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October 18, 2019

VIA OVERNIGHT MAIL

John P. Asiello
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Cutaia, Michael v. Board of Managers of 160/170 Varick, et al.
APL-2019-00168

Dear Mr. Asiello:

This office represents the plaintiff-respondent, Michael Cutaia ("Cutaia") in this matter. Pursuant to Rule 500.11, please accept this letter submission in opposition to the September 27, 2019 letter served by the appellants.

Preliminary Statement

This case presents a classic violation of Labor Law §240(1) wherein a

construction worker fell from an elevated height from unsecured ladder causing severe injuries. Based on the undisputed evidence that both Cutaia and the ladder fell to the ground after Cutaia received an electric shock, the Appellate Division properly determined that the plaintiff established that the device provided to him was inadequate to provide him with the protection required by the statute. As discussed below, the First Department's decision here is supported by well-established precedent from this Court, and this Court's decision in Nazario v. 222 Broadway LLC, 28 N.Y.3d 1054 (2016), and the other cases relied upon by the defendants are distinguishable. In contrast to the cases relied upon by the defendants, here, Cutaia submitted uncontroverted evidence and uncontested expert opinion unequivocally proving that the ladder was insufficient for the work assigned to him. Accordingly, there is no merit to the defendants' argument that the decision of the Appellate Division is at "odds" with decisions from the other Appellate Divisions for Labor Law §240(1) claims involving a worker who falls from a ladder after receiving an electric shock, as the subject ladder was inadequate as a matter of law to provide him with proper protection (see, Felker v. Coming Inc., 90 N.Y.2d 219 [1997]), since the device did not satisfy the "core" objective of preventing the plaintiff from falling from an elevation. (See, Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 561 [1993]).

We acknowledge that the mere fact that a ladder falls, standing alone, does not provide a basis for granting summary judgment under §240(1) when the record

contains a question of fact as to whether the failure of the ladder was a proximate cause of the incident. However, there is no such factual dispute in this case. Here, the facts demonstrate that Cutaia could not perform his task of re-routing plumbing pipes in the ceiling above a wall with the A-frame ladder in an open and locked position, and the ladder needed to be folded and leaned against the wall at an angle so that he could use both hands to perform this work.

Critically, the *only* evidence in the record is that the ladder fell to the ground along with the plaintiff as he received the electric shock. In addition, Cutaia proffered the uncontested opinion of an expert that the unsecured ladder was inadequate for his task, and that a manlift or scaffold, which could have been placed flush against the wall, and provided a secure platform with rails, would have prevented his fall to the ground. Thus, the plaintiff made a prima facie showing that the failure to provide such a device, or proper support for the ladder, was a proximate cause of his fall to the ground resulting in the need for five surgeries to his spine and shoulders. In opposition, the defendants did not proffer any evidence that the ladder was sufficient for Cutaia's task, or that there was an alternative adequate safety device available which he refused to use. Rather, the defendants primarily rely upon a dissenting opinion which contains factual determinations that are simply not supported by the evidence.

Therefore, on this record, there is not a genuine issue of fact for a jury to

decide, and the Appellate Division correctly rejected the argument that this Court's decision in Nazario, supra, dictates a different result when it determined:

> "This case is distinguishable from Nazario v 222 Broadway, LLC, (28 N.Y.3d 1054 [2016]), relied on by the dissent. The plaintiff in Nazario fell while 'holding the ladder, which remained in an open locked position when it landed' (cit. omitted). Thus, there was no evidence that the ladder was defective or that another safety device was needed. Here, on the other hand, it is undisputed that the ladder provided was not fully open and locked, nor was it otherwise secured, as plaintiff's expert opined it ought to have been."

As discussed below, Cutaia's §240(1) claim is based upon sound, well-established precedent from this Court which has implemented the legislative intent behind the statute. If this Court were to reverse the First Department's decision in this case, it would profoundly unsettle accepted precedent from the Appellate Courts, as it is blackletter law that: "It is the responsibility of the contractor and owner – not the individual worker – to provide and place appropriate safety devices at the particular worksite so 'as to give proper protection to a person so employed'". (See, Ramos v. Port Authority, 306 A.D.2d 147, 148 [1st Dept. 2003]). Based upon this Court's precedents, the First Department has long held that the "failure to secure that a ladder remains stable and erect while the plaintiff (is) working on it constitutes a violation of Labor Law §240(1) as a matter of law (MacNair v. Salamon, 199 A.D.2d 170, 171 [1st Dept. 1993]). The other Appellate Divisions are in accord. (See, Guzman v. Gumley-Haft Inc., 274 A.D.2d 555, 556 [2d Dept. 2000]; Morin v.

Machnick Builders, Ltd., 4 A.D.3d 668 [3rd Dept. 2004]; and Kin v. State, 101 A.D.3d 1606 [4th Dept. 2012]).

The Parties, Project and Incident

On the day of the incident, March 26, 2012, Cutaia was working on a renovation project in a building owned by The Rector Church-Wardens and Vestrymen of Trinity Church in the City of New York ("Trinity Church"). (451-453, 920-922). Michilli Construction, Inc. and Michilli, Inc. ("Michilli"), is a construction company which leased a portion of the building for its corporate office and was acting as general contractor for renovation of its space. (1017-1095, 1149). Michilli requested Cutaia's employer, A+ Installation Corp. ("A+"), do the plumbing work, including the subject men's bathroom, an open area which had been demolished, that would eventually contain two sinks, two toilets and a urinal. (829-831, 925-926, 1095, 1142).

Cutaia was a "plumbing mechanic", but he was not a licensed plumber and had no formal training in construction safety standards. (324-325, 332, 860). On the day of the incident, Cutaia and his helper, James Alonso ("Alonso"), were instructed to relocate sinks in the room, and the plaintiff's supervisor expected that Cutaia would follow whatever instructions were given to him by Michilli's project manager, Joseph Renna ("Renna"). (454-459, 876). Cutaia's assignments included cutting pipes in the ceiling and re-routing them to a new location. (467). Even though this

work needed to be performed at an elevated height, the defendants did not request that A+ bring scaffolding or any other equipment for this work, and Renna stated Michilli was not required to provide any equipment. (874, 981-982, 1200, 1363, 1894). In addition, A+ did not provide the plaintiff with any devices to perform work in the ceiling, and Cutaia was given the general instruction to use any ladders on site when necessary, so he regularly used a ten foot A-frame ladder, since it was “always” in that room. (471-473, 578).

Earlier that day, Cutaia used the subject ladder to perform various tasks in the ceiling and was able to use it in an open position and engage its locking mechanism. (469-480). After completing these tasks, Cutaia moved the ladder approximately five to seven feet to perform work at the far end of the room above a wall. (489-490). This last task required Cutaia to re-route copper pipes which were approximately ten feet above ground level. (467-477, 773-775). Cutaia used the subject ladder since it was the only equipment provided, and he initially attempted to reach the pipes with the ladder in an open position, but was unable to access the area so that he could work with both of his hands. In this regard, Cutaia's undisputed testimony is that:

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

Accordingly, Cutaia needed to lean the ladder at an angle so that he could perform his work on the pipes, and once it was in place, its base was approximately two feet from the wall. (494). The ladder was not secured or anchored in any manner, nor was Cutaia provided with a harness or safety belt. (684,1731, 1749). At no time prior to the accident, did anyone instruct Cutaia not to fold the ladder and lean it against the wall for his work. (1884). Renna did not dispute Cutaia's claim that he could not access the pipes with the ladder open, and even admitted he was aware that "[s]ometimes they leaned it on the wall to get close to the wall". (1186-1187, 1241).

Just prior to the incident, Cutaia was on the ladder working on the pipes with hand tools. (500). After grabbing the pipe to his left, Cutaia used his other hand to grab the part of the pipe to his right, when, without any warning, he was electrocuted. (734). Cutaia felt the electrical current traveling through his body, and the next thing he remembered was being on the ground, a few feet from where he had been working. (507-508, 539). Cutaia crawled to the hallway, and after hearing screams for help, Michilli's project manager immediately came to the scene and observed the closed ladder on the floor under the subject pipes. (508, 1157, 1167, 1186-1187). Renna conceded that Alonso told him the ladder Cutaia was using "slid from under him", and specifically testified, "It was a wood ladder, an old and the way it fell on the floor it was obvious it was leaning on the wall, ... It looked like it was leaned up

against the wall, because of the way it landed ... Had it been open, it would not have fallen that way". (1186-1187, 1240-1241, 1309-1310). The only other person in the room was Alonso who did not recall handling the ladder at any point after Cutaia fell. (1771). Therefore, despite what is contained in the First Department's dissenting opinion, it is uncontroverted that the ladder fell at the time of the incident.

Renna observed that a "cap" was missing from one of the electrical wires in the area, and acknowledged that he had not inspected the ceiling in the relevant period of time prior to the incident. (1169-1175). Briefly stated, the electrical system violated industry standards (1523, 1688-1689), and based upon the evidence proving that the system was not de-energized or properly insulated, and no warnings were provided of this hazard, the trial court determined the defendants violated Labor Law §241(6) due to their failure to comply with 12 NYCRR§23-1.13(b)(3-4). (16-27).[1]

With respect to Cutaia's conduct, Renna conceded that he never gave instructions to the plaintiff that Cutaia refused to follow, nor did he instruct Cutaia to use certain equipment which Cutaia refused to use. (1186). Similarly, the plaintiff's supervisor did not provide any instructions to Cutaia that he violated, nor was he aware of Cutaia refusing to use available safety equipment. (877-878).

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[1]The Trial Court left the question of Cutaia's comparative negligence open for a jury to decide.

The Plaintiff's Motion and Decision of the Trial Court

The plaintiff moved for partial summary judgment under Labor Law §240(1) (28-1856), and argued that he established a prima facie violation of the statute since the following facts were undisputed: 1) the A-frame ladder provided to Cutaia needed to be folded and leaned against the wall in order to access his work area; 2) Cutaia was not provided with a manlift or bakers' scaffold, which would have enabled him to perform his work from a secure platform with railings; 3) the ladder and Cutaia both fell to the ground after he received the electric shock; and 4) Cutaia was not provided with a harness or safety belt, and the ladder was not anchored or secured. Cutaia's proof contained an expert affidavit which set forth

> "Considering the nature of the work assigned to Cutaia, which involved cutting pipes, and preparing them to be re-routed with the use of hand tools at an elevated height, Cutaia should have been furnished with a more stable device equipped with a platform and rails, such as a baker scaffold or man lift. Had Cutaia been provided with a scaffold, or other appropriate device for his work, he would have been protected from falling to the ground when he received an electric shock".

(1848).

Cutaia relied upon numerous cases where summary judgment was granted under §240(1) to a worker who fell off of an unsecured ladder after receiving an electric shock, or other similar precipitating event, and the evidence demonstrated that the ladder was insufficient for the worker's task. The plaintiff argued that this Court's decision in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054 (2016) was

distinguishable, as there, the evidence showed that the worker was able to use the A-frame ladder in an open and locked position, and that unlike Nazario, Cutaia proffered uncontested expert evidence stating that a more secure device with a platform and rails, was required for the work since the ladder was inadequate.

In opposition, the defendants argued that the ladder was "not defective" because it appeared sturdy to Cutaia prior to the incident, and this created an issue of fact as to whether the statute was violated. (1880-1896). The defendants also inexplicably proffered an affidavit from Renna wherein he admitted that the general contractor did not provide any equipment for work required to be performed at an elevated height. (1894). The defendants relied upon Nazario, supra, in support of their argument that plaintiff's motion should be denied, but they did not provide any evidence to rebut Cutaia's proof that he could not access the work area with the ladder open, that it failed to remain in place after he was shocked, or provide any proof that there was another adequate device available for him to use. In his Reply, Cutaia argued that the defendants failed to proffer any evidence raising a genuine issue of fact to rebut his prima facie proof. (1897-1914).

Despite the undisputed evidence and uncontested expert opinion submitted by Cutaia, the Supreme Court incorrectly determined that plaintiff "has not made a *prima facie* showing that his injuries were proximately caused by a violation of §240(1)". (16-27). However, the Court did not cite any evidence which raised a

genuine issue of fact to controvert plaintiff's proof that he was not provided with an adequate safety device, nor did the Court find that plaintiff's conduct was the sole proximate cause of the incident. Instead, in evaluating Cutaia's §240(1) claim, the Court stated, "the issue is more complicated when plaintiff's accident involves not only a fall from a ladder, but also an electric shock which precedes the fall from the ladder", citing this Court's decision in Nazario, supra.

The Decision of the First Department

The plaintiff appealed the denial of his motion for summary judgment under §240(1), and argued that Nazario, supra, was distinguishable, since there is no genuine issue of fact in this case. Cutaia argued that the assertion that any worker who falls to the ground after receiving an electrical shock should not be covered by Labor Law §240(1) was entirely inconsistent with the legislative intent behind the statute, and to take that argument literally, it would mean that the defendants would fortuitously be absolved of liability because the precipitating event that caused a worker to fall off a ladder was an electric shock. Cutaia noted that this has never been the law in this State, and argued that *whatever* the cause of the fall, the critical inquiry is whether the device provided was adequate for the work.

In opposition, the defendants maintained their reliance on this Court's decision in Nazario, yet completely ignored the testimony of their own project manager that the ladder fell to the ground, and 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 it against the wall. The defendants also made the ill-conceived argument that Cutaia was required to prove that the failure of the ladder was the sole proximate cause of the accident. However, in his Reply, Cutaia noted that the statutory violation need only be a proximate cause of the accident, not necessarily the sole cause, citing Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003).

A majority of the Appellate Division reversed the trial court's holding, and determined that the defendants violated §240(1), stating as follows:

> "The 'safety device' provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task. The ladder could not be opened or locked while plaintiff was performing his task, and the only way plaintiff could gain access to his work area on the ceiling at the end of the room was by folding up the ladder and leaning it against the wall. It is undisputed that the ladder was not anchored to the floor or wall. There were no other safety devices provided to plaintiff. Plaintiff's expert opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked. He further opined that given the nature of plaintiff's work, which involved cutting pipes and the use of hand tools at an elevated height, plaintiff should have been furnished with a more stable device such as a Baker scaffold or a man lift."

This decision is in accordance with well-settled precedent since Cutaia established that the ladder failed to provide the protection required by the statute.

Legal Argument
THIS COURT SHOULD AFFIRM THE DECISION OF THE APPELLATE DIVISION AS THE COURT CORRECTLY HELD THAT THE PLAINTIFF ESTABLISHED A VIOLATION OF LABOR LAR §240(1) AS A MATTER OF LAW

A. The Decision of the Appellate Division is Supported by Numerous Precedents from this Court

The defendants' appeal is premised upon the misplaced argument that "where a worker falls from a ladder and there is no evidence in the record that the ladder was defective, collapsed, or otherwise moved after having sustained an electric shock, a question of fact is presented as to whether the plaintiff is entitled to judgment under Labor Law §240(1)". However, here, the only evidence in the record is that the ladder moved and collapsed to the ground with Cutaia after he received the electric shock. The facts in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054 (2016), are easily distinguishable, as here, the A-frame ladder had to be folded and leaned against the wall in order for Cutaia to access his work area at the time he was injured, but in Nazario, the First Department noted the plaintiff fell while "holding the ladder, which remained in an open, locked position when it landed". (Nazario, supra, 135 A.D.3d 506, 507).

In their submission to this Court, the defendants distort Cutaia's testimony and set forth Cutaia "tried to open the ladder, but could not given the dimensions of the work space". This is simply untrue as Cutaia testified that he *could* open the ladder

in the area where he performed the subject task, but that he could not access the subject pipes with the ladder open. The plaintiff's testimony was not controverted by Renna, who was at the scene of the incident. (1186-1187). In fact, nowhere in the affidavit the defendants submitted from Renna (1894), or anywhere else in their opposition, did the defendants submit any evidence controverting Cutaia's proof that he could not access his work area with the ladder open, that the area was large enough for a manlift or scaffold, or that the ladder failed to remain in place after he was shocked.

In this regard, while it is generally true that undisputed testimony need not be accepted merely because it is uncontroverted (Matter of Nowakowski, 2 N.Y.2d 618 [1957], this Court has recognized that undisputed testimony that is not "contradicted by direct evidence, is not opposed to the probabilities, nor in its nature surprising or suspicious" must be accepted by a finder of fact. (Woodson v. NYCHA, 10 N.Y.2d 30, 32-33 [1961]). This Court has also held, in the context of summary judgment motions, that "facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." (Kuehne & Nagel Inc. v. Baiden, 36 N.Y.2d 539, 544 [1975]).

Moreover, unlike the evidence presented in Nazario, Cutaia submitted an uncontested expert affidavit stating that the failure to provide a manlift or scaffold established a violation of §240(1), as such devices are equipped with a secure

platform and guardrails that would have prevented Cutaia from falling to the ground. Additionally, the plaintiff in Nazario gave several inconsistent accounts as to the manner in which the accident occurred. (See Nazario, supra, 135 A.D.3d at 511. [Tom, J., concurring]). Thus, under the discreet facts in Nazario, this Court relied upon Blake, supra, in holding that there was a question of fact as to whether the ladder provided to Nazario was insufficient as a matter of law under §240(1). Notably, in Blake there was an explicit finding that the ladder was "in proper working condition," that Blake "could not identify a defect in the ladder", and most importantly, that Blake was unsure "if he had locked the extension clips in place before ascending the rungs... Leading to the inescapable conclusion that the accident happened not because the ladder malfunctioned or was defective or improperly placed, but solely of plaintiff's own negligence in the way he used it". Id. at 283-284. The facts here are distinguishable from both Blake and Nazario because the ladder provided to Cutaia could not be used in its intended fashion, and there is no valid line of reasoning that would permit a jury to find that a §240(1) violation does not exist.

There is no indication that this Court's decision in Nazario, supra, "essentially adopted" the concurring opinion by the First Department in that case. However, even assuming arguendo, that this is accurate, here, the proof submitted by Cutaia completely satisfies every single element that the concurrence stated was lacking in

Nazario. In his concurring opinion, Judge Tom expressed his belief that "for plaintiff to prevail...he must present evidence-for example from an expert-that he should have been provided with additional safety devices and that the failure to do so was a contributing cause of the accident". Id. at 513. In this case, Cutaia's uncontested expert affidavit should have satisfied this concern.

Cutaia's work entailed the risk posed by working at an elevated height on an unsupported ladder, and performing tasks including working on pipes with hand tools, then moving the pipes together with both hands, at which time he was electrocuted. As noted by this Court in Felker v. Corning Inc., 90 N.Y.2d 219 (1997), there may be more than one risk associated with construction work at an elevated height, and one of the risks to Felker involved the danger posed by his need to reach over an elevated, open area to do his work. As the worker attempted to access the area, he fell from the ladder, and this Court determined:

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

The holding by the First Department in this case is in accordance with other well-known precedents from this Court. In Haimes v. New York Telephone Co., 46 N.Y.2d 132 (1978), the worker was performing work on a ladder which toppled, and "the ladder was not being secured against slippage by any mechanical or other means

whatsoever", leading this Court to hold that the plaintiff was entitled to summary judgment under §240(1). Similarly, in Klein v. City of New York, 89 N.Y.2d 833 (1996), the ladder the worker was using, "slipped out from under him causing him to fall" due to a slippery condition on the floor. This Court held that the plaintiff established that the defendants violated §240(1) by failing to ensure the ladder was "constructed, placed and operated" as required by the statute. Further, Panek v. County of Albany, 99 N.Y.2d 452, 458 (2003), is also on point, as there the plaintiff's proof that the ladder he was using "gave way...causing him to fall, was uncontested", warranting summary judgment under §240(1).

There is no material difference in the uncontested expert opinion Cutaia submitted here stating that a device with rails would have prevented him from falling to the ground after he was shocked, and the evidence this Court determined warranted summary judgment under §240(1) for the plaintiff in Barreto v. MTA, 25 N.Y.3d 426 (2015). There, the worker alleged that as he walked towards the rear of an enclosure to perform his work, he fell into an open manhole. This Court found that the plaintiff established §240(1) was violated through the testimony of a safety consultant, who stated that there should have been a guardrail system around the open manhole, and "that the absence of guardrails was a proximate cause of the accident because had they been in place he would not have fallen". Id. at 433.

This Court's decision in Gordon v. Eastern Railway Supply Inc., 82 N.Y.2d

555 (1993), demonstrates that an accident related to the defective electrical system at this construction site was not so unforeseeable to constitute a "superseding act" relieving the defendants of liability. In Gordon, the worker was using a sandblaster with a defective trigger, when the ladder plaintiff was standing on tipped over. While the injuries the plaintiff sustained were due to being sprayed with sand from the sandblaster, rather than the fall, the Court nevertheless held:

> "In this case, plaintiff was working on a ladder and thus was subject to an 'elevation-related risk.' The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240(1) was not met. Accordingly, plaintiff is within the protection of the statute if his injury was proximately caused by the risk...(and) was a substantial cause of the events which produced the injury." Id. at 561-562.

In rejecting the argument that the defective condition of the sandblaster was a superseding cause of plaintiff's injuries, independent of defendant's statutory violation, this Court stated:

> "Defendants are liable for all normal and foreseeable consequences of their acts. To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate the risk of some injury from defendants' conduct was foreseeable." Id. at 562.

Similar to Gordon, the failure by the defendants here to provide a device that prevented Cutaia from falling to the ground violates the "core" objective of §240(1), and, as noted by the First Department in this case, there is nothing in the statute that indicates that the legislature intended to diminish the protection of §240(1) to a

worker who falls from an unsecured ladder after receiving an electric shock. Indeed, it has long been the rule that the statute should be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed". (Zimmer v. Chemung, 65 N.Y.2d 513, 514 [1985]). As this Court noted in Runner v. NYSE, 13 N.Y.3d 599 (2009), the purpose of the statute is to protect construction workers from the pronounced risks arising from construction work site elevation differentials. To 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 (Barreto, supra, and Runner, supra).

Also similar to Gordon, here, Cutaia demonstrated that there were two proximate causes of his fall to the ground. The first cause was the electric shock, and the second cause was the failure to provide him with an adequate safety device to prevent him from falling to the ground. As a result of his fall to the ground, Cutaia required five operations to his spine and shoulders. (1821-1838). This Court noted in Blake, supra, it is sufficient for plaintiff to prove that the "statutory violation is a proximate cause of an injury ...". (1 NY3d at 290), and here, Cutaia has shown that the failure to provide him with an adequate safety device was a "substantial cause of the events which produced the injury." (See Gordon, supra, 2 N.Y.2d at 562; See also Pardo v. Bialystoker Center & Bikur Cholim, Inc., 308 A.D.2d 384, 385 [1st Dept. 2003] ["A plaintiff under Labor Law §240(1) need only show 'that his injuries

were at least partially attributable to defendant[s'] failure to take statutorily mandated safety measures'...[since] [t]here may be more than one proximate cause of a workplace accident"]; and Nahmias v. Concourse 163rd Street Corp., 41 A.D.2d 719 [1st Dept. 1973] ["If two conditions combine to cause an accident, for one of which the defendant is responsible, there is liability even though the other cause may have been a contributing factor"]).

Based upon these well-settled precedents, the Appellate Divisions have repeatedly found a 240(1) violation where the device provided to the worker was inadequate to prevent the worker from falling to the ground after an initial precipitating event caused the worker to lose his/her balance. (See Plywocz v. 85 Broad Street LLC, 159 A.D.3d 543 [1st Dept. 2018]) (suction cup loosened causing worker to lose balance); Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580 (1st Dept. 2017) (plaintiff hit in arm by electrical wire that shot out); Robinson v. Bond Street Levy, LLC, 115 A.D.3d 928 (2nd Dept. 2014) (piece of metal duct struck worker knocking him and ladder to the ground) and Riffo-Velozo v. Village of Scarsdale, 68 A.D.3d 839 (2d Dept. 2009) (garage door unexpectedly opened tipping ladder over). Thus, even if there is no defect with the ladder, per se, where the furnished device fails to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to prevail under §240(1). (Cruz v. Turner Construction Company, 279 A.D.2d 322 [1st Dept. 2001]).

Here, the defendants' argument that the ladder was sufficient since Cutaia initially believed it was "sturdy" ignores the undisputed fact that it could not be used in its intended fashion at the time of the incident, and that it was insufficient to prevent him from falling to the ground after being shocked. Although Cutaia does not recall if the ladder moved as he fell, there is not a scintilla of evidence that controverts the plaintiff's proof that the device fell to the floor, and Cutaia's inability to recall the manner in which he and the ladder fell is irrelevant since the lack of certainty as to what preceded his fall does not create a material issue of fact. (See Felker, supra, [although plaintiff didn't recall incident, workers alerted to accident observed injured worker on floor near ladder]. [90 N.Y.2d at 223]). And the testimony by Alonso almost six years after the incident that he did not recall if the ladder fell, does not create an issue of fact, as by the time of his deposition, he "very vaguely" remembered the incident, and the record shows he had immediately told Renna at the scene the ladder "slid from under him". (1167, 1740). While the plaintiff's proof that both he and the ladder fell to the floor is based upon the observations of Michilli's project manager, and this statement by Alonso, the evidence is not controverted. (See, Ajche v. Park Avenue Plaza Owner, LLC, 171 A.D.3d 411 [1st Dept. 2019], [plaintiff had no recollection of the fall, and relied upon his foreman's statement that he found the plaintiff on the floor, and testimony of the defendants' superintendent that after hearing a noise, he observed the plaintiff near

a scaffold]; and Weicht v. City of New York, 148 A.D.3d 551 [1st Dept. 2017]).

There is no support for the defendants' contention that this Court's decision in Nazario, supra, overturned either Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515 (1st Dept. 2013) or Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533 (1st Dept. 2009)[2]. In Del Rosario, the plaintiff fell off a ladder after he came into contact with an energized wire which caused him to pull back and the ladder to wobble. The plaintiff moved for summary judgment under §240(1) and relied upon an expert affidavit stating that the device provided to him was insufficient, and the Court properly determined §240(1) was violated since the ladder "was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was the proximate cause of his injury." Id. at 515. Similarly, in Vukovich, a pipe fitter received an electric shock and fell from an unsecured A-frame ladder. There were no witnesses to the accident and the plaintiff had no recollection of falling to the floor. The plaintiff's proof that §240(1) was violated included an expert affidavit stating that had the plaintiff been using a manlift or scaffold with guardrails and a suitable work platform, he would not have fallen to the ground.

The defendants' assertion that there is a "split of authority" amongst the

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[2] The facts set forth from Del Rosario and Vukovich which are not contained in the Appellate Division decisions were gathered from the record.

Appellate Divisions in cases where a worker falls from an elevated height after receiving an electric shock is baseless, and the cases relied upon by the defendants are easily distinguishable. In their submission to this Court, the defendants ignore the numerous cases involving a worker's fall from a safety device after an electric shock where plaintiffs were granted summary judgment by establishing that the safety device provided was inadequate, such as Caban v. Maria Estela Houses 1 Assocs. L.P., 63 A.D.3d 639 (1st Dept. 2009), where it was held that the plaintiff-electrician was entitled to summary judgment on his §240(1) claim after sustaining an electric shock and falling from a ladder which was inadequate to protect him from the elevated height danger. The defendants also ignore the Second Department's decisions in Lodato v. Greyhawk N. Am., LLC, 39 A.D.3d 491 [2d Dept. 2007] [summary judgment properly granted to worker on his §240(1) claim when he fell off of a scaffold after receiving an electric shock]). And Quackenbush v. Gar-Ben Associates, 2 A.D.3d 824 [2d Dept. 2003] [summary judgment granted to plaintiff-electrician as the ladder he was using was inadequate in preventing him from falling to the floor after sustaining an electric shock]).

The defendants' reliance upon Jones v. Nazareth College of Rochester, 147 A.D.3d 1364 (4th Dept. 2017), is misguided as that case is easily distinguishable. While the facts in Jones, supra, are scant, there is a notable absence of any discussion as to whether the worker could have opened the subject A-frame ladder in the space

provided to perform the subject task. In addition, there is no evidence that the ladder being used by Jones actually fell to the ground. In contrast, here it is undisputed that Cutaia could not access his work area with the ladder in an open and locked position, and that the ladder fell to the ground at the same time as Cutaia after he was shocked. Further, unlike here, Jones did not submit any expert opinion supporting his argument that the defendants' failure to provide adequate safety devices violated §240(1). Similarly, the defendants cannot find any support in Grogan v. Norlite Corp, 282 A.D.2d 781 (3d Dept. 2001) or Gange v. Tilles Inv. Co., 220 A.D.2d 556 (2d Dept. 1995), as in these cases, there was no evidence that the ladders fell or could not be used in their intended fashion, nor did the plaintiffs submit any expert proof that §240(1) was violated. Therefore, the Courts found that there was an issue of fact as to whether the particular device provided to those workers failed to give proper protection to prevent a fall from an elevated height after receiving an electric shock. In contrast, here, the record evidence unequivocally proves that the device provided to Cutaia was inadequate.

The appellants claim that the Appellate Division's decision "is at odds with pre-2009 precedent of the First Department" appears to be based solely upon the holding in Weber v. 1111 Park Ave. Realty Corp., 253 A.D.2d 376 (1st Dept. 1998). However, the facts in the present case are also distinguishable from Weber, as there was no evidence there that the ladder used by the worker had to be folded to access

his work area or that the ladder actually fell to the ground. Further, it does not appear that Weber provided any expert testimony that an alternative safety device was necessary for his work.

The appellant's assertion that Justice Kahn's dissent in this case is consistent with her opinion in Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580 (1st Dept. 2017) is completely misguided. In Faver, the worker fell from an unsecured ladder after his arm was hit by an electrical wire that shot out of a conduit pipe, causing the ladder to wobble which resulted in plaintiff losing his balance and falling to the ground establishing a §240(1) violation. There 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.

B. The Defendants and First Department Dissent have Failed to Show that there is any Defense to Rebut Cutaia's Prima Facie Proof that the Statute was Violated

Here, the defendants have only three possible defenses - that Cutaia's action was the sole proximate cause of the accident, that he was a recalcitrant worker, or that there is a genuine issue of fact as to whether the ladder he was provided was adequate to perform his task. As a matter of law, none of these defenses apply.

This Court's decision in Batista v. Manhattanville College, 28 N.Y.3d 1093 (2016) precludes the defense that Cutaia's actions constituted the "sole proximate

cause of the accident", as the facts here demonstrate the subject ladder was insufficient for Cutaia's task, and there is no evidence of another adequate device that was available to him, or that Cutaia violated any instructions. As this Court has noted, it is "conceptually impossible" for plaintiff to be solely responsible for an accident where a violation of §240(1) was a proximate cause of the accident. Blake, supra, 1 N.Y.3d at 290. Moreover, Cutaia cannot be deemed a recalcitrant worker as a matter of law (Gallagher v. New York Post, 14 N.Y.3d 83 [2010]).

In this case, the dissent made factual determinations which are simply not supported by the record including (1) the ladder did not fall to the ground and remained "sound and in place" after Cutaia received the electric shock; (2) Cutaia could not open the ladder in the subject area because the area was too small; (3) Cutaia's work area was a confined space that prevented the use of a manlift or scaffold; and (4) Cutaia was "propelled" off the ladder as a result of the electric shock.

First, the dissent completely ignores the testimony of Michilli's project manager, and there is no evidence here that the ladder remained in place after Cutaia was shocked. Second, the dissent disregards Cutaia's undisputed testimony that while he could open the ladder in the subject area, he could not perform his work unless the ladder was leaned against the wall so he could use both of his hands. Third, this was not the confined space defense counsel disingenuously asserts it was,

and the facts demonstrate that it was an open area, and the ladder only needed to be folded and leaned at an angle for the particular task Cutaia was performing at the time of the incident. Fourth, the dissent sets forth the speculative assertion that "electrical jolts have been known to thrust the person across the distance, opened ladder or not". However, there is not a scintilla of evidence that Cutaia was "propelled" off the ladder, as the electric wires contained only 110 volts, and the facts show that when Cutaia and the ladder fell to the ground he was a few feet from the ladder, which was on the floor directly under Cutaia's work area. (539, 1239-1241, 1275).

Unable to dispute the fact that the ladder could not be used in an open and locked position to access plaintiff's work area, the defendants have attempted to create an issue of fact when none exists by pointing the plaintiff's testimony that the ladder seemed "sturdy" to him earlier in the day, and that he only folded it because it was "more convenient". However, they ignore the undisputed fact that was not the proper device to safely access the subject pipes, and that it failed to protect Cutaia from falling to the ground after he received an electric shock. Thus, there is no genuine issue of fact as to whether it was an adequate device since it clearly was not.

For the reasons set forth above, this Court should affirm the decision of the

Appellate Division granting the plaintiff's summary judgment on his Labor Law §240(1) cause of action.

Respectfully Submitted,

LOUIS GRANDELLI, ESQ.

cc: James J. Toomey via Email and Regular Mail

Cutaia v. Bd of Mngrs of 160/170 Varick, et al.
Court of Appeals Docket No.: APL-2019-00168
Date: October 18, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to 22 NYCRR § 500.11(m), that the foregoing letter brief was prepared on a computer word processor using Word Perfect and that a proportionally spaced typeface was used as follows:

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Dated: New York, New York
October 18, 2019

Respectfully submitted,

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