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)

REPLY 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.

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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"), hereby submit their Reply Brief in further support of their appeal seeking reversal of the May 2, 2019 decision and order of the First Department, which reversed the Supreme Court's denial of the motion for summary judgment by the Plaintiff-Respondent, Michael Cutaia ("plaintiff"), on his Labor Law § 240(1) cause of action.

Despite the lengthy nature of plaintiff's Respondent's Brief, all of his arguments hinge on the false premise that the ladder that he was using slipped, collapsed, fell, or otherwise moved upon his receipt of an electric shock. Plaintiff argues throughout his Respondent's Brief that the "undisputed" and "uncontroverted" evidence is that plaintiff was injured because the ladder fell. Plaintiff makes this argument despite the evidence to the contrary, including his own testimony that he does not know how he got on the floor after his electric shock or whether the ladder moved at all. Plaintiff argues that Trinity Church and Michilli have not sufficiently rebutted plaintiff's proofs, when in fact, plaintiff has not met his initial burden to establish a prima facie case of a Labor Law § 240(1) violation that proximately caused his accident.

The plaintiff perpetuates this false narrative by arguing that "the undisputed evidence firmly establishes that the only ladder in the room at the time of the incident was the one being used by Cutaia" (*see* Respondent's Brief, p. 5). Plaintiff does not cite to any portion of the record where this "undisputed evidence" can be found. It cannot be found, because it is not correct, unless plaintiff is willing to concede that he was using a different ladder from the one that he has been claiming all along to have been using at the time of his accident. Plaintiff testified that he was using a blue 10-foot fiberglass A-frame ladder at the time of his accident (A165-169)[1] (472-476)[2]. However, Joseph Renna, from Michilli, who came to the accident location within about minute later, could recall seeing only a wooden 8-foot A-frame ladder on the floor (A501-503) (1160-1162). Mr. Renna testified that he had never seen the wooden ladder before and that any 10-foot blue-colored A-frame ladder likely belonged to the electricians (1272-1273). This raises an issue of fact as to whether the ladder that plaintiff's helper, James Alonzo, told Mr. Renna had slipped out from under plaintiff, is the same ladder that plaintiff was actually using. How could Mr. Alonzo accurately tell Mr. Renna that the ladder slipped out from under plaintiff when Mr. Alonzo did not witness the accident? How can plaintiff explain that the wooden ladder that Mr.

[1] Citations to the Appendix filed with the Court of Appeals will be in the form "(A)".
[2] Citations to the reproduced Record on Appeal used at the Appellate Division will be in the form "( )".

Alonzo stated as having slipped out from under plaintiff is a different ladder from the one that plaintiff testified as being the one that he was actually using at the time of the accident?

Where plaintiff has presented no evidence that the ladder upon which he was standing at the time of his electric shock actually slipped, collapsed, fell, or otherwise moved, he is not entitled to judgment as a matter of law on his Labor Law § 240(1) claim. No one witnessed plaintiff's accident. The incident report cites Mr. Alonzo as stating shortly after the accident that he did not witness the accident (A750-752) (1758-1760, 1842). Six years later, at his deposition, Mr. Alonzo said he saw the accident from his peripheral vision (A741) (1749), but could recall no other details. Plaintiff could not recall how he got on the floor or whether the ladder moved at any time (A231-232) (538-539). Mr. Alonzo's brief description of the accident to Mr. Renna on the date of the accident is not credible because Mr. Alonzo did not witness the accident and because Mr. Alonzo told Mr. Renna that plaintiff was using a particular ladder, which plaintiff has denied using. Lastly, at his deposition, Mr. Alonzo could barely remember that an accident even occurred. He denied memory of any detail about the accident, including whether the ladder fell or what he told Mr. Renna on the day of the accident (A742-744) (1750-1752).

All we are left with is that plaintiff was injured after having received an electric shock while on a ladder. This is why plaintiff was granted summary judgment on his Labor Law § 241(6) claim pursuant to an Industrial Code provision regarding electrical dangers at a worksite. Trinity Church and Michilli have not sought review of the Supreme Court's determination of liability as a matter of law under Labor Law § 241(6). However, the mere fact that plaintiff fell from a ladder after receiving an electric shock does not entitle him to summary judgment on his Labor Law § 240(1) claim (*see Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]). To the extent that the First Department held otherwise, its decision and order should be reversed. The cases relied upon by the plaintiff in his Respondent's Brief are either distinguishable or are First Department cases based on the same flawed legal rationale that the First Department employed in rendering its decision in *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009], which has put it at odds with the decisions of the Court of Appeals and the other three appellate departments. It is for this precise reason that the First Department's decision here should be reversed and the issue of liability under Labor Law § 240(1) be put before a jury to decide.

RESPONSE TO PLAINTIFF'S "INTRODUCTION AND BACKGROUND"

Starting on page 6 of his Respondent's Brief, the plaintiff presents his "INTRODUCTION AND BACKGROUND" which can best be described as his counter-statement of the facts set forth in the Appellants' Brief. Trinity Church and Michilli wish to draw the Court's attention to the fact that most of the time that plaintiff refers to his "undisputed" or "uncontroverted" evidence, he does not cite to any portion of the record and ignores the fact that Trinity Church and Michilli have disputed plaintiff's version of the "facts," which would be more accurately described as plaintiff's attorneys' *interpretation* of the facts rather than an undeniable truth supporting judgment as a matter of law.

On page 9 of his Respondent's Brief, plaintiff quotes his "undisputed testimony" about how he tried to open the ladder, but "couldn't". Although Trinity Church and Michilli do not necessarily dispute this testimony, the testimony is unclear at best. The defense interpreted plaintiff's testimony to mean that he could not physically open the ladder in the workspace. Indeed, Justice Tom and Justice Kahn interpreted plaintiff's testimony to mean this as well (A23). In fact, it appears that even the majority who decided plaintiff's appeal below in his favor also so interpreted his testimony. The majority wrote that "[t]he ladder could not be opened or locked while plaintiff was performing his task . . ." (A15-16). If this

does not indicate that reasonable minds can differ as to the cause of this accident, then nothing does.

Plaintiff's attorney writes on page 9 of the Respondent's Brief that "[t]his was not a confined space". In support of this statement, plaintiff cites to page 683 of the Record on Appeal that was submitted to the First Department. When one goes to page 683, it is a page of plaintiff's deposition testimony where plaintiff describes what his helper, James Alonzo, was doing at the time of his accident. It provides no information about the dimensions of the space where plaintiff was working. As discussed in the Appellants' Brief, plaintiff's counsel's attempted correlation between the length of the pipes that plaintiff was working on to the dimensions of his work space or the room itself are misleading. Plaintiff's counsel did not mention that the pipes made turns in the ceiling and extended into other rooms, rendering their length immaterial to the size of the workspace below the ceiling grid where the accident actually occurred.

On page 10 of his Respondent's Brief, plaintiff states that Mr. Renna, from Michilli, "observed the closed ladder on the floor under the subject pipes". Mr. Renna observed *a* ladder on the floor, but not necessarily *the* ladder that plaintiff was using at the time of his accident. Mr. Renna saw a wooden 8-foot ladder on the floor, whereas plaintiff testified that he was using a fiberglass, blue, 10-foot ladder. Plaintiff has never even attempted to explain this discrepancy. Instead, he

wants the Court to assume that ladder that Mr. Renna saw on the floor was the ladder from which he fell because a ladder on the floor is consistent with, or at least not inconsistent with, the claim that the ladder fell, despite plaintiff testifying that the ladder was sturdy just prior to the accident and that he has no idea how he fell, why he fell, or whether the ladder moved at all during or after his electric shock (A231-232) (538-539). This Court should not affirm the First Department's award of summary judgment based on mere speculation.

On page 12 of his Respondent's Brief, plaintiff writes that "[t]here is no evidence that there was any other ladder in the room". This is incorrect where plaintiff described using a 10-foot blue fiberglass ladder and Mr. Renna only saw an 8-foot wooden ladder in the room. Further, as the party moving for summary judgment, it was incumbent on plaintiff to prove that there was no other ladder in the room or at least that he was using the ladder that he said he was using. It is not Trinity Church and Michilli's obligation to prove that there were other ladders in the room or that plaintiff was not using the ladder that he claims to have been using.

Plaintiff then writes that "[t]herefore, it is uncontroverted that the ladder being used by Cutaia fell to the ground the same time as him after he received the electric shock" (*see* Respondent's Brief, p. 12). Plaintiff's conclusion is self-serving and nonsensical. No one ever saw the ladder fall or even move. In support

of such statement, plaintiff cites to page 1184 of the record submitted to the First Department. Page 1184 is a portion of Mr. Renna's deposition testimony wherein he responds "[n]o" to the question of whether anyone has even told him of a version of the accident other than what plaintiff told him happened. There are several problems with this. First, Mr. Renna testified that plaintiff never explained to him what happened (1164-1165). Second, at the time of his deposition, Mr. Renna had no reason to know that plaintiff was claiming to have fallen from a 10-foot blue fiberglass ladder, when the only ladder that Mr. Renna saw on the floor in the room was an 8-foot wooden ladder (A501-503) (1160-1162).

On page 13 of his Respondent's Brief, plaintiff cites to his expert's affidavit in which he wrote that "[h]ad 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." This statement by plaintiff's expert merely assumes that the ladder did not remain stable when plaintiff was shocked and that plaintiff did not fall simply because of the electric shock itself. The expert further speculates that if the ladder was anchored, then plaintiff "*could* have been prevented from falling to the floor" [emphasis added]. Speculation and false premises cannot serve as the basis for an award of summary judgment (*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])

Plaintiff's description of the parties' arguments to the First Department and said court's subsequent decision are also inaccurate. For example, plaintiff states on page 15 of his Respondent's Brief that he argued that denying an injured worker's motion for summary judgment on a Labor Law § 240(1) claim every time a claim is paired with the allegation of an electric shock is inconsistent with the legislative intent of the statute. However, Trinity Church and Michilli never argued that a plaintiff cannot obtain summary judgment simply because his fall was precipitated by an electric shock. Rather, consistent with Justice Tom's concurring opinion in *Nazario v. 222 Broadway LLC*, 135 A.D.3d 506, 23 N.Y.S.3d 192 [1st Dep't 2016], and 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], Trinity Church and Michilli have argued that just because a plaintiff falls from a ladder after receiving an electric shock does not mean that he is automatically entitled to summary judgment absent establishing that a statutory violation was a proximate cause of the accident. To the contrary, it is the First Department's decision in *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009], and here, that have vitiated a plaintiff's obligation to establish a prima facie case before being awarded summary judgment. *Vukovich*, and the decision below by the First Department here, are inconsistent with the Court of Appeals' decision in *Nazario* and is inconsistent with the holdings of all three of the other

appellate departments. As such, the decision and order by the First Department here should be reversed.

After presenting his strawman arguments described above, on page 16 of his Respondent's Brief, plaintiff states that Trinity Church and Michilli "failed to rebut Cutaia's *proof* that while he could open the ladder in the subject area, he could not access the pipes without folding it and leaning against the wall" [emphasis added]. Again, plaintiff would have this Court blindly accept his so-called "proof." Such "proof" is plaintiff's own convoluted version of the accident that has led not only defense counsel to believe that plaintiff was saying that the workspace was too small to fit an open A-frame ladder, but also led Justice Tom and Justice Kahn to believe that as well (A23). As previously stated, it appears that the majority below also believed this to be the case, writing that "[t]he ladder could not be opened or locked while plaintiff was performing his task . . ." (A15-16).

Plaintiff then goes back to his strawman tactics, claiming that Trinity Church and Michilli argued that plaintiff was required to prove that failure of the ladder was *the* sole proximate cause of the accident in order for him to obtain summary judgment (*see* Respondent's Brief, p. 16). Trinity Church and Michilli never made any such argument. Rather, their position all along has been that in order to obtain summary judgment on his Labor Law § 240(1) cause of action, plaintiff must prove a violation of the statute and that such violation was *a* proximate cause of his

injuries. In other words, and consistent with this Court's holding in *Nazario*, where a worker falls from a ladder upon receipt of an electric shock, and there is disputed evidence, or no evidence at all, 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). Plaintiff has not met his burden of proof where his expert's affidavit is based on pure speculation as to the cause of the accident or the need for or feasibility of other devices. Accordingly, plaintiff should not have been granted summary judgment and the decision and order of the First Department should be reversed.

LEGAL ARGUMENT IN REPLY FOR DEFENDANTS-APPELLANTS

POINT I

THE CASES RELIED UPON BY THE PLAINTIFF IN HIS RESPONDENT'S BRIEF ARE DISTINGUISHABLE OR ARE THE FRUIT OF A POISONOUS TREE THAT IS THE FIRST DEPARTMENT'S DECISION IN *VUKOVICH*

The plaintiff cites in his Respondent's Brief the case of *Caban v. Maria Estela Houses I Associates, L.P.*, 63 A.D.3d 639, 882 N.Y.S.2d 97 [1st Dep't 2009], a case where the First Department awarded summary judgment to an electrician who fell from a ladder. This holding by the First Department is not persuasive for several reasons. First, although the decision does not cite to

Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009], *Caban* was decided just two months after *Vukovich* and two of the justices on the panel in *Vukovich*, Justices Mazzarelli and DeGrasse, were also on the panel in *Caban*. With all due respect to Justices Mazzarelli and DeGrasse, if they had put the First Department on a wayward path with *Vukovich*, they had no incentive to issue a contrary ruling in *Caban* just two months later.

Second, at least in *Caban*, the court noted that the electric shock caused the ladder to shake immediately preceding the fall. In the case at bar, there is no evidence that the ladder shook whatsoever. All we know is that plaintiff fell because he received an electric shock, which is why he obtained summary judgment on his Labor Law § 241(6) cause of action. There is no evidence, however, that the ladder that the plaintiff here was using fell, shook, or otherwise moved. Accordingly, it was error for the First Department to have awarded plaintiff summary judgment on his Labor Law § 240(1) cause of action.

The plaintiff's reliance on the Second Department case of *Lodato v. Greyhawk North America, LLC*, 39 A.D.3d 491, 834 N.Y.S.2d 242 [2d Dep't 2007], is unavailing. In *Lodato*, the issue on appeal was not whether Labor Law § 240(1) was violated (in fact, a violation was conceded), but rather the appellant argued that it was not within the class defendants subject to liability under Labor Law §§ 240(1) and 241(6). In the case at bar, the defendants vigorously dispute

that there was a violation of Labor Law § 240(1) and they argue that plaintiff has not met his burden so as to be awarded judgment as a matter of law on such claim.

The plaintiff's reliance on the Second Department case of *Quackenbush v. Gar-Ben Associates*, 2 A.D.3d 824, 769 N.Y.S.2d 387 [2d Dep't 2003], is also unavailing. The order appealed from in *Quackenbush* was from an order awarding judgment as a matter of law to the plaintiff following the close of evidence at trial, where the plaintiff presented eyewitness testimony and defendants offered no evidence in rebuttal. In the case at bar, the plaintiff was incorrectly awarded summary judgment by the First Department following a denial of his motion for summary judgment on his Labor Law § 240(1) claim by the Supreme Court. The plaintiff here has no eyewitnesses to his accident and testified that he does not know how or why he fell after receiving an electric shock. Here, there is disputed factual evidence as to what ladder plaintiff was actually using at the time of his accident and whether the ladder in use was defective or inadequate for the task being performed.

Plaintiff also cites to the Second Department case of *Viera v. WFJ Realty Corp.*, 140 A.D.3d 737, 31 N.Y.S.3d 613 [2d Dep't 2016]. While the factual recitation is scant in *Viera*, the Second Department held that "the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold that lacked a safety

railing, and that he was not provided with a safety device to prevent him from falling" after having received an electric shock (*see Viera*, 140 A.D.3d at 739). *Viera* was decided a few months prior to the Court of Appeals' decision in *Nazario*, and to the extent it is inconsistent with *Nazario*, the Second Department's decision in *Viera* is not persuasive. It is likewise inconsistent with its prior decision in *Gange v. Tilles Inv. Co.*, 220 A.D.2d 556, 632 N.S.Y.2d 808 [2d Dep't 1995] (*see* Appellants' Brief, p. 11).

The last of such Second Department cases relied upon by plaintiff here, *Raia v. Berkeley Co-op Towers Section II, Corp.*, 147 A.D.3d 989, 48 N.Y.S.3d 410 [2d Dep't 2017] is inapplicable as it involved the appeal of post-trial motions where the jury found a violation of Labor Law § 240(1). *Raia* is further inapplicable here as the facts involved neither an electric shock, nor a fall from a ladder.

The plaintiff argues that the First Department's holding here was in accordance with precedent set by the Court of Appeals. Plaintiff cites to *Haimes v. New York Telephone Co.*, 46 N.Y.2d 132, 412 N.Y.S.2d 863, 385 N.E.2d 601 [1978]. *Haimes*, however, is distinguishable. Not involving an electric shock, the court found after a non-jury trial that the ladder upon which the plaintiff was standing "toppled, throwing him 18 feet to the ground and causing him to lose his life" (*Haimes*, 46 N.Y.2d at 134). The only issue before the Court of Appeals was whether the owner, which did not supervise or control the plaintiff's work, could

be held liable under Labor Law § 240(1). The Court held that it could. *Haimes* has no bearing on the case at bar where Trinity Church does not contest that it may be held vicariously liable if and when plaintiff proves a violation of the statute which proximately caused his injuries.

In *Klein v City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723, 675 N.E.2d 458 [1996], also cited by plaintiff here, judgment as a matter of law was awarded to Mr. Klein, where it was undisputed that the ladder upon which he was standing "slipped" out from under him because it was set up on a portion of the floor containing "'air scubber water' which defendant conceded could have some degree of greasiness, slickness or slipperiness" (*Klein*, 89 N.Y.2d at 834). In the case at bar, plaintiff has not met his burden to show that the ladder toppled, slipped, collapsed, fell, or otherwise moved at all when he received an electric shock, and he has proffered nothing but baseless speculation as to feasibility of an alternative safety device.

Panek v. County of Albany, 99 N.Y.2d 452, 758 N.Y.S.2d 267, 788 N.E.2d 616 [2003], also cited by plaintiff is distinguishable because the issue there was whether the plaintiff's activities constituted "alteration" of a building or structure. Trinity Church and Michilli do not dispute that plaintiff was engaged in a covered activity at the time of his accident. In *Panek*, however, "[p]laintiff's allegation that the ladder 'gave way' or collapsed beneath him, causing him to fall, was

uncontested" (*see* 99 N.Y.2d at 458). The manner in which plaintiff's accident occurred in the case at bar is hotly contested and plaintiff has not met his burden to show that the ladder "gave way" or collapsed beneath him. To the contrary, plaintiff testified that the ladder was "sturdy up against the wall" (A173, A194) (480, 501), and that he does not know if the ladder even moved after he received an electric shock (A231-232) (538-539).

In *Felker v Corning Inc.*, 90 N.Y.2d 219, 660 N.Y.S.2d 349, 682 N.E.2d 950 [1997], also cited by the plaintiff, this Court held that the plaintiff there was subjected to two potentially dangerous height differentials. The first was his need to work at an elevated height. The Court held that there was no violation in that plaintiff was provided with a ladder which did not fail him. The second, however, involved the "plaintiff's need to reach over the eight-foot alcove wall and work over an elevated, open area [and that] [i]t is the contractor's complete failure to provide any safety device to plaintiff to protect him from this second risk of falling over the alcove wall and through the suspended ceiling to the floor below that leads to liability under Labor Law § 240(1)" (*Felker*, 90 N.Y.2d at 224). The case at bar is more akin to the first example raised in *Felker* regarding the plaintiff's need to work at an elevated height. Like in *Felker*, here, the ladder utilized by plaintiff provided him with the proper protection for the task that he was performing, or at least plaintiff has not established a prima facie case that it did not

provide the proper protection but for the electric shock, which caused him to fall. While the plaintiff in *Felker* was facing two height-related dangers, the plaintiff here was facing one height-related danger and the danger (unknown at the time) of an electric shock. As a result of this second non-height-related danger, plaintiff here was granted summary judgment on his Labor Law § 241(6) claim, and Trinity Church and Michilli have not challenged this determination. However, because plaintiff has not met his prima facie burden to demonstrate that the ladder was defective or was inadequate for his task of performing pipe work in the ceiling, it was error for the First Department to award summary judgment to plaintiff on his Labor Law § 240(1) claim.

Plaintiff's reliance on *Barreto v. Metropolitan Transp. Authority*, 25 N.Y.3d 426, 13 N.Y.S.3d 305, 34 N.E.3d 815 [2015] is also misplaced. In *Barreto*, there was no dispute that no safety device was provided to plaintiff, but both the Supreme Court and a majority of the justices hearing the case in the First Department held that the plaintiff there was the sole proximate cause of his own accident. The Court of Appeals reversed, and awarded summary judgment to the plaintiff on his Labor Law § 240(1) claim, holding that because of inadequate lighting and the fact that two men were required to cover the hole that plaintiff fell into, he could not have been the sole proximate cause of his accident as a matter of

law (*see Barreto,* 25 N.Y.3d at 433-34). Accordingly, the case at bar is not analogous to *Barreto,* and *Barreto* lends no support to plaintiff's argument here.

While plaintiff cites other cases throughout his Respondent's Brief, for example, *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009], he cites them for the stated proposition that "[t]o prove liability under §240(1), the plaintiff need only show that the statute was violated, and that the violation was a proximate cause of the accident" (*see* Respondent's Brief, p. 25). Trinity Church and Michilli do not quarrel with this general statement of the law. What they do quarrel with, however, is plaintiff's premise here that he has shown that the statute was violated and that any such violation was a proximate cause of the accident.

Plaintiff also cites to cases in which the Court of Appeals or various appellate courts held in favor of plaintiffs on their Labor Law § 240(1) claims due to the failure of a ladder to remain "steady and erect" (*see* Respondent's Brief, p. 26, quoting *Bland v. Manocherian,* 66 N.Y.2d 452, 497 N.Y.S.2d 880, 488 N.E.2d 810 [1985]). However, the plaintiff's argument here is only persuasive if we ignore the fact that there is no proof that the ladder here did not remain "steady and erect." On page 28 of his Brief, plaintiff writes that "here it is undisputed that Cutaia could not access his work area with the ladder in an open and locked position, and that the ladder fell to the ground at the same time as Cutaia after he

was shocked." Carefully note that plaintiff does not cite to any portion of the record in support of such blatantly false and misleading statement. First, plaintiff's argument that he "could not access his work area with the ladder in an open and locked position" again perpetuates the unproven notion that a scaffold or manlift, as an alternative safety device, could have fit in the confined space in which plaintiff was working.

Second, it is a complete fabrication that "that the ladder fell to the ground at the same time as Cutaia after he was shocked." It is hotly disputed that the ladder fell or moved at all. Plaintiff testified that the ladder was "sturdy up against the wall" and did not know if the ladder fell or moved at all before, during, or after his accident. While Joseph Renna from Michilli testified years later that to his recollection the plaintiff's helper, James Alonzo, told him that the ladder slipped out from underneath plaintiff, Mr. Alonzo is noted in the accident report to have not witnessed the accident (1842). Although Mr. Renna saw a closed wooden 8-foot A-frame ladder on the floor a few minutes after plaintiff's accident, plaintiff testified that he was using a blue fiberglass 10-foot A-frame ladder at the time of his accident. There is no evidence that the ladder that plaintiff was using and the ladder that Mr. Renna saw were the same ladder or that there was not more than one ladder in the room. All of these issues are for a jury to determine before plaintiff may be entitled to a judgment on his Labor Law § 240(1) claim.

Plaintiff argues that *Higgins v. TST 375 Hudson, L.L.C.*, 179 A.D.3d 508, 119 N.Y.S.3d 80 [1st Dep't 2020], relied upon by Trinity Church and Michilli in their Appellants' Brief, is distinguishable (*see* Respondent's Brief, pp. 29-30). In an effort to distinguish *Higgins* from the case at bar, plaintiff submitted to this Court a Respondent's Appendix containing the written decision of the Supreme Court, in Bronx County, which granted Mr. Higgins' motion for summary judgment before being reversed by a panel of the First Department evidently less impressed with the rationale of *Vukovich, supra*.

Plaintiff argues (i.e., speculates) that the electrical shock that he sustained was only 110 volts, whereas the shock that Mr. Higgins received was 227 volts. Although plaintiff here has not served any expert report from an electrical engineer, he essentially wants the Court to assume that had he retained the same expert as the defendants in *Higgins*, the expert would have reached a similar conclusion that being shocked by 110 volts is like "being hit with the stream of a household garden hose," and while significant enough to knock him off of a ladder would not have knocked him off of a scaffold had one been provided.[3]

[3] The purpose of the defendants' expert affidavit in *Higgins* was to show that being shocked by 227 volts "is like being blasted with a fire hose" (RA10), and thus, Labor Law § 240(1) was not violated because the force of the shock would have knocked the plaintiff off a scaffold even if one had been provided to him. In granting summary judgment to the plaintiff, which was later reversed by the First Department, the Supreme Court did not discuss this expert testimony and simply cited to *Vukovich, supra*, in awarding summary judgment to the plaintiff.

There are several problems with the plaintiff's attempt here to distinguish *Higgins*, which ultimately proves correct the argument by Trinity Church and Michilli. First, the plaintiff's musings on *Higgins* is indicative of his propensity to argue speculative theories as uncontroverted fact. Plaintiff here actually wants this Court to *assume* that the defendants' expert in *Higgins* would have reached the same conclusion in this case *had plaintiff retained him*, opining that while plaintiff would have fallen from a ladder, he would not have fallen from a scaffold had one been provided to him because being shocked by 110 volts is really not that serious. Note that this stands in stark contrast to plaintiff's prior claims of electrical burns and his description of the incident as him being "electrocuted" (500, 515).

Second, plaintiff still has not adequately explained how a scaffold would have fit in the confined space where plaintiff was working if he could not even use his A-frame ladder in an open position. To the extent that plaintiff or his attorneys now argue that the space was large enough to have a scaffold or use his ladder in the open position, this merely raises issues of fact given his testimony that led not only defense counsel and Justices Tom and Kahn to believe otherwise, but apparently the justices in the majority at the First Department as well.

Third, notwithstanding the Supreme Court's recitation of the experts' opinions in *Higgins*, the Supreme Court in Bronx County did not appear to rely on the expert opinions in reaching the (erroneous) conclusion that Mr. Higgins was

entitled summary judgment on his Labor Law § 240(1) claim. What did the Supreme Court base its decision on in *Higgins*? If you guessed *Vukovich*, you would be guessing correctly. In fact, aside from citing to *Felker*, *supra*, for a boiler plate proposition that the injured worker has an obligation to prove proximate cause, the Supreme Court cited to *Vukovich* as the sole basis for its decision to award summary judgment to Mr. Higgins.

As this Court is well aware, a panel of the First Department different from the panel that decided *Vukovich* reversed the award of summary judgment to Mr. Higgins because, like here, an issue of fact was presented as to whether the ladder provided adequate protection notwithstanding the fact that he fell from the ladder following an electric shock (*see Higgins*, 179 A.D.3d at 509-10 [citing *Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]]).

As important as *Higgins* is to Trinity Church and Michilli's arguments here, they continue to believe that the First Department's decision in *Faver v. Midtown Trackage Ventures LLC*, 150 A.D.3d 580, 52 N.Y.S.3d 626 [1st Dep't 2017], more particularly the absence of a dissent from Justice Kahn there, is the most significant illustration of why the First Department was wrong in ruling in plaintiff's favor in the case at bar. As discussed on pages 16-19 of their Appellants' Brief, Trinity Church and Michilli believe that Justice Kahn participated in the unanimous decision in the plaintiff's favor in *Faver* and yet

joined the dissent of Justice Tom here because, in *Faver*, 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 and that such insecurity caused him to fall to ground after having received an electric shock. Unless this was Justice Kahn's rationale for joining Justice Tom's dissent here, which was astute in recognizing the subtle differences in the facts as applied to the law, then there is no way to reconcile Justice Kahn's opinions in these cases.

In response to Trinity Church and Michilli's arguments with regard to the *Faver* case, plaintiff wrote only three sentences in his 44-page Respondent's Brief (*see* Respondent's Brief, pp. 31-32). He summarily dismissed the argument as "meritless" and said that "[t]here is no material difference whatsoever between the facts here and those in Faver, since the only evidence in the record here is that after Cutaia received the electric shock, both he and the ladder fell to the ground" (*Id.*). Plaintiff makes no attempt to even proffer an opinion as to why Justice Kahn joined the unanimous decision in *Faver* and yet joined Justice Tom's dissent here.

Plaintiff also resorts to reference to his "evidence," without any citation to the record, that he and the ladder both fell to the ground at the same time.

Contrary to plaintiff's paltry and self-serving analysis, the decision and order of the First Department should be reversed for the reasons stated in Justices Tom and Kahn's dissent here, the rationale for which is best illustrated by comparing the facts in *Faver* to those here and the ways in which the differences influenced Justice Kahn's opinions.

In sum, the cases cited by plaintiff in his Respondent's Brief are distinguishable as illustrated above, and to the extent that they rely on the First Department's decision in *Vukovich*, they are the fruit of a poisonous tree, which as demonstrated by the First Department's decision in the case at bar, continues to grow, further separating the First Department from precedent set by the Court of Appeals and the other three appellate departments. The First Department's recent decision in *Higgins*, by a panel different from that which decided *Vukovich*, while encouraging, merely illustrates a growing fracturing within the First Department itself. Further guidance from the Court of Appeals, in the form of a reversal of the First Department's decision here, would signal a correction to the First Department's wayward tendencies on the issue of Labor Law § 240(1).

POINT II

THE PLAINTIFF HAS NOT MET HIS PRIMA FACIE BURDEN SUFFICIENT FOR AN AWARD OF SUMMARY JUDGMENT NOTWITHSTANDING HIS BASELESS ASSERTIONS TO THE CONTRARY

By this time the plaintiff's strategy here is clear. It reminds one of the old adage first learned in law school that "if the law is on your side then pound the law, if the facts are on your side then pound the facts, and if neither are on your side then pound the table." While this saying comes to mind, it is not entirely reflective of plaintiff's case because plaintiff does have a relatively good case and a jury may very well believe his version of the accident and may give him a verdict on his Labor Law § 240(1) cause of action. He is not, however, entitled to summary judgment.

The first line of Point II of plaintiff's Respondent's Brief refers to the "undisputed proof submitted by the plaintiff". As he frequently does throughout his brief, plaintiff 'pounds' the notion of his "undisputed" and "uncontroverted" evidence or proof, ignoring the evidence that plaintiff's fall was caused by his "electrocution" (his words) and not by any failure or inadequacy of the ladder that he was using at the time of his accident.

While plaintiff did submit the affidavit of Robert Fuchs, P.E., Mr. Fuchs is not an electrical engineer and did not opine on whether the force of the electric shock was strong enough to knock plaintiff off of a ladder but not strong enough to

have knocked plaintiff off a scaffold had plaintiff been provided with one, similar to what the successful party did in *Higgins v. TST 375 Hudson, L.L.C.*, 179 A.D.3d 508, 119 N.Y.S.3d 80 [1st Dep't 2020]. In fact, for plaintiff to now suggest that his "electrocution" was relatively minor and that he would not have fallen off of a scaffold had one been provided, is contrary to his previously successful argument in obtaining summary judgment on his Labor Law § 241(6) claim. It would also be inconsistent with the burns that he received as a result of his self-described "electrocution." Mr. Fuchs does not address this issue, and even if he had, he (a) is not qualified to so opine given his lack of training in the electrical or medical field, and (b) would merely be speculating as to the feasibility of a scaffold or manlift in the confined space in which plaintiff had to work. While plaintiff would assuredly argue that the workspace was large enough to fit a scaffold or manlift, this takes us back to disputed issues of fact. Plaintiff has not met his burden to show that a scaffold or manlift was necessary or feasible. His own testimony led defense counsel, the dissenting justices below, and evidently the majority of the panel below, to belief that he could not use his ladder in the opened and locked position due to the dimensions of the workspace. To the extent that Mr. Fuchs says otherwise, he is merely speculating as he never visited the accident location. Even plaintiff's reference to the blueprints on page 1095 of the record below merely shows the tenant footprint on the entire floor of the building without any interior

walls or dimensions noted. This is insufficient to warrant a conclusion as a matter of law that a device alternative to the ladder that plaintiff used was necessary or feasible.

As previously discussed, plaintiff has not met his burden to demonstrate that the ladder that he was using fell or moved in any way as a result of his electric shock. Plaintiff testified that the ladder was sturdy prior to the shock and that he does not know what happened with the ladder upon being shocked. The ladder that Joseph Renna saw on the floor a few minutes after the accident is different from the ladder that plaintiff said he was using. Lastly, plaintiff's helper, James Alonzo, could recall no details whatsoever about the accident, including anything about the ladder, other than that he saw the accident from his peripheral vision (A741, A756) (1749, 1764). He testified to this six years after the accident despite giving a statement contemporaneous with the accident that he did not witness the accident (1842).

Based on this record, plaintiff has not met his prima facie burden for an award of summary judgment on his Labor Law § 240(1) claim. Even if the Court deems plaintiff as having met his initial burden, Trinity Church and Michilli have raised sufficient issues of fact to warrant the denial of this aspect of plaintiff's motion. Accordingly, it was error by the First Department to have awarded

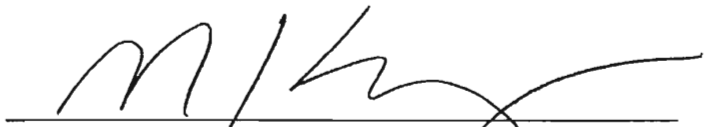
plaintiff summary judgment on his Labor Law § 240(1) claim in its reversal of the Supreme Court's denial of this aspect of plaintiff's motion.

CONCLUSION

For the foregoing reasons, and as argued in the Appellants' Brief, the decision and order of the First Department should be reversed, plaintiff's motion for summary judgment on his Labor Law § 240(1) claim denied, and the issue of liability under the statute put before a jury for determination.

Dated: May 1, 2020
New York, New York

Respectfully submitted,
Law Office of
JAMES J. TOOMEY



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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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Dated: May 1, 2020
New York, New York

Respectfully submitted,
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