To Be Argued By:
Louis Grandelli
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 PLAINTIFF-RESPONDENT

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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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QUESTION PRESENTED

Was the order of the Appellate Division, First Department, entered on May 2, 2009, which reversed the amended order of the Supreme Court, New York County, entered on August 9, 2018, correct?

It is respectfully submitted that the question should be answered in the affirmative. The order and decision of the Appellate Division, First Department is consistent with well-established doctrine from this Court, as well as prior decisions of the First Department and the other three Appellate Divisions, which hold that that where a worker falls from an elevated height and demonstrates that the safety device provided was inadequate, a prima facie violation of Labor Law §240(1) is established. Since the defendants did not proffer evidence sufficient to raise a genuine issue of fact to rebut the plaintiff's proof and there is no evidence that Cutaia's actions were the sole proximate cause of the incident, the holding by the First Department that the plaintiff is entitled to summary judgment under Labor Law §240(1) should be affirmed, and the case remitted for trial.

PRELIMINARY STATEMENT

This case presents a classic violation of Labor Law §240(1) wherein a construction worker fell from an elevated height from an unsecured A-frame ladder causing severe injuries. Based on the undisputed evidence demonstrating that the device could not be used in its intended fashion by engaging its safety mechanism,

and that both the plaintiff, Michael Cutaia ("Cutaia"), and the ladder fell to the ground after the plaintiff received an electric shock, the Appellate Division, First Department, properly held that the subject ladder was inadequate to provide Cutaia with the protection required by the statute. As discussed below, the First Department's decision 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); as well as the cases relied upon by the defendants, to the extent they are not favorable to the plaintiff's position, are factually and legally distinguishable. There is no merit to the defendants' argument that the decision of the First Department is at "odds" with decisions from the other Appellate Divisions with respect to Labor Law §240(1) claims involving a worker who falls from a ladder after receiving an electric shock. In contrast to the cases relied upon by the defendants, here, Cutaia submitted uncontroverted evidence that the safety feature of the A-frame ladder could not be used at the time he performed the subject task, and uncontested expert opinion demonstrating that the ladder was insufficient for the work assigned to him.

Contrary to the defendants' unsupported assertions, there is no genuine question of fact in the record as to whether the ladder was an adequate safety device. Rather, the undisputed evidence demonstrates that Cutaia attempted to use the A-frame ladder in an open position, but he could not use both of his hands to perform his task of re-routing plumbing pipes in the ceiling above a wall with the ladder in

an open and locked position. Thus, unlike the facts present in Nazario, supra, the evidence here establishes that Cutaia could not use the ladder in its intended fashion. Further, unlike in Nazario, supra, the plaintiff here submitted an uncontested affidavit from an expert who reviewed all the evidence in the record demonstrating that the ladder was an inadequate safety device. The defendants did not proffer any evidence to rebut Cutaia's expert's opinion that the failure to provide an adequate device such as a baker scaffold or manlift, which could have been placed flushed against the wall and provided a secure platform with rails, would have prevented his fall to the ground after being shocked by the electric wire.

In addition, the facts in Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003) are also easily distinguishable, as there, the evidence supported a jury's determination that the worker's conduct was the sole proximate cause of the incident since there was no evidence that the ladder was an inadequate device and the plaintiff admittedly was unsure if he had locked the extension clips of the ladder in place before he ascended the rungs. Here, by way of contrast, Cutaia could not use the locking mechanism of the ladder since it needed to be folded and leaned against the wall at an angle so that he could use both of his hands to access his work area at the far end of the room above the wall. Accordingly, the fundamental difference between the facts in Nazario and Blake, and those present in this case, is that those

workers were able to secure the ladders by using the safety feature on the ladder, while here, Cutaia attempted to, but could not.

Moreover, as there was no safety belt or harness provided to Cutaia, the plaintiff's expert's uncontested opinion was that the unsupported and unsecured ladder did not provide Cutaia with the protection required by §240(1). Thus, the plaintiff made a prima facie showing that the failure to provide an adequate safety device, or proper support for the ladder, was a proximate cause of his fall to the ground which resulted in the need for five surgeries to his spine and shoulders.

In opposition, the defendants did not submit 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 that is factually and legally untenable, as it contains numerous erroneous factual determinations that have absolutely no support in the record, including the following: 1) that the ladder remained "sound and in place" after Cutaia received the electric shock; 2) that the plaintiff was working in a confined area which prevented him from opening the ladder; 3) that this purportedly confined space precluded the use of a manlift or scaffold; and 4) that Cutaia was "propelled" off the ladder by the electric shock. As detailed below, all of these findings are completely unsubstantiated.

Further, the defendants' assertion that the evidence is unclear as to whether the subject ladder was 8 or 10 feet, or made of fiberglass or wood, is completely immaterial to a §240(1) analysis as 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, and that the ladder fell to the ground along with the plaintiff as he received the electric shock. Accordingly, the ladder 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]).

Therefore, on this record, there is no 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 plaintiffs expert opined it ought to have been."

(A16-17)[1]

The First Department's decision here is based upon sound, well-established precedent from this Court which has implemented the legislative intent behind the

[1] Citations to the Appendix the appellants filed with this Court will appear herein as "(A __)".

statute. If this Court were to reverse this decision, 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 the well-established precedent of this Court, the First Department has long held that the "failure to properly secure a ladder to insure that it remains stable and erect while being used, constitutes a violation of Labor Law §240(1)." (See, Plywacz v. 85 Broad Street LLC, 159 A.D.3d 543, 544 [1st Dept. 2018]). The other Appellate Divisions are in accord. (See, Baugh v. New York City School Const. Authority, 140 A.D.3d 1104 [2d Dept. 2016]; Cooper v. Delliveneri, 166 A.D.3d 1152 [3d Dept. 2018]; and Kin v. State, 101 A.D.3d 1606 [4th Dept. 2012]).

INTRODUCTION AND BACKGROUND

The Parties, Project and Incident

On the day of the incident, March 26, 2012, Cutaia was working on a renovation project on the 11th Floor at 160 Varick Street in New York City. (R.451- 452, 1821)[2]. The twelve-story building was owned by The Rector Church-Wardens and Vestrymen of Trinity Church in the City of New York ("Trinity Church"). (R.920-

[2] Citations to the Record on Appeal used in the Appellate Division appear herein as "(R. ___)".

922). Michilli Construction, Inc. and Michilli, Inc. ("collectively Michilli"), is a construction company which leased a portion of the building for its corporate office and was acting as general contractor for the renovation of its space. (R.1017-1095, 1149). Michilli requested Cutaia's employer, A+ Installation Corp. ("A+"), do the plumbing work, including the subject men's bathroom. (R.829-831). This was an open area that had been previously demolished by a contractor hired by Trinity Church after the prior tenant vacated the space a few years earlier, and at the time of the incident, the room contained the "roughing" for two sinks, two toilets and a urinal. (R.483, 529-531, 925-926, 1095, 1142, 1252-1253, 1407-1411, 1445).

Cutaia testified that he was a "plumbing mechanic", but he was not a licensed plumber, and had no formal training in construction safety standards. (R.325, 332, 860). Cutaia had worked on and off at the Michilli space for two to three months, and the last time he worked there was approximately two weeks earlier. (R.461-463). The plaintiff's supervisor expected Cutaia to follow whatever instructions were given to him by Michilli's project manager, Joseph Renna ("Renna"). (R.455-459, 470, 876). Upon arriving at the site on the day of the incident, Cutaia spoke to Renna and "found out what the duties of the day were", and he and his helper, James Alonso ("Alonso"), were instructed to relocate sinks in the subject room. (R.454-455, 470, 876).

Cutaia's tasks included cutting pipes in the ceiling and re-routing them to a new location. (R.466-467). 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.[3] (R.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. (R.471-473, 578-579).[4] Neither Cutaia nor Renna could recall if the subject ladder had non-skid surface or any similar safety functions. (R.476, 1202).[5]

Earlier that day, Cutaia used the subject ladder to perform various tasks in the ceiling and he was able to use it in an open position and engage its locking mechanism in other parts of the room. (R.469-480). After completing his previous task, Cutaia moved the ladder approximately five to seven feet to perform work at the far end of the room above a wall. (R.489-490). As Renna explained, this area was "in the center of the right wall, when you walk in the door". (R.1166-1167). This last task required Cutaia to re-route copper pipes which were approximately ten feet above ground level over the wall. (R.467-474). Cutaia initially attempted to reach the

[3] Renna asserted that he was Michilli's "competent person" at the site to ensure that there were no safety hazards, but Michilli's project manager acknowledged that he did not have any training in OSHA or construction safety standards prior to the incident. (R.1132-1133, 1179-1180).
[4] Renna testified, "I think it was an *eight* foot ladder". (*emphasis added*) (R.1162)
[5] The dissenting opinion in the Appellate Division incorrectly determined that the ladder was "rubber footed". (A19).

pipes with the ladder in an open position, but as he explained, "in order to get where I was working, it needed to be closed. I couldn't get to the area where [with] the ladder opened". (R.773). 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".

(R.490)

Thus, here it is uncontroverted that when the plaintiff attempted to access the work area with the A- frame ladder open, he was too far from the pipes to perform work with both of his hands, so he had to fold it and lean it at an angle so that he could do the assigned work on the pipes.

This was not a confined space and Alonso was doing his work at ground level approximately five to ten feet away at the time. (R.683). Moreover, other than the wall Cutaia leaned the ladder against, there is no evidence that there were any other walls or partitions in the immediate area, either next to Cutaia or behind him. (R.1241). Once Cutaia set the ladder in place, its base was approximately two feet from the wall (R.494). The ladder was not secured or anchored in any manner, nor was Cutaia provided with a harness or safety belt. (R.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, and in Renna's opinion, the plaintiff "always used the

right equipment". (R.1273). Michilli's project manager 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". (R.1186-1187, 1241).[6]

Just prior to the incident, Cutaia was on the ladder working on the pipes with hand tools. (R.467, 500). The ladder was not being supported by Alonso or anyone else. (R.684, 1749). 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. [7] (R.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. (R.507-508, 539). Cutaia crawled to the hallway calling for help, and upon hearing screams, Michilli's project manager immediately ran to the scene from down the hallway and observed the closed ladder on the floor under the subject pipes "in the center of the right wall, where you walk in the door". (R.509, 575, 1157, 1240). When

[6] The "Building Rules and Regulations for Construction Work" provided that workers at the site be instructed on "the safe use of ladders and scaffolding" and that "ladders over 8 feet tall will be manned by two people at all times when in use at the job site for safety reasons" (and that) "Ladders to be used in the fully extended position at all times". (R.1558-1581). However, even though the management for the defendants were instructed to implement these rules at the site, the defendants acknowledged that they failed to do so. (R.872-873, 938-942, 955-956, 1145-1149, 1225-1226, 1406).

[7] Briefly stated, Renna observed a "cap" was missing from one of the 110-volt electrical wires in the area, and the facts showed that the electrical system violated industry standards. (R. 1168-1169, 1275, 1523, 1688-1689). Based upon this evidence, the trial court determine the defendants violated Labor Law §241(6) due to their failure to comply with 12 NYCRR §23-1.13(b)(3), (4). (R. 16-27). However, the Court left the question of Cutaia's comparative negligence claim open for a jury to decide.

he got to the scene, Renna asked Alonso how the accident happened, and testified as follows:

> Q. Did Mr. Alonso say what happened to the ladder that Michael Cutaia was using?
>
> A. He said it slid from under him.
>
> Q. Did you ask Mr. Alonso whether the ladder that you observed on the floor was the ladder that Mr. Cutaia was using?
>
> A. Yes.
>
> Q. And what did he say?
>
> A. That was the ladder.

(R.1167).

In addition, when Renna was asked about Cutaia's claim that he needed to fold and lean the ladder, for this task, he stated as follows:

> Q. Could Mr. Cutaia access that area of the ceiling with the ladder open?
>
> A. I don't know.

(R.1186-1187)

Renna also specifically testified, "I think it was an eight foot ladder"... "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". (R.1162, 1186, 1240-

1241, 1309-1310). There is no evidence that there was any other ladder in the room, and the only other person in the room was Alonso who did not recall handling the subject ladder at any point after Cutaia fell. (R.1771). Therefore, 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. (R.1184).

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. (R.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. (R.877-878).

The Plaintiff's Motion and Decision of the Trial Court

The plaintiff moved for partial summary judgment under Labor Law §240(1) (R.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".
>
> "Further, the A-frame ladder Cutaia was using was not anchored, tied down, or otherwise adequately secured to the floor or wall, and there were no other safety devices provided such as a harness or safety belt to prevent Cutaia from falling to the floor. Had the ladder been supported or secured to the floor or wall by anchoring, the ladder would have remained stable when Cutaia was shocked, and he could have been prevented from falling to the floor. Moreover, had other safety devices been provided such as a harness or safety belt, the device would have prevented him from falling to the floor".

(R.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, as such a device would have protected the plaintiff from the elevated height danger.

In opposition, the defendants argued that the ladder was "not defective" because it appeared sturdy to Cutaia prior to the incident, and that this created an issue of fact as to whether the statute was violated. (R.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. (R.1894). However, nowhere in that affidavit did Michilli's project manager dispute Cutaia's claim that he could not access the pipes with the ladder open, nor did Renna contest the opinion of plaintiff's expert that a manlift or scaffold could have been used in the area. 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 use the ladder in its intended fashion by engaging the locking mechanism, 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.

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)". (R.16-27). However, the Court did not cite any evidence which raised a

genuine issue of fact to controvert Cutaia's proof that the ladder was an inadequate 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 a question of fact is always present on a plaintiff's §240(1) claim when the worker falls to the ground after receiving an electrical shock is 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 under §240(1) because the precipitating event that caused Cutaia to fall off the ladder was an electric shock. The plaintiff argued that this has never been the law in this state, and the initial cause of the incident is immaterial to a §240(1) analysis in instances where the safety device fails, and the relevant inquiry must be whether the subject device provided the protection required by the statute.

In opposition, the defendants maintained their reliance on this Court's decision in Nazario, yet they again 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. In addition, the defendants completely ignored the testimony of their own project manager establishing that the ladder fell to the ground at the same time as Cutaia. 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."

(A15-16).

As discussed below, this decision is in accordance with numerous decisions from this Court and effectuates the legislative intent behind Labor Law §240(1).

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD AFFIRM THE DECISION OF THE APPELLATE DIVISION AS THE COURT CORRECTLY HELD THAT THE PLAINTIFF ESTABLISHED THAT THE DEFENDANTS' VIOLATION OF LABOR LAW §240(1) WAS A PROXIMATE CAUSE OF THE INCIDENT AS A MATTER OF LAW

A. The Decision of the First Department is Supported by Numerous Precedents from this Court and is Accordance with the Other Appellate Divisions

The defendants' appeal is based upon the incorrect premise that the decision of the First Department "demonstrates and exacerbates a split of authority amongst the four Appellate departments", and is contrary to this Court's decisions in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054 (2016) and Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003). However, Nazario, supra, and Blake, supra, are easily distinguishable for numerous reasons, the most important of which is that the workers in those cases were able to use the subject ladders in their intended fashion. This is a critical difference. While the plaintiffs in Blake and Nazario were able to use the safety mechanism on the ladder, here, it is undisputed that Cutaia could not. Accordingly, notwithstanding the defendants' attempts to muddy the waters, the uncontroverted facts prove that Cutaia could only perform his work by

folding the ladder and leaning it against the wall. Further, in contrast to the record in Nazario, Cutaia submitted uncontested expert opinion that the unsupported and unsecured ladder in its closed position was an inadequate safety device, and that a manlift or scaffold were the proper equipment to provide the plaintiff with the protection required under §240(1).[8]

There is no support whatsoever for the defendants' assertion that there is a "split of authority" amongst the Appellate Divisions in cases where a worker falls from an elevated height after receiving an electric shock, as the cases relied upon by the defendants are materially and factually distinct from this case. Notably, in their submission to this Court, the defendants ignore the numerous cases the plaintiff has cited in support of his §240(1) claim 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. For example, in both the Supreme Court and the Appellate Division Cutaia has relied upon 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

[8] It is well settled that a ladder may constitute an inadequate protective device even where it is not defective (See, Izrailev v. Ficarra Furniture, 70 NY2d 813 [1987]; Quackenbush v. Gar-Ben, 2 AD3d 824 [2d Dept. 2003]; Caceres v. Standard Realty, 131 AD3d 433 [1st Dept. 2015]; and Deng v. AJ Contr., 255 AD2d 202 [1st Dept. 1998]).

him from the elevated height danger. However, the defendants fail to distinguish, or even discuss that opinion.

In addition, 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]).

Further, the defendants fail to discuss Viera v. WFJ Realty Corp., 140 A.D.3d 737 (2d Dept. 2016),[9] which is also directly on point. In Viera, the plaintiff was working on a scaffold affixing aluminum siding to the roof of a building when a piece of the siding came into contact with overhead power lines which shocked him and cause the worker to fall off the unguarded scaffold. Under these facts, the Second Department determined as follows: "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". (Id. at 738).

[9] Cutaia did not cite Viera, supra, in his arguments to the Courts below.

Similarly, in Raia v. Berkeley Coop, 147 A.D.3d 989 (2d Dept. 2017), [10] the Second Department affirmed the grant of summary judgment to the plaintiff on his Labor Law §240[1] claim where a co-worker bumped into a valve which caused hot water and steam to pour on the plaintiff, precipitating his fall from a ladder at a construction site. Raia, together with the intermediate Appellate Division decisions cited herein, establish the propriety of the majority's holding in this case that plaintiff's proof was sufficient to warrant the grant of summary judgment on his §240[1] claim.

In addition to their failure to distinguish, or even discuss these cases, in their instant Brief, the defendants cite to Cutaia's testimony and disingenuously set forth that "plaintiff testified that he tried to open the ladder 'but I couldn't'". (Defendants' Brief, pages 18-19). This is a blatant distortion of his testimony as Cutaia testified "Originally I tried to - I opened the ladder and I was trying to position it where I could get to the pipe that I was working on, but I couldn't". (R.490). Thus, as the plaintiff explained, in order to access the area he "had to fold the ladder and lean it up against the wall...". (R.490). [11] Cutaia's testimony was not controverted by Michilli's

[10] Cutaia did not cite Raia, supra, in his arguments to the Courts below.

[11] A construction worker cannot be faulted for using a ladder or improvising when the ladder is too large, short, cumbersome or inadequate to allow the plaintiff to use it in a proper manner. (See Saavedra v. 89 Park Ave., 143 A.D.3d 615 [1st Dept. 2016]; Noor v. NYC, 130 A.D.3d 536 [1st Dept. 2015], app. dismd., 27 N.Y.3d 975 [2016]; Keenan v. Simon Properties, 106 A.D.3d 586 [1st Dept. 2013]; and Rudnik v. Brogor Realty, 45 A.D.3d 828 [2d Dept. 2007]).

project manager, Renna, who was at the scene immediately following the incident and conducted an investigation. (R.1181-1187). In fact, nowhere in the affidavit the defendants submitted from Renna (R.1894), or anywhere else in their opposition to the plaintiff's summary judgment motion, 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.[12]

The facts in Nazario v. 222 Broadway, LLC, 135 A.D.3d 506 (1st Dept. 2016), are also easily distinguishable, as here, the A-frame ladder could not be used in its intended fashion, 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). 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

[12] 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]).

falling to the ground after he was shocked. 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). However, the facts in Blake, are also easily distinguishable from those present here. Notably, in Blake there was an explicit finding that the subject ladder was "in proper working condition"; that Blake "could not identify a defect in the ladder"; and most importantly, that while Blake could open the ladder in his work area, he 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 because of plaintiffs own negligence in the way he used it". (Id. at 283-284).

In contrast to the facts in both Blake and Nazario, here, the evidence unequivocally proves that since Cutaia could not access his work area with the ladder open, he was unable to use the locking mechanism on the device when performing the subject task. Thus, "there is no view of the evidence by which defendants' violation of §240(1) could not have been a proximate cause of plaintiff's injury". (See, Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 524 [1985]).

Moreover, 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 were 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.

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 Tel. 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).

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.

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).

As noted by the First Department in this case, "There is nothing in the statute that indicates that the legislature intended to exempt from the protection of Labor Law §240(1) a worker who falls from an unsecured ladder after receiving an electric shock", and as the Court explained in its decision "our directive is to construe the statute 'as liberally as may be for the accomplishment of the purpose for which it was thus framed', (Citing Zimmer v. Chemung, 65 N.Y.2d 513, 521 [1985])". (A15). In Zimmer, supra, this Court determined that the legislative history of the statute "makes clear the legislature's intent to achieve the purpose of protecting workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor...instead of on workers, who are scarcely in a position to protect themselves from accident'". (65 N.Y.2d at 520). 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).

At bar, the failure to secure the ladder or provide Cutaia with additional protective devices such as a safety belt, given the foreseeable hazards of working in the ceiling cutting copper pipes and re-directing the water lines with hand tools, also establishes an additional basis for imposing liability in favor of plaintiff under Labor Law §240(1). For instance, in Wasilewski v. Museum of Modern Art, 260 A.D.2d 271 (1st Dept. 1999), the plaintiff fell from an eight to ten foot A-frame ladder, which was not secured to something stable and was not chocked or wedged in place, and the plaintiff was not provided with any other safety devices, such as safety belts or harnesses. Under these facts, the Court determined that the failure to provide the plaintiff with adequate safety devices, including safety belts to perform work at an elevated height constituted a violation of Labor Law 240(1). (See also, Bland v. Manocherian, 66 N.Y.2d 452 [1985] [§240(1) violated where "...no safety equipment, safety belts...scaffolding or anything else, was used to protect plaintiff from falling...or to secure the ladder to insure it remained steady and erect..."."] [66 N.Y.2d at 460]; Mayo v. Metropolitan Opera Ass'n, Inc., 108 A.D.3d 422 [1st Dept. 2013] [summary judgment granted to plaintiff on his §240(1) claim where the worker needed to use both of his hands while on the ladder and "no safety device was provided to protect him against the risk associated with breaking three points of contact with the ladder..."]. [Id at 424]; and Clavijo v. Atlas Terminals, LLC, 104 A.D.3d 475, 476 [1st Dept. 2013]

[defendant's violation of Labor Law §240(1) established due to absence of a harness or other safety device to protect plaintiff from falling]).

There is no support for the defendants' contention that this Court's decision in Nazario, supra, overturned the First Department's decisions in 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).[13] 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.

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

Accordingly, in Del Rosario, supra and Vukovich, supra, the First Department properly determined that the defendants failed to raise a genuine issue of fact to rebut the worker's prima facie showing that §240(1) was violated, and there is no merit to the defendants' assertion that these decisions "marked a sharp departure" from pre-2009 holdings of the First Department, the other Appellate Divisions and from this Court. However, even if there was some basis for this assertion, the facts here are more compelling than Del Rosario or Vukovich, as unlike the evidence in those cases, in the instant case the evidence demonstrates that Cutaia attempted to use the subject ladder in an open position but was unable to do so. This is another critical fact which is not present in any of the cases relied upon by the defendants, all of which are distinguishable.

For instance, the defendants' reliance upon Jones v. Nazareth College of Rochester, 147 A.D.3d 1364 (4th Dept. 2017), is misguided as the facts there are materially different from those present here. 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).

In addition, 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.

Similarly, the defendants' reliance upon Higgins v. TST 375 Hudson LLC, 179 A.D.3d 508 (1st Dept. 2020), is misplaced as the facts there are easily distinguishable. Significantly, in Higgins, supra, the Supreme Court noted "There is no testimony that the ladder was defective", nor is there any indication in the Supreme Court or Appellate Division decisions that the worker could not use the A-frame in an open and locked position. (RA8-11) [14]. Moreover, the Supreme Court's decision reveals that Higgins received an electric shock from a 227-volt of electricity from a junction box, which is much greater than the electric shock to Cutaia. (RA9). Accordingly, in opposition to Higgins' motion for summary judgment under §240(1), the defendants submitted an expert affidavit which opined that the subject A-frame ladder was an adequate safety device, as it was being used in its intended fashion, and that receiving a shock from a 227-volt of electricity "is like being blasted with a fire hose", which

[14] Citation to the Appendix filed by Cutaia appear as "(RA ___)".

"would have caused him to fall to the ground with the same likelihood regardless of whether he was on a scaffold or on a ladder". (RA10).

Here, in contrast to Higgins, Cutaia submitted uncontroverted evidence that he could not use the ladder in an open and locked position, and that he was shocked by a wire that only contained 110 volts[15]. (R.490, 1275). Indeed, Michilli's project manager conceded that the electric wires contained only 110-volts resulting in a shock he considered relatively minor. (R.1167, 1185-1186, 1275). Accordingly, it is evident that the shock from the 110-volt wire was not enough electricity to "propel" Cutaia across the room, but was sufficient to jolt him and cause the plaintiff and the ladder to fall together, where he landed only a few feet from where he had been working. (R.507-508, 529). Further, in this case, Cutaia's expert's opinion that the folded A-frame ladder was inadequate to provide the plaintiff with the protection required by the statute was not contested.

Thus, based upon the facts, in Higgins, the First Department did not adhere to its reasoning in its Cutaia decision, since there was adequate evidence that the electric shock to Higgins was of such magnitude that it would have knocked him off of any device that was provided, thereby providing a jury with sufficient evidence to potentially find that the electric shock was the sole proximate cause of the incident.

[15] Notably, in Higgins, the defendants' expert also opined that "the pressure exerted on someone from 120-volts of electricity is comparable to being hit with the stream of a household garden hose", which is a higher voltage than Cutaia was shocked with here. (RA10).

Based upon the record in Higgins, the First Department relied upon this Court's decision in Nazario, supra, and determined that "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 [citing Nazario]; plaintiff had no problem with the ladder prior to the electric shock…". (179 A.D.3d at 510).

The defendant's claim that the Appellate Division's decision in this case "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.

Similarly, 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 meritless. 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.

In view of the above, it is clear that in the cases cited by the defendants the Courts properly 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 to provide him with the protection required by the statute, and there is no valid line of reasoning that would permit a jury to find that a §240(1) violation does not exist. (See, Zimmer, supra).

B. The Defendants' Violation of the Statute was a Proximate Cause of Cutaia's Injuries

In this case, Cutaia demonstrated that there were two proximate causes of his fall to the ground. The first cause was the electric shock which initiated the accident, 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. (R.1821-1838). In view of these facts, the First Department properly determined that

> "Plaintiff suffered not only electrical burns but injuries to his spine and shoulders that necessitated multiple surgeries and are clearly

> attributable to the fall, and not to the shock, presenting questions of fact as to damages, but not liability". (Cits omitted).

(A 17).

In Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555 (1993), this Court was presented with facts which established two proximate causes of the worker's accident. In Gordon, the plaintiff was using a sandblaster with a defective trigger, when the ladder the worker was standing on tipped over. While the worker was sprayed with sand from the sandblaster resulting in injuries, and these injuries were not caused solely from the fall, this 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).

As this Court subsequently explained in Blake, supra, it is sufficient for plaintiff to prove that the "statutory violation is a proximate cause of an injury...". (1 N.Y.3d

at 290), and here, there can be little question that 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, Plywacz 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 [2d 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). (See, Cruz v. Turner Construction Company, 279 A.D.2d 322 [1st Dept. 2001])[16]. These decisions by the Appellate Divisions are based upon the well-settled doctrine established by this Court long ago which has implemented the legislature's intent behind the statute, and as this Court has stated 'the doctrine of stare decisis should not be departed from except under compelling circumstances'". (See, Eastern Consol Props v. Adelaide Realty Corp., 95 N.Y.2d 785, 787 [2000]).

Here, the defendants' argument that the ladder was adequate since Cutaia initially believed it was "sturdy" ignores the 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 at the same time he was shocked, and Cutaia's inability to recall the manner in which he and the ladder fell is irrelevant

[16] It bears noting that the First Department has long held that the failure to secure a ladder to ensure that it remains stable and erect while the plaintiff is working on it constitutes a violation of Labor Law §240[1] as a matter of law. (See, Jamil v. Concourse Ent., 293 A.D.3d 271, 273 [1st Dept. 2002]; MacNair v. Salamon, 199 A.D.2d 170-1 [1st Dept. 1993]; and Fernandez v. MHP, 188 A.D.2d 417-8 [1st Dept. 1992]).

since the lack of certainty as to what preceded his fall does not create a material issue of fact. (See, Felker, supra, at 223, [although plaintiff didn't recall incident, workers alerted to accident observed injured worker on floor near ladder]. 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". (R.1167, 1740).[17]

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. However, once again, the defendants distort the record and in their Brief to this Court for the first time make the argument that "there are issues of fact as to whether the ladder seen by Mr. Renna is even the ladder from which plaintiff fell",[18] and that, "Plaintiff's helper, Mr. Alonso could have moved the ladder". (Defendants' Brief, pages 23-24). These assertions have absolutely no support in the record as the evidence shows that Renna immediately ran to the scene from down the hallway upon hearing screams for help, and the only ladder he recalled observing was the ladder which was on the floor directly under the pipes Cutaia had

[17] Alonso testified "I don't remember" in response to dozens of questions at his deposition. (R. 1733-1790).

[18] The defendants did not argue that there may have been another ladder in the room in either of the Courts below.

been working on. (R.507-508, 539, 1167, 1186-1187). Moreover, the plaintiff's helper, Alonso did not recall handling the ladder at any time after the incident, and any claim by the defendants that it, "could have fallen after plaintiff hit the ground", is pure conjecture with no support in the record. (R.1771).

The facts here are materially the same as those present in Ajche v. Park Avenue Plaza Owner, LLC, 171 A.D.3d 411 (1st Dept. 2019), where the plaintiff sustained injuries while insulating air-conditioning ducts in the kitchen ceiling of a restaurant under construction. There were no witnesses to the accident and plaintiff admitted that he had no recollection of the fall. In moving for summary judgment under §240(1), the plaintiff relied primarily upon circumstantial evidence based upon his foreman's statement that he found the plaintiff on the floor, as well as the testimony of the defendants' superintendent that after hearing a noise, he observed the plaintiff a few feet away from a scaffold. Although there was conflicting evidence as to whether the plaintiff was on a ladder or scaffold at the time of the incident, the Court nevertheless held that the worker was entitled to summary judgment under §240(1), since whichever device was provided failed to "…prevent him from falling, (and) his inability to identify the precise manner in which he fell is immaterial". (171 A.D.3d at 413).

Thus, the evidence and well-established precedents set forth above demonstrate that Cutaia has proven a prima facie violation of Labor Law §240(1).

POINT II

THE DEFENDANTS AND FIRST DEPARTMENT DISSENT FAILED TO SHOW THAT THERE IS ANY DEFENSE TO REBUT CUTAIA'S PRIMA FACIE PROOF THAT THE STATUTE WAS VIOLATED

The undisputed proof submitted by the plaintiff establishes a prima facie showing of entitlement to summary judgment as a matter of law, and it is well-established that "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action...". (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]). 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 since there is no proof that he failed to use adequate equipment that was available to him, or that he disregarded any instructions. (Gallagher v. New York Post, 14 N.Y.3d 83 [2010]).

Significantly, nowhere in the First Department's dissenting opinion is there any finding that an alternative safety device was available to Cutaia that he refused to use, or that the plaintiff disregarded a specific instruction when performing his work. Rather, 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 most fundamental error by the dissent is overlooking the undisputed evidence that both Cutaia and the subject ladder fell to the ground at the same time.

In this regard, the dissenting opinion incorrectly states that "Notably, the ladder did not slip". (A20). However, this finding has no support in the record, and the undisputed evidence demonstrates that the ladder failed to remain in place after Cutaia received the electric shock, and that it fell to the ground along with Cutaia.

As detailed above, the evidence establishes that Cutaia's helper stated to Michilli's project manager immediately after the incident, the ladder "slid out from under him," and that Michilli's project manager observed the ladder on the floor directly under the pipes Cutaia was working on when he arrived at the scene. (R.1159, 1167, 1239-1241).

Second, the finding by the dissent that Cutaia could not open the ladder in the subject area inexplicably 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. As a result of the erroneous determination by the dissent that Cutaia could not open the ladder in the subject area, the dissent disregarded prior decisions from the First Department involving a worker's fall from an unsecured ladder which are directly on point. (See, Cronin v. NYCTA, 143 A.D.3d 419 [1st Dept. 2016] [defendant failed to rebut plaintiff's testimony that he used defendant's straight ladder, because the work space would not have allowed for the A-frame ladder to be opened] and Saavedra v. 89 Park Ave. LLC, 143 A.D.3d 615 [1st Dept. 2016] [plaintiff's use of a six-foot ladder that required him to stand on top step did not make him sole proximate cause of his accident where the eight-foot ladder could not be opened in space due to the presence of construction debris]).

Third, the dissent also incorrectly disregarded the facts showing that this was not the "confined space" that defense counsel disingenuously asserted prevented the use of a manlift or scaffold in the area. Notably, despite the fact that Michilli's project manager was present, and the defendants promptly investigated the incident, they have never cited to any testimony or other evidence in support of this contention. In adopting this unsubstantiated claim, the dissent states:

> "[P]laintiff's expert, Fuchs, 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. Rather, 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".

(A23-24).

However, this finding ignores the undisputed evidence that the subject bathroom was a wide-open area which had previously been demolished by the defendants, and while Cutaia could open the ladder, he needed to fold it and lean it at an angle solely for the particular task he was performing at the time of the incident. The facts show that prior to setting up the ladder for the subject task, Cutaia moved the ladder five to seven feet from its prior location. (R.489). As Cutaia performed his work, his helper was at ground level approximately five to ten feet away. (R.683, 1749). Further, there is no evidence that any walls or partitions were in the vicinity

either next to Cutaia, or behind him, so that the use of a manlift or scaffold would have been precluded. (R.1241).

In addition, the dissent inexplicably ignores the statement by the plaintiff's expert that he reviewed all of the relevant evidence in the record which shows that the subject bathroom was large enough to contain two sinks, two toilets and a urinal. (R.1142, 1847). This evidence included the floor plan attached to the subject lease and photographs of the room annexed to the plaintiff's submission which clearly show the room was not the "confined" or "tight" space that defense counsel claimed it was. (R.1095 and 1791-1798). Therefore, there is nothing speculative about the plaintiff's expert's opinion as he properly based his determinations on the evidence in the record. (See, Admiral Ins. Co. v. Joy Contractors, Inc., 19 N.Y.3d 448 [2012]).

Fourth, the dissent inexplicably finds that "[it] can be concluded from plaintiff's own testimony that he was propelled from where he had been located on the ladder by the force of the electrical charge rather than by the force of gravity, which was not a result of any defect in the ladder". (A20). However, this speculative assertion has absolutely no evidentiary support. Instead, the only evidence regarding the distance Cutaia's body traveled after falling is his undisputed testimony that he landed a few feet from his work area. (R.539). Moreover, as noted above, Michilli's project manager conceded that the electric wires contained only 110-volts resulting in a shock he considered relatively minor, and Cutaia's co-worker immediately stated

after the incident that the ladder Cutaia was using, "slid from under him". (R.1167, 1185-1186, 1275). This uncontroverted evidence completely undermines the "propulsion" theory advanced by the dissent, and while the dissent may be correct in stating that "Electrical jolts have been known to thrust a person across a distance, opened ladder or not" (A24), there is not one iota of evidence that Cutaia was "propelled" across the room, and this assertion is pure conjecture further illustrating the factually and legally untenable position of the dissent.

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 plaintiffs 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 the closed ladder was not the proper device to safely access the subject pipes, it could not be used in its intended fashion, 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 the ladder provided to Cutaia was an adequate device since it clearly was not. Lastly, the defendants' argument that Cutaia was inconsistent in his deposition as to whether he asked Michilli's project manager for an adequate device to do the work is immaterial and does not raise a bona fide issue of fact. It is evident that whether or not such a conversation took place is completely irrelevant to a §240(1)

analysis as it is the non-delegable duty of the owner and general contractor to ensure that adequate safety devices are "constructed, placed and operated" as required by the statute. (See, Klein v. City of New York, 89 N.Y.2d 833 [1996]).

CONCLUSION

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,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.13(c) that the foregoing brief was prepared on a computer.

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Dated: April 17, 2020

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