plaintiffs,

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 (“plaintiff” or “Cutaia”), submits this Brief in connection with the present Appeal taken from the portion of the Order/Decision and Amended Order (hereinafter “Decision”) of the Supreme Court, New York County (Edmead, JSC), dated August 3, 2018 and August 8, 2018, respectively, which denied plaintiff’s motion for summary judgment on his Labor Law §240(1) claim. Cutaia also seeks modification of the Court’s holding that the defendants, 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”), violated Labor Law §241(6), as the Court did not specifically determine that Cutaia was not comparatively negligent.

This is an action sounding in negligence and violations of the Labor Law involving an accident which occurred when the plaintiff was performing plumbing work in the ceiling of a bathroom at a construction site and was caused to fall from an unsecured A-frame ladder after receiving an electric shock due to an electrical hazard in his work area. On the day of the incident, March 26, 2012, Cutaia was working on a renovation project in a building owned by Trinity Church. Michilli is a construction company which leased a portion of the eleventh floor in the building for its corporate office, and was acting as general contractor for renovation of its space. The plaintiff’s employer, third-party defendant, A+ Installation Corp. (“A+”),

was retained by Michilli to do plumbing work for the project, including in the men's bathroom where the accident occurred.

At the time of the incident, Cutaia was assigned a task involving the rerouting of copper pipes in the ceiling of the room in order to move a sink. The pipes the plaintiff had to work on were approximately ten feet above ground level and located on the far end the room adjoining a wall. The only equipment provided to Cutaia to perform work at an elevated height was an A-frame ladder. The plaintiff initially attempted to reach the pipes with the ladder in an open and locked position, but was unable to access the area. Accordingly, due to the absence of an appropriate safety device such as a manlift or scaffold, the only way Cutaia could perform his task was to fold the ladder and lean it against the wall.

Just prior to the incident, Cutaia was on the ladder cutting and soldering pipes in the ceiling with hand tools. The ladder was not supported by anyone or secured in any manner, nor was Cutaia provided with a harness or safety belt. When he attempted to connect both ends of the pipe by pushing them together with his hands, he received an electric shock due to an uninsulated live wire in the vicinity of the pipes, causing him and the ladder to fall to the ground. Immediately after the incident, the general contractor's project manager came to the scene and observed that one of the electrical wires next to the pipes was not properly insulated as it was missing a "cap". Michilli's project manager also observed the subject A-frame

ladder on the floor in a folded and closed position under the pipes plaintiff had been working on. As a result of the incident, Cutaia sustained electric burns from the shock, as well as severe injuries to his neck, back and shoulders which resulted in the need for five operative procedures that were caused by his fall to the ground.

In support of his motion for summary judgment to the Supreme Court, Cutaia submitted an uncontested affidavit from an expert who observed that the evidence showed, “Cutaia could not access his work area in the ceiling with the A-frame ladder in an open and locked position”, and that,

“Considering the nature of the work...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.”

As detailed below, the evidence supporting Cutaia’s §240(1) claim demonstrate that the following 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.

These uncontroverted facts establish a *prima facie* violation of Labor Law §240(1). In opposition to Cutaia’s motion, the defendants failed to demonstrate that there was any issue of fact by showing that the ladder provided to the plaintiff was an adequate safety device, or that there was another adequate device available to Cutaia which he refused to use. Despite this, the Supreme Court incorrectly determined that “plaintiff is not entitled to summary judgment as he has not made a *prima facie* showing that his injuries were proximately caused by a violation of §240(1)”. However, the Court did not cite any evidence which raised a genuine issue of fact to controvert plaintiff’s proof that he was not provided with an adequate safety device, nor did the motion Court find that plaintiff’s conduct was the sole proximate cause of the incident. Instead, in evaluating Cutaia’s §240(1) claim, the Court stated, “the issue is more complicated when plaintiff’s accident involves not only a fall from a ladder, but also a electric shock which precedes the fall from the ladder”, citing Nazario v. 222 Broadway LLC, 28 N.Y.3d 1054 (2016). It is respectfully submitted that the Supreme Court erred, as there is no support for the proposition that the Court of Appeals’ decision in Nazario was intended to exclude the protection afforded by §240(1) to every worker who falls from an elevated height after receiving an electric shock. Rather, the fact that the precipitating event which

initially caused Cutaia to lose his balance was an electric shock is immaterial to a §240(1) analysis, since the undisputed evidence proves that the unsecured ladder was not an adequate safety device to access his work area or prevent him from falling to the ground.

It is well-established that where an unsecured ladder fails to support a worker and prevent his/her fall to the ground after an occurrence which causes the worker to lose his/her balance, including an electric shock, and plaintiff proves that the device was insufficient, a prima facie violation of §240(1) is established. In such a case, the critical inquiry is whether the ladder provided to the worker was an adequate safety device as envisioned by §240(1), and here, the defendants cannot avoid their non-delegable duty on the basis that the initial event which caused Cutaia to initially lose his balance was an electric shock. The facts in Nazario, supra, are easily distinguishable, and do not alter this well-established principle. In contrast to the evidence present here, the Nazario plaintiff was able to use the subject ladder “in an open and locked position”, and there was no expert evidence proffered by Nazario that another safety device, such as a manlift or a scaffold, should have been provided to perform his task. Thus, this Court’s decisions in Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 [1st Dept. 2013]; Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 [1st Dept. 2009], and Caban v. Maria Estela Houses I Assocs. L.P., 63 A.D.3d 639 [1st Dept. 2009], are directly on point and establish that the trial

Court's Order should be reversed as it pertains to the plaintiff's motion for partial summary judgment under Labor Law §240(1).

With respect to his Labor Law §241(6) claim, the undisputed facts show that the electrical wiring in the room where the incident occurred was not labeled, de-energized, or properly insulated, and no warnings were provided to Cutaia regarding this potential electrical hazard. Significantly, by the admission of the foreman of the electrical contractor for the project, defendant, Patriot Electric Corp. ("Patriot"), the manner in which the electrical wires were permitted to exist in Cutaia's work area constituted a "dangerous condition". Accordingly, Cutaia was properly granted partial summary judgment on his §241(6) claim predicated on the defendants' violation of Industrial Code §§23-1.13(b)(3) and (4).¹ However, the motion Court erred in not specifically finding that Cutaia was not comparatively negligent, as the defendants did not proffer a scintilla of evidence proving that Cutaia was warned of this potential danger in his work area, or that he disregarded any instructions. In addition, the defendants failed to distinguish the numerous cases cited by the plaintiff involving almost identical facts wherein it was held that the worker was not comparatively negligent as a matter of law. Therefore, that part of the trial Court's

¹ The defendants' have appealed the portion of the Court's Order granting Cutaia partial summary judgment under Labor Law §241(6).

order which did not specifically determine that Cutaia was not comparatively at fault should be modified, and this Court should hold that the plaintiff was not negligent.

QUESTIONS PRESENTED

1. Where the evidence demonstrates that the unsecured ladder provided to plaintiff failed in its core purpose of preventing plaintiff from falling to the ground after receiving an electric shock, and this failure proximately caused plaintiff's injuries, did plaintiff establish a prima facie violation of Labor Law §240(1)?

The answer is yes.

2. Where the defendants failed to raise a question of fact on a material issue and demonstrate that the subject ladder was an appropriate safety device for the task, or that plaintiff's actions were the sole proximate cause of the accident, did defendants sufficiently rebut plaintiff's prima facie showing?

The answer is no.

3. In view of the Court of Appeals' decision in Nazario v. 222 Broadway LLC, 28 N.Y.3d 1054 (2016), can a worker's fall off of an unsecured ladder after receiving an electric shock still entitle a plaintiff to partial summary judgment under Labor Law §240(1) where the facts prove the ladder was inadequate?

The answer is yes.

4. Where the defendants failed to proffer any evidence that Cutaia was warned of an electrical hazard, or disregarded instructions, did the Supreme Court err in not

specifically determining that the plaintiff was not comparatively negligent as it related to his claim under Labor Law §241(6)?

The answer is yes.

STATEMENT OF FACTS

The Subject Building and Project

On the day of the incident, Cutaia was directed by his supervisor from A+ to do plumbing work at the premises, 160-170 Varick Street in New York City, a twelve story building owned by Trinity Church. (R.451-453, 829-832, 920-922). Michilli is a general contractor that entered into a lease agreement with Trinity Church in 2011 to occupy space on the 11th Floor of the building for its corporate office. (R.1017-1095). After the prior tenant vacated the space in 2009, Trinity Church had demolition work performed, and hired third-party defendant, Atlas-Acon, to do certain electrical work. (R.924-926, 948-949). Once Michilli became a tenant, it began renovations and hired Patriot as its electrical contractor, and requested that A+ perform the plumbing work. (R.829-831, 1096-1121).

Michilli's project manager, Joseph Renna ("Renna"), was in charge of safety at the site, but he only worked at the project on a part-time basis since this was not a "money-making job" for Michilli. (R. 1136). Therefore, while Renna kept an office at the space to do his paperwork, he did not create any daily logs for the project and would only check on the progress of the work when he was present. (R.1228-1229,

1136-1138). Moreover, while Renna asserted that he was a “competent person” at the site to ensure there were no hazards, he acknowledged that he did not have any training in OSHA or construction safety standards. (R.1134, 1179-1180). In addition, Michilli had a Safety Manual containing the industry standards for the safe performance of the work. (R.1148-1149, 1582-1591), and Trinity Church provided the general contractor with the “Building Rules for Construction Work” (938, 1558-1569), but neither of these documents were implemented at the site. (R.872-873, 940-942, 1224-1226).

The plaintiff’s supervisor, Steven Rothenberg (“Rothenberg”), testified that A+ was not paid for the work, and that he did the work without a contract as a courtesy to Michilli’s owner. (R.829-830, 837-838). While Rothenberg would normally conduct a safety inspection of a site before A+ began its work, he did not recall doing such an inspection for the Michilli build-out. (R. 865). Michilli did not provide any documents or plans to A+ for the plumbing work, and since Renna was in charge of the work for Michilli, Rothenberg simply directed Cutaia to “follow whatever Joe Renna told him”. (R.833, 856, 876-877).

Michilli’s project manager was aware that live electrical wires were in the ceiling where the A+ plumbers had to perform work, yet at no time before the incident did Renna instruct anyone from Michilli or Patriot to inspect the electrical

system in the room to ensure there were no hazards. (R.1173-1176, 1216-1217).² Renna asserted that he only performed such an inspection months before the incident, and at that point he observed yellow electrical wiring in the ceiling which was capped. (R.1173-1174). However, Michilli's project manager admitted that he did not recall inspecting the area in the month prior to the incident to ensure that it was safe, and conceded there were no warning signs posted to alert workers that there was a potential hazard. (R.1174-1175). Similarly, numerous witnesses all concurred that at no time prior to the incident was Cutaia warned that there was a potential electrical hazard in the ceiling of the room. (R.571, 880-881, 993, 1366-1367, 1461-1463).

Cutaia's Duties and the Equipment Provided to the Plaintiff

While Cutaia worked for A+ over the years as a "plumbing mechanic", he was not a licensed plumber, and had no formal training in construction safety standards. (R.324-325, 332, 860). On the day of the incident, Cutaia and his helper, James Alonso ("Alonso"), were instructed to move sinks from one spot to another in the men's bathroom, and plaintiff's supervisor from A+ expected that Cutaia would follow whatever instructions were given to him by Michilli's project manager. (R.454-455, 876). The last time Cutaia had been in the bathroom was a few weeks prior to the incident. (R.462-463). The ceiling in the room was approximately ten feet above

² It does not appear that any permit was obtained for Patriot's electric work. (R.1154-1155).

ground level, and was framed out, but did not have any ceiling tiles. (R.982, 1160). The plumbing pipes in the ceiling were approximately twenty feet long, and contained “branches”, which were secured on racks. (R.490, 527, 735-736).

Cutaia’s task that day required him to cut pipes in the ceiling, and reroute them to a new location. (R.467). However, the defendants did not request that A+ bring scaffolding or any other equipment for tasks that had to be performed at an elevated height, and Michilli’s project manager stated he was not required to ensure appropriate safety devices were provided to Cutaia. (R.874, 981-982, 1200, 1363). In addition, the plaintiff’s supervisor from A+ did not provide him any specific directions on the equipment he was to use for work in the ceiling, other than the general instruction to use ladders that were on the job site when he needed them. (R.578).

Thus, Cutaia was not provided with a man lift, scaffold, or any other device with a platform and guardrails that he could have used to access the area in the ceiling. Therefore, he used a ten foot A-frame ladder that he had regularly used, as it was “always” in that room. (R.471-473). The ladder was not owned by A+, and Cutaia did not know who owned it. (R.472). Renna never told Cutaia not to use the subject ladder, and in his opinion, Cutaia “always used the right equipment”. (R.1273).

The Incident

On the morning of the incident, Cutaia used the subject ladder to perform various tasks in the ceiling, and was able to use it in an open position and engage its locking mechanism. (R.469-471, 474-480). Neither Cutaia nor Renna knew if the ladder had a black runner or non-skid surface at the bottom of each leg, and the plaintiff did not inspect the ladder since it seemed steady. (R.476, 479, 1202). Renna observed Cutaia working in the bathroom that day, but he did not recall conducting any safety inspection of the room prior to the incident. (R.1174-1175, 1187, 1236-1237). After lunch, the A+ workers had to add a water line to a pipe in the ceiling, and in order to do so, Cutaia needed to cut a portion of the pipe that was on the far side of the room. (R.467-477, 773-775). However, since the area Cutaia had to access was next to a wall, he was not able to reach the pipes with the A-frame ladder in an open position. As he explained:

“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).

Once the ladder was put in place, its base was approximately two feet from the wall, but it was not anchored to the wall or ground, nor was Cutaia provided with a harness or safety belt. (R.494, 1731). At no time prior to the accident, did anyone instruct Cutaia not to fold up the ladder and lean it against the wall in order to access

this area, and Renna even admitted he was aware that “Sometimes they leaned it on the wall to get close to the wall”. (R.884, 1241). Cutaia was on the ladder approximately ten minutes before the accident occurred, and while he observed wires in the area, he did not notice any electrical wires making contact with the pipe, and there were no warnings posted of a potential hazard. (R.486-487, 495, 541, 776). The plaintiff was not wearing gloves at the time, as he was not required to while doing this work. (R.783-784, 866, 1192). Alonso was working at ground-level next to Cutaia, but he did not assist the plaintiff by holding the ladder for him. (R.684, 1749).

As he was on the second step from the top of the ladder, Cutaia cut the pipe, cleaned it with an emery pad, fluxed it, and then inserted a “T” into it. (R.500). Since the pipes could be moved, Cutaia’s intention was to slide the “T” into the other portion of the pipe by pushing them together. (R.501). After grabbing the pipe to his left, Cutaia used his other hand to grab the part of the pipe to his right, when, without any warning, he was electrocuted. (R.734). Cutaia recalled feeling the electrical current traveling through his body, and the next thing he remembers was being on the ground. (R.507-508). The plaintiff then crawled out to the hallway and screamed for help, as he bled from his face, left hand, and left side of his body. (R.508-511, 1159).

Renna was down the hallway at the time and heard screaming, so he immediately went to the scene and observed Cutaia moaning outside of the bathroom. (R.1158). The plaintiff told Renna that he was electrocuted while on the

ladder, and Renna testified that Alonso stated the ladder Cutaia was using “slid from under him”. (R.681-682, 1159, 1167). When Renna went into the room, he observed, “It was a wood ladder, an old and the way it fell on the floor it was obvious it was leaning on the wall.” (R.1309-1310). Renna noted that the ladder was in a closed position on the floor next to the wall directly below the piping that Cutaia was working on, with electrical wires that were hanging. (R.1239-1241). Thus, it is uncontroverted that the ladder fell at the time of the incident, as the only other person in the room was Alonso, and he did not recall handling the ladder at any point after Cutaia fell. (R.1771). In addition, Renna did not see any other ladders in the room, and detailed his observations of the subject ladder as follows:

Q. Are you aware of whether or not the ladder that Mr. Cutaia was using at the time of the incident, was open or whether it was leaned up against the wall?

A. It looked like it was leaned up against the wall, because of the way it landed.

Q. And what was it about the way that you saw it landed that made you think that it was leaned up against the wall?

A. Had it been open, it would not have fallen that way.

Q. Could Mr. Cutaia access that area of the ceiling with the ladder open?

A. I don't know.

(R.1186-1187).

In addition, Renna observed that the electrical wire was hanging down below the ceiling framing by approximately one foot, just below the copper plumbing pipes Cutaia was working on. (R.1197). After the plaintiff was taken away by ambulance, Renna performed a closer inspection and noticed a yellow live electrical wire that was missing a cap, accounting for the electrical shock to the plaintiff³. (R.1168-1169). A photograph taken on behalf of Trinity Church after the incident was apparently taken to show the unprotected electric wire. (R.1844).

After the incident, a Patriot employee came to the scene and noticed a cap on the floor, and claimed it came from temporary wiring which was installed before Michilli became a tenant. (R.1171, 1218-1219). It appeared to Renna that the cap must have been used for the exposed wire, because it matched the other caps on the existing wires in that area. (R.1221-1222). Renna noted that the caps were not taped to the other wires, and testified that in his experience it was only permissible to use that type of electrical wire for temporary power. (R.1169-1170, 1238). The building engineer also came to the scene and acknowledged that the subject wire was the building's temporary wire which he claimed had been capped at some point. (R.1219-1224).

³ During discovery, Trinity Church produced an incident report which had been prepared on its behalf, but the report could not be authenticated rendering it inadmissible. (R.969, 1306-1309, 1366, 1758-1760, 1842-1843).

When Patriot's foreman, Lopez, inspected the area shortly after the incident, he observed the copper plumbing pipes and yellow electrical wiring with wire nuts, and conceded that the manner in which the wires were permitted to exist was a "dangerous condition". (R.1435-1436, 1523). Lopez explained that when there are live wires in such an area, electricians are responsible to indicate any location where there was a disconnect, label the voltage, install warning signs, and take measures to support and cover the wires. (R.1425, 1514). However, Patriot's foreman acknowledged that there were no warning signs posted alerting workers that there was a potentially dangerous condition in the area. (R.1461-1462).

With respect to Cutaia's conduct, Renna admitted that he never gave instructions to the plaintiff which Cutaia refused to follow, nor did he instruct Cutaia to use certain equipment which Cutaia refused to use. (R.1186). Similarly, the plaintiff's supervisor from A+ did not provide any instructions to Cutaia which he refused to follow, nor was Rothenberg aware of Cutaia refusing to follow anyone else's instructions, or refusing to use safety equipment that was available to him. (R.877-878). Further, the other witnesses were unaware of any evidence that the plaintiff did anything to cause or contribute to the incident, or Cutaia refusing to use equipment that he had been instructed to use. (R.989-992, 1364, 1467, 1523).

After the incident, Cutaia was treated for electric shock, and for the severe injuries he sustained to his neck, back and shoulders due to his fall to the ground,

which required five operative procedures. For his spine, Cutaia required a cervical spinal fusion due to a herniated disc compressing on his spinal cord, and a lumbar laminectomy for a disc herniation compressing his nerve roots. The plaintiff also required two operations on his left shoulder to address labral tears, and surgery on his right shoulder due to a torn labrum. (R.1821-1838).

The Opinions of Plaintiff's Expert, Robert Fuchs, P.E.

The plaintiff retained Robert Fuchs, P.E., an expert in construction safety and industry standards. (R.1845-1856). After reviewing the evidence, Mr. Fuchs' opinion is as follows:

“Considering the nature of the work assigned to Cutaia, which involved cutting pipes, and preparing them to be re-routed with the use of hand tools at an elevated height, 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”.

“Further, the A-frame ladder Cutaia was using was not anchored, tied down, or otherwise adequately secured to the floor or wall, and there were no other safety devices provided such as a harness or safety belt to prevent Cutaia from falling to the floor. Had the ladder been supported or secured to the floor or wall by anchoring, the ladder would have remained stable when Cutaia was shocked, and he could have been prevented from falling to the floor. Moreover, had other safety devices been provided such as a harness or safety belt, the device would have prevented him from falling to the floor”.

“It is my professional opinion that the failure... to ensure that Cutaia was provided with adequate equipment for the task that he was performing..., constitutes a violation of Labor Law §240(1), and...was

the proximate cause of Cutaia's fall to the floor and consequential injuries".

(R.1848, 1853).

In addition, based upon the failure of the defendants to post warning signs, advise workers of the locations of electrical lines, de-energize the circuit, or provide proper insulation for the wires, Mr. Fuchs' states that:

"It is also my professional opinion...that the failure to adequately protect Cutaia from the inherent hazard posed by the electrical wiring in the work area violated...Labor Law §241(6) and...Industrial Code §§23-1.13(b)(3) and (4), and was a substantial factor and proximate cause for the electrical shock that he received, which caused him to fall to the ground from the ladder and sustain consequential injuries".

(R.1853).

PROCEDURAL HISTORY

This action was commenced by the plaintiff on August 9, 2012. (R.82-96). Defendants, Board of Managers 160/170 Varick Street Condominium ("Board of Managers"),⁴ Michilli Construction Inc. and Patriot appeared by service of their Answers. (R.97-116). Subsequently, the plaintiff amended his Complaint to add Trinity Church and Michilli, Inc., as defendants. (R.117-131). Board of Managers, Trinity Church, the Michilli defendants, and Patriot served Amended Answers. (R.132-157). Thereafter, a Third-Party action was initiated by Michilli against A+, which appeared by service of its' Answer. (R.158-177). Subsequently, Trinity

⁴ The claims against the Board of Managers have been dismissed.

Church and Michilli filed a Third Third-Party action against Atlas-Acon, which appeared by service of its' Answer. (R.196-229). Cutaia's Third Amended Verified Bill of Particulars appears at R.1821-1838.

SUBMISSIONS TO THE TRIAL COURT

On April 2, 2018, the plaintiff moved for partial summary judgment under Labor Law §§240(1) and 241(6). (R.28-1856). In support of his §240(1) claim, the plaintiff argued that the A-frame ladder Cutaia was using failed in its core purpose of preventing the plaintiff from falling after receiving an electric shock, and that other than the insufficient ladder, no other equipment was provided for this elevation-related task. The plaintiff noted that the ladder was not anchored or supported in any fashion, and Cutaia was not provided with any additional safety device such as a belt or harness. Based upon these undisputed facts, Cutaia argued that he had established a prima facie violation of §240(1).

Cutaia relied upon this Court's decisions in Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 (1st Dept. 2013), Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 (1st Dept. 2009), Caban v. Maria Estela Houses I Assocs. L.P., 63 A.D.3d 639 (1st Dept. 2009) and numerous other cases where summary judgment was granted under §240(1) to a worker who fell off of an unsecured ladder after receiving an electric shock, or another similar precipitating event, and the evidence demonstrated that the ladder was insufficient for the worker's task. The plaintiff

argued that the Court of Appeals' decision in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054 (2016) was distinguishable, as there, the evidence showed that the worker was able to use the subject ladder in an open and locked position. Moreover, the plaintiff noted that unlike Nazario, here, Cutaia proffered expert evidence stating the subject ladder was insufficient and that a more secure device with a platform and rails, such as a manlift or scaffold, should have been provided for the subject task.

In support of his Labor Law §241(6) claim⁵, Cutaia argued that the wire that electrocuted plaintiff was not “de-energized” or properly insulated, and no warnings of an electrical hazard were given to plaintiff prior to the incident. Accordingly, the plaintiff argued that under this Court's decisions in Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603 [1st Dept. 2017]; O'Leary v. S & A Elec. Contracting Corp., 149 A.D.3d 500 [1st Dept. 2017] and Hernandez v. Ten Ten Co., 31 A.D.3d 333 [1st Dept. 2006], he was entitled to partial summary judgment due to the defendants' failure to comply with Industrial Code §§23-1.13(b)(3) and (4), and since there was no evidence that Cutaia was comparatively negligent, the Court should determine the plaintiff was not at fault as a matter of law in accordance with those precedents.

In their opposition to plaintiff's motion under §240(1) (R.1880-1896), Trinity Church and Michilli asserted that the ladder Cutaia was using was not “defective”,

⁵ The Nazario Court did not determine the issue of the defendants' liability under Labor Law §241(6).

and they inexplicably relied upon an affidavit from Michilli's project manager wherein he admitted that "No discussion was ever had at any time between plaintiff and I about the tools or equipment that plaintiff needed to perform his work. ...Michilli provided no tools or equipment, and Michilli was never asked to provide any tools or equipment". (R.1894). The defendants also relied upon Nazario v. 222 Broadway LLC, supra, in support of their argument that plaintiff's motion should be denied on the basis that there was an issue of fact as to whether the plaintiff was the sole proximate cause of the accident, but they did not provide any evidence to rebut Cutaia's proof that the subject ladder was insufficient for his task, and that there was no other adequate device which was available for him to use.

The defendants opposed the plaintiff's motion under Labor Law §241(6) based upon the misguided assertion "that the plaintiff voiced no concerns and made no objections to defendants or his supervisors at A+" about the wires in the ceiling, and that the Industrial Code sections relied upon by Cutaia, "mandate certain precautionary measures by the 'employer', in this case, A+ Installations, and not the defendants, the owner and general contractor". Notably, the defendants did not proffer any evidence showing that Cutaia was warned that there was a potential electrical hazard in his work area, or that Cutaia disregarded any instructions from Michilli's project manager or his supervisors.

Third-party defendant, A+, submitted opposition⁶ to plaintiff's motion under §240(1) (R.1857-1879), wherein they also relied upon the Court of Appeals' holding in Nazario, supra, in support of their assertion that there was an issue of fact as to whether the defendants violated §240(1). A+ argued that Nazario "overturned" this Court's decisions in Vukovich, supra, and Del Rosario, supra, despite the absence of any discussion of those cases in the Nazario opinion. In addition, A+ relied solely upon its attorneys' affirmation in support of its contention that the area where plaintiff was working was too small to accommodate an alternative safety device such as a manlift or scaffold. A+ also claimed that plaintiff's expert affidavit regarding the OSHA requirements for "fixed ladders" versus "portable ladders" undermined plaintiff's expert's contentions.

In his Reply Affirmation (R.1897-1914), Cutaia demonstrated that the arguments opposing his §§240(1) and 241(6) claims were factually and legally untenable, and merely raised feigned issues of fact which were insufficient to rebut the plaintiff's proof that the following material facts were uncontroverted:

- (a) The task assigned to Cutaia required that he work at an elevated height of approximately ten feet in the ceiling at the far end of the subject room;
- (b) There was no scaffold, manlift or other adequate device with a secure platform and rails provided to Cutaia to perform his task;

⁶ A+ submitted opposition to Cutaia's motion under §240(1) despite the fact that plaintiff did not move against A+, but A+ did not oppose Cutaia's §241(6) claim.

- (c) Cutaia used the only device available, an A-frame ladder, which needed to be folded and leaned against the wall in order to access his work area;
- (d) The ladder was not supported by anyone, and was not anchored or secured to the floor or wall;
- (e) There was no additional safety device such as a belt or harness provided to Cutaia;
- (f) There was electrical wiring in Cutaia's work area in the ceiling which was not de-energized or properly insulated, and constituted a "dangerous condition";
- (g) There were no warnings provided to Cutaia that there was a potential electrical hazard in the ceiling;
- (h) As Cutaia was in the process of cutting copper plumbing pipes, he received an electrical shock causing him and the ladder to fall to the ground;
- (i) Cutaia did not disregard any instructions that were provided to him; and
- (j) Cutaia did not refuse to use adequate safety equipment which was available.

Cutaia argued that based upon these facts, and the uncontested opinion set forth in plaintiff's expert's affidavit, he had demonstrated that the defendants violated Labor Law §§240(1) and 241(6). Plaintiff argued that the affirmations from opposing counsel were insufficient to rebut plaintiff's expert's opinions. Moreover, Cutaia argued that both opposing affirmations misstated the holding in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054 (2016), and that the case was easily distinguishable. In this regard, although the Court of Appeal's decision did not detail

the facts of the case, this Court's decision noted that the Nazario plaintiff was using the subject A-frame ladder "in an open, locked position"....(and that)...."the ladder itself may not have been defective." (Nazario v. 222 Broadway, LLC, 135 A.D.3d 506, 507 [1st Dept. 2016]). In addition, in the concurring opinion, Judge Peter Tom noted that the Nazario plaintiff gave several inconsistent accounts as to the manner in which the incident occurred. Thus, under those discreet facts, the Court of Appeals relied upon Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003) in support of its determination that there was a question of fact as to whether the ladder provided to Nazario was insufficient as a matter of law under §240(1). However, in Blake there was an explicit finding that the subject ladder was owned and frequently used by the plaintiff, "that the ladder was steady, had rubber shoes and was in proper working condition", that the Blake plaintiff "could not identify a defect in the ladder", and, most importantly, that he was unsure "if he had locked the extension clips in place before ascending the rungs". (Blake, 1 N.Y.3d at 283-284).

Thus, Cutaia argued that the contention by A+ that the Court of Appeals' decision in Nazario "overturned" this Court's holdings in Vukovich, supra, and Del Rosario, supra, was simply incorrect and noted that the trial courts have continued to cite these cases as controlling law. (Wolodin v. Lehr Construction Corp., 2017 WL 3263217 [Sup. Ct. NY Co. 2017]; Kim v. E. 7th ISS LLC, 2017 WL 5513327 [Sup. Ct. NY Co. 2017]; and Rivera v. Home Depot USA Inc., 312 F.Supp.3d 406

[SDNY 2018]). Further, Cutaia argued that the non-sensical assertion that any worker who falls to the ground after receiving an electrical shock should not be covered by Labor Law §240(1) is entirely inconsistent with the legislative intent behind the statute, and to take that argument literally, it would mean that in this case the defendants would fortuitously be absolved of liability because the precipitating event which caused Cutaia to fall off of the unsecured ladder was an electric shock. We noted that this has never been the law in this state, and that it is abundantly clear that *whatever* the cause of the fall, the critical inquiry is whether the ladder provided was an adequate safety device. Cutaia cited numerous post-Nazario cases involving the same material facts wherein this Court found for a worker on his or her §240(1) claim based upon the showing that a subject ladder was either unsecured, or an inadequate device to perform the subject task. (Plywacz v. 85 Broad Street LLC, 159 A.D.3d 543 [1st Dept. 2018]; Rom v. Eurostruct, Inc., 158 A.D.3d 570 [1st Dept. 2018] and Messina v. City of New York, 148 A.D.3d 493 [1st Dept. 2017]).

Lastly, the plaintiff argued that the defendants had not provided a scintilla of evidence that he was comparatively negligent, and that he should be granted partial summary judgment as a matter of law on his §241(6) claim in accordance with numerous Appellate Division precedents which are directly on point.

THE ORDER ON APPEAL⁷

In its Decision (R.16-26), the Supreme Court cited this Court's holdings in Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603 [1st Dept. 2017] and O'Leary v. S&A Elec. Contr. Corp., 149 A.D.3d 500 [1st Dept. 2017], in finding in favor of the plaintiff on his §241(6) claim, and stated as follows:

“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”.

“As violations of the Industrial Code proximately caused plaintiff's injuries, plaintiff is entitled to partial summary judgment as to his Labor Law §241(6) claim against Trinity Church and Michilli”.

(R.23-24).

However, despite the Supreme Court's reliance upon this Court's holdings in Rubino, supra, and O'Leary, supra, where this Court rejected the defendants' arguments that those workers were comparatively negligent, in the present case the Supreme Court did not specifically state that Cutaia was not comparatively

⁷ On August 8, 2018 the Court issued an Amended Order after being informed by the parties at a compliance conference on August 7, 2018 that its original Order dated August 3, 2018 stated that the Court granted Cutaia's motion under Labor Law §240(1), which was inconsistent with the Court's Decision. (R.16-27).

negligent.⁸ The Court erred by not making that determination as the defendants did not proffer any evidence whatsoever that Cutaia was at fault.

In addition, the Supreme Court denied Cutaia's motion for summary judgment under Labor Law §240(1), and stated as follows:

“Typically, courts grant summary judgment where plaintiffs fall from an unsecured ladder (see e.g. Plywacz v. 85 Broad St. LLC, 159 AD3d 543 [1st Dept 2018]). However, the issue is more complicated when plaintiff's accident involves not only a fall from a ladder, but also a electrical shock which precedes the fall from the ladder (citing Nazario v. 222 Broadway, LLC, 28 NY3d 1054, 1055 [2016]. ... Here, plaintiff is not entitled to summary judgment as he has not made a prima facie showing that his injuries were proximately caused by a violation of section 240 (1). Even assuming that the unsecured, unopened ladder was inadequate to protect plaintiff against gravity related dangers, plaintiff has not shown that those dangers caused his injuries. That is, plaintiff has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received.”

“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.24-25).

⁸ Although the holding by the Court on Cutaia's §241(6) claim can arguably be construed as a determination he had proven the defendants' liability as a matter of law under the statute, at the Court conference on August 7, 2018, the parties expressed their different views on the interpretation of the Court's decision, but were informed that any motion for reargument would result in the exact same holding.

Respectfully, based upon the overwhelming proof submitted by Cutaia, it is difficult to understand the reasoning behind the motion Court's determination that the plaintiff did not show, or even argue, that his injuries were caused by his fall from the ladder.⁹ Indeed, in its Decision the Court did not cite any evidence showing that the subject ladder was adequate, or that another safety device was available to Cutaia. In fact, the Court did not refer to any evidence raising an issue of fact controverting Cutaia's proof that §240(1) was violated, or that his conduct was the sole proximate cause of the incident. Therefore, it is submitted that the Court erred in denying Cutaia's motion under §240(1), as the undisputed evidence proves a violation of the statute, and the defendants failed to rebut plaintiff's prima facie showing.

⁹ The trial Court did not permit oral argument on the plaintiff's motion.

POINT I

THE SUPREME COURT ERRED IN DENYING CUTAIA'S MOTION FOR SUMMARY JUDGMENT UNDER LABOR LAW §240(1) AS THE PLAINTIFF WAS NOT PROVIDED WITH AN ADEQUATE SAFETY DEVICE TO PERFORM HIS TASK

The evidence shows that Cutaia was performing plumbing work approximately ten feet above ground level, an activity which is clearly covered by Labor Law §240(1), which states, in pertinent part:

“All contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, shall furnish or erect...scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices, which shall be so constructed, placed and operated as to give proper protection to a person so employed”.

There is *nothing* in the statute which indicates that the legislature intended to diminish the protection of §240(1) to a worker who falls from an unsecured ladder after receiving an electric shock, and it has long been the rule that the statute should be “construed as liberally as may be for the accomplishment of the purpose for which it was thus framed”. (Zimmer v. Chemung, 65 N.Y.2d 513, 514 [1985]).

It is well-known that “Section 240(1) of the Labor Law was designed to place the responsibility for a worker’s safety squarely upon the owner and contractor rather than on the worker”. (Felker, Jr. v. Corning, Inc., 90 N.Y.2d 219, 224 [1997]). As the Court of Appeals noted in Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009), the purpose of the strict liability statute is to protect construction workers not

from routine work-place risks, but from the pronounced risks arising from construction work site elevation differentials. To prove liability under Labor Law §240(1), the plaintiff need only show that it was violated and that the violation was a proximate cause of the accident (Barreto v. Metropolitan Transp. Authority, 25 N.Y.3d 426 [2015] and Runner, *supra*), and “Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker ‘proper protection’, absolute liability is ‘unavoidable’ under section 240[1]”. (Bland v. Manocherian, 66 N.Y.2d 452, 459 [1985]).

In the present case, the “safety device” provided to Cutaia was an unsecured A-frame ladder which was clearly inadequate to safely perform his assigned task, and there were no other safety device or protective fall equipment provided to him. As this Court has repeatedly determined, “Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law §240(1)”. (Hernandez v. Bethel United Methodist Church of N.Y., 49 A.D.3d 251, 252 [1st Dept. 2008]; and Montalvo v. J. Petrocelli Constr., 8 A.D.3d 173 [1st Dept. 2004]); see also Kijak v. 330 Madison Ave. Corp., 251 A.D.2d 152, 153 [1st Dept. 1999]). Accordingly, the defendants violated their duty to provide a device that was “constructed, placed and operated as to give proper protection” for Cutaia’s work, which is precisely the sort of “extraordinary”

and foreseeable elevation-related risk against which §240(1) was enacted to prevent, establishing a prima facie violation of the statute. (Runner, supra).

A. The Subject Ladder was an Inadequate Safety Device for Cutaia’s Task

This Court has consistently held that a violation of Labor Law §240(1) is established where, as here, a worker falls from an unsecured ladder which was insufficient to provide the protection required by the statute. (Gordon v. City of New York, 164 A.D.3d 1110 [1st Dept. 2018]; Rom v. Eurostruct, Inc., 158 A.D.3d 570 [1st Dept. 2018]; Pena v. Jane H. Goldman Residuary Trust No. 1, 158 A.D.3d 565 [1st Dept. 2018]; and Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582 [1st Dept. 2018]). As this Court recently set forth in Kebe v. Greenpoint-Goldman Corp., 150 A.D.3d 453, 454 (1st Dept. 2017), where a worker is injured as a result of the collapse or malfunction of a ladder or scaffold, there is a “presumption that the ladder or scaffolding device was not good enough to afford proper protection”. Indeed, the failure of a ladder to prevent a worker from falling violates the “core” objective of §240(1). (Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 561-562 [1993] and Lopez v. Melidis, 31 A.D.3d 351 [1st Dept. 2006]). Therefore, it is well known that where a ladder fails to remain steady and erect, resulting in injury to a worker, prima facie liability under §240(1) is established (Erkan v. McDonald’s Corp., 146 A.D.3d 466 [1st Dept. 2017], and Howard v. Turner Const. Co., 134 A.D.3d 523 [1st Dept. 2015], because the failure to secure the ladder against movement constitutes a

violation of the statute as a matter of law. (MacNair v. Salamon, 199 A.D.2d 170 [1st Dept. 1993], Fernandez v. MHP Land Associates, 188 A.D.2d 417 [1st Dept. 1992]).

Despite these well-established principles, here, the motion Court made the fundamental error of denying Cutaia's motion under §240(1) on the basis that the event which initially caused him to move, or lose his balance, was the electric shock. In doing so, the Supreme Court incorrectly interpreted the statute, and it is evident that the focus in an "electric shock" case where the worker alleges a violation of §240(1), should be on whether the device provided was adequate to protect the worker from falling to the ground after receiving the electric shock.

Directly on point with the facts at bar is Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 (1st Dept. 2013), where the plaintiff was working on a ladder when he came into contact with an energized wire which caused him to pull back. As he did so, the ladder wobbled causing him to lose his balance and fall. The plaintiff moved for summary judgment under §240(1) and relied upon an expert affidavit setting forth that the device provided to him was insufficient. The Supreme Court's denial of plaintiff's motion under §240(1) was reversed and summary judgment granted to the plaintiff since the ladder "was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was the proximate cause of his injury". *Id* at 515.

Also on point with the facts here is Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 (1st Dept. 2009), where a pipe fitter received an electric shock and fell from an unsecured A-frame ladder. There were no witnesses to the accident and the plaintiff had no recollection of falling to the floor. Although the defendants argued the ladder was “safe”, the evidence showed that the ladder was “twisted and jarred”, after the incident.¹⁰ In support of his §240(1) claim, the plaintiff submitted an affidavit from an expert who set forth that had the plaintiff been using a manlift or scaffold with guardrails and a suitable work platform when he received the electric shock, he would not have fallen to the ground. This Court reversed the Supreme Court’s denial of plaintiff’s motion, and granted him summary judgment under §240(1), stating:

“The ladder provided to plaintiff was inadequate to prevent him from falling five to seven feet to the floor after being shocked, and was a proximate cause of his injuries (cits. omitted). That plaintiff had no recollection of falling to the floor does not alter this result”. (61 A.D.3d at 534).

This Court’s decisions in Del Rosario and Vukovich, are consistent with earlier cases involving workers who fell from a ladder after receiving an electric shock where the ladder provided to the worker was inadequate to provide the protection required by the statute. For instance, in Caban v. Maria Estela Houses I Assocs. L.P., 63 A.D.3d 639 (1st Dept. 2009), an electrician was repairing a

¹⁰ The facts set forth from Vukovich which are not contained in this Court’s opinion were gathered from the record.

malfunctioning floodlight when he received an electric shock causing him to fall off the ladder. As the ladder was an inadequate safety device, this Court granted plaintiff's summary judgment motion under §240(1). (See also Lodato v. Greyhawk North Amer., LLC, 39 A.D.3d 491 [2d Dept. 2007] [summary judgment properly granted to worker on his §240(1) claim when he fell off of a scaffold as he was installing a drop ceiling after receiving a shock from live electrical wires]; Quackenbush v. Gar-Ben Associates, 2 A.D.3d 824 [2d Dept. 2003] [summary judgment granted to plaintiff-electrician as the ladder he was using was inadequate to prevent him from falling to the floor after sustaining an electric shock as he connected a ceiling fixture]); Cf. Jones v. Nazareth College of Rochester, 147 A.D.3d 1364 [4th Dept. 2017]). (Summary judgment denied to worker who fell off of a ladder after receiving electric shock where there was no expert opinion proffered by the plaintiff supporting his contention that the defendants failed to provide an adequate safety device, and no evidence as to whether the worker could have opened the subject A-frame ladder in his work area).

As noted above, Cutaia initially attempted to use the A-frame ladder in an open and locked position to do his work, but was unable to access the area without folding up the ladder and leaning it against the wall. In view of these facts, the plaintiff's expert states 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",

which would have “protected (him) from falling to the ground when he received an electric shock.” (R.1848). The defendants failed to proffer any expert opinion contradicting Cutaia’ expert, and neither the defendants nor the motion Court cited *any* evidence raising an issue of fact as to whether an adequate device was available for the plaintiff to use.

The facts and uncontested expert opinion here are significantly different from the evidence present in Nazario v. 222 Broadway, LLC., 135 A.D.3d 506 (1st Dept. 2016), aff’d as modified, 28 N.Y.3d 1054 (2016), where the plaintiff was using a six foot A-frame ladder to perform electrical work at an elevated height, when he received an electric shock from an exposed wire, causing the worker to fall to the floor “holding the ladder, which remained in an open, locked position when it landed”. Id. at 507. Under these facts, this Court held that the plaintiff had established a prima facie violation of §240(1). However, in his concurring opinion, Judge Tom found that there was a question of fact noting “Plaintiff concedes in his brief that the ladder furnished to him was not defective and that the several accounts he gave of the manner in which he sustained injury are inconsistent.” Id. at 511. In support of his position, Judge Tom discussed various cases, including Grogan v. Norlite Corp, 282 A.D.2d 781 (3d Dept. 2001) and Gange v. Tilles Inv. Co., 220 A.D.2d 556 (2d Dept. 1995), in which the Courts found that there was an issue of fact as to whether the particular device provided to those workers failed to give proper protection to prevent a fall from an

elevated height after receiving an electric shock. However, those cases are easily distinguishable as here, the record evidence unequivocally demonstrates that the device provided to Cutaia was inadequate. Significantly, in his concurring opinion, Judge Tom specifically stated that he was “not suggesting that all falls from elevated surfaces following contact with live electricity be carved out of the protections of Labor Law §240(1)”. Nazario at 514. Rather, Judge Tom expressed his belief that “for plaintiff to prevail he must present evidence—for example from an expert—that he should have been provided with additional safety devices and that the failure to do so was a contributing cause of the accident”. Nazario at 513.

The Court of Appeals modified this Court’s Decision in Nazario, and held as follows:

“Plaintiff is not entitled to summary judgment under Labor Law §240(1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices”. (Citing Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 [2003]).

Contrary to the defendants’ argument that the intention of the Court of Appeals in Nazario was to treat cases involving workers who fall from a ladder after receiving an electric shock in a unique fashion, the Court made no such pronouncement. As noted by Justice Nancy Bannon in Wolodin v. Lehr Construction Corp., (2017 WL 3263217) (Sup.Ct. NY Co. 2017), 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”. Indeed, there is nothing in the Nazario opinion that indicates the Court’s belief that either Vukovich, Del Rosario, or any of the other cases where workers fell from a ladder after receiving an electric shock and prevailed on their §240(1) claim were wrongly decided.

In contrast to Nazario, here, the A-frame ladder provided to Cutaia could not be “opened” or “locked” when performing his task, and that the only way he could access his work area in the ceiling at the end of the room was by folding up the ladder and leaning it against the wall. Moreover, it is critical that, unlike the plaintiff in Nazario, Cutaia submitted an affidavit from an expert whose uncontested opinion is that the failure to provide Cutaia with a manlift, scaffold, or any other adequate safety device with a secure platform and guardrails that could have been positioned flush against the wall, and protected him from falling to the ground, constitutes a violation of §240(1).

The material facts here are indistinguishable from the proof set forth by the workers in Vukovich, Del Rosario and Caban wherein it was established that those plaintiffs fell from an elevated height after being shocked because the particular ladders provided to them were inadequate safety devices which is precisely what happened to Cutaia. In fact, here the evidence is even more compelling as it is

undisputed that Cutaia initially attempted to use the ladder in an open and locked position, but was unable to access his work area. Moreover, at the moment Cutaia was electrocuted, both of his hands were holding pipes attempting to connect them while he was on top of the unsecured A-frame ladder as it leaned against the wall. This is similar to the worker in Ward v. Union Horizons II Housing Development Fund Corp., 128 A.D.3d 434 (1st Dept. 2015) who was granted partial summary judgment on his §240(1) claim when he fell from a ladder while performing drilling work. As this Court noted, “The work required use of two hands, so plaintiff did not have a hand available to hold onto the ladder. ...[N]o equipment was provided to plaintiff to guard against the risk of falling from the ladder”, and “plaintiff’s coworker was not stabilizing the ladder at the time of the fall”. Id. 128 A.D.3d at 434.

Here, the defendants’ argument to the Supreme Court that the ladder was not defective is meritless as there is no requirement that Cutaia show the ladder was defective since it was unsecured, could not be opened to access his work area, and clearly insufficient for his task. (Montalvo v. J. Petrocelli Constr., 8 A.D.3d 173-175 [1st Dept. 2004], [P]laintiffs were not required to show that the ladder on which he was standing was defective.... As the uncontradicted evidence establishes that Montalvo was injured, at least in part, due to the failure of [the general contractor] to provide adequate safety devices to secure the ladder on which he was working, and since the risk created by such failure is one that it is covered by the statute (i.e.,

falling), plaintiffs have established a violation of §240(1) as a matter of law”; and Orellano v. 29 E. 37th St. Realty Corp., 292 A.D.2d 289-291 [1st Dept. 2002], [“(Defendant’s) contention that plaintiff was required to show that the ladder from which he fell was defective in some manner or that defendants violated some rule of the Industrial Code is not the law. It is sufficient for purposes of liability under §240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent”)].

This is not a case where a worker simply lost his balance and fell from a secure ladder, and there is no evidence that disputes Cutaia’s testimony that the ladder could not be used in an open and locked position to perform the subject task. (See Cronin v. New York City Transit Authority, 143 A.D.3d 419 [1st Dept. 2016] [defendant failed to rebut plaintiff’s testimony that he used defendant’s straight ladder, because the work space would not have allowed for the A-frame ladder to be opened] and Saavedra v. 89 Park Ave. LLC, 143 A.D.3d 615 [1st Dept. 2016] [plaintiff’s use of a six-foot ladder that required him to stand on top step did not make him sole proximate cause of his accident where the eight-foot ladder could not be opened in space due to the presence of construction debris]).

Further, in the absence of a manlift or scaffold, at the very least, there should have been someone footing the ladder as Cutaia performed his work, or it should have been anchored in some fashion. However, neither the plaintiff’s supervisor nor

Michilli's project manager instructed Cutaia's helper to hold the ladder, it was not anchored to the floor or wall, and Cutaia was not provided with a harness or safety belt in the event that the ladder gave way. As set forth by plaintiff's expert:

“Had the ladder been supported or secured to the floor or wall by anchoring, the ladder would have remained stable when Cutaia was shocked, and he could have been prevented from falling to the floor. Moreover, had other safety devices been provided such as a harness or safety belt, the device would have prevented him from falling to the floor”.

(R.1848).

Thus, the failure to secure the ladder or provide Cutaia with additional protective devices such as a safety belt, given the foreseeable hazards of working in the ceiling cutting and re-directing pipes with hand tools, further supports Cutaia's §240(1) claim. For instance, in Wasilewski v. Museum of Modern Art, 260 A.D.2d 271 (1st Dept. 1999), the plaintiff fell from an A-frame ladder, which was not secured to something stable and was not chocked or wedged in place, and the plaintiff was not provided with any other safety devices. Under these facts, this Court determined that the failure to provide the worker with an adequate safety device, such as a safety belt, constituted a violation of §240(1). (See also, Bonanno v. Port Auth. of N.Y. & N.J., 298 A.D.2d 269 [1st Dept. 2002] and Deng v. A.J. Contracting Co., Inc., 255 A.D.2d 202 [1st Dept. 1998]).

Practically speaking, for a safety device to adequately prevent workers from falling, it must be adequate enough to absorb movement by a worker and his/her

materials while engaged in a task. “It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law §240(1)”. (Montalvo, supra, at 175). Moreover, even though Cutaia does not recall if the ladder moved or shifted while he was being electrocuted, the uncontroverted evidence is that he fell to the floor after receiving the electrical shock, and that when Renna came to the scene immediately after the incident, he observed the ladder laying on the floor in a folded position. Thus, Cutaia’s inability to recall the manner in which he and the ladder fell is simply irrelevant since the lack of certainty as to what preceded his fall does not create a material issue of fact. (See, Felker, Jr. v. Corning, Inc., 90 N.Y.2d 219 [1997]; and Vergara v. SS 133 West 21, LLC, 21 A.D.3d 279 [1st Dept. 2005]).

As noted above, more recently, in cases involving facts which are not materially different from those present here, this Court has continued to consistently find that a worker should be granted summary judgment under §240(1) where the ladder provided was inadequate. For instance, in Plywacz v. 85 Broad Street LLC, 159 A.D.3d 543 (1st Dept. 2018), partial summary judgment was granted to the plaintiff under §240(1) where the worker was injured when he fell from an unsecured ladder while installing steel wall panels in the lobby of a building. This Court found it was irrelevant whether plaintiff initially lost his balance before or after the ladder wobbled because it was uncontested that the precipitating cause of both was that the

suction cup which he had affixed to the panel and gripped to pull the panel into place came loose. Under either scenario, the ladder failed to remain steady under plaintiff's weight as he performed his work. Moreover, in Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580 (1st Dept. 2017), this Court held that the plaintiff established §240(1) was violated with his testimony that he was hit in the arm by an electrical wire that shot out of a section of conduit pipe after being jammed inside, causing the unsecured ladder he was standing on to wobble, resulting in the worker losing his balance and falling to the ground. Similarly, in Messina v. City of New York, 148 A.D.3d 493 [1st Dept. 2017], this Court determined that the defendant violated §240(1) based upon the plaintiff's testimony that he was injured when the A-frame ladder on which he was standing moved underneath him as he applied pressure to it while trying to remove part of the drop ceiling he was demolishing. Plaintiff was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his prima facie burden, as there was no evidence that there were other available adequate safety devices at the site which the worker declined to use. It is respectfully submitted that Plywacz, Faver and Messina firmly establish that the initial event which caused the worker to lose his or her balance is immaterial to a §240(1) analysis, and that *whatever* the precipitating event is, the focus must be on whether the device provided to the worker was adequate to protect him or her from falling to the ground.

B. As Cutaia Has Demonstrated a Prima Facie Violation of Labor Law §240(1), the Sole Proximate Cause Defense Does Not Apply

In its Decision, the Supreme Court did not find that an adequate safety device was available to Cutaia, and that he refused to use such a device. In fact, there is no evidence whatsoever that Cutaia disregarded a specific instruction, or that he refused to use available equipment that was adequate for his task. In addition, there is no evidence that Cutaia could access his work area with the ladder in an open and locked position, and even if there was something negligent about Cutaia's use of the ladder, it does not provide a defense as it is well settled that a worker's negligence in setting up a scaffold, ladder or similar elevation device is not a defense to a §240(1) claim if the device is inadequate. (See, Aponte v. City of New York, 55 A.D.3d 485 [1st Dept. 2008] ["Defendants' failure to provide adequate safety devices and to properly secure the ladder was a contributing cause of the accident. Plaintiff's conduct, at most, constituted comparative negligence, which is not a defense under Labor Law §240(1)]; see also, Erkan v. McDonalds Corp., 146 A.D.3d 466 [1st Dept. 2017] and Ernish v. City of New York, 2 A.D.3d 256 [1st Dept. 2003]). In this regard, in Blake v. Neighborhood Hous., 1 N.Y.3d 280 [2003], while it was noted in that case that plaintiff's actions could constitute the sole proximate cause of his accident, the Court of Appeals wrote that was "conceptually impossible" where plaintiff established a violation of §240(1) which led to his injury. Thus, any criticism of Cutaia's use of the ladder by folding it up and leaning it against the wall with no one supporting it

is simply irrelevant as his conduct is not an issue since the defendants violated their non-delegable duty to insure that he was provided with an adequate safety device.

POINT II

THE DEFENDANTS FAILED TO PROFFER ANY EVIDENCE PROVING THAT CUTAIA WAS AT FAULT AS IT RELATES TO HIS CLAIM UNDER LABOR LAW §241(6), WARRANTING A DETERMINATION THAT HE WAS NOT NEGLIGENT AS A MATTER OF LAW

In this case, the motion Court properly determined that Trinity Church and Michilli violated 12 NYCRR (Industrial Code) §23-1.13(b)(3), which provides, in pertinent part, as follows:

“Before work is begun the employer shall ascertain... whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken”.

In addition, the trial Court also held that the defendants violated §23-1.13(b)(4), which states, in relevant part, the following:

“No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit...unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means”.

The plaintiff’s expert notes that despite the requirements of §23-1.13(b)(4), the evidence establishes “that the electrical wires in Cutaiia’s work area were not de-

energized, or properly protected at the time of the incident”. (R.1849-1850). In addition, in violation of §23-1.13(b)(3), the plaintiff’s expert states that:

“Based upon the evidence that I have reviewed, no such warning signs were posted and Michael Cutaia was not advised of the location of the subject electrical wires, the potential hazards involved, or any protective measures to be taken”.

(R.1849).

Inherent in these Industrial Code regulations is the practical requirement that a worker, such as Cutaia, be protected from unknown dangers posed by defective electrical systems. In view of this, Labor Law §241(6) and Industrial Code §23-1.13(b)(4) place the burden upon the owner and general contractor to avoid any potential hazard by “de-energizing the circuit” or providing “effective insulation”, and §23-1.13(b)(3) affirmatively requires an inspection of an electrical power circuit and the posting of warning signs to alert workers of any potential hazard. It is evident that these regulations address the unique dangers posed by faulty electrical systems, and here, there is an absence of any evidence that Cutaia violated instructions, or was on notice of a dangerous electrical condition in his work area. Thus, the defendants’ violation of these sections should impose liability upon them as a matter of law.

Indeed, over the last several years, this Court has consistently found for the worker on their §241(6) claims predicated on a violation of Industrial Code §23-1.13(b) and rejected the defendants’ contention that an issue of fact exists as to plaintiff’s comparative negligence in strikingly similar circumstances. For instance,

in O’Leary v. S & A Elec. Contracting Corp., 149 A.D.3d 500 (1st Dept. 2017), plaintiff sustained injuries when he was shocked by temporary electrical wiring laid on the floor while overseeing renovation work performed by his employer. This Court determined that the “Owner’s contention that an issue of fact exists as to plaintiff’s comparative negligence is unavailing.” Id at 502. Accordingly, this Court held that the defendants violated 12 NYCRR 23-1.13(b)(4), and granted plaintiff partial summary judgment on the issue of liability on the Labor Law §241(6) claim as a matter of law.

Similarly, in Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603 (1st Dept. 2017), this Court granted the plaintiff partial summary judgment under §241(6) as the evidence established that violations of §§23-1.13(b)(3) and (4) proximately caused plaintiff’s injuries when a metal part of his safety harness contacted a live electrical wire, which was hanging down from a drop ceiling of a building under renovation. This Court also found that the defendants failed to point to any evidence that would support a finding that plaintiff was comparatively negligent, since he was acting pursuant to his foreman’s instructions and neither knew, nor should have known, that the cable was electrified, and there was an absence of any warnings or caution tape indicating that workers should avoid the area. Additionally on point is Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 (1st Dept. 2013), where the plaintiff came into contact with an energized wire which caused him to

pull back resulting in him falling from the ladder. The motion Court's denial of summary judgment on plaintiffs claim under §241(6), predicated upon a violation of §§23-1.13(b)(3) and (4) was reversed by this Court with judgment on liability granted to plaintiff.

Moreover, in Harris v. Arnell Const. Corp., 47 A.D.3d 768 (2d Dept. 2008), another case with the same material facts, the Second Department held that the worker demonstrated entitlement to judgment as a matter of law under §241(6) by showing that he was engaged in a covered activity when he was injured; that there were violations of §§23-1.13(b)(3) and (4); and that the defendants failed to raise a triable issue of fact proving the plaintiff was comparatively negligent. (See also, Lodato v. Greyhawk North Amer., LLC, 39 A.D.3d 491 [2d Dept. 2007]).

Simply stated, the defendants have not proffered any evidence showing that Cutaia was not careful, and while the 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 there was an unprotected live wire near the copper pipes he was working on. Thus, there is no relationship between plaintiff's knowledge that electrical wires were present in the area and comparative negligence. Here, no warning signs were posted, and Cutaia, a plumber, with no formal OSHA training, was not advised of the location of the subject electric wires, the hazards involved or any protective measure to be taken. Accordingly, as in the cases discussed above,

the Supreme Court should have affirmatively rejected the defendants' argument that Cutaia was comparatively negligent given the undisputed proof that the electrical wire which caused his electric shock had not been properly insulated. In fact, the evidence in this case is even more compelling, since the material facts have been admitted by Michilli's project manager who conceded that the electrocution occurred because the subject wires had not been de-energized, and that one of the wires was missing a cap exposing Cutaia to a dangerous condition.

In view of these facts, it is abundantly clear that the defendants cannot sustain their burden of proof under CPLR §§1411 and 1412 to demonstrate that Cutaia's conduct was a substantial cause of the accident. (See, Rodriguez v. City of New York, 31 N.Y.3d 312 [2018]; Capuano v. Tishman Construction Corporation, 98 A.D.3d 848 [1st Dept. 2012]; and Melchor v. Singh, 90 A.D.3d 866 [2d Dept. 2011]). Thus, while the apportionment of liability and comparative negligence ordinarily present questions for a jury, the Court of Appeals has made it clear that "contributory negligence should not be charged if there is no or insufficient evidence to support it." (Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 517 [1980]). As this Court instructed in Perales v. City of New York, 274 A.D.2d 349 [1st Dept. 2000], "A comparative negligence charge is inappropriate where there are no specific factual allegations to support it and no valid line of reasoning which could lead the jury to find the plaintiff comparatively negligent". Id. Therefore, this Court should modify

the Decision of the Supreme Court and hold that the plaintiff was not at fault as a matter of law.

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.

Dated: New York, New York
November 2, 2018



LOUIS GRANDELLI

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Dated: New York, New York
November 2, 2018

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

MICHAEL CUTAIA,

Plaintiff-Appellant-Respondent,

against

THE BOARD OF MANAGERS OF THE
160/170 VARICK STREET CONDOMINIUM,

Defendant-Respondent,

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

Defendants-Respondents-Appellants,

and

PATRIOT ELECTRIC CORP.,

Defendant.

MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third-Party Plaintiffs,

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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1. The index number of the case in the Court below is 155334/12.
 2. The full names of the original parties are set forth above. The caption was amended by the filing of an Amended Summons and Amended Verified Complaint which added The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York (collectively, "Church Parties") and Michilli Inc. to the caption as Defendants.
 3. The action was commenced in the Supreme Court, New York County.
 4. This action was commenced on or about August 9, 2012, by the filing of a Summons and Verified Complaint. Issue was joined by service of an Answer of The Board of Managers of the 160/170 Varick Street Condominium ("160/170 Varick") on or about November 29, 2012. Issue was also joined by service of a Verified Answer of and Michilli Construction, Inc. on or about December 19, 2012.

The action against Church Parties and Michilli Inc. was commenced on or about March 12, 2013, by the filing of an Amended Summons and Amended Verified Complaint. Issue was joined by service of an Amended Answer of 160/170 Varick and Church Parties on or about June 27, 2013. Issue was also joined by service of a Verified Answer of Michilli Construction, Inc. and Michilli, Inc. on or about July 12, 2013.

The third-party action was commenced on or about July 18, 2013, by the filing of Third-Party Summons and Verified Third-Party Complaint. Issue was joined by service of a Verified Answer of A+ Installations Corp. on or about September 20, 2013.

5. The nature and object of the action is Plaintiff seeks to recover damages for personal injuries resulting from a work related accident.
6. The appeals are from the Decision and Order of the Honorable Carol R. Edmead, dated August 3, 2018, and from the Amended Order of the Honorable Carol R. Edmead, dated August 8, 2018.
7. This appeal is being perfected with the use of a fully reproduced Joint Record on Appeal.