To Be Argued By:
Michael J. Kozoriz
Time Requested: 30 Minutes

APL-2019-00168

New York County Clerk's Index No. 155334/12

Court of Appeals

STATE OF NEW YORK

MICHAEL CUTAIA,

Plaintiff-Respondent,

against

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

Defendant,

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

Defendants-Appellants,

and

PATRIOT ELECTRIC CORP.,

Defendant.

(Additional Caption on the Reverse)

BRIEF FOR DEFENDANTS-APPELLANTS

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MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

Third-Party Plaintiffs,

against

A+ INSTALLATIONS CORP.,

Third-Party Defendant.

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.

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The Defendant-Appellant, The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, has no parents, and has the following subsidiaries and affiliates:

St. Margaret's House Housing Development Fund Corporation
Trinity Concerts, Inc.
Trinity Episcopal Center Association, Inc.
Trinity Global Leadership Institute
Church Divinity School of the Pacific
Hudson Square Properties, LLC
Currently included in the Hudson Square Properties, LLC Joint Venture:
Trinity Hudson Holdings, LLC
Trinity REIT, Inc.
375 HSP, LLC
Four Hudson Square, LLC
561 HH, LLC
92 HH, LLC
Remaindermen: The sole member of each entity is Trinity Church
100 AOA LLC
155 AOA LLC
200 Hudson LLC
205 Hudson LLC
345 Hudson LLC
350 Hudson LLC
435 Hudson LLC
160 Varick LLC
225 Varick LLC
12 Vestry LLC
1 Hudson Square LLC
375 Hudson LLC

The Defendants-Appellants, Michilli Construction, Inc., and Michilli Inc., have no parents, subsidiaries, or affiliates.

Dated: March 5, 2020
New York, New York

Respectfully submitted,
Law Office of
JAMES J. TOOMEY

By: MICHAEL J. KOZORIZ
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STATUS OF RELATED LITIGATION

By order of the Appellate Division – First Department, dated and entered August 6, 2019, all further proceedings in the Supreme Court, including trial, are stayed pending a decision by the Court of Appeals.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction to entertain this appeal and to review the questions raised herein pursuant to CPLR §§ 5602(a), 5602(b)(1), and 5713, and the order of the Appellate Division – First Department, dated and entered August 6, 2019, granting Defendants-Appellants leave to appeal to the Court of Appeals and certifying that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, entered May 2, 2019, which, to the extent appealed, reversed an amended order of the Supreme Court, New York County, entered August 9, 2018, properly made?" (A9).[1]

In its August 6, 2019 order, the Appellate Division – First Department certified "that its determination was made as a matter of law and not in the exercise of discretion." (A9).

[1] Citations to the Appendix filed with the Court of Appeals will be in the form "(A)".

QUESTION PRESENTED

Was the order of the Appellate Division – First Department, entered May 2, 2019, which, to the extent appealed, reversed an amended order of the Supreme Court, New York County, entered August 9, 2018, properly made?

It is respectfully submitted that the question should be answered in the negative. The order of the Appellate Division – First Department, entered May 2, 2019, is at odds with pre-2009 precedent of the First Department, it demonstrates and exacerbates a split of authority among the four appellate departments, putting the First Department at odds with decisions of the Second, Third, and Fourth Departments, and it is contrary to the binding decision by this Court in *Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]. For this reason, the award of summary judgment to the plaintiff under Labor Law § 240(1) by the Appellate Division – First Department should be reversed and the issue of liability under said statute remitted to a jury for trial.

PRELIMINARY STATEMENT

Defendants-Appellants, The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York ("Trinity Church"), and Michilli Construction, Inc. and Michilli Inc. ("Michilli"), seek reversal of the May 2, 2019 decision and order of the Appellate Division - First Department, which reversed

the Supreme Court's denial of the motion for summary judgment under Labor Law § 240(1) by the Plaintiff-Respondent, Michael Cutaia ("plaintiff"). Trinity Church and Michilli seek reversal because the majority's May 2, 2019 decision and order is at odds with pre-2009 precedent of the First Department, it demonstrates and exacerbates a split of authority among the four appellate judicial departments, putting the First Department at odds with decisions of the Second, Third, and Fourth Departments, and it is contrary to the binding decision by the Court of Appeals in *Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016].

The Second, Third, and Fourth Departments, and the Court of Appeals have held that where a worker falls from a ladder, and there is disputed evidence and issues of fact as to whether the ladder was defective or inadequate for the assigned task, and yet the worker fell therefrom after having sustained an electric shock, a question of fact is presented as to proximate cause and as to whether the plaintiff is entitled to judgment under Labor Law § 240(1).

Accordingly, it was reversible error for the majority to award summary judgment to the plaintiff on his Labor Law § 240(1) cause of action. Rather, the Court of Appeals should reverse for the well-stated reasons that formed the dissenting opinion in the court below by the Honorable Justice Peter Tom, and joined by the Honorable Justice Marcy L. Kahn, and for the reasons stated herein.

STATEMENT OF FACTS

The plaintiff was employed as a plumbing mechanic by A+ Installations Corp. when, on March 26, 2012, he alleges to have sustained an electric shock from an exposed Romex wire in the ceiling where he was working, on the 11th floor of 160/170 Varick Street, New York, NY (A43) (325).[2]

Trinity Church owned the building located at 160/170 Varick Street (A456-457) (920-921). Plaintiff's accident happened in tenant space on the 11th floor, occupied by Michilli (A143-145) (450-452).

No one from Trinity Church or Michilli told plaintiff how to perform his work (A153) (460).

To perform his tasks in the men's restroom where his accident would later occur, plaintiff used a blue-colored A-frame ladder that he found in the restroom (A165-166) (472-473). The ladder was a fiberglass ladder with metal steps and rubber feet (A168-169) (475-476). He had used that same ladder every day that he worked at the jobsite (A165) (472). He did not know who owned the ladder (A165) (472).

The restroom floor was made of cement and was level (A171-172) (478-479). Just a few feet from where the accident would later occur, plaintiff set the

[2] Citations to the reproduced Record on Appeal used at the Appellate Division will be in the form "( )".

ladder up in the restroom and was frequently going up and down the ladder, as needed, and the ladder was stable (A172-173) (479-480). The drop ceiling in the restroom was framed out, but there were no ceiling tiles in place yet (A175) (482). Lighting in the room was adequate (A178-179) (485-486). Plaintiff observed electrical wiring running through the ceiling, mostly BX cable, but also yellow wires that plaintiff speculated were temporary. These yellow wires were near the copper pipes that plaintiff was cutting (A179-181) (486-488).

After working on the ladder, going up and down it several times for about 30 minutes, plaintiff moved the ladder in the restroom about five to seven feet from its prior location. This time, plaintiff did not set up the ladder in the open and locked position, but rather kept it closed and leaned it against a wall (A182-183) (489-490). Plaintiff leaned the 10-foot A-frame ladder against the wall so that the top was about eight to nine feet high up on the wall. This brought the top of the ladder about one foot beneath the ceiling frame. The base of the ladder was about two feet from the wall (A185-187) (492-494).

Plaintiff climbed the ladder and was up on it for five to 15 minutes before he fell (A188) (495). The ladder did not move and was "sturdy up against the wall" (A194) (501). He described his accident as follows:

> I went up the ladder, I cut the pipe, and then I stayed on the ladder. There's a process. You've got to clean the pipe, flux it, and then stick the T on. So I cut it, I cleaned it, and when I went to go stick

> the T on, I grabbed the pipe and then I went to grab the other side of the pipe to push it onto the T, and that's when I got electrocuted.

(A188-189) (495-496). "I was on the ladder while I was being electrocuted and then the next thing I remember was getting up off the ground, being on the ground" (A200) (507). Plaintiff did not know if the ladder had fallen, testifying:

> Q: How did you break away from that pipe? Did somebody have to remove you from it, or did you fly off the ladder, or something else?
>
> A: I don't know. I have no idea. The next thing I know I was on the floor.
>
> Q: Did anybody ever tell you, 'Hey, we had to knock you off of that'?
>
> A: No.
>
> Q: Did the ladder move at all after you found yourself on the ground?
>
> A: I don't know.
>
> Q: Well, the ladder didn't fall on top of you, correct?
>
> A: I don't know. I don't think so. I don't know.
>
> Q: Do you remember seeing the ladder?
>
> A: After the accident?
>
> Q: Yes.
>
> A: No, I don't remember seeing the ladder.

(A231-232) (538-539).

According to plaintiff, a smaller A-frame ladder would not have allowed him to access the pipe in the ceiling. When asked if he inquired about an alternative means to access the pipes in the ceiling, plaintiff insisted that there was no other way than to lean the ladder against the wall. Only later did he testify that he asked Joe Renna, the project manager for Michilli, about an alternative ladder, but then he contradicted himself, testifying that he could not remember if he spoke to Joe Renna about another ladder (A194-196) (501-503). In opposition to plaintiff's motion for summary judgment, Trinity Church and Michilli submitted an Affidavit from Joe Renna denying that he had any such discussion with plaintiff about the ladder available to him as being inadequate for the job or whether there were alternative ladders or scaffolds available (A790-791) (1893-1894). Plaintiff did not know if the ladder itself had fallen during or after his electric shock, if at all (A201) (508). Plaintiff's helper, James Alonzo, was present in the restroom when plaintiff set up the ladder and at the time of the accident (A196-197) (503-504). When Alonzo testified at a deposition, he essentially had no memory of how the accident occurred (A741-742) (1749-1750).

Joe Renna, the project manager for Michilli, testified that after the accident, he saw an old wooden, eight-foot A-frame ladder laying on the floor. He did not know who owned the ladder, but it did not belong to Michilli (A501-503) (1160-1162). Note that plaintiff claims to have fallen from a 10-foot blue fiberglass

ladder, not an eight-foot wooden ladder. Plaintiff's employer, A+ Installations, would bring its own tools for its work (A502) (1161). Plaintiff was the person in-charge at the site for the work performed by his employer, A+ Installations (A586-587) (1245-1246). On the day of the accident, plaintiff and his assistant were the only employees from A+ Installations present (A587-588) (1246-1247).

As the Supreme Court aptly held in determining plaintiff's motion for summary judgment on his Labor Law § 240(1) claim, plaintiff "has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received" (A35) (25). Therefore, the Supreme Court correctly denied that portion of plaintiff's motion for summary judgment as to his Labor Law § 240(1) cause of action.

On plaintiff's appeal to the Appellate Division – First Department, the appellate court, in a 3-2 decision, reversed the Supreme Court's denial of summary judgment to plaintiff on Labor Law § 240(1) cause of action (A14-A25).

LEGAL ARGUMENT FOR DEFENDANTS-APPELLANTS

POINT I

THE DECISION AND ORDER OF THE FIRST DEPARTMENT GRANTING SUMMARY JUDGMENT TO PLAINTIFF ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD BE REVERSED AND THE DENIAL OF SAID MOTION AS TO LABOR LAW § 240(1) BY THE SUPREME COURT IN NEW YORK COUNTY REINSTATED

The majority opinion of Appellate Division - First Department's May 2, 2019 decision and order reversed the denial of summary judgment to plaintiff on his Labor Law § 240(1) claim. Despite the First Department's prior incorrect holding in *Nazario v. 222 Broadway LLC*, 135 A.D.3d 506, 23 N.Y.S.3d 192 [1st Dep't 2016], which was reversed by the Court of Appeals (*see* 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]), the First Department here once again adhered to its rationale as set forth in *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009] and *DelRosario v. United Nations Federal Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dep't 2013], both of which marked a sharp departure from pre-2009 holdings of the First Department, and from holdings in the other three appellate departments and the Court of Appeals. In his concurring opinion, in *Nazario*, *supra*, 135 A.D.3d at 512-13, which was essentially adopted by the Court of Appeals, Justice Tom wrote that "prior to this Court's holdings in *Vukovich* and *DelRosario*, all four Departments were

unanimous in finding that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electric shock, and where there is no evidence the ladder is defective and no record evidence of the need for another device" (*Nazario*, *supra*, 135 A.D.3d at 512-13).

Although the majority here, in its May 2, 2019 order wrote that "*Nazario* never suggested that all elevated falls following electrical shocks were carved out of the protections of the statute," neither Trinity Church and Michilli, nor Justices Tom and Kahn in their dissenting opinion below, have suggested any such thing. As stated in Justice Tom's prescient concurring opinion in *Nazario* and reiterated in his dissenting opinion below, issues of fact are presented when a worker falls from a ladder after having received an electric shock *"where there is no evidence the ladder is defective and no record evidence of the need for another device"* (*Id.* [emphasis added]).

Justice Tom aptly pointed out in his dissenting opinion below that it is the majority which has carved out exclusively in the First Department, "a special category of injury that circumvents a plaintiff's responsibility in the first instance of establishing a prima facie case of causation" (A25). Although the majority would assuredly deny that a special category of injury has now been carved out in

the First Department, the majority's opinion below, and *Vukovich* and *DelRosario*, have essentially ensured such a result.

The majority's decision below is in direct contravention of this Court's decision in *Nazario v. 222 Broadway LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016] and *Blake v. Neighborhood Hous. Servs of N.Y. City*, 1 N.Y.3d 280, 288-89, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003] [referring to "the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party" and that "causation must also be established"].

The majority's decision below is also in direct conflict with decisions of the Second, Third, and Fourth Departments. In *Gange v. Tilles Inv. Co.*, 220 A.D.2d 556, 632 N.S.Y.2d 808 [2d Dep't 1995], the Second Department held:

> [T]he fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder (*see*, *Izrailev v Ficarra Furniture*, 70 NY2d 813). However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices [citations omitted].

(*Gange*, 220 A.D.2d at 558 [citing *Izrailev v Ficarra Furniture of Long Is.*, 70 N.Y.2d 813, 523 N.Y.S.2d 432, 517 N.E.2d 1318 [1987]).

The majority's decision below is also in direct conflict with the Third Department's decision in *Grogan v. Norlite Corp.*, 282 A.D.2d 781, 723 N.Y.S.2d 529 [3d Dep't 2001], where the appellate court held:

> The Court of Appeals has routinely ruled that in order for a plaintiff to recover under Labor Law § 240(1), the injury must be proximately caused by a defendant's failure to provide an adequate safety device [citations omitted]. Moreover, this Court has consistently held that "a mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker" [citations omitted]. However, the holdings of these cases are a corollary to the general rule in this Court that "when a worker injured in a fall was provided with an elevation-related safety device, the question of whether the device provided proper protection within the meaning of Labor Law § 240(1) is ordinarily a question of fact ... except where the device collapses, slips or otherwise fails to perform its function of supporting the workers and their materials" [citations omitted].
>
> Thus, where, as here, there is no evidence that the ladder slipped, collapsed or was otherwise defective, the question of whether the ladder provided proper protection is a factual one and neither the injured worker nor the owner is entitled to summary judgment on a Labor Law § 240(1) claim [citation omitted]. To this end, we note that under circumstances essentially identical to the case at bar, each of the other Departments has held that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electrical shock (*see*, *Donovan v CNY Consol. Contrs*., 278 AD2d 881; *Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376, 378; *Gange v Tilles Inv. Co.*, 220 AD2d 556, 558).

(*Grogan*, 282 A.D.2d at 782-83).

The majority's decision below is also in direct conflict with the Fourth Department's decision in *Jones v. Nazareth College of Rochester*, 147 A.D.3d 1364, 46 N.Y.S.3d 357 [4th Dep't 2017], where that court held:

> We conclude that Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240(1) cause of action. At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder, which was "at least four feet off the floor." As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.
>
> Contrary to plaintiff's contention, we conclude that the court properly denied the motion. "[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices" (*Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 [1995]; *see Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016]; *Grogan v Norlite Corp.*, 282 AD2d 781, 782-783 [2001]; *Donovan v CNY Consol. Contrs.*, 278 AD2d 881, 881 [2000]).

(*Jones*, 147 A.D.3d at 1365).

As early as one month after the First Department's 2009 decision in *Vukovich*, *supra*, the trial courts within the department began begrudgingly citing it with bewilderment, noting its departure from well-established precedent not only in the First Department, but from the other appellate departments as well (*see*

Nakis v. Apple Computer, Inc., 24 Misc.3d 967, 879 N.Y.S.2d 910 [Sup.Ct.2009],

in which Justice Edward H. Lehner, J.S.C., wrote in a reported decision:

> [C]oming to the issue of whether the fall as a result of an electric shock can result in liability under § 240(1), the First Department, in denying summary judgment in *Weber v. 1111 Park Avenue Realty Corp.*, 253 A.D.2d 376, 676 N.Y.S.2d 174 (1998), quoted the Second Department conclusion in *Gange v. Tilles Investment Co.*, 220 A.D.2d 556, 632 N.Y.S.2d 808 (1995), that "the fact that the plaintiff fell off the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1), ... (but) the plaintiff is not entitled to summary judgment ... as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective in any way, failed to provide proper protection and whether plaintiff should have been provided with additional safety devices" (p. 378, 676 N.Y.S.2d 174). Similar holdings that an issue of fact is raised when a worker falls off a non-defective ladder as a result of an electric shock were rendered in *Karapati v. K.J. Rocchio, Inc.*, 12 A.D.3d 413, 783 N.Y.S.2d 839 (2nd Dept.2004); *Donovan v. CNY Consolidated Contractors, Inc*., 278 A.D.2d 881, 718 N.Y.S.2d 760 (4th Dept.2000); *Grogan v. Norlite Corporation*, 282 A.D.2d 781, 782–783, 723 N.Y.S.2d 529 (3rd Dept.2001) ("we note that under circumstances essentially identical to the case at bar, each of the other Departments has held that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electric shock," citing the foregoing cases).
>
> *However, this year in Vukovich v. 1345 Fee, LLC, 58 A.D.3d 410, without mentioning any of the above-cited cases, the First Department granted summary judgment to plaintiff under facts similar to those in said cases, stating merely that 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."* That action was then tried before me and resulted in a jury award to plaintiff of over $5,000,000. However, shortly after the award, the First Department recalled its prior determination and issued a new decision (61 A.D.3d 533, 878

> N.Y.S.2d 15), which adhered to its prior grant of summary judgment to plaintiff, but withdrew the portion of the prior decision that granted summary judgment on an indemnity claim, and determined that there were triable issues of fact on such claim.
>
> In view of the above, the motion of Apple to dismiss plaintiff's claim against it under § 240(1) is denied. It is noted that plaintiff has not moved for summary judgment.

(*Nakis*, 24 Misc.3d at 971-72 [emphasis added]).

Once *Vukovich* was decided, the First Department began relying on it as precedent to, as Justice Tom wrote in his dissent below, carve out "a special category of injury that circumvents a plaintiff's responsibility in the first instance of establishing a prima facie case of causation" (A25). In *DelRosario*, the First Department cited *Vukovich* as precedent. In the First Department's decision in *Nazario*, which was later reversed by this Court, the First Department relied on *Vukovich* <u>and</u> *DelRosario*. Now, despite the Court of Appeals' decision in *Nazario*, *supra*, 28 N.Y.3d 1054, the First Department here has again reverted back to reliance on *Vukovich* and *DelRosario* as precedent, contrary to this Court's decision in *Nazario* and contrary to the decisions by all the other appellate departments.

With its 2009 decision in *Vukovich*, the First Department split with the other three departments and abandoned its own precedent as seen in its 1998 decision in *Weber v. 1111 Park Ave. Realty Corp.*, 253 A.D.2d 376, 676 N.Y.S.2d 174 [1st Dep't 1998].

In *Weber*, the First Department cited the Second Department's decision in *Gange*, *supra*, with approval:

> *Gange v Tilles Inv. Co.* (220 AD2d 556) is directly on point. There, the Appellate Division, Second Department, stated (at 558), "the fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder (*see*, *Izrailev v Ficarra Furniture*, 70 NY2d 813). However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, *inter alia*, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices".

(*Weber*, 253 A.D.2d at 378).

Perhaps the case that best illustrates how the majority of the justices in the First Department on the decision below overlooked or misapprehended the Court of Appeals' decision in *Nazario* and the decisions of the other departments, is *Faver v. Midtown Trackage Ventures LLC*, 150 A.D.3d 580, 52 N.Y.S.3d 626 [1st Dep't 2017]. In *Faver*, in reversing the denial of summary judgment to the plaintiff there on his Labor Law § 240(1) claim, a unanimous panel of the First Department wrote: "Plaintiff established entitlement to partial summary judgment on his Labor Law § 240(1) claim through his own 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, which*

resulted in plaintiff losing his balance and falling to the ground" (150 A.D.3d at 580 [emphasis added]).

Justice Kahn, who joined Justice Tom's dissent here, voted unanimously with her colleagues in *Faver*. Why? The undersigned believes that the reason is clear. Justice Kahn clearly voted with the majority in *Faver* because the plaintiff there presented evidence that the ladder he was using was unsecure, was caused to wobble as a result of his electric shock, and that such wobbling caused the plaintiff to lose his balance and fall to the ground. In other words, the plaintiff in *Faver* established that the safety device provided to him was inadequate for the task which he was assigned. In the case at bar, the plaintiff, Michael Cutaia, has proffered no evidence that the ladder he was using was unsecure. To the contrary, he testified that the ladder was stable and "sturdy up against the wall" (A173, A194) (480, 501). Unlike in *Faver*, the plaintiff here presented no evidence that the ladder wobbled or otherwise moved as a result of his electric shock. To the contrary, he testified that after his "electrocution" he does not know how he ended up on the floor (A201) (508). When asked what happened to the ladder when he got electrocuted and whether it stayed against the wall or fell, plaintiff responded "I don't know" (A201) (508). The only other person with plaintiff in the room when the accident occurred was his co-worker, Michael Alonzo. When asked at his deposition whether he observed the ladder after the accident, Alonzo responded

"I don't remember" (A741) (1749). When asked if he saw the ladder on the ground after the accident, Alonzo responded "I don't remember" (A742) (1750).

Plaintiff provided no testimony or other evidence that he lost his balance or that he would not have fallen off of any other ladder or scaffold that could have been or should have been provided to him. As Justice Tom aptly pointed out in his dissent, plaintiff's expert "did not elaborate on how a scaffold or manlift could have even fit into such a confined space and thus could have even been used for the assigned plumbing task" [where] "the record suggests that if an A-frame ladder could not be opened in the subject location, assembling a scaffold would have been precluded, as would the use of a manlift under similar dimensional factors" (A23-A24).

Based on plaintiff's opposition to Trinity Church and Michilli's motion for leave to appeal to the Court of Appeals, it appears that plaintiff's position is that the room was large enough to accommodate, in the opened position, the A-frame ladder that plaintiff was using, yet plaintiff chose to use it in the closed position because it offered more convenient access to the pipe that plaintiff was working on. The problem with this argument is that it is a factual argument by plaintiff's counsel without any foundation in the record. Plaintiff's counsel's argument is creative and perhaps even plausible, but plaintiff's deposition testimony in such regard was ambiguous at best. In fact, plaintiff testified that he tried to open the

ladder "but I couldn't" (A183) (490). Not only did Justices Tom and Kahn interpret plaintiff's testimony to mean that the space was too confined so as to use the ladder in the open position (A23-A24), but the majority also appear to have so interpreted plaintiff's testimony. The majority wrote that "[t]he ladder could not be opened or locked while plaintiff was performing his task . . ." (A15-A16). To the extent that plaintiff argues that he could have used the ladder in the open position, but chose not to, there is no other evidence pertaining to the dimensions of plaintiff's work space. Plaintiff's expert, Robert Fuchs, P.E., has not described the dimensions, and, in fact, he had never actually visited the accident location, rendering his opinion speculative and of little or no value (*see Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 754 N.Y.S.2d 195, 784 N.E.2d 68 [2002] ["Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force . . ."]).

In opposition to Trinity Church and Michilli's motion for leave to appeal, plaintiff's counsel also argued that the room was large enough to accommodate the ladder in the open position, in that the room was supposedly 15 to 20 feet long. However, this again is counsel's argument, but it is not supported by the record. What plaintiff actually testified to was that the pipe he was working on at the time of his accident was about 20 feet long, but that the pipe was not straight, it had

"some elbows," "[i]t turned" (A220) (527). Plaintiff testified that the pipe that he was cutting in the ceiling "continued into another room" and that where he was cutting was "maybe 15 feet" from the door (A396) (737). Contrary to plaintiff's counsel's argument, plaintiff did not testify that the room was 15 to 20 feet long. There is no evidence in the record to establish the size of the room other than plaintiff's testimony that he tried to open the ladder, but could not, presumably because of the dimensions of the workspace. To that end, plaintiff's expert affidavit by Robert Fuchs, P.E., who never even visited the accident location, is based on mere speculation and proffers nothing more than legal opinions (*see Diaz*, *supra*, 99 N.Y.2d at 544) (A778-789) (1845-1856).

Justice Tom astutely wrote in his dissent below that "[a] claim under section 240(1) still requires proof that an injurious fall from a height, even when induced by an electrical shock, was proximately caused by the inadequacy of the safety devices provided," that "we are left to speculate as to the feasibility of alterative safety devices," that "the record is bereft of evidence plausibly explaining why plaintiff fell, apart from his having been shocked," and that "the record does not allow us to conclude as a matter of law that the ladder somehow slipped" (A21-A25). The undersigned believes that these distinctions between *Faver* and the case at bar is why Justice Kahn voted with the majority in *Faver* and yet joined Justice

Tom's dissent here. Justices Tom and Kahn did not overlook or misapprehend these important distinctions, which, respectfully, the majority below did.

To be clear, Trinity Church and Michilli have at no time sought dismissal of plaintiff's Labor Law § 240(1) cause of action and they have not appealed the award of summary judgment to plaintiff on his Labor Law § 241(6) claim pertaining to the electric shock itself. Rather, it has been the position of Trinity Church and Michilli all along that there are material issues of fact that preclude the award of judgment as a matter of law to plaintiff on his Labor Law § 240(1) cause of action.

Accordingly, the Court of Appeals should reverse that portion of the First Department's May 2, 2019 decision and order, which awarded summary judgment to plaintiff on his Labor Law § 240(1) cause of action upon reversing the Supreme Court's denial of that aspect of the plaintiff's motion. In other words, this Court should hold that plaintiff has not met his burden of proof on his motion for summary judgment and that whether Labor Law § 240(1) was violated is an issue of fact to be resolved at trial.

POINT II

THE DECISION OF THE MAJORITY BELOW IS BASED ON THE FALSE PREMISE THAT PLAINTIFF FELL TO THE GROUND BECAUSE THE LADDER FAILED AND NOT DUE TO THE ELECTRIC SHOCK ITSELF

The decision of the majority below should be reversed because it based on the false premise that the plaintiff fell to the ground because the subject ladder failed and not due to the electric shock itself. Such false premise is evidenced by several instances in the decision. The majority wrote that *Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016] is distinguishable from the instant case because the ladder in *Nazario* "remained in an open locked position when it landed" and "[t]hus, there was no evidence that the ladder was defective or that another safety device was needed" (A16-A17). First, as the First Department would assuredly agree, just because a ladder that has fallen remains open and locked does not automatically mean that the ladder was not defective or suitable for the task being performed, and yet, the majority's decision here implies that this is so in its justification for distinguishing *Nazario*, which the Supreme Court relied upon in denying plaintiff's motion for summary on his Labor Law § 240(1) cause of action.

Second, the majority's decision wrote that the subject ladder here was not "otherwise secured," blindly giving credence to plaintiff's expert's opinion that the

ladder was not secure, but should have been (A17). The majority's decision has ignored the fact that the plaintiff testified that the ladder was secure and that he does not know if the ladder slipped, collapsed, fell or otherwise moved before, during, or after he received the electric shock. In fact, neither plaintiff nor his helper, Peter Alonso, who were the only two persons in the room at the time of the accident, could recall whether or not the ladder fell or even moved at any time in connection with this accident (A188-189, A194, A200-201, A231-232, A741-742) (495-496, 501, 507-508, 538-539, and 1749-1750). To the extent that plaintiff relies on the testimony of Joe Renna, from Michilli, who came to plaintiff's aid a few minutes after the accident and who testified that he saw a closed A-frame ladder on the ground, such reliance raises rather than eliminates issues of fact. Mr. Renna was not in the room and did not witness the accident. There is no evidence as to how the ladder got in the location or position where Mr. Renna saw it. Plaintiff's helper, Mr. Alonso, could have moved the ladder. Mr. Alonso could not remember (A741-742) (1749-1750). The ladder could have fallen after plaintiff hit the ground due to the electric shock. Most importantly, the ladder that Mr. Renna saw on the ground was an eight-foot wooden ladder whereas plaintiff allegedly fell from a 10-foot blue fiberglass ladder (A501-503) (1160-1162). Thus, there are issues of fact as to whether the ladder seen by Mr. Renna is even the ladder from

which plaintiff fell. On this record, summary judgment should not have been awarded.

The majority wrote that "*Nazario* never suggested that all elevated falls following electrical shocks were carved out of the protections of the statute" (A17). While Trinity Church and Michilli do not quarrel with this observation, in support of this statement the majority does not cite to *Nazario* or any other case from the Court of Appeals, but rather to its own flawed decisions in *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009] and *DelRosario v. United Nations Federal Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dep't 2013]. These two cases are discussed at length in Point I above. In addition to *Vukovich* and *DelRosario*, the First Department also cited to its decision in *Faver v. Midtown Trackage Ventures LLC*, 150 A.D.3d 580, 52 N.Y.S.3d 626 [1st Dep't 2017]. *Faver* is discussed extensively and distinguished in Point I above as illustrative as to why Justice Kahn, who joined in Justice Tom's dissenting opinion here, joined the majority in *Favor*. In short, Justice Kahn did not overlook or misapprehend the important distinctions between these two cases, which, respectfully, the majority below did.

Third, the majority wrote that plaintiff sustained injuries that "are clearly attributable to the fall, and not to the shock, presenting questions of fact as to damages, but not liability" (A17). Trinity Church and Michilli do not contest the

fact that plaintiff fell, but the majority's rationale in this regard dispenses with the requirement that a plaintiff prove proximate cause as a result of a violation of the statute. Instead, the majority concluded that because plaintiff was injured in a fall, then he is entitled to judgment as a matter of law irrespective of causation. The majority's decision is contrary not only to the Court of Appeals' decision in *Nazario*, but contrary to numerous other holdings by the Court of Appeals, contrary to all other appellate departments, and contrary to its own pre-*Vukovich* decisions (*see* Point I, *supra*).

The First Department has already begun citing its decision here, *Cutaia v. Board of Managers of 160/170 Varick Street Condominium*, 172 A.D.3d 424, 100 N.Y.S.3d 221 [1st Dep't 2019], as authority for awarding a plaintiff summary judgment where "the ladder wobbled, flipped, and flopped, causing him to fall" (*see Rivera–Astudillo v. Garden of Prayer Church of God in Christ, Inc.*, 176 A.D.3d 425, 425, 112 N.Y.S.3d 79 [1st Dep't 2019]). The First Department's reliance on *Cutaia* in support of its rationale in *Rivera–Astudillo* is troubling and somewhat ironic because in *Cutaia* there is no evidence whatsoever that the ladder that Mr. Cutaia was using wobbled, flipped, flopped, or otherwise moved at all. The absence of such evidence in the *Cutaia* case is precisely the reason why the First Department's decision should be reversed.

More recently, a panel of justices from the First Department, different from the panel that decided *Cutaia*, cited the Court of Appeals' decision in *Nazario* in reversing the Supreme Court's award of summary judgment to a plaintiff on his Labor Law § 240(1) cause of action (*see Higgins v. TST 375 Hudson, L.L.C.*, 179 A.D.3d 508, --- N.Y.S.3d --- [1st Dep't 2020]). In a unanimous decision, in *Higgins*, the justices wrote that "[s]ummary judgment in plaintiff's favor as to liability on his Labor Law § 240(1) claim is precluded by an issue of fact as to whether the ladder, which was properly set up, provided plaintiff with proper protection (*see Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]; plaintiff had no problem with the ladder prior to the electric shock and questions of fact exist whether a scaffold could have prevented this accident" (*Id.*). A copy of the *Higgins* decision is included at the end of this principal brief, pursuant to 22 NYCRR § 500.1(h).

Thus, not only is there a split of authority, with the First Department being at odds with the other appellate departments, there is now a split of authority among different panels of justices within the First Department on the issue presented here. While one may observe that the court in *Higgins* noted that the ladder there was "properly set up," this distinction is not dispositive of the outcome here. Although Mr. Cutaia did not properly set up his ladder, there is no evidence that it was this improper set up that proximately caused his accident. As in *Higgins*, "plaintiff

[here] had no problem with the ladder prior to the electric shock and questions of fact exist whether a scaffold could have prevented this accident". While plaintiff here may argue that his expert has already opined that a scaffold or manlift would have prevented his accident, such a conclusion is purely speculative, particularly because plaintiff's expert has never visited the accident location, and as Justice Tom astutely pointed out in his dissent, the expert never explained how a scaffold or manlift could fit in the workspace where plaintiff could not even fit an open A-frame ladder. To the extent that plaintiff argues that the space was large enough to open his ladder, this merely presents an issue of fact that must be decided by a jury.

CONCLUSION

Pursuant to the foregoing arguments, it is respectfully submitted that the question presented above should be answered in the negative.

Accordingly, based on this Court's prior decisions in *Nazario* and *Blake*, this Court should hold that where a worker falls from a ladder upon receipt of an electric shock, and there is no evidence or evidence is reasonably in dispute, that the worker fell as a result of a defect in the ladder or because the ladder was inadequate for the work being performed, there is an issue of fact as to the defendant's liability under Labor Law § 240(1). Upon such holding, that portion

of the First Department's May 2, 2019 decision and order that awarded summary judgment to plaintiff on his Labor Law § 240(1) cause of action should be reversed and the issue of Trinity Church and Michilli's liability under said statute remitted to the Supreme Court for trial.

Dated: March 5, 2020
New York, New York

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to 22 NYCRR § 500.13(c), that the foregoing letter brief was prepared on a computer word processor using Word and that a proportionally spaced typeface was used as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Certificate of Compliance and the Table of Contents, Table of Authorities, Proof of Service, or authorized addendum containing statutes, rules, regulations, etc., if any, is 6,766.

Dated: March 5, 2020
New York, New York

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Addendum

Friedman, J.P., Richter, Kern, Singh, JJ.

10797- 10797A Index 24722/13E 43057/14E 43112/14E 43202/15E 43102/16E

Edward Higgins,
Plaintiff-Respondent,

-against-

TST 375 Hudson, L.L.C., et al.,
Defendants-Respondents-Appellants,

ADCO Electrical Corp.,
Defendant-Appellant-Respondent.

- - - - -

Americon Construction Inc.,
Third-Party Plaintiff,

-against-

EMCOR Services of New York/New Jersey Inc.,
Third-Party Defendant,

ADCO Electrical Corp.,
Third-Party Defendant-Appellant-Respondent.

- - - - -

EMCOR Services New York/New Jersey Inc.,
Second Third-Party Plaintiff-Respondent-Appellant,

-against-

OMC, Inc., et al.,
Second Third-Party Defendants-Appellants-Respondents.

- - - - -

Americon Construction Inc.,
Third Third-Party Plaintiff-Respondent-Appellant,

-against-

OMC, Inc., et al.,
Third Third-Party Defendants-Appellants-Respondents.

- - - - -

TST 375 Hudson, L.L.C., et al.,
Fourth Third-Party Plaintiffs-Respondents-Appellants.

-against-

OMC, Inc., et al.,
Fourth Third-Party Defendants-Appellants-Respondents.

- - - - -

ADCO Electrical Corp.,
Fifth Third-Party Plaintiff-Appellant-Respondent,

-against-

OMC, Inc., et al.,
Fifth Third-Party Defendants-Appellants-Respondents.

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Perry, Van Etten, Rozanski & Primavera, LLP, New York (Geoffrey H. Pforr of counsel), for ADCO Electrical Corp., appellant-respondent.

Russo & Toner, LLP, New York (Josh H. Kardisch of counsel), for OMC, Inc. and OMC Sheet Metal, Inc., appellants-respondents.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for Edward Higgins, respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for TST 375 Hudson, L.L.C., and TST 375 Hudson Corp. respondents-appellants.

Kaufman Dolowich Voluck, LLP, Woodbury (Jonathan B. Isaacson of counsel), for Americon Construction, Inc., respondent-appellant.

London Fisher LLP, New York (Brian A. Kalman of counsel), for EMCOR Services New York/New Jersey, Inc., respondent-appellant.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered July 24, 2018, which, insofar as appealed from, granted

plaintiff’s motion for summary judgment on his Labor Law § 240(1) claim as against defendants TST 375 Hudson, L.L.C. and TST 375 Hudson Corp. (Hudson), EMCOR Services of New York/New Jersey Inc., and Americon Construction, Inc., denied without consideration defendant ADCO Electrical Corp.’s motion for summary judgment dismissing the Labor Law § 241(6) claim as against it, and implicitly denied Hudson’s and EMCOR’s motions for summary judgment dismissing all cross claims and counterclaims against them for common-law indemnification and contribution, unanimously modified, on the law, to deny plaintiff’s motion, grant EMCOR’s and Hudson’s motions, and deny ADCO’s motion on the merits, and otherwise affirmed, without costs. Order, same court and Justice, entered November 29, 2018, upon reargument, to the extent it granted plaintiff’s motion for summary judgment on his Labor Law § 241(6) claim against ADCO, granted conditionally Americon’s motion for summary judgment on its contractual indemnification claim against ADCO, granted conditionally EMCOR’s motion for summary judgment on its contractual indemnification claims against second, third, fourth and fifth third-party defendants OMC, Inc. and OMC Sheet Metal, Inc. (together, OMC) and unconditionally its motion for summary judgment on its contractual indemnification claim against ADCO, and granted Americon’s motion for conditional summary judgment on

its claim for contractual indemnification against OMC, unanimously modified, on the law, to grant EMCOR's motion for summary judgment on its contractual indemnification claim against OMC unconditionally to the extent not barred by the anti-subrogation rule, and deny EMCOR's and Americon's motions for summary judgment on their contractual indemnification and conditional contractual indemnification claims against ADCO and OMC, respectively, and, appeal therefrom, insofar as it adhered to the original determination, dismissed, without costs, as academic, and, insofar as it denied reargument, dismissed, without costs, as taken from a nonappealable order.

Plaintiff seeks damages for personal injuries he sustained in a fall from a ladder while installing duct work on a building renovation project after either he received a shock or an arc fault occurred when he came into contact with a live electrical junction box. Summary judgment in plaintiff's favor as to liability on his Labor Law § 240(1) claim is precluded by an issue of fact as to whether the ladder, which was properly set up, provided plaintiff with proper protection (*see Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]; plaintiff had no problem with the ladder prior to the electric shock and questions of fact exist whether a scaffold could have prevented this accident.

Plaintiff is entitled to summary judgment on his Labor Law §

241(6) claim predicated on violations of Industrial Code (12 NYCRR) § 23-1.13(b)(2), (3) and (4) against ADCO, the electrical subcontractor, which failed to warn of and de-energize or "safe off" the junction box so that a worker would not come into contact with it. Because ADCO had been delegated authority to control the electrical work that gave rise to plaintiff's injury, it was a statutory agent subject to liability under the statute (*see Schaefer v Tishman Constr. Corp.*, 153 AD3d 1169, 1170 [1st Dept 2017]; *Martinez v Tambe Elec., Inc.*, 70 AD3d 1376, 1377 [4th Dept 2010]).

ADCO contends that the junction box was outside the scope of its work at the time of the accident. This contention is based on the assertion by its director of safety, in an affidavit in opposition to plaintiff's motion and in support of ADCO's motion, that ADCO had not yet been instructed to prepare the area for work by other trades. However, the assertion is insufficient to defeat summary judgment, because it has no support in the record and, further, presents a feigned factual issue insofar as it conflicts with the deposition testimony of ADCO's foreman that, upon discovering the live junction box the day before the accident, ADCO "secured it up into the ceiling so it wasn't a hazard to anybody working in the area" (*see e.g. Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1st Dept 2009]). In

addition, ADCO’s foreman acknowledged that ADCO had strung the temporary lighting on the project, which it is uncontroverted was present in the area of the accident. Nor does an issue of fact exist as to plaintiff’s comparative negligence, because the record establishes that, even if he moved the junction box, all power except for temporary lights was to be de-energized in his work area, and the presence of temporary lights indicated that the area had otherwise been de-energized.

The indemnification provision in ADCO’s subcontract, which requires ADCO to indemnify Americon, the general contractor, for claims or damages resulting from injuries arising out of ADCO’s operations “[t]o the fullest extent permitted by law,” contemplates indemnification only to the extent Americon is not negligent. Therefore, the provision is not void under General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). Moreover, Americon is entitled to conditional summary judgment on its contractual indemnification claim against ADCO, even if an issue of fact exists as to its negligence (*Rainer v Gray-Line Dev. Co., LLC*, 117 AD3d 634, 636 [1st Dept 2014]). However, because Americon’s negligence, if any, has not yet been determined, the motion court correctly granted it conditional summary judgment on the claim (*id.*).

All common-law indemnification and contribution claims

against EMCOR, the HVAC subcontractor, and Hudson, the owner, must be dismissed, because EMCOR and Hudson are free from negligence. Moreover, because EMCOR is free from negligence, it is entitled to unconditional contractual indemnification from OMC, plaintiff's employer (*see Rainer*, 117 AD3d at 635-636), to the extent not barred by the anti-subrogation rule. Although the indemnification provision in the sub-subcontract between them does not limit EMCOR's right to indemnification where it is partially negligent, the provision is not void under General Obligations Law § 3-522.1 to the extent EMCOR is not negligent (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

EMCOR is not entitled to contractual indemnification from ADCO. There is no contract between them, and EMCOR was not named in ADCO's subcontract as a party that ADCO was required to indemnify.

Americon is not entitled to contractual indemnification from OMC. As the indemnification provision in its favor in its subcontract with EMCOR does not relate to the scope, quality, character or manner of the work, it is not incorporated into the EMCOR-OMC sub-subcontract (*see Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018]; *cf. e.g. Frank v 1100 Ave. of the Ams. Assoc.*, 159 AD3d 537 [where subcontract contained indemnification

provision in favor of “Owner” without clearly identifying “Owner,” identity was determined by reference to prime contract incorporated into subcontract]).

We have considered the parties’ remaining arguments for affirmative relief and find them unavailing, where not academic.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 16, 2020

CLERK